

Original

No. 31738-9

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY *[Signature]*

JOSEPH KWIATKOWSKI,

Appellant,

v.

RALPH DREWS, JAMES FROST, SEATTLE FIRST NATIONAL  
BANK (BANK OF AMERICA), PUGET SOUND NATIONAL BANK  
(KEY TRUST COMPANY), AND U.S. BANK TRUST DEPARTMENT,

Respondents.

**RESPONDENT BANK OF AMERICA'S BRIEF**

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PM 3/23/07

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## I. INTRODUCTION

Appellant Joseph Kwiatkowski argues that the facts in this matter are complex (Appellant's Brief, p. 1), but his brief is complicated only because he tries to obscure the simple facts that dispose of his appeal: (1) there are multiple orders of the Thurston County Superior Court from 1988 - 1991 that release Seattle First National Bank<sup>1</sup> of liability and bar his claims as *res judicata*; and (2) Mr. Kwiatkowski signed a Settlement Agreement that releases Seattle First and the other Bank Appellees ("the Banks") from any claims. There is no need for the Court to consider many of the factual arguments in Appellant's brief, because Mr. Kwiatkowski's claims against Seattle First were properly dismissed.

First, it is undisputed that the Thurston County Superior Court entered multiple orders that relieved Seattle First of liability for its services as limited guardian of Mr. Kwiatkowski's estate. For example, on September 16, 1991, Judge McPhee of the Thurston County Superior Court entered an Order Approving Fourth and Final Account and Report of Seattle First National Bank in which it was "ordered, adjudged and decreed that Seattle First National Bank be, and it is hereby discharged from all further liability in connection with its duties as Limited Guardian of the Estate of Joseph Kwiatkowski." CP 318. Pursuant to RCW 11.92.053, this and the court's prior orders are final and binding

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<sup>1</sup> Bank of America, N.A. is the successor by merger to Seattle First National Bank, N.A. Because the documents regarding Mr. Kwiatkowski's guardianship refer to Seattle First National Bank, Bank of America is referred to herein for clarity's sake as "Seattle First."

upon Mr. Kwiatkowski, subject only to the right of appeal as upon a final order. *Id.*<sup>2</sup> No appeal from any of these orders was taken by Mr. Kwiatkowski or by his Guardian ad Litem. The Final Order bars Mr. Kwiatkowski's claims as *res judicata* and any attempt to attack the order collaterally is invalid as a matter of law. The trial court properly granted summary judgment for Seattle First on this basis.<sup>3</sup>

Second, on January 13, 2005, following the trial court's Summary Judgment decision, Mr. Kwiatkowski signed a Settlement Agreement that released any and all claims against the Banks.<sup>4</sup> At the time, he was adjudged to be and was competent and restored to all of his rights and responsibilities *and he was represented by at least two lawyers*. Only after Mr. Kwiatkowski hired his current lawyers did he raise any questions about the settlement, claiming that he had found "new evidence" that caused him to reconsider his agreement. But in the Settlement Agreement he signed, Mr. Kwiatkowski explicitly waived the right to rely on "newly discovered information" and assumed the risk that some such information might someday come to light:

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<sup>2</sup> The Banks (Bank of America, Key Trust Company and U.S. Bank Trust Department) have attempted to avoid unnecessarily duplicative briefing. While Key Trust and U.S. Bank also will file separate briefs that describe the unique facts pertinent to those banks, this brief was written as the "master brief" and discusses the common facts and legal arguments in depth. Pursuant to RAP 10.1(g)(2), Seattle First anticipates that Key Trust and U.S. Bank will incorporate those common facts and arguments in their separate briefs.

<sup>3</sup> Subsequent to Seattle First's discharge, the Thurston County Superior Court issued similar orders discharging the other Banks as successor limited guardians of Mr. Kwiatkowski's estate.

<sup>4</sup> As discussed below, this was the second time Mr. Kwiatkowski released Seattle First.

Each party assumes the risk that the facts or evidence may turn out to be different than it now understands them to be and agrees to be bound by this AGREEMENT notwithstanding the discovery of new or different facts or evidence.

Settlement Agreement, ¶ 5 (CP 3005). Notwithstanding this Agreement, Mr. Kwiatkowski refused to dismiss his claims, forcing the Banks to move to enforce the Settlement Agreement. The trial court properly granted that motion as well.

The trial court's dismissal of Mr. Kwiatkowski's claims against Seattle First and the other Banks must be affirmed as a matter of law if this Court agrees with either of the following: (1) summary judgment was appropriately granted because the orders of the Thurston County Superior Court discharging the Banks from liability are final and may not be collaterally attacked by Mr. Kwiatkowski at this late date; *or* (2) the Settlement Agreement is valid and enforceable and bars any claims against the Banks. Both of these propositions are clearly correct as a matter of law.<sup>5</sup>

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<sup>5</sup> In any event, there is no merit whatsoever to Mr. Kwiatkowski's arguments on the supposed "new evidence." Seattle First and the other Banks submitted detailed responses to his arguments that showed that even if he were not precluded from relying on it by the terms of the Agreement he signed, this evidence was neither new, nor did it establish wrongdoing by the Banks. Seattle First will summarize its response to certain of these factual arguments later in this brief, but the Court need not resolve the merits of these factual arguments unless it finds that neither the summary judgment order nor the two agreements releasing claims against Seattle First justify dismissal of Mr. Kwiatkowski's claims.

## II. STATEMENT OF THE CASE

### A. **The Thurston County Superior Court Issued Orders That Absolve Seattle First From Liability For The Claims Alleged Herein**

On May 7, 1986, following a tragic automobile accident in New Zealand in which Mr. Kwiatkowski was severely injured and his wife Jana died, Seattle First was appointed as one of two Co-Personal Representatives of the Estate of Jana Kwiatkowski (Thurston County Cause No. 86-4-00153-5); an Order Approving Final Report and Petition for Non-Intervention Decree of Distribution and Decree of Distribution was entered on April 11, 1990. CP 2925-29. That Order imposed certain ongoing duties on Seattle First as co-personal representative; the court found those duties had been performed and entered an Order of Discharge of Co-Personal Representatives on November 13, 1991. CP 2931.<sup>6</sup>

Seattle First was appointed by the Thurston County Superior Court as Limited Guardian of the Estate of Joseph Kwiatkowski on December 8, 1986. CP 2933-35. Seattle First served in that role until September 30, 1991, when the court approved its resignation and petition for discharge from the estate. CP 2915.

During Seattle First's term as co-personal representative and limited guardian, the Thurston County Superior Court was intimately involved with Mr. Kwiatkowski's estate and it appointed a number of other fiduciaries with respect to Mr. Kwiatkowski's person and estate and

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<sup>6</sup> Each of the Banks will prepare its own Statement of the Case. This Statement is focused on the facts that pertain to Seattle First.

his late wife's estate. Thus, in the guardianship matter, Messrs. Drews and Frost were appointed as Special Administrators regarding Mr. Kwiatkowski's interest in the Great American Herb Company ("GAHC"). In that capacity, Messrs. Drews and Frost were responsible for maintaining possession and control of the stock in the company and managing its affairs.<sup>7</sup> Although stock in this company was an asset of the guardianship, Seattle First's role was specifically limited by the court to exclude involvement in the business.<sup>8</sup> For that reason, in its Order Approving Final Account and Decree of Distribution of Jana Kwiatkowski's estate, the court specifically found that "Seattle-First National Bank should be exonerated from any and all liability in connection with the operation of the Great American Herb Company." CP 2927-28.

John Parr, a Thurston County attorney, was appointed as Mr. Kwiatkowski's Guardian ad Litem for purposes of reviewing and approving the reports of the various fiduciaries. Mr. Parr served as Guardian ad Litem throughout the period of time covered by Mr. Kwiatkowski's belated claims. Between December 1986 and October 1991, Seattle First submitted several interim reports to the court. In each

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<sup>7</sup> Messrs. Drews and Frost were initially appointed as special administrators by the court in connection with Jana Kwiatkowski's estate (CP 244-46); their appointment was later renewed in the guardianship. CP 18-23 (at ¶ 1). As such, Seattle First never had any role in the operation of the Kwiatkowskis' business at any time. Mr. Kwiatkowski's half-brother, Marek Perelmuter, was appointed by the Court as the Limited Guardian for his Person.

