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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Kenneth (“Ken”) and Catherine (“Kitty”) Frank created Respondent the Frank Family Foundation (the “Foundation”) in 1993. Shortly thereafter, Ken and Kitty deeded to the Foundation a square mile of undeveloped Mason County forest and lake property called Cranberry Lake. In 1996 they executed wills, both of which included unambiguous specific bequests of Cranberry Lake to the Foundation. The Foundation has existed and has pursued its purposes since its inception.

Less than a month before both of the Franks died in late 2005, their son David Frank commenced a negligence action against lawyers and accountants whom he asserted had misled his parents into deeding Cranberry Lake to the Foundation. Ken and Kitty were also named as plaintiffs, although, according to the complaint’s caption, Ken (who was 98 years old when the action was commenced) brought the action “by and through David K. Frank, his attorney-in-fact.” In addition to seeking money damages from the professionals, the plaintiffs sought rescission of Ken and Kitty’s deeds of Cranberry Lake to the Foundation.

Ken and Kitty did not, however, change their wills. Ken and Kitty both died less than a month after the commencement of the action. On David Frank’s motion, the wills were admitted to probate, and he was appointed as personal representative (“PR”). On the Foundation’s

subsequent TEDRA petition, the Mason County probate court ruled that even if the rescission action were successful, title to Cranberry Lake would vest in the Foundation under the wills. David Frank as PR has appealed the decision of the probate court in the two estates under consolidated caption No. 36206-6-II.

The same Mason County judge then granted the Foundation's motion for summary judgment in the negligence action, dismissing all claims as to the Foundation. The court dismissed the rescission claim as to the Foundation on the basis that David Frank as PR would have no cognizable interest in Cranberry Lake even if the deeds were rescinded, and therefore he lacked standing to pursue rescission of the deeds. The court additionally dismissed David Frank's breach of fiduciary duty claims as to the Foundation. David Frank appeals from this grant of summary judgment in this proceeding.

The trial court's grant of summary judgment in favor of the Foundation was correct. First, David Frank has no standing to pursue his rescission claim, for the simple reason that if he is successful, he will be required to immediately distribute Cranberry Lake to the Foundation pursuant to the wills. Second, regardless of whether David Frank has standing to pursue his claims as to the Foundation, his rescission claims are plainly barred by the applicable statute of limitations. Third, David

Frank's arguments that the grant of summary judgment precludes him from bringing unjust enrichment and similar claims against the Foundation was not argued before the trial court, or asserted in his Amended Complaint, is thus barred, and is otherwise without merit. Finally, David Frank's arguments that the Foundation should have been equitably reformed to give control of the Foundation to David Frank is barred both by his lack of standing to raise the issue, and his failure to assert the claim in his Amended Complaint or raise it before the trial court. The order granting summary judgment should be affirmed.

II. STATEMENT OF ISSUES

Issues Relating to Appellant's Assignments of Error:

1. Whether the Court should affirm the summary judgment on the basis that appellant's action is barred by the statute of limitations governing actions to recover possession of real property, RCW 4.16.020(1).
2. Whether the trial Court properly dismissed David Frank's claim on the basis that he lacked standing to bring his claim for rescission of the Cranberry Lake property.
3. Whether David Frank ever asserted, or failed to preserve, a cause of action against the Foundation for wrongful management of Cranberry Lake.

4. Whether David Frank ever asserted, or failed to preserve, a cause of action against the Foundation to recover inter vivos monetary gifts now alleged to have been made by Ken and Kitty to the Foundation.

5. Whether David Frank ever asserted, or failed to preserve, his claim that he is entitled to demand that the organizational structure of the Foundation be “reformed” to place himself or members of his family in positions of control.

6. Whether the doctrines of “cy pres” and/or “equitable deviation” are applicable to the “reformation” of a Washington nonprofit corporation.

7. Whether a court may apply equitable principles to alter the organizational structure of a Washington non-profit corporation that is organized and exists under Ch. 24.03 RCW.

8. Whether David Frank has waived his appeal of the trial Court’s grant of summary judgment dismissing his breach of fiduciary duty claims as to the Foundation.

III. STATEMENT OF THE CASE

A. Factual Background

1. Creation of Foundation And Conveyance of Cranberry Lake

Kenneth (“Ken”) and Catherine (“Kitty”) Frank created the respondent Frank Family Foundation (“Foundation”) on or about

December 30, 1993. CP 324-28. The Foundation is a nonprofit corporation organized under RCW 24.03, with a principal place of business in Mason County, Washington. The Foundation is qualified under Section 501(c)(3) of the Internal Revenue Code and is therefore exempt from federal income tax under Section 501(a) of the Code. CP 324. The Foundation is classified as a private operating foundation under Section 3942(j)(3) of the Code. CP 428.

