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No. 88500-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Estate of

MARGARET L. PERTHOU-TAYLOR,

Deceased,

ALISON PERTHOU,

Petitioner/Appellant,

v.

CORNELIA PERTHOU MacConnel, individually and as Executor and Notice Agent for the Estate of Margaret L. Perthou-Taylor,

Respondent.

APPELLANT'S REPLY BRIEF

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES ii

III. ARGUMENT 1

A. Appellant's claim for intentional interference with a gift is not barred by the Probate Code 1
B. Alison's claims are not barred by laches. 2
C. Admissible evidence supports Alison's claims. 7
D. Appellant presents evidence on each element of an inter vivos gift. 10
E. The Court should recognize tortious interference with a testamentary expectancy or gift. 11
F. Alison's claims for breach of fiduciary duty, conversion, constructive trust, and accounting have not yet been adjudicated. 18
G. The trial court erred in dismissing appellant's claim for punitive damages under California law. 19
H. The trial court erred in denying appellant's motion for revision... 20
I. The trial court erred in denying appellant's motion for reconsideration. 20
J. Respondent's failure to file a notice of cross-appeal bars consideration of her argument regarding the trial court's denial of her request for attorney fees. 23
K. Respondent's request for attorney fees on appeal should be denied. 23

IV. CONCLUSION 24

4

V. CERTIFICATE OF SERVICE 25

II. TABLE OF AUTHORITIES

Washington State Cases

Adams v. Department of Labor & Industries, 128 Wn. 2d 224, 905 P. 2d 1220 (1995).....20
Amalgamated transit Local 587 v. State, 142 Wn.2d 183, 11 P. 3d 762 (2000).....23
Applied Industrial Materials Corp. v. Melton, 74 Wn. App. 73, 872 P. 2d 87 (1994).....22
Bland v. Mentor, 61 Wn. 2d 150, 385 P. 2d 187 (1963)..... 6
Brost v. L.A.N.D, Inc., 37 Wn. App. 372, 680 P. 2d 453 (1984).....3, 4
Buckerfield's Ltd. v. B. C. Goose & Duck Farm, Ltd., 9 Wn. App. 220, 511 P. 2d 1360 (1973).....10
Clark County Public Utility Dist. No. 1 v. Wilkinson, 139 Wn. 2d 840, 991 P. 2d 1161 (20000).....3
Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801, 828 P. 2d 549 (1992).....7, 15
Davenport v. Taylor, 50 Wn. 2d 370, 311 P. 2d 990 (1957).....22
Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 20 P. 3d 447 (2001)...22
Dickenson v. Edwards, 105 Wn. 2d 457, 716 P. 2d 814 (1986).....7
Endicott v. Saul, 142 Wn. App. 899, 176 P. 3d 560 (2008).....6
Fairbanks v. J.B. McLoughlin Co., Inc., 131 Wn. 2d 96, 929 P. 3d 433 (1997).....8
Fishburn v. Pierce Co. Planning & Land Survey Dept., 161 Wn. App 452, 250 P. 3d 146 (2011).....21
Guardianship of Lamb, 173 Wn. 2d 173, 265 P. 3d 876 (2011).....24
Hadley v. Cowan, 60 Wn. App. 433, 804 P.2d 1271 (1991).....14
In re: 1934 Deed to Camp Kilworth, 149 Wn. App. 82, 201 P. 3d 416 (2009).....1
In re: Estate of Hendrix, 2006 WL 2048240.....15
In re: Irrevocable Trust of McKean, 144 Wn. App. 333, 183 P. 2d 317 (2008).....13
In re: Novolich's Estate, 7 Wn. App. 495, 500 P. 2d 1297 (1972).....4
Jacobs v. Brock, 73 Wn. 2d 234, 437 P. 2d 920 (1968).....9
JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 970 P. 2d 343 (1999).....21
Kammerer v. Western Gear Corp., 96 Wn. 2d 416, 635 P.2d 1708 (1981).....20
King v. Clodfelter, 10 Wn. App. 514, 518 P. 2d 206 (1974).....9

