

NO. 62598-5-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

DAVID L. MARTIN and CHARLES M. CRUIKSHANK III,

Appellants.

v.

KATHRYN A. ELLIS,

Respondent.

ANSWER OF RESPONDENT

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Appellants

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A. ASSIGNMENTS OF ERROR

Assignments of Error

Respondent Kathryn A. Ellis assigns no error to the superior court's orders dated October 3, 2008 and April 19, 2009.

Issues Pertaining to Assignments of Error

Ellis restates the statement of issues as follows:

1. Whether the trial court properly dismissed plaintiff David Martin's claims of negligence and breach of fiduciary and statutory duty where (1) Martin lacked *prima facie* proof of each element of his claims; (2) these claims were barred by collateral estoppel; (3) these claims were barred by judicial and equitable estoppel, *res judicata*, and waiver.

2. Whether the trial court properly exercised its discretion in denying Martin's motion for sanctions where he failed to show that (1) Ellis improperly withheld discovery; and (2) that he was prejudiced.

3. Whether the trial court properly denied Martin's motion to strike Ellis's and Moore's declarations where they showed sufficient proof for a reasonable fact finder to find in favor of authenticity.

4. Whether the trial court erred in failing to grant Ellis's motion to strike inadmissible evidence and unsupported allegations submitted by Martin in opposition to Ellis's motions for dismissal.

5. Whether the trial court properly awarded sanctions against Mr. Cruikshank under Civil Rule 11 where the court found that he had

filed the lawsuit without reasonable inquiry, that the claims were not well grounded in fact, warranted by existing law, or by a good faith argument for its alteration; or that he had filed the lawsuit for an improper purpose; and against Martin under RCW 4.84.185 where it found that the law action was frivolous in its entirety and advanced without reasonable cause.

B. STATEMENT OF THE CASE

1. Gary Delguzzi sued Wilbert for breach of duty in 1994.

This case arises out of the probate in Clallam County Superior Court, Cause No. 8087 of Jack Delguzzi who died in 1978 (“the Estate”). In 1982 executor and heir Gary Delguzzi (“Delguzzi”) asked William Wilbert (“Wilbert”) to replace him as personal representative. CP 2585, 2722. Wilbert resolved numerous lawsuits as well as federal and state claims for death duties with legal assistance from Short Cressman & Burgess (“SCB”) from 1982 to 1991 and from Chicoine & Hallett from 1991 to 2004. *Id.*, CP 2787. In 1994 Delguzzi, represented by Charles Cruikshank, filed a complaint against Wilbert in the probate alleging breach of fiduciary duty, later amending his complaint to add numerous claims and defendants, including claims against SCB that were dismissed in 1996. CP 2123-57. The claims against Wilbert were dismissed for discovery violations and re-instated by the Court of Appeals in 2001.

2. In 1998 the probate court approved the Final Report and awarded Wilbert and Short Cressman & Burgess their fees.

In 1996, Wilbert filed final and supplemental reports and

comprehensive accounts (CP 2585-2785) which Delguzzi challenged: in his brief, at the evidentiary hearing and in argument he attacked Wilbert's property transactions, billing, repeated earlier allegations, and demanded accounting for personal assets. CP 2570-2290; 2820. Judge Costello's October 10, 1997 ruling stated that,

It appears to this Court, having heard the testimony and reviewed the documents ...that this Estate is ready to be settled and closed or ... as ready to be settled and closed as it will ever be. In light of the length of time this Estate has been open and in light of [its] complexity.....

CP 2821. Judge Costello approved Wilbert's final reports and administrative fee claims of SCB and accountants Benson & McLaughlin ("B&M"), among others. CP 2821-4. The court limited Wilbert's commission and disallowed fees relating to Costa Rican assets due to a potential conflict of interest. *Id.* Wilbert filed an adjusted claim for \$1,644,542 inclusive of accrued interest of \$893,168. In its final order of June 5, 1998, the court approved the adjusted fees with interest from October 10, 1997, but disallowed earlier interest. CP 2839, 2863, 2894. By June, 1998 Wilbert, SCB and B&M were owed fees and accrued interest of \$806,661, \$1,077,204 and \$141,173 respectively. CP 2782-3, 2790, 2808, 2822, 2863, 2894-6, 3160-69. Paul Cressman testified that SCB incurred total fees and costs of \$1,128,029 of which it had received \$723,989 resulting in a net sum due of \$404,040 plus accrued interest to 1996 of \$506,868. CP 2808. The court affirmed SCB's and B&M's fee

awards with interest. CP 2895-6. Martin claims that Judge Costello approved a total award to SCB, not the sum remaining due, and excluded accrued interest. This interpretation is not credible; the 1997 order awarded SCB fees and costs “which remain unpaid”; the 1998 order expressly approves Exhibit B which sets out SCB’s total fees of \$1,128,029 and accrued interest. A more reasonable interpretation is that SCB was awarded its remaining fees and the requested interest to make a net award of \$910,908, plus interest accruing from January, 1997. CP 2790, 2802, 2808, 2821, 2895, 3706. (James Oliver’s declaration refers to the court’s award of interest at 12%, the rate used by SCB to calculate the requested interest; this is not inconsistent. *Id.*, CP 4425, Ex. 21, ¶13.)

The 1998 final order directed Wilbert to sell all remaining Estate land, to liquidate its wholly-owned corporation, DelHur Inc. (“DelHur”), and Cedarwood Properties Inc. (“Cedarwood”) in which Delguzzi later claimed an interest, and to distribute and close the Estate. CP 2896-2900.

3. In 2003, the probate court denied Gary Delguzzi’s claims regarding Cedarwood Properties and Malcolm Island.

In 2003, Delguzzi moved for judgment against Wilbert in respect of his share of jointly owned property which he alleged Wilbert had failed to distribute. CP 2902-3020. This included a one-third interest in Cedarwood, the only documentary evidence of which was self-referencing correspondence from Cruikshank; its purported value was based on hearsay. CP 2911-2, 3006-9. Delguzzi also claimed a separate interest in

land at Malcolm Island, BC. CP 2910-2911. In his 1996 Final Report, Wilbert testified that in 1986 he had taken title to Estate land at Malcolm Island worth about \$11,250 US for fees he was owed of \$11,340. CP 769-70, 2784. Delguzzi claimed that the land was worth \$66,000 CDN in 1986 not \$15,000 CDN (\$11,250 US). CP 2910-16, 3004. However, Delguzzi exhibited a document stating a value of \$33,000 CDN not \$66,000; this \$33,000 may refer to a full interest; a half-interest only was transferred to Wilbert. CP 3001-3. The court denied the entire motion. CP 3711.

4. In 2004, Loretta Wilbert, Wilbert's personal representative filed financial statements from 1997 to 2004.

Delguzzi and Wilbert both died in early 2004. Wilbert's personal representative filed Leslie Stanton's declaration verifying and exhibiting financial statements showing the source and disposition of funds since the Final Report, including distributions to Wilbert, SCB, and B&M between 1998 and 2004. CP 2353. A copy was served on Cruikshank who represented Delguzzi's personal representative, Margaret Shaw. CP 2315-2355, 3040. Cedarwood and DelHur were dissolved in the 1990s; the 19 remaining parcels of real estate were valued at \$224,100. CP 2325, 2355, 2380, 4286 at 28:6-25. Neither Margaret Shaw nor Martin who replaced Wilbert as administrator of the Estate in 2004 objected that the financial statements or Stanton's declaration were insufficient.

5. Shaw's motion to vacate the 1998 fee awards was denied.

In 2004, Margaret Shaw unsuccessfully moved to vacate the June

1998 fee awards on grounds of fraud. CP 2288-2314, 2356-98. Judge Costello re-affirmed all his prior distributions, expressly denying the motion as to SCB and B&M. CP 2395, 2418-9, 3711. Margaret Shaw was succeeded by Sidney Shaw (“Shaw”); Cruikshank who represented Delguzzi from 1992 to 2004 represented both of the Shaws. CP 3040.

6. Ellis was prohibited from pursuing or approving any claim by or against the Estate without court approval.

Martin, whom Cruikshank had retained as an expert witness, was appointed personal representative of the Estate in 2004 and given access to Estate files. CP 3050-1. The creditors argued that Martin and Cruikshank had conflicts of interest and Martin was removed. CP 2316-19, 2404-419.