<sup>8</sup> *See, e.g.*, CP 2913-14 at § XIII: "[Seattle First] had no participation in or responsibility for the management of the company, . . . received no financial statements for [it] during this accounting period and [was] not accountable for its operations."

case, Mr. Parr was appointed as Guardian ad Litem for purposes of reviewing and approving Seattle First's reports. *See* Motions for and Orders Appointing Guardian Ad Litem, dated December 14, 1988, December 14, 1989 and February 26, 1991 (CP 2937-38, 2940-41 and 2943-44, respectively); Reports of Guardian Ad Litem regarding reports of limited guardian of estate, dated December 22, 1988, December 22, 1989 and March 6, 1991 (CP 2946-50, 2952-54 and 2956-58, respectively). In each case, on Mr. Parr's recommendation, the Thurston County Superior Court approved the interim report and entered an order releasing Seattle First from any liability stemming from its role as limited guardian of Mr. Kwiatkowski's estate for the time period covered by the report. Those orders specifically provided that Seattle First "is released from all liability in connection with the management of Great American Herb Company and is not accountable for its operations." *See, e.g.*, Order Approving Third Report of Limited Guardian of Estate, dated March 11, 1991, p. 2 (CP 2961); copies of the orders approving Seattle First's second and first reports are at CP 2964-66 and 2968-69, respectively.

During Seattle First's tenure as limited guardian, it appears that a disagreement developed among Mr. Kwiatkowski and the various fiduciaries appointed to assist him with his affairs. In mid-1991, Mr. Parr, the Guardian ad Litem, requested that Seattle First withdraw as limited guardian of Mr. Kwiatkowski's estate. *See* June 4, 1991 Letter from John Parr to Seafirst Bank Trust Department (CP 2971). Seattle First agreed to

withdraw as limited guardian and its resignation and petition for discharge was approved by the Court on September 16, 1991. CP 2907-17.

Pursuant to RCW 11.92.053, Seattle First filed its Fourth and Final Account and Report on September 11, 1991. On September 16, 1991, Mr. Kwiatkowski; Messrs. Frost and Drews, as Limited Guardians of the Person of Joseph Kwiatkowski; Arthur Davies, their attorney; and Mr. Parr as Mr. Kwiatkowski's Guardian ad Litem, executed a Waiver of Notice of Hearing on Fourth and Final Account and Report (CP 2922-23). That same day, the same group of people, including Mr. Kwiatkowski and his Guardian ad Litem, executed a "Release of All Claims." This Release provided that:

Joseph Kwiatkowski, James Frost and Ralph Drews, as Limited Guardians of Joseph Kwiatkowski and John M. Parr as Guardian Ad Litem of Joseph Kwiatkowski acting jointly and severally, for adequate consideration, do hereby release Seattle First National Bank from liability for any and all claims arising out of the performance by Seattle First National Bank of its duties as one of the administrators of the Estate of Jana Kwiatkowski, Thurston County Cause No. 86-4-00153-5, and as Limited Guardian of the Guardianship Estate of Joseph Kwiatkowski, Thurston County Cause No. 86-4-00386-4.

CP 2919.<sup>9</sup>

On September 16, 1991, Judge McPhee of the Thurston County Superior Court entered an Order Approving Fourth and Final Account

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<sup>9</sup> The Release was conditioned only upon Seattle First obtaining and filing with the court receipts by the successor limited guardian acknowledging delivery of the net assets of the guardianship estate. These receipts were obtained and filed with the Thurston County Clerk. *See* CP 2983-90.

(CP 2907-17). The Court’s Order provided, “[T]he Fourth and Final Account and Report of Seattle First National Bank as limited guardian . . . is in all respects confirmed, approved and granted.” CP 2915. The Order also confirmed and accepted Seattle First’s resignation as limited guardian as of September 30, 1991. *Id.* Finally, Judge McPhee “ordered, adjudged and decreed that Seattle First National Bank be, and it is hereby discharged from all further liability in connection with its duties as Limited Guardian of the Estate of Joseph Kwiatkowski.”<sup>10</sup>

**B. The Trial Court Properly Granted the Banks’ Motions for Summary Judgment And the Parties Then Settled the Claims**

**1. Summary judgment.**

Mr. Kwiatkowski was adjudged fully competent on January 26, 2001. Notwithstanding the Orders of the Thurston County Superior Court that precluded his claims, and ignoring the release that he and his Guardian ad Litem had executed, Mr. Kwiatkowski filed suit against Seattle First, Key Trust, U.S. Bank and Messrs. Drews and Frost on January 21, 2004. CP 213-21.

In late April 2004, the Banks each moved for summary judgment, arguing that the earlier Orders of the Thurston County Superior Court that released the Banks from any liability were final and binding on Mr.

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<sup>10</sup> CP 2916 at § XVI. As with the Release, the Order was conditioned upon Seattle First obtaining and filing receipts from the successor limited guardian acknowledging transfer of the guardianship assets. CP 2916-17. These receipts were filed. *See* CP 2983-90.

Kwiatkowski. On May 20, Mr. Kwiatkowski responded to the summary judgment motions by filing an opposition brief and supporting declaration. Mr. Kwiatkowski did not seek discovery in connection with these summary judgment motions, nor did he seek a continuance to obtain discovery under CR 56(f). On June 4, 2004, based on the evidence that the parties had called to the court's attention, the trial court granted summary judgment in favor of the Banks on all of Mr. Kwiatkowski's claims. CP 736-37, 3035-36. The court concluded that the Orders relieving the Banks of liability were final and binding on Mr. Kwiatkowski. (See discussion, *infra*.) A month later, on July 7, the court granted the Banks' motions for fees and costs. CP 785-90. On July 30 each Bank submitted petitions for fees and costs; the fees totaled approximately \$65,000. CP 827-44, 856-59, 860-877.

## **2. Settlement agreement.**

Meanwhile, in the interest of avoiding the expense associated with further litigation, the Banks jointly proposed to Mr. Kwiatkowski a settlement, whereby the Banks would waive their claims for fees in exchange for Mr. Kwiatkowski's agreement not to pursue any appeal of the summary judgments in favor of the Banks. CP 952. A draft agreement to that effect was prepared and after several revisions were exchanged between the Banks and Mr. Kwiatkowski's attorney, the Settlement Agreement was finalized in early January 2005. See CP 954-60. Mr. Kwiatkowski signed the Settlement Agreement on January 13, 2005. See CP 941-50, 962.

Mr. Kwiatkowski clearly communicated his understanding that the Agreement was final as of January 13, 2005, the date of his signature. On that day, counsel for Seattle First sent an e-mail to all of the parties stating:

Where are we on the settlement? I understand that all parties have agreed on the terms. Do plaintiffs agree that a facsimile signature will be treated as an original and that the Agreement may be signed in counterparts? If so, then I understand that we merely need to exchange faxed signatures and file the papers with the Court.

January 13, 2005 e-mail from Michael E. Kipling to Michael Schein (counsel for Mr. Kwiatkowski), Matt Turetsky (counsel for Key Trust Company), and Gregory Montgomery (counsel for U.S. Bank Trust Department); a copy of the e-mail chain including this message is at CP 962.

Mr. Schein, counsel for Mr. Kwiatkowski replied:

Plaintiff agrees. I have Mr. Kwiatkowski's signature here, and am about to put it on the wire. Let's agree that today – January 13, 2005 – is the date of the Settlement Agreement. I have entered that on page 1 of our Agreement, and it should be entered on the document filed with the Court. As soon as I have received everyone's signature on the Settlement Agreement, I will execute the Stipulation and Order Dismissing Claims.”

*Id.*

The parties thus expressed a common understanding that the Settlement Agreement was final as of January 13, 2005. They anticipated that signatures from the other parties would be obtained in order to facilitate filing the stipulation and order of dismissal, but the enforceability of the Agreement was not dependent upon obtaining those

signatures. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983).

Signatures from each of the Banks in fact were obtained and delivered to Mr. Kwiatkowski by April, prior to the time he attempted to rescind his agreement. CP 1000-01. The Stipulation and Order Dismissing Claims with Prejudice and Without Award of Fees or Costs required by ¶ 6 of the Settlement Agreement was signed by counsel and forwarded to Mr. Kwiatkowski's attorney, Michael Schein, on May 2, 2005. CP 937 (at ¶ 6). On May 4, 2005, counsel for the Banks received via facsimile a letter from Mr. Kwiatkowski's new attorney, Robin Balsam, seeking "to hold further work on the settlement" (i.e., refusing to execute and file the Stipulation in accordance with the Settlement Agreement) until "newly discovered information" can be fully investigated. CP 964-65. The following day, the Banks received a letter from Mr. Schein stating that Mr. Kwiatkowski had instructed him to withdraw from the case. CP 967.

