

NO. 62598-5

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

David L. Martin and Charles Cruikshank,
APPELLANTS

VS.

KATHRYN A. ELLIS

RESPONDENT

BRIEF OF APPELLANTS
[AMENDED]

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 There was substantial support in law and fact for the claims made on behalf of

Martin contained in the pleadings, motions and legal memoranda signed by Cruikshank

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The trial court erred in granting R.C.W. 4.84.185 sanctions against Martin and Cruikshank, because:

- The claims in the Complaint were not devoid of all merit and thus not frivolous
- As to Cruikshank, he was the attorney for Martin and R.C.W. 4.84.185 only permits sanctions to be imposed against parties, and not their attorneys
- As to Martin, any claims that he made or were made on his behalf were made in reliance upon the advice of counsel
- There was no evidence of lack of diligence or bad faith on the part of Martin or his attorney in preparation of the allegations in the Complaint
- There was evidence beyond what that necessary for reasonable persons to be convinced that Ms. Ellis had violated her fiduciary duties, as a factual and legal contradiction of 'frivolity'
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ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Respondent Ellis' motions for summary judgment for the following reasons:

a. Plaintiff Martin offered evidence in Response to the summary judgment motions that substantially and materially controverted the evidence proffered in support of the summary judgment motions, and which affirmatively established material issues of fact and breaches of Ms. Ellis' fiduciary duties, a core element of the 2nd Amended Complaint, particularly as to payment of attorney fees in excess of those allowed by the court and failure to administer a Costa Rica property of the Estate abandoned by Ms. Ellis.

b. The trial court erred as a matter of law in denying sanctions sought by Martin against attorney Moore pursuant to CR 56(g) and after which Ms. Moore's declaration in support of Ms. Ellis' summary judgment motion was considered by the court as Ms Moore testified that her summary judgment declaration was based on personal knowledge, although her prior testimony related to the CR 56(g) issues denied any such personal knowledge and granting Martin's CR 56(g) motion would have excluded consideration of Ms. Moore's declaration in support of the summary judgment motions.

c. The trial court erred, as a matter of law, when it denied the motion pursuant to CR 26(g) of Martin for exclusion of undisclosed evidence and

where evidence offered by Ms. Ellis in support of her summary judgment motion included the requested-to-be-excluded evidence.

d. The authenticating declarations proffered by Defendant Ellis and her attorney, Rosemary J. Moore, in support of the motions for summary judgment failed to satisfy the standards set by CR 56(f), ER 601, ER 901 and ER 902 to authenticate the exhibits in support.

e. As to collateral estoppel, there was no evidence offered sufficient to satisfy the requirements for the application of that doctrine as there was no preclusive event.

f. As to judicial estoppel, there was no evidence offered sufficient to satisfy the requirements for the application of that doctrine as there was no clearly inconsistent position taken by Martin and no unfair advantage or unfair detriment imposed upon Ellis by Martin.

2. The trial court erred in imposing CR 11 sanctions against Martin and Cruikshank because:

a. Martin had signed no pleading, motion or legal memorandum required by CR 11 for imposition of sanctions according to the language of the Rule.

b. There was substantial support in both law and fact for all the allegations in the Complaint and other pleadings in the case.

c. There was substantial support in law and fact for the claims made on behalf of Martin contained in the pleadings, motions and legal memoranda signed by Cruikshank.

d. There were no findings of fact and conclusions of law entered with regard to the CR 11 sanctions order that specifically identified the offending behavior of either Martin or Cruikshank.

3. The trial court erred in granting R.C.W. 4.84.185 sanctions against Martin and Cruikshank, because:

a. The claims in the Complaint were not devoid of all merit and thus not frivolous.

b. As to Cruikshank, he was the attorney for Martin and R.C.W. 4.84.185 only permits sanctions to be imposed against parties, and not their attorneys.

c. As to Martin, any claims that he made or were made on his behalf were made in reliance upon the advice of counsel.

i. There was no evidence of lack of diligence or bad faith on the part of Martin or his attorney in preparation of the allegations in the Complaint.

d. There was evidence beyond what that necessary for reasonable persons to be convinced that Ms. Ellis had violated her fiduciary duties, as

a factual and legal contradiction of 'frivolity'.

e. R.C.W. 4.84.185 only permits recovery of attorney fees and costs to parties who have incurred¹ those expenses.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. **BREACH OF FIDUCIARY DUTIES.** Did the successor administrator of the Jack Delguzzi Estate, Respondent Kathryn Ellis, breach her fiduciary duties where:

a. The probate court specifically reserved to her administration the rights and duties to assert any claims against attorneys Short Cressman & Burgess, who represented former administrator William Wilbert, after those attorneys have been granted fee awards totaling only \$604,040 and where they provided evidence of receipt of fees from the prior administration of \$723,989 as of January 21, 1997 and where Mr. Wilbert provided evidence of payments to them after that date of an additional \$257,757.28 and where Administrator Ellis paid them \$199,478.00 more after January 7, 2005, so that they received a total of \$1,181,224.28, or \$577,184.28 more than ordered and allowed?

b. Ms. Ellis paid the SCB law firm \$199,478 without evidence that satisfied the standards of R.P.C. 1.5, R.P.C. 5.4, R.C.W. 11.68.100 and the

¹ "Find or makes oneself subject to (danger, displeasure, etc.); bring on oneself (expense, obligation, etc.). . . } to be administered as an asset of the Jack Delguzzi estate" New Shorter Oxford English Dictionary, Ed. Lesley Brown, Clarendon Press, Oxford, 1993.

applicable case law², which lack of evidence can be determined by review of the court file.

c. Where Administrator Ellis failed to investigate, marshal, and either administer or distribute property of the estate known as Finca Delguzzi, a Costa Rica farm, which the probate court specifically ordered to be administered as an asset of the Jack Delguzzi Estate on September 14, 1999 and where Administrator Ellis moved to close the estate after having been advised by prior Administrator Wilbert's attorney of the September 14, 1999 Order restoring ownership of the finca to the Jack Delguzzi Estate and where Ellis has, under oath, denied the existence of that Order and knowledge of Finca Delguzzi, do such acts and failures to act constitute breaches of Ellis' fiduciary duties.

2.SUMMARY JUDGMENT. Did the trial court err, as a matter of law, when it granted Respondent Ellis' motions for summary judgment based upon the doctrines of collateral estoppel and judicial estoppel because:

a. Plaintiff Martin offered evidence responsive to the defense summary judgment motions that substantially and materially controverted the evidence in proffered in support of the summary judgment motions, and

²Mahler v. Suczs, 135 Wn.2d 398, 957 P.2d 632(1998); Absher Construction v. Kent School Distr., 79 Wn. App. 841, 917 P.2d 1086(1995); Scott Fetzer Co. v. Weeks, 122 Wash.2d 141, 149, 859 P.2d 1210 (1993).

which established material issues of fact and which affirmatively established prima facie breaches of Ellis' fiduciary duties, which is a core element of the operative pleadings;

b. The authenticating declarations proffered by Respondent Ellis and her attorney, Rosemary J. Moore, in support of the motions for summary judgment failed to satisfy the standards set by CR 56(f), ER 601, ER 901 and ER 902 to authenticate the exhibits offered in support;

c. The trial court abused its discretion in denial of Plaintiff Martin's CR 26(g) Motion for Sanctions (exclusion of evidence) where Defendant Ellis answered 15 interrogatories with 23 different objections, with the answers having multiple objections, and where she did not move for a protective order or convene a discovery conference and where the discovery sought evidence that withheld by Ellis and which was then offered in support of Ellis' summary judgment motions;

d. There was no evidence that was offered to the trial court in support of the allegations of collateral estoppel sufficient to satisfy the requirements for the application of that doctrine;

e. There was no evidence that was offered to the trial court in support of the allegations of judicial estoppel sufficient to satisfy the requirements for the application of that doctrine.

3. The trial court abused its discretion in denying sanctions sought by Martin against counsel for Respondent Ellis, pursuant to CR 56(g) for Ms.

Moore's declaration offered in support of Ellis' motion for summary judgment where she claimed her declaration was based on her personal knowledge, where her immediately prior testimony denied any such personal knowledge and where her directly contradictory positions were sufficient to create disputed and unsupported factual disputes as to the material issues in the Ellis summary judgment motions.

