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No. 63392-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VANCE VOLLSTEDT, as Personal Representative of the ESTATE OF
MARIE VOLLSTEDT; and VOLLSTEDT FAMILY LLC,

Appellants,

and

JELENA NIKIC, as Trustee of the MARIE VOLLSTEDT
IRREVOCABLE TRUST; BRUCE MOEN, as trustee of the FRED
VOLLSTEDT FAMILY TRUST,

Plaintiffs,

v.

DEYONNE TEGMAN, as Personal Representative of the ESTATE OF
CHARLES TED VOLLSTEDT,

Respondent.

OPENING BRIEF OF APPELLANTS

RYAN, SWANSON & CLEVELAND PLLC
Robert J. Curran
Lance Losey
Kari Brotherton
1201 Third Ave, Ste 3400
Seattle, Washington 98101-3034
(206) 464-4224

Attorneys for Appellants

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I. INTRODUCTION

This appeal arises from the dismissal at summary judgment of the claims asserted by the Estate of Marie Vollstedt and the Vollstedt Family LLC based upon 20 years of self-dealing and breaches of fiduciary duties by Marie's son, Charles "Ted" Vollstedt.¹ Ted died by his own hand in April, 2005. Marie died at age 90 in April, 2007, just under two years after Ted's death.

Marie's claims and those of the LLC were dismissed on statute of limitations grounds. Based upon oral comments from the bench, Judge Washington of King County Superior Court concluded that Marie should have inquired about her investments, and thereby discovered her claims more than three years prior to her death. RP 40:25-41:6 and 44:10-14. No explanation was given why the LLC's claims were dismissed other than the rejection of the concept that the statute of limitations was tolled while Ted served as sole manager of the LLC. RP 43:9-44:3.

Whether a plaintiff exercised due diligence, and knew or should have known of her claims are questions of fact which cannot be decided at summary judgment unless reasonable minds cannot differ. The documentary record reveals a complicated and convoluted morass

¹ Vollstedt family members are referred to by both sides in this litigation by their first names to avoid confusion. No disrespect is intended.

of transactions and investments in which Ted invested his mother's funds to his benefit and her detriment. There is no evidence of actual knowledge, and no evidence which would have put Marie to inquiry regarding her claims. In addition, the statute of limitations for the LLC was tolled while Ted served as its manager under the adverse domination doctrine. The claims of both Marie and the LLC were tolled by the continuous representation rule, and Ted's fraudulent concealment of the claims against him. Accordingly, the trial court's granting of summary judgment was in error and should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order Granting Defendant's Motion for Partial Summary Judgment on April 15, 2009 based upon the statute of limitations and laches.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in concluding as a matter of law that Marie Vollstedt should have discovered her claims for breach of fiduciary duty against Charles "Ted" Vollstedt more than three years prior to her death at age 90? (Assignment of Error No. 1).

2. Whether the trial court erred in concluding as a matter of law that the claims of the Vollstedt Family LLC for breach of fiduciary duty should have been discovered more than three years prior to the death

of Marie Vollstedt even though Marie was not a member of the LLC?
(Assignment of Error No. 1).

3. Whether there are genuine issues of material fact which preclude summary judgment based upon the statute of limitations?
(Assignment of Error No. 1).

4. Whether the claims of the LLC against Ted were tolled while Ted served as its manager under the doctrine of adverse domination or related equitable principles? (Assignment of Error No. 1).

5. Whether the continuous representation rule tolled the statute of limitations while Ted continued to act as Marie Vollstedt's fiduciary and as manager of the LLC? (Assignment of Error No. 1).

6. Whether Ted fraudulently concealed the claims against him, thereby tolling the statute of limitations, by actively concealing the claims, and by failing to make full and frank disclosures of his self dealing and the profits earned thereby? (Assignment of Error No. 1).

IV. STATEMENT OF THE CASE

A. Factual Background

This case arises from an extended course of self dealing by Charles "Ted" Vollstedt while in a fiduciary or confidential relationship with his mother, Marie Vollstedt ("Marie"); two family trusts, the

Marie Vollstedt Irrevocable Trust (“MVIT”) and the Fred Vollstedt Family Trust (“FVFT”); and the Vollstedt Family LLC (“LLC”). Ted died by his own hand in April, 2005. Marie died just under two years later in April, 2007, at age 90. Both are represented in this action by their estates referred to as “CTV’s Estate” and “Marie’s Estate,” respectively.

Following Ted’s death, Marie found herself in financial difficulty and unable to pay a \$4,000 per month rent obligation Ted created for her. CP 2219 ¶5, CP 2732 ¶7. She retained attorney Alan Kane at K&L Gates who advised her for the first time that she had possible claims against Ted. CP 2803 ¶3. Marie then retained Ryan Swanson to investigate Ted’s investments on her behalf. CP 2732 ¶8. That investigation, which required that numerous documents be gathered from all the affected trusts and the LLC, required a number of months and resulted in the filing of this action. The core claims are breach of fiduciary duty, and the plaintiffs’ joint request for an accounting. CP 8-11.

1. Ted’s fiduciary and/or confidential relationship with Marie and the LLC

Ted served in a fiduciary or confidential relationship with Marie from the mid-1980’s until his death. He exercised control over

Vollstedt family assets,² corresponded with professional advisors on behalf of Marie and the family as a whole,³ and actively managed Marie's financial affairs.⁴ Ted provided investment and estate planning advice to Marie and arranged for Marie to invest in his businesses and real estate deals.⁵ Ted arranged for numerous loans from Marie, the trusts and the LLC to himself and his businesses (most notably East Teak Trading Group);⁶ retained attorneys to draft estate planning documents for Marie;⁷ arranged for the creation of the MVIT and the LLC and funded them using Marie's and FVFT's assets.⁸

Marie signed numerous documents at Ted's request, including promissory notes, deeds, and assignments.⁹ Ted was a signatory on bank accounts with Marie, held her stock in his investment account,¹⁰ and signed a tax return on her behalf. CP 2229-2232; CP 2040. Almost all of Marie's liquid assets were invested in Ted's business ventures.¹¹

² CP 180, 2024, 2045, 2059, 2065, 2083, 2128, 2142-2147, 2154-2155, 2811-2812.

³ CP 2045, 2059-2060, 2071-2072, 2111, 2114, 2149, 2153-2158, 2161-2165, 2167-2170.

⁴ CP 180 2149, 2168, 2178-2183, 2186, 2188, 2190-2196, 2718.

⁵ CP 180, 2169, 2207, 2209, 2285-2286, 2290, 2293-2297, 2303-2304, 2366-2374, 2454-2460, 2462, 2464, 2466-2474, 2483-2489.

⁶ CP 2293-2297, 2303-2304, 2366-2369, 2373, 2454-2460, 2462, 2517-2518, 2540-2559, 2594, 2598, 2607, 2623, 2624.

⁷ CP 2045, 2060, 2149, 2157-2158, 2811-2812.

⁸ CP 2045, 2071-2072, 2083, 2108-2109, 2111, 2124-2125, 2127-2128, 2174, 2394-2399.

⁹ CP 2268-2273, 2550-2511, 2553, 2661, 2665, 2667, 2646-2648, 2394-2399.

¹⁰ Marie represented on her tax return and supporting work papers that the Pan Am stock sold in Ted's EF Hutton investment account was her stock. See CP 2234-2241.