The Banks then filed a Motion to Enforce the Settlement Agreement. Notwithstanding that Mr. Kwiatkowski had signed a Settlement Agreement waiving the right to rely on "new evidence," the trial court allowed his new lawyer to conduct limited discovery into the supposed "irregularities" he claimed to have newly discovered.<sup>11</sup> After

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<sup>11</sup> From the initial hearing on June 10, 2005 at which this belated discovery was discussed, the trial court made it clear that Mr. Kwiatkowski would be responsible to reimburse the Banks for any fees or costs incurred in connection with this belated discovery and/or the Bank's motion to enforce the Settlement Agreement. *See, e.g.*, CP 4293 and discussion *infra* at III.C and n. 30.

nine months of investigation and several hearings on the Banks' Motion to Enforce the Settlement Agreement, the court found on March 20, 2006 that the Agreement was binding (CP 1985-86) and judgment was finally entered on May 19, 2006. CP 2397-2401.

### III. ARGUMENT

#### A. The Summary Judgment Orders Were Properly Granted

##### 1. Pursuant to RCW 11.92.053, the Order Approving Fourth and Final Account of Seattle First is final and binding upon Mr. Kwiatkowski.

RCW 11.92.053 is very clear and it disposes of Mr. Kwiatkowski's claims. Upon the termination of a guardianship, for any reason, the guardian or limited guardian shall petition the court for an order settling his or her account. Interested persons may file objections or may appear at the hearing and present objections. If the court thereafter issues an order, the effect of such order is to bar subsequent claims by the incapacitated person:

At the hearing on the petition of the guardian or limited guardian, if the court is satisfied that the actions of the guardian or limited guardian have been proper, and that the guardian has in all respects discharged his or her trust with relation to the receipts, expenditures, investments, and acts, then, in such event, the court shall enter an order approving the account, *and the order shall be final and binding upon the incapacitated person, subject only to the right of appeal as upon a final order.*

RCW 11.92.053 (emphasis added).<sup>12</sup>

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<sup>12</sup> The only exception, which does not apply here, is that where the ward is a minor, he or she may challenge the account within one year of gaining majority on the ground of fraud. This exception does not apply to Mr. Kwiatkowski and, even if it did,

Neither Mr. Kwiatkowski nor his Guardian ad Litem filed an appeal of the Order Approving Final Account. Indeed, they *waived* any objections to the Final Account, waived a hearing, and executed a release of all claims against Seattle First. CP 2922-23, 2919-20. As such, pursuant to RCW 11.92.053, the Order Approving Final Account and absolving Seattle First of any liability in connection with acts done regarding the limited guardianship is final and binding upon Mr. Kwiatkowski.<sup>13</sup> The Order acts as *res judicata* as to Mr. Kwiatkowski's claims herein.

**2. The Order Approving Final Report in the Jana Kwiatkowski Estate is also final and binding upon Mr. Kwiatkowski.**

The Order Approving Final Account in the Estate of Jana Kwiatkowski is also binding and bars Mr. Kwiatkowski's claims herein, to the extent those claims are based on Seattle First's actions as Executor:

It is settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings upon due notice as provided by statute are final adjudications having the effect of judgments in rem, and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well. Such

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the claims in this case were filed well over one year after his full rights were restored by the court on January 26, 2001. See Claim for Damages (CP 213-21) at ¶ 3.9.

<sup>13</sup> Seattle First is also absolved of any potential liability with respect to its role as guardian during the terms covered by the interim reports. Seattle First filed interim accounts and reports with the court on the following dates: December 14, 1988; December 13, 1989 and February 26, 1991. In each case, a Guardian ad Litem was appointed and approved the reports. Thereafter, the court approved the reports. Pursuant to RCW 11.92.050, these interim reports are also final and binding orders that may not be challenged by Mr. Kwiatkowski at a later date. Cf. *In re Guardianship of Rudonick*, 76 Wn. 2d 117, 123-24, 456 P.2d 96 (1969) (only where Guardian ad Litem is appointed are orders approving interim accounts final and binding).

decrees cannot be attacked or annulled in any collateral proceeding, except for fraud.

*Farley v. Davis*, 10 Wn. 2d 62, 70-71, 116 P.2d 263 (1941) (citations omitted); RCW 11.76.050.

**3. Mr. Kwiatkowski's collateral attack on these Orders is untimely and, in any event, lacks any merit.**

In opposition to the Banks' Motions for Summary Judgment, Mr. Kwiatkowski made several arguments, some of which he appears to repeat in the Brief of Appellant.<sup>14</sup> Each of his arguments was based on alleged improprieties in the Thurston County proceedings that (if they had any merit, which they do not) would have been apparent to the court and/or Mr. Kwiatkowski's advisors (including his Guardian ad Litem) at the time. Of course, if either Mr. Kwiatkowski or his Guardian ad Litem had any real complaint regarding the Orders discussed above, or the procedures followed by Seattle First, they had the right to appeal the Orders at the time. They did not do so. His attempt to attack the Orders over a decade after they were entered is untimely and is barred by RCW 11.92.053. In any event, there is also no merit to any of the belated challenges he raised in opposition to the summary judgment motions.

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<sup>14</sup> It is unnecessarily difficult to discern from his brief what issues and arguments Mr. Kwiatkowski asserts as to the Banks in this proceeding. In any event, pursuant to RAP 9.12, Mr. Kwiatkowski may only rely in this Court on evidence and issues that he presented to the trial court in connection with the summary judgment motions.

**a. Proper notice was given with regard to the Order Approving Final Report.**

Mr. Kwiatkowski repeatedly mischaracterizes the Orders that released Seattle First from liability, including the Final Order, as *ex parte* orders and argues that inadequate notice was given to Mr. Kwiatkowski. This argument misrepresents the record. Mr. Kwiatkowski and his Guardian ad Litem were in fact given notice of the presentation of the Final Order, *which notice they acknowledged in writing*. CP 2922-23. They also waived a hearing on presentation of the Order.<sup>15</sup>

On September 16, 1991, Mr. Kwiatkowski, the limited guardians of his person, their attorney, and the Guardian ad Litem appointed by the Court to review Seattle First's Final Report each executed a Waiver of Notice of Hearing with respect to the Fourth and Final Account and Report. CP 2922-23. In that written waiver, each acknowledged that he had received notice of the hearing and a copy of the Fourth and Final Account and Report of Seattle First, waived further notice of the hearing on the Report, and consented to entry of an Order approving the Report and granting the prayed for relief.

Mr. Kwiatkowski concedes that he and his Guardian ad Litem signed the Waiver of Notice. Appellant's Brief, pp. 59-60. But, without citing any authority, he argues that he should not be bound by this agreement because he lacked the legal capacity to make this waiver. Of

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<sup>15</sup> An *ex parte* order is one that is entered without notice. *Black's Law Dictionary* (5<sup>th</sup> ed. 1979) at 517. Here, all interested parties received notice, waived the right to a hearing, stipulated to entry of the relief requested, and the court so found.

course, Mr. Kwiatkowski's lack of capacity is precisely why the court had appointed a Guardian ad Litem to look out for his interests. As Guardian ad Litem, Mr. Parr had the authority to bind the ward as to procedural matters such as the waiver of formal notice when adequate actual notice was in fact provided. *Quesnell v. State*, 83 Wn. 2d 224, 238, 517 P.2d 568 (1973) (as an attorney, Guardian ad Litem is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate hearing); RCW 2.44.010 (attorney has authority to bind client by written stipulation as to procedural matters). It is his Guardian ad Litem's stipulation to this process, which Mr. Kwiatkowski does not dispute, that is binding on him.<sup>16</sup>

Finally, Mr. Kwiatkowski completely ignores the fact that the Order Approving Fourth and Final Report itself recites that adequate notice was provided to all parties. "[I]t appear[s] to the Court that all persons entitled to notice of the hearing on said Fourth and Final Report as provided in RCW 11.92.053 and RCW 11.88.040 have waived notice of hearing . . . and have consented to entry of an order approving said Fourth and Final Report and granting the relief prayed for therein." CP 2907. Where a guardianship order recites that adequate notice was provided, that recital is "accepted as conclusive on a collateral attack" on the Order. *Exchange Bank of Spokane v. Jumer*, 150 Wash. 355, 361, 272 P. 978

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<sup>16</sup> *In re Guardianship of K.M.*, 62 Wn. App. 811, 816 P.2d 71 (1991), on which Mr. Kwiatkowski relies, is inapposite because it involved the guardian ad litem's purported waiver of a minor's right to attend a hearing at which her parents petitioned for her sterilization, a process that implicated her constitutional right of privacy.