4. CR 11 SANCTIONS. The trial court erred in granting CR 11 sanctions against Martin and his attorney, Cruikshank because:

a. Martin had signed no pleading, motion or legal memorandum required by CR 11 for imposition of sanctions according to the language of the Rule.

b. There was substantial support in both law and fact for all the allegations in the Complaint and other pleadings in the case.

c. There was substantial support in law and fact for the claims made on behalf of Martin contained in the pleadings, motions and legal memoranda signed by Cruikshank.

d. There were no findings of fact and conclusions of law entered with regard to the CR 11 sanctions order that specifically identified the offending behavior of either Martin or Cruikshank.

e. The materials offered by Martin in opposition to the summary judgment motions of Ellis provided prima facie legal and factual support for allegations in the operative pleadings that were more than sufficient to

defeat any finding of a violation of CR 11.

5. R.C.W. 4.84.185 SANCTIONS. The trial court erred in granting R.C.W. 4.84.185 sanctions (for frivolity) against Martin and his attorney, Cruikshank, because:

a. The claims in the Complaint were not devoid of all merit.

b. As to Cruikshank, he was the attorney for Martin and R.C.W. 4.84.185 only permits sanctions to be imposed against parties, and not their attorneys.

c. As to Martin, any claims that he made or were made on his behalf were made in reliance upon the advice of counsel.

d. There was no evidence of lack of diligence or bad faith on the part of Martin or attorney Cruikshank in the allegations in the operative pleadings.

e. There was evidence offered by the Plaintiff beyond what that which was sufficient for reasonable persons to be convinced that Ellis had violated her fiduciary duties, establishing as factual and legal impossibilities any findings of 'frivolity'.

f. R.C.W. 4.84.185 only permits recovery of attorney fees and costs to parties who have incurred³ those expenses.

³ 'Find or makes oneself subject to (danger, displeasure, etc.); bring on oneself (expense, obligation, etc.), New Shorter Oxford English Dictionary, Ed. Lesley Brown, Clarendon Press, Oxford, 1993.

STATEMENT OF THE CASE

Division 2 of the Washington Court of Appeals⁴ summarized the early history of the Jack Delguzzi Estate on August 31, 2001 as follows:

Jack DelGuzzi died in 1978, leaving his son and sole heir, Gary DelGuzzi (DelGuzzi) as personal representative of his estate. DelGuzzi served as representative until August 13, 1982, when he resigned in favor of the current Administrator, William Wilbert. Under Wilbert's administration, DelGuzzi has received no distributions from the multi-million dollar estate. Wilbert, however, has billed the estate for 125% of its net value; of this billed amount, he has been paid fees and costs totaling about 90% of the net estate. Moreover, the estate's net assets have diminished from \$7.36 million in 1989 to less than the \$1.6 million Wilbert billed in 1997. Although the estate was ready to be closed at least by 1997, it still remains open.

Mr. Wilbert continued as the administrator of the Jack Delguzzi Estate until his death in that office on March 24, 2004. On January 21, 1997, almost 15 years after his appointment, he brought on for hearing his Petition for Final Accounting and for Decree of Distribution before the Honorable Leonard Costello in Clallam County Superior Court.[CP 2573- Ex 37] In that Petition, Mr. Wilbert had filed an accounting claiming that the Estate was, and had been since its inception, insolvent. [CP 2573- Ex 2-3] It was this Petition and the evidence offered in support that formed the foundation for the facts in the Unpublished Opinion.[CP 4425- Ex 14]

⁴From the Unpublished Opinion of Division II, Washington Court of Appeals, Aug. 31, 2001, Gary Delguzzi v. William E. Wilbert, Administrator, No. 24860-3-II.(CP 4425-Ex 14)

No Decree of Distribution has been entered during any period of the Estate's administration nor was Mr. Wilbert's bond exonerated. He was only released from his duties by his death on March 24, 2004.

The 1997 Wilbert Petition for Final Accounting and Decree of Distribution only accounted for a limited portion of the period of Wilbert's very extended administration, between October 13, 1982 through September 30, 1996. No accountings were offered by Mr. Wilbert subsequent to the 1997 hearings and before the date of his death, leaving a period of just over eight years with **incomplete** purported disbursements and no accounting. Also, **no** purported disbursements or accounting records have been produced for the period of time between October 1, 1997 and November 1, 1997. [Sub# 112-Ex 33, ZDH⁵ 0251]

Mr. Wilbert's first attorneys as administrator were Short Cressman and Burgess ("SCB") and they were replaced by Chicoine & Hallett in 1991. [CP 2573-Ex 1, 4, 5 & 7]

During a brief period in 2004, after Mr. Wilbert's death, a temporary administrator, David L. Martin, CPA, the current Appellant, was appointed as administrator of the Jack Delguzzi Estate and he recovered what appears to be only a small portion of the Estate's files from a storage unit in North Bend, Washington.[CP 2573-Ex 14] The electronic/digital files

⁵ ZDH is the Bates # prefix for documents from the Zeno, Drake & Hively law firm.

and the remainder of the paper files and records of the Estate are being held by the former attorneys for Mr. Wilbert under claims of attorney-client privilege and/or the attorney work product confidentiality. [CP 2573-Ex 22]

On January 7, 2005, Kathryn A. Ellis was appointed by the Court as administrator of the Jack Delguzzi Estate, having been nominated by members of the two Wilbert law firms, Cori Flanders-Palmer of Chicoine & Hallett⁶ and Michael Zeno, of Zeno, Drake & Hively, who undertook representation of the Wilbert interests in January of 2005. Zeno and Flanders-Palmer proposed different orders to appoint Ms. Ellis, both of which Judge Costello signed [CP 2573-Ex 11-12] over Martin's objections, not only because of the obvious conflicts, but also the due to exculpatory language in the orders. [CP 2573-Ex 9]

Nor did Ms. Ellis seek entry of a Decree of Distribution, attempting instead to close out her period of administration with a "Final Supplemental" [CP 2573-Ex 59] which Appellant Martin alleged failed to comply with R.C.W. 11.28.240, 11.68.100 and 11.76.020, 030, and 040. [CP2573-Ex 61]

Ms. Ellis' "Final Supplemental" only addressed an escrow account and

⁶ The Chicoine & Hallett attorneys continued to act as Mr. Wilbert's lawyers until January of 2005, when they nominated Ms. Ellis through the actions of Ms. Flanders-Palmer.

what she described as 19 real estate parcels⁷ on a list attached to the June 30, 2004 Declaration of Mr. Wilbert's bookkeeper, Leslie Stanton. [CP 4425, Attachment 10 to Exh. A] On February 14, 2006, in response to an earlier oral ruling by the probate court, Martin's attorney gave notice of assignment dated February 14, 2006 that the claims of the Estate of Jack Delguzzi against William Wilbert and others belonged now to the Estate of Gary Delguzzi. [CP2573-Ex 55] On August 4, 2006, any claims that the Estate of Jack Delguzzi could make against Wilbert's attorneys, SCB, were specifically reserved back to Ellis for her to administer by an "Order Correcting Order" which excepted from the Estate's assignment to Gary Delguzzi's estate, the claims against the law firm.[CP 2573-Ex 55]

Ms. Ellis never retained an attorney to represent her as administrator. [CP 2573-Ex 46]

Ellis resisted filing an annual report and Inventory and Appraisalment under oath as required by RCW 11.76.010, 11.44.015, 11.44.025. [CP 2573-Ex 48; ELL5251;Ex 56; ELL5049]⁸ She repeatedly and persistently claimed that her files as administrator were entitled to work product and attorney-client privilege protection and refused to produce them, as though the fact that she had no attorney, but was one, created privilege and confidentiality. [CP 2573-Ex 45, ELL5242; Ex 47, ELL5151] Delguzzi's

⁷ The list actually identifies 21 parcels, including one dual listing at "WILB3005 053005 300250 1000/2001".

⁸ "ELL" is the prefix for the Ellis discovery documents.

attorney was forced to move to require her to produce files which had not been produced for over a year after her appointment and which she resisted. [CP 2573-Ex 48, ELL5235-37]

Ms. Ellis did not prepare her own Inventory and Appraisal, even after learning of the claims against prior administrator Wilbert, but simply accepted Wilbert's attorney's list of properties as the only remaining Estate assets. The bookkeeper's declaration did not mention the property list and Ellis even admitted that the property list had been produced to her by counsel for William Wilbert's Estate. [CP 2573-Ex 56; ELL5047, ll.17-22]

In the course of her administration she sold assets of the estate for \$430,426.67 [CP 2573-Ex 59; ELL5361].