Attorney Kathryn Ellis was appointed successor PR of the Estate **without** non-intervention powers in January, 2005 (CP 2574, 3022-28, 3032-39) based upon her experience in liquidating insolvent estates and in acting as a fiduciary. CP 4257, 4262-3. Shaw objected because her appointment was suggested by counsel for Wilbert’s estate. CP 3024. The court’s order prohibited her from pursuing claims against Wilbert’s estate or from pursuing or approving any claim without court approval:

4. The appointment herein does **not grant non-intervention powers** and does not include authority **to approve or process any claims against or on behalf of the Estate of Jack Delguzzi** without prior court approval.

5. There is presently pending an action by the Estate of Gary Delguzzi versus the Estate of William E. Wilbert, et al. On or about August 10, 2004, the Estate of Jack Delguzzi, through David Martin acting as interim Administrator, filed a creditor’s claim

against the Estate of William E. Wilbert in King County Superior Court. To date the claim has neither been approved nor rejected. Unless otherwise ordered by the Court, the Administrator of the Estate of Jack Delguzzi **shall not process or pursue the claim against the Estate of [Wilbert]** pending final resolution of the case of *Estate of Gary Delguzzi v. Estate of William E. Wilbert, et al.*

CP 3033 (emphasis added). The court ordered that Ellis's duties were to "be directed towards winding-up the Estate, as far as **tangible known assets....**" *Id.*, ¶7. The court re-affirmed that all "prior orders of this Court regarding allowance and [priority] of claims and distribution of assets remain in effect and shall be followed...". *Id.*, ¶6. The order expressly provided that Ellis "**shall be relieved from any liability arising out of the omissions, conduct and/or actions of any prior administrator, their agents, or attorneys.**" CP 3034, ¶9 (emphasis added). Judge Costello signed the order over Shaw's objection that limiting her duties to winding up tangible known assets would prohibit her from prosecuting claims against Wilbert. CP 3025. In spite of this, Cruikshank expressed his intent of suing Ellis, even before her administration began, if she did not pursue these claims. CP 2421-2.

7. Ellis promptly took steps to sell and report on Estate assets.

Ellis collected sums held by Wilbert's PR, investigated the assets and retained an agent to appraise and market the properties. CP 2575, 3029-30, 3042-3068, 3072-76, 3184-3201. At a hearing on notice to Cruikshank, the court approved her schedule of remaining properties. CP

3038-39. During her administration Ellis consulted Cruikshank as attorney for Shaw and Martin and requested all records and assets held by Martin. CP 3030, 3043- 3061, 3195-3201, 4257. There was no reason to consult Martin further; he reported that his sole act as PR was to file a claim against Wilbert; he failed to open a bank account. CP 2575, 3050.

When notified of a potential asset in Costa Rica, the Finca Delguzzi, Ellis was unable, on investigation, to find evidence of any remaining property in Costa Rica owned by the Estate, Delguzzi or in the name of Finca Delguzzi S.A. CP 4256-7, ¶¶5-6. The Stanton Declaration only referred to stock in a company “Finca Delguzzi S.A.”, of doubtful value, without stating that it still owned real estate; Ellis concluded that the land was sold or foreclosed for unpaid taxes and that further investigation was impractical. *Id.*; CP 4287-4288, 41:2-42:7. The 1999 court order also refers only to corporate stock. CP 4425, Ex. 8. Ellis, who was required to collect “tangible known assets” would have investigated further, if provided with credible evidence. CP 2576, 2583, 3033, 4255-7, ¶¶3, 6, 4276-7, 27:7-22. Cruikshank who held the Estate’s records was unable to provide Martin with a description to enable it to be appraised or find reference to it in Wilbert’s “Black Book” that he believed contained Wilbert’s record of Estate properties. CP 3263, 3398. (Wilbert’s testimony and documents Cruikshank obtained from Ms. Cyphers’ and Wilbert’s files were evidently no help. CP 4425, Ex. 1-8.)

In July, 2005, Ellis reported to the court on notice to Cruikshank as Shaw's attorney that she had sold six of the 19 remaining properties and filed a status report on unsold properties: the only other assets were collection payments for properties sold earlier and the Estate's litigation claims. CP 3136-3150. The court approved her fees; Shaw did not object to her report or complain that assets were omitted. CP 2577, 3152-4.

8. Contrary to Martin's claim, Ellis provided access to records; the court denied Shaw's unfounded motions three times.

In May 2005, Cruikshank moved for relief, falsely accusing Ellis of denying him access to Estate records; the court denied his motion. CP 2576-7, 3078, 3095-6, 3099, 3104-5, 3108-3116, 3123-34, 3155-8, 3171, 3180, 3213, 3255. After Ellis, Cruikshank and Michael Zeno attorney for Wilbert's estate reviewed the Estate files that were in storage, the court approved their agreement that Cruikshank would assume possession of files Ellis did not need. *Id.*, CP 3246. Cruikshank possesses approximately 100 boxes of Estate files. CP 2520 at 172:1-4. These contained a folder marked as attorney-client privileged that Ellis refused to release. CP 3175, 3190-91, 3208, 3213. This is the sole basis for Martin's allegation that attorney-client files were withheld by Ellis. CP 2573. Contrary to his allegations, Ellis made her files available to Cruikshank to review. CP 3213-14, 3487, 3190, 3268-69. (Martin omits to say that Shaw's motion for a transfer of records was denied. CP 3512.)

9. In 2005, the court approved an interim distribution, refused to delay payment pending trial of Shaw's claims, and ruled that his criticisms of Ellis lacked merit; Shaw failed to claim that the distribution was miscalculated.

A fundamental dispute between Ellis and Shaw's counsel as to the nature of her duties was soon apparent. CP 3205, 3208. Even though, her order of appointment prohibited her, without court order, from pursuing claims against anyone, including Wilbert, or approving claims against the Estate, Cruikshank demanded that she do both, and unsuccessfully sought court relief when she declined. CP 3033, 3212-3. In June 2005, Cruikshank told Ellis of his suspicions regarding Malcolm Island as to which the court denied relief in 2003, and offered to produce evidence if she paid his expenses of acquiring this. CP 2576, 2910-11, 3118-3121, 37. The documents that he showed her did not justify the expense of investigation. CP 2576. Shaw brought his allegations against Wilbert regarding Malcolm Island before the court in motions that he filed in December 2005 and January 2006, in response to Ellis's second motion to quash in March 2006, and in Objections to the Closing of the Estate. CP 2576, Ex. 37, 39, 41, 61, 62, 64. The court denied him relief each time.

Ellis informed Cruikshank that there was a deed of trust in favor of Cedarwood, the dissolved corporation, on a property known as Three Sisters sold in June 2005. CP 2575, ¶17, 3070. Cruikshank reviewed the real estate files including this file at Ellis's offices in October, 2005 (Ex. 37, Dec., ¶¶45-47) and claimed that G. Delguzzi had a 32.48 per cent

interest in Cedarwood which was owed money by the Estate, a debt that was increased by the Three Sisters sale. Ex. 34. Ellis did not agree that this entitled G. Delguzzi's Estate to a share in the sale proceeds or other assets. CP 2577, ¶17. Shaw asked the court for relief in December 2005, twice in 2006, and in 2007; each time the court denied his claim. *Id.*, CP 3408-13, 3420-2, 3460-61, 3512, 3708-10, 3850-53. In responding to an allegation in November 2005 about another asset allegedly owned by the Estate and Delguzzi "the Ozette Partnership" that was dissolved in Wilbert's administration, Ellis asked for evidence. CP 3203-5. "[W]ithout supporting documentation I will not ...investigate allegations regarding potential assets. This estate is ... insolvent and cannot afford such a luxury." *Id.* Cruikshank also complained that Ellis would not pay to obtain copies of the Estate's earlier tax returns. CP 3176, 3180, 3213.

