Supreme Court No. 92419-8

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
OCT 28 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 45250-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER LINTH AND THE ESTATE OF CAROLYN LINTH, THE EVELYN PLANT TESTAMENTARY TRUST; AND THE FRANKLIN & EVELYN PLANT GREEN POINT FOUNDATION,

Appellants,

v.

CARL GAY AND ROBIN A. GAY, HUSBAND AND WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF; et al.,

Respondents

PETITION FOR REVIEW

Linda B Clapham, WSBA No. 16735
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 476-8215
Email: clapham@carneylaw.com

Thomas E. Seguine, WSBA No. 17507
LAW OFFICE OF TOM SEGUINE
1023 South 3rd Street
Mount Vernon, Washington 98273-4301
Telephone: (360) 755-1000
Facsimile: (360) 757-1000
Email: northcascadeslegal@gmail.com

Attorneys for Appellants Jennifer Linth & The Estate Of Carolyn Linth

FILED IN COA ON OCTOBER 22, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

A. Mrs. Plant Retained Carl Gay to Create an Effective Estate Plan. 2

B. The Problems Arising From the Amendment 3

C. The Problems Related to Taxes. 5

D. The Problems Related to Gay's Conflict of Interest. 7

E. Nature of the Dispute and Trial Court Rulings. 8

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 9

A. Members of the Washington State Bar Association, who Hold Themselves out to the Public as Exceptionally Experienced in the Field of Trusts and Estates Law, Are Expected to Competently Protect Their Testator Clients. When They do Not, the Public Interest – both to Members of the WSBA and to the People The Serve – is Negatively and Substantially Affected. The Court of Appeals Decision Warrants Review by This Court Because the Decision Undermines the Protection to Which Intended Beneficiaries are Entitled Under This Court's Decisions. RAP 13.4(b)(4). 9

1. Carl Gay Did Not Know the Estate Tax Consequences of the Estate Plan he

LIN035-0001 3394527.docx

Recommended for his Client, Mrs. Evelyn Plant 9

2. The Court of Appeals Was So Concerned About Protecting an Attorney's Duty of Loyalty to Their Client That It Lost Sight of the Fact That the Point in the Representation at Which Gay Erred, Presented No Risk and No Conflict With That Duty 10

3. The Decision Incorrectly Focuses on the Duty of Care Owed by Carl Gay as Attorney for the Trustee, Dan Doran, Instead of the Duty of Care Owed by Carl Gay as Attorney for the Trustor, Mrs. Plant. 13

B. The Decision is in Conflict With Another Decision of the Court of Appeals With Virtually Identical Facts. RAP 13.4(2) 15

VI. CONCLUSION 18

Appendix 1: September 22, 2015 Decision, Court of Appeals, Division II

Appendix 2: *Moen v. Driscoll*, 122 Wn. App. 1038, 2004 WL 1658976, reported in 14 No. 4 Andrews' Prof. Liab. Litig. Rep. 9

TABLE OF AUTHORITIES

Page(s)

Washington Cases

In re Disciplinary Proceeding Against Hall,
180 Wn.2d 821, 329 P.3d 870 (2014)....................................8

In re Disciplinary Proceeding Against McKean,
148 Wn.2d 849, 64 P.3d 1226 (2003)....................................8

Moen v. Driscoll,
122 Wash.App. 1038, 2004 WL 1658976
(Wn. App. Div. I July. 26, 2004),
reported in 14 No. 4 Andrews' Prof. Liab. Litig. Rep. 9......16, 17

Parks v. Fink,
173 Wn. App. 366, 293 P.3d 1275 (2013) 10, 11, 13, 15

Trask v. Butler,
123 Wn.2d 835, 872 P.2d 1080 (1994)..............................1, 13

Constitutional Provisions, Statutes and Court Rules

RAP 13.4(b)(2)..2, 16

RAP 13.4(b)(4)..2, 9

RPC 1.7 8

I. IDENTITY OF PETITIONER

Appellants Jennifer Linth and the Estate of Carolyn Linth ("Linth") ask this court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Linth seeks review of the published portion of the decision of the Court of Appeals, Division II, filed September 22, 2015 ("Decision"). A copy of the Decision is attached as Appendix 1. Linth did not move for reconsideration.

III. ISSUES PRESENTED FOR REVIEW

This appeal involves the duty of an attorney to non-client beneficiaries under the multi-factor balancing test set forth by the Supreme Court in *Trask v. Butler*, 123 Wn.2d 835, 843, 872 P.2d 1080 (1994). Linth seeks review by the Supreme Court to clarify this duty under factual circumstances different than those presented in *Trask v. Butler*. Here, an attorney who held himself out to be exceptionally experienced in the field of trusts and estates, did not know the applicable law and failed to properly advise his client resulting in the complete failure of his client's estate plan. In addition, respondent attorney Carl Gay ("Gay") permitted his client, Mrs. Evelyn Plant, to fully and properly execute Amended Trust documents, that he prepared and that he held in his offices, *before they were complete*. Gay also failed to know and understand the estate tax consequences of the estate plan that he created for

Mrs. Plant. Gay's misfeasance resulted in the *complete failure* of Mrs. Plant's estate plan. After her death, litigation ensued due to the incomplete, *but fully executed*, Amended Trust document prepared by Gay. The trial court ruled incorrectly that Gay owed no duty to non-client intended beneficiaries of the fully executed Amended Trust that he created, and that failed, due solely to his breach of duties owed to his client, Mrs. Plant.

The Decision involves an issue of substantial public interest for the members of the Washington State Bar and the people we serve that should be determined by the Supreme Court, as described more fully in §§ V. (A). *See*, RAP 13.4(b)(4). The Decision also conflicts with a decision of the Court of Appeals, as described more fully in § V.(B). *See*, RAP 13.4(b)(2).

IV. STATEMENT OF THE CASE

A. Mrs. Plant Retained Carl Gay to Create an Effective Estate Plan.

It is no exaggeration to say the entire purpose of retaining a lawyer to create an estate plan is to insure that the plan is, in fact, put into effect so that your detailed plans are not frustrated. Reliance is placed on this principle by Washington citizens every day to order their affairs and provide for their loved ones.

Mrs. Plant thought she had done just that. Prior to her death, Mrs. Plant placed her "confidence in Carl Gay as her legal advisor for purposes of estate planning and other matters."

(CP: 182). Mrs. Plant and her husband, who predeceased her by twenty years, had no children. However, no one disputes that Mrs. Plant had a long-standing and special relationship with Jennifer Linth and her entire family. (CP: 161-62). Jennifer cared for Mrs. Plant after her husband passed and no one disputes that Mrs. Plant intended to provide for Jennifer in her estate plan. (*See*, CP:915). Of relevance to this dispute are the two Trust documents that Gay prepared for Mrs. Plant. (CP:70-81 and CP:88-89).

In July 2000, Gay drafted the Original Trust for Mrs. Plant. (CP:70-81, 235). Mrs. Plant fully executed the Original Trust document, with Gay acting as notary, on July 22, 2000 (CP:70-81).[1] The Original Trust "generously" provided for both Jennifer Linth and her mother, Carolyn Linth (now deceased). (CP:236). In addition, the Original Trust provided a residuary gift of Mrs. Plant's stunning 60-acre Green Point property to a charitable organization entitled: Christa Ministries. (CP:70-81).