Ms. Stanton reported receipts to the Estate after Wilbert's accounting of \$771,299.96 [CP 2573-Ex 61, Attach. 1 to Ex 1, Bates ELL5400] and that \$1,046,365 was disbursed, but there was no other explanation or accounting. Ms. Ellis also presented these purported disbursements prepared by Ms. Stanton to the court for the period of June 24, 1998 to May 31, 2004, after Wilbert's 'final' accounting in 1997 as part of Ellis' "Final Supplemental, but offered no explanation of the benefit to the Estate of the expenditures. [CP 2573-Ex 41, 53 & 59]

Gary Delguzzi, who had preceded Mr. Wilbert in death by about a month in February of 2004, had died in poverty and on public assistance. The claims against Mr. Wilbert and his estate that Gary's estate had

acquired by probate court order in 2006⁹ were assigned by the personal representative of Gary's estate to Appellant Martin in 2007.[CP 2573-Ex 53 & 55]

The operative 2nd Amended Complaint [CP 2188, Ex S] in this case identifies properties and assets of the Estate of Jack Delguzzi and Gary Delguzzi's separate property that were administered by Mr. Wilbert. The 2nd Amended Complaint alleges, *inter alia*, that Mr. Wilbert either failed to show the disposition of the assets, or that they were not inventoried by him, or that they were separate property of Gary Delguzzi and were never distributed to him or that properties were transferred to Mr. Wilbert or his alter ego corporations and entities at less than full value and without proper accounting and that administrative and expense claims of Mr. Wilbert and his attorneys were improper because of their contradictory, incomplete, misleading, and summarized nature without credible evidence of the claimed assets and expenditures. Martin provided additional evidence to support these claims in his constructive trust motion of December 14, 2005. [CP 2573-Ex 37, ELL4753-4776].

As to Ms. Ellis, the 2nd Amended Complaint alleges that she breached her fiduciary duties as administrator by not marshaling and managing the

⁹A noteworthy exception was the claims of the Estate of Jack Delguzzi against the SCB law firm. The probate court excepted those from the assignment to David Martin by its "Order Correcting Order" based on SCB's motion heard August 4, 2006. [CP 2573-Ex 55, also found at Sub#112, Ex 17]

assets and issues that her predecessor, William Wilbert, had failed to properly administer.

Ms. Ellis limited her activities as administrator to sale of the 19 [sic] properties and making payments to the Wilbert estate, to SCB and to the accountants, Benson & McLaughlin. The accountants' claim was the only administrative creditors's claim that was reduced to judgment in the 1997 hearings on Wilbert's Petition for Final Accounting.[CP2573, Ex 5,7]

Ms. Ellis moved to close the Estate without reporting to the court the allegedly missing, undervalued or converted assets and incomplete accountings that she had been advised of by Gary Delguzzi's representatives and that were addressed in the 2nd Amended Complaint and other documents produced to her.[CP 2573-Ex 67; CP 1108, Ex H, O, P, Q(p.1), U(p.2), V(pp 6, 13]

Martin identified many of these problems and issues specifically and moved for a constructive trust to hold the proceeds of the assets sales until the court could determine the proper entitlement to the funds. This motion was denied. [CP 2563-Ex 37, ELL 4753-4776]

Ms. Ellis also did not advise the probate court of the improper fee claims and the secret reallocation of fees between Mr. Wilbert and his former attorneys in contravention of the court order allowing administrative fees. [CP 4425, Exh. 27-32; ZDH 0067-0088]

Ellis' "Final Supplemental" also did not mention or explain 8 of the 21

properties, which she counted as 19, that she attempted to abandon without court notice or approval. These were addressed in Martin's Objections to her Final Supplemental [CP 2573-Ex 61-62] and so she added language to the proposed order which Judge Costello signed [CP 2573-Ex 64] granting her the right to dispose of them as she, in her sole discretion, saw fit despite the fact that the list supplied by Martin showed that 7 of the 8 parcels were partially or totally owned by Wilbert interests despite Ellis' claim of being Estate properties. [CP 2573-Ex 62, Ex U, p. 2]

Attorney Fees of Wilbert's Law Firm, SCB

The Short Cressman & Burgess law firm ("SCB") represented Mr. Wilbert from the date of his appointment until November of 1991. Two fee orders were entered awarding fees and costs to SCB during the Estate's administration, the first on December 30, 1985, which allowed them payment of \$200,000 conditioned upon their filing proof of services and expenses of at least that amount with the court¹⁰. On January 20, 1997, Paul R. Cressman, Sr., the senior partner of SCB, filed an affidavit to support the law firm's claim for fees for its representation of Mr. Wilbert as administrator. [CP 2573-Ex 4] Exhibit B to that Affidavit proved receipt by the law firm as of that date of \$723,989. As a result of the hearing that

¹⁰While not critical to this appeal, the invoices filed with the probate court by SCB had all of the financial data redacted from them. The invoices included only the tasks performed, the initials of the timekeeper and the time. There are no hourly rates, extensions, balances or credits in the SCB invoices for their work from 1982-1985. [CP 2573-Ex 65, p. 24]

began on January 21, 1997, Judge Leonard Costello awarded the firm exactly the amount requested, or \$404,040, on October 10, 1997, [CP 2573-Ex 5] in addition to the \$200,000 award from 1985¹¹ and on June 5, 1998, his Order Regarding Administrative Expense Reimbursement allowed 12% interest on that beginning January 21, 1997. The total amount awarded was thus \$604,040 and as they had admitted collections of \$723,989 in the Cressman affidavit, making interest illusory, as the law firm owed the Estate the amount of \$119,949 as of January 21, 1997. Having withdrawn from Wilbert's representation in 1991, There were no later fees or interest.

On April 6, 2007, in another litigation claim involving some of the same parties, James A. Oliver, a partner at SCB, filed a declaration regarding many of the matters raised by the Plaintiff in response to the motions for summary judgment of the Respondent. Mr. Oliver gave a general background of the firm's activities at ¶¶ 2, 3 and 4 on page 2[CP 1108, Ex V]. He also detailed the same two fee Awards in favor of SCB during the course of their representation of Mr. Wilbert at ¶6, for the \$200,000 authorized, and then again at ¶13 where he agrees with the \$404,040 amount [CP 4425, Ex 21, p. 2] which was the other award made to the firm during SCB's representation. He mentions no other fee orders during SCB's representation of Mr. Wilbert and Appellant agrees there

¹¹ Judge Grant Meiner removed some of the restrictions on Mr. Wilbert's nonintervention powers and allowed \$200,000 to be paid to SCB upon documentation being filed to show entitlement to that amount in an ex parte order entered on December 30, 1985. [CP 1108, Ex V]

were none.

On June 11, 1998, Wilbert's later attorney, Larry Johnson calculated that SCB was entitled to fees still unpaid of \$1,077,204 instead of the totals reflected by the 2 court orders. He did not deduct and credit the Estate for the \$723,989 already acknowledged received by Mr. Cressman. [CP 4425-Ex 24-25; CP2573, Ex 25] The total fees Johnson that he claimed SCB was entitled to were \$1,801,193, or almost 3 times the total fee awards listed by SCB partner James Oliver in 2007.

There was a "private agreement" referenced in the lower left corner of Wilbert's "Court Approved Fees Prior to June 1999" [CP 2573-Ex 9] which does not show how the total that bookkeeper Leslie Stanton showed as owed to each SCB and Wilbert in amount of \$941,542.50 was calculated. That is at wide variance with the October 10, 1997 Memorandum Decision allowing the law firm \$404,040 and what Wilbert claimed for himself in his declaration of May 15, 1998 of \$1,644,542 [CP 2573-Ex 6,p.33-34] particularly when compared to the Oliver Declaration and to the Johnson letter of June 11, 1998.

Ms. Ellis claimed that she derived the amounts of payments that she was to make to these attorneys and to Wilbert's estate from the court's orders. [CP1108, Ex K, p. 109 (Testimony 5-14-2008); Ex P(letter 7-2-2005; CP 4425, Exh 27-32)] but then she made distributions based on percentages which do not agree with either those percentages or the equal

distributions shown in by the bookkeeper, so the basis of the percentages that she used for administrative fee payment calculations can only be the percentages that were dictated to her by Mr. Zeno and by Mr. Maron. She did not seem to be aware that Wilbert's accounting in 1997 showed that Wilbert had billed and not been paid exactly \$500,000 for his fees and \$183,891 for un-reimbursed expenses [CP 2573, Tab 4, p. 1, C&H003759]

How these percentages were arrived at cannot be determined, nor can the source for the total of payments to be made of \$2,024,258 from Ms. Stanton's spreadsheet of May 31, 2004.