(1928). Once again, if Mr. Kwiatkowski or his Guardian ad Litem had any complaint about notice, their arguments should have been raised by way of appeal of the Order. They may not now raise those arguments by way of collateral attack on the Order. *Id.*

**b. There is no merit to the belated argument that the Thurston County Superior Court lacked jurisdiction to enter the Final Order.**

Even if there were merit to Mr. Kwiatkowski's argument that insufficient notice was given of the hearing on Seattle First's Final Report and Account (and even if we ignore that Mr. Kwiatkowski is precluded from raising this argument as a matter of law), it would not follow that the supposed lack of notice deprived the Thurston County Court of jurisdiction to enter the Order, as he argues incorrectly. Mr. Kwiatkowski relies on cases that involved hearings for the *appointment* of a guardian, pursuant to RCW 11.88.040. That statute specifies that ten days' notice shall be given for a hearing "before *appointing* a guardian or limited guardian." *Id.* Similarly, Mr. Kwiatkowski's cases hold merely that the court has no power to appoint a guardian unless the notice requirements of RCW 11.88.040 are complied with, because it does not acquire jurisdiction until the statutory notice is provided. Appellant's Brief, pp. 28-29.

These cases are inapposite to the issue before this Court because Mr. Kwiatkowski does not challenge the *appointment* of Seattle First as limited guardian. Instead, he challenges the termination of its role as

limited guardian and the Order entered at that time discharging Seattle First of liability. He concedes, as he must, that the court had already obtained jurisdiction over the ward and over the guardianship. CP 215-16 at ¶¶ 3.5, 3.9; CP 708-710. This concession is fatal to his argument because once the court obtains jurisdiction over a guardianship and appoints a guardian, it retains jurisdiction to enter further orders in the same matter. *In re Gaddis' Guardianship*, 12 Wn. 2d 114, 124, 120 P.2d 849 (1942) (“[S]o long as the ward remains subject to his disability, and continues to reside within this state, the superior court which originally acquired jurisdiction retains the same, for all purposes connected with the administration of the ward’s estate.”); *see also Mathieu v. United States Fidelity and Guaranty Co.*, 158 Wash. 396, 399, 290 P. 1003 (1930) (notice requirements in the statute governing appointment of guardians do not apply to subsequent hearings, even where the guardian is removed and a successor guardian is appointed).

Mr. Kwiatkowski’s reliance on *Patchett v. Superior Court*, 60 Wn. 2d 784, 375 P.2d 747 (1963) and *Grady v. Dashiell*, 24 Wn. 2d 272, 163 P.2d 922 (1945) is misplaced. In *Patchett*, the court found that there had been “utter disregard of the statutory procedure for the final settlement of the estate and the discharge of the personal representative.” 60 Wn. 2d at 787. Here, in contrast, the record shows that the procedures were followed with respect to the guardianship, and with respect to the Estate of Jana Kwiatkowski. *Patchett* simply has no bearing on this case. Likewise, the facts of *Grady* were quite distinct, involving the validity of a

purported settlement of claims by the guardian, who failed utterly to comply with the requirements of Rem. Rev. Stat. § 1576 (now codified as RCW 11.92.060) requiring court approval of such settlements. *Grady* also involved, unlike the instant case, proceedings that were truly *ex parte* as to the plaintiff. 24 Wn. 2d at 287. Moreover, the citation of *Grady* for the proposition that the failure to follow the statutory procedures meant that the court lacked jurisdiction to enter the challenged order fails to recognize that this aspect of *Grady* was overruled by the Supreme Court in *In re Estate of Phillips*, 46 Wn. 2d 1, 278 P.2d 627 (1955).<sup>17</sup>

- c. All parties, including Mr. Kwiatkowski, his Guardian ad Litem and the court, were well aware of Seattle First's limited role with respect to the Great American Herb Company, and the court repeatedly approved that role.**

Mr. Kwiatkowski also mischaracterizes the record when he argues that Seattle First somehow “changed the scope of the guardianship” without approval of the court. Appellant’s Brief, p. 4. He argues that Seattle First misrepresented its status to the court when it described its role as a “limited,” rather than as a “full” guardian of Joseph Kwiatkowski’s Estate, and that the court never accepted its “limited role.” *Id.*, p. 43. The “limitation” that he alleges was wrongly represented to the court was the

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<sup>17</sup> Likewise, Appellant finds no support in *In re Guardianship of Rudonick*, 76 Wn. 2d 117, 456 P.2d 96 (1969). *Rudonick* holds that *ex parte* interim orders are not final, but confirms that interim orders that are entered after a Guardian ad Litem has been appointed are final and binding on the ward. 76 Wn. 2d at 123-124. Here, it is undisputed that a Guardian ad Litem was appointed and that he reviewed each of the interim reports as well as the Fourth and Final Report. Appellant’s Brief, pp. 4-5, n.9. As such, the Orders approving those reports that release Seattle First from all liability are also “final and binding” on Mr. Kwiatkowski.

fact that Seattle First was not responsible for management of the Great American Herb Company. This argument disregards and misrepresents undisputed evidence in the record.

In the first place, contrary to Mr. Kwiatkowski's argument, the Order initially appointing Seattle First as Guardian of the Estate of Joseph Kwiatkowski is entitled "Order Appointing *Limited* Guardians." CP 2933-35 (emphasis added). Moreover, a review of the entire record (as opposed to the selective citations on which Mr. Kwiatkowski relies) shows that the Thurston County Superior Court not only was aware of the limits on the guardian's role, but in fact it *orchestrated* the appointment of several fiduciaries in this guardianship, the effect of which was to create a limit on Seattle First's role.

As noted above, Seattle First was appointed as limited guardian of Mr. Kwiatkowski's Estate in December 1986. CP 310. Seven months earlier, in May 1986, the same court had appointed Appellees Drews and Frost as special administrators in connection with the Estate of Jana Kwiatkowski, his deceased wife. CP 244-46. Pursuant to their appointment by the court as special administrators in that Estate, Drews and Frost were responsible for management of the Great American Herb Company. *Id.* CP 311. Later, when the Jana Kwiatkowski Estate closed, Drews and Frost were appointed as special administrators in connection with Mr. Kwiatkowski's guardianship, in order to allow them to continue to serve as of managers of Great American Herb Company. *See* Order

Approving Special Administrator's Report, Petition for Approval and Further Authority, dated April 12, 1990. CP 18-23 at ¶ 1.

Not only did the court create this arrangement, it repeatedly affirmed the limited role of Seattle First as guardian with respect to the company. Thus, when Seattle First submitted interim reports to the court regarding its role as guardian, each of the orders approving those reports provided that Seattle First as the limited guardian had not been involved in the management of the business and should not be held accountable for its operations. For example, the Order Approving Second Report of Limited Guardian of Estate provided:

[A]lthough all of the stock of Great American Herb Company is an asset of the guardianship, the limited guardian of the estate has *respected the request of the ward that said limited guardian not be involved in the management of the business* and therefore said guardian has no responsibility for the management of the company, has received no financial statements for Great American Herb Company during the accounting period and should not be held responsible for its operations[.]

CP 2964-65 (emphasis added).

More importantly, not only does the Final Order discharging Seattle First from any further liability in connection with this matter repeatedly refer to Seattle First as "limited guardian," the order specifically provided:

[Seattle First] as limited guardian of the estate is not involved in the management of Great American Herb Company . . . . [Seattle First] as limited guardian of Ward's estate has had no participation in or responsibility for the management of the company, has received no

financial statements for the Great American Herb Company . . . and is not accountable for its operations.

CP 2913-14. Indeed, following Seattle First's removal as limited guardian, several successive guardians were appointed, at the request of and with the blessing of Mr. Kwiatkowski, his Guardian ad Litem, and the court. In each case, the successor guardian's role was limited in exactly the same way that Seattle First's role was limited.<sup>18</sup>

Mr. Kwiatkowski's argument that Seattle First somehow misrepresented its role to the court, or that the court never approved that role, is absurd. It is clear from the entire record that the Thurston County Superior Court was at all times in control of the guardianship, and that the court established the roles of the limited guardians, the Guardian ad Litem, the special administrators and the other fiduciaries it appointed. The court specifically directed that Seattle First's role be limited, at least as far as the Great American Herb Company was concerned. This, of course, is an entirely appropriate function and well within the power of the court. "Guardians or limited guardians herein provided for shall at all times be under the general direction and control of the court making the appointment[.]" RCW 11.92.010. There is likewise no reason that this issue could not have been raised by way of appeal in 1991 or earlier, because all of the evidence on which Mr. Kwiatkowski purports to rely has been in the court file since that time.

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<sup>18</sup> The status of the successor guardian is contained in the briefs of the other Banks. To avoid repetition, that discussion is incorporated by reference herein. RAP 10.1(g)(2).

