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OF THE STATE OF WASHINGTON
DIVISION I
SEATTLE

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SEATTLE, WASHINGTON

DAVID K. FRANK and PATRICIA L. FRANK, individually and
as a marital community, and David K. Frank, as Personal
Representative for the Estates of Kenneth and Catherine Frank,

Appellant,

v.

GEORGE AKERS, individually and as part of his marital
community; and MONTGOMERY, PURDUE, BLANKINSHIP &
AUSTIN PLLC, a Washington corporation,

Respondents.

Appeal from King County Superior Court
No. 09-2-22927-9 SEA

APPELLANT'S BRIEF

William Keller, WSBA #29361
Dennis Moran, WSBA # 19999
MORAN WONG & KELLER PLLC
5608 17th Avenue Northwest
Seattle, Washington 98107
Telephone: 206-788-3000
Facsimile: 206-788-3001
Attorneys for Appellant

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I. INTRODUCTION

Plaintiff-Appellant (“the Franks” namely the children of Ken and Catherine Frank) request that this Court reverse and remand the trial court’s summary dismissal of all claims of negligence against George Akers and his law firm Montgomery Purdue. At summary judgment the Franks presented admissible evidence to support all the elements of a legal negligence claim, namely:

(1) Duty: The defendants owed a duty to the plaintiff because Ken Frank had an attorney-client relationship with Mr. Akers and his firm; CP 354

(2) Breach: A qualified expert witness Thomas Culbertson testified as to the standard of care and that Mr. Akers breached the duty by failing to meet that standard of care by failing to tell Ken Frank to change his will during the 2 years he was supposedly working to unwind the swindle and before Ken died; CP 341-346; CP 867-870, and

(3) Proximate Cause and Damage: “But for” the Mr. Akers' failure to tell Ken Frank to modify his will to disinherit the Foundation, for a full 2 years, when Ken Frank sued the professional defendants and Foundation, and then died shortly thereafter, the Foundation (controlled by the very same professional defendants) inherited the claim against them and essentially dismissed it. "But for" the Akers' negligent failure to tell Ken to change his will, the children were unable to continue with the case, a case they likely would have won. CP 867-870

The Case begin in 1993 when the elderly members of the Frank clan, Ken and Catherine Frank were advised by certain “professional defendants” to create the “Frank Family Foundation” and gift a large tract of property in Southwest Washington to that foundation. CP 1350-56. The same professional defendants also advised the Franks to

make those one of them the trustee in control of the Foundation and advised the Franks to give up all their own control. CP 871-900. In this way the professional defendants, trusted fiduciaries preying on their the elderly Frank couple they were legally obligated to protect, misused their fiduciary roles to take enrich themselves by tricking an elderly couple into turning over control of their property over to the predatory professional defendants controlled Foundation.

Later in 2003 when the Frank couple realized later that they were swindled by their trusted fiduciaries, they hired a lawyer to help them reverse the swindle. CP 354; CP 347-350. In that year, George Akers, attorney at the Montgomery Purdue firm took the case and said he would fix it. *Id.* They gave him all the documents necessary to fix it, including Ken Frank's will, which had been drawn up (on advise of the professional defendants) to give all his property to the Foundation, of course, which was controlled by those same professional defendants. CP 347-50; CP 357-358; CP 412-421. During the two years between when Mr. Akers took the case and finally filed the first lawsuit, Mr. Akers negligently failed to one thing, the most important thing, the thing that would have turned around the swindle. He failed to advise Ken Frank to change his will before he died. CP 867-870; CP 341-346

Mr. Akers finally did the right thing in November 2005 when he filed the negligence lawsuit against the "professional defendants" who swindled the Franks, Callahan, Clees and Gentry and a claim for rescission against the Foundation. However, later in the same month, the elderly Ken Frank died. His will was still intact, reading the same way the professional defendants told him to write it back during the swindle. It bequeathed everything to the Foundation. *Id.*

The Foundation (controlled by professional defendant Laurie McClanahan)) took control of Ken's right to bring the rescission action in the first place. Then, predictably, they convinced the court that Ken's children didn't have standing to continue the case because they weren't his heir to the property, the Foundation was.

The professional defendants won: The swindle worked only because Mr. Akers negligently failed tell Ken to change his will at any time in the 2 years preceding Ken's death.

Ken Frank hired Mr. Akers to use his legal skill and expertise to turn around the swindle. Had Mr. Akers provided them the bare minimum required by the standard of care in the industry, had he not been negligent, Ken would have changed his will, the Frank children would have been designated the right and proper heirs, and they would have successfully reversed the swindle by winning the case against the professional defendants who swindled their father. Mr. Akers had 2 years to do this before Ken died..

The Franks presented admissible evidence on all the points above at summary judgment.

Duty: Mr. Akers owed a duty to Ken Frank, to use the skill and care that is the standard in the industry; CP 354

Breach: Expert witness Thomas Culbertson established that standard of care and that Mr. Akers breached the standard by failing to tell Ken to change his will; CP 341-346

Proximate Cause and Damages: But for the breach, Frank would have changed his will, disinherited the Foundation and the Frank Children would have continued on to

win the lawsuits. But for the breach they would have unwound the swindle and recovered the property, valued at more than \$3.6 million dollars. CP 871-900; CP 341-346

The superior court should not have dismissed the case upon summary judgment. This court should reverse that erroneous ruling.

II. ASSIGNMENTS OF ERROR

Assignment Of Error

The trial court erred in dismissing the negligence claim against George Akers.

Issues Pertaining To Assignments Of Error

Whether plaintiff presented *prima facie* evidence sufficient to support all the elements of a professional negligence claim against Mr. Akers at summary judgment.

Answer: YES.