At the time they created the Foundation, Ken and Kitty owned all but 80 acres of a full section (640 acres) of Mason County land, commonly called Cranberry Lake, and legally described as Section 28, Township 21 North, Range 3 West, WM. Cranberry Lake is undeveloped forest and lake property. The Franks created the Foundation for the purpose of owning Cranberry Lake in perpetuity, and managing Cranberry Lake for educational and research purposes related to forest and wildlife management. CP 211-12.

On December 30, 1993, Ken and Kitty conveyed 4% of their interest in Section 28 (Cranberry Lake) to the Foundation. A year later, on December 28, 1994, they conveyed *all* of their interest in Section 28 (Cranberry Lake), "together with all after acquired title of the grantor(s) therein," to the Foundation. CP 304. A few weeks later, in January 1995, David Frank and his wife, who owned the other 80 acres of Section 28,

conveyed those 80 acres to Ken and Kitty by Statutory Warranty Deed. This deed was recorded on January 24, 1995. CP 306-07. Title to this 80 acre parcel immediately vested in the Foundation under the after acquired title language of the 1994 deed from Ken and Kitty to the Foundation, and under Washington's after acquired title statute, RCW 64.04.070. As of January 1995, Ken and Kitty had thus conveyed to the Foundation all of Section 28.

Ken and Kitty subsequently executed another deed on December 23, 1997, conveying the 80 acre parcel to the Foundation (CP 309), but because title to the 80 acres had already passed to the Foundation, the new deed did not operate to convey title to any property. The Foundation continues to own and manage Cranberry Lake for the purposes described in the documents that created the Foundation. CP 212.

On August 30, 1996, some 18 months after conveying the Cranberry Lake property to the Foundation, Ken and Kitty executed substantively identical wills.¹ Article VIII of each will provided in part as follows:

¹ The Foundation notes that the construction of Ken and Kitty's wills is not directly at issue in this appeal, but is the subject of David Frank's related appeal of the probate court's orders. See *In Re Estates of Frank*, No. 36206-6-II. In an effort to avoid excessive duplication, the Foundation has not designated the documents from Ken and Kitty's probates. However, the Foundation's Respondent's Brief in appeal No. 36206-6-II contains proper citations to the probate record, and the Foundation references such documents here for the convenience of the Court. Furthermore, the Foundation intends to shortly move this Court to consolidate this appeal with appeal No. 36206-6-II.

RECOGNITION OF FOUNDATION . . .

1. On December 30, 1993, my wife and I created a non-profit corporation known as the Frank Family Foundation. Any reference in this document to “the Foundation” shall be understood to mean the Frank Family Foundation herein referenced.

CP 133. In Article VII.2, both wills provided as follows:

2. All of my interest in Section 28, Township 21 North, Range 3 West, commonly known as Cranberry Lake, I give to my wife, provided that she survives me by a period of thirty (30) days. In the event that she fails to survive me, . . . my interest in this property shall be distributed to the Frank Family Foundation referenced in Article VIII below.

CP 133. Ken and Kitty each subsequently executed a First Codicil dated October 2, 2000 (CP 234-35), a Second Codicil dated July 8, 2002, and a Third Codicil dated August 20, 2003. Although these codicils made substantial changes to many provisions in the wills, including provisions affecting the disposition of other items of real property, neither Ken nor Kitty ever modified or revoked Articles VII and VIII above. David Frank is the residuary beneficiary under the wills. He would also be the sole heir of Ken and Kitty under the laws governing intestacy.

2. David Frank Attempts to Obtain Cranberry Lake

In early 2004, the Foundation's Directors were Ken and Kitty, Laurie McClanahan, Norm Eveleth, Bill Batstone, Ron Godwin, Lyle Coleman, and Patti Case. All of the directors had known Ken and Kitty for many years. In late 2003 and early 2004, members of the Board became concerned that David Frank was exercising influence over his elderly parents, and that he desired by some means to oust the board and to get the Cranberry Lake property out of the Foundation, so that he could use it for his own benefit. David Frank and one of his lawyers attended a board meeting in late January 2004. Ken and Kitty, who were directors at the time, did not attend. David Frank presented the board with powers of attorney from Ken and Kitty that on their face specifically purported to authorize David to bring legal action to wrest title to Cranberry Lake from the Foundation, and that purported at the same time to delegate to David all of their duties and authority as Foundation directors. At the meeting David Frank told the board that he wanted to obtain title to Cranberry Lake and run it as a tree farm. For this and other reasons, including Ken's advanced age and inability to participate meaningfully in Foundation affairs, the Board removed Ken and Kitty as board members in June 2004. CP 319-40.