In December 2005, Ellis, who lacked non-intervention powers, moved for approval of a partial distribution and to quash a subpoena that Cruikshank served upon her. CP 3207-3234. Ellis verified the sums due creditors by reviewing the court pleadings and orders. *Id.*, CP 3160-9; 4257, ¶8, 4263, 4270-1. Ellis testified as follows (in part):

Since my appointment ...Cruikshank has solicited himself to be engaged and paid by the estate to pursue various alleged claims against [Wilbert]. I declined Cruikshank ... commenced ... demanding immediate access of various documents, including ... documents that I did not have access to. I made available to Cruikshank all of the documents that I had ..., including documents that my office created or obtained independently, and

later provided physical custody of the majority of documents in this estate, as he opposed their destruction. Thereafter, Cruikshank demanded that I waive the attorney client privilege of [Wilbert] and agree to pay to obtain various tax returns dating back to 1982 of [JDG], [Cedarwood] Northland Properties Inc., [DelHur], Peninsula Properties, Inc. ...I have repeatedly declined his demands to pay for the tax returns or waive any privilege. He has made the following allegations to me in various letters ...: That I am not performing my 'duties'; [that] I am not exercising due diligence as I have failed to 'review and/or audit' financial records and tax returns in this case; [that] I have a duty to investigate the alleged deficiencies of prior administrators; [that] I have a duty to provide him with federal income tax returns

CP 3212-3. Shaw opposed a distribution and cross-moved for all Estate assets to be held in a constructive trust until the court ruled on his 2004 motion to vacate Wilbert's fees and identified Delguzzi's separate property; he repeated many allegations made in Delguzzi's 2003 motion against Wilbert. CP 3249-3399 *Cf.* CP 2902-3020. Cruikshank who had assumed Wilbert's records stated that he was unable to trace two Estate properties: "Property 212" and "Finca Delguzzi", the inference being that Wilbert had misappropriated or sold them. CP 3171, 3258-9, 3398. He did **not** allege that the proposed distributions to Wilbert or SCB exceeded their entitlement under the 1998 order, merely saying that he did not know if they were correct. CP 3261. Shaw alleged that Ellis had breached her duties by, *inter alia*, failing to provide an inventory of Estate properties (CP 3257), to act on his information that Malcolm Island was transferred to Wilbert at an undervalue, or to ensure that Delguzzi's alleged share of the \$45,000 loan from Cedarwood was paid (CP 3263-5); by refusing to

waive the Estate's attorney-client privilege asserted by Wilbert, to pay for old tax returns and (repeating his May, 2005 allegations) by denying him access to documents. CP 3256-8, 2362, 3267 -71. On December 16, 2005, Judge Costello denied his motion, quashed the subpoena and approved a total distribution of \$275,000 to Wilbert, SCB and B&M. CP 3408-13, 3710-11. Shaw did not appeal.

10. In 2005-6, the court approved the sale to Shaw of Estate claims against Wilbert for \$15,000, funded by Martin.

To close the Estate, Ellis invited offers from Shaw and Wilbert's PR to buy any claims the Estate had against Wilbert. CP 3173-5, 3178-81, 4258-9. Ellis also consulted SCB and B&H, recognizing that as the Estate was insolvent their claims might be compromised. *Id.*; CP 4279-80. Loretta Wilbert asked the court to approve the sale of the claims to Shaw, or to her, should Shaw fail to purchase them within 30 days. CP 3237, 3242, 3246. With the reservation that he was unable to value the claim, Shaw made no objection. CP 3266-7, 3420. On December 16, 2005, the court approved sale of the claim for \$15,000, giving Shaw 30 days to match that sum. CP 3408-13; U, 152. In a Petition filed January 2, 2006, Shaw withdrew his agreement and asked for a stay. CP 3422-3, 3434. Even though Cruikshank had litigated these claims since 1993 and filed a creditor's claim for the Estate (CP 3419) he professed not to know "what constitutes the elements of, and the values assigned to" the Estate's claims against Wilbert because *Ellis* had not quantified these. *Id.* Repeating

criticisms made in his motion the previous month as to Cedarwood, Ozette and Malcolm Island and accusing Ellis of failing to collect missing assets, Shaw asked the court to rule among other things that Ellis had breached her fiduciary duty. CP 3420-2. In spite of this, he then mailed Ellis a check and a draft Notice of Assignment. CP 2579, ¶45. Although no assignment had taken place, in a further *volte-face* Cruikshank filed a Notice of Assignment that as of January 16, 2006:

Shaw...acquired and accepted assignment of all claims, interests, rights, ...known or unknown, which ... were, or could have been, or could still be asserted by any of the Administrators of the Estate... against the Estate of [Wilbert]...and against all other defendants named in the Complaint for Damages of [Delguzzi] ... filed on July 16, 1996, or any and all other defendants which may later be named or identified as liable to ...[the Estate].

CP 3437. After both Wilbert's PR and Shaw offered to buy the claims, in June 2006 the court approved their assignment to Shaw who filed a second law action against Wilbert's Estate. CP 2563, 3523-5, 3551-69, 3574-86. Martin funded the purchase by an option to buy Shaw's claims against Wilbert, SCB, Ellis and other professionals for \$15,000. The court granted SCB's request to exclude claims against other defendants to the 1996 action. CP 3574-86. Shaw did not ask Ellis to pursue claims against SCB or ask the court to compel her to do so. CP 2582.

11. In 2006 the court again rejected claims that Ellis had failed to report and investigate Estate assets or disclose records and awarded terms against Shaw for a second subpoena.

Ellis filed and served an Annual Report in January, 2006

summarizing the claims paid and cash in hand; she re-filed the list of Estate properties showing which were unsold and her plan for disposal. CP 3415-6, 3445-49. After Cruikshank objected that the report failed to comply with RCW 11.76.010, Ellis pointed out that as the court approved the Final Report in 1997 no Annual report was required, the Estate was insolvent, and a report was unnecessary and costly. CP 3440-57. Ellis alerted the court to this dispute. *Id.* Disregarding the order quashing his subpoena, Cruikshank served a second one demanding to review documents Ellis had already provided and to depose her regarding her investigation. *Id.* In answer to her motion to quash, he claimed she had not produced a list of properties acquired in 2005 (she produced this in 2005 and in January 2006 (CP 3143, 3149, 3415-6)) and that she had failed to account for funds from Wilbert (her February 2005 report contained this). CP 3038, 3141, 3212, 3459-3461, ¶2. He complained again regarding the “Three Sisters” proceeds; that she had not reported investigating the Ozette or Elwha partnerships, and attached letters to Ellis described as “a futile attempt to get her to do her duties and stop wasting and ignoring estate assets.” CP 3460-61. Shaw cross-moved for relief, claiming again that Ellis was failing to investigate Wilbert’s conduct and demanding that she hand over records. CP 3507. The court quashed the subpoena, awarded Ellis terms and denied Shaw’s motion. CP 3512.

12. In 2006, Shaw moved to close the Estate; again he did not object that distributions exceeded the 1997-98 awards.

In May 2006, Shaw asked the court to order Ellis to close the Estate within 30 days because only one property of significant value remained (CP 3514-22) but he opposed Ellis's motion later in May for a second distribution complaining again, *inter alia*, that until she filed an inventory and appraisal it was unknown whether there were other assets (CP 3524-47 *cf.* 3459-61) even though Ellis's motion, like her earlier reports, contained an inventory and appraisal of known assets. CP 3137-43, 3415-46, 3525-35. The court approved the distribution. CP 3571-2. Again, Shaw did **not** allege that the proposed payments exceeded Wilbert's or SCB's entitlement under the 1997-98 orders. CP 3545-7.

13. Over Shaw's objections which mirror his allegations in this action, the court approved closure and final distribution.

a. The probate court ruled that Ellis was in substantial compliance with RCW 11.44.

Shaw moved to compel Ellis to comply with RCW 11.44.015-025 by providing *inter alia* a sworn inventory and appraisal; Ellis disputed the requirement but pointed out that the information had been provided. CP 3589-3604. Shaw complained that her list differed from Wilbert's 1998 report. CP 3605-9. The court denied his motion ruling that Ellis was in substantial compliance. CP 3612. Ellis established that the "missing" properties were sold by Wilbert after 1998. CP 2581, ¶57, 3636, 3677-85.

b. The sums collected were insufficient to pay the creditors.

In 2007, Ellis filed a Final Supplemental Report and Petition for Distribution; she had received \$430,426.97 through property sales of which she had disbursed on notice, with court approval \$414,783.21 to the creditors and received \$26,901.15 in fees; Ellis had paid \$199,477.50 to SCB; \$149,377.50 to Wilbert's estate, and \$26,145 to B&M. CP 3208-10, 3408-9, 3526, 3571-2, 3617, 3624, 3635. The Estate was insolvent: on her appointment the creditors' claims exceeded the 1998 awards due to accrued interest which exceeded distributions between 1998 and 2004. *Id.*; CP 2353; §B.2, *supra*. Of the remaining balance of \$15,643.46, Ellis requested approval for her fees of \$10,169.35 and distributions of \$3,130.13 to SCB and \$2,343.97 to Wilbert's Estate; B&M agreed to take in lieu of fees the only remaining property of value. CP 3618-19, 3623.

c. The probate court did not agree with Shaw that Ellis failed to sufficiently comply with closing procedures.