III. STATEMENT OF THE CASE

A. Facts Relating to the Underlying Case

In 1993 Ken and Catherine Frank began the ill-fated decision to heed the advice of accountants Laurie McClanahan and John Clees, and attorney Mary Gentry, and create the Frank Family Foundation, and then subsequently gift their property known as Cranberry Lake. CP 1350-1356. Cranberry Lake was the Franks most valued piece of property and McClanahan convinced them that gifting the property to the foundation would serve two purposes: (1) keep the property under their control and (2) provide tax advantages. See Declaration of Gerry Treacy. CP874-875; CP 888. The Franks made the gift in increments. Since Ken and Catherine were in their 80s, in order to ensure the gift would be completed in case they died the same professional defendants helped them

execute wills bequeathing whatever property had not already been gifted *inter vivos*, to the Foundation. CP 341-346; CP 413

For the next several years, Ken, Catherine and their family used the property as if nothing had changed. As time wore on Ken and Kitty Frank and their family began to have concerns with how the property would be managed in the future. In March-June 2002, the Franks met with Mary Gentry regarding use issues for Cranberry Lake in the future once Ken and Catherine died. Ms. Gentry informed them that the cabin on the lake was not set aside for family use but that she would engage the Foundation to try and rectify the situation. See Keller Decl, Exhibit 4, Documents from Gentry's File. In February 2003, through a letter from the Frank Family Foundation president Norm Eveleth, the Franks were informed that they and their family could never use the property again. CP 1350-1355; CP 1362-1365. Shortly thereafter the Foundation retained counsel, amended its bylaws and removed Ken and Kitty Frank as directors of the Foundation and informed the family that locks were changed and they could not step foot on the property without permission of the Foundation. Through counsel, the Foundation learned that the Franks personal use of the property for the ten years prior violated IRS regulations for foundation property. Thereafter, the Franks were told for the first time that IRS regulations required that they not have access to the property then, and in the future.¹ CP 1350-1355

In March 2003, Ken and Kitty Frank, along with their son David Frank and his wife Patti, retained George Akers to rescind Ken and Kitty Franks' *inter vivos* gift of their Cranberry Lake property to the Frank Family Foundation. CP 354. Because the same

¹ The Franks and their family had been using the property for personal use during the ten years prior, all in violation of IRS regulations. No one at the Foundation understood the rules.

professionals that created the foundation had also drafted trust documents, a limited partnership and the Frank's wills, the Franks provided Akers with their 1996 wills, and several other documents so that they could proceed to recover the property and ensure that no other damage had been done to their estates. CP 357-358

As set forth in the Declaration of Gerry Treacy (CP 871-900), McClanahan, Clees and Gentry had made a multitude of errors and omissions in advising the Franks to make the gift and in creating the Foundation. Not only was the Foundation a poor estate planning choice for the Franks, the foundation as constructed did not meet any of goals they had for the use of the property. The Foundation did not provide for the tax savings they were looking for, nor did it allow the family to continue to use the property. Id. CP 1365-1382

Mr. Akers on behalf of the Franks filed a complaint to obtain the Foundation records. During the records lawsuit the Foundation deposed Kitty Frank wherein she testified that she created the Foundation for tax advantages and to leave the property to her grandson. Neither of these goals were achieved by creating a Foundation. CP 874

In November 2005, Mr. Akers filed a lawsuit against the Foundation seeking rescission of the gift of the Cranberry Lake property, based on mistake, undue influence and negligent misrepresentation, and against Clees, McClanahan and Gentry for negligence. CP 1421-1430. A month after the lawsuit was filed Ken Frank died. A few weeks later Kitty Frank also died. Thereafter, David Frank was appointed the personal representative of the estate, and substituted as the party in interest in the lawsuit Akers had filed. He then retained Moran, Windes and Wong PLLC to replace Mr. Akers in the

underlying negligence and rescission action. Mr. Akers remained probate counsel for the Estates of Ken and Kitty Frank.

Mr. Akers filed Ken and Kitty's 1996 wills for probate. Despite having the wills in his possession since May 2003, Akers never reviewed them and had done nothing to alter, amend or avoid any provisions of the wills during the time he had them after their death Akers probated the wills, which contained a provision bequeathing all right and title to Cranberry Lake to the Frank Family Foundation. CP 347-356. This provision was in direct contradiction to the Franks goals for the property as evidenced by the rescission claim that had brought against the Foundation prior to death.

With the wills probated, the Foundation moved the Court to have all right and title to the property, including the rescission claim in the lawsuit against the Foundation, to be distributed to the Foundation. The Foundation also moved to have the rescission lawsuit dismissed on the basis that David Frank lacked standing to pursue rescission because the wills gave that right to the Foundation. The Foundation also moved for dismissal on statute of limitations. The trial court found the will provisions valid, and dismissed the rescission claim for lack of standing. See *Frank v. Frank Family Foundation*, 146 Wn.App 309 (2008). In short, since the wills had been filed for probate and devised the Cranberry Lake property to the Foundation, the underlying rescission action was lost.

B. Statement of Facts in the Current Case.

Mr. Akers negligently handled the probate of Ken and Kitty Frank's wills and their estate planning needs. CP 867-870; CP 341-346. He never changed or altered the effects of the Franks will bequest of Cranberry Lake to the Foundation. Attorney

Thomas Culbertson offered the expert opinions that Akers should have taken the following actions in relation to the wills bequest of Cranberry Lake to the Foundation:

- Have the Franks execute new wills (or codicils) leaving any interest they might have in the Cranberry Lake property to their intended beneficiary rather than to the foundation.
- Since Defendants contend that Mr. Frank lost testamentary capacity after he retained them, have the Franks' son, as attorney-in-fact for his father, quit claim any interest (including any after acquired interest) in the Cranberry Lake property to Mrs. Frank, who still had testamentary capacity and who could still change her will.
- Determine whether, in executing a revocation of their community property agreement, Mrs. Frank intended to relinquish her interest in Cranberry Lake (which seems unlikely given the bequest of her interest in it in her will). Assuming she never intended to relinquish her interest in it, have her sign a statement to that effect and change her will.
- Rather than petitioning to the court to admit the wills to probate, seek to have the Franks' prior, 1991, wills admitted to probate, asserting that the newer wills were invalid for the same reasons the conveyances to the foundation were invalid.
- File will contests in the probates seeking to invalidate the wills that were admitted (although they may have been barred from seeking to invalidate wills they had presented for probate on the grounds of judicial estoppel).

CP 341-346; CP 867-870

As a result of the estate planning/probate negligence, the plaintiffs were deprived of the right to litigate the rescission claim for the Cranberry Lake property in the underlying action. *Id.* Defendants sought to dismiss this claim in the first motion for summary judgment, but the claim was denied as issues of fact remain as to the scope of Akers duties relating to the wills and the resulting damage caused the estate by the failure to change them. CP 913-915. The court did dismiss one claim, however, finding that plaintiff failed to prove that Akers failure to file a will challenge fell below the standard of care. In September 2010, this Court heard defendants' second motion for summary judgment.

In defendants' second summary judgment motion, the issues raised were defined as follows:

1. Whether plaintiffs' claim that Montgomery Purdue is vicariously liable for the conduct of attorney Treacy should be dismissed as a matter of law, by application of *Glover v Tacoma General Hospital*, ...

2. Whether plaintiffs claims that defendants failed to advise the Sr. Franks of the statutes of limitations applicable to their claims in the Underlying Action should be dismissed as a matter of law,...