B. The Problems Arising From the Amendment.

On August 21, 2000, Gay was asked by Mr. Dan Doran – **not** by his client Mrs. Plant – to draft an Amendment to the Original Trust. (CP:236). ***Without ever speaking with his client***, Gay drafted the requested Amendment to Mrs. Plant's Original July 22, 2000 fully executed Trust. (CP:230). According to Gay, the Amendment:

[1] Remarkably, under the circumstances, Gay never actually spoke with his client, Mrs. Plant, again.

> effectively removed Christa [Ministries] as a beneficiary of [Mrs. Plant's] Green Point residence and property and left that property to the North Olympic Land Trust, to be held as a wildlife refuge and ecological preserve, subject to Jenny's right to live in [Mrs. Plant's] residence for five years and then occupy the northeast corner of the property for the rest of her life.

(CP:83, 236).[2] As drafted by Gay, the Amendment required the Trustee[3] to

> . . . convey the Green Point residence, together with the sum of Fifty Thousand Dollars ($50,000.00), to a nonprofit corporation and tax-exempt private foundation to be created by trustee in accordance with the terms set forth on the document entitled "THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATIONS PLAN" (hereinafter "the Foundation plan"), ***a copy of which is attached hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full.***

(CP88-89)(emphasis added).

Mrs. Plant signed the Amendment and her signature was notarized on August 22, 2000. (CP:88-91). Unfortunately for everyone, Mrs. Plant fully executed the Amendment ***before "Exhibit 1" (i.e., the Foundation Plan) was ever attached.*** According to Gay:

[2] Jennifer Linth was given a life estate under *both* the Original Trust and the Amendment to the Trust. (CP:73-74, 89-90)

[3] Trustee was Dan Doran, the same person who asked Gay to draft the Amendment. (CP:236)

> without my knowledge, Dan Doran came to my office and requested my secretary to print a copy of the trust amendment I had drafted. I had not yet prepared a transmittal letter to Mrs. Plant ***nor spoken with her*** to determine whether the draft met with her approval nor had I discussed with her the specifics to the proposed new entity to be created for the Green Point Property. . . . Mr. Doran later delivered to me the signed original amendment . . .

(CP:230-231; 88-91) (emphasis added). In short, Gay drafted the Amendment without ever speaking with Mrs. Plant and then held the fully executed Amendment in his office, knowing that it was incomplete *and ineffective*. Gay declared:

> Before certain *necessary* exhibits were added to the draft Amendment, it was picked up from my (Gay's) office by [Dan] Doran, presented to Evelyn [Plant], and signed.

(CP:236) (emphasis added). There is no dispute: "without the referenced attachment, the Amendment to the Trust was therefore incomplete and subject to challenge." (Respondent's Brief at p. 6).

C. The Problems Related to Taxes.

To put it simply; Carl Gay did not realize or understand the estate tax consequences of the estate plan he created for Mrs. Plant. (CP: 200). Gifting real property (Green Point) to a private charitable foundation would have avoided significant estate taxes. However, where that gift of real property is subject to a life estate, as it was drafted by Carl Gay, the estate taxes are significantly higher. (CP:169-170, 191). In this case, it was questionable whether there would be enough cash in the estate to pay the enormous estate taxes

owing because of the way Gay drafted the Trust. Thus, whether Mrs. Plant left her Green Point property to Christa Ministries (as she originally intended - CP:74-77), or to the Green Point Foundation (as contemplated by the Amendment - CP:88-89), *both* are 501(c)(3) non-profit corporations that have particular estate planning requirements; requirements that Gay clearly did not understand or contemplate when advising Mrs. Plant.

It was not until *after* Mrs. Plant died that Carl Gay realized the magnitude of his error and the effect it would have on Mrs. Plant's estate: "The IRS could force [the] sale of the Green Point property to pay taxes frustrating Mrs. Plant's estate plans." (CP:200).[4] So concerned was Gay that he retained an outside tax lawyer to provide an opinion on his drafting of the Trust documents.[5] The opinion was that the Trust documents drafted by Gay were defective *and* that Carl Gay had a conflict of interest in representing the personal representative, Dan Doran, precisely because the Trust documents were defective.[6] (See, §D, *infra.*)

[4] There are additional problems for Mrs. Plant's estate due to Carl Gay's failure to draft the Trust without ambiguity in order that the estate taxes were paid from the Trust residue. None so glaring, however, as the failure of Gay to know about the significant estate tax consequences of the plan he created for Mrs. Plant.

[5] In his capacity as attorney for Dan Doran, the Trustee of the Trust that he defectively created, not in his capacity as attorney for Mrs. Plant.

[6] Linth attempted to obtain the entire opinion through discovery ("the Butler opinion"), but, the interrogatory was met with objection. What IS before the Court, however, is sufficient to raise an inference that Gay owed a duty of impartiality and loyalty to Mrs. Plant, and, after her death, to the beneficiaries of the Trust that he incompetently attempted to create for Mrs. Plant.

Carl Gay's failure to know and understand the estate tax consequences of the Trust documents he drafted for Mrs. Plant has caused controversy over the interpretation and enforceability of the Trust, as amended, and has frustrated Mrs. Plant's undisputed intentions as expressed to Carl Gay and as set forth in her estate planning documents.

D. The Problems Related to Gay's Conflict of Interest.

Carl Gay has asserted that as of August 16, 2000, he became the lawyer for Dan Doran, the Trustee of the Trust that he drafted. (Respondent's Brief at p. 1). Of course, he was also the lawyer for Mrs. Plant at the same time. Upon her death, on January 1, 2001, Gay continued to owe a duty of impartiality and loyalty to Mrs. Plant related to the estate planning documents that he drafted for her. Gay had a patently clear concurrent conflict of interest by representing the Trustee of the defective Trust that he drafted for Mrs. Plant at the same time that the beneficiaries of that Trust (1) accused the Trustee of breach of fiduciary duties, and (2) accused Carl Gay of failing to draft the Trust to effectively transfer Mrs. Plant's assets in accordance with her intentions. RPC 1.7. Gay was specifically advised by the outside lawyer that he retained on behalf of the Trustee, that he had a conflict of interest. (CP: 138-141; 120, 121).

Carl Gay owed a duty of impartiality and loyalty to Mrs. Plant *before he ever undertook his representation of the Trustee*. It was up to Carl Gay, as a lawyer licensed to practice law in the State of Washington, to either withdraw from representing the Trustee or to obtain a waiver from both the Trustee and the beneficiaries of the Trust he drafted for Mrs. Plant. RPC 1.7; *see*, *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 64 P.3d 1226 (2003); *In re Disciplinary Proceeding Against Hall*, 180 Wn.2d 821, 329 P.3d 870 (2014). Carl Gay did neither.

E. Nature of the Dispute and Trial Court Rulings.

In her individual capacity as an intended beneficiary of the Trust that was negligently drafted by Gay, Linth filed a malpractice action against Gay. (CP:913-925). Gay moved for summary judgment asserting that he owed no duty to a non-client beneficiary. (CP:272-282, 266-271).[7] The trial court granted Gay's motion for summary judgment. (CP:22-24). This appeal timely followed. (CP:14-22).

[7] Linth's Response (CP:238-260; 037-238); Gay's Reply (CP:025-34).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Members of the Washington State Bar Association, who Hold Themselves out to the Public as Exceptionally Experienced in the Field of Trusts and Estates Law, Are Expected to Competently Protect Their Testator Clients. When They do Not, the Public Interest – both to Members of the WSBA and to the People The Serve – is Negatively and Substantially Affected. The Court of Appeals Decision Warrants Review by This Court Because the Decision Undermines the Protection to Which Intended Beneficiaries are Entitled Under This Court's Decisions. RAP 13.4(b)(4).