Kofmehl v. Baseline Lake, LLC, 175 Wn. 2d 584, -- P. 3d -- (2013)7, 8, 10
Marriage of Moody,
137 Wn. 2d 979, 976 P. 2d 1240 (1999).....19, 21, 23
Matter of Estate of Lint, 135 Wn. 2d 518, 957 P. 3d 755 (1998).....2, 7
McCarton v. Estate of Watson, 39 Wn. App. 358, 693 P. 2d 192 (1994). 11
McKnight v. Basilides, 19 Wn. 2d 391, 143 P. 2d 307 (1943).....4
Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 277 P. 3d 18 (2012).....5
Rutter v. Rutter, 59 Wn. 2d 781, 370 P. 2d 862 (1962).....4
Satomi Owners Ass'n v. Satomi, LLC,
167 Wash. 2d 781, 225 P.3d 213 (2009) 12
Shelby v. Keck, 85 Wn. 2d 911, 541 P. 2d 365 (1975).....7
Smith v. King, 106 Wn. 2d 443, 722 P. 2d 796 (1996).....3
Stranberg v. Lasz, 115 Wn. App. 396, 63 P. 3d 809 (2003).....8
Vaughn v. Vaughn, 23 Wn. App. 527, 597 P. 2d 932 (1979)..... 21
Wildman v. Taylor, 46 Wn. App. 546, 731 P.2d 541 (1987).....9

Other State Cases

Beckwith v. Dahl, 205 Cal. App. 4th 1039,
141 Cal... Rptr. 3d 142 (2012).....11, 13, 15, 16, 17

Washington State Statutes

RCW 2.24.050.....21, 23
RCW 5.60.030.....8
RCW 11.02.005 (10).....1
RCW 11.40.051.....1
RCW 11.96A.020 (1), (2) 13
RCW 11.96A.150.....24

Washington Court Rules

CR 56 (f).....18
CR 59.....21, 22
CR 59 (g).....22

GR 14.1(a).....15

RAP 5.2 (f).....23
RAP 10.3 (a) (6).....2, 7, 15
RAP 10.7.....15

Other Authority

Black's Law Dictionary 917 (4th ed. 1968).....7
Restatement (Second) of Torts § 774B.....12, 14
Comment e to Restatement (Second) of Torts § 774B.....14

III. ARGUMENT

A. Appellant's claim for intentional interference with a gift is not barred by the Probate Code.

Respondent advances RCW 11.40.051 as her defense to Alison's claims. RB 10-12. Respondent fails to address Alison's argument that it remains unresolved whether the money gifted by Margaret to Alison meets the definition of a nonprobate asset in RCW 11.02.005 (10). AB 22-23. The evidence before the Court suggests that during her lifetime, Margaret made an irrevocable gift to Alison. If so, then Margaret's inter vivos gift falls outside the definition of a nonprobate asset in RCW 11.02.005 (10). Nor could such an inter vivos gift qualify as a probate asset, as it did not belong to Margaret as of the date of her death. *In re: 1934 Deed to Camp Kilworth*, 149 Wn. App. 82, 87-88, 201 P. 3d 416 (2009).

Respondent attempts to distinguish *O'Steen v. Wineberg's Estate*, 30 Wn. App. 923, 934, 640 P. 2d 28 (1982) by arguing that Alison's claim is not for a specific asset. RB 12. To the contrary, even a casual perusal of Alison's TEDRA Petition reveals that she seeks recovery of a specific asset. In paragraph 3.8, Alison alleges that Margaret Perthou funded an investment account for Alison's retirement. CP 60-61. In paragraph 3.9, Alison alleges that she contacted respondent to claim her retirement account. CP 61 In paragraph 3.10, Alison alleges that the account

established by Margaret was dissolved by respondent. CP 61. In paragraph 3.11, Alison alleges that respondent's actions wrongfully interfered with her expectancy of Margaret's gift of the retirement account. CP 61. Alison alleges that respondent breached her fiduciary duties by failing to deliver the retirement account to her. CP 61-62. Alison alleges that respondent interfered with the chattel created by Margaret with the intent of depriving Allison of the chattel. CP. 62. Alison alleges that by fraud, duress or other tortious means, respondent intentionally prevented Alison from receiving the gift from Margaret. CP 62-63. Alison also asks that court declare that respondent holds in constructive trust those assets, together with any proceeds or any increase that had been gifted by Margaret to Alison. CP 63. Alison also asks the court to hold respondent to account to Alison for any such property, its proceeds, or any increase thereof. CP 63. Respondent's attempt to distinguish *O'Steen* therefore fails

B. Alison's claims are not barred by laches.

Respondent fails to make a single citation to the record in support of her argument regarding laches. BR 13-14. Respondent's argument should therefore not be considered. RAP 10.3 (a) (6); *Matter of Estate of Lint*, 135 Wn. 2d 518, 531-32, 957 P. 2d 755 (1998).