**d. No hearing was required where all interested parties waived the right to a hearing.**

The final argument in opposition to the summary judgment motions was that the Thurston County Superior Court was compelled to hold a hearing on Seattle First's Fourth Report, notwithstanding the fact that Mr. Kwiatkowski, his Guardian ad Litem and all other interested parties had waived the right to a hearing and consented to entry of the Order discharging Seattle First from liability.<sup>19</sup> It is difficult to understand what the point of such a hearing would be, when the court and all of the parties had agreed that there were no issues that precluded entry of the requested Order. In any event, Mr. Kwiatkowski offers no authority for the remarkable assertion that a court has no power to enter an Order unless it holds a formal hearing, even though the affected parties all have consented to the relief requested. To the contrary, where (as here) the Order on its face recites that all parties have received adequate notice and the court has reviewed the matters presented, those matters are conclusive against Mr. Kwiatkowski's collateral attack on the Order. *Exchange Bank of Spokane, supra*, 150 Wash. at 361.

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<sup>19</sup> Mr. Kwiatkowski cites RCW 11.92.050 as the basis for the supposed requirement of a hearing. However, that statute by its terms applies not to final accounts but to intermediate accounts. The Order Approving Fourth and Final Account and Report of Seattle First was not an intermediate account; it was a final account.

**4. Under RAP 9.12, this Court may consider only documents and issues that were called to the attention of the trial court prior to entry of the Summary Judgment Order.**

In his Brief, Mr. Kwiatkowski appears to rely on a number of new arguments and evidence that were not presented to the trial court in opposition to the Banks' Motions for Summary Judgment. Indeed, Mr. Kwiatkowski's Brief appears to be designed to blur the distinction between these new arguments and the arguments on which he relied in opposition to summary judgment in the trial court. Under RAP 9.12, his attempt to introduce new issues and evidence in this Court is improper and those arguments should not be considered. Because the arguments he raised in the trial court have no merit, the summary judgment orders must be affirmed.

**B. The Order Enforcing the Settlement Agreement Should be Affirmed.**

**1. Mr. Kwiatkowski waived any right to rescind the Settlement Agreement based on supposed "new evidence."**

Mr. Kwiatkowski admits that he signed a Settlement Agreement and that the Agreement clearly resolves his claims against Seattle First.<sup>20</sup> CP 1000-01, 3004-13. In the Settlement Agreement, Mr. Kwiatkowski expressly waived any right to rely on "new evidence" to revoke the

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<sup>20</sup> In the Agreement, Mr. Kwiatkowski not only "waives and releases his right to appeal" the Summary Judgment Orders in favor of each of the Bank Appellees, he also "fully and completely releases and waives any and all claims [] against any other party" to the Settlement Agreement. CP 3004.

Agreement and accepted the risk that he might later conclude that the facts were different than he understood them at the time:

Each party acknowledges that it has had the opportunity to conduct an investigation into the facts and evidence relating to the Released Claims and that it has made an independent decision to enter this AGREEMENT, without relying on representations of any other party. Each party assumes the risk that the facts or evidence may turn out to be different than it now understands them to be and agrees to be bound by this AGREEMENT, notwithstanding the discovery of new or different facts or evidence.

Settlement Agreement, ¶ 5 (CP 3005). Mr. Kwiatkowski was fully competent and was represented by counsel in connection with the Settlement Agreement. The Agreement bars any subsequent argument that “new evidence” justifies revoking it.<sup>21</sup>

**2. Mr. Kwiatkowski cannot argue that mistake allows him to avoid the Settlement Agreement.**

Even if Mr. Kwiatkowski were able to show that all parties to the Settlement Agreement were mistaken at the time the Agreement was signed, he cannot avoid it on that ground. A contract may be voidable due to mutual mistake when both parties independently make a mistake at the time the contract is made as to a basic assumption of the contract, *unless the party seeking avoidance bears the risk of the mistake*. *Bennett v. Shinoda Floral, Inc.*, 108 Wn. 2d 386, 396, 739 P.2d 648 (1987); *PUD 1 v. WPPSS*, 104 Wn. 2d 353, 362, 705 P.2d 1195 (1985); Restatement (Second) of Contracts § 152 (1981). A party (such as Mr. Kwiatkowski)

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<sup>21</sup> Mr. Kwiatkowski’s attempt to characterize this as an “as-is” clause (Appellant’s Brief, p. 7) is puzzling. It has nothing to do with the sale of goods; it is an acceptance of risk and a waiver of claims in the context of a settlement. See discussion, *infra*.

bears the risk of any such mistake where “he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.” Restatement (Second) of Contracts § 154(b) (1981); *see also Bennett*, 108 Wn. 2d at 396; *PUD 1 v. WPPSS*, 104 Wn. 2d at 362. The language of the Settlement Agreement could not be clearer in this regard: “Each party assumes the risk that the facts or evidence may turn out to be different than it now understands them to be and agrees to be bound by this Agreement, notwithstanding the discovery of new or different facts or evidence.” Settlement Agreement, ¶ 5 (CP 3005).

In this situation, there was no mistake. *Bennett, supra*. Instead, Mr. Kwiatkowski admits that he was aware that there might be uncertainty as to the facts but he accepted the risk that his understanding might be wrong. Having knowingly accepted this risk, he cannot now seek to void the Agreement because he later feels he has made the wrong choice. *Id.*; *see also Tieggs v. Boise Cascade Corp.*, 83 Wn. App. 411, 426-27, 922 P.2d 115 (1996); *CPL (Delaware) LLC v. Conley*, 110 Wn. App. 786, 791-92, 40 P.3d 679 (2002).<sup>22</sup>

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<sup>22</sup> Nor can Mr. Kwiatkowski avoid the Settlement Agreement by arguing that he was unilaterally mistaken. A party to a contract may be entitled to reform a contract based on unilateral mistake, but this right arises only where the other party engaged in “fraud or inequitable conduct.” *Washington Mutual Savings Bank v. Hedreen*, 125 Wn. 2d 521, 525, 886 P.2d 1121 (1994).

**3. Nor can Mr. Kwiatkowski claim he was entitled to, or did, rely on information from the Banks.**

Mr. Kwiatkowski now argues that he is not bound to his Agreement because the Banks failed to disclose material information. But, where a failure to disclose is alleged to be the basis for voiding a contract, it is well established that the party challenging the contract must show that the other party or parties concealed a material fact *that it was obligated to disclose*. *Washington Mutual Savings Bank v. Hedreen*, 125 Wn. 2d 521, 525, 886 P.2d 1121 (1994); *Kelley v. Von Herberg*, 184 Wash. 165, 174, 50 P.2d 23 (1935). Concealment rises to the level of fraud or inequitable conduct only when the party possesses knowledge that it has a duty to disclose to the other party. *Id.* Again, Mr. Kwiatkowski's efforts to create such a duty fail as a matter of law. Contrary to his repeated arguments, at the time the Settlement Agreement was executed, none of the Banks was in a position of trust or confidence with respect to Mr. Kwiatkowski. Indeed, at the time the Settlement Agreement was executed he was in litigation—an adversarial relationship—with each of the Banks. Even the case on which he purports to rely recognizes this distinction. “The relationship was adversarial, not one of trust or reliance.” *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 698, 994 P.2d 911 (2000).

In order for Mr. Kwiatkowski to avoid the Agreement based on an alleged failure to disclose information to him, he would have to show (among other things) that he relied on the Banks to disclose information to

him. *Martin v. Miller*, 24 Wn. App. 306, 308, 600 P.2d 698 (1979). But, he expressly represented that he had an opportunity to do his own investigation and that he was not relying on representations of any other party. CP 3005 at ¶ 5.<sup>23</sup>

**4. No evidentiary hearing was required to enforce the Settlement Agreement because Mr. Kwiatkowski's defenses are barred as a matter of law.**

Mr. Kwiatkowski's argument that the court was required to hold an evidentiary hearing prior to enforcing the Settlement Agreement is based on the erroneous premise that this issue is governed by *Brinkerhoff*. *Brinkerhoff* does not apply here because the Settlement Agreement in this case is materially different from the agreement in *Brinkerhoff*.<sup>24</sup> Mr. Kwiatkowski continues to ignore that the Settlement Agreement in this case includes his *express agreement* to assume the risk that his understanding of the facts might be incomplete or inaccurate, and to waive any right to rely on new evidence to revoke the agreement. Settlement Agreement, ¶ 5 (CP 3005).

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<sup>23</sup> Even if we ignore that he waived the right to rely on anything the Banks told him, it is clear that he could avoid his obligations under the Agreement only if he could show that he was misled as to a *material* fact when he signed it. *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, 122 Wn. 2d 371, 390, 858 P.2d 245 (1993); *see also* Restatement (Second) of Contracts § 164 (2005). In the context of the Settlement Agreement, a material fact would be one that would convince a reasonable person that there was merit to Mr. Kwiatkowski's claims of breach against the Banks, notwithstanding that this Court had already dismissed all of his claims on summary judgment. None of the alleged "new evidence" rises to this level. (See discussion, *infra*.)

<sup>24</sup> *Brinkerhoff* also involved an affirmative misrepresentation, rather than an alleged failure to disclose. *Id.* at 699.