1. Carl Gay Did Not Know the Estate Tax Consequences of the Estate Plan he Recommended for his Client, Mrs. Evelyn Plant.

It is undisputed that the purpose for which Mrs. Plant retained Carl Gay as her lawyer was to provide for the effective transfer of her property upon her death. Certainly avoiding estate taxes, to the extent legally possible, can be presumed as another purpose for which Mrs. Plant retained Carl Gay to prepare her estate planning documents. Carl Gay failed to serve either of these purposes for his client.

Carl Gay declares himself as a lawyer practicing over 30 years and as being exceptionally experienced in the field of estate planning, "including the preparation of wills, trusts and other estate planning documents as well as creation of non-profit entities for a wide variety of clients." (CP 266-267). Certainly Washington lawyers with such experience should be expected to know and understand the estate tax consequences of burdening a gift of real

property to a charitable corporation with a life estate. Gay's incompetence and breach of his duty to provide competent advice to Mrs. Plant began with the Original Trust and carried through to the Amended Trust.

There is every reason to impose this same duty upon Carl Gay to the intended beneficiaries of the estate plan and Trust he created for Mrs. Plant, precisely to avoid future harm of the sort suffered by Linth. Moreover, there can be no undue burden on the legal profession by requiring that members of the State Bar Association comply with standards of competency and standards of professional conduct. Supreme Court review is necessary to uphold the integrity of the WSBA for its members and for the public that they serve.

2. The Court of Appeals Was So Concerned About Protecting an Attorney's Duty of Loyalty to Their Client That It Lost Sight of the Fact That the Point in the Representation at Which Gay Erred, Presented No Risk and No Conflict With That Duty.

The Decision relies upon *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013), to hold that, prior to his client's death, Gay did not owe a duty to Linth because to do so would impose a risk of interfering with Gay's duty of undivided loyalty to his client, Mrs. Plant. But there is no issue of Linth attempting to interfere with Gay's duty of loyalty to Mrs. Plant. The "critical duty issue" in *Parks* was "whether a duty is owed to an intended beneficiary where the attorney fails to ensure the decedent executes the will promptly."

The *Parks* court found that imposing such a duty on the legal profession would create a conflict of interest between the attorney representing the testator and the hopeful beneficiary who had not yet been established as a beneficiary.

In finding a conflict of interest, the Decision incorrectly assumes, "[h]ere, as in *Parks*, the Trust documents were not properly executed before Plant's death." (Decision at p. 8).[8] On the contrary; both the Original Trust and the Amendment were fully executed by Mrs. Plant. After she signed and her signature was notarized, there was nothing more required from Mrs. Plant.

The "critical duty issues" in the present case are markedly different than the one in *Parks*, thereby making the facts and holding from *Parks* inapplicable here. Here, the "critical duty issues" are:

1.

> Whether an attorney who holds himself out as an experienced trusts and estates lawyer and who drafts an Amendment to a Trust document that references an Attachment "as though set forth in full," owes a duty to his client to advise her that the Amendment will not be valid and enforceable until such time as the Attachment is completed and attached, or, to advise the client not to fully execute the Amendment until such time as the Attachment referenced in the Amendment is complete and ready to attach in order to avoid any dispute between the original Trust and the Amendment to the Trust?

---

[8] It may seem obvious, but in this context, "properly execute" means to sign and have that signature notarized.

2.

> Whether an attorney who holds himself out as an experienced trusts and estates lawyer, owes a duty to his client, who has retained him for advice and counseling on estate planning and for drafting documentation to create a Trust, to know and understand estate tax laws and to advise that client about the estate tax consequences of the client's planned Trust?

3.

> Whether an attorney who has a concurrent conflict of interest as defined by RPC 1.7 has a duty to withdraw or to obtain a waiver from both sides of the concurrent conflict?

No compelling argument can be made that the legal profession will be unduly burdened by imposing any of these duties on an attorney, especially one who holds himself out as being an experienced trusts and estates lawyer.

The Decision fails to recognize the distinction from *Parks*: here, it was the Trust document itself that was defective – *not* the Testator's failure to property execute it. Unlike in *Parks*, the Trust document here was defective in more ways than one due to Carl Gay's incompetence. It was Carl Gay's responsibility to ensure that the Trust document was not defective. Extending Carl Gay's duty to the intended beneficiaries of Mrs. Plant's estate in this case would not create a conflict of interest between Carl Gay and his client, Mrs. Plant. Supreme Court review is warranted to clarify this distinction.

3. The Decision Incorrectly Focuses on the Duty of Care Owed by Carl Gay as Attorney for the Trustee, Dan Doran, Instead of the Duty of Care Owed by Carl Gay as Attorney for the Trustor, Mrs. Plant.

The Decision asserts that Cary's duty to Dan Doran as the Trustee did not include a duty to Linth, a non-client beneficiary. (Decision at pp. 10-11). But Jennifer Linth did not bring this action against Carl Gay, in his role as the attorney for the Trustee. Jennifer Linth brought this action against Carl Gay in his role as the attorney for Mrs. Plant.

In its' holding, the Decision relies upon *Trask v. Butler*, 123 Wn.2d 835, 845, 872 P.2d 1080 (1994),[9] which held that there is no duty "owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries." The Decision lost sight of the primary consideration learned from *Trask* and its progeny: it is the factual circumstances of each case that are critical to each decision and underscore the fact-specific analysis that is required of a court under the multi-factor balancing test. *See*, *Parks v. Fink*, 173 Wn. App. 366, 377 n.9, 293 P.3d 1275 (2013) (citations omitted).

With the particular facts of *Trask* in mind, the Supreme Court gave three reasons for its holding, **none** of which apply to this case.

---

[9] Ironically, the Decision never analyzes the multi-factor balancing test for which the *Trask v. Butler* decision is known.

First, the estate and its beneficiaries in *Trask* were incidental, not intended, beneficiaries of the attorney-personal representative relationship. Here, it is undisputed that Linth was one of the *intended* beneficiaries of the relationship between Carl Gay and Mrs. Plant. Again, it is Carl Gay's duty to Mrs. Plant that is at issue here, not Carl Gay's duty to Dan Doran, the Trustee.

Second, the estate heirs in *Trask* could bring a direct cause of action against the personal representative for breach of fiduciary duty. Linth has brought a direct action against the Trustee, Dan Doran, for breach of fiduciary duty. That claim remains in this lawsuit but, unlike the facts of the *Trask* case, the direct action against the Trustee has no value since the corpus of the Trust has been depleted due to the negligence of the attorney that created the Trust. Moreover, the Trustee, Mr. Doran, has died.

Third, under the particular facts in *Trask*, the Supreme Court found there was an unresolvable conflict of interest between the personal representative (who was also a beneficiary) and the plaintiff beneficiary. Thus, there was a conflict of interest between the attorney representing the personal representative and the plaintiff beneficiary. In the case at bar, there was never a conflict of interest between Mrs. Plant and Jennifer Linth with regard to Mrs. Plant's intention to care for Jennifer Linth through her estate plan. Thus, there is no conflict of interest between the attorney representing Mrs. Plant in drafting her estate planning documents and Jennifer Linth.

It is important to note, as well, the following critical factual differences in *Trask*: there was no dispute in *Trask*, as there is in this case, about the competence of the attorney drafting the underlying estate planning documents; there was no dispute in *Trask*, as there is in this case, about the validity of those documents; and unlike the facts in *Trask*, the same attorney who was representing the personal representative was not responsible for drafting the defective estate planning documents. Thus, even though the multi-factor balancing analysis set forth by the Supreme Court in *Trask* is applicable to the case at bar, the holding from Trask is not. This Court should grant review to clarify this basic tenet of *Trask*.