Respondent argued laches in the trial court. CP 96. Neither the Order Approving Petition to Dismiss Claims, nor the Order Denying Motion for Revision nor the Orders Denying Reconsideration made any finding as to any element of laches. CP 125-127; CP 280-83; CP 323. The trial court's failure to make such findings constitutes an implied negative finding as to each element of the doctrine of laches. *Smith v. King*, 106 Wn. 2d 443, 451, 722 P. 2d 796 (1996).

To the extent that it merits consideration here, laches is an extraordinary remedy. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 376. 680 P. 2d 453 (1984). Laches requires proof knowledge of a cause of action, unreasonable delay and resulting prejudice. *Davidson v. State* 116 Wn. 2d 13, 25, 802 P. 2d 1374 (1991). The main component of the doctrine is not so much the period of delay in bringing the action, but the resulting prejudice and damage to others. *Clark County Public Utility Dist. No. 1 v. Wilkinson,* 139 Wn. 2d 840, 849, 991 P. 2d 1161 (2000). A court will not presume prejudice merely from the fact of a delay. *Ibid.* The burden is upon respondent to show whether and to what extent she has been prejudiced by the delay. *Id.* Determining whether injury cognizable under the doctrine of laches occurs depends on assessing the inherent equities of a particular case. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 376.

Laches is not available to respondent, as she has steadfastly refused to cooperate with petitioner in investigating what happened to the funds promised to petitioner by Margaret Perthou-Taylor. CP 61. *See In re Novolich's Estate*, 7 Wn. App. 495, 502, 500 P. 2d 1297 (1972) ("*[L]aches is an equitable defense and cannot be successfully urged by those who withhold information which would have prompted action at an earlier time.*"). Nor did anything prevent respondent from seeking the aid of the court in timely resolving whether any funds were due to petitioner. Respondent should not be rewarded for her inaction by allowing her the defense of laches. *Brost v. LAND. Inc.*, 37 Wn. App. 377 ("*[T]he defense of laches is improperly invoked when both parties are equally at fault in creating the delay.*"); *McKnight v. Basilides*, 19 Wn. 2d 391, 403, 143 P. 2d 307 (1943). Moreover, to the extent that respondent had any involvement in wrongfully withholding funds due to petitioner, laches would not be available to her. *Rutter v. Rutter's Estate*, 59 Wn. 2d 781, 785, 370 P. 2d 862 (1962).

Laches is peculiarly fact-specific. *Brost v. LAND, Inc.*, 37 Wn. App. 376 ("*Determining whether injury cognizable under the doctrine of laches occurs depends on assessing the inherent equities of a particular case.*"). Therefore, laches should not be resolved on a motion. Instead,

the court should have deferred ruling on laches until the equities of the case had been fully developed through discovery.

Laches cannot apply where a plaintiff has no reason to believe that legal action is necessary. *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.,* 168 Wn. App. 56, 79, 277 P. 3d 18 (2012). Here, petitioner had no reason to believe that she had a cause of action against respondent until July, 2010, when she turned 65 and contacted respondent regarding her promised retirement account. CP 32. Given the close relationship that Alison had with Margaret, and given the strength of Margaret's assurances in her letter of December 14, 1982, Alison had no reason to doubt the word of her former mother-in-law. CP 31-32; CP 66-67. Among those assurances was Margaret's statement that "[*b*]*y the time you retire at 65, presumably, you should have a very nice nest egg.*" CP 66. Under such circumstances, the trier of fact could find that any delay by Alison in inquiring as to her retirement account was reasonable. Therefore, petitioner did not unreasonably delay filling this action less than two years later.

Laches is an equitable doctrine based upon estoppel. *Newport Yacht Basin Association*, 168 Wn. App. 76. Estoppel requires proof by clear cogent and convincing evidence. 168 Wn. App. 79. Therefore,

respondent must be held to a burden of clear cogent and convincing proof on her defense of laches.