¹¹ CP 1883 ¶9, CP 1888-1889 ¶30

Every witness with knowledge of Ted and Marie's relationship testified that Marie trusted Ted unequivocally.¹²

Ted served as the sole manager of the LLC from its creation in 1997 until his death. CP 2083. Thereafter he was succeeded as manager by his brother Vance. CP 2012. Marie never served as manager and did not personally own an interest in the LLC.¹³

2. Ted's self-dealing and breach of his fiduciary/confidential duties to Marie

Beginning in the 1980's, Ted began investing his mother's funds, and later those of the trusts and the LLC, in his business ventures. A sampling of the more significant transactions includes:

a. *Marie's 108th Street Property in Bellevue*

The Vollstedt family home, where all three sons were raised, was located on an oversized lot on 108th Street in Bellevue. The property was the single most valuable asset Marie held in her name.¹⁴ In 1988, the property was subdivided into three lots with the home on lot 3. CP 2248-2249. In July of 1988, Ted entered into a joint venture to develop lots 1 and 2. CP 2253-2255. Although she owned all three lots, Marie was not a part of the joint venture.

¹² CP 3089 (122:17-23), CP 3128 (32:16-17), CP 3133 (58:22-59:1), CP 2814 ¶3.

¹³ The two members of the LLC were the MVIT and the FVFT. CP 2105, 2108-2109.

¹⁴ Marie's personal financial statement prepared as of 12/31/84 details the value of her assets held at that time, including the 108th Property. CP 2245-2246.

In December 1988, Marie signed two sets of deeds for the lots: one set transferred ownership to Ted for “valuable consideration,” the other “for love and affection.” CP 2268-2273. Ted filed the “love and affection” deeds for all three lots, choosing to claim each as a gift. CP 2268-2270. The deeds for the lots 1 and 2 were filed shortly before Ted sold each lot. CP 2275-2276. The deed for the home on lot 3 was filed in 1991 shortly before Ted encumbered the property to secure a personal loan. CP 2278-2281. The home remains in CTV’s Estate today.

According to Marie’s 1988 tax return, the 108th Street properties were transferred as part of a tax free exchange. CP 1884 ¶13, CP 2283. Ted also represented that he acquired the property by exchange; yet, there is no evidence a tax-free exchange actually occurred. CP 2285; CP 1884 ¶12. The three lots were transferred by gift deeds filed long after the timelines for a § 1031 exchange expired; Marie was never on title to the property allegedly exchanged; and no documents evidencing a § 1031 exchange have been produced. CP 1884 ¶12, CP 2000 ¶5.

b. East Teak Trading Group

From 1988 to 2004, Ted invested Marie’s funds, and later the funds of the two trusts and the LLC, in East Teak Trading Group, a company owned by Ted. Most of these investments were treated as

loans by Ted or East Teak. Almost all the loans were unsecured, and often were rolled into new loans rather than repaid at maturity. CP 1888-1889 ¶¶ 30 and 32, CP 2550-2551, 2553. Marie also wrote checks to Ted which he deposited in East Teak accounts. CP 2450-2451, 2455-2460. Marie's funds were used to cover payroll and various cash shortages at East Teak. CP 3146 (76:13-77:15). In July 1993, Ted arranged for Marie to purchase a container of teak entering through customs for \$43,669 for the benefit of East Teak. CP 2462.

From 1988 to 2004, Marie put more money into East Teak than Ted. CP 1888 ¶27, CP 1909. The rate of borrowing from Marie only slowed when Ted was able to borrow funds from the LLC and the trusts. CP 1888 ¶29. Steve Roberts, the plaintiffs' forensic accounting expert, estimates that \$3,826,423 in profits are attributable to loans made by Marie and the other plaintiffs. CP 1890 ¶37, CP 1895.

c. East Teak Lumber Co.

Marie owned shares in East Teak Lumber Co. ("ETLC"), a company through which Ted did business in the 1980's. CP 1887 ¶22, CP 2485-2489. ETLC redeemed Marie's 195 shares for \$144,295.26 in 1986. CP 2476-2477. At the same time, ETLC redeemed the shares of another insider at a higher price, and on more favorable terms. CP 2492-2493. In addition, Ted sold some of his shares establishing a

substantially higher fair market value. CP 1903, 1907.

There is no evidence Marie was informed she was receiving a lesser price, or less favorable terms. CP 1887 ¶23, CP 2001 ¶10. In addition, a merger of the East Teak entities was planned on the same day which would have made Marie's shares more valuable. CP 2500-2501. Again, no evidence has been produced that this was disclosed to Marie, or that she had access to documents which would have put her on notice of her claim.

d. 5914 Lake Washington Boulevard

Ted owned and maintained an office he rented to East Teak at 5914 Lake Washington Blvd. As part of his divorce, a lien was placed on the property for \$156,000. CP 2406, 2411. During a refinance, the bank required that the lien be satisfied. CP 2415-2416. After applying for a loan, Marie wrote Ted a check for \$156,000 on April 30, 1993. CP 2418-2420; CP 2422-2423. On May 5, 1993, a Commission Agreement was entered into for the sale of the property to Marie. CP 2425. Ted also represented to his ex-wife that he was satisfying her lien by "selling the property in Kirkland to my mother, Marie Vollstedt." CP 2427. For the next few months, Marie paid the mortgage payments for 5914 Lake Washington Blvd., received rent for the office space, and paid for improvements as if she were the owner.

CP 2371, 2429-2433. In October 1993, Marie paid off the loan from the original owners. CP 2435-2436

Ted never put Marie on title to the property. CP 2440-2442. Instead, he converted her investment to a note, which was later used to partially fund the MVIT pursuant to an estate plan Ted devised for Marie. CP 1886 ¶19, CP 2389-2390, 2394-2399. Ted sold the property in 1996 for \$416,000. CP 2444-2445. There is no evidence that the Ted ever disclosed the profit he received to Marie.

e. Brighton East

In 1993, Marie made a short term loan of \$200,000 to East Teak. CP 2517-2518. Rather than repay the loan, Ted sold a company known as “Brighton East” to Marie. CP 2464. Brighton East was then a failed teak furniture division which East Teak wanted to get off its books. CP 1887-1888 ¶25, CP 2523. Marie was 76 at the time of the sale and retired. CP 2245.

Ted later arranged for Marie to sell her shares at cost through an installment sale. CP 2467-2470. As a part of the sale, Marie was also required to retain slow moving inventory while it was sold. CP 2468, 2533. Marie eventually recouped her principal from the original “loan” several years later, still without profit. CP 2533.

There is no evidence that Ted disclosed to Marie that Brighton

East was a failed company, that East Teak needed to get it off its books, or that it was an imprudent investment for a retired person of her age.

3. Ted's Self-Dealing in Breach of his Fiduciary Duties as Manager of the LLC

Ted formed the Vollstedt Family LLC in 1996, and served as its manager until his death in 2005. CP 2083. The MVIT and the FVFT are the LLC's only members. CP 2105, 2108-2109. In 1997, Ted loaned \$80,000 in LLC funds to East Teak and \$59,500 to a personal business associate. CP 2587-2588, 2591-2592, 2594-2595. In 1998, Ted loaned another \$100,000 from the LLC to East Teak. CP 2598.

Ted also loaned \$215,000 from MVIT to East Teak. CP 2623-2624. The MVIT was to pay for its 50 percent interest in the LLC with these funds. CP 2109. As a result, the LLC had to borrow funds, directly and through Ted, to pay for the construction of a home on its real property. CP 2621-2622, 2577-2580.

4. There is no evidence Marie knew or should have known she had been harmed by Ted's actions

Although Marie was aware Ted was investing her funds, and aware of their confidential/fiduciary relationship, there is no evidence

in the record that Marie knew or should have known that she was being harmed by Ted's actions.¹⁵

First, there is no evidence of actual notice. Ted never disclosed his self dealing to Marie, he never repudiated his role as a fiduciary, and he never provided her with an accounting. There is also no evidence that the CPA's or attorneys Ted hired discussed Ted's fiduciary responsibilities with Marie, or that they informed her that she was being harmed or was at risk. CP 1889 ¶31.