B. The Decision is in Conflict With Another Decision of the Court of Appeals With Virtually Identical Facts. RAP 13.4(2).

The Decision conflates two distinct concepts. On the one hand, attorneys do not owe a duty to non-client beneficiaries of a will that has *not* been properly executed. The courts in Washington are clear on this point; for an attorney to force the testator to promptly sign his or her will is a breach of their duty of undivided loyalty to their client, the testator. *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013).

On the other hand, attorneys *do* owe a duty to non-client beneficiaries of a will that ***has been properly executed by the client/testator***, but which fails due to solely to the attorney's breach of duty to his client. *Moen v. Driscoll*, 122 Wn. App. 1038,

2004 WL 1658976 (Wn. App. Div. I July. 26, 2004), reported in 14 No. 4 Andrews' Prof. Liab. Litig. Rep. 9.[10] (Copy attached as Appendix 2). The facts of this case present the latter circumstance and the Decision directly conflicts with Division I's decision in *Moen v. Driscoll*.

In *Moen v. Driscoll*, Division I reversed and remanded for trial a summary judgment in favor of a lawyer in a malpractice action brought by several beneficiaries of a trust that lawyer drafted. The lawyer prepared a Trust for Mary Bracelin, referring to an Attachment A, which was to be a list of assets that would be used to fund the trust. Bracelin properly executed the Trust documents, just as Mrs. Plant had done, but did not complete the Attachment A. The attorney reminded Bracelin, through Bracelin's daughter, to complete the Attachment A but had no further contact with Bracelin before she died. The Trust failed because there was no Attachment A to the Trust document, just as Mrs. Plant's Trust failed because there was no Exhibit 1. The beneficiaries sued the lawyer alleging that he had a duty to accurately advise Bracelin with her estate planning. In reversing the trial court on the issue relevant for this case, Division I held:

[10] RAP 13.4(b)(2) does not require conflicting decisions to be published decisions.

> Here, the evidence presented could support an inference that but for [the lawyer's] failure to fully advise and assist [Bracelin] in the proper procedure for funding the trust, she would have actually funded the trust such that her specific bequests would be carried out, and the intended beneficiaries received less than expected from the estate and the estate incurred unnecessary costs in probate. Given the disputed facts on each element of the malpractice claim, summary judgment was not proper.

Id.

Likewise here the evidence supports more than an inference that but for Carl Gay's failure to fully advise and assist Mrs. Plant in the proper procedure for ensuring that the Amendment to the Trust would be effective upon her death, she would not have signed the Amendment before the Foundation Plan was complete, or she would have agreed to destroy the fully executed Amendment until such time as the Foundation Plan was complete and ready to be attached to the Amendment. Just like the attorney in the *Moen* case, there is no evidence that Carl Gay ever spoke with Mrs. Plant after she signed the Amendment.

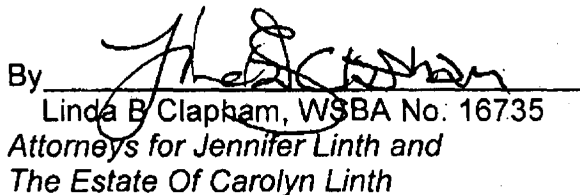
Linth asserts that this Court should accept review to clarify that the analysis and the holding in *Moen* is correct, and to eliminate the conflict in the approach of the Courts of Appeals on this important point of estate planning jurisprudence.

VI. CONCLUSION

The court should grant review to address the conflict between the Decision and another decision of the Court of Appeals, as well as the important public policy implications of the Decision.

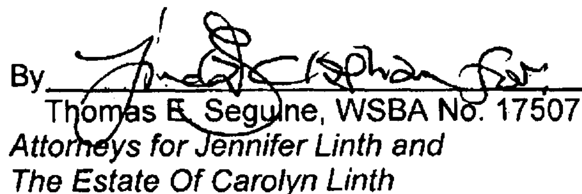
Respectfully submitted this 22nd day of October, 2015.

CARNEY BADLEY SPELLMAN, PS



By Linda B. Clapham, WSBA No. 16735
Attorneys for Jennifer Linth and The Estate Of Carolyn Linth

LAW OFFICE OF TOM SEGUINE



By Thomas E. Seguine, WSBA No. 17507
Attorneys for Jennifer Linth and The Estate Of Carolyn Linth

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. I hereby certify that on October 22, 2015, I caused true and correct copies of the foregoing document to be electronically filed with the Clerk of the Court using the JIS -Link system, and which Clerk of Court will send notification of such filing to the following via email, and I sent via hard copies to the following:

Christopher W. Keay, WSBA No. 13143 Johnson, Graffe, Keay, Moniz & Wick, LLP 2115 N 30th St Ste 101 Tacoma WA 98403-3396 ckeay@jgkmw.com mcdermottm@jgkmw.com	Thomas Edward Seguine Law Office of Tom Seguine 1023 S 3rd St Mount Vernon WA 98273-4301 northcascadeslegal@gmail.com
Michael Brandt McDermott, WSBA No. 42773 Johnson, Graffe, Keay, Moniz, and Wick, LLP 925 4th Ave Ste 2300 Seattle, WA 98104-1145 mcdermottm@jgkmw.com	

DATED this 22nd day of October, 2015.

Patti Saiden, Legal Assistant

APPENDIX
1

Filed
Washington State
Court of Appeals
Division Two

September 22, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JENNIFER LINTH and the estate of CAROLYN LINTH; the EVELYN PLANT TESTAMENTARY TRUST; AND THE FRANKLYN & EVELYN PLANT GREEN POINT FOUNDATION, Appellants, v. CARL GAY and ROBIN A. GAY, husband and wife, and the marital community composed thereof; GREENWAY & GAY, a Washington legal partnership; GREENWAY, GAY & ANGIER, a Washington legal partnership; GREENWAY, GAY & TULLOCH, a Washington legal partnership; and DANIEL W. DORAN and CAROL DORAN, husband and wife, and the marital community composed thereof, Respondents.	No. 45250-2-II Consolidated with: No. 45590-1-II PART PUBLISHED OPINION

LEE, J. — This litigation involves a legal malpractice action arising from a dispute over an amendment to the Evelyn Plant Testamentary Trust ("the Trust"). Carl Gay was hired to draft the Trust and the First Amendment ("Amendment") to the Trust. After Plant's death, beneficiaries of the Trust challenged the validity of the Amendment.

In 2009, Jennifer Linth, in her individual capacity as a beneficiary, brought a legal malpractice suit against Gay. In 2011, Linth formed the Franklin and Evelyn Plant Green Point

Foundation ("the Foundation"). In 2011, the Trust and the Foundation moved to intervene in Linth's suit.

Gay moved for summary judgment against Linth, arguing that he did not owe her a duty as a nonclient beneficiary, and the superior court granted Gay's motion for summary judgment. Gay then moved for summary judgment against the Trust and the Foundation, arguing that the statute of limitations had expired, and the superior court also granted this motion.

In the published part of this opinion, we hold that Gay did not owe Linth a duty as a nonclient beneficiary. In the unpublished portion of this opinion, we hold that the statute of limitations has expired for the Trust's and the Foundation's claims against Gay. Accordingly, we affirm the superior court's order granting Gay's motions for summary judgment and dismissing all claims against Gay.