**5. In any event, the supposed “new evidence” was neither new nor was it evidence of wrongdoing by Seattle First.**

Mr. Kwiatkowski claims that his “appellate counsel” discovered “new facts in 2005 indicating [Seattle First’s] involvement with GAHC exceeded what had been disclosed to the guardians and court” (Appellant’s Brief, p. 81). He argues that such “new facts” justify his attempt to rescind the Settlement Agreement notwithstanding that he, while fully competent and represented by counsel, waived the right to do so. In any event, none of the “irregularities” he argued to the trial court and now presents to this Court was “new” to him. (The fact that some of it may have been new to his *current* attorney is irrelevant.)<sup>25</sup>

For Mr. Kwiatkowski to point to “new evidence” of purported “irregularities” he would have to show that neither he, *nor* any of his attorneys, *nor* his Guardian ad Litem had any knowledge of the facts until *after* January 2005, when he signed the Settlement Agreement. In fact, as shown clearly below, every alleged “irregularity” raised by Mr. Kwiatkowski was known years ago to him, his attorneys, and/or his Guardian ad Litem. Mr. Kwiatkowski’s arguments to the contrary are based on mischaracterization of the evidence and a willful disregard of the record.

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<sup>25</sup> Mr. Kwiatkowski argues repeatedly that his belated discovery was limited to the files of the Banks’ *counsel*. Appellant’s Brief, p. 11. This is simply untrue. What the court ordered to be produced—and what Seattle First did produce—was a copy of the Bank’s entire file relating to the Kwiatkowski limited guardianship (which happened, by this point, to be in its counsel’s offices). See 6/10/05 Hearing Transcript at pp. 49-50 (CP 4289-90). This file had never been requested by either of Mr. Kwiatkowski’s attorneys prior to the Summary Judgment Orders, so (not surprisingly) some of the documents contained therein were “new” to Mr. Kwiatkowski and his current lawyer.

Mr. Kwiatkowski's Brief twists and turns and circles back on itself, conflating (as he did at the trial court) the evidence before the court at the time it granted summary judgment and the evidence presented in conjunction with enforcing the Settlement Agreement. The following paragraphs respond to what appears to be a reasonably concise statement of the alleged "omissions and misrepresentations" that Mr. Kwiatkowski claims allow him to avoid the Settlement Agreement (Appellant's Brief, pp. 84 – 85).

**a. Seattle First's "involvement" (or lack thereof) with GAHC was known to Mr. Kwiatkowski, the other fiduciaries, and the court.**

As to Seattle First's alleged "involve[ment] in the corporate governance of Sirius Enterprises, Inc." (CP 1128-31), the documents on which this allegation is based show nothing more than normal communication between Seattle First, as Limited Guardian, and the group that had been appointed by the court to manage the company. All parties involved, including the court, Mr. Kwiatkowski, and Mr. Kwiatkowski's Guardian ad Litem, knew that Great American Herb Company stock was an asset of the Guardianship, but that Seattle First was not to be involved in the management of the company. *See, e.g.*, Order Approving Third Report of Limited Guardian of Estate, March 11, 1991 (CP 2960-62) at p. 2.

A look at the minutes of the "special meeting" Mr. Kwiatkowski now cites (CP 1174-75) shows clearly the following: (1) the meeting was

called at Mr. Kwiatkowski's request; (2) Seattle First attended solely for the purpose of voting Mr. Kwiatkowski's shares *at his request and in the manner he directed*; and (3) Mr. Kwiatkowski attended the meeting and signed the minutes. The only action taken at the meeting was the addition of Art Davies and Ralph Drews to the board of directors (to serve along with Mr. Kwiatkowski) at Mr. Kwiatkowski's request.

The fact that these two gentlemen were on the company's board of directors was no secret. It was known to the court (*see* Report of Special Administrators, November 30, 1988, ¶¶ 9, 13 (CP 4442-44)), to Mr. Kwiatkowski, and to Mr. Parr (the Guardian ad Litem). In addition, this fact was known to Mr. Kwiatkowski's attorney at least as early as July 2002. *See* July 25, 2002 Letter from Brent Dille (Owens Davies) to Donna Holt, counsel for Mr. Kwiatkowski, setting forth, among other things, the tenures of Art Davies, Jim Frost and Ralph Drews on the Board of Directors (CP 4503-04).<sup>26</sup> In any event, as a corporate record of Sirius Enterprises, Mr. Kwiatkowski has had access to this very document at all times since it was created over twenty years ago. RCW 23B.16.020. There is no showing that any of this information was "newly discovered" after January 2005 and that, had Mr. Kwiatkowski known it in January 2005, he would not have signed the Settlement Agreement.

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<sup>26</sup> Recall as well that at the time Mr. Kwiatkowski, through his attorney, communicated with Mr. Dille regarding the membership of the Great American Herb Company Board of Directors, Mr. Kwiatkowski had been fully restored to his rights. There is simply no justification for him to now claim he "didn't know" about the Board membership until after January 13, 2005, when he signed the Settlement Agreement.

**b. The Great American Herb Company stock devaluation was known to Mr. Kwiatkowski, the other fiduciaries, and the court.**

The internal Seattle First materials cited by Mr. Kwiatkowski regarding the “devaluation” of Great American Herb Company stock merely reflect Seattle First’s efforts to place an accurate value on the major asset of the Guardianship, i.e., the stock of a closely held company. When it became impossible to do so because Seattle First had too little information about the Company, it changed the value of the asset on its books to \$1.00. All of this was reported to the court and known to all parties, including Mr. Kwiatkowski’s Guardian ad Litem. *See, e.g.*, Third Report of Limited Guardian of Estate, filed February 26, 1991 (CP 4506-12), ¶ 2 and Schedule A; Fourth and Final Account and Report of Seattle First National Bank as Limited Guardian of the Ward’s Estate, Resignation, and Petition for Discharge, filed September 16, 1991 (CP 4528-41), § X(e) (“The basis for [Seattle First’s] estimate of Fair market value of such property is as follows: . . . for the stock of Sirius Enterprises, Inc. which is carried as Great American Herb Co., the name under which it does business, the sum of \$1.00, because without a careful evaluation of the business of said corporation, [Seattle First] has no real basis for better estimating the value.”).

- c. **The fact that Seattle First did not receive certain financial statements and was released from liability for company operations was known to Mr. Kwiatkowski, the other fiduciaries and the court.**

Mr. Kwiatkowski's next argument has to do with Seattle First's alleged access (or lack thereof) to company financial information (CP 1132-36, 1184, 1186, 1188-89, 1191-96, 1198, 1200, 1202, 1204, 1206, 1208, 1210). This argument is puzzling. In light of the structure of this Guardianship, in which the court repeatedly ordered Seattle First not to involve itself in the operations of the company, there is no relevance to what information Seattle First did or did not have, or what internal discussions took place at Seattle First regarding the Great American Herb Company.

In any event, nothing was withheld from the court or from Mr. Kwiatkowski on this point. Seattle First never denied having received financial statements for 1986 and 1987. Its Second and Third Reports to the court state only that it had not received financial statements "during the accounting period" of each of these Reports. CP 4520-26, ¶ 5 and CP 4506-12, ¶ 5, respectively. In fact, Seattle First did *not* receive financial statements for those accounting periods (1988 and subsequent years), and quite accurately reported that fact to the court. *Id.* Mr. Kwiatkowski even acknowledges that the documents indicate that Seattle First did not receive financial statements for the accounting periods covered by these Reports. *See, e.g.*, CP 1134 at lines 5-11.

Mr. Kwiatkowski also conveniently fails to note that within a few months of that Order, through his Guardian Ad Litem, he petitioned the court to remove Seattle First as Limited Guardian and replace it with Puget Sound National Bank. CP 4556-57. Shortly thereafter, Seattle First submitted its Fourth and Final Report, which was read and approved by Mr. Kwiatkowski's Guardian ad Litem and by the court. The Order approving the Fourth and Final Report clearly states:

[The Bank] as limited guardian of Ward's estate has had no participation in or responsibility for the management of the company, has received no financial statements for the Great American Herb Company during this accounting period and is not responsible for its operations. James Frost and Ralph Drews as "Special Administrators" continue to exercise management direction and control of said operations under the powers conferred upon them.

The Order goes on to state that Seattle First was "hereby discharged from all further liability in connection with its duties as Limited Guardian of the Estate of Joseph Kwiatkowski" provided that it filed certain receipts (which it did). CP 2916-17. Again, all of this is in the court file, it was debated *ad nauseum* by Mr. Kwiatkowski's attorneys in connection with Seattle First's motion for summary judgment in 2004, and it cannot by any stretch of the imagination justify Mr. Kwiatkowski's attempt to avoid the Settlement Agreement.