Shaw filed procedural and factual objections repeating many allegations and attaching assorted and incomplete documents taken out of context in this 29 year probate. CP 3694-3844. Shaw alleged that Ellis was negligent and had breached her fiduciary and statutory duties. *Id.*, e.g. CP 3698, 3703, 3708-10. (She "promptly set about ignoring the Wilbert transgressions and creating her own." CP 3709.) Shaw demanded *inter alia* that the Estate be kept open while the court ruled on his 2004 motion to vacate Wilbert's award, reviewed Wilbert's post-1997 expenses

and completed a full investigation and accounting. CP 3705, 3711-12. Although served with the motion (CP 2576 ¶20, 3632, 3687), Shaw alleged that Ellis failed to show compliance with RCW 11.28.240's service provisions. CP 3695-7. Although Ellis's report was supplemental to the 1998 final report, Shaw objected that Ellis failed to follow RCW 11.76.020-050's procedures for a final report by failing to list the sole beneficiary's name and address, failing to advertise and serving her affidavit after the report. CP 3695-97. Ellis rectified any defect in timeliness by continuing the hearing. CP 2576, 2581, ¶61, 3632, 3687-92. Although Ellis had filed her report showing several landlocked parcels had no value at least three times (CP 3136-50, 3415-6, 3535) Shaw claimed that failing to list these in her supplemental report breached RCW 11.76.030. CP 3415-16, 3698. Cruikshank attached an undisclosed offer he had obtained to buy the parcels for \$1200.00. CP 3697-8.

d. Shaw delayed making claims including those about SCB until only \$15,643.46 remained; the probate court denied the claims.

Shaw's Objections made fresh claims against Wilbert and attacked SCB's fee award for the first time while Ellis was administrator. CP 2582. Although Stanton's declaration was filed and served on Cruikshank in 2004 (CP 2316), he claimed for the first time that it failed to adequately show that the Estate's expenditure from 1998-2004 was reasonable. CP 2582, 3695-97. Disregarding Wilbert's 1996-97 testimony about the

Surfside properties and transfers made to pay claims, Shaw alleged that Estate properties received from the Surfside Estates partnership in 1978 were missing CP 2231-32, 2582, 2795, 3710. Shaw attacked the 1996 Kleinman report and Wilbert's fee adjustment both approved by Judge Costello in 1998. *Id.*; CP 2821-2, 2894-6, 3707-09. He complained that the DelHur 1999 closing tax return showed a write-off of \$799,000. (There was no loss as the primary asset of DelHur, owned by the Estate, was a loan to shareholders of \$902,251. CP 2582, 2590, 3710. 3717.) For the first time Shaw argued that SCB should not be paid. CP 2582. He claimed that (1) SCB's fees were miscalculated (*see* §B.2, *supra*); (2) that loans by Cressman to the Estate and SCB's 1982 fee agreement breached ethical rules; (3) that SCB and Wilbert mutually agreed to toll the statute of limitations as to potential claims after Delguzzi filed the 1994 complaint; and (4) that SCB and Wilbert agreed in 1998 to equally share court-approved disbursements from the Estate. CP 3703-12. Shaw provided no evidence that the loans or fee agreement breached professional rules in force in the 1980s or why he was entitled to raise this in 2007 when the fee agreement and loans were disclosed with the final report in 1997. CP 2657, 2735-6, 2804-7. Sharing distributions or a tolling agreement does not prove misconduct but Ellis did not receive attorney communications about, or know of, the tolling agreement and was unaware of an agreement to share distributions until June 2007. CP 4259;

4267, ¶6. The court rejected the Objections and approved Ellis's report and proposed order. Shaw appealed. CP 3855 *et seq.*

14. Dissatisfied by the probate court's rulings, Martin makes the same claims in this action.

Shaw served his Objections on **June 28, 2007** and served Amended Objections on July 3, 2007. CP 3694, 3703. Fulfilling the threat he made in January 2005, Cruikshank filed this action on **June 29, 2007** on behalf of Martin, making the same allegations as the superior court for Clallam County rejected. CP 2421-2, 2451-70.

15. The Court of Appeals denied Shaw's appeal; all issues that could have been raised before June 2, 2006 were untimely; there was no breach of statutory requirements.

In its June 30, 2009 order Division II of the Court of Appeals in *In re Estate of DelGuzzi*, No. 36682-7-II Wash. App. LEXIS 1626 (June 30, 2009) ruled, *inter alia*, that the probate court's 2005 and 2006 interim distribution orders were final when entered because Shaw had notice of the proposed orders; they were no longer appealable. *Delguzzi*, slip op. at 21-25, 30. The only issues that could be raised on appeal were "Ellis's actions taken between the date of the 2006 interim distribution order through the final closing order." *Id.* at 25. Therefore, Shaw's allegations that Ellis failed to comply with the 1998 closing plan when paying fees to Wilbert and to SCB (*id.*), objections to Stanton's record for the 1997-2004 period (*id.* at 36), the denial of the constructive trust (*id.* at 21-25) and objections to the distribution of the Three Sisters proceeds were not

appealable. *Id.* at 34. Among other things, Division II dismissed Shaw's claim that Ellis failed to follow the closing procedures of RCW 11.76 and RCW 11.28.240. *Id.* at 29-31. Procedural claims relating to the 1998 order could have been litigated then; the court and Ellis correctly proceeded on the basis that the court entered a closing plan under RCW 11.76.030 in 1998. *Id.* Division II also ruled that the court did not err by not requiring Ellis to file a new inventory and appraisal under RCW 11.44 because she provided reasonable grounds for declining to do so and because Shaw failed to show damage. *Id.* at 34-36.

16. The trial court correctly denied Martin's claim for sanctions.

In response to Ellis's motions for dismissal, Cruikshank moved to strike her supporting declarations making the unmerited claim that they relied on evidence that Ellis should have produced in discovery. CP 148. Ellis showed that this was unfounded and the court denied his motion and awarded sanctions against him. CP 175-86, 193-4, 4140-44.

Ellis complied with her discovery obligations by producing her files in the winter of 2007-8 (supplementing this in June, 2008). CP 4140-1, 4158. Ellis's privilege log listed a few items that were redacted **not** withheld. (Martin obtained unredacted copies in May, 2008. CP 4159-60; 4425, Ex. 30.) After Ellis objected to Martin's second and third discovery requests because, *inter alia*, they requested privileged materials created or obtained in this action or exceeded the permitted number, Martin

withdrew his second requests (CP 113, 128, 4142, 4191) and his other discovery was answered. CP 177-9, 129-146, 181-5, 4140-4219. Martin failed to hold a mandatory discovery conference and failed to show need of attorney work product. CP 175-7, 179-80, 4140-42; *see also* 266-1008.

Martin failed to show prejudice because the material used in the motions came from Ellis's file, Martin's production of over 9000 pages, publicly-available pleadings in his possession, or transcripts from depositions he attended that she produced. CP 133-34, 175-86, 4142-43.

Martin filed a second motion to strike Ellis's and her counsel's declarations, objecting *inter alia* that Rosemary Moore claimed personal knowledge of pleadings which he alleged contradicted her testimony in support of her motion for a protective order to prevent Martin deposing her. CP 1841. Moore and Ellis filed supplemental declarations to cure any defects and the court denied the motion. CP 266-1008, 1078-9.

17. Martin's claims were dismissed on three separate grounds.

Ellis moved for summary judgment on six grounds: (1) lack of the elements of negligence, breach of fiduciary duty and statutory duty; (2) collateral estoppel; (3) *res judicata*; (4) judicial estoppel; (5) waiver; (6) equitable estoppel. CP 1-49. Martin mischaracterizes the trial court's ruling by stating that the court granted Ellis's summary judgment solely on grounds of collateral and judicial estoppel; the court also dismissed his claims for lack of evidence. CP 1085-90, 1457-8.