Secondly, there is no evidence in the record of any event which would have caused Marie to inquire further about Ted's handling of her affairs. Again, there were no accountings, no disclosures, no warnings which should have triggered further inquiry. Even if she had inquired, Steve Roberts, the plaintiffs' forensic accounting expert, testified that Ted's financial transactions were so convoluted, and complicated, and documented by contradictory and misleading documents, that Marie could not have ascertained where she stood financially at any point in time. CP 1883 ¶9, CP 1889 ¶32.

¹⁵ The trial court appeared to conclude that knowledge of the relationship itself, or the fact that Marie had entrusted Ted with her funds was sufficient to put her to inquiry. See RP 27:5-22.

B. Prior Proceedings

Shortly after suit was filed, CTV's Estate filed two motions for summary judgment against Marie's Estate and the LLC: one to dismiss all claims for lack of proof; and later a motion based on the statute of limitations and laches. CP 39-59, 1799-1813. The first motion was continued pursuant to CR 56(f). Later, both motions were stricken by an Order Compelling Discovery entered by Judge Glenna Hall. Eventually, the motions were argued before Judge Chris Washington on August 29, 2008, but no decision was rendered.

At the close of discovery, plaintiffs moved for summary judgment to establish that Ted was a fiduciary to all four plaintiffs. Thereafter, CTV's Estate "renewed" its summary judgment motions. CP 3032-3052. At a hearing on April 3, 2009, Judge Washington granted the statute of limitations and laches motion, but not the original motion on its merits, and denied plaintiffs' motion without allowing oral argument. CP 3215-3219, RP 40:4-7.

Marie's Estate and the LLC moved for CR 54(b) certification of the dismissal order and for a stay of trial. Both motions were granted. CP 3220-3225. Notice of Appeal was timely filed and this Court accepted review by letter opinion dated May 28, 2009.

The four plaintiffs also filed a Motion for Discretionary Review of the order denying their motion for partial summary judgment. This was denied by Ruling dated June 4, 2009.

V. AUTHORITY

A. Standard of review.

An appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). All facts and inferences are considered in the light most favorable to the non-moving party. *Yakima Fruit & Cold Storage Co. v. Cent. Hearing & Plumbing Co.*, 81 Wn.2d 528, 530 503 P.2d 108 (1972). Summary judgment is proper when the pleadings, depositions, and admissions in the record, together with any affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). A trial court's resolution of questions of law is reviewed de novo. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). The credibility of witnesses may not be decided at summary judgment. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963). If a credibility issue exists, summary judgment must be denied. *Id.*

B. Ted was in a confidential and/or fiduciary relationship with his mother from the mid 1980's until his death, and served as a legal fiduciary in his position as manager of the LLC.¹⁶

The legal requirements of a confidential relationship are set forth in *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970):

A confidential or fiduciary relationship between two persons may exist either because of the nature of the relationship between the parties historically considered fiduciary in character; *e.g.*, trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient, attorney and client; or the confidential relationship between persons involved may exist in fact. As stated in Restatement of Restitution § 166 d. (1937):

A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation is particularly likely to exist where there is a family relationship.

Parentage alone does not necessarily create a confidential relationship between parent and child. There must be something more. However, the fact of parentage frequently furnishes the occasion for the existence of a confidential relationship. This is true when the parent may become dependent upon the child, either for support and maintenance, or for care or protection in business matters as well, or for both, and the child, by virtue of factors of personality and superior

¹⁶ The motion for summary judgment at issue did not concede that confidential or fiduciary relationships existed with Marie or the LLC for purposes of the statute of limitations analysis. CP 1800-1801. Separate motions for summary judgment addressing the existence of the fiduciary relationships were filed by both plaintiffs and defendants and were denied. However, since the issue was still arguably raised by the motion, it is addressed briefly here.

knowledge and the assumption of the role of adviser accepted by the parent, may acquire a status, *vis-à-vis* the parent, that will bring about the confidential relationship. (Citations omitted).

“Actual domination . . . need not be shown to prove a confidential relationship.” *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 391, 725 P.2d 644 (1986). “The essential elements are (1) that the parent reposes some special confidence in the child’s advice and (2) that the child purports to advise with his parent’s interests in mind.” *Id.* A confidential relationship exists whenever “one occupies towards another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other’s interest.” *Peterson v. Groves*, 111 Wn. App. 306, 312, 44 P.3d 894 (2002).

The law equates the abuse of a confidential relationship with breach of a fiduciary duty. 2 Dobbs, *Dobbs Law of Remedies* § 10.4 (1993); *McCutcheon*, 2 Wn. App. at 356; *Arneman v. Arneman*, 43 Wn.2d 787, 799, 264 P.2d 256 (1953) (one who stands in a “personal fiduciary relationship” to another is under a duty not to profit at their expense). Both may exist in fact regardless of the legal relationship of the parties. *McCutcheon*, 2 Wn. App. at 356; *Liebergessell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980).

A fiduciary relation . . . exists in all cases in which influence has been acquired and abused, in which

confidence has been reposed and betrayed. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal. If the confidence in fact exists, is reposed by the one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation.

Kausky v. Kosten, 27 Wn.2d 721, 732, 179 P.2d 950 (1947); *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433, 40 P.3d 1206 (2002) (a person need only occupy a relation to another which justifies the expectation her interests will be cared for).

A person in a fiduciary or confidential relation to another is under a duty to act for the benefit of the other person in all matters within the scope of the relationship.

[A]s a general rule, a person occupying a relation of trust or confidence to another is in equity bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes upon him, or which has a tendency to interfere with the discharge of such duty.

In re Carlson's Guardianship, 162 Wash. 20, 31-32, 297 P. 764 (1931).

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. ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Tucker v. Brown, 20 Wn.2d 740, 768, 150 P.2d 604 (1944) (quoting with “unqualified approval” Chief Judge Cardozo in *Meinhard v Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928)). Self-dealing by a fiduciary is a breach of the duty of loyalty. *Wilkins v. Lasater*, 46 Wn. App. 766, 775, 733 P.2d 221 (1987). Commingling of personal and trust funds or assets is a form of self-dealing. *In re Marriage of Petrie*, 105 Wn. App. 268, 19 P.3d 443 (2001). A fiduciary cannot loan trust funds to himself or to his business. *Smith v. Fitch*, 25 Wn.2d 619, 634, 171 P.2d 682 (1946); Fratcher, *Scott on Trusts* (4th Ed.) § 170.17. If he breaches this duty, he is chargeable with a *pro rata* share of the profits earned, as well as any losses incurred at the option of the beneficiaries. *Id.*; *Guardianship of Eisenberg*, 43 Wn. App. 761, 766, 719 P.2d 187 (1986).

The evidence in this case establishes that a confidential or fiduciary relationship existed between Ted and Marie from the mid-1980’s until Ted’s death in 2005. Ted provided ongoing investment and estate planning advice to Marie, and purported to act on behalf of Marie and the family as a whole. Ted retained attorneys to draft estate

planning documents for Marie, caused the MVIT and the LLC to be created, and arranged for the funding of those entities using Marie's assets and the assets of FVFT.¹⁷ Ted also arranged for Marie to invest most of her liquid assets in his businesses and in his real estate deals, either through equity purchases or loans which spanned two decades on an almost continuous basis.