3. *Whether plaintiffs' claim that defendants' conduct deprived them of a right to recover Cranberry Lake should be dismissed as a matter of law, where plaintiffs are unable to prove they would have prevailed in the underlying action because*

(a) Washington case authorities do not support the granting of an order excluding Article VII section 2, of the Sr. Franks' will on grounds of mistake;

(b) Washington case authorities do not support the granting of an order rescinding the deeds conveying Cranberry Lake to the Foundation on grounds of mistake.

4. Whether plaintiffs' damages claim for the value of the financial securities allegedly transferred to the Foundation und the Sr. Franks' wills should be dismissed as a matter of law,...

5. Whether plaintiffs' claim that the defendants' failure to recover Cranberry Lake proximately caused them damages should be dismissed as a matter of law , where by settling with the underlying Action plaintiffs were fully compensated for their alleged loss of a rescission remedy, ...

6. Whether plaintiffs' damages claim for the value of the financial securities allegedly transferred to the Foundation under the Franks' wills should be dismissed as a matter of law...

CP 442-465

(Emphasis Added)

The Franks defended the motion by providing the declarations of David and Patti Frank, the Declaration of Gerry Treacy, who provided expert testimony in the underlying case, the declaration of Mr. Culbertson, the documents relating to the rescission claim in the underlying action and a memorandum of law providing that the legal claims in the underlying action were valid. In its Order entered on September 17, 2010, the Court

denied summary judgment on each of these issues, other than that on issue 6. CP 916-918. Defendants then filed a motion for reconsideration, in which they defined the issue to be reconsidered as follows:

Whether the court should reconsider its denial of Montgomery Purdue motion to dismiss the Frank's claim that Montgomery Purdue's conduct deprived them of a right to recover Cranberry Lake, *where the Franks lacked the support of Washington case authorities on which to argue their rescission claim on grounds of "mistake" would have succeeded on its merits, where the Franks cited no evidence of "mistake" that could have been argued in the Underlying Action*, and where the failure to assert a claim not supported by Washington law does not fall below the standard of care for Washington attorneys.

CP 919-926

Plaintiffs opposed the motion for reconsideration pointing out that (CP 960-970)

(1) the Franks presented numerous case authorities and facts which supported the rescission claim in the underlying action on the issues of mistake, and (2) that in addition to having proper legal grounds to argue rescission on the basis of mistake, there were several other legal theories which would have succeeded in allowing rescission of the gift. In proving the viability of the rescission remedy Plaintiffs also submitted the declarations of David and Patty Frank, and the declaration of Robert Windes (CP 703-866), which attached the declarations and pleadings, which were used in the underlying action to provide evidence to support the rescission remedy on the issue of mistake. In fact the deposition testimony of Norm Eveleth among others demonstrated that neither the Franks nor the Foundation even understood what a Foundation was required to do, or knew about use restrictions required by the IRS². *Id.* Notably, Plaintiffs also presented the 32 page declaration of Gerry Treacy, the estate planning expert in the underlying

² The testimony in the underlying action proved that no one at the Foundation, nor Ken and Kitty knew that they could not use the property for personal reasons until the Foundation retained Davis Wright Tremaine, who quickly informed the Foundation that Ken and Kitty's use of the property had to be immediately restricted.

case, which set forth the errors and omissions of Clees, Gentry and McClanahan and his factual knowledge of the Franks' goals for the property, which they mistakenly believed would be accomplished by the Foundation. CP 990-991. Plaintiffs also included multiple case and treatise authorities to prove rescission would be a successful legal remedy under the facts and circumstances.

The Court granted the motion for reconsideration on the issue and signed an Order provided by the defendants which stated: "defendants motion to dismiss plaintiffs' claim of negligence that defendants' conduct deprived them of a right to recover Cranberry Lake is hereby Granted."

Plaintiffs moved for reconsideration and the Court entered an Order on November 29, the first sentence of which stated:

On October 20 2010 the court entered an order broadly granting the defendants' motion to dismiss plaintiffs' claims of negligence. To clarify: this court stated orally at the second hearing on summary judgment, consistent with cases in New York and California, rescission is applicable in Washington. Had this court held that it was not applicable, there would be no issue of fact. Having held that it is applicable, then it remains a question of fact whether it is negligence for an attorney not to argue that law should be extended."

CP 105

There after defendant made a third motion for summary judgment on the remaining question of fact as Appellants had never plead such a claim and further requested that the Court find that the October 20, Order had dismissed all remaining claims. The trial court agreed and found that all claims were dismissed. CP 1721-1723

IV. SUMMARY OF ARGUMENT

To support a claim of legal malpractice, the plaintiff must prove (1) the existence of an attorney-client relationship, which gives rise to a duty of care on the part of the

attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-261 (1992). If an attorney client relationship is established, the elements for legal malpractice are the same as for negligence. *Id.* at 261. Proximate cause is determined by the "but for" test. *Griswold v. Kilpatrick*, 107 Wn.App. 757, 760 (2001).

1. Mr. Akers owed a legal duty to the Franks because an attorney client relationship existed between Akers and the appellants. See Declaration of David Frank and Patti Frank wherein they state that they provided Mr. Aker's with Ken and Catherine Franks 1996 wills to review in the context of estate planning and trying to recover the Cranberry Lake Property. CP347-356

2. Plaintiffs presented expert testimony from Attorney Thomas Culbertson that established the standard of care and that Mr. Akers breached the standard of care to the Franks by failing to take the following actions:

Have the Franks execute new wills (or codicils) leaving any interest they might have in the Cranberry Lake property to their intended beneficiary rather than to the foundation.

Since Defendants contend that Mr. Frank lost testamentary capacity after he retained them, have the Franks' son, as attorney-in-fact for his father, quit claim any interest (including any after acquired interest) in the Cranberry Lake property to Mrs. Frank, who still had testamentary capacity and who could still change her will.

Determine whether, in executing a revocation of their community property agreement, Mrs. Frank intended to relinquish her interest in Cranberry Lake (which seems unlikely given the bequest of her interest in it in her will). Assuming she never intended to relinquish her interest in it, have her sign a statement to that effect and change her will.

Rather than petitioning to the court to admit the wills to probate, seek to have the Franks' prior, 1991, wills admitted to probate, asserting that the newer wills were invalid for the same reasons the conveyances to the foundation were invalid.

File will contests in the probates seeking to invalidate the wills that were admitted (although they may have been barred from seeking to invalidate wills they had presented for probate on the grounds of judicial estoppel).