David Frank and his wife have never been members of the Foundation's board, and have never had any role in the affairs of the Foundation.

3. Plaintiffs File Civil Suit Against the Foundation and Professional Defendants

On November 4, 2005, the plaintiffs filed a complaint in the Mason County Superior Court under Cause No. 05-2-01057-0 (the "Negligence Action"). CP 457-67. The original plaintiffs in the Negligence Action were David Frank, his wife Patricia L. Frank, "Kenneth W. Frank by and through David K. Frank, his attorney-in-fact," and Kitty Frank. CP 457. The defendants are Mary G. Gentry (an Olympia attorney), John A. Clees (an Olympia attorney and accountant), and Laurie McClanahan (a Shelton accountant) (together the "Professional Defendants"), all of whom were alleged to have assisted Ken and Kitty in the conveyance of Cranberry Lake into the Foundation. The plaintiffs also named the Foundation as a defendant. *See* CP 457-67.

David Frank and the other plaintiffs allege in the complaint, *inter alia*, that the Professional Defendants through breach of duty, misrepresentation or otherwise, wrongfully induced Ken and Kitty to convey the Cranberry Lake property into the Foundation. The plaintiffs

seek damages against the Professional Defendants on account of their alleged misconduct. *See* CP 457-67.

The complaint does not allege that the Foundation itself acted wrongfully in inducing the Franks to convey Cranberry Lake to the Foundation. Based on the alleged misconduct of the Professional Defendants, however, the plaintiffs seek rescission of the conveyances of Cranberry Lake into the Foundation (CP 464-65 [Complaint, Par. 21.1-21.8], and seek to quiet title to Cranberry Lake in the plaintiffs (CP 465-66 [Complaint, Par. 22.1-22.6]).

The plaintiffs in the complaint also identify a laundry list of alleged instances in which the Foundation allegedly breached its fiduciary duties to the plaintiffs by, for example, allegedly failing to comply with state law disclosure obligations, failing to timely qualify as a private operating foundation under federal law, and failing to carry on significant charitable activities. CP 460-61 (Complaint, Par. 17). The plaintiffs seek both damages for these alleged breaches of fiduciary duty and an order removing the Foundation directors from the board. CP 466.

Ken died on November 15, 2005, less than two weeks after the plaintiffs filed the Negligence Action. Ken's August 30, 1996 will and the three codicils were admitted to probate in Mason County Cause

No. 05-4-00230-2 on December 30, 2005. The court appointed David Frank as personal representative. He continues to serve in that capacity.

Kitty died on December 3, 2005, only 18 days after Ken, and one day short of a month after the Negligence Action was filed. Her Last Will and Testament, dated August 30, 1996, and the three codicils were admitted to probate in Mason County Cause No. 06-4-00014-6, on January 20, 2006. The court appointed David Frank as personal representative of Kitty's estate.

On or about December 26, 2006, with leave of court, David Frank as PR filed an Amended Complaint. The Amended Complaint is substantially identical to the original complaint, but substitutes David Frank as PR for Ken and Kitty as plaintiffs in the action. CP 284-96.

B. Procedural Background

While they lived, Ken and Kitty may well have had standing to pursue rescission of the Cranberry Lake deeds (whether or not the claims were meritorious). Once they died, however, their wills were irrevocable. Under Article VII.2 of the wills, which David Frank himself offered for probate, Ken and Kitty specifically devised Cranberry Lake to the Foundation. If, therefore, the original deeds were rescinded, title to Cranberry Lake would return to the estate and immediately vest in the Foundation under the wills. *See* RCW 11.04.250. David Frank as PR

therefore had no current or prospective interest in Cranberry Lake, and lacked standing to seek rescission of the deeds.

The Foundation on November 13, 2006, therefore filed petitions in both probates under the Trust and Estate Dispute Resolution Act, Ch. 11.96A RCW, seeking an order declaring that if the estates of Ken and Kitty ever acquired any interest in Cranberry Lake, David Frank as PR would be required under the specific devise contained in Article VII.2 of the wills to distribute Cranberry Lake to the Foundation. The petition was supported by a declaration of counsel attaching, among other things, the wills, the complaint and a proposed amended complaint.