Clear and convincing proof has 2 elements: (1) the amount of evidence necessary to submit the question to the trier of fact or the burden of production, which is met by substantial evidence; and (2) the burden of persuasion. As to the burden of persuasion, the trier of fact must be persuaded that the fact in issue is "*highly probable.*" *Endicott v. Saul*, 142 Wn. App. 899, 910, 176 P. 3d 560 (2008). "'*Whether the evidence in a given case meets the standard of persuasion, designated as clear, cogent, and convincing, necessarily requires a process of weighing, comparing, testing, and evaluating—a function best performed by the trier of the fact, who usually has the advantage of actually hearing and seeing the parties and the witnesses, and whose right and duty it is to observe their attitude and demeanor.*'" *Endicott*, 142 Wn. App. 910 (*Quoting Bland v. Mentor*, 61 Wn. 2d 150, 154, 385 P. 2d 187 (1963)). Thus, a motion to dismiss was particularly ill-suited for respondent's defense of laches, as the determination whether respondent met her burden of clear, cogent and convincing proof necessarily required live testimony.

Respondent complains that Alison never inquired of Margaret as to the existence of a retirement account for her benefit. BR 13. Respondent provides no authority that Alison was required to make such an inquiry.

Lacking authority, respondent's argument should be disregarded. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P. 2d 549 (1992).

C. Admissible evidence supports Alison's claims.

Respondent fails to make a single citation to the record in support of her argument regarding admissibility of evidence to support Alison's claim. BR 14-16. Respondent's argument should therefore not be considered. RAP 10.3 (a) (6); *Matter of Estate of Lint*, 135 Wn. 2d 531-32.

Despite arguing the absence of evidence to support Alison's claims, respondent nevertheless acknowledges that the December 14, 1982 letter from Margaret to Alison is evidence. BR 14; CP 66. In reviewing the trial court's orders, the Court is required to view that letter and all inferences therefrom in the light most favorable to Alison. *Kofmehl v. Baseline Lake LLC,* 175 Wn. 2d 584 at 4; --P. 3d – (2013). An inference is "' *'[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.*' " *Dickinson v. Edwards,* 105 Wn. 2d 457, 461, 716 P. 2d 814 (1986) (*Quoting Shelby v. Keck*, 85 Wn. 2d 911, 914-15, 541 P. 2d 365 (1975) (*citing* Black's Law Dictionary 917

(4th ed. 1968)). *See also, Fairbanks v. J. B. McLoughlin Co., Inc.*, 131 Wn. 2d 96, 101-02, 929 P. 2d 433 (1997).

Margaret's letter of December 14, 1982 reveals a close personal bond with Alison. CP 66. In her letter, Margaret also reveals her history of gifting to Alison. *Id.* Margaret also recites the *quid pro quo* for her promise to fund Alison's retirement, that Alison not pursue her lawsuit against Margaret's son, Perth, and that Alison continue to live in the Madison Park area so that her children would be near their father and his new family. *Id.* Given the totality of these facts, it is reasonable to infer that Margaret did just exactly what she said she would do in her letter, fund Alison's retirement account. The trial court therefore committed reversible error in not recognizing that inference in Alison's favor. *Kofmehl v. Baseline Lake LLC, supra.*

Respondent argues that the Dead Man's Statute, RCW 5.60.030, prohibits Alison's testimony about the December 14, 1982 letter or any conversation with Margaret. BR 14-16. Respondent fails to identify where in the record she objected to or moved to strike Alison's testimony regarding conversations with Margaret. By failing to object, respondent thereby waived the protection of the Dead Man's Statute. *Stranberg v. Lasz*, 115 Wn. App. 396, 405-06, 63 P. 3d 809 (2003).

To the extent that respondent's argument regarding the Dead Man's Statute merits consideration, Alison's testimony as to her feelings and impressions regarding the December 14, 1982 letter are not prohibited by the statute. *Jacobs v. Brock*, 73 Wn. 2d 234, 237-38, 437 P. 2d 920 (1968); *Wildman v. Taylor*, 46 Wn. App. 546, 553-54, 731 P. 2d 541 (1987). Thus, the Dead Man's Statute does not bar Alison's testimony in paragraph 8 of her declaration that based upon the letter, she had expected that the funds from the retirement account became automatically available to her when she turned 65 in 2010. CP 32. Nor does the statute bar Alison's testimony in paragraph 7 of her declaration that she has no doubt that Margaret fulfilled her promise and immediately began funding of the retirement account and continued to so until her death in 2005. CP 32.

The Dead Man's Statute also does not bar a witness' testimony as to the performance of services. *King v. Clodfelter*, 10 Wn. App. 514, 516-17, 518 P. 2d 206 (1974). Thus, the Dead Man's Statute does not bar Alison's testimony in paragraph 6 of her declaration that, as Margaret had requested, she remained near the Madison Park area and did not move to Southern California where she had an excellent job waiting for her. CP 32.