CP 867-870; CP 341-346

3. Mr. Akers breached the duty directly and proximately caused the plaintiffs damages by causing their rescission claim to be dismissed for lack of standing. See Order of Mason County Superior Court in underlying case. *See also Frank v. Frank Family Foundation*, 146 Wn. App. 309 (2008)(consolidated cases). *Id.*
4. Taking all the facts and inferences there from in the light most favorable to the plaintiff, a reasonable fact finder could have found that Akers' conduct proximately caused the Franks to lose an otherwise successful rescission claim against the Foundation and awarded the Franks the property or the value thereof.

CP 871-900; CP 703-866

The trial court incorrectly focused on the conduct of Mr. Akers in the rescission case, instead of his actions in the probate. The trial court also incorrectly appeared to believe that expert testimony was required to establish the proximate cause element in addition to the standard of care element. Plaintiff had an expert for the standard of care and the breach thereof, but not proximate cause, because damages and proximate cause are for the jury to decide, which does not always require expert opinion. Instead,

Appellant presented the testimony, evidence and authority from the underlying case because in the “case within a case” analysis of a legal malpractice action damages and proximate cause are issues of fact for a jury. Washington courts hold that it is for the trier of fact to decide whether the client would have fared better but for the attorney’s negligence, and the extent to which they would have done better. *Brust v. Newton*, 70 Wn. App. 286, 293-294 (1993). Appellants duty on summary judgment was to present the evidence from the underlying case and allow the Judge to determine taking all evidence in the light most favorable to the appellant whether there a reasonable trier of fact could rule in their favor. Appellants met this burden on summary judgment. The case should be reversed and remanded for trial by jury.

V. LEGAL ARGUMENT

A. Standard of Review

The party moving for summary judgment bears the burden of providing evidence that there is an absence of an issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216 (1989). In reviewing a summary judgment, the appellate court engages in the same inquiry as the trial court. *Snohomish County v. Anderson*, 124 Wn.2d 834, 843, 881 P.2d 240 (1994). The facts and all reasonable inferences from the facts are construed in favor of the nonmoving parties. *Id.* The Court does not weigh the evidence or determine the truth of the matter; the only question is whether there is a genuine issue for trial. A motion for summary judgment should be granted only if the court concludes that reasonable persons would reach but one conclusion based upon the facts and reasonable inferences therefrom. And, where material facts are particularly within the knowledge of the moving

party, courts have been reluctant to grant summary judgment. *Mich. Nat'l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 (1986) (quoting *Felsman v. Kessler*, 2 Wn. App. 493, 496-97, (1970)). “It is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment and to clearly state in its opening papers those issues upon which summary judgment is sought. *White v. Kent Medical Center*, 61 Wn. App. 163, 169 (1991); see also *Merrill Company v. The Pollution Control Hearing Board*, 137 Wn. 2d 118 (1999). Moreover, a party responding to a summary judgment motion should not have to guess what additional issues may be “inherent” in the motion. *Merrill Company v. The Pollution Control Hearing Board*, supra.

In this case, the defendant narrowly tailored its issue to whether negligence claims against Akers should be dismissed because Washington case law allegedly does not support a claim for rescission based upon mistake. As set forth below, rescission is a valid remedy under Washington law on the issue of mistake as well as many other legal theories. The case should not have been dismissed, but instead should have proceeded to a trial by jury as plaintiff presented sufficient evidence that when viewed in the light most favorable to the Franks a reasonable fact finder could rule in their favor on each element of the claim.

B. Plaintiff Presented Evidence of Duty, Breach, Causation and Damages

To prove a claim for legal malpractice, a plaintiff must prove that an attorney client relationship exists, a breach of the standard of care, damages and that the damages were proximately caused by the attorney’s conduct. *Hizey v. Carpenter*, 119 Wn.2d 251 (1992). There is no dispute that an attorney client relationship existed in this case. Once that is established the elements for legal malpractice are the same as for negligence.

Bowman v. Two, 104 Wn.2d 181 185 (1985). A breach is a failure to exercise the degree of care, skill diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction. *Hansen v. Wightman*, 14 Wn. App. 78, 90 (1975). Generally, the recognized standards of practice of a profession must be proved by testimony of a member of that profession, unless negligence alleged is within the common knowledge of a layperson. *Id.*; *see also Walker v. Bangs*, 92 Wn.2d 854, 858 (1979). However, when a trial court is presented with a question of law, the court may properly disregard expert affidavits that contain conclusions of law. *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 788 (1987); *see also Eriks v. Denver*, 118 Wn. 2d 451, 458 (1992).

1. Akers Failed to Review, Alter, Amend or Otherwise Eliminate the Will Provision Gifting the Cranberry Lake Property To the Foundation, Knowing that the Franks Were Seeking to Rescind the Intervivos Gift of Property To the Foundation.

As set forth in the Declarations of David and Patti Frank in the trial court, Akers met with David and Patti Frank, and with Ken and Catherine Frank, with the goal of seeking to rescind the gift of the Cranberry Lake property to the Frank Family Foundation. CP 347-356; CP 357-358. These early meetings discussed the role that Mary Gentry, John Clees and Laurie McClanahan had taken in creating the Foundation and then making a substantial gift of property to it. *Id.* The Franks also asked Akers to review Ken and Catherine's wills and other estate planning documents. Patti Frank testified as follows about the initial meetings with Mr. Akers:

it was also discussed that those same practitioners had advised David's parents on and developed a larger estate plan than the Foundation, including multiple trusts and wills. Therefore, it was discussed that George Akers was to review the wills and other estate planning documents, which were prepared by the same practitioners, including the wills prepared by Gentry, and to straighten them out as needed.

CP 357-358

Akers took possession of the wills but did nothing with them. He did not have the provision deleted. He did nothing to eliminate the ramifications of the wills' bequest of the Cranberry Lake property to the Foundation. CP 341-347; CP 867-870. Since the Franks had a claim for rescission against the Foundation, Akers should have taken steps to protect the claim from being taken from the Franks by their wills.

2. Plaintiff Presented Expert Testimony on The Standard of Care and the Breach Thereof

Attorney Tom Culbertson offered the expert opinion on the standard of care and that Akers conduct fell below the standard of care owed to the Franks. CP 341-347; CP 867-870. He testified that Akers failure to take any action relating to the 1996 will provisions caused the Franks to lose the ability to seek rescission of the Cranberry Lake gift. David Frank and Patti Frank testified that Akers received the wills in May 2003. Mr. Akers also had Mary Gentry's file, which had copies of the will. He never took any steps to amend the bequest of the Cranberry Lake property to the Foundation. Akers provides myriad reasons why nothing was done with the wills, the most egregious excuse being that they never reviewed it. He stated at his deposition that the first time he even reviewed the clauses were at Ken's death. CP 1016-1023. Even Akers agrees, however, that had he actually looked at the provision, in hindsight he would have had the provision amended. *Id.* This of course begs the question, why bring a rescission claim for people in their 90s and charge them in excess of \$100,000 in fees, while disavowing any responsibility to do a simple will review of wills you know were prepared by one of the negligent and persuasive defendants.