Finally, it is particularly galling for Mr. Kwiatkowski to imply that Seattle First somehow shirked its duties as Limited Guardian of Mr. Kwiatkowski's Estate to further its own interest. Appellant's Brief, p. 40. In fact, not only were the limitations in Seattle First's role well known to

all involved (and directed by the court), Seattle First applied a significant discount to its normal asset management fees as a result of the fact that management of the stock was not its responsibility. CP 2949-50. Mr. Kwiatkowski gladly accepted the discount in his fees, but now challenges the basis for his discount.

**d. The allegation that Messrs. Drews and Frost did not report regularly to the Thurston County Superior Court is irrelevant and, in any event, was something that Mr. Kwiatkowski knew or should have known prior to signing the Settlement Agreement.**

Mr. Kwiatkowski alleges that he should be relieved of the commitments in the Settlement Agreement because Seattle First allegedly did not report to the court that two other fiduciaries were not reporting regularly, as the Court had ordered. Appellant's Brief, p. 85. Mr. Kwiatkowski does not explain how this alleged failure on the part of two different fiduciaries fifteen years earlier justifies his renegeing on a Settlement Agreement with the Banks he signed in 2005. In any event, the extent to which Messrs. Drews and Frost reported to the Thurston County Superior Court is part of the court record. As such, the information was available to Mr. Kwiatkowski, his Guardian ad Litem, and others (including the court, itself) at the time. Most importantly for these purposes, there is no showing that it was information that was uniquely known to the Banks, or that the Banks had some duty to disclose that information to Mr. Kwiatkowski in January 2005 prior to the time he executed the Settlement Agreement. To the contrary, Mr. Kwiatkowski

acknowledged in the Settlement Agreement that he was not relying on information from the Banks and that he waived the right to attempt to avoid the agreement based on supposed “new information.”

- e. **There is no evidence that Seattle First had knowledge of “excessive” professional fees that was not also known by the Guardian ad Litem and the court.**

Mr. Kwiatkowski’s next argument involves certain fees charged by Ralph Drews and Art Davies in 1986-87. Appellant’s Brief, p. 85. Mr. Kwiatkowski argues that these fees were “excessive,” but the April 1988 internal Seattle First memo cited by Mr. Kwiatkowski merely states that the author does not know the precise amount of fees charged by Mr. Davies and Mr. Drews because he does not know how much the patent work that was done for the company cost. CP 1191. It then describes the fees as “large” but goes on to say that they “were certainly well earned in 1986[.]”<sup>27</sup> *Id.* Seattle First then comments that the company had been gradually adding overhead necessary to manage itself. There is no statement or insinuation in Seattle First’s memo that these fees were improper or “excessive.” Seattle First’s employee merely expressed the opinion that the fees were “large” and probably would decline in the future as the company added management personnel to run the day-to-day operations. *Id.*

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<sup>27</sup> Lest Mr. Kwiatkowski come back and try to argue that this is merely a matter of semantics, it should be noted that “large” is not synonymous with “excessive.” According to the dictionary, “excessive” means “exceeding what is proper, normal, or reasonable.” “Large,” by contrast, is defined as being “greater than average in size, extent, quantity or amount: BIG.” *Webster’s II New College Dictionary* (Houghton Mifflin: 1995).

Moreover, it is quite clear that Seattle First was not privy to any inside information that was not known by many others, including the Great American Herb Company Board of Directors and the court. In the first place, Messrs. Drews and Frost were on the Board, along with Mr. Kwiatkowski. Report of Special Administrators (CP 4438-47) at ¶ 9. Mr. Kwiatkowski has not even offered a suggestion (let alone provided evidence) that the Board was unaware of the company's finances, including the management fees. It also appears that the court and Mr. Kwiatkowski's Guardian ad Litem were aware of the fees charged at the time. The internal Seattle First memo on which Mr. Kwiatkowski relies was based on the official financial statements of Sirius Enterprises, Inc. prepared by Frost & Company, P.S. The Bank received copies of these financial statements from Ralph Drews, one of the Special Administrators, in late March 1988. CP 4582. These statements were available to the court, as is clear from the November 30, 1988 Report of Special Administrators in the Jana Kwiatkowski Estate matter:

The Court should take testimony as to the financial condition of the Company and the performance of the Special Administrators, but the Special Administrators request that the financial statements not be filed in the Court file since the Court records are public records and, therefore, ask permission to withdraw such financial statements or seal the Court file to protect the privacy of the information. They would be maintained at all times for the Court's benefit, the Court should be satisfied with such statements before entering its order approving this report and the Court may either seal the file or simply allow the Special Administrators to withdraw the financial statements.

CP 4438-47 at ¶ 14. These statements were also available to John Parr, the Guardian ad Litem. In his December 14, 1988 report in the Jana Kwiatkowski Estate, Mr. Parr discussed the Special Administrators' report quoted above:

The special administrators' report was a clear and concise narrative of the events leading to the court's order to appoint the special administrators, and the operation of the business thereafter. The company's sales and profits increased significantly.

CP 4488-92 at § V.C. Mr. Parr's report further makes clear that Mr. Kwiatkowski himself was well aware of the company's operations:

Joseph Kwiatkowski has received a substantial salary and bonus from the company and the company has provided a number of employment opportunities in our community. Joseph Kwiatkowski has been very pleased with the increased sales of his business, the salary and bonus he has received, and the general operation of the business.

*Id.*<sup>28</sup>

When he was deposed in 2006, Mr. Parr had no specific recollection of seeing the particular GAHC Financial Statements that reflect the management fees about which Mr. Kwiatkowski now complains. However, he testified that in preparing his 1988 report to the Court:

I had seen information and I had verbally received information from both – from the special administrators as

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<sup>28</sup> Mr. Kwiatkowski was a member of the Board of Directors throughout this time period and the management fees were necessarily approved by the Board. He has always had access to all company records, including the financial statements that contain the information regarding management and other professional fees addressed in the internal Seattle First memorandum. RCW 23B.16.020.

to what was happening out there at the business. . . . I could easily have seen [the financial statements], I just don't recall. . . . *I can't imagine that information was coming out of that company that I didn't see*, but I just don't have a direct recollection of that.

Parr Deposition, Vol. I, p. 48:11 – 19 (CP 4700) (emphasis added).

It is not surprising that Mr. Parr does not specifically recall seeing these particular financial statements nearly twenty years after the fact because, even now, he does not believe the amount paid by GAHC for management fees during this time period was out of line. “I think a person in a corporation could easily be paid that amount,” depending on the circumstances. Parr I, p. 51:14 – 15 (CP 4701). The circumstances here show that the amounts at issue were fully justified, which is certainly why the court approved the Special Administrators' Report (CP 4735-40) and entered a final order in the Jana Kwiatkowski estate. CP 4742-46.

Prior to Mr. Kwiatkowski's auto accident in 1986, the company had, under his management, struggled with an inadequate accounting system and its total sales for 1985 were approximately \$1.7 million. CP 4439, ¶ 2. After the accident, Mr. Drews (and, to a lesser extent, Mr. Frost) took over management of the company. They overhauled the accounting system and focused the company's sales efforts. As Mr. Parr testified, Mr. Drews “gave up his [accounting] practice” and “two years of his life to take care of Joe.” Parr I, p. 22:7 – 22 (CP 4686).

The Special Administrators did take good care of Mr. Kwiatkowski, both financially and personally. *Id.*; *see also* CP 4438-47. As noted above, the company's total sales in the year before Mr.

Kwiatkowski's accident were approximately \$1.7 million. *Id.* at ¶ 2. In 1986, the first year that Messrs. Drews and Frost managed the company, they increased sales to more than \$10 million. *Id.* at ¶ 5. As a consequence, notwithstanding Mr. Kwiatkowski's disability, Great American Herb Company was able to pay him a salary in excess of \$2 million in 1986. CP 4758. In 1987, Mr. Kwiatkowski received another \$800,000 in salary. *Id.* As a result of the Special Administrators' efforts, Mr. Kwiatkowski was financially secure for the rest of his life. Parr I, p. 30:16 – 23 (CP 4690); CP 4438-47 at ¶ 7. It is undisputed that the financial performance of the company in 1986-87 (the years in question) was remarkable. Mr. Kwiatkowski has offered no evidence that, in light of the Special Administrators' efforts, the management fees were out of line. The Thurston County Superior Court was fully informed of all of these matters and approved the conduct of the business. Parr I, p. 30:16 – 23 (CP 4690).