FACTS

Evelyn Plant owned and lived on property known as Green Point in Port Angeles, Washington. In July 2000, Plant retained Gay to create a living trust. On July 22, 2000, Plant signed the Trust, naming herself trustee.

In relevant part, the Trust provided a gift of $100,000 to Linth. It also provided that if the Green Point property was part of Plant's estate, then it was to be conveyed to Crista Ministries, Inc., subject to the condition that "[f]or a period of five (5) years commencing immediately upon [Plant's] death, [Linth] shall be entitled to an estate in the Green Point residence" and "[u]pon expiration of the five-year estate, [Linth] shall be entitled to a life estate in the northeast corner of the approximately sixty (60) acres." Clerk's Papers (CP) at 606-07.

In August 2000, Plant resigned as trustee and appointed Daniel W. Doran[1] as successor trustee. Gay remained counsel to Doran in his role as trustee.

Also in August 2000, Plant sought to amend the Trust. Gay drafted the Amendment.

On August 22, 2000, Doran took a draft of the Amendment from Gay's office and presented the draft to Plant, who signed it. The Amendment provided that if the Green Point property was part of Plant's estate, then it was to be conveyed, along with $50,000,

> to a nonprofit corporation and tax-exempt private foundation to be created by trustee in accordance with the terms set forth on the document entitled "THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION PLAN" [. . .] a copy of which is attached hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full. The gift of cash and the Green Point residence to the Foundation shall be subject to the following:
>
> . . . [Linth] shall be entitled to occupy [Plant's] residence at Green Point, free of any costs, subject to the Foundation plan.

CP at 631-32. However, the referenced Foundation plan did not exist at the time Gay drafted the Amendment and exhibit 1 was not attached. The Amendment also removed Crista Ministries as a beneficiary.

Doran hired Linth's sister, Claudia Smith, to help create the Foundation in accordance with the Amendment and Plant's wishes. But before the Foundation was created, Plant died on January 1, 2001. In March 2001, Smith presented a Foundation plan to Doran and Gay. Doran and Gay did not believe that Smith's Foundation plan conformed to Plant's wishes, and Doran did not adopt Smith's plan.

Crista Ministries, a beneficiary under Plant's original Trust but not under the Amendment to the Trust, disputed the validity of the Amendment. Linth, who was entitled to a life estate to

[1] Doran is deceased and his estate is not involved in this appeal.

the entire Green Point property under the Amendment, as opposed to a life estate in only a portion of the Green Point property under the original Trust, sought to enforce the Amendment.

In 2001, Linth filed a Trust and Estate Dispute Resolution Act (TEDRA)[2] action for a declaration of rights under the Trust.[3] In 2003, Linth and Gay agreed to toll the statute of limitations for Linth's potential claims against Gay. In 2004, attorney S. Brooke Taylor began representing the trustee.

In 2005, Linth signed a Nonjudicial Dispute Resolution Agreement (NDRA) to resolve the TEDRA action.[4] As part of the NDRA, Doran resigned as trustee and personal representative.

In 2009, Linth, in her individual capacity as a beneficiary, filed a legal malpractice against Gay. Gay moved for summary judgment against Linth, arguing that he did not owe a duty to Linth because she was not his client. The superior court found that Gay did not have a duty to Linth as a nonclient beneficiary and granted Gay's motion. Linth appeals the superior court's order of summary judgment in favor of Gay.

ANALYSIS

Linth argues that the superior court erred by granting Gay's motion for summary judgment because genuine issues of material fact exist about whether Gay owed her a duty as primary beneficiary of the Trust. We disagree.

---

[2] TEDRA provides that the superior court has jurisdiction over the administration of estates, and that it may administer and settle all matters relating to trusts. RCW 11.96A.010, .040(1), (3).

[3] Linth's 2001 petition is not at issue here.

[4] Linth has since moved to vacate the order approving the NDRA, which the superior court denied. In 2010, Linth filed a separate appeal in this court, which is currently pending after being stayed until 2014. No. 41285-3-II.

A. LEGAL STANDARD

We review a superior court's order granting summary judgment de novo. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 698-99, 324 P.3d 743, *review denied*, 181 Wn.2d 1008 (2014). Further, we engage in the same inquiry as the superior court and our review is limited to the precise record before the superior court. RAP 9.12; *Vernon v. Aacres Allvest, LLC*, 183 Wn. App. 422, 436, 333 P.3d 534 (2014). We resolve all factual disputes and reasonable inferences in favor of the nonmoving party. *Clark County Fire*, 180 Wn. App. at 698. "[I]ssues of law are not resolved in either party's favor, but are reviewed de novo." *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 208, 875 P.2d 1213 (1994). "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Clark County Fire*, 180 Wn. App. at 698.

"[A] defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case" and (2) the plaintiff fails to demonstrate a genuine issue of fact on an element essential to the plaintiff's case. *Clark County*, 180 Wn. App. at 699. "The nonmoving party may not rely on mere allegations, denials, opinions, or conclusory statements" to show a genuine issue of fact on an essential element. *Parks v. Fink*, 173 Wn. App. 366, 374, 293 P.3d 1275, *review denied*, 177 Wn.2d 1025 (2013). If the nonmoving party fails to demonstrate the existence of an essential element, then the court should grant summary judgment. *Washington Fed. Sav. & Loan Ass'n v. McNaughton*, 181 Wn. App. 281, 297, 325 P.3d 383, *review denied*, 181 Wn.2d 1011 (2014). We may affirm on any grounds established by the pleadings and supported by the record. *Lane v. Skamania County*, 164 Wn. App. 490, 497, 265 P.3d 156 (2011).

A legal malpractice claim requires:

> "(1) [t]he existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred."

Parks, 173 Wn. App. at 376 (quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992)).

B. LINTH'S LEGAL MALPRACTICE CLAIM AGAINST GAY

Linth contends that Gay owed her a duty as beneficiary of the Trust. Specifically, Linth claims that Gay owed her a duty during two distinct periods. First, Linth claims that Gay owed her a duty before Plant's death, when he negligently prepared and executed Plant's estate planning documents, including the Trust and the Amendment to the Trust. Second, Linth claims that Gay owed her a duty after Plant's death, when he negligently represented Doran as personal representative and trustee. We disagree.

A threshold question in negligence claims is whether, as a matter of law, the defendant owed the plaintiff a duty of care. *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83, 328 P.3d 962 (2014). Generally, only an attorney's client may bring an attorney malpractice claim. *Parks*, 173 Wn. App. at 377. However, in limited circumstances, an attorney may owe a nonclient a duty. *Id.* Whether an attorney owes a nonclient beneficiary a duty is a question of law. *Id.*

1. Negligence Before Plant's Death: Preparation of Estate Planning Documents

Linth claims that Gay negligently failed to competently draft Plant's estate and trust plans by failing to include the missing attachment to the Amendment to the Trust before Plant died. The question here is whether Gay, as Plant's estate attorney, owed Linth, as a beneficiary, a duty to

properly execute the Trust documents, including a duty to ensure that the Amendment was complete.