Since Article VII was found to be valid, the Foundation requested that all right and title to the property, which included the rescission claim, be vested in the Foundation. Consequently, the personal representative of the Franks Estate's had no standing to litigate the rescission claim, as even if successful, the property would still pass under the will.

3. Plaintiffs Presented Admissible Evidence of Proximate Causation and Damage.

In legal malpractice actions, proximate cause is determined by the "but for" test. *Griswold v. Kilpatrick* 107 Wn. App. 757 (2001). The Franks did not lose their rescission claim on the merits in the underlying action, they lost the claim because Akers failed to change the wills. The wills took the rescission cause of action and gave it to the Foundation. The Franks were left with no standing to bring the rescission claim. The Franks supported these facts with the testimony of Attorney Thomas Culbertson who testified that Akers breaches of duty eliminated the ability to pursue the rescission claim.

The expert testimony met the Franks burden of proof on summary judgment. A reasonable finder of fact, taking Culbertson's testimony as true could find that Akers conduct deprived the Franks of the rescission claim against the Foundation.

The remaining question then becomes whether plaintiff would have had a better result in the underlying case had they not lost the ability to litigate the claims. It is for the trier of fact (not an expert witness) to decide (1) whether the client would have fared better but for the attorneys mishandling of the case and (2) it is also for the trier of fact to decide the extent to which that is true. *Brust v. Newton*, 70 Wn. App. 286, 293-94 (1993). A mere conclusion of law from an expert that a jury would have ruled in appellants favor would be stricken as conclusory and improper. *Charlton v. Day Island*

Marina, Inc., 46 Wn. App. 784, 788 (1987); *see also Eriks v. Denver*, 118 Wn. 2d 451, 458 (1992).

The jury's task is to determine what a reasonable judge or fact finder would have done. *Brust*, 70 Wn. App. At 293. The jury's decision is based upon the facts and evidence that could have been provided in the underlying action as opposed to what a hired expert may speculate as to what a reasonable judge or jury would have decided. As set forth below, the Franks submitted sufficient evidence to create a genuine issue of material fact as to whether Akers actions proximately caused the Franks damages.

C. Plaintiffs Presented Sufficient Evidence That They Would Have Had a Better Result in the Underlying Case Absent Mr. Akers Negligence

On summary judgment the Franks burden is to provide evidence that the underlying action could have been successful.³ As set forth in opposing summary judgment, but for Akers failing to maintain the Franks standing to bring the rescission claim, the Franks had the evidence and legal claims to successfully rescind the gift to the Foundation. The legal theories of mistake, undue influence, and negligent misrepresentation, unjust enrichment, constructive trust, all would have been successful and provided for rescission and returned the Cranberry Lake property to the Franks.

In the underlying action plaintiff had the expert testimony of Gerry Treacy. CP 871-900. Treacy testified the Franks had been negligently advised to gift the property to the Foundation. He submitted a declaration in which he stated that the conduct and actions of the professional defendants, including Laurie McClanahan who sat on the Foundation board, fell below the standard of care for estate planning professionals. *Id.* He further

³ Having the opportunity to actually litigate the rescission claim would have provided a better avenue for success than losing the ability to bring the claim at all. Mr. Akers obviously believed at one point that rescission were a possibility otherwise he wouldn't have charged well over \$100,000 pursuing the claim.

testified that the Foundation did not meet the estate planning goals of Ken and Catherine Frank as expressed to him, and through his review of the documents. In coming to his conclusions Mr. Treacy read the deposition testimony below including the deposition of Catherine Frank, he reviewed the entire files of the professional defendants and also spoke directly to Ken and Catherine Frank about their goals for the property prior to their deaths. CP 891-900. He concluded that Ken and Catherine Frank were negligently advised to create the Foundation and gift property to it, and proved through his meetings with Ken and Catherine that they did not understand the ramifications of the gift and the results the gift would provide for their estate. He further testified that they and the recipient of the gift were mistaken as to the operations and requirements of running a Foundation. He further evidenced the overwhelming influence Ms. McClanahan had in the Franks business and estate affairs.

Based upon Treacy's testimony, each legal theory (misrepresentation, undue influence and mistake) had significant evidentiary support and case law support, and the remedy for each was rescission, rendering the *intervivos* transfers to the Foundation voidable. Indeed, a gift can be rescinded if it was induced by material misrepresentation. Restatement of Restitution, §§ 26, 39: *See Saks and Company v Barbee*, 36 Cal.2d 602, 609, 226 P.2d 340 (1951); *In re Clark's estate*, 253 N.Y.S. 523, 527, noted 45 Harv. L. Rev. 750. "A mistake which entails the substantial frustration of the donor's purpose entitles him to restitution. No more definite general statement can profitably be made as to what constitutes a basic mistake in the making of the gift." *Id.*, comment C.

Furthermore, an agreement secured through undue influence on the part of a fiduciary is voidable under Washington law. *See Pleuss v. City of Seattle*, 8 Wn. App.

133, 137, 504 P.2d 1191 (1972) (“Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.”) (quoting Restatement of Contracts § 497 (1932)). This rule has been consistently upheld in Washington. *See, e.g., Gerimonte v. Case*, 42 Wn. App. 611, 613, 712 P.2d 876 (1986) (quoting same passage); *Ferguson v. Jeanes*, 27 Wn. App. 558, 563, 619 P.2d 369 (1980) (quoting same passage). Rescission is the proper remedy. *Ferguson*, 27 Wn. App. at 564. Misrepresentation renders a contract voidable as well. *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 186, 840 P.2d 851 (1992). A contract entered into under mutual mistake also renders the transaction voidable. *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 396, 739 P.2d 648 (1987). Furthermore, unilateral mistake is grounds for rescission when the other party knows or is charged with knowing of the mistake. *Snap-On Tools Corp. v. Roberts*, 35 Wn. App. 32, 35, 665 P.2d 417 (1983).

A material innocent misrepresentation is a sufficient representation on which to base a claim for rescission. It is unnecessary for the purpose of affording the remedy of rescission to find that the representation is fraudulent. *See Anthony v. Warren*, 28 Wash.2d 773, 184 P.2d 105, 190 P.2d 88 (1947); *Algee v. Hillman Inv. Co.*, 12 Wash.2d 672, 123 P.2d 332 (1942); Restatement of Contracts s 470, 476 (1932); These legal principles are sound black letter law and provide that the deeds could have been deemed voidable and rescinded on the basis of misrepresentation, undue influence and mistake.