Mr. Wilbert paid another \$257,757 to SCB after January 21, 1997, when the law firm owed the Estate \$119,949. Ms. Ellis then paid them the additional sum of \$201,821. [CP 2573-Ex 41, 53, 59]

When Ms. Ellis was appointed, the percentages changed from the equal split shown by Ms. Stanton, according to Mr. Maron of SCB.[CP 4425-Exh. 27- 32] and Ms. Ellis began using the percentages dictated by him. This was confirmed by the attorney for the Wilbert interests, Zeno.

Mr. Zeno wrote an email to Ms. Ellis on December 1, 2005, and disclosed that he had learned from Mr. Maron that the proportions that the administrative claimants (his client Wilbert, SCB and the accountants) are allowed are SCB 53.164%, Wilbert, 39.834% and the CPAs, 6.972%. These are the percentages that Ms. Ellis uses in her distributions despite the "private agreement" equalizing the fees and despite the two orders entered

by the probate court awarding SCB a total of \$606,040 where SCB admitted to earlier receipt of \$723,989 before her administration and despite her initial belief that the court orders governed.[CP 4425, Ex 28]

In December of 2005, Mr. Zeno, on behalf of the Wilbert interests, was asked to sign a Covenant Mutually Tolling the Statute of Limitations with SCB, on the other side. [CP 4425-Ex 33, Bates ZDH 0067-69; ZDH 0075-0088, 0123-0136] This agreement addressed claims between Mr. and Ms. Wilbert, on the one hand and SCB, on the other, regarding damages allegedly caused to assets previously owned by the Estate and Gary Delguzzi's trust that the Wilberts then claimed to have acquired. These assets, the damages and the counterclaims have never been identified to the court or the other creditors. [CP 2573-Ex 62, Ex BB thereto]

Wilbert's attorney Johnson writes to SCB and details the terms of the "private agreement" in the box on the first page. [CP 4425-Ex 27] This was produced by Mr. Zeno in response to discovery and shows where the law firm and Mr. Wilbert agreed to share equally in all distributions to either of them from the Estate and also to unreservedly support each other's fee claims. Mr. Wilbert was not an attorney.¹²

Email correspondence between Ellis and Zeno [CP 4425-Ex 30] shows that she was instructed by Mr. Zeno not to make equal distributions as

¹²Rule of Professional Conduct 5.4, Professional Independence of a Lawyer.(a) A lawyer or law firm shall not share legal fees with a nonlawyer. . .

required by the 'private agreement' which seemed to disturb her, as she responded with an expletive in her email. [CP 4425-Ex 33, ZDH0367]

Mr. Maron explains the fee split arrangements between the law firm and the Wilbert interests, but not how it was arrived at. He further claims that the law firm received \$47,444.28 with payments of \$17,831.64 and \$23,722.14, but these payments only total \$41,603.78.[CP 4425-Ex 29]

The 3 demonstrative exhibits and the included email copies illustrate the bias and rancor against Gary Delguzzi's estate and Mr. Martin, and include evidence of the conflicts of interest as well as much of the legal and business advice provided to Ellis by Zeno.[CP 4425-Ex 33, CP 219]

FINCA DELGUZZI

On May 7, 1984, Mr. Wilbert was deposed related to Estate interests and he testified about a farm in Costa Rica where called a "*finca*". He stated that he was a board member of that "Sociedad Anónima¹³" on page 23 of his deposition transcript.[CP 4425, Ex 1] Recovered with the files from the Jack Delguzzi Estate was a copy of a letter written by Mr. Wilbert to a real estate professional by the name of Rick Anderson Beer, which included a description of Finca Delguzzi and his claim that it contained approximately 70 acres. [CP 4425, Ex 2] Mr. Wilbert's former

¹³The Costa Rica name for business corporations. At the time, it was permissible for a Sociedad Anónima (S.A.) to issue bearer stock certificates, which is how Mr. Wilbert claimed to have held the Delguzzi Costa Rica corporate interests.

attorneys, Chicoine & Hallett, released documents to Martin that included a copy of Mr. Wilbert's affidavit dated November 10, 1992, stating that the Costa Rica property called "Finca Delguzzi" was Gary Delguzzi's personal farm. [CP 4425, Ex 1-8] In 1992, Gary had secured independent counsel, an attorney by the name of Jackie Cyphers, after his former attorneys, SCB, who also represented Mr. Wilbert as administrator, had withdrawn. Ms. Cyphers wrote to Mr. Wilbert's daughter, Laure Wilbert, requesting the original stock certificates for Finca on November 4, 1992.[CP 4425, Ex 4] On September 8, Ms. Cyphers wrote a letter to one of the beneficiaries of Gary's will at the College of St. Martins, identifying the *finca* as Gary's and valuing it between \$100,000 and \$150,000, while noting Wilbert's acknowledgment of Gary's ownership. [CP 4425, Ex 5] In 1992, Mr. Wilbert wrote to Ms. Cyphers and told her about Finca and that it was worth approximately \$100,000 after closing costs, which he estimated at 30 percent.[CP 4425, Ex 6]

In Mr. Wilbert's Petition for Final Accounting and Decree of Distribution of December 12, 1996, at pages 23-26 the Supplement thereto, on pages 24 -26, Mr. Wilbert for the first time claimed that the *finca* was an asset of the Estate of Jack Delguzzi. [CP 2573- Ex 7]

On September 14, 1999, 15 months after the June 5, 1998 Order Regarding Administrative Expense Reimbursement was entered, Judge Costello entered a Memorandum Decision affirming the ownership of Finca

Delguzzi as property of the Estate, which defeated Gary's claim of ownership. [CP 4425, Ex 8] Ms. Ellis, in her deposition, denied that there was any such order. [CP 4425, Ex 9] even though she was advised of the farm being an Estate asset, how to investigate and marshal it and other details by the attorney for the estate of William Wilbert, Michael Zeno, whose client was at also at risk for her failure to do so.[CP 4425-Ex 33, ZDH 0352, June 13, 2007] This failure further highlights their conflicts of interest. Had Ellis recovered the finca, Zeno's client would have that issue removed from the damages in the pending lawsuit against Wilbert estate.

The documents provided by Mr. Wilbert's Petition which was signed December 12, 1996, did not account for the *finca* as an asset of the Estate, as it was not until September 14, 1999 that Judge Costello had determined that it was actually an Estate asset and that the farm did not belong to Gary.

Ms. Ellis' "Final Supplemental" included a Balance Sheet for the Estate that included Finca Delguzzi, as well as two other Estate corporations (Sociedad Anónima, or "S.A.") called Colorado Bar and Surfside, S.A. prepared as of May 31, 2004, after Mr. Wilbert's passing and shortly before Ms. Ellis became Administrator. [CP 2573-Ex 59, Attach. 1 to Ex 1, ELL 5372; CP 4425, Exh. 11]

Ms. Ellis was served with Martin's Motion in December of 2005 which sought to create a constructive trust for the funds partially derived from the disposition of Gary Delguzzi's separate assets which she was

seeking to distribute to SCB and Mr. Wilbert's estate. The motion included a report prepared by Mr. Martin that traced the history of Finca Delguzzi and attempted to value it. [CP 2573-Ex 37, Ex 6] Instead of agreeing to a constructive trust in the interests of fairness, Ms. Ellis instead chose to request the attorneys for SCB and Mr. Wilbert to oppose the motion and it was not granted. [CP 4425, Exh. 33]

MALCOLM ISLAND, BRITISH COLUMBIA

When Ms. Ellis was advised that Mr. Wilbert had reported to the court in his Supplement to the 1997 Petition that he had transferred an Estate property located in British Columbia called Malcolm Island to himself as compensation for administrative fees and had valued it at \$13,245 and that he had later sold the property for CDN\$325,000, without reporting the different values to the court, Ms. Ellis did not think that the matter was significant enough to reimburse the \$500 out of pocket investigative and travel expense to obtain certified copies of the real estate records from British Columbia or to advise the court of Mr. Wilbert's actions. [CP 2573-¶21, Ex 21; Ex 62, Ex M]

SURFSIDE PROPERTIES

Ms. Ellis in her Declaration in support of her Motion for Summary Judgment claimed that she was not aware of any information on another Estate asset, Surfside Properties Joint Venture. Copies of deeds for the real estate that was distributed to the Estate shortly after Jack Delguzzi's death

in 1978 and much of which showed up in the names of Wilbert family members was provided specifically to her in the Objections to her Final Supplemental. She never inventoried, marshaled or otherwise accounted to the court or the creditors for these properties.[CP 2573-¶62, pp.10-11; Ex T to Ex 62, ELL5741 “¶ 3.8 Pacific County” & ELL5743-5751]

CEDARWOOD PROPERTIES, INC.