18. The court found that this action was frivolous in its entirety and awarded sanctions under RCW 4.84.185 and CR 11.

Ellis put Martin on notice of her intent to claim sanctions in her Answer which contained her allegation that the law suit was frivolous as well as 21 other affirmative defenses and in her discovery answers. CP 1289, 1314, 1319. The court granted Ellis's motion for sanctions against Martin under RCW 4.84.185 finding that the action was frivolous in its entirety and advanced without reasonable cause. CP 1457-8. Cruikshank had filed the lawsuit without reasonable inquiry; the claims were not well grounded in fact, warranted by existing law, or warranted by a good faith argument for the alteration of existing law; alternatively, he filed the lawsuit for an improper purpose. He was therefore liable under CR 11. *Id.* The judge gave detailed reasons why the lawsuit was unwarranted. *Id.* Ellis filed a second motion supported by a declaration and billing records, illustrating why the work done, the billing rate and the asked-for fees were reasonable. CP 1499-1652. On December 17, 2008, Martin retained John Tollefson who filed a response on behalf of Martin; Cruikshank also filed a response. CP 4705-4858. **Neither challenged the amount of Ellis's claimed fees.** *Id.* Cruikshank, Tollefson and Ellis filed additional briefing in 2009 and Judge Benton entered judgment against Martin and Cruikshank in the sum of \$114,641.05 on April 19, 2009. *Id.*

C. SUMMARY OF ARGUMENT

The superior court properly dismissed Martin's claims of

negligence and breach of fiduciary and statutory duty as a matter of law because Martin was unable to raise a material issue of fact in rebuttal to Ellis's showing that his claims were unsupported by evidence. His claims are also barred by collateral estoppel and *res judicata*, and, in whole or in part, by judicial and equitable estoppel and waiver. The superior court did not abuse its discretion (1) in denying Martin's motion for sanctions where Ellis fulfilled her discovery obligations **and** Martin failed to show prejudice; (2) in denying Martin's motion to strike where the objected-to documents were sufficiently authenticated; and (3) in awarding Ellis her reasonable attorney fees and costs pursuant to RCW 4.84.185 and CR 11.

D. ARGUMENT

1. Summary judgment was proper because no genuine factual dispute exists.

An appellate court engages in *de novo* review of an order of summary judgment. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 261, 956 P.2d 312 (1998). Summary judgment will be granted when the pleadings and evidence presented show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A moving defendant may meet its burden by merely pointing out the absence of evidence to support the plaintiff's case, and is entitled to judgment as a matter of law when the plaintiff fails to make a sufficient showing on an essential element in which it has the burden of proof. *Young v. Key Pharmaceuticals, Inc.*, 112

Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party will not defeat the motion by offering only a “scintilla” of evidence, evidence that is “merely colorable,” or evidence that “is not significantly probative” (*Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987)) or by relying on speculation or argumentative assertions. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). Ellis incorporates herein her motion to strike unsupported allegations and inadmissible evidence in Martin’s response (which the trial court neither granted nor denied.) CP 4225-47, 4302-3, 4320-21. This court should disregard all allegations that are unsupported by admissible evidence. *King County Fire Prot. Dist. No. 16 v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); CR 56(e). Because Martin failed to produce sufficient evidence to support **any** element of his claim or to defeat Ellis’s affirmative defenses Ellis was entitled to dismissal as a matter of law; failure as to one element was sufficient. *Young*, 112 Wn.2d at 225.

2. The court should disregard assignments of error, statements or argument unless supported by factual and legal citation.

This court should decline to consider all statements made by Martin that are inadequately cited to the record or arguments absent citation to legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(5). Several citations do not fully support the cited principles. E.g. Brief at 33: 8-12, 16-22. The court should also consider **only** evidence and issues called to the

attention of the trial court. RAP 9.12; RAP 2.5; *Van Dinter v. Orr*, 157 Wn.2d 329, 333-34, 138 P.3d 608 (2006). The court should disregard all Martin's new arguments including a theory that Ellis was strictly liable for Wilbert's conduct. *Cf.* CP 195-208.

3. By limiting argument to Finca Delguzzi, Martin concedes that collateral estoppel bars his other claims.

Absent argument in support of issues presented for review, together with citation to legal authority an assigned error will not be considered. RAP 10.3(a)(5); *Kagele v. Aetna Life & Casualty Co.*, 40 Wn. App. 194, 196, 698 P.2d 90, review denied, 103 Wn.2d 1042 (1985). Because Martin's **sole** ground for assigning error to the collateral estoppel ruling is his claim that there was no preclusive event as to Finca Delguzzi, he concedes that the rest of his claim is barred by collateral estoppel. His conclusory allegation as to Finca Delguzzi is also insufficient to merit consideration. "It is not the function of trial or appellate courts to do counsel's thinking and briefing." *Orwick v. Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984). Absent argument, the court should affirm the trial court's dismissal of all his claims on grounds of collateral estoppel.

"Collateral estoppel promotes the policy of ending disputes by preventing the relitigation of an issue or determinative fact after the party estopped has had a full and fair opportunity to present a case." *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987); *accord Nielson*, 135 Wn.2d at 262. The doctrine applies even if the court has reason to

believe the first result was erroneous. *Thompson v. D.O.L.*, 138 Wn.2d 783; 982 P.2d 601 (1999). The actions need not be identical, and the party invoking the defense need not have been a party to the underlying action. *Lucas v. Velikanje*, 2 Wn. App. 888, 471 P.2d 103 (1970). To establish estoppel, the following questions must be answered affirmatively:

(1) Was the issue decided in the prior adjudication identical with the one presented in this action? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

McDaniels, 108 Wn.2d at 307. All four criteria are met because Martin's allegations against Ellis in this action are the same as, or based upon, claims made by Shaw in the Superior Court for Clallam County that were ruled on and denied by that court and Martin may not make them in this action. CP 2451-70. These include allegations of non-compliance with RCW 11.44.015-025, 11.76.020-050 and 11.28.240 and with the court's fee awards (*see* §B.11.13 *supra*); failure to provide an inventory and appraisal (§B.11-12; CP 3257), an accounting (§B.11.13) or access to information (§B.8-9, 12), failure to investigate Wilbert's expenses or conduct (§B.9-11.13); marshal assets (§B.10-11); abandonment of property (§B.13); allegations as to Cedarwood (§B.4, 9-10, 12), Malcolm Island (*id.*); Del Hur (§B.13); Elwha Bluffs (CP 3710), Surfside (§B.13) and Delguzzi's separate interests including the Elwha and Ozette

partnerships (§B.3.9-11.13); her refusal to waive Wilbert's attorney-client privilege (§B.9) and the alleged conflict of interest because the Wilbert Estate's attorneys proposed her appointment. CP 3022; §B.7. Because the court **denied** these claims (*id.*) and ruled that distributions to SCB and to Wilbert should not be delayed or denied by reason of Shaw's allegations (§B.5-6.9.12-13) this court is estopped from ruling otherwise. As to Finca Delguzzi, Shaw alleged that Ellis was failing to marshal assets in 2006 and in 2007 and that she was abandoning assets. CP 3171, 3249, 3258-9, 3263, 3398, 3420-22, 3460-61, 3703. The court denied him relief; therefore, this claim too is barred by collateral estoppel. Martin, as Shaw's assignee, is subject to all defenses that could have been asserted against Shaw. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 359, 662 P.2d 385 (1983). Thus there is no injustice. This court's dismissal of Shaw's appeal and its affirmation of Judge Costello's closing order provide further grounds for collateral estoppel. §B.15. *supra*.

Moreover, because the court's interim distribution orders were final and appealable when entered and could not be attacked or litigated at the final report (*Tucker v. Brown*, 20 Wn.2d 740, 800, 150 P.2d 604 (1944); *Merlino's Estate*, 48 Wn.2d 494, 496, 294 P.2d 941 (1956); *Manning v. Mnt. St. Michael's Sem'y*, 78 Wn.2d 542, 548, 477 P.2d 635 (1970); *Batey v. Batey*, 35 Wn.2d 791, 215 P.2d 694 (1950), Shaw was barred from raising on appeal all issues that were or could have been

litigated before June 2, 2006. *In re Krueger's Estate*, 11 Wn.2d 329, 351, 119 P.2d 312 (1941) (*res judicata* or estoppel apply to interim orders where a party has notice of the proceedings); *Delguzzi*, slip op. at 21-25, 30. The principles of collateral estoppel and *res judicata* apply equally here to prevent the court considering those issues. Therefore, collateral estoppel bars Martin's claim in its entirety.

4. Martin's claims were also barred by *res judicata*.

In its *de novo* review of a grant of summary judgment, the court may affirm on any ground established by the pleadings and supported by the evidence. *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). The elements of *res judicata* are set forth in *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000) as follows:

Res judicata ... bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. Application ... requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made.

Elements (1), (3) and (4) are met because Martin stands in Shaw's shoes while Ellis is defending her conduct as administrator. *Lonsdale*, 99 Wn.2d at 359. *Res judicata* precludes his claims because Shaw alleged negligence and breach of fiduciary and statutory duties by Ellis on numerous occasions in Clallam County. E.g. CP 3703, 3709; §B.9-13. In order that a judgment or decree should be on the merits, it is sufficient that the parties might have had their suit disposed of, if they had properly presented and

managed their case. *Pederson*, 103 Wn. App. at 70. *Res judicata* prohibits the relitigation of claims and issues that were litigated, **or could have been litigated**, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995); *Krueger's*, 11 Wn.2d at 351. The court had power to adjudicate Shaw's claims and to remove Ellis if Shaw had established a fiduciary breach or other just cause. *Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004); RCW 11.28.250. Shaw knew that Finca Delguzzi was missing when he alleged in 2006 and in 2007 that Ellis had failed to "investigate and marshal the assets of the estate" and was abandoning assets. CP 3171, 3249, 3258-9, 3263, 3398, 3703. Because he could have listed this in his catalogue of Ellis's alleged errors, this claim too is precluded by *res judicata* as a matter of law.