Furthermore, the treatises and journals to which the Washington courts look for guidance are heavily supportive of the merits of there being a right of action for

rescission of an intervivos gift on the grounds alleged. “Equity will intervene to set a gift aside where the donor was induced to make it through a mistake of fact or misrepresentation.” Gifts, § 36, CJS, p. 216. “An innocent or negligent misrepresentation regarding a material fact can...lead the donor to make a donative transfer that the donor would not otherwise have made. In such a case, the donative transfer has been induced by mistake, and should be remedied accordingly.” Restatement (third) of Property: Wills and Other Donative Transfers § 8.3.

Moreover, Restatement (Second) of the law of Trusts, §333 provides a comment a, in the context of a lifetime gift to a Trust (including a charitable trust) that “the settler can rescind a trust created by him as a result of a material mistake. Where no consideration is paid for the creation of the trust, it is sufficient that the settlor was induced by mistake to create the trust, although neither the trustee nor the beneficiary shared in the mistake or knew of it, since in the case of the gratuitous transfers a mistake by the transferor is a sufficient ground for the setting aside the transfer, although the mistake was not caused or shared by the transferee and he did not know or have reason to know of the mistake of the transferor.” See also Parker, George E. III, Gifts – Mistake – Rights of th Donor, Donee and their successors in interest to Relief,” 58 Mich. L. Rev. 90o 91-2 (1959).

Other cases that have approved of and or applied claims of rescission of gifts based on mistake include: *Saks and Company v Barbee*, 36 Cal.2d 602, 609, 226 P.2d 340 (1951); *Levy v Crocker-Citizens Nat. Bank*, 14 Cal.App. 3d 102, 104 (1971); *In re Clark’s estate*, 253 N.Y.S. 523, 527; *In re Furjanick’s Estate*, 375 Pa. 484, 100 A.2d 85 (1953); *Moore v Bowyer*, 180 Ind.App. 429, 430, 388 N.E.2d 611 (1979); *Walton v Bank of California*, 218 Cal.App.2d 527, 542 (1963); *Phillips v Cope*, 111 S.W.2h 81, 83 (Mo.

1937); *Mott v Iosa*, 18 Backes 185, 119 N.J.Eq. 185, 181 A. 689 (1935); *Needles v Shenandoah Nat. Bank*, 202 Iowa 927, 211 N.W. 393 (1926); *Orth v Kaesche*, 165 A.D. 513, 150 N.Y.S. 957 (1914); *Baley v Bailey*, 141 a.D. 243, 126 N.Y.S. 102 (1910); *Lutheran Church Zion Evangelical*, 200 Pa. 567, 50 A. 244 (1901).

D. In Addition to Misrepresentation and Undue Influence, Mistake Allows For the Rescission of a an Intervivos Gift When the Other Party Is Charged With Knowing Of The Mistake

Laurie McClanahan advised the Franks to gift their property to the Foundation, and to place her on the Board of the Foundation. Her knowledge is the Foundations knowledge.

Unilateral mistake is grounds for rescission when the other party knows or is charged with knowing of the mistake. *Snap-On Tools Corp. v. Roberts*, 35 Wn. App. 32, 35, 665 P.2d 417 (1983). The Washington Supreme Court certainly believed that mistake could be used to rescind a conveyance when it stated : ‘Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. *Power v. Esarey*, 37 Wn. 2d 407 (1950). This is further set forth in the case of *Crodle v. Dodge*, 99 Wash. 121 (1917). In that case a woman brought an action to cancel a deed against when she signed a deed quit claiming away property, when she mistakenly believed that she was just giving her aunt the power to manage land. She was also misinformed as to the scope of the land she was giving away. The beneficiaries of the land sought to fight the rescission claim on account of laches. The Court ultimately found that the laches defense was unavailable under the circumstances *and the deed was cancelled*. The deed was cancelled because the donor

believed she was giving her aunt the right to manage her property for her through a power of attorney as opposed to giving away the property by deed.

In the underlying case, the evidence showed that Ken and Catherine Frank gifted the property *intervivos* under the mistaken belief that they would save on taxes and still maintain use and control of the property. This is evidenced by the testimony of Norm Eveleth.

The testimony of Norm Eveleth the President of the Foundation demonstrated that the Franks were mistaken in understanding what deeding their property to the Foundation would cause. Norm Eveleth, president of the Board Director of the Frank Family Foundation, agreed that the Franks used and accessed the property at will and was given no reason to believe doing so was improper after deeding the property:

We never interfered with their personal access or use to the property. Now, I'm not -- I think this is something we've learned from Ms. Woods [in 2004] that we were remiss in doing, they weren't supposed to be using it. But anyway, the Board didn't know that and we respected the family, all the members of the family greatly, and we admired the Franks greatly and we had no desire whatsoever to infringe on their use of the property.

CP 782-804

See Windes Decl, Exhibit D in opposition to second motion for summary judgment. CP 805-811, which contained excerpts from the Kitty Frank Dep. 42:12 – 25.

But we never interfered with it. So when a family member came or David went out there or whatever, Ken and Kitty were the ones who set the rules.

CP 782-804

The Franks met with Norm Eveleth, Mary Gentry and David Frank to discuss management issues regarding the cabin. Norm Eveleth testified at his deposition that up

until that point Ken and Kitty managed the Cabin on their own. CP 782-804. At that point they did not know the Franks were disqualified persons prohibited from use by law. Id.

The Board of the Foundation had no idea that allowing Ken and Kitty to manage the cabin and use it personally ran afoul of IRS rules and regulations. CP 871-900. Furthermore, neither Ken and Kitty Frank, nor any of its family members, or the Foundation had ever been assessed a self-dealing tax for their use of the property for personal use under Code §§ 4946 or 4941, nor were they ever questioned about their personal use of the property by the Foundation or their CPA Laurie McClanahan during the existence of the Foundation. The Foundation Board, including McClanahan had no idea that Ken and Kitty Frank were disqualified persons under IRS regulations and therefore barred from using the property for personal use, and therefore the issue was never raised to Ken and Kitty Frank. CP 782-804; (Eveleth Dep. Testimony). Even after the purported transfer of the Cranberry Lake property to the Foundation, Ken and Kitty Frank and family continued to use the property for their own personal use. Ken and Kitty would allow relatives to come onto the property as they pleased and in fact would host luncheons and dinners there. Ken and Kitty never asked permission, nor did they need to ask permission to use the property for whatever reason they wanted since they were told by Laurie that they could continue to use the property at the time she set up the Foundation. As set forth above, the Franks would never have given the property to the Foundation, for no value, had they known that they and their family could not utilize the property in any manner they deemed. The legal allegations relating to the mistakes,

undue influence of Laurie, the professional defendants and the Board, are set forth in the Declaration of Gerry Treacy. CP 871-900