Cedarwood Properties, Inc. was a corporation whose stock was owed 2/3 by the Estate and 1/3 by Gary Delguzzi, individually. The corporation held a deed of trust encumbering a real estate parcel for a \$45,000 loan to DelHur, Inc., a corporation that was 100% Estate owned. The encumbered land was sold by Ms. Ellis during her administration. Even though she was advised about the DelHur debt to Cedarwood and the deed of trust, at the time that she sold the DelHur parcel, she refused to pay over the 1/3 interest for Gary's share ownership. Her justification was that filing a final income tax return for Cedarwood somehow made its remaining assets disappear or that the final tax return divested the corporation of any remaining assets it owned. [CP 2573-¶17 & Ex 17] Martin's objections to her actions is discussed in the Objections to her Final Supplemental.[CP 2576, p.8; Ex W, ELL5501]

PROCEDURAL HISTORY

Martin alleged that Ellis never reviewed any of the thousands of pages of discovery documents that were offered and made available to her. Her

discovery from Martin was limited to documents which she specifically identified and that he printed and produced at her request. [CP 67, p. 8, ¶26-27, CP 148]

Martin's 3rd Discovery Requests mirrored the allegations in the 2nd Amended Complaint, to which Ellis produced substantive responses to only one of 19 interrogatories (No. 7) and no new documents. The only documents that had been previously produced by Ellis in response to his discovery requests were copies of some of her files as administrator and 'turn-a-rounds' of Martin's document productions to her.[Sub#105, Ex 3] Very few of the documents that Ellis offered in support of her summary judgment motions were produced in discovery.

Defense counsel Moore claimed, at one point, that she only withheld from document production those items that were in a privilege log [Sub#105, Ex 2, letter of 6/26/08 and attach.] which contained a "Privilege Log E-mails". No other privilege logs were produced for the thousands of pages of documents from which were culled about 2,000 pages of summary judgment exhibits and none of the other documents were produced by Ellis.

The above "Privilege Log E-mails" showed 15 emails in the log, and all of which were sent between Ellis and Mr. Zeno (Wilbert's attorney), Mr. Oliver (SCB's attorney) and/or Mr. Gay (Benson and McLaughlin's attorney), none of whom were otherwise identified as Ellis' attorney. The log also was produced based on a privilege identified in the last column as

“Non Responsive”. All except one of these withheld emails was dated either May 12 or May 13 of 2008, one or two days before Ms. Ellis’ deposition on May 14, 2008 and if there ever was any attorney-client privilege attached to these emails, each had multiple waivers as disclosed by the identified recipients.

Because Ellis' objections to Martin’s 2nd Interrogatories (none of which were answered) were alleged by her attorney to be cloaked with attorney-client privilege, they were thus not subject to Ellis's use or to Martin's discovery. Martin relied upon that representation of counsel and withdrew his 2nd Discovery Requests [CP 67, Ex D]. He thus had a right to expect that none of the materials sought by Martin's 2nd Discovery Requests would be offered as evidence based upon Ellis' representation of attorney-client privilege.

Martin sought sanctions pursuant to CR 26(g) that sought to have any evidence that was not produced in response to his discovery requests excluded from being used by Ellis. The court denied his motion and imposed a monetary sanction against him for seeking the CR 26(g) sanction. The order did not reveal the reason for the sanction. [CP 193]

Martin had earlier served a subpoena duces tecum upon Ms. Ellis' attorney, Rosemary Moore, or, alternately, the records custodian at the Lee Smart law firm, in order to discover what evidentiary materials that Ellis acquired as his discovery requests had drawn only scorn and sanctions.

When Ellis moved for a protective order, [CP 172] the court ordered monetary sanctions against Martin, based in part upon Ms. Moore's declaration that she had no personal knowledge of any of the materials sought by the subpoena.

Martin's motion alleged that the response of Ellis to his 3rd Discovery Requests were in violation of CR 26(f) and that Ellis had violated KCLR 37 by her failures to arrange a discovery conference as the objecting party (KCLR 37(e)) and to move for a protective order (KCLR 37(d)) and that CR 26(g) made sanctions mandatory based upon her deceptive and misleading discovery responses. [CP 147-171]

Martin's motion identified 24 different objections which he called "boilerplate", and "evasive and misleading". In his CR 26(g) motion, he related his 3rd Discovery Requests to specific allegations in the 2nd Amended Complaint, and compared them to the Ellis Discovery Requests to show the almost exact correlations of the three items. [CP 147-171, Appendix, Tables 1-3]

When Ellis then filed dual motions for summary judgment, supported by the declarations of Ms. Moore, [CP 2188] whose declaration to authenticate exhibits then claimed that she had personal knowledge of the evidence, as did the declaration of Ms. Ellis. Martin moved to strike the Moore declaration pursuant to CR 56(g) as it was directly contrary to the allegations in her declaration in support of her Motion for a Protective

Order on the issue of her personal knowledge. The court waited until after the argument on the motion for summary judgment to deny the motions of Martin to strike the Ellis and Moore declarations for failure to meet the standards imposed by CR 56(f), ER 601, ER 901 and 902. [CP 1078]

After the Ellis summary judgment motions were granted on 2 of the 6 grounds argued, judicial estoppel and collateral estoppel, Ellis moved for sanctions pursuant to CR 11 and RCW 4.84.185 against both Martin and his attorney, and claiming that sanctions should be joint and several, based on application of the Washington Tort Reform Act. The court granted those motions on November 17, 2008 but as Ellis had not specified what sanctions she sought, the nature and amount of sanctions were then left unresolved.

On January 28, 2009, Martin had hired attorney John Tollefsen because of the potential conflict of interest in being represented by his trial attorney when sanctions were being sought against both of them, and Tollefsen moved for leave for additional briefing based upon no prior opportunity of Martin to have independent counsel argue the sanctions issue. That motion was granted on February 19, 2009. [Sub#219]

On April 20, Judge Benton issued an order purporting to deny the Martin Motion for Supplemental Briefing, contrary to the February 19 order, and after substantial supplemental briefing had been filed. On April 22, she entered another order that vacated the above denial order. Prior to

this she had issued an order signed on April 19, 2008 [sic] entered on April 20, 2009, quantifying the sanctions against Martin and his attorney Cruikshank, jointly and severally, based upon CR 11, RCW 4.84.185, and the Washington Tort Reform Act.

ARGUMENT

Kathryn Ellis was appointed as administrator of the very long-standing estate of Jack Delguzzi on January 7, 2005. She was expected to complete the administration that had been commenced by the sole heir, Gary Delguzzi, in 1978 when the estate was opened and which, from 1982 to 2004, had been administered by William Wilbert, whose administration was terminated by his death in March 2004.

Ms. Ellis was aware that the heir had commenced litigation against Mr. Wilbert years before and continued to allege in litigation that Mr. Wilbert had not properly administered the estate of Jack Delguzzi and that assets were missing, not accounted for, not paid over to Gary or his estate¹⁴ and that administrative fees and costs that had been previously awarded had not been yet paid. [CP 2573, Exh. 14; CP 2188]

Rather than reading the file, interviewing all the people who had participated in the administration or litigation related to the estate, Ms. Ellis just consulted with the attorneys to whom she was beholden as they had nominated her for the job and proposed orders to the court which

¹⁴ Gary died in 2004, about a month before Mr. Wilbert.

exculpated her liability. She then she proceeded to ignore court orders that identified assets, that designated payments to administrative claimants and evidence brought to her attention by Gary Delguzzi's representatives that showed her where assets had been mismanaged, concealed, ignored, or otherwise wasted by the previous administrator.

She never interviewed David L. Martin, CPA, who had consulted on behalf of Gary's interests for several years, served as a interim administrator for the Estate and who was in the course of her administration was assigned the claims that Jack Delguzzi's Estate was entitled to make against William Wilbert. [CP 67; CP 148]

She used subterfuges, including claims of attorney-client privilege, attorney work product confidentiality, where she had no attorney and other devious means of making her administration as opaque as possible. [CP 67; CP 193]

She claimed that she could not afford to investigate missing assets since the estate was "administratively insolvent" despite the fact that hundreds of thousands of dollars of fees had been overpaid during the Wilbert administration to his attorneys [CP 1108, Exh. V] and despite the fact that sales of property that she conducted, in a very limited, careless and thoughtless fashion, generated over \$430,000 property sales during her administration.