D. Appellant presents evidence on each element of an inter vivos gift.

Respondent argues that Alison has not met her burden of proof as to each element of an inter vivos gift. BR 16-17. To the contrary, the December 14, 1982 letter contains clear, cogent and convincing evidence of Margaret's donative intent: "*As I told you, I will more than adequately fund your retirement.*" CP 66. Therefore, the existence of Margaret's intent to make a gift is an evidentiary issue to be resolved by the finder of the fact. *Buckerfield's Ltd. v. B. C. Goose & Duck Farm, Ltd.*, 9 Wn. App. 220, 224, 511 P. 2d 1360 (1973).

Respondent argues that there is no evidence of Margaret's history of gifting to Alison. BR 17. To the contrary, in her letter of December 14, 1982, Margaret recites her prior history of gifting to Alison: "*This will require diverting my annual gifting to you, **which has always been at the highest allowable by the IRS, and will continue to be,** plus additional funds I and my advisors select, as well as the reinvestment of all income generated by these funds.* (Emphasis added). " CP 66. Given such a prior history of gifting, it is reasonable to infer that Margaret did what she said she would do in her letter. For purposes of summary judgment, the Court must draw such an inference in Alison's favor. *Kofmehl v. Baseline Lake LLC, supra.*

Respondent argues that Alison fails to meet her burden of proving delivery of the retirement account. BR 17-18. Respondent asserts that delivery must be as complete as the nature of the property and the attendant circumstances will permit, citing *McCarton v. Estate of Watson*, 39 Wn. App. 358, 364-65, 693 P. 2d 192 (1984). BR 17. Respondent overlooks that in *McCarton,* the court emphasized the strength of the donor's intent relevant to the issue of delivery. In *McCarton*, the court concluded that "[g]*iven such concrete and unequivocal evidence of intent, we think the constructive delivery and constructive donee possession in this case were sufficient to transfer the gifts.* 39 Wn. App. 368. Here, as in *McCarton*, given concrete and unequivocal evidence of Margaret's donative intent, the requirement of delivery has been satisfied here.[1]

E. The Court should recognize tortious interference with a testamentary expectancy or gift.

Respondent argues that a claim for tortious interference with a testamentary expectancy or gift is not an issue of public importance. BR 18. To the contrary, as noted in *Beckwith,* recognition of the tort of intentional interference with a testamentary expectancy or gift will foster important public policy in allowing a remedy to injured parties. 205 Cal. App. 4th 1051. Respondent also overlooks Alison's citation to decisions of

courts in 16 other states, plus decisions of the United States Supreme Court , the Tenth Circuit Court of Appeals, and the Restatement (Second) of Torts §774B, all of which recognize tortious interference with a testamentary expectancy or gift as an issue of public importance. AB 13-14. The weight of this authority compels the conclusion that whether to recognize tortious interference with a testamentary expectancy or gift is an issue of public importance.

Respondent alludes to the availability of other unspecified remedies under Washington law. BR 18. Apart from failing to identify the remedies to which she refers, respondent offers no explanation how recognition of the tort of tortious interference with a testamentary expectancy or gift would be incompatible with such other remedies. Are those other unspecified remedies exclusive? Without adequate, cogent argument and briefing, petitioner's argument should not be considered. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 808, 225 P.3d 213 (2009).

Respondent argues that tortious interference with a testamentary expectancy or gift is an unnecessary intrusion on the probate court's special procedures and evidentiary requirements. BR 18. To the contrary, the trial court was invested with plenary authority to hear Alison's claims

under RCW 11.96A.020 (1), (2); *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P. 2d 317 (2008).

Respondent misplaces reliance upon *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 141 Cal. Rptr 3d 142 (2012). BR 18. While *Beckwith* took notice of other courts that prohibit an interference action when the plaintiff already has an adequate probate remedy, ultimately, the court adopted the tort:

> [W]e conclude that a court should recognize the tort of IIEI if it is necessary to afford an injured plaintiff a remedy. The integrity of the probate system and the interest in avoiding tort liability for inherently speculative claims are very important considerations. However, a court should not take the "drastic consequence of an absolute rule which bars recovery in all ... cases [ ]" when a new tort cause of action can be defined in such a way so as to minimize the costs and burdens associated with it.