Division One of our court addressed an issue similar to the one here and held that an attorney does not owe a duty of care to the prospective beneficiary of a client's estate to promptly execute a will. *Id.* at 368. In *Parks*, the testator, without witnesses or a notary, signed a draft of a second will, which designated the plaintiff as a beneficiary. *Id.* at 369. The attorney did not promptly obtain two witnesses for the testator's signature as required by statute for a valid will. *Id.* at 370. When the attorney finally attempted to have the testator properly execute the second will, the testator was physically unable to do so. *Id.* at 369-70. In the probate proceedings, the plaintiff submitted declarations stating that the testator wanted the plaintiff to be the primary beneficiary of his estate. *Id.* at 371-73. Ultimately, the original will, with no provisions for the plaintiff, was administered over the plaintiff's objections. *Id.* at 373. The plaintiff brought a legal malpractice action against the attorney who prepared the will, arguing that the attorney owed him a duty to promptly execute the second will that named him beneficiary. *Id.* at 367-68. The plaintiff argued that he was deprived of his entitlement to the testator's property because of the attorney's failure to properly execute the testator's will. *Id.* at 373. The *Parks* court held that to impose a duty to prospective beneficiaries to promptly execute a will "would severely compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden on the attorney-client relationship." *Id.* at 368. As the *Parks* court held:

> "Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen."

Id. at 387-88 (quoting *Krawczyk v. Stingle*, 208 Conn. 239, 246-47, 543 A.2d 733 (1988)).

Linth argues that *Parks* does not apply here because *Parks* was concerned about compromising the attorney's loyalty to the client. Linth claims that there was no need for Gay to be concerned about encouraging or influencing Plant because "by *every* account, she was deeply loved by [Plant] for many different reasons." Br. of Appellant (Linth) at 24. However,

> "[w]hereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient time to consider and understand his or her estate planning options."

Parks, 173 Wn. App. at 388 (quoting *Sisson v. Jankowski*, 148 N.H. 503, 509, 809 A.2d 1265 (2002)). Linth fails to explain, or offer authority for, her assertion that *Parks* does not apply because Plant wanted to provide for her.

The circumstances here closely parallel those in *Parks*.[5] Here, as in *Parks*, the Trust documents were not properly executed before Plant's death. Further, like *Parks*, there is evidence that Plant wanted to provide a life estate for Linth. Because *Parks* controls, we hold that Gay did not owe a duty to Linth, a nonclient beneficiary.[6]

---

[5] Linth asserts that *Parks* is inapplicable because it dealt with a prospective beneficiary and she is an actual beneficiary. She provides no authority to support her assertion that the distinction is consequential. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Therefore, we do not consider this argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[6] Linth also asserts, without authority, that the cases cited by Gay discuss the "duty in the context of estate planning generally" but "do not apply to this estate planning setting, which involves the establishment first of an inter vivos irrevocable trust with testamentary provisions" and "where an amendment—whether effective or not—increased the gift to the beneficiary." Br. of Appellant

Linth relies on *In re the Matter of the Guardianship of Karan*, 110 Wn. App. 76, 38 P.3d 396 (2002), to support her claim that Gay owed her a duty despite the absence of an attorney-client relationship. However, *Karan* is factually and legally distinguishable from the present case.

In *Karan*, a three-year-old child's mother hired an attorney to establish a guardianship for her child's estate, which consisted of the child's father's life insurance proceeds. *Id.* at 79. The mother eventually depleted the estate. *Id.* The guardian of the child brought a legal malpractice claim against the mother's attorney, claiming that he failed to comply with the guardianship statute requirements. *Id.* at 79-80. The superior court granted the attorney-defendant's motion for summary judgment, finding that the defendant did not owe a duty of care to the nonclient beneficiary of the guardianship. *Id.* at 80.

Division Three of this court reversed, finding that under the unique circumstances of guardianship, the attorney owed a duty to the child. *Id.* at 79. The court in *Karan* held that while the court is concerned that imposing a duty to nonclient beneficiaries could "create an impossible ethical conflict for lawyers" because beneficiaries and the personal representative of an estate are often in an adversarial relationship, those concerns were inapplicable in the context of a guardianship. *Id.* at 86. The court held that "[t]he obligation to protect the interests of wards in a circumstance such as this does not put lawyers in an ethical bind." *Id.* The *Karan* court noted that the circumstances before it—"a legally incompetent infant ward" in a nonadversarial relationship—were factually distinguishable from the situation involving two competent adults. *Id.* at 84.

(Linth) at 18. Because her assertions are not supported by authority, we do not address them. RAP 10.3(a)(6); *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

The policy concerns present in *Karan* are not present here because Linth and Plant were competent adults. *Id.* at 84. Accordingly, *Karan*'s rationale is inapplicable.

2. Negligence After Plant's Death: Representation of the Personal Representative and Trustee

Linth claims that Gay negligently represented Doran, as the personal representative and trustee, after Plant's death.[7] Linth apparently claims that Gay's duty to Doran included a duty to her as a nonclient beneficiary. We hold that Gay's duty to Doran, as personal representative and trustee, did not include a duty to Linth, a nonclient beneficiary.

In *Trask v. Butler*, the court held that "a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries." 123 Wn.2d 835, 845, 872 P.2d 1080 (1994). The plaintiff in *Trask* was the successor personal representative and a beneficiary of his parents' estate. *Id.* at 839. The plaintiff brought a legal malpractice claim, on his own behalf as a beneficiary, against the former personal representative's attorney, alleging that the attorney negligently advised the former personal representative. The *Trask* court noted:

> In *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987), we acknowledged the right of an estate beneficiary to bring a cause of action against an attorney under the multi-factor balancing test . . . . In finding a duty to beneficiaries under the multi-factor balancing test, we recognized "if the beneficiaries could not recover for the attorney's alleged negligence, no one could." *Stangland*, at 681, 747 P.2d 454. This rationale is inapplicable to the facts in this case since estate beneficiaries have two preexisting legal procedures to protect their interest in the estate. Foremost, the personal representative owes the beneficiaries of an estate a fiduciary duty to act in the estate's best interest. If the personal representative's conduct falls below this standard, the estate beneficiaries may bring a cause of action against the personal representative for breach of fiduciary duty. By directing estate beneficiaries to file suit against the personal representative for breach of fiduciary duty, we properly place the emphasis of estate decisionmaking upon the correct individual—the personal representative.

[7] Linth's discussion of this claim contains no citation to authority or to the record.

Id. at 843 (internal citations omitted).

Here, Linth has alternative methods to address her claims—methods that she has utilized. She can, and has, brought a complaint against the trustee and personal representative of the estate. Accordingly, the concerns expressed in *Stangland* and noted in *Trask* do not apply in this case.

In the absence of any authority that Gay owed her a duty or that *Trask* does not control this issue, Linth has not met her burden to establish that Gay owed her a duty as a nonclient beneficiary. Thus, because Linth has not met her burden to establish that Gay owed her a duty as a nonclient beneficiary, summary judgment in favor of Gay was appropriate.

A majority of the panel having determined that only the foregoing portion of the opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

FACTS

In 2011, Jennifer Linth formed the Franklin and Evelyn Plant Green Point Foundation ("the Foundation"). Also in 2011, the Trust and the Foundation moved to intervene in Linth's suit. Gay moved for summary judgment against the Trust and the Foundation, arguing that the statute of limitations had expired. The superior court granted the motion for summary judgment and dismissed the Trust's and the Foundation's claims. We hold that the statute of limitations has expired for the Trust's and the Foundation's claims against Gay. Therefore, we affirm the superior court's order granting summary judgment in favor of Gay.

In July 2008, Linth was appointed trustee of the Trust. On February 2011, Linth formed the Franklin and Evelyn Plant Green Point Foundation ("the Foundation").[8]

[8] Linth was listed as registered agent and as a director.

On October 7, 2011, the Trust and the Foundation moved to intervene in Linth's 2009 legal malpractice claim against Gay. The superior court granted the motion, finding that it could not determine whether the statute of limitations had run or whether Gay owed a duty to the Trust or the Foundation based on the evidence presented.