Marie demonstrated her trust in Ted by placing her funds and assets in his hands and by signing almost any document he requested. For example, in 1988 Marie signed the two sets of deeds transferring the family home on 108th Street in Bellevue to Ted: one set for "love and affection" and one as a tax-free exchange. Ted filed the "love and affection" deeds a year or more later, after falsely representing that a tax free exchange had taken place. Marie evidently believed a tax free exchange occurred since she reported the transfer on her tax return. This is an obvious and telling instance of trust reposed, accepted and betrayed. *McCutcheon*, 2 Wn. App. at 356-57 (a confidential relation exists whenever one person has gained the confidence of the other and purports to act or advise in their interest); *Hetrick v. Smith*, 67 Wash. 664, 668, 122 P. 363 (1912) (plaintiff's trust in her fiduciary proven when she "placed her property interests unreservedly in his hands").

¹⁷ During her lifetime, Marie was principal beneficiary of the FVFT, which was established by the Last Will of Adele G. Vollstedt. CP 2017.

Ted's fiduciary obligations to the LLC and its members arise as a matter of law from his position as the LLC's sole manager. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 575, 161 P.3d 473 (2007) (in a manager managed LLC only those members serving as a manager owe a fiduciary duty); cf. *Bishop of Victoria Sole Corp. v. Corporate Business Park, LLC*, 138 Wn. App. 443, 456, 158 P.3d 1183 (2007), rev. denied 163 Wn.2d 1013 (2007) (LLC members owe a fiduciary duty to each other in a member managed LLC).

Although CTV's Estate disputes that a confidential or fiduciary relationship existed between Ted and Marie, there is no evidence which controverts the existence of the relationship. CTV's Estate has attempted to graft an incompetency or illiteracy requirement onto the elements of a confidential relationship, but this is clearly not required by *McCutcheon* or the numerous decisions which follow it. In the case of the LLC, a fiduciary relation exists as a matter of law and cannot credibly be disputed.

Based upon the law and the facts in evidence, this Court can rule as a matter of law that a confidential and/or fiduciary relation existed between Ted and Marie and Ted and the LLC. If the Court determines that material issues of fact exist, the evidence must still be interpreted in the manner most favorable to Marie and the LLC. Either

way, the statute of limitations issues must be analyzed as if Ted were a fiduciary to both Marie and the LLC.

C. Whether Marie and the LLC knew or should have known of their claims against Ted more than three years prior to Marie's death is an issue of fact, which cannot be decided at summary judgment.

The discovery rule “operates to toll the date of accrual [of a cause of action] until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim.” *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997), *rev. denied*, 132 Wn.2d 1008 (1997). Simply knowing that a person owes a duty to the claimant is not sufficient. *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998) (a cause of action governed by the discovery rule does not accrue until a party knows or should have known all “the essential elements of the cause of action—duty, breach, causation, and damages”).

The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm.

Green, 136 Wn.2d at 96 (emphasis added). “Unless the evidence is undisputed or unless reasonable minds cannot differ, what a person knew or should have known at a given time is a question of fact.” *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 170, 855 P.2d

680 (1993). “Whether the plaintiff has exercised due diligence under the discovery rule is a question of fact.” *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 102 P.3d 408 (2000).

This Court’s decision in *Gillespie v. Seattle-First National Bank*, 70 Wn. App. 150, is instructive. In *Gillespie*, family members owned several income producing properties in trust. The bank recommended a trade of one property for another of greater value. To make up the difference, the family borrowed additional funds. Two family members also purchased direct interests in the property which were managed by the bank.

The investment did poorly, suit was filed, and the bank sought dismissal based upon the statute of limitations. This Court held that the plaintiffs were entitled to rely upon the bank as their fiduciary, and the 30-year relationship between them. 70 Wn. App. at 170. Even when the new investment began to perform poorly, the plaintiffs, who were financially unsophisticated, were not put on notice of their claims. *Id.*

Before any such obligation of due diligence can arise, something first must happen to cause the one who justifiably relies upon his or her own expert reasonably to suspect that malpractice may have occurred.

70 Wn. App. at 171. The Court rejected the idea that the plaintiffs were on notice simply because they had access to complex information,

which if properly analyzed by an expert would have revealed their claims. *Id.*; see also, *Arneman*, 43 Wn.2d at 800 (plaintiff could not have discovered the fiduciary's fraud for it would have required an examination of his books); *August v. U.S. Bancorp*, 146 Wn. App. 328, 344-45, 190 P.3d 86 (2008), *rev. denied* 165 Wn.2d 1034 (2008) (reversing summary judgment in a fiduciary duty case because there were material issues of fact regarding what the plaintiff should have known); *cf. Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 626, 393 P.2d 287 (1964) (where misrepresentations and concealments deceive a party in a fraud case, it is immaterial that a proper investigation would have revealed the truth).

The same principles apply in this case. Ted dominated the financial life of his elderly mother, investing her funds and assets almost entirely in his personal business ventures or his businesses. Marie trusted him to do what was best for her, allowed her assets to be controlled by him, and by all accounts did what he asked her to do. Like the plaintiffs in *Gillespie* and *August*, she was financially unsophisticated.¹⁸ There is no evidence Marie knew or should have known that Ted's actions had harmed her financially, and no evidence

¹⁸CTV's Estate may argue that Marie was sophisticated, but the evidence interpreted in the manner most favorable to the non moving party establishes that Marie relied upon Ted due to her naiveté, and because he appeared to be a successful businessman. CP 3089 (122:17-23).

of a triggering event which would have put Marie to inquiry. *Gillespie*, 70 Wn. App. at 171. Accordingly, there is no legal or factual basis which would have allowed the trial court to decide that Marie should have known of her claims as a matter of law.

Finally, there is no connection between what Marie knew or should have known and the LLC. Thus, the trial court's oral ruling that all claims of the LLC predating Marie's death by three years is plainly in error. RP 40:25-41:6.

D. There are genuine issues of material fact arising from the transactions Marie entered into with Ted and his companies which preclude summary judgment.

In addition to the inherently factual nature of the discovery rule, there are genuine issues of material fact arising from the transactions Marie entered into with Ted which bar summary judgment.

1. The 108th Street Property

There are genuine issues of material fact arising from the alleged § 1031 exchange of Marie's 108th Street property in Bellevue for Ted's Maltby property. Marie evidently believed she received full value for the property through a § 1031 exchange because she represented she had on her tax return. CP 2283. Similarly, Ted represented that he acquired the 108th Street property by exchange with Marie, and for a time treated her as the owner of the exchanged

property by paying her rent. CP 1884 ¶13, CP 2285, 2308. However, it cannot be disputed that Ted filed three gift deeds to effect the transfers, on three separate occasions. CP 2268-2270. There is also a total absence of any documents in the record which actually evidence that a § 1031 exchange occurred, and the transfers took place long after the 180-day deadline for a § 1031 exchange had expired. CP 1884 ¶12.

There is no evidence that Marie ever knew a § 1031 exchange did not occur, that she did not receive title to Maltby in return, or that she did not receive full value for her property. There is also no evidence that would have put Marie to inquiry. For example, there is no evidence in the record that Ted ever disclosed that he filed the gift deeds, or revealed that the exchange never occurred.¹⁹ Furthermore, Ted's representations that he had acquired the property in an exchange, and his payment of rent to her, fraudulently concealed the true facts, tolling the statute. *Crisman*, 85 Wn. App. at 21. There are therefore genuine issues of material fact which preclude summary judgment dismissing this claim on the basis of the discovery rule and the statute

¹⁹ Marie cannot be charged with constructive notice of the recorded deeds unless "ordinary prudence and business judgment" required examination of the record. *Aberdeen Fed. Sav. & Loan Ass'n. v. Hanson*, 58 Wn. App. 773, 777, 794 P.2d 1322 (1990) (quoting *Irwin v. Holbrook*, 32 Wash. 349, 357, 73 P. 360 (1903)). Since Marie was never put on notice that an exchange did not occur as represented, there was no reason to research the state of title. See also, *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 626, 393 P.2d 287 (1964) (mere fact that an examination of the public records would have revealed the truth, does preclude a claim for fraud as the victim is under no duty to examine the records).

of limitations.