205 Cal. App. 4th 1056.

Beckwith compels a similar conclusion here. It is no less possible for this Court to recognize tortious interference with a testamentary expectancy or gift while preserving the integrity of the probate system and while avoiding inherently speculative claims.

Respondent misplaces reliance upon *Hadley v. Cowan*, 60 Wn. App. 433, 804 P. 2d 1271 (1991). In *Hadley*, the court held that the settlement of a will contest in a probate was res judicata as to a subsequent claim for undue influence and interference with the child-parent relationship filed by two beneficiaries who were signatories to the settlement. In contrast, this case involve no prior settlement nor any issue of res judicata. Moreover, the court in *Hadley* was not called upon to address, nor did it address, tortious interference with a testamentary expectancy or gift or Restatement (Second) of Torts §774B. *Hadley v. Cowen* is not controlling here.

Respondent argues that relief is available in restitution. BR 19. Respondent fails to recognize that tortious interference with a testamentary expectancy or gift is compatible with restitution. Note Comment e to Restatement (Second) of Torts § 774B:

> *e. Remedies.* The normal remedy for the conduct covered by this Section is an action in tort for the loss suffered by the one deprived of the legacy or gift. (See § 774A, on damages). If, however, the defendant has himself acquired the benefits of the legacy or gift, he is unjustly enriched at the expense of the plaintiff and a remedy is also afforded in restitution. This may consist of holding the wrongdoer to a constructive trust, imposing an equitable lien or subjecting him to a simple monetary judgment to the extent of the benefits thus tortiously acquired. A

> statement of the rules governing these equitable remedies may be found in the Restatement of Restitution, especially § 184.

Respondent also overlooks that Alison pleads a claim for constructive trust. CP 63.

Respondent improperly relies upon an unpublished decision of the Court of Appeals in *In re: Estate of Hendrix,* 2006 WL 2048240. BR 19. An unpublished decision of the Court of Appeals may not be cited. GR 14.1 (a) ("*A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.*"). Alison moves the Court to strike all references to that unpublished decision. RAP 10.7.

Respondent argues that Alison failed to avail herself of numerous other unspecified remedies over the years. BR 20. Because she fails to support her argument with a single citation to authority, respondent's argument should not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Respondent once again cites to the concern expressed in *Beckwith* for the integrity of the probate system and the need to avoid speculative claims. BR 20. Once again, respondent fails to recognize that in *Beckwith*, the court balanced those concerns against the need for a

carefully crafted tort and recognized the tort. 205 Cal. App. 4th 1056.

Respondent once again argues that the issue of tortious interference with a testamentary expectancy or gift is not an issue of public importance. BR 20. Once again, respondent fails to recognize that recognizing the tort of intentional interference with a testamentary expectancy or gift will foster important public policy in allowing a remedy to injured parties. *See Beckwith, supra.* Once again, respondent refuses to recognize the 16 state courts, the United States Supreme Court, the Tenth Circuit Court of Appeals and the American Law Institute which recognize the public importance of this tort. AB 14. Recognition of tortious interference with a testamentary expectancy or gift in Washington is of no less public importance than it was in those cases.

Respondent argues that Alison cannot satisfy the elements of tortious interference with a testamentary expectancy or gift articulated in *Beckwith.* BR 21. To the contrary in her Amended TEDRA Petition, Alison alleges the expectation of receiving a retirement benefit (CP 59, 60-61, 66-67), intentional interference by respondent (CP 61, 63), interference that was independently wrongful or tortious (CP 61- respondent's dissolution of the account, contrary to Margaret's expressed intent), a reasonable certainty that but for the interference, Appellant would have received the gift (CP 59-61, 66-67), and damages (CP 61,63).

Alison thus states a claim for tortious interference with a gift. *Beckwith v. Dahl, supra.*

In *Beckwith*, the court held that despite the fact that the plaintiff's complaint failed to allege any independently tortious conduct directed at the testator, the plaintiff should have an opportunity to correct any deficiencies in his complaint because the trial court improperly dismissed the complaint without affording the plaintiff an opportunity to correct the deficiencies in his claim for intentional interference with expectation of inheritance. 205 Cal. App. 4th 1059. As in *Beckwith*, the trial court upheld dismissal of Alison's complaint without any leave to amend. CP 280-83. Thus, as in *Beckwith*, if any allegation in Alison's Amended TEDRA Petition is deemed insufficient to support tortious interference with a testamentary expectancy or gift, the Court should order that Alison be granted leave to amend her petition accordingly.