5. Shaw's claims are barred by waiver and equitable estoppel.

A waiver is the intentional and voluntary relinquishment of a known right. It may result from express agreement or be inferred from circumstances. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive. *Id.* By failing to appeal the court's interim orders Shaw waived his right to pursue the claims that he failed to appeal. *Tucker*, 20 Wn.2d at 800. Because these orders are subject to principles of *res judicata*, by failing to appeal the court's interim distributions he also waived all claims that he **could have made** by June 2, 2006 including

issues that he raised in June 2007. *Id.*, *Krueger's*, 11 Wn.2d at 351; *see also, Delguzzi*, slip op. at 21-25, 30. Equitable estoppel requires a showing that (1) a party made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act. *Wendle v. Farrow*, 102 Wn.2d 380, 686 P.2d 480 (1984). The following conduct of Shaw establishes both equitable estoppel and waiver: buying the claim against Wilbert; failing to object to the amount of interim distributions or raise several matters until the bulk of the assets were distributed (CP 2451, 2582, 3695, 3703; §B.13); moving for closure of the Estate within 30 days (CP 3514) and denying knowledge of additional Estate assets unless she filed an inventory thus waiving claim of failing to marshal assets. CP 3456. He failed to object that Ellis omitted Finca Delguzzi or Surfside from the inventories that she filed and served **five times**. CP 2577 ¶23, 2581, ¶57, 3143, 3415, 3487, 3594, 3617.

6. Martin failed to produce evidence of a material issue of fact as to every element of his claims.

A plaintiff must prove four elements to sustain a breach of fiduciary duty: “(1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury.” *Micro Enh. Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 433-34, 40 P.3d 1206 (2002). A negligence claim requires proof of these

same elements. *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). Breach and causation may be determined as a matter of law where reasonable minds could reach but one conclusion from the evidence presented. *Briggs v. Pacificorp*, 120 Wn. App. 319, 323, 85 P.3d 369 (2003), rev. den'd 152 Wn.2d 1018, 101 P.3d 109 (2004); *Nielson v. Eisenhower*, 100 Wn.App. 584, 594, 999 P.2d 4 (2000).

7. Martin failed to show that Ellis breached a duty to Gary Delguzzi's estate or proximately caused it damage.

Martin failed to show that Ellis breached a duty owed to the Estate of Gary Delguzzi either as heir or as owner of separate property.

Ellis's conduct was subject to court direction and oversight; her compliance with court orders cannot provide evidence of breach of duty. Shaw complained of Ellis's conduct to that court and the court denied relief. §B.9-13. He cannot show a breach of duty for that reason alone.

a. There was no breach of statutory duty.

The trial court did not err in dismissing Martin's claim of breach of statutory duty because (1) Martin failed to show damage proximately caused by any breach; (2) the probate court, which has discretion to regulate the winding-up of an estate, held there was no breach when Shaw complained. *Id.* This court has affirmed that the statutory closing procedures of RCW 11.76.020 - .050 and of RCW 11.28.240 did not apply to Ellis's **supplemental** report and that the probate court did not abuse its discretion in declining to require Ellis to file a new inventory and appraisal

under RCW 11.44.015, .025, and .050. *Delguzzi*, slip. Op. at 34-36. Under RCW 11.96A, the probate court has wide powers to direct a personal representative to do or abstain from doing any act in a fiduciary capacity including matters involving non-probate assets. RCW 11.96A.020, 030, .80.; *see also In re Estate of Walker*, 10 Wn. App. 925, 935, 521 P.2d 43 (1974) (pre-dating RCW 11.96A). Martin alleges that Ellis did not comply with RCW 11.68.100 but this applies to a PR with non-intervention powers. 11.96A.030(1)(b).¹ A breach of statutory duty may only be brought when the resulting damage is caused by the hazard that the violated statute is intended to prevent. *Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 324-325 (1991); RCW 5.40.050. Martin failed to present evidence that the alleged irregularities resulted in damage that they were designed to prevent. *E.g.* Shaw had actual notice of the proposed final distribution. Orders or decrees are jurisdictionally deficient and subject to avoidance **only** with respect to nonnotified and nonappearing heirs. *Estate of Walker*, 10 Wn. App. 925, 521 P.2d 43 (1974).

b. Ellis did not breach a duty by failing to pursue claims against Wilbert or SCB where this was prohibited by court order.

Ellis could only pursue claims against Wilbert or pay or approve claims with court approval. CP 3033-4. The court over-ruled Shaw's

¹ Martin cites for the first time without explaining its relevance the holding of *Estate of Tuott*, 25 Wn. App. 259, 606 P.2d 706 (1980) which he misstates by confusing RCW 11.40.090 with 11.28.290.

objection to this limitation and consistently denied his motions to compel Ellis to investigate or pursue claims against Wilbert or to delay distributions pending resolution of Shaw's claims (CP 2574, 3022-9, §B. 6.9-13) and made this permanent when it exercised its power under RCW 11.48.130 to approve the sale to Shaw. §B.10. Martin cites a guardianship case *Le Fevre's Guardianship*, 9 Wn.2d 145, 157 (1941) which stands for the principle that a trustee can be strictly liable for actual damage resulting if he invests or commingles funds in his own name even if acting in good faith. *Le Fevre's* has absolutely no relevance to this case. Absent fault, a personal representative is not liable for loss to the estate or for uncollected debts. RCW 11.48.030, 080. The probate court also expressly provided that Ellis was not liable for the omissions and conduct of "any prior administrator, their agents or attorneys." CP 3034, ¶9. CP 3034, ¶9; see RCW 11.96A.020. The court and the PR both have a duty to guard against potential waste or loss to the estate. *Jones*, 152 Wn.2d at 19; *Estate of Langill*, 117 Wn. 268, 269, 201 P.28 (1921) (in appointing an administrator the court has a duty to guard an estate against possible waste and loss.) An administrator should not bring an action unless the action will result in benefit to the Estate (*Karterman v. Nat'l Surety Co.*, 128 Wn.182, 222 P.224 (1924)) and should avoid "continuous litigation with resultant loss to the estate." *Estate of Thomas*, 167 Wn. 127, 133, 8 P.2d 963 (1932). After 12 years pursuit, the Estate's claims against Wilbert

were speculative. CP 3266, 3419-22. There was no breach of duty not to recommend costly investigation and litigation faced with an uncertain outcome *even if* Ellis had that duty. Judge Costello who was more familiar with Cruikshank's allegations that were repeatedly before the court from 1994 to 2005 relieved her of the duty. See §B.1-5; CP 3033-4.

Martin claims that Ellis failed to account for Wilbert's expenses for the period 1998-2004. This is groundless. Stanton's declaration, filed in 2004 and in 2007, set out his expenses. CP 2316; 3642. Ellis was not responsible for, or required to investigate, Wilbert's conduct. If the expenses were incorrect this forms part of Martin's claim against Wilbert. Again, the probate court **refused** to require supplementation when Shaw claimed Stanton's declaration was inadequate. *See also* ¶7.a. *supra*.

Ellis had no grounds to ask for court approval for action against SCB or to adjust the fee awards because, *inter alia*, Shaw failed to disclose his allegations until June 2007 when it was too late to re-open earlier distributions. *Tucker*, 20 Wn.2d at 800. Even if alerted earlier, the allegations were pure speculation, probably time-barred or subject to res judicata or estoppel. §B.13. Ellis was **under a duty** not to engage in unnecessary litigation and to avoid waste. *Langill*, 117 Wn. at 269; RCW 11.28.250; *Thomas*, 167 Wn. at 133-134. It would have been wrong to recommend such an action lacking probable benefit to the Estate. Because the court **denied** relief in 2007, Martin can show neither **breach of duty**

nor proximately caused **damage**.

c. Ellis was under no duty to recommend payment of doubtful claims and the court denied the Delguzzi Estate's claims.