Furthermore, in *Davey v. Brownson*, 3 Wash.App. 820, 478 P.2d 258, 50 A.L.R.3d 1182 (1970), it was reiterated that a court of equity may provide relief from a mutual mistake by decreeing rescission of a contract. Such a remedy is available only if both parties to the agreement are clearly mistaken about a material fact, and if the party seeking rescission is not guilty of culpable negligence in failing to discover the mistake. *Davey v. Brownson, supra* at 824, 478 P.2d 258. The test in cases of mutual mistake is whether the contract would have been entered into had there been no mistake. *Davey v. Brownson, supra* at 824, 478 P.2d 258. *See also Stahl v. Schwartz*, 67 Wash. 25, 120 P. 856 (1912); *Ross v. Harding*, 64 Wash.2d 231, 391 P.2d 526 (1964); 13 Williston on Contracts 1542, 1557 (3d ed. W. Jaeger 1970).

As for the rescission of the deeds, the record below established that Ken and Kitty Frank were not aware of the ramifications of gifting property to the Foundation. The Foundation which received the property was charged with knowledge of the mistake because (1) the Foundation was created and had board members who were responsible for setting up the Franks estate plan, and (2) the Foundation allowed for the Franks to violate every rule relating to the Foundation, which potentially could have subjected them to numerous tax penalties.

E. The Franks Would Have Been Successful on the Rescission claim On the Theory of Constructive Trust and Unjust Enrichment

In the underlying action, if the Foundation would have claimed that it was an innocent donee of the property, which was of course untrue as Laurie McClanahan was clearly controlling the foundation, however, their alleged innocence would not have

defeated a rescission claim because of the circumstances of the gifting process. Based upon the fact that the Franks deeded property to the Foundation as a direct result of a mistake, undue influence and the negligent misrepresentations of their professional advisers, the Foundation would have been found to hold the title to the Cranberry Lake property *in Constructive Trust for the Frank Family*.

The principle controlling the application of constructive trusts is set forth in *Seventh Elect Church v. First Seattle Dexter Horton Nat'l Bank*, 162 Wash. 437, 440, 299 P. 359 (1931):

Where, for any reason, the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto. This arises by construction of equity, independently of the intention of the parties. Equity will raise a constructive trust and compel restoration, where one through actual fraud, abuse of confidence reposed and accepted, or through other questionable means, gains something for himself which, in equity and good conscience, he should not be permitted to hold. 26 R.C.l. 1236, 1237, 35 A.L.R. 307; *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N.W. 9; *Quinn v. Phipps*, 93 Fla. 805, 113 South. 419, 54 A.L.R. 1173; *Scott v. Thompson*, 21 Iowa 599.

In *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 191, 116 P.2d 507 (1941), the Court stated:

When property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity coverts such holder into a trustee. *Perry on Trusts*, 309, sec 183.

Pursuant to the Restatement of the Law, *Restitution*, § 167, the Foundation held the property as a constructive trustee for the plaintiffs as opposed to being the legal and equitable owner of the property.

Where the owner of property transfers it to another being induced by fraud, duress or undue influence of a third person, the transferee holds the

property upon a constructive trust for the transferor, unless before notice of the fraud, duress or undue influence the transferee has given or promised to give value.

The facts were overwhelming that Ken and Kitty were never informed of the ramifications of deeding the property to the Foundation. The declarations of Gerry Treacy and David Frank, and the deposition testimony of Kitty Frank (Attached to Windes Dec at CP 805-811) overwhelmingly supported the theory that the Foundation was ill-conceived, and that Ken and Kitty Frank never would have made the gift had they known they and their family would be banned from setting foot on the “crown jewel” of ken’s estate. (these declarations have previously been provided to the Court in opposition to summary judgment.) Additionally, Laurie McClanahan was the person who presented the Franks with the idea of the Foundation. Despite the fact that she promoted the idea and sat on the board when the majority of the property was gifted, she never informed the Franks of the ramifications of gifting property to a Foundation. This is proven by the fact that no one at the Foundation knew to restrict the Franks and their family from using the property for personal use, and the Franks actually used the property for personal use without any fear of the tax ramifications of doing so.

F. The Rescission Claim Would Have Succeeded Under a Theory of Unjust Enrichment

Even third parties who innocently acquire property must sometimes surrender it if the property was fraudulently obtained. *See Baille Communications v. Trend Business Systems*, 53 Wn. App 77, 84 (1988), *citing Restatement of Restitution* §123 (1937); *see also Restatement of Restitution* §§3, 13, 17, 28, 63, 64, 107 (1937). As comment b to *Restatement of the Law, Restitution*, § 167 sets forth, where the owner of property

gratuitously transfers it to another, the transfer being induced by the fraud of a third person, the transferee would be unjustly enriched if he were permitted to retain the property. Furthermore, a constructive trust may arise even if the acquisition of the property was not wrongful. *Scymanski v. Dufault*, 80 Wn. 2d 77, 89 (1971). *See also Viewcrest Cooperative Association, Inc. v. G.E. Deer*, 70 Wn.2d 290, 293 (1967). Indeed, Restatement of Restitution §201, *quoted in Hesthagen v. Gunda Harby*, 78 Wn.2d 934, 945 (1971) sets forth Washington States applicable law on the issue:

Where a fiduciary in violation of his duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon a constructive trust for the beneficiary.

Id.; *see also Bryant v. Joseph Tree*, 57 Wn. App. 107 (1990); *Viewcrest Coop. Asso v. Deer*, 70 Wn.2d 290 (1967).

In this case, the Foundation did not pay value for the property. Additionally, the Foundation, through its director, secretary/Treasurer Laurie McClanahan had notice of her errors and omissions.

Even had the Foundation made the argument that it were an innocent party, which the facts and law disputed, a constructive trust still arises where the retention of property would result in unjust enrichment of the person retaining it. *Scymanski, Id.* at 89; citing 5 A Scott, *The Law of Trusts*, §462.2 at 3414 (3d ed. 1967); *see also* Restatement of Restitution §160 (1937). The Foundation had been unjustly enriched for several reasons: (1) the Foundation received and retained the proceeds of the professional defendants' negligence, mistakes and undue influence knowing of the Frank's rights. The Foundation knew of the negligence, mistakes and undue influence through Laurie McClanahan since she was a Director of the Foundation. *See* 3 W. Fletcher, *Private*

Corporations, supra; (2) the Foundation did not pay any value for any of the property. Either of these reasons makes the Foundation's otherwise lawful acquisitions and retention of the property unjust. *Id*; *See also Baille*, 53 Wn. App at 85.