In the procedures related to the litigation giving rise to this appeal,

she and her attorneys refused to review any of the documents offered by Gary's successor in interest in response to her discovery requests and limited her acquisition of discovery material from Martin that she had specifically identified that was produced at her request. She reviewed absolutely no documents at Delguzzi's attorney's office that were offered to her and saw only those that she specifically identified. [CP 67, CP 148]

After Martin's interests were frustrated by her refusals to provide discovery to him, his attorney moved for an order pursuant to C.R. 26(g), seeking exclusion of the use of any evidence that she had not produced in response to his discovery request for such evidence. He was sanctioned for asking. [CP193]

He moved for an order compelling discovery, which was denied and he moved to strike Ellis' summary judgment motions because her attorney, in seeking to avoid having to testify or to produce documents responsive to a subpoena, had claimed no personal knowledge and then on the same day, Ms. Moore signed another declaration in support of the summary judgment motions that claimed personal knowledge of some 400 pages of exhibits offered to support dual summary judgment motions. [CP 2188; CP 2078]

Martin also moved to strike her declaration and that of her client Ellis because of failure to comply with C.R. 56(f) and the Evidence Rules as far as authentication of the MSJ documents. These were denied on the day of the summary judgment hearing. Summary judgment was granted on

the issues of collateral estoppel and judicial estoppel and Ellis moved for sanctions pursuant to C.R. 11 and R.C.W. 4.84.185, which were granted and then she moved to quantify those sanctions asking and obtaining a judgment, jointly and severally against both Martin and his Cruikshank based on alleged violation of C.R. 11 and R.C.W. 4.84.185. The court even went so far as to make the attorney's fee judgments joint and several against both Martin and his attorney. [CP 2078]

Ms. Ellis, as the administrator of the Estate of Jack Delguzzi, was charged with fiduciary duties. Those include the duties to not act while in a conflict of interest, to inventory and appraise, to promptly ascertain and to pay off the creditors of the estate, to report to the court and to cause no loss to the interests of those entitled to the assets of the estate. Meryhew v. Gillingham, 77 Wn. App. 752, 893 P.2d 692(1995); R.C.W. 11.44.015, 11.44.066, 11.44.025. The personal representative's principal duties are to collect the estate assets, settle any claims by or against the estate, and then distribute the assets. Estate of Morris, 89 Wash. App. 431, 949 P.2d 401 (1998); R.C.W. 11.44.066; RCW 11.48.010.

In order to successfully bring a claim for breach of fiduciary duties, it is necessary to establish that 1) a fiduciary relationship existed which gave rise to a duty of care on the part of the defendant to the plaintiff; 2) That there was an act or omission by the fiduciary in breach of the standard of

care; 3) That the plaintiff sustained damages; and 4) that the damages were proximately caused by the fiduciary's breach of the standard of care.

Patnode v. Edward N. Getoor & Associates, Inc., 26 Wash. App. 463, 613 P.2d 804, review denied, 94 Wash. 2d 1014(1980).

There are certain exceptions to this requirement that make the trustee a guarantor with respect to any loss that occurs in connection with a breach of duty. That is, certain breaches of duty result in strict liability. The breaches that may create strict liability are 1) commingling of trust property, 2) failure to properly earmark trust property, and 3) unauthorized delegation of discretionary duties. In re Lefevre's Guardianship, 9 Wash. 2d 145, 157, 113 P.2d 1014, 1020 (1941); *Restatement (Second) of Trusts* § 179 (1959). Ellis was in violation of 2 of these 3 strict liability elements.

Failure to make an accounting in compliance with R.C.W. 11.40.090 deprives the court of the jurisdiction to discharge an estate's representative. In re Estate of Tuott, 25 Wn. App. 259, 606 P.2d 706(1980).

As a fiduciary, Ellis was required to act without conflicts of interest.

It is a general principle that a trustee must act with the most scrupulous good faith. The one great duty arising from this fiduciary relation is to act in all matters relating to the trust wholly for the benefit of the beneficiary. A trustee will not be permitted to manage the affairs of his trust, or to deal with the trust property, so as to gain any advantage, either directly or indirectly, for himself. Tucker v. Brown, 20 Wn.2d 740, 768, 150 P.2d 604(1944).

The principle is well expressed in Menhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Wendt v. Fischer, 243 N.Y. 439, 444, 154 N.E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

"Duty of Loyalty. . . . (2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know." *Restatement, Trusts*, p. 431, § 170. Cited in Wool Growers Service Corp. v. Simcoe Sheep Co., 18 Wash. 2d 655, 140 P.2d 512.

"The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust." *Restatement of the Law of Trusts* 447, §173.

Where a trustee finds himself in the position where he has, either individually or as trustee for another, an interest which conflicts with that of the beneficiaries of the trust, he should resign from the trust so as not to attempt the impossible task of representing conflicting interests. In re Brown's estate, *supra*. These principles apply to all trustees, regardless of whether they are original or successor trustees. Tucker v. Brown, *supra*, 769.

Appellant, in assuming the duties of administrator de bonis non and administrator with the will annexed, stepped into the shoes of Reese Brown and became the successor trustee of the trust. As successor trustee, it assumed all the duties and was charged with all the obligations of the original trustee in so far

as an accounting was concerned. This duty was not one imposed upon appellant as administrator of the Brown estate, by only incidental thereto.

It was the duty of appellant to make a full and correct accounting of all known assets of the Smith-Brown trust which had come into the possession or under the control of appellant. Tucker v. Brown, supra, 771.

* * *

It is the general rule that all successor trustees must make an accounting of the trust. “. . . the personal representative of a deceased trustee must account for the period his decedent was in possession as well as for that during which he himself has held it,” 65 C.J. 890, Trusts, §786.

“Where new or substituted trustees have been appointed, it is they or the survivor of them who is required to account rather than the original trustees. On the death of a trustee, where no successor had been appointed, the personal representative of decedent is under the duty of accounting under the trust . . .” 65 C.J. 886, Trusts, §785.

The decedent was the trustee of the fund. It was his duty to have made a settlement of his accounts as trustee, and when he died without having made a settlement it was the duty of his executors to make such a settlement. When they failed to make it, the only remedy for the present trustees was a suit to have the trust settled. Boreing v. Faris, 127 Ky. 67, 104 S.W. 1022. Tucker v. Brown, supra, 880.

A successor trustee is, however, liable if he as well as his predecessor is guilty of a violation of duty to the beneficiaries. This is the case (1) where his predecessor improperly purchased or retained property and he continues to retain it; (2) where he neglects to take proper steps to compel his predecessor to turn over trust property to him; or (3) where he neglects to take proper steps to compel his predecessor to redress a breach of trust committed by him.” Scott, Trusts, 1181, § 223. It is the duty of the successor trustee to secure trust property and hold it for the benefit of the cestui. Scott, Trusts, 1182, § 223.2. Tucker v. Brown, supra, 881.

As the statement of this case clearly indicates, Ellis failed dramatically in her performance of these duties.

SUMMARY JUDGMENT MOTIONS. On September 3, 2008, Respondent Ellis filed dual motions for summary judgment totaling some 42 pages. The declarations in support signed by Ellis and Attorney Moore attempted to authenticate almost 2,000 pages of exhibits, although not in compliance with CR 56(f) and the Evidence Rules. [CP 1-49]

Additionally, the Declaration of Ms Moore is directly and totally contradictory to another declaration of hers, also signed on August 29, 2008, so that she has impeached herself and disputed the material facts of her own dual Summary Judgment Motions. [CP 1866-2110]

Ms. Moore's declaration states:

I am an attorney of record for defendant in the above-referenced matter. I am competent to testify to the matters set forth herein, and testify herein from personal knowledge.

Ms. Moore fails to offer testimony to establish the foundation of her claim of personal knowledge, and as she does not provide that necessary foundation, her declaration must fail. Because Ms. Moore has provided diametrically opposed sworn testimony about her personal knowledge of the matters in the summary judgment motion of the defendant, she has come into conflict with CR56(g) which states:

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of the reasonable expenses which the filing of the affidavit caused him to

incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

At page 4 of her declaration in support of Defendant's Motion for a Protective Order, she states, at lines 18-21 "Mr. Cruikshank served supplemental witness disclosure [sic] naming me as a defense witness although I have no firsthand knowledge of the events at issue." The events at issue are those in the Plaintiff's Subpoena of August 28, 2008 which mirror precisely most of the same factual issues that she relied upon in her dual Motions For Summary Judgment.