Respondent argues the absence of evidence to support Alison's claim. BR 22. Respondent fails to acknowledge her role in ensuring such lack of evidence. It was respondent whose attorney obtained dismissal of Alison's Amended TEDRA Petition by misrepresenting to Alison's counsel that she would obtain a trial assignment, but instead presented a motion to dismiss for the commissioner. AB 7-8. Had respondent's attorney obtained the trial assignment as she promised, Alison would have

had the opportunity to pursue discovery on her claims. Respondent does not deserve to be rewarded for the sharp practice of her attorney.

Respondent also fails to recognize that the trial court dismissed Alison's Amended TEDRA Petition on October 10, 2012, only 119 days after the amended petition was filed. CP 125-127: CP 57-67. The trial court may commit reversible error if it grants summary judgment without allowing reasonable discovery. *See, e.g., Demelash v. Ross Stores, Inc.,* 105 Wn. App. 105 Wn. App. 508, 20 P. 3d 447 (2001). While CR 56 (f) allows court to continue a summary judgment hearing to allow the nonmoving part to conduct discovery, respondent's untimely scheduling of the hearing on the motion to dismiss deprived Alison of an opportunity to invoke CR 56 (f).

F. Alison's claims for breach of fiduciary duty, conversion, constructive trust, and accounting have not yet been adjudicated.

Respondent's arguments against Alison's claims for conversion or constructive trust are improper, as the trial court as yet has not ruled on those claims. RB 23-24. Alison's Amended TEDRA Petition alleges, in addition to her claims for tortious interference with gift, claims for breach of fiduciary duty, conversion, constructive trust, and accounting. CP 57-67. Neither respondent's Petition to Dismiss Claims nor her Reply made any mention of Alison's claims for fiduciary duty, conversion or

constructive trust. CP 91-102; CP 118-24. Neither the trial court's Order Approving Petition to Dismiss Claims nor the Order Denying Motion for Revision made any reference to any of Alison's claims other than the tortious interference claim and the punitive damages claim. CP 125-127; CP 280-83. As a result, Alison's claims for breach of fiduciary duty, conversion, constructive trust, and accounting remain unadjudicated. Alison moved the trial court on reconsideration to remand the case to allow her claims for conversion and constructive trust to be heard. CP 286-88. The trial court denied reconsideration. CP 322. The appropriate course of action for the trial court was to remand the case to the commissioner to hear Alison's unadjudicated claims. *Marriage of Moody*, 137 Wn. 2d 979, 992, 976 P. 2d 1240 (1999). The trial court abused its discretion in failing to order remand.

G. The trial court erred in dismissing appellant's claim for punitive damages under California law.

Alison testified that in 2010, after her retirement, when the funds from her retirement account did not arrive, she contacted respondent who denied knowledge of any retirement account and refused to cooperate or investigate further as to where Alison's retirement funds may have been located. CP 33. Respondent acknowledges that she was contacted in California by Alison in 2010 regarding a gift left by Margaret. CP 365-66.

Thus, California clearly has a connection with the acts giving rise to Alison's claims. Therefore, California has a specific interest in deterring tortious conduct occurring within its borders. Under *Kammerer v. Western Gear Corp.*, 96 Wn. 2d 416, 423, 635 P. 2d 708 (1981), a Washington court may allow punitive damages under California law if California courts would allow such damages to punish respondent's conduct.

H. The trial court erred in denying appellant's motion for revision.

Respondent offers no argument or authority contrary to Alison's argument that the trial court erred in denying Alison's motion for revision. The Court may therefore make its decision on the argument and record before it. *Adams v. Department of Labor & Industries,* 128 Wn. 2d 224, 229, 905 P. 2d 1220 (1995).

I. The trial court erred in denying appellant's motion for reconsideration.

Respondent fails to address Alison's argument that the trial court erred in denying her motion for reconsideration for the court's failure to address her claims for conversion and constructive trust. BR 26-27. The Court may therefore make its decision on the argument and record before it. *Adams v. Department of Labor & Industries,* 128 Wn. 2d 229.

Respondent argues that Alison's supplemental declaration fails to comply with CR 59. BR 26-27. Respondent is mistaken, as Alison's supplemental declaration was filed in support of her motion for revision. CP 259-66. Respondent provides no authority that CR 59 applies to a motion for revision brought under RCW 2.24.050. Neither *Fishburn v. Pierce Co. Planning and Land Services Dept.*, 161 Wn. App. 452, 250 P. 3d 146 (2011), nor *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 970 P. 2d 343 (1999), nor *Vaughn v. Vaughn*, 23 Wn. App. 527, 597 P. 2d 932 (1979) involved a motion to revise a commissioner's ruling. Respondent's reliance upon those cases is therefore misplaced.