Gay moved for summary judgment against the Trust and the Foundation, arguing that the statute of limitations expired and that he did not owe either the Trust or the Foundation a duty. The superior court agreed with Gay and granted Gay's motion. The Trust and the Foundation appeal the superior court's order of summary judgment in favor of Gay.[9]

ANALYSIS

A. Legal Standard

We review a superior court's order granting summary judgment de novo and engage in the same inquiry as the superior court. *Clark County Fire Dist. No. 5*, 180 Wn. App. at 698-99. Further, in reviewing a motion for summary judgment, our review is limited to the record before the superior court. RAP 9.12; *Vernon*, 183 Wn. App. at 436. We resolve all factual disputes and reasonable inferences in favor of the nonmoving party. *Clark County Fire*, 180 Wn. App. at 698. "[I]ssues of law are not resolved in either party's favor, but are reviewed de novo." *Rice*, 124 Wn.2d at 208. "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Clark County Fire*, 180 Wn. App. at 698.

[9] This court consolidated the Foundation's appeal, cause no. 45590-1-II, with Linth's appeal, under cause no. 45250-2-II.

"[A] defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case" and (2) the plaintiff fails demonstrate a genuine issue of fact on an element essential to the plaintiff's case. *Id.* at 699. "The nonmoving party may not rely on mere allegations, denials, opinions, or conclusory statements" to show a genuine issue of fact on an essential element. *Parks*, 173 Wn. App. at 374. If the nonmoving party fails to demonstrate the existence of an essential element, then the court should grant summary judgment. *Washington Fed.*, 181 Wn. App. at 297. We may affirm on any grounds established by the pleadings and supported by the record. *Lane*, 164 Wn. App. at 497.

A legal malpractice claim requires:

> "(1) [t]he existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred."

Parks, 173 Wn. App. at 376 (quoting *Hizey*, 119 Wn.2d at 260-61).

B. THE TRUST AND THE FOUNDATION V. GAY

The Trust and the Foundation contend that the superior court erred by granting Gay's motion for summary judgment because genuine issues of material fact exist about whether the statute of limitations has expired.[10]

---

[10] To the extent that the Trust and the Foundation argue that the superior court improperly considered Gay's reply declaration, we do not address this argument because the Trust and the Foundation fail to offer any citation to authority as required by RAP 10.3(a)(6). *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

Furthermore, the Trust and the Foundation argue that Gay's reply declaration contained legal arguments, new facts, and hearsay. However, the Trust's and the Foundation's claims are belied by the record. There is no evidence that the superior court considered improper legal arguments or that the declaration introduced new facts. Moreover, the statements that the Trust and the Foundation recite as "glaring" examples of hearsay are not out of court statements and thus

1 *Columbia Gorge Audubon Society v. Klickitat County*

In the Trust and the Foundation's motion for reconsideration before the superior court, they argued that under *Columbia Gorge*, once their motion for intervention was granted, the statute of limitations no longer applied. *Columbia Gorge Audubon Soc'y v. Klickitat County*, 98 Wn. App. 618, 989 P.2d 1260 (1999). We disagree.[11]

The Trust and the Foundation mischaracterize *Columbia Gorge*. In *Columbia Gorge*, the appellants, the Confederated Tribes and Bands of the Yakama Indian Nation, filed a timely petition for review of a Klickitat County Board of Adjustment decision. *Columbia Gorge*, 98 Wn. App. at 621. Klickitat County moved to dismiss because the Yakama Nation failed to join indispensable parties. *Id.*. The Yakama Nation voluntarily dismissed its petition. *Id.* The Columbia Gorge Audubon Society also filed a timely petition for review of a Klickitat County Board of Adjustment decision. *Id.* Approximately one month after the allowable period to petition for review, the Yakama Nation filed a motion to intervene in the Audubon Society's action. *Id.* at 622. Klickitat County objected, arguing that the Yakama Nation's motion was untimely because it failed to perfect its own timely appeal. *Id.* The superior court denied the motion, finding that the Yakama Nation's motion for intervention was untimely. Division Three of this court reversed, holding that

---

do not constitute hearsay. Amended Reply Br. of Appellant (Trust and Foundation) at 12; ER 801(c) (hearsay is an out of court statement offered for the truth of the matter asserted).

[11] The Trust and the Foundation did not present their arguments based on *Columbia Gorge* in the summary judgment motion before the superior court. Instead, they raised this argument for the first time in their motion for reconsideration. Generally, a party is not permitted to present new argument based on new authority on a motion for reconsideration. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999). However, it appears that the trial court considered this argument on reconsideration. Therefore, we will address it.

the trial court erred by denying the appellant's motion for intervention, despite its untimeliness, because in part, the "Yakama Nation is not seeking damages. So here, win or lose, the outcome" is the same, regardless of intervention. *Id.* at 628.

Columbia Gorge is factually and procedurally distinguishable. Here, after the statute of limitations had expired for claims to be brought against Gay, the Trust and the Foundation intervened in Linth's action. But, Linth's action was timely only because of Linth and Gay's tolling agreement. Without Linth and Gay's tolling agreement, Linth's action also would have been barred by the statute of limitations. Significantly, the Trust and the Foundation were not included in or party to the tolling agreement. Those not party to the agreement may not later seek intervention as a means to benefit from the terms of the agreement. *See Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992) (holding that a non-party to a contract cannot claim benefits under the contract). Accordingly, *Columbia Gorge* does not apply to the facts of this case.

2. The Trust's Claims

The Trust argues that the superior court improperly granted Gay's motions for summary judgment because genuine issues of material fact exist about whether the statute of limitations has expired. Because the Trust fails to cite to authority to support its claims or demonstrate that any genuine issue of material fact exist, we disagree.[12]

[12] The Trust and the Foundation do not offer argument or authority regarding Gay's duty. For the purposes of this opinion, we assume without deciding that Gay owed it a duty.

a. Statute of limitations claim

The statute of limitations for attorney malpractice action is three years. RCW 4.16.080(3); *Hipple v. McFadden*, 161 Wn. App. 550, 557, 255 P.3d 730, *review denied*, 172 Wn.2d 1009 (2011). Whether the statute of limitations has expired is a legal question, but the underlying circumstances that give rise to the action are questions of fact. *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). The statute of limitations on an action begins to run when the cause of action accrues, measured by when the plaintiff has a right to seek relief. *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001). "[W]hen reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465, *review denied*, 155 Wn.2d 1012 (2005).

Washington courts apply the "discovery rule," which provides that the statute of limitations begins to run when the client discovers, or exercising due diligence, should have discovered, the facts that give rise to the cause of action. *Janicki*, 109 Wn. App. at 659. The discovery rule is also applied where the defendant fraudulently conceals material facts from the plaintiff. *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163, *review denied*, 132 Wn.2d 1008 (1997). Under the discovery rule, "[t]he plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period." *Clare*, 129 Wn. App. at 603.

However, the date the plaintiff discovers facts giving rise to a malpractice claim is not dispositive. The "continuous representation" rule tolls the statute of limitations "during the lawyer's representation of the client in the *same matter* from which the malpractice claim arose."