The declaration of Ms. Ellis states "I, Kathryn A. Ellis, declare under penalty of perjury under the laws of State of Washington that the following is true and correct." She then closed that declaration with approximately the same statement "I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief." [CP 2573]

Ms. Ellis's declaration is deficient on several bases, the first of which is that nowhere does it include the required evidence of her own competency. She must first testify to her own competence, as without it, there is no other evidence of her competence. Ms. Ellis also fails to make any testimonial claims of personal knowledge to establish necessary foundation for the purported facts in her declaration. Information and belief is not a sufficient foundation for summary judgment evidence: Affidavits submitted in support of motion for summary judgment must satisfy CR56(e). Loss v. DeBord, 67 Wash.2d 318, 407 P.2d 421

(1965)

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible into evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

ER 602 also must be satisfied if the exhibits are properly to become evidence. The relevant parts of that rule are:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony.

This rule requires that evidence must be introduced that is sufficient to support a finding that the witness has personal knowledge. The naked conclusions or allegations of the Ellis and Moore declarations are not sufficient to satisfy this requirement and since Ms Ellis's declaration does not allege personal knowledge, it does not even require an ER 602 analysis to cause it to fail.

Thus it is that affidavits submitted should comply with the requirements of the rule and conform, as nearly as possible, to what the affiant would be permitted to testify to in court. Although the rule, in this respect, makes no distinction between affidavits of the moving and nonmoving party it is almost the universal practice – because of the drastic potentials of the motion – to scrutinize with care and particularity the affidavits of the moving party while indulging in some leniency with respect to the affidavits presented by the opposing party. 6 J. Moore, Federal Practice, ¶56.22(1), at 2819-20 (2d ed. 1966); 3 W. Barron & A. Holtzoff, Federal Practice & Procedure §1237, at 171 (1958). Meadows' v. Grant's Auto Brokers, Inc., 71 Wash. 2d 874, 879, 880, 431 P.2d 216(1967).

In Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 11 P.3d 883 (2000),

the court held that “Summary judgment affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.” [Emphasis supplied].

Nowhere in either MSJ Declaration does either witness describe or state on her personal knowledge how she claims to know what the exhibits are or how she came to know that of her personal knowledge¹. Personal knowledge, while a common sense term, is better defined as a legal term of art.¹⁵

This necessary element of “firsthand sensory observation or experience” is missing from both the Ellis and the Moore Declarations and without it, the proffered exhibits cannot to be considered.

Ms Moore's Declaration [CP 2118-2572] appears to be entirely based on hearsay. An affidavit which states beliefs formed on the basis of hearsay is not made on personal knowledge or admissible in evidence as required by CR 56(e)

¹⁵Personal knowledge. Clearly FRE 901(b)(1) contemplates testimony by a witness having personal knowledge of the sort which FRE 602 requires of all witnesses. It follows that the **testimony of the witness should rest upon firsthand sensory observation or experience**, although categorical certainty is not required. Nor is exclusion required because the witness possesses only a fragment of the information needed properly to authenticate a matter, although such a witness cannot alone provide evidence sufficient to authenticate. Mueller & Kirkpatrick, 5 Federal Evidence § 514 (2nd ed.) (footnotes and case citations omitted). [Emphasis added.] Washington Practice, Vol. 5C, Evidence Law and Practice, § 901.6, fn. 3.

and need not be considered in a summary judgment proceeding. An affidavit which makes claims of established foundation (i.e., the personal knowledge of Moore that the documents listed were what they appeared to be) must include the affirmative showing **within the affidavit** how the witness came to have that personal knowledge that is required by CR 56(e). State v. Evans Campaign Committee, 86 Wash.2d 503, 546 P.2d 75(1976). The Moore declaration offers no such foundation. Ellis' declaration does not even claim to be upon personal knowledge, being made only based upon information and belief.

Where the summary judgment declarations only explained that the attorney reviewed documents and made copies from originals, the declarations are still insufficient to establish personal knowledge. International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App.736, 87 P.3d 774 (2004), *rev.den.* 153 Wash.2d 1016, 101 P.3d 109.

Where proof of the affiant's personal knowledge is lacking, the affidavit will be accorded no consideration in ruling on a motion for summary judgment. Loss v. DeBord, *supra*. Rather than properly authenticating the document, the attorney simply attached a portion of the police report to his memorandum in opposition to the motion for summary judgment and stated, “[p]laintiff’s attorney ... certifies under penalty of perjury that Exhibits 1 through 24 ... are true and certified copies of the originals....”, it was held that the attorney did not testify to the authenticity or the contents of the police report based on personal knowledge. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 367-368 966 P.2d 921

(1998). Division II affirmed the trial court's striking the documents and the issue was dispositive, just as it is here. The trial court denied the motion of Martin to strike the exhibits offered by the declarations of Ms Moore and Ms Ellis on the date of the summary judgment hearing in error.

Even if the exhibits had been properly authenticated¹⁶, the exhibits still fail as the basis for the summary judgment orders, which were collateral and judicial estoppel. The evidence cited earlier in Martin's Statement of the Case provides irrefutable evidence of at least 2 examples of the breaches of Ms. Ellis' fiduciary duties that cannot be reached by the doctrines of estoppel:

Finca Delguzzi. There was no preclusive event after September 14, 1999 when the Costa Rica corporate farm was ordered to be inventoried as an estate asset. Nor can Ms. Ellis's failure to investigate and report on this asset be assigned as a responsibility of Mr. Martin's based upon the assignment of the Estate claims against Wilbert to him. Without proof that the Costa Rica property was lost or otherwise compromised, the responsible party for its loss cannot be ascertained or even that there is a responsible party for its loss, other than Ms. Ellis. Without evidence provided by her that someone else lost or abandoned that farm, only she can be held responsible. It was included in Wilbert's bookkeepers' Statement of Assets and Liabilities which was part of the Ellis "Final Supplemental" and thus it

¹⁶ Martin here challenges their authentication and reserves the right to later challenge their authenticity, relevance, etcetera, should they every be offered with a *prima facie* authentication foundation.

was Ellis duty to administer the property or to prove that someone else had breached a duty to do so. Absent that proof, it can only be her responsibility.

Attorney Fees of SCB. Claims against SCB by the Estate were not assigned to Martin, but were specifically reserved to Ms. Ellis by the “Order Correcting Order” of August 4, 2006. [CP 4425, Exh. 17] The conflicting and egregious attorney fees mess that Ms. Ellis participated in cannot be the source of estoppel, particularly judicial estoppel as it was her specific assigned duty to manage those fees and she delegated the calculation of the attorney fees to the attorneys and the fox then ruled the chicken house. This delegation imposed strict liability upon her for her unauthorized delegation of discretionary duty to properly ascertain and pay the obligations of the Estate of Jack Delguzzi.

The 26(g) Motion to Exclude Evidence Not Produced in Discovery. When Ms. Moore wished to avoid testifying in a deposition, she testified that she had no personal knowledge of the “matters therein”, and when she wished to pursue summary judgment, then she claimed to have personal knowledge of those matters on the very same day. Whichever declaration was false, however, she never established the foundation for such personal knowledge.

Since the matters that she addressed in her Motion for Summary Judgment are all related to the files and records of the Estate of Jack Delguzzi, and as all those events occurred before Ms. Moore’s involvement in the case, which she claims was first in October, 2007, she has excluded herself from circumstances that may have been the opportunity for her to gather knowledge based upon

personal knowledge. She testified in her Protective Order Declaration that it was only after the end of Ms. Ellis' tenure as administrator that she learned anything about the case so that she would therefore have no way of acquiring the personal knowledge of those matters because had all occurred before her involvement with the estate.

Her Summary Judgment Motion would not have been brought but for her claim of personal knowledge and therefore the response of the plaintiff and the time and expenses of that response incurred by the plaintiff, are all properly compensable under CR 56(g), but were denied in error by the trial court.

In response to the defendant's summary judgment motions, Martin responded with 33 exhibits, [CP 4425] which began with a deposition transcript of prior administrator Wilbert's testimony in May of 1984 where he talked about the property called Finca Delguzzi. He described this as a sociedad anónima (S.A.), the Costa Rican term for a corporation. This was a Costa Rican farm and Wilbert testified that he was a board member and that it belonged to Gary Delguzzi. [Exh. 1] He confirmed this shortly thereafter in a letter [Exh. 2] stating that it consisted of 70 acres and he had later signed an affidavit as to its value, stating that the net value after cost of sale should be somewhere in the neighborhood of \$100,000.