Respondent argues that the trial court in a motion for revision is limited to the record before the commissioner. BR 27. Respondent overlooks that in *Marriage of Moody*, this Court recognized that "[*i*]*n an appropriate case, the superior court judge may determine that remand to the commissioner for further proceedings is necessary.*" 137 Wn. 2d 992. Under *Moody*, remand was clearly warranted in this case, given the evidence in Alison's supplemental declaration regarding the statement of Mr. Fernald and the likelihood that the retirement account established by Margaret for Alison was maintained at a Seattle investment firm, Martin Nelson. CP 260-66.

To the extent that Alison's discovery of the documents was subject to a requirement of diligence, Alison testified that she had only recently discovered those documents in an unmarked box in her garage. CP 260. Alison's diligence in locating those documents should take into consideration the fact that her case was dismissed on a motion on October 10, 2012, only 119 days after the amended petition was filed. CP 125-127: CP 57-67. Alison should not be held to the same standard of diligence demanded of one who discovers documents after a trial. *See, e.g., Davenport v. Taylor*, 50 Wn. 2d 370, 311 P. 2d 990 (1957). In *Taylor*, the trial court erred in granting the defendant a new trial based upon the introduction of three letters discovered 11 days after the end of trial.

To the extent that CR 59 does apply here, consideration of Alison's supplemental declaration is authorized by CR 59 (g): "*On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.*" Washington courts also permit consideration of additional evidence on a motion to reconsider an order granting summary judgment. *See, e.g., Applied Industrial Materials Corp. v. Melton*, 74 Wn. App. 73, 77, 872 P. 2d 87 (1994).

Respondent's discussion of RCW 2.24.050 fails to address *Marriage of Moody,* in which the Court recognized that remand is an appropriate remedy. 137 Wn. 2d 992.

J. Respondent's failure to file a notice of cross-appeal bars consideration of her argument regarding the trial court's denial of her request for attorney fees.

In order to preserve the right to appeal the trial court's denial of her request for attorney fees, respondent was required to timely file a notice of cross-appeal of the order denying her request. RAP 5.2 (f). Failure to cross-appeal an issue generally prevents review of an issue on appeal. *Amalgamated Transit Union Local 587 v. State*, 142 Wn. 2d 183, 202, 11 P. 3d 762 (2000). Since respondent did not timely file a notice of cross-review, the Court cannot consider her arguments regarding the trial court's denial of her request for attorney fees.

K. Respondent's request for attorney fees on appeal should be denied.

In its order denying revision, the trial court explained its reason for denying respondent's request for attorney fees:

> The Court declines to award attorney fees or costs pursuant to RCQ 11.96A.150. The Court finds that under the facts of this case, and considering all equities, and the petitioner presenting a novel issue of law in the State of Washington, which has been adopted in other jurisdictions, neither side should be awarded fees or costs.

CP 281.

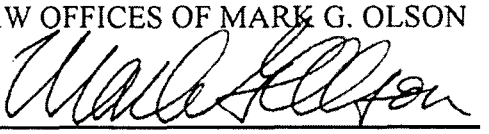
The trial court's reasoning is no less applicable here. RCW 11.96A.150 permits the Court to consider any relevant factor, including whether a case presents novel or unique issues. *In re: Guardianship of Lamb*, 173 Wn. 2d 173, 198, 265 P. 876 (2011). The case at bar presents a novel issue in the State of Washington, whether tortious interference with a testamentary expectancy or gift is recognized or should be recognized as a tort in Washington. Assessment of attorney fees against Alison will cast a chill upon all parties such as Alison who dare to advance the growth of the law. Respondent's request for attorney fees on appeal should be denied.

IV. CONCLUSION

In light of the foregoing, the Court should recognize the tort of tortious interference with a testamentary expectancy or gift, reverse the trial court's orders denying revision and reconsideration and the order of dismissal, and remand the case to the trial court for further proceedings.

Respectfully submitted,

LAW OFFICES OF MARK G. OLSON



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V. CERTIFICATE OF SERVICE

I, Mark G. Olson, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered the foregoing Appellant's Reply Brief to the following parties:

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