It is particularly remarkable that Mr. Kwiatkowski raises this issue now, claiming that it is newly discovered, when his *own attorney* had all this information since at least since 2002, long before the Settlement Agreement was signed. The management fees at issue were paid to Messrs. Drews and Frost. Donna Holt (one of Mr. Kwiatkowski's attorneys) had copies of, and apparently reviewed, the invoices from Messrs. Drews and Frost to the company in 2002, some two years before Seattle First's Motion for Summary Judgment was heard by the trial court. *See* May 20, 2002 Letter from Brent Dille (Owens Davies) to Donna Holt

(CP 4584); July 25, 2002 Letter from Brent Dille to Donna Holt (CP 4503-04); and July 23, 2002 Correspondence from Donna Holt to Brent Dille (CP 4586-87). Clearly, this was information that was available to Mr. Kwiatkowski and his lawyers at the time he executed the Settlement Agreement.

**f. Mr. Kwiatkowski's final argument as to Seattle First, regarding the proposed transfer of stock, is absurd.**

Mr. Kwiatkowski's final argument as to why Seattle First should not be allowed to enforce the Settlement Agreement is based on a transfer of stock that took place *after* another limited guardian had taken Seattle First's place and that, in any event, was *specifically approved* by the Thurston County Superior Court as a result of Mr. Kwiatkowski's motion. *See* Order [approving issuance of corporate stock], filed November 13, 1991 (CP 4559-60).

The argument that Seattle First should bear any responsibility for a court-approved transaction that occurred subsequent to its discharge is absurd on its face. Leaving that aside for the sake of argument, once again Mr. Kwiatkowski mischaracterizes the record by implying that this information was unknown to him when he signed the Settlement Agreement, which is absolutely untrue. Mr. Kwiatkowski first cites to a September 19, 1990 letter as proof that Seattle First "knew of the proposal" well in advance of the time that the proposal was brought to the court. It is unclear what relevance lies in Seattle First's knowledge of this proposal, but the fact is that *Mr. Kwiatkowski and his Guardian ad Litem*

also knew of the proposal at that time, and in fact, they knew about it as early as May 1990. First of all, Mr. Parr was copied on the September 19, 1990 letter that Mr. Kwiatkowski cites, which means that both of these gentlemen were aware of the same information as Seattle First. *See* CP 1214. Furthermore, Mr. Parr and Mr. Kwiatkowski actually attended the Board of Directors meeting at which the Board approved the proposal. CP 1219 (“The meeting reconvened at 3:00 p.m. on May 6, 1990, at the home of Ralph Drews. All directors [including Mr. Kwiatkowski] except Gary Gores were present. Also present was John Parr, Guardian Ad Litem for Joseph Kwiatkowski . . . . The management team discussed the terms and conditions under which they would continue in their employment with the company. It was agreed that if the management team was successful in turning the company around and making it profitable, 60% of Mr. Kwiatkowski’s stock would be available to them as an incentive for such performance.”)

Mr. Kwiatkowski complains that Seattle First did not “address this significant issue” with the court. But there was no need for it to do so, because the court already was well aware of it. The Special Administrators discussed the proposal in a slightly different form as early as April 1990 in their Report. In their effort to attract a professional management team, the Special Administrators and the Board of Directors negotiated a contract that provided, in exchange for a lower salary and as an incentive to perform, that “forty percent of Mr. Kwiatkowski’s ownership in the company would be available for distribution to selected

members of the management team for this purpose[.]” Report of Special Administrators, April 11, 1990, pp. 6-7 (CP 4567-68). Then, as Mr. Kwiatkowski acknowledges, in August 1991, his Guardian ad Litem filed with the court a Petition to Approve Issuance of Corporate Stock, in order to put the plan into effect (CP 4577-80). How can Mr. Kwiatkowski now complain that Seattle First defrauded him by failing to bring to the court’s attention something that was before the court on his own petition?

Finally, all this has been known to Mr. Kwiatkowski and his representatives since the time the idea to make the transfer was first discussed. The concept was presented to the court in April 1990. The Board of Directors – including Mr. Kwiatkowski – discussed and approved the proposal in May 1990 at a meeting attended by his Guardian ad Litem. In August 1991, the transfer itself was presented to the court by Mr. Kwiatkowski’s Guardian ad Litem. And in November 1991 (after Seattle First was no longer involved in the Guardianship), the court approved the transfer. It is absurd for Mr. Kwiatkowski to argue now that he and the court had no advance knowledge of the transfer. It is even more absurd for him to claim that he only learned about the transfer since January 2005, when he signed the Settlement Agreement.

**C. There Is No Showing That The Trial Court Abused Its Discretion In Awarding Attorneys’ Fees To The Banks**

Mr. Kwiatkowski concedes that the award of attorneys’ fees to the Banks may be reversed only on a finding that the trial court abused its

discretion. Appellant's Brief, p. 91. To the contrary, the court's decision to award fees to the Banks was entirely appropriate.

RCW 11.96A.150 provides that the court "may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) from any party to the proceedings . . . ." RCW 11.96A.150(1). The award of fees is also supported by paragraph 10 of the Settlement Agreement between the Banks and Mr. Kwiatkowski, which provides that the prevailing party in any action to enforce the Agreement is entitled to its fees and costs (CP 3006).<sup>29</sup>

The court was also quite clear with Mr. Kwiatkowski that he would be required to pay the fees of the Banks at all times after June 10, 2005, when – over the Banks' strenuous objections – the court granted Mr. Kwiatkowski's very unusual request to take discovery to support his claim that the Settlement Agreement was not enforceable, notwithstanding that the court had already dismissed his claims on summary judgment *and* he had admitted signing the Agreement. The *quid pro quo* for this belated discovery was that Mr. Kwiatkowski must bear the cost of discovery and the cost of his resistance to the Banks' motion to enforce the Settlement Agreement. Thus, the court told him:

[U]pon thinking about this, this is the lateness of the hour, I think [Mr. Kwiatkowski] should bear the cost of it because . . . summary judgment was entered almost a year ago. This thing has been delayed and I think [Mr.

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<sup>29</sup> It is worth noting that the court awarded over \$60,000 in fees and costs to the Banks following their successful motions for summary judgment, which Mr. Kwiatkowski avoided by entering the Settlement Agreement with the Banks. Notwithstanding that he reneged on this Agreement, he has not paid these fees.

Kwiatkowski] should bear the cost. . . . [He is] getting the motion [for continuance] but [he] bear[s] the costs.

June 10, 2005 Transcript of Proceedings, p. 53, ll. 7-14 (CP 4293).<sup>30</sup>

Indeed, *Mr. Kwiatkowski presented an order to the Court* prepared by his counsel that provided that “Mr. Kwiatkowski should bear the cost of the continuance motion for all counsel and for costs associated with producing documents.” September 23, 2005 Order on Motion for Continuance at CP 1368. He accepted the benefits of additional discovery in his unsuccessful efforts to avoid the Settlement Agreement and now has no basis to complain about the fees that were at all times to be the *quid pro quo* for that discovery.<sup>31</sup>

The same reasons support an award to Seattle First of its fees and costs for this appeal. Thus, an award of fees for the appeal is appropriate under RCW 11.96A.150 and under the terms of the Settlement Agreement. CP 3006 at ¶ 10. Pursuant to RAP 18.1, therefore, Seattle First hereby requests an award of its fees and costs.<sup>32</sup>

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<sup>30</sup> The entire transcript is attached as Exh. 2 to the Declaration of Greg Montgomery in Response to Kwiatkowski Findings and In Support of Attorneys’ Fee Request, filed September 22, 2005 (CP 4217-4302).

<sup>31</sup> Mr. Kwiatkowski offers no support for his challenge to the reasonableness of Seattle First’s fees. In fact, the fees were completely reasonable. *See* CP 1506-42.

<sup>32</sup> To avoid repetition, Seattle First adopts by reference: (1) the portions of Respondent Key Trust Company’s aka Puget Sound National Bank’s Brief regarding Mr. Kwiatkowski’s belated motion to amend; and (2) the portions of the Brief of Respondents Drews and Frost regarding Mr. Kwiatkowski’s argument that a new judge should be assigned in the event of a remand. RAP 10.1(g)(2).

**IV. CONCLUSION**

Seattle First respectfully requests that the Court affirm the Judgment in its entirety and award Seattle First the reasonable fees and costs it has incurred in this appeal.

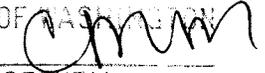
DATED this 23 day of March, 2007.

KIPLING LAW GROUP PLLC

By:   
Michael E. Kipling, WSBA #7677  
Counsel for Respondent Bank of America

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**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON  
BY   
DEPUTY

I do hereby certify that on this 23<sup>RD</sup> day of March, 2007, I

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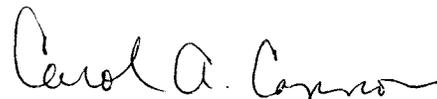
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