The same arguments apply to claims that Ellis should have paid claims regarding Delguzzi's non-probate assets pending resolution of the pre-existing litigation. The court had ample power to adjudicate matters involving nonprobate assets. RCW 11.96A.020(a). It was her duty to protect the estate from invalid and doubtful claims (*Estate of Shea*, 69 Wn.2d 899, 901, 421 P.2d 356 (1966)) and to conserve estate assets for the benefit of heirs **and** creditors. *Estate of Livingston*, 7 Wn. App. 841, 844, 502 P.2d 1247 (1972). Martin cannot show a breach of duty where court approval was required **and** the court denied relief when Shaw complained of her conduct **and** denied his claims. CP 3033., §B.3.4, 9-13. A shareholder is only entitled to distribution after dissolution if the corporation is solvent and its liabilities paid (RCW 23B.06.400(2)) but Shaw failed to produce sufficient evidence to convince Ellis or the court that his claim to a one-third interest in the Cedarwood deed of trust had merit on at least *four* occasions. §B.9.

d. There was no breach in obeying court orders to pay creditors.

The court affirmed its prior fee awards. §B.5.6. There was no breach of duty in asking the court on notice to approve distributions. The payments were correctly calculated; even if wrong, Ellis's interpretation

was reasonable. §B.2.9. Judge Costello, who made the original orders approved the payments when Shaw complained they were miscalculated. §B.13. A speculative allegation that she failed to review court orders cannot defeat summary judgment. *Cf.* CP 4257, ¶8,

e. Martin cannot establish proximately caused damage.

A claimant must demonstrate enough certainty to provide a reasonable basis for establishing damages. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997). Proximate cause must be based on more than speculation and conjecture. *Id.*; *Johanson v. King Cy.*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941) (recovery cannot be based on what “might have happened.”) The “but for” element of causation requires that Martin show that an injury would not have occurred without the negligent act; without a showing that he would have achieved a better result there is no prima facie case. *Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 869-870, 147 P.3d 600 (2006). Causation may be determined as a matter of law where only one conclusion is reasonable from the evidence presented. *Briggs*, 120 Wn. App. at 323. Martin’s claim for damage, however, rests on **pure speculation**. For example, he cannot prove that Ellis would have been permitted by the court to pursue or pay claims or do any other matters he complains of **where the court denied Shaw this relief both before and during her administration**. §B.1-13. It is purely speculative to assume a recovery had the court let Ellis pursue claims; it is

equally likely that remaining assets would have been used up in costs or in a judgment for fees. Shaw would only benefit if a recovery exceeded remaining creditors' awards. Moreover, Shaw is **continuing** to litigate claims against Wilbert's estate. Equally, Martin fails to show damage as to all other claims, such as alleged failure to make an accounting. As to Shaw's 2007 Objections, there was only \$15,643.46 left; the interim distributions were no longer subject to attack. CP 3408-9, 3571-2; *Tucker*, 20 Wn.2d at 800. All claims that were or **could have been** made before the interim orders were no longer subject to review. *Krueger's*, 11 Wn.2d at 351; *see also, Delguzzi*, slip op. at 21-25, 30.

f. The claim of failure to marshal assets fails in the absence of evidence that Finca Delguzzi or Surfside were recoverable.

Martin's claim that Ellis's search for Finca Delguzzi farm was inadequate fails for several reasons. Ellis was directed to collect "tangible, known, assets." CP 3033. She had a duty to conserve assets and not to waste money in fruitless investigation. *Jones*, 152 Wn.2d at 19. When unable to find property in Costa Rica, she reasonably concluded that Finca Delguzzi S.A. no longer owned land, that it was sold or foreclosed for unpaid taxes and that further investigation was wasteful. CP 4256-7, ¶¶5-6, 4287-4288, 41:2-42:7; *see also*, CP 2576, 2583, 4255-7, ¶¶3, 6; 4276-7, 27:7-22. Cruikshank was also unable to locate the property. CP 3171, 3258-9, 3263, 3398. Second, Martin admits in his brief at 23 that **Finca Delguzzi forms part of his claim against Wilbert**; therefore, any duty to

trace the asset ceased in 2006 when he bought that claim. Third, Martin's claim is wholly speculative because **he has not produced any evidence that the property was both traceable and recoverable by the Estate in 2005-7**. On the contrary, Cruikshank himself could not find it. CP 3171, 3258-9, 3263, 3398. In sum, this claim is too speculative to avoid dismissal. The same considerations apply to Surfside properties which Shaw first alleged was missing in 2007. In the absence of evidence that Ellis could have recovered these properties in 2005-7, allegations as to Surfside must also fail. No reasonable person would find a breach of duty where Shaw failed to draw Ellis's attention to Surfside until he raised this at closing **and** the court ruled that this did not warrant delaying closure.

g. Martin's other claims are equally unmeritorious.

As well as being denied by the probate court, Martin's other claims were equally unmeritorious. His claim that Ellis failed to provide access to records is patently untrue. §B.8.9. He fails to offer legal authority that Ellis's refusal to waive the former administrator's attorney-client privilege was wrong; this argument too is waived. *Id.*; *Cowiche*, 118 Wn.2d at 809. (Martin confuses this issue with Ellis's discovery objection in the current action and an allegation that Ellis sought legal advice from other counsel.)

8. There was no conflict of interest or damage from alleged bias.

Martin cites no legal authority for a conclusory allegation that Ellis had a conflict of interest due to her nomination by Wilbert's attorneys and

the court appointed her over this objection. §B.5. Ellis owed a duty to preserve the Estate for the benefit of the Estate's beneficiary **and** its creditors. *Livingston*, 7 Wn. App. at 844; RCW 11.48.010. It was not wrong for Ellis to consult creditors' counsel as well as Cruikshank especially where the creditors' court awards exceed available funds. CP 3030, 3043-61, 3195-3201, 4257-8, 4279-80; §B.2.13. Martin cannot raise an issue of fact because Ellis, who researched her duties, made jokes. CP 4257-8, ¶8. Ellis must be judged by her **actions** (made on notice with court approval) not offhand remarks which stem directly from Cruikshank's repeated accusations of breach of duty. CP 4255, ¶3; §B.9-13. Evidence of bias is not evidence of breach of duty or of proximately caused damage. A motion for dismissal is not defeated by a "scintilla" or "merely colorable" evidence. *Herron*, 108 Wn.2d at 170.

9. Judicial estoppel bars Martin from asserting that Ellis erred by asking the court to approve the sale of the Estate's claim.

While the appellate courts review summary judgment de novo, they review a trial court's application of judicial estoppel to the facts for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 541, 160 P.3d 13 (2007); *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). Martin has not presented any legal argument in support of this assigned error which the court should, therefore, disregard. *Kagele*, 40 Wn. App. at 196. There are three core elements of judicial estoppel: (1) whether a party's later position is clearly inconsistent with its

earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Arkison*, 160 Wn.2d at 538. Shaw's conduct in successfully moving for an order in June 2006 to purchase claims against Wilbert and then filing suit to pursue those claims is clearly inconsistent with Martin's assertion that Ellis should have done so. §B.10. Shaw did not object in principle in December 2005. Apart from briefly objecting in his Petition for Instructions, Shaw consistently pursued a course to obtain approval of the sale. *Id.* Shaw and Martin gained an unfair advantage because they are litigating the claim against Wilbert while suing Ellis for having sold them the claim.

10. The court's decisions to admit evidence and award sanctions are reviewable only for an abuse of discretion.

A court's decisions to admit evidence (*Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 76-77, 684 P.2d 692 (1984)), to exclude for alleged discovery violations (*Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)) and to award sanctions under RCW 4.84.185 or CR 11 are only reviewable for abuse of discretion. *Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). There is an abuse of discretion when its exercise is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

a. There were no grounds to exclude documents.

The superior court did not abuse its discretion by denying Martin's sanctions motion where Martin failed to show that evidence was wrongly withheld **and** failed to show resulting prejudice. §B.16. A trial court is not required to impose sanctions. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 82 P.3d 1199 (2004). Even if warranted the court is required to impose "the least severe sanction that will be adequate to serve the purpose of the particular sanction." *Fisons*, 122 Wn.2d at 355-356. The court has broad discretion as to the choice of sanctions for a discovery violation. *Burnet*, 131 Wn.2d at 497-8. Where plaintiff has not shown significant prejudice exclusion of testimony is too severe. *Id.*

b. The trial court did not abuse its discretion by admitting declarations authenticating documents.