Gary's later attorney, Jacqueline Cyphers, hired after the resignation of SCB as his attorney in 1991, tried to secure the stock certificates for the Costa Rican corporation from Wilbert and she then wrote to Saint Martin's College, one of the beneficiaries of Gary's will and trust, to advise them about the Finca. [CP

4425, Exh. 4-6]

In December of 1996, when Wilbert filed a supplement to his final report [CP 4425, Exh. 7] he claimed that discoveries recently made indicated that the Costa Rican corporation and farm actually belonged to the Estate and in 1999 he moved to have the farm and the corporation that owned it declared as property of the Estate, which was ordered on September 14, 1999. Cruikshank's declaration in opposition to the motions for summary judgment, establishes the absence of any accounting of Wilbert that added the Finca or the corporation, Finca Delguzzi, S.A., to the estate's inventory or of any reporting by Wilbert of its sale or other distribution. [CP 4425]

In 2005, Mr. Wilbert's estate attorney, Michael Zeno wrote to Ms. Ellis, as administrator of the Delguzzi estate and he explained to her the short history about the Memorandum Decision of September 14, 1999 and that Finca Delguzzi was an estate asset. He offered her the name of a English speaking Costa Rican lawyer to contact about it. [CP 4425, Exh. 10] She responded to this email but then in her deposition in 2008, she denied that, denied the court's order, and denied that the farm had value or even that it still was owned by the estate, all without offering any evidence in support. [CP 4425, Exh. 12]

In December 2005, a motion was made to hold funds from properties that Ms. Ellis has sold in constructive trust until the ownership of the assets that had been the source of the funds could be determined. [CP 2573, Exh. 37] Rather than agreeing to this, she encouraged the administrative creditors to whom she was

funneling funds to which they were not entitled in order to defeat the motion while she took no public position. That motion included a report by David Martin, a CPA, who traced the history and valuation of the farm and the Costa Rican corporation within the motion which was served on Ms. Ellis on December 14, 2005.

The unpublished Opinion of Division 2 of the Washington Court of Appeals dated August 31, 2001 held that collateral estoppel, res judicata and law of the case doctrines could not be used to block Gary Delguzzi's claims against Wilbert because he had been denied discovery. The language of the unpublished Opinion identified the failure of due process and the way Gary's claims have been treated and the discovery that had been denied him.

In May 15, 1998, Mr. Wilbert filed an affidavit claiming that he was entitled to fees and expense reimbursements totaling over \$1,644,541. [CP 4425, Exh. 23] In his accounting filed in December of 1996, the estate the prior year, he claimed that he was entitled to only \$683,591, which included fees of exactly \$500,000 and expenses of \$183,591 for which he had billed the estate, but for which he had not been paid. There has been no explanation of these differences.

On June 30, 2004, Wilbert's former attorney Ms. Flanders-Palmer, objected to the appointment of an interim administrator for the estate of Jack Delguzzi and filed a set of bookkeeping records prepared by Mr. Wilbert's accountant, Leslie Stanton. This showed that the fees had been secretly reapportioned according to a "private agreement" between Wilbert and SCB and that they were each owed over

\$941,000.00 each. [CP 4425, Exh. 11]

The affidavit of Paul R. Cressman, senior partner of SCB, filed a Fee Affidavit dated January 20, 1997 that stated that the firm had received fees of \$723,989 and was due \$404,040 at that time. [CP 4425, Exh. 18] On October 10, 1997, the court entered a Memorandum Decision that awarded them the \$404,040 but was silent as to interest. On June 6, 1998, the court awarded them interest beginning on January 20, 1998 on their \$404,040 claim.

The Wilbert accounting offered by his CPA for his final accounting at CP 2573-Ex 2, Tab 12 states that SCB had been paid fees of \$1,250,442 as of the date of that accounting. September 30, 1996. [CP 4425, Exh. 19]

The declaration of James Oliver, a senior partner of SCB, lists only two fee orders as entered: one for \$200,000 on December 30, 1985 and the second one the \$404,040 on June 5, 1998. Interest was only allowed beginning January 21, 1997, when the law firm had been overpaid \$119,949. [CP 4425, Exh. 21]

From the conflicting and contrary claims, it is only certain that two and only two fee awards were entered by the court, one on October 10, 1997, for \$404,040 and another on December 30, 1985 for \$200,000 and that Ms. Ellis acted totally in conflict with these fee awards. No one has offered and evidence to the contrary. The Order of June 5, 1998 addresses the \$404,040 claim and allows interest on it beginning as of January 21, 1998, the same date that interest began to run on Mr. Wilbert's claim in the same order.

How the fees were split up and for what purposes is unknown except that the agreement that they were to share the fees equally that was honored during Wilbert's lifetime was somehow renegotiated afterwards and these attorneys of Mr. Wilbert and Ms. Ellis began a practice called "truing the pot" wherein the fee percentages were adjusted dramatically differently instead of approximately 1 to 4, they became 39.834 % to Wilbert and 53.164 % to SCB. Ms. Ellis participated in these agreements and knew they were happening and when asked if she could make the payments equally pursuant to the equalization agreement from June 11, 1998, Mr. Zeno, on behalf of the Wilbert estate instructed her "No" and she responded with an expletive, apparently from her exasperation. [CP 4425, Exh. 27-32]

The fee sharing agreement set out in the June 11, 1998 letter from Wilbert attorney Larry Johnson to members of the SCB firm calls for SCB to share its attorney fees to be shared with a nonlawyer, in violation of R.P.C 5.4. The fee is contingent and it is prohibited for lawyers to enter into a contingent fee arrangements in probate matters. [CP 4425, Exh. 24]

The court's summary judgment order based upon collateral estoppel was 75 percent in error. There are four elements required to establish collateral estoppel, the policy behind which is to promote finality and re-litigation of an issue on which all parties have had a full and fair opportunity to present a case. Estate of Tolson, 89 Wash. App. 21, 34, 947 P.2d 1242 (1977). Collateral estoppel requires first that the issue decided in the prior adjudication to be

identical with the one presented in the second. Where there was no order entered related to the Costa Rica farm other than the Memorandum Decision of September 14, 1999, which designates that property as an estate asset, it is not in conflict with a later order, because there is no later order on that property. Obviously, since that was the first and only mention of this farm corporation in any order, there cannot be a second. Nor was it mentioned in either of the orders from the 1997 fee hearings, dated October 10, 1997 and June 5, 1998.

Also, the prior adjudication must end in a final judgment on the merits. Of course, since the estate has never been properly closed as the administrator has not provided a statutorily compliant final accounting, there is no final judgment and her failure to address the issue of the farm corporation in her “Final Supplemental” absolutely blocks any competent finding that she has closed the estate or that she has been discharged. Estate of Tuott, supra.

While Martin concedes that there is privity between Ellis and Wilbert as administrators of the Estate of Jack Delguzzi, collateral estoppel requires that all four elements be present.

The Finca property was valued in 1992 by Mr. Wilbert at about \$100,000. It is conceivably worth many times that now and its last known designation or ownership was to the estate. There is no indication that Wilbert breached his duties as it was listed as an estate asset in the financial statement presented by his bookkeeper after his death. Apparently it was Ms. Ellis who breached her duty in dealing with it even after being so advised by the attorney for the Wilbert estate.

She produced no evidence that she administered or distributed this property.

As to second summary judgment order based upon judicial estoppel, that doctrine prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. The gravamen of judicial is unfair inconsistency.

Martin has been entirely consistent. He has consistently urged Ms. Ellis to honor her fiduciary duties. The fees of administrator Wilbert's attorney belonged to the Estate and were her sole responsibility by the "Order Correcting Order" of August 4, 2006. The claims against SCB were excepted from the assignment to Martin by the order Correcting Order of August 4, 2006. Urging Ellis to sort out that mess and the massive overpayments could not be construed as inconsistent or unfair by any construction. The judicial estoppel summary judgment order was entirely in error. In any event the failure of the summary judgment evidence prevents the application of any of the doctrines upon which the summary judgment motions were based.

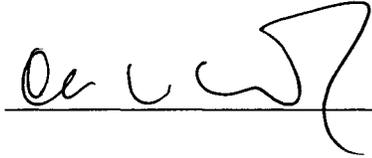
Dated and signed this August 17, 2009.



Charles Cruikshank
Attorney for the Appellants

Certificate of Service

I certify that I caused to be mailed by the U S Postal Service a copy of the foregoing to the parties/defendants as below listed by placing such in the U S Mail, first class postage affixed on this August 17, 2009.

A handwritten signature in black ink, appearing to read "Rosemary J. Moore", is written over a horizontal line. The signature is stylized and cursive.

Ms Rosemary J. Moore
701 Pike Street #1800
Seattle, WA 98101