The only way the Franks interest in the property being held as a Constructive Trust could be extinguished is if it was purchased by a bona fide purchaser, whose interest would trump that of the plaintiffs. The Foundation was certainly not a bona fide purchaser. To be classified as bona fide purchaser, the purchaser must be (a) a purchaser, not a donee, heir or devisee, (b) be bona fide, that is act in good faith, (c) have paid value as the law defines value, and (d) be without notice, actual or constructive of the rights, equities, or claims of others to or against the property. *Colfax National Bank v. Jennie Corporation*, 49 Wn. App. 364, 368 (1987); *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436 (1956).

The Foundation would not have been able to present any evidence that it could defeat a claim of unjust enrichment in the rescission action. They never paid for the property, in fact the Franks were the only people to provide any funding. The evidence suggests that the Foundation did nothing in furtherance of its alleged "purposes." The Foundation also had notice of the Franks rightful ownership as Laurie McClanahan as the CPA who first proposed a Foundation, should have known that the Franks never would have gifted the property had they known that none of the family could have stepped foot on the property to actually enjoy the property they used or grew up using. CP 871-900. Consequently Laurie knew that the Franks wanted their grandson to use and control the property but she put nothing in the Foundation bylaws which would allow for family control or for Daniel to be guaranteed a position of power.

G. Undue Influence Also Could Have Allowed The Rescission Claim To Succeed Had Akers Not negligently Handled the Probate of the Wills.

A gift transfer which is occasioned by undue influence, either by the donee or by a third party, is invalid. See “Gifts,” §33, 38A CJS, p. 211; Gifts,” §35, 38 Am Jur 2d, p 733. . As to third-party undue influence, the ability to rescind arises whether or not the actual donee personally had any connection with the transaction:

In order to set aside a gift on the ground of undue influence, it is not essential that the donee should have personally had any connection with the transaction; if another employed such influence in behalf of the donee, however innocent, the result will be the same as if it were employed by the donee himself.

“Gifts,” §33, 38A CJS, p. 213. See also Restatement (3d) of Property: Wills & Other Donative Transfers, §8.3 Undue Influence, Duress or Fraud:

(a) A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud.

(d) A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.

c. *The wrongdoer.* Typically, the wrongdoer procures a donative transfer for himself or herself. Sometimes, however, the wrongdoer procures the donative transfer for the benefit of another, such as a member of the wrongdoer’s family. *In such a case, the donative transfer is invalid whether or not the beneficiary of the wrong acquiesced in the wrong or even knew that the wrong was committed.*

See also Restatement (2d) of Property: donative Transfers § 34.7 Transfer to Donee

Induced by Undue Influence or Duress or Fraud or Mistake

Among the factors considered in determining whether a gift was the result of undue influence are the following⁴:

⁴ The factors are in the context of a gift transfer to a trust but their relevance is equally applicable here.

(1) whether and to what extent a fiduciary or confidential relationship existed at the time of the creation of the trust between the settler and the person persuading him to create the trust;

(2) whether it was the trustee, the beneficiaries or a third person who persuaded the settler to create the trust;];

(3) the improvidence of the settler in creating the trust

(4) whether the settler when he created the trust had independent legal advice;

(5) the age, health, business competence, intelligence of the settler;

(6) whether the trust is of such a character that it would be natural for a person in the position of the settler to create it when not unduly influenced by other.

Restatement (Second) of the Law of the Trusts, §366, comment c; see also Restatement (Second) of the Law of Trusts, §366 (“a charitable trust can be rescinded or reformed upon the same grounds as those upon which a private trust can be rescinded or reformed”). The naturalness of the gift is one of the essential factors in determining whether undue influence has been exerted. “Gifts.” §33, 38 CJS, p 211-12, *citing Peters v. Skalman*, 27 Wn. App. 247 (1980).

In this case the Franks had a confidential relationship with Laurie as their CPA and as a director of the very entity she sought to have the Franks gift their property to. The evidence to sustain this gift, therefore, must show that the gift was made freely, voluntarily and with a full understanding of the facts. *Peterson v. Bibioff*, 64 Wn. App. at 720. The gift in this case was not made with full knowledge of the facts, it was induced by Laurie McClanahan. First, the Franks admit to being duped and making a huge mistake in giving the property away because they were told they and their family would still control the property. See Declaration of Gerry Treacy, CP 871-900. At the time of the gift, Ken and Kitty were elderly and ailing. *Id.* The creation of the Foundation itself was a mistake as it did not supply the type of tax benefits and benefits the Franks sought in their estate planning. *Id.* Ken and Kitty Frank were not sophisticated as to matters relating to foundations and the tax consequences of charitable giving, as evidenced by

Kitty's deposition testimony wherein she admits they had no idea what a foundation was supposed to do and by Kitty's statement to David that she and Ken just signed whatever Laurie put in front of them since she took care of all their estate planning. *Id.* The transfer of the property, the Frank's largest asset was made for no consideration whatsoever. *Id.* Finally, the transfer of the Cranberry Lake property to the Foundation was not a transfer to the natural object of the Franks' affection, their own family (*Id.*), but Laurie mistakenly (or deliberately) had told them the family would still control the property, and Kitty testified that they placed the property in the foundation so they could leave it for their son and grandson. The fact that Kitty believed that they needed the Foundation in order to ensure their son and grandson would get the property while they avoided taxes, further shows the influence Laurie exerted over Ken and Kitty.

CONCLUSION

This is both a complicated case and at the same time an extraordinarily simple case for summary judgment. Unfortunately the trial court reversed these, erroneously wading into some of the more difficult areas of nuanced estate law rather than correctly stepping back and viewing this case as the simple negligence action that it is. Duty, Breach, Cause and Damage,- that's it. The Franks produced prima facie evidence establishing each of these elements. The case should not have been dismissed.

The Franks deserved their day in court against those who predated on their elderly parents. The Franks would have had that day, and those predatory fiduciaries who swindled Ken should have been held accountable. All that was necessary for that to happen, was for Mr. Akers to have, at some time during the 2 years he sat on this case, told Ken to change his will. Mr. Akers professional negligence prevented the Franks day

in court and prevented the Frank children from holding the swindlers accountable. Mr. Akers needs to be held accountable for that.

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Respectfully submitted,

MORAN WONG & KELLER PLLC



William Keller, WSBA #29361
Attorneys for Plaintiff/Appellant
5608 17th Avenue Northwest
Seattle, Washington 98107
Telephone: 206-788-3000
Facsimile: 206-788-3001