2. East Teak Trading Group

The documentary record of Ted's use of Marie's funds to keep East Teak Trading Group afloat is a confusing morass. The record is full of rolled over, restated and assigned loans, checks to Ted which he deposited in East Teak accounts, teak inventory purchases, payroll funding, loans converted to stock, and real property purchases for the benefit of East Teak.²⁰ As Mr. Roberts established in his declaration, it has taken forensic accountants hundreds of hours to unravel and understand the transactions. CP 1883 ¶9. Marie could not reasonably have known whether she had been benefited or harmed by these transactions at any point in time. Moreover, there is no evidence that Ted's self dealing was ever disclosed to Marie, or that she was provided with an accounting. Accordingly, interpreting all evidence and inferences to the benefit of Marie's Estate, it was error for the trial court to conclude that Marie knew or should have known of her claims more than three years prior to her death.

3. East Teak Lumber Co.

There is again no evidence Marie knew or should have known that Ted paid another insider more for her shares and on better terms

²⁰ See citations in the Statement of the Case above on pages 5, 7-8, and 10-11 referencing the documentary record that supports these actions.

than he paid to Marie, or that he himself received more for his shares than was paid to Marie. These were essentially private transactions where the information could not have been known unless disclosed by Ted. Since there is no evidence of disclosure, there is nothing that would have placed Marie on notice or have put her to inquiry.

4. 5914 Lake Washington Boulevard

The evidence, taken in the light most favorable to the non-moving party, demonstrates that Ted sold 5914 Lake Washington Blvd. to Marie for \$156,000 and her assumption of debt. A Commission Agreement was executed for the sale, and Ted represented to his ex-wife that he was selling the property to Marie. Marie paid the mortgage payments for 5914 Lake Washington Blvd. and received rent. She also paid off the loan from the original owners. However, Ted never transferred title to Marie. Instead, he converted her investment to note, which he used to partially fund the MVIT. When Ted sold the property for \$416,000, he retained all the profits.

Once again, there is no evidence that Marie knew Ted never transferred title to her, or that Ted had profited at her expense. Interpreting the evidence in the light most favorable to Marie, Ted's restructuring of the transaction as a loan and the assignment of the debt to an entity he created, concealed the cause of action from Marie, and

thus raises material issues of fact regarding what Marie knew or could have known.

5. Brighton East

In 1993, Marie made a short term loan of \$200,000 to East Teak. Instead of repaying the loan when it was due, Ted sold a failed furniture division of East Teak to Marie known as “Brighton East.” There is no evidence Marie was told Brighton East was a failed venture when it was sold to her, or that she was given any other information which would have placed her on notice of her claim. Although Marie eventually recovered her principal, she made no profit, entitling her to recover the profits prudent investment would have returned. *Guardianship of Eisenberg*, 43 Wn. App. 761, 766, 719 P.2d 187 (1986).

E. The testimony offered by CTV’s Estate failed to establish that there are no genuine issues of material fact, or that the estate is entitled to dismissal as a matter of law.

1. The opinion testimony of Gordon Smith is not based upon testimonial knowledge of the transactions, and raises issues of credibility which cannot be resolved at summary judgment.

The motion for summary judgment, in both its original and “renewed” form, rely heavily upon testimony of CPA Gordon Smith to establish that Marie entered into each transaction with full knowledge of facts, and with the benefit of independent professional advice. In

fact, Mr. Smith was Ted's longtime CPA, friend and business partner; he does not have testimonial knowledge of numerous transactions; and his opinions are neither persuasive, consistent or admissible as evidence. His testimony raises serious credibility and evidentiary issues which cannot be resolved at summary judgment. *Balise v. Underwood*, 62 Wn.2d at 200.

a. *Gordon Smith does not have testimonial knowledge of most of the transactions in question*

At summary judgment, CTV's Estate presented Gordon Smith as *the* person with testimonial knowledge of the transactions at issue.²¹ In fact, Mr. Smith's knowledge is much more limited, and in most cases acquired after the fact.

The earliest transaction at issue took place in 1986 when Marie's shares in East Teak Lumber Co. were redeemed. According to Mr. Smith, Marie "did very well" in the transaction, realizing a \$124,000 profit. CP 2907-2908 (339:25-340:1). However, Mr. Smith was not working for Marie when East Teak Lumber Company redeemed Marie's shares, he was not aware of the value of the company at the time, or the structure of the redemption and its terms,

²¹ For example, at page 7 of the Renewed Motion, Smith is quoted as stating, "all the deals all the way back to day one she wanted to do them[.]" CP 3038.

and he never discussed the transaction with Marie.²² Accordingly, he has no knowledge of the transaction which is admissible into evidence except perhaps the gain she reported on her historical tax returns. ER 602.

In regard to the loans Marie made to Ted, Mr. Smith only became aware of these transactions when he recapped her check register for tax preparation purposes. He was not a part of any discussions between Ted and Marie at the time of the transactions (CP 3084 (87:1-2)), he never discussed the loans with Marie, and he never discussed the inventory purchases which he characterized as loans. CP 3099 (181:3-9), CP 3107 (231:9-17, 232:5-23), CP 3112 (273:1-24). He was not aware that Marie would write checks to Ted that were deposited in East Teak accounts. CP 3084 (87:17-88:4). He did not review promissory notes, or amendments to ascertain their terms. CP 3103 (218:10-18), CP 3121-3122 (399:24-401:4), CP 3124-3125 (411:20-412:2). According to Mr. Smith, he “just noted that the principal and interest was received.” CP 3124 (410:5). He could not testify that he discussed the loans, the balances, the status, or the interest rates with Marie. CP 3100 (185:3-6).

²² CP 3092 (136:23-137:14), 3111 (271:11-16), 3122 (401:24-402:12, 403:18-20).

Gordon Smith was not aware that Ted sold Brighton East to Marie, or of her ownership of South Carolina property bordering East Teak's property. CP 3082 (73:9-23), CP 3098 (165:24-166:12). He did not assist Marie in the supposed § 1031 exchange of the 108th Street Property for Maltby, lot 1, and erroneously thought Ted had purchased the property from Marie. CP 3094 (149:7-14), CP 3105 (224:3-18). He mistakenly thought some of the loans to Ted were secured by the property for which money was transferred. CP 2000 ¶ 8, CP 2440-2442, CP 3080 (63:19-64:1), CP 3119 (329:3-5). He was not aware that Ted represented he was selling the office building at 5914 Lake Washington Blvd. to Marie and testified that this occurred without his knowledge. CP 3110 (252:9-253:3, 253:16-25).

As a result, Mr. Smith's testimonial knowledge is far more limited than his opinions, raising questions as to whether his after the fact knowledge or his opinions are admissible as evidence in support of a motion for summary judgment. CR 56 (supporting affidavits shall be based upon personal knowledge, and shall set forth facts as would be admissible in evidence); ER 602 (a lay witness may not testify to a matter unless he has personal knowledge); ER 701 (a lay witness may not offer opinion testimony which is not rationally based upon the perception of the witness).

b. Gordon Smith's testimony raises significant credibility issues

In addition to a lack of foundation proving personal knowledge, the testimony of Gordon Smith raises significant credibility issues which cannot be resolved at summary judgment. *Balise v. Underwood*, 62 Wn.2d at 200.