In addition, and relevant to the current appeal, the Foundation filed two separate motions for summary judgment in the Negligence Action. In its first Motion for Summary Judgment, the Foundation argued (in prospective reliance on the order sought in the probate petitions) that David Frank as PR lacked standing to seek rescission of Ken and Kitty's original conveyances of Cranberry Lake to the Foundation, for the reasons set forth above. CP 436-56. The Foundation also moved for summary judgment on the claims of breach of fiduciary duty against the Foundation, on the grounds that (1) the Foundation owed no fiduciary duties to David Frank or the other plaintiffs; (2) the plaintiffs lacked standing to serve as private attorneys general to assert such claims as to a nonprofit

corporation such as the Foundation; and (3) each individual breach of fiduciary claim was without substantive merit. CP 445-55.

In its Second Motion for Summary Judgment, the Foundation argued that plaintiffs' rescission claims as to the Foundation were barred by the statute of limitations, RCW 4.16.020, pursuant to which an action for the recovery of real property, or for the recovery of possession of real property, may not be maintained unless the plaintiff was seized or possessed of the premises in question within ten years before the commencement of the action. CP 310-16.

The Mason County superior court judges and the Mason County court commissioner recused themselves from participation in these actions. Oral argument on the probate petitions and the two motions for summary judgment in the Negligence Action were heard by the Honorable Nelson Hunt, Judge of the Lewis County Superior Court, sitting by designation, on February 5, 2007. In an "Order Granting in Part and Denying in Part the Petition of Frank Family Foundation for Declaration Regarding Application of Will Article VII.2 to Cranberry Lake, and for Other Relief" entered March 9, 2007, the probate court granted the Foundation's petition regarding the application of Article VII.2 of Ken and Kitty's wills. The court ordered that if the plaintiffs in the Negligence Action were to obtain a judgment against the Foundation that ordered

rescission of the conveyance of Cranberry Lake to the Foundation, the judgment would vest legal title to Cranberry Lake in Ken and Kitty's estates, and that the PR of the estates would then be obligated to distribute all of the estates' interest in Cranberry Lake to the Foundation under the wills.

Having granted the principal relief that the Foundation sought in the two probate petitions, the Court granted the Foundation summary judgment dismissing David Frank's rescission claims in the Negligence Action, on the ground that David Frank as PR lacked standing to seek rescission of the original Cranberry Lake conveyances. CP 8-11. The Court also granted the Foundation's motion to dismiss the plaintiffs' breach of fiduciary duty claims in Par. 17 of the Complaint and Amended Complaint, and thus gave the Foundation summary judgment as to all claims and causes of action against the Foundation. The Court denied the Foundation's second Motion for Summary Judgment.

In the Probate Actions, David Frank as PR timely filed a Notice of Appeal of the March 6, 2007 Order in Mason County Superior Court on April 4, 2007. That appeal is currently pending in this Court. See *In Re Estates of Frank*, No. 36206-6-II. David Frank as PR filed his Appellant's Brief in that appeal on September 24, 2006. The Foundation filed its Respondent's Brief in that appeal on November 21, 2007.

In the Negligence Action, on subsequent motion of David Frank as PR, the Court directed the entry of final judgment in favor of the Foundation and against David Frank as PR under CR 54(b). CP 17-21. David Frank as PR then filed a timely Notice of Appeal (CP 5-16), and filed his Appellant's Brief on November 14, 2007.

IV. ARGUMENT

A. Standard of Review.

On appeal, an order granting summary judgment is reviewed de novo. *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007). The court is to review all facts and reasonable inferences in "the light most favorable to the nonmoving party." *Id.*, citing *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The appellate court may uphold a grant of summary judgment on "any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). Here, the Court may affirm the grant of summary judgment in favor of the Foundation based on any of the grounds

argued by the Foundation below, including the statute of limitations bar argued in the Foundation's Second Motion for Summary Judgment. CP 310-316.

B. David Frank's Action Is Barred by RCW 4.16.020(1)

The Foundation moved below for summary judgment on the ground that the action was barred by the ten-year limitations period under RCW 4.16.020(1) applicable to actions for the recovery of possession of real property. The trial court erred in denying that motion; and the statute of limitations provides an independent ground upon which to affirm the final order dismissing the rescission claims, irrespective of any of the issues raised in the Appellants' Brief.