Ellis's and Moore's declarations each complied with the requirements of RCW 9A.72.085. Documents exhibited to a motion for summary judgment are more appropriately challenged under the authenticity requirements or hearsay rules, not lack of personal knowledge. *Int'l Ultimate v. St. Paul Fire & Marine*, 122 Wn. App. 736, 745, 87 P.3d 774 (2004) rev. den'd 153 Wn.2d 1016, 101 P.3d 109 (2005). If an exhibit cited in support of summary judgment is properly authenticated, then it is irrelevant whether the authenticating attorney has personal knowledge. *Id.* at 746. "Because the proponent seeking to admit a document must make

only a prima facie showing of authenticity, [CR 56]’s requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact finder to find in favor of authenticity.” *Id.* ER 901 does not limit the type of evidence to authenticate a document; it merely requires sufficient evidence to support a finding that the document is what its proponent claims it to be. *Id.* This can include distinctive characteristics such as “appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances” (ER 901(b)(1),(b)(4); and may be circumstantial *State v. Payne*, 117 Wn. App. 99, 109, 69 P.3d 889 (2003), rev. den’d, 150 Wn.2d 1028, 82 P.3d 242 (2004); ER 901(b)(4). Moore and Ellis filed supplemental declarations under CR 56(e) to provide additional information authenticating the documents. CP 266-1008, 1078-9. The court has discretion to accept affidavits filed anytime before issuing a final summary judgment order. *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987); CR 6(b). Martin did **not** dispute the authenticity of the documents² that consist primarily of pleadings from this action and the probate action or documents produced by Martin. A few are from the related action against SCB, or transcripts from hearings or

² Without reason or specificity, Martin states for the first time that he challenges authenticity. The court should consider only evidence and issues called to the attention of the trial court. RAP 9.12; RAP 2.5; *Van Dinter*, 157 Wn.2d at 333-34. The court should ignore this conclusory statement.

depositions attended by Cruikshank; these provide background and are not key to Ellis's motions. The documents contain indicia of reliability, namely, the usual characteristics of pleadings, the signatures and names of the attorneys, court stamps, and stamps of legal firms. The trial court did not err in denying Martin's motion.

11. The superior court properly exercised its discretion by granting sanctions under CR 11 and RCW 4.84.185.

As to the fee award, other than arguing the claims had merit, Martin and Cruikshank present no argument or legal authority in support of their other assignments of error and issues; the court should therefore disregard these. *Kagele*, 40 Wn. App. at 196. They have never disputed the amount of the award. The filing of a lawsuit is subject to CR 11 sanctions where pleadings are interposed for an improper purpose (*Madden v. Foley*, 83 Wn. App. 385, 392, 922 P.2d 1364 (1996)) or where (1) the action was not well grounded in fact, (2) was not warranted by existing law, and (3) the attorney signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the action. *Manteufel v. SAFECO Ins. Co. of Am.*, 117 Wn. App. 168, 176, 68 P.3d 1093 (2003) rev. den'd, 150 Wn.2d 1021 (2003). The court's findings of fact and legal conclusions amply identified and supported the offending behavior and Martin cites no authority that greater detail or specificity is required than that contained in the order. CP 1457-8, ¶1.

Contrary to [A's] claim, the order granting [the] motion for attorney fees and costs contained findings, albeit stated as conclusions, reciting the complaint was frivolous and advanced without reasonable cause; the lawsuit could not be supported by rational argument on the law or facts; the lawsuit was not grounded in fact or warranted by existing law; and finally that counsel failed to conduct reasonable inquiry into the factual or legal basis of the action.

Escude v. King County Pub. Hosp. Dist., 117 Wn. App. 183, 193-195, 69 P.3d 895 (2003) (ruling that the court gave sufficient reasons for imposing sanctions under RCW 4.84.185 and CR 11); *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (the findings required under CR 11 are that the claim is not grounded in fact or law, that the attorney or party failed to make reasonable inquiry into the law or facts, or the filing was for an improper purpose); *Madden*, 83 Wn. App. at 392 (findings sufficient where order indicated the filing was baseless). “The policies underlying CR 11 are best served where the rule is interpreted broadly so a court can fashion a penalty that deters litigation abuses most efficiently and effectively.” *Id.* Once reasonable inquiry would reveal that an action should be dismissed, any later pleading is a violation of CR 11. *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 110, 780 P.2d 853 (1989). Ellis’s Answer and discovery answers warned appellants that the lawsuit was frivolous. CP 1289, 1314, 1319. CR 11 imposes an **objective** standard on all Washington attorneys to diligently research the law before filing any document. *Watson v. Maier*, 64 Wn. App. 889, 897,

827 P.2d 311 (1992) rev. den'd 120 Wn.2d 1015, 844 P.2d 436 (1992).

The issue is whether a reasonable attorney or party would believe the action has merit. *Id.* at 897. Sanctions in an amount equal to the amount expended in opposing filings violating CR 11 are appropriate. CR 11; *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d 829, amended 57 Wn. App. 107 (1990), aff'd 119 Wn.2d 210, 829 P.2d 1099 (1992). CR 11 permits the court to sanction a represented party (emphasis added):

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, **may impose upon the person who signed it, a represented party, or both, an appropriate sanction**, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

An award under RCW 4.84.185 was sought against Martin. RCW 4.84.185 does not require a finding of lack of bad faith. “The standard of review for attorney fees in frivolous lawsuits is abuse of discretion, examining the trial court’s decision **whether a case, taken as a whole, is advanced without reasonable cause.**” *Entm’t Indus. Coalition v. Health Dep’t*, 153 Wn.2d 657, 666, 105 P.3d 985 (2005); *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004) (clear language of statute permits reasonable attorney fees “upon written findings that the action is frivolous in its entirety and was advanced without reasonable cause.”) Notably, in *Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998), the Supreme Court distinguished between “a merely frivolous petition”

and one motivated by bad faith in addressing whether a fee award could be made under RCW 4.84.185 **in a proceeding under RCW 29.82.023** and concluded that a bad faith element was required in a recall suit because of the nature of the action and RCW 29.82's ambiguous cost provision. RCW 4.84.185's use of the word "reasonable" indicates that the standard is objective. Ellis's sanctions motion was based on appellants' conduct throughout this action. The lawsuit was devoid of **any** legal basis where, *inter alia*, the elements of Martin's claims were absent **and** they were barred by collateral estoppel. An award may be made under RCW 4.84.185 where the fees are paid by insurers. *Koch v. Mut. of Enumclaw*, 108 Wn. App. 500, 511, 42 P.3d 974 (2001). A contrary holding would violate the collateral source rule. *Wheeler v. Cath. Arch.*, 124 Wn.2d 634, 640, 880 P.2d 29 (1994). Further, Ellis's insurers have a subrogated right to the fees. *Touchet Valley Grain Growers, Inc. v. OPP & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 341, 831 P.2d 724 (1992). Absent argument or authority, the court should disregard a theory that reliance on counsel is an excuse. *Cowiche*, 118 Wn.2d at 809. RCW 4.84.185 plainly permits an award against a party filing a frivolous action without limiting it to a *pro se* party or a party acting against counsel's advice. The court may not rewrite this plain statute even if it thinks "the legislature intended something else." *Det. of Martin*, 163 Wn.2d 501, 508-509, 182 P.3d 951

(2008). It is unlikely that court inquiry into attorney-client communications from a party with a pending right of appeal was intended. If Martin received poor advice, his recourse lies elsewhere. The point is not well made when he is forcing Ellis to incur fees on appeal. The decision to award fees under RCW 4.84.185 is at the trial court's discretion and will not be disturbed absent clear showing of abuse. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 339-40, 798 P.2d 1155 (1990). Appellants failed to show that the award was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons; it should be upheld.

12. Ellis should be awarded her attorney fees on appeal.

Ellis prays for fees on appeal under RAP 18.1. The claim is based on RCW 4.84.185, CR 11, and the case law cited above. Martin's lawsuit and appeal were both frivolous because, *inter alia*, he fails to dispute that his claim is barred by collateral estoppel, or provide evidence of a breach of duty or of proximately-caused damage. Martin's method of prosecuting the claim in the trial court and on appeal further increased Ellis's fees. Ellis was forced to incur considerable legal expense in defending this action, and should be awarded her attorney fees and costs on appeal.

E. CONCLUSION

For the reasons stated, this court should deny Martin's and Cruikshank's appeal, affirm the trial court's decisions, and award Ms.

Ellis her reasonable fees for defending this frivolous action on appeal pursuant to CR 11 and RCW 4.84.185.

RESPECTFULLY SUBMITTED this 15th day of September, 2009.

LEE SMART, P.S., INC.

By: Rosemary J. Moore
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Rosemary J. Moore, WSBA No. 28650
Of Attorneys for Respondent/Cross-Appellants

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September 18, 2009, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. Charles M. Cruikshank, III
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VIA LEGAL MESSENGER

Mr. John J. Tollefsen
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DATED this 18th day of September, 2009 at Seattle, Washington.



Jennifer A. Riley, Legal Assistant