First, Mr. Smith was never simply Marie's personal accountant as claimed by CTV's Estate. By his own admission, Mr. Smith was Ted's personal accountant from 1975 until Ted's death in 2005. CP 1753-1754 ¶1. He also owned a large yacht with Ted (CP 2682), was a partner in both real estate (CP 2685-2687, 2689) and securities investments (CP 2691-2694, 2696, 2698-2699), and he communicated with Ted frequently regarding their joint investments. CP 2696, 2702-2711. Mr. Smith also admits he was a joint venturer with Ted in the development of Marie's property on 108th Street in Bellevue, giving him a direct pecuniary interest in that transaction. CP 2713-2714, 3095 (151:25-152:12). Accordingly, the assertion that Marie acted upon Mr. Smith's independent advice ignores his conflicts of interests as well as his direct, personal involvement in Ted's business transactions, and the development of Marie's property. *Id.*

Second, CTV's Estate relies upon Mr. Smith to prove Marie had full knowledge of the 108th Street transaction, and of the alleged § 1031 exchange. However, the undisputed fact that Ted filed three *gift* deeds to transfer the property trumps any belief Mr. Smith may have. These deeds are dispositive of the manner in which Ted transferred title to himself.²³ Moreover, Mr. Smith did not participate in the alleged § 1031 exchange, and could not testify that it actually occurred. At deposition, his recollection was that Ted purchased the 108th Street Property from Marie for \$150,000. CP 3094 (149:7-14), CP 3105 (224:3-18). When pressed and asked whether the transfer was a sale or a tax free exchange, he admitted, "[W]ell I don't know, all I know is Ted ended up with the property" CP 3105 (225:13-14).

At best, Mr. Smith has imprecise and generally erroneous knowledge of what actually occurred. His recollection, or lack thereof, cannot wipe away the simple fact that the 108th Street Property was transferred when Ted filed three separate gift deeds listing the consideration as "love and affection." Since Mr. Smith was unaware of this fact, his conversations with Marie could not have put her on notice

²³RCW 64.04.010 provides, "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed . . ."; *State ex rel. Wirt v. Superior Court for Spokane County*, 10 Wn.2d 362, 368, 116 P.2d 752 (1941) (statute of frauds provides the only method by which title to land may be transferred by voluntary act of the parties).

that the property transferred by gift. Indeed, if Mr. Smith fully explained the non-existent § 1031 exchange to Marie as he claims in his declaration (CP 1754 ¶3), his statements only served to further mislead Marie into the mistaken belief that Ted compensated her for the property.

Third, Mr. Smith's opinion that Marie was always fully aware of her financial affairs is contradicted by his own words and actions. For tax years 1989, 1990, and 1995, Mr. Smith prepared and filed requests for extensions citing Marie's "severe health problems" and hospitalizations. CP 2720, 2722, 2723. In April of 2004, Ted signed Marie's tax return with Mr. Smith signing as the preparer. CP 2243. Mr. Smith also strongly criticized Ted (after his death) for taking advantage of Marie in financial and legal matters.²⁴ Lest there be any doubt concerning the dynamics between Ted and Marie, Mr. Smith wrote the following to Marie's attorney Alan Kane after Ted's death:

Although she signed the documents, because of her advanced age and naiveté in these matters, she relied on her son who misrepresented they contained what she wanted. This amounts to fraud in the execution. CP 2226.

Mr. Smith confirmed Marie's reliance upon Ted at his deposition:

Q: Did Marie trust Ted?

²⁴ Gordon Smith prepared a synopsis after Ted's death, as verified in the accompanying affidavit, criticizing Ted's actions. CP 2738-2739.

A: Yes.

Q: Did she rely on him for business advice?

A: Only from her naïvety, she thought Ted was a successful businessman in her mind, and so he was obviously far better prepared to help, be the kind of financial leader of the family.

Q: How was she naïve?

A: She just didn't understand all of the complexities of the investments and the details of it. . .

CP 3089-3090 (122:17-123:1).

Finally, there is no evidence in the record that Mr. Smith (or anyone else) ever discussed Ted's obligations as a fiduciary with Marie, his conflicts of interest, his acts of breach, or the risks and the harm caused by Ted's self-dealing. There is nothing in Mr. Smith's declaration or his deposition testimony which indicates he put Marie on notice that she had a claim, or even a grievance, against Ted prior to Ted's death in 2005. As a result, Mr. Smith's testimony raises numerous questions concerning his credibility, but ultimately fails to establish that Marie discovered or should have discovered her claims against Ted prior to his death.

2. James Brown and Patti Bridges, the East Teak controllers relied upon by CTV's Estate, had no contact with Marie, and have limited knowledge regarding the loans she made to East Teak.

Next to Gordon Smith, CTV's Estate claims the two most knowledgeable people regarding loans from Marie to East Teak are James Brown and Patti Bridges, both of whom served as controllers at East Teak. However, James Brown never met or talked with Marie until Ted's funeral. CP 3136 (14:19-15:2). His knowledge regarding the loans or deposits from Marie came exclusively from Ted and amounted to little more than the fact that a check had been deposited. CP 3136 (15:17-23).

Patti Bridges also learned of Marie's loans to East Teak through Ted. CP 3145 (39:23-40:20). She provided the following overview of the company's need to borrow from Marie:

Once in awhile, the line of credit would be maxed out and there would be a container sitting on the dock, and it was just fast and easy.

CP 3144 (36:8-10).

[A]nd it wasn't always inventory, you know. It was, you know, we've got payroll coming up and the timing's going to be – it was always timing with a line of credit, I mean, because I reset the borrowing base every – every time we took a draw. So, sometimes the line of credit would be maxed out. . . . So, you know, we – I guess in that – in that context, Ted and I would discuss borrowing money from Marie if I knew we had

something big coming up, whether it – like I said, whether it was payroll or what have you.

CP 3146 (76:24-77:13). Ted controlled all requests for funds from Marie (CP 3147 (80:2-4), as well as the drafting and terms of the notes. CP 3148 (98:7-23). Ms. Bridges never questioned Ted's handling of the loans from Marie, even when he reduced the interest rate retroactively or East Teak failed to repay by the maturity date. CP 3151 (123:25-124:14, 124:22-125:3). Ms. Bridges also never discussed the terms of the loans with Marie. CP 3148 (98:24-99:2), CP 3152 (128:2-6).

As with the testimony of Gordon Smith, there is nothing in the testimony of James Brown or Patti Bridges which would establish that Marie knew or should have knows of her claims against Ted. They never communicated with her, or did anything which should have caused Marie to question the loans. Accordingly, their testimony does not establish entitlement to summary judgment under the statute of limitations as a matter of law.

3. The knowledge of Marie's sons, Vance or Jim, cannot cause Marie's claims or the claims of the LLC to accrue prior to Vance's appointment as personal representative of Marie's Estate or as manager of the LLC

CTV's Estate has argued that Marie's claims and the claims of the LLC accrued long ago because Vance or his brother Jim had

knowledge of the claims or knowledge which should have put them to inquiry. However, none of the claims at issue are owned by Vance or Jim in their own right, and their knowledge is therefore irrelevant. Even if it is assumed Vance had knowledge which might have put him to inquiry, this would only establish that the statutory periods began to run when Vance was appointed manager of the LLC and later the personal representative of Marie's Estate. Since suit was filed within two years of Ted's death, the claims are timely.

The case of *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008) is on point. In *Ives*, the personal representative of a deceased investor, Jerome Ives, brought suit against a securities dealer for securities violations which depleted Ives' liquid assets. Ives' son was appointed as the personal representative and filed suit. The defendant raised the statute of limitations as a defense. Although there was no evidence Ives knew or should have known of his claims, the defendant claimed the son and his wife were "aghast" when they learned of Ives' investments three years prior to his death. This was apparently offered as evidence that Ives knew or should have known of his claims.