Janicki, 109 Wn. App. at 663-64; *Hipple*, 161 Wn. App. at 557. Accordingly, even if the plaintiff discovers facts giving rise to a malpractice claim, but the attorney continues to represent the plaintiff, the statute of limitations is tolled. *See Hipple*, 161 Wn. App. at 558. Generally, the determinative event for the continuous representation rule is termination of the representation of the matter giving rise to the malpractice claim. *Id.* at 558-59 ("The inquiry is not whether an attorney-client relationship ended but when the representation of the specific subject matter concluded." Termination can be implied from circumstantial evidence and does not require counsel to formally withdraw. *Id.* at 558. "As there is no bright-line rule for determining when representation ends, particular circumstances most often present an issue of fact." *Id.* at 558.

a. The "discovery rule"

In Gay's motion for summary judgment, he claimed that the statute of limitations had expired because the Trust was aware, or should have been aware, of any facts giving rise to a malpractice claim in 2000 or 2001.[13] The Trust contends that "[t]his action was brought within three years of the disclosure and release of *some of* the documents provided to Ms. Linth, but not all, namely those withheld under a dubious claim of attorney-client privilege." Amended Br. of Appellant (Trust and Foundation) at 34, n.14.

On summary judgment, the nonmoving party cannot rely on "mere speculative and argumentative assertions." *Adams v. King County*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008). In asserting the discovery rule, the Trust has the burden to prove that the facts giving rise to its claim

[13] In Gay's motion for summary judgment, he asserted that the statute of limitations began to run on either August 22, 2000, or January 1, 2001, based on his alleged negligent drafting. Alternatively, Gay argued that the statute of limitations began to run in 2004, when attorney S. Brooke Taylor replaced him "as attorney for the trust and for [Doran], the trustee." CP at 351.

"were not and could not have been discovered by due diligence within the applicable limitations period." *Clare*, 129 Wn. App. at 603. The Trust had the burden to come forward with some evidence that Gay concealed information giving rise to the malpractice claim. *See Clare*, 129 Wn. App. at 603; *see also Crisman*, 85 Wn. App. at 20.

Linth's declaration, in her capacity as trustee, states that she was appointed trustee in 2008. Linth, in her capacity as trustee, claims that in 2008, the Trust's attorney shared documents with her, and in those documents, she discovered information related to Gay's alleged malpractice in October 2008.[14] Aside from bald assertions, the Trust did not provide any evidence that Gay wrongfully withheld or concealed documents, or otherwise prevented Linth, as trustee, or the former trustees, from discovering the documents. Moreover, the Trust did not provide any evidence that a trustee could not have discovered the facts giving rise to the cause of action until 2008.

The Trust has provided no authority or support for its claim that the statute of limitations should be tolled under the discovery rule because Linth, as trustee, first saw documents in 2008 when she was appointed trustee. Here, and before the superior court, the Trust has merely stated that it discovered documents in 2008. But, the Trust has not demonstrated how these documents

[14] Gay argued that the statute of limitations began to run when Doran, as trustee, became aware of facts giving rise to a claim—not when Linth, as the second successor trustee to Doran—discovered the facts giving rise to a malpractice claim. The fact that Linth had access to the documents because she was trustee, and that the Trust's attorney had access to the documents, suggests that the former trustees also had access prior to 2008. Logically, if the Trust is correct that the statute of limitations began to run each time a new trustee was appointed, attorneys would be perpetually at risk of new malpractice actions each time a new trustee was appointed, which would defeat the purpose of the statute of limitations.

gave rise to its claim, or that it did not and could not have discovered the information giving rise to its claim prior to 2008.

The Trust asserts that Gay had a conflict of interest when he advised the trustee in matters related to Gay's own legal work.[15] The Trust argues that the statute of limitations was tolled because Gay concealed that conflict.[16] However, the Trust does not argue that Gay concealed his conflicts of interest from the Trust—rather, it argues that Gay concealed his conflicts of interest from the Trust beneficiaries. Furthermore, the Trust does not argue that Gay's concealment from the Trust beneficiaries prevented the Trust from discovering the facts giving rise to the malpractice action. Even assuming that Gay intentionally failed to disclose conflicts of interest to the Trust beneficiaries, the Trust does not argue or demonstrate that it did not and could not discover facts giving rise to its malpractice action until 2008. Accordingly, the Trust's argument that Gay's alleged concealment of conflicts of interest tolled the statute of limitations fails.

The Trust has not met its burden to demonstrate that because of Gay's actions, it did not and could not discover the facts giving rise to its claim within the applicable limitations period.

---

[15] Much of the Trust's supporting documents are dated 2000 and 2001—the Trust does not offer explanation about which documents it first discovered in 2008. Furthermore, the Trust's own supporting documents suggest that it had access to the information that it alleges Gay withheld. It relies on requests for production to Doran, which, in relevant part, states that although Doran objected on the basis of attorney-client privilege, "*respondent's counsel [Gay] previously provided petitioners with the complete legal memorandum by e-mail attachment on October 1, 2001.*" CP at 414 (emphasis added).

[16] To the extent that the Trust argues that the statute of limitations is tolled because Gay prevented Doran from forming the Foundation in light of Gay's realization of a potential malpractice claim, there is no evidence in the record to support the argument to create a genuine issue of material fact.

Accordingly, the discovery rule does not operate to toll the statute of limitations. *Clare*, 129 Wn. App. at 603.

b. Continuous representation

Here, Gay was retained by Plant in 2000. Gay then represented Doran, in Doran's capacity as trustee. At some point in 2002, Taylor was brought in to assist Gay. In 2004, Taylor replaced Gay as counsel for the Trust and trustee.[17] In 2005, Doran resigned from his role as trustee and personal representative. There is no evidence or claim that Gay represented any trustee other than Doran or that he was involved when Doran was not trustee. There also is no evidence in the record that Gay was involved in the Trust affairs after 2004.

Assuming without deciding that Gay represented the Trust and thereby owed it a duty, Gay's representation ended in 2004 when Taylor replaced Gay as counsel for the Trust. Therefore, under the continuous representation rule, the statute of limitations began to run in 2004 and would have expired in 2007. Even if we assume without deciding that Gay represented the Trust until Doran resigned as trustee in 2005, the statute of limitations would have begun to run in 2005 and expired in 2008. *See* RCW 4.16.080(3); *Hipple,* 161 Wn. App. at 557-58. The Trust filed its action in 2011. Accordingly, the Trust's claims are barred by the statute of limitations.

Thus, the Trust, by relying on argumentative assertions, does not meet its burden to survive summary judgment because it provided no evidence or authority demonstrating a genuine issue of material fact. Therefore, we affirm the superior court's order granting summary judgment.

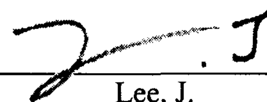
[17] To the extent that the Trust argues that a formal withdrawal from representation is necessary, the claim fails. *Hipple*, 161 Wn. App. at 558 (holding that "de facto termination can be implied from circumstantial evidence").

3. The Foundation's claims

The Foundation argues that Gay owed it a duty and that the statute of limitations was tolled until it was created. We disagree.

The Foundation was created in 2011. Gay was involved in Plant's affairs until 2004. The Foundation has offered no authority to support its claim that that the scope of Gay's duty to his former clients from 2000-2004 extends to a foundation formed in 2011, or that the statute of limitations for a legal malpractice claim should be tolled from the time Gay ended his involvement in 2004 until the Foundation was formed in 2011. Therefore, in the absence of authority, we reject the Foundation's argument that Gay owed the Foundation a duty and that the statute of limitations tolled for the Foundation until it was created in 2011. RAP 10.3(a)(6); *Cowiche Canyon*, 118 Wn.2d at 809.

We affirm the superior court's orders granting summary judgment and dismissing all claims against Gay.



Lee, J.

We concur:

Worswick, P.J.

Maxa, J.