The Court of Appeals, Division II, rejected this argument. The securities claims at issue accrued only when the aggrieved party or the plaintiff knows or should have known of his claims. Since Ives' son

and his daughter-in-law were not aggrieved parties when the claims arose, “their knowledge, if any, could not trigger accrual under the discovery rule.” 142 Wn. App. at 385. Even assuming that Ives’ son knew of his father’s claims before he was appointed personal representative, and his knowledge was attributable to his father’s estate, the claims were still timely because the complaint was filed within three years of his appointment. 142 Wn. App. at 386.

The same principles apply here. Vance and Jim do not own the claims at issue in their own right. They are not “aggrieved parties.” Vance is only a party in his capacity as personal representative of his mother’s estate. Even if his alleged knowledge or access to knowledge—which is disputed—is attributed to Marie’s Estate and the LLC as of the dates of his appointments, the claims are still timely since they were filed within three years of each appointment.

F. The claims of the LLC against Ted were tolled while Ted controlled the LLC as its manager.

Ted served as the sole manager of the LLC from its creation in 1997 until his death in 2005. While serving as manager, Ted loaned \$80,000 in LLC funds to East Teak in 1997, and \$100,000 in 1998. He also loaned \$59,500 to a personal business associate in 1997. There

was no business purpose for the LLC to make these loans. Each is a clear example of self dealing.

The majority of jurisdictions which have considered this issue refuse to apply the discovery rule to a entity whose knowledge of a claim is derived through the wrongdoer under the doctrine of adverse domination. Although no Washington appellate court appears to have expressly adopted this rule, it is compatible with the public policy underlying the discovery rule, fraudulent concealment, estoppel and equitable tolling. See *Resolution Trust Corp. v. Parker*, 865 F. Supp. 1143, 1151-52 (1994) (finding that the adverse domination doctrine is compatible with Pennsylvania's policies behind the discovery rule and fraudulent concealment) *and cases cited therein*. As explained by the Oregon Supreme Court:

The doctrine [of adverse domination] serves either to delay the accrual of a claim by a corporation against its directors and officers, or, in the alternative, to toll the running of the applicable statute of limitations. The doctrine is premised on the theory that it is impossible for the corporation to bring the action while it is controlled, or "dominated," by culpable officers and directors. Courts applying the doctrine of adverse domination have reasoned that corporations act only through their officers and directors, and those officers and directors cannot be expected to sue themselves or to initiate any action contrary to their own interests.

Federal Deposit Insurance Corp. v. Smith, 328 Or. 420, 426, 980 P.2d 141 (1999); *see generally* 3A Fletcher Cyclopedia § 1306.20.²⁵

This case presents a straightforward application of the doctrine. Ted controlled or “dominated” the LLC. The LLC obtained whatever knowledge it had of Ted’s actions through Ted, and he controlled the decision to file suit. Pursuant to the doctrine of adverse domination, the LLC’s claims did not accrue, or the statutory period was tolled, until Ted’s tenure as manager ended with his death. The trial court’s ruling dismissing all claims of the LLC which predated Marie’s death by three years was therefore in error as a matter of law. Moreover, there is no logical nexus between Marie’s death and accrual of the LLC’s claims under any possible analysis.

G. The statute of limitations was tolled by the continuous relationship rule while Ted remained in a continuing fiduciary relationship with Marie and the LLC.

Ted was in a fiduciary or confidential relationship with Marie continuously from the mid-1980’s until his death in 2005. Ted was also a legal fiduciary to the LLC in his position as manager from formation until his death. At no time did Ted cease to borrow money

²⁵ A similar result can be reached under an agency analysis. The LLC received its knowledge from, and acted through, Ted, its sole manager. Yet, a corporate agents’ knowledge will not be imputed to the corporation if his interests are adverse to the entity. *Hendricks v. Lake*, 12 Wn. App. 15, 528 P.2d 491 (1974); Restatement (Second) of Agency, § 279 at 608. Ted’s self dealing with LLC funds was adverse to the LLC. Therefore, the cause of action would not have accrued while Ted controlled the LLC and its ability to file suit.

from his mother and the family entities he controlled, and at no time did he repudiate his fiduciary relationships.

Under the “continuing relationship” doctrine, any claims against a fiduciary which arise during the relationship are tolled until the relationship is terminated. *See Janicki Logging v. Schwabe, Williamson*, 109 Wn. App. 655, 661-662, 37 P.3d 309 (2001) and cases cited therein. The doctrine has found expression within the case law in a variety of ways.

Under the common law, any claims against an express or resulting trust did not accrue until the trust was terminated or repudiated. *Gillespie v. Seattle-First Nat’l Bank*, 70 Wn. App at 158-159; *Arneman v. Arneman*, 43 Wn.2d at 797; *Tucker v. Brown*, 20 Wn.2d 740, 797, 150 P.2d 604 (1944); 54 C.J.S. “Limitations on Actions” § 184. Prior to repudiation of the trust, the beneficiary has no duty of due diligence or inquiry. *Tucker*, 20 Wn.2d at 774; *Skok v. Snyder*, 46 Wn. App. 836, 840, 733 P.2d 547 (1987); *accord, Frank v. Tavares*, 142 Cal.App.2d 683, 298 P.2d 887, 890 (1956) (there is no duty of inquiry until the fiduciary or confidential relationship is repudiated). In essence, the beneficiary is entitled to rely upon their fiduciary. To trigger the beneficiary’s duty of inquiry, repudiation of the trust by the fiduciary had to be “brought home” to the beneficiary in

an unambiguous manner: simply failing to account or perform some other duty was not sufficient. *Arneman*, 43 Wn.2d at 797; *Irwin v. Holbrook*, 26 Wash. 89, 96, 66 P. 116 (1901); *Skok*, 46 Wn. App. at 840 (mere failure or neglect to perform an accounting does not set the statute of limitations in motion).

As described in *Gillespie*,²⁶ RCW 11.96.060 superseded the common law for express trusts by adding a discovery rule; however, the summary judgment motion at issue expressly excludes the Vollstedt family trusts, leaving only Ted's actions as a fiduciary on behalf of his mother and the LLC at issue. Thus, the common law still applies. Since Ted never repudiated his fiduciary obligations, the statute was tolled until his death.

In its briefing below, CTV's Estate attempted to avoid the consequences of the continuing relationship doctrine by arguing it was limited to specific engagements. For support, it cited *Janicki*, which adopted the continuous representation rule (as opposed to the continuous *relationship* rule) for the first time in an attorney malpractice case. *Janicki*, 109 Wn. App. at 661; *see also Burns v. McClinton*, 135 Wn. App. 285, 297-98, 143 P.3d 630 (2008), *rev. denied* 161 Wn.2d 1005 (2007) (discussing continuous representation

²⁶ 70 Wn.2d at 160-61

rule as applied to an accountant). However, as both the *Janicki* and *Burns* decisions make clear, this Court was well aware of the preexisting continuous relationship rule and its application to fiduciary relationships not involving professional services. Nothing in the *Janicki* or *Burns* decisions purports to alter or replace the continuous relationship rule.

Ted served as his mother's fiduciary and as manager of the LLC on a continuous basis. His fiduciary responsibilities did not involve the provision of professional services and he was not engaged to perform specific tasks. At no time did he cease to act as a fiduciary or repudiate his positions. Accordingly, his fiduciary responsibilities are defined by the continuing relationship Ted had with Marie and the LLC, and not by any specific engagement. If CTV's Estate contests the continuous nature of the relationship, this merely raises an issue of fact. *Hermann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 17 Wn. App. 626, 630, 564 P.2d 817 (1977). It was therefore error for the trial court to dismiss the claims of Marie's Estate and the LLC as a matter of law.

H. The statute of limitations was tolled by Ted's fraudulent concealment of the claims against him.

Fraudulent concealment of a cause of action tolls the statute of limitations. *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 452,

6 P.3d 104 (2000). A defendant will not be allowed to use the statute of limitations as a defense when he has “by deception or any violation of duty towards plaintiff, caused him to subject his claim to the statutory bar . . .” *August v. U.S. Bancorp*, 146 Wn. App. 328, 190 P.3d 86 (2008) (quoting 53 C.J.S. “Limitations of Actions” § 25, pp. 963-64). “Silence or passive conduct by a defendant is not fraudulent unless the relationship of the parties is fiduciary; then, there is a duty on the defendant to disclose.” *August*, 146 Wn. App at 348.

Once a fiduciary relationship arises, the agent has a duty to act in the utmost good faith, to fully disclose all facts relating to his interest in and his actions involving the affected property, and to deliver all benefits derived from or inuring to the property from the breach to the principal.

Crisman, 85 Wn. App. at 22 (fraudulent concealment proven by breach of an affirmative duty to disclose); *see also*, *Cross v. Bonded Adjustment Bureau*, 48 Cal. App. 4th 266, 281, 55 Cal. Rptr. 2d 801 (1996) (where there is a duty to disclose, the disclosure must be full and complete; any delay in filing suit caused by a fiduciary’s failure to disclose tolls the statute of limitations); 51 Am. Jur. 2d Limitations of Actions § 187 (failure to adequately disclose facts giving rise to a plaintiff’s cause of action in a confidential or fiduciary relationship tolls the statute of limitations).

There is no evidence Ted ever issued an accounting to Marie or the LLC or that he disclosed his numerous acts of self dealing or the profits earned at the plaintiffs' expense. Ted also actively manipulated transactions to deceive Marie and conceal her claims against him. He habitually rolled over loans, and reconstituted transactions changing equity purchases into loans and loans into gifts or contributions to trusts.²⁷ As plaintiffs' forensic accounting expert testified, the record of Ted's financial manipulations is so convoluted and complex, Marie could not have discovered her claims even with a reasonable inquiry. CP 1883 ¶9. Accordingly, the statute of limitations was tolled both by Ted's affirmative concealment and his failure to account for his profits improperly earned in violation of his duty of loyalty as a fiduciary.

I. The laches defense is precluded by the discovery rule and Ted's unclean hands.

The doctrine of laches operates to equitably bar the right to sue where the plaintiff has slept on his rights. *Carstens v. Morck*, 159 Wash. 129, 136, 292 P. 262 (1930). However, a plaintiff "cannot be deemed guilty of laches while the fraud remains undiscovered, unless by the exercise of ordinary diligence he might sooner have discovered

²⁷ For examples, see earlier references to 108th Street property, 5914 Lake Washington Boulevard, East Teak Trading Group loans, and Brighton East.

it.” *Carstens*, 159 Wash. at 136 (quoting 27 C.J. 764). Thus, the discovery rule applies to laches as well as to the statute of limitations.

As set forth above, Marie never discovered the harm caused by Ted’s financial machinations until after his death, and could not have been expected to unravel his schemes using ordinary diligence. Indeed, it has taken forensic accounting experts hundreds of hours going through thousands of documents to try to make sense of Ted’s financial manipulations. CP 1883 ¶9.

Laches is also an equitable doctrine. To claim the benefit of laches, a party must act equitably. *Income Investors v. Shelton*, 3 Wn.2d 599, 601, 101 P.2d 973 (1940) (equitable remedies are not available to “a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by want of good faith . . .”). Ted never provided his mother or the LLC with an accounting, he never disclosed the profits he earned through self dealing, he repeatedly manipulated transactions to his benefit and Marie’s detriment, and he fraudulently concealed the claims against him. Conversely, Marie and the LLC had the right to rely upon Ted as their fiduciary, relax their guard, and to repose their trust in him. *Liebergessell*, 93 Wn.2d at 889; *Collins v. Nelson*, 193 Wash. 334, 345, 75 P.2d 570 (1938). Under these circumstances, the defense of laches

is not available to Ted, or to his Estate, which stands in his shoes vis-à-vis the claims at issue. *Tucker*, 20 Wn.2d at 769-70.²⁸

The Supreme Court in *Tucker* also noted that the interests of finding an equitable solution in a fiduciary dispute may override technical defenses which might otherwise be asserted:

It is not always that a trustee is permitted to urge, against the strict examination of his accounts, all of the rules of legal warfare governing in purely adversary proceedings. His duty to render an account not only mathematically correct, but equitably fair, and to submit his performances of the trust duties to examination, operates, often, to the advantage of the cestuis que trust, who might be, otherwise, considered to be irretrievably in default. This rule is also one largely of public policy.

Tucker, 20 Wn.2d at 771 (quoting *Pomeroy v. Noud*, 145 Mich.38, 108 N.W. 498, 502 (1906)). In the present case, all parties—including CTV's Estate—have requested an accounting. CP 10, 30. It would be truly unjust if CTV's Estate is allowed the benefits of an equitable accounting which excludes the profits Ted earned through unbridled self dealing over a period of decades at the expense of his mother and the LLC.

As with the statute of limitations, there are genuine issues of material fact regarding what Marie knew or should have known at any

²⁸ Ted's duty to account for his activities as a fiduciary transferred to his estate upon his death. *Tucker*, 20 Wn.2d at 771 (the personal representative of a deceased fiduciary must account for the period her decedent was in possession).

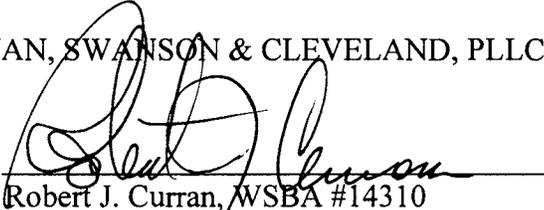
point in time. It was therefore error to dismiss the claims of Marie's Estate and the LLC at summary judgment on grounds of laches.

VI. CONCLUSION

For the reasons stated above, this Court should reverse the Order Granting Defendant's Motion for Partial Summary Judgment, and remand this matter to the trial court for trial on the merits.

DATED this 10th day of July, 2009.

RYAN, SWANSON & CLEVELAND, PLLC

By 

Robert J. Curran, WSBA #14310

Lance Losey, WSBA #28196

Kari Brotherton, WSBA #39453

Attorneys for Petitioners Vance Vollstedt, as
Personal Representative of the Estate of Marie
Vollstedt; and Vollstedt Family LLC

DECLARATION OF SERVICE

I declare that on the 13th day of July, 2009, I caused the foregoing document to be served on counsel for all interested parties, as noted, at the following addresses:

Via Messenger

Robert M. Sulkin
David R. East
McNaul Ebel Nawrot & Helgren,
PLLC
600 University St, Ste 2700
Seattle, WA 98101-3143
Attorney for Respondent

Via Email

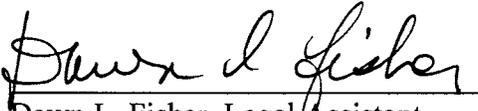
Robert J. Henry
Lasher Holzapfel Sperry &
Ebberson
Two Union Square
601 Union St, Ste 2600
Seattle, WA 98101-4000
Attorney for Plaintiff Moen, as Trustee of
Fred Vollstedt Family Trust

Via Email

Eric V. Jeppesen
Allen R. Sakai
Jeppesen Gray Sakai P.S.
10655 NE 4th St Ste 801
Bellevue, WA 98004
Attorney for Plaintiff Jelena Nikic

Via Email

Timothy J. Warzecha
719 Second Ave, Ste 104
Seattle, WA 98104
Attorney for James Vollstedt


Dawn L. Fisher, Legal Assistant

Dated: July 13, 2009

Place: Seattle, WA

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