1. David Frank Failed To Commence His Action Within Ten Years, the Applicable Limitations Period.

David Frank and the other plaintiffs in Paragraph 22 of their Amended Complaint seek to quiet title in Cranberry Lake in the plaintiffs. Under RCW 4.16.020(1), an action "for the recovery of real property, or for the recovery of the possession thereof" is subject to a 10-year limitations period. RCW 4.16.020(1) further provides that "no action shall be maintained for such recovery unless it appears that the plaintiff . . . was seized or possessed of the premises in question within ten years before the commencement of the action." *Id.*

None of the plaintiffs was seized or possessed of Cranberry Lake within ten years prior to November 4, 2005. David Frank and the other plaintiffs seek to recover title to and possession of property conveyed by deeds dated in 1993, 1994, and 1997, according to the averments of the Amended Complaint. The first two conveyances occurred more than ten years before this action was commenced. Ken and Kitty executed the 1997 deed within ten years prior to the commencement of this action, but the property described in the 1997 deed, the north half of the northwest quarter of Section 28 (that is, of Cranberry Lake) was conveyed to them by David and his wife Patricia on January 11, 1995, more than ten years before the commencement of this action. Upon the conveyance by David and Patricia Frank to Ken and Kitty of the two sixteenth sections, which comprise a portion of Section 28, Township 21 North, in Mason County, title to these two sixteenth sections immediately vested in the Foundation, by virtue of Ken and Kitty's 1994 Quit Claim Deed, which conveyed to the Foundation all of their interest in Section 28, including all after acquired title. RCW 64.04.070 compels this result:

After acquired title follows deed

Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter

sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered, and to his and their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands and to his or their heirs and assigns, and shall thereafter run with such land.

RCW 64.04.070. By operation of this statute, title to the north half of the northwest quarter of Section 28 vested in the Foundation immediately on January 11, 1995, as soon as David and Patricia Frank deeded the property to Ken and Kitty. The 1997 deed from Ken and Kitty to the Foundation was surplusage. None of the plaintiffs in this action was seized or possessed of any portion of Section 28, i.e., of Cranberry Lake, within ten years of the commencement of this action. The action to quiet title in or recover possession of Cranberry Lake is barred by RCW 4.16.020(1).

David Frank and the other plaintiffs below implicitly conceded that if their claim against the Foundation for recovery of title to and possession of Cranberry Lake is subject to RCW 4.16.020(1), then their action is time-barred. They did not contend that they were "seized or possessed of" Cranberry Lake within ten years of the commencement of this action, as

the statute requires. Rather, they argued that no statute of limitations applies to an action to quiet title to real property, and alternatively that the applicable limitations period is the three year period applicable to claims of fraud, RCW 4.16.080(4), extended beyond ten years by the discovery rule.

Plaintiffs argued broadly below that quiet title actions are not subject to statutes of limitations at all. For this proposition they relied on statements in *Petersen v. Schafer*, 42 Wn. App 281 (1985); *Van Sant v. City of Seattle*, 47 Wn.2d 196 (1955); and *Kent School District No. 415 v. Ladum*, 45 Wn. App. 854 (1986). These are all cases in which the plaintiffs had possession of the land at the commencement of the litigation, and were attempting to clear title as against the defendants' assertions of an interest in the properties. The better analysis in these cases might have been that because the plaintiffs had possession of the land within ten years of the commencement of the actions (indeed, they had possession at the very moment that they commenced the actions), the actions were timely under RCW 4.16.020(1). In any event, Washington law is quite clear that where a party seeks to quiet title in land that he does *not* possess, RCW 4.16.020(1) will bar the action if it is not brought within ten years. The most obvious examples are actions to quiet title (and thus to regain possession) as against a defendant in possession of the property

and claiming title through ten years of adverse possession. Such actions are plainly subject to the ten year statute of limitations. *See, e.g., ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757 (1989) (applying RCW 4.16.020 and the ten year statute of limitations to an action for quiet title involving adverse possession); *Doyle v. Hicks*, 78 Wn. App. 538 (1995) (same). Here, the Foundation claims title not only through ten years of possession but also through ten years of actual possession of legal title. The plaintiffs, by contrast, had neither possession nor title for more than ten years before commencement of the action.

2. David Frank Cannot Rely on the Limitations Period Applicable to Claims for Fraud

In the proceedings below, David Frank and the other plaintiffs cited *Morgan v. Morgan*, 10 Wash. 99 (1894), for the proposition that the applicable statute of limitations is RCW 4.16.080(4), with its three year statute of limitations and the discovery rule. CP 172-75. *Morgan*, and a few similar cases, are cases in which the plaintiff brought the action within the ten year period allowed by RCW 4.16.020 or its predecessors, and the courts were therefore considering whether the plaintiff should be barred by the shorter, three-year statute of limitations applicable to actions for fraud. *See id.* at 108 (applying the three-year limitation period to bar an action commenced three and one-half years after the defendant's alleged

fraudulent actions); *Hutchinson Realty Co. v. Hutchinson*, 136 Wash. 184 (1925) (considering whether the complaint was barred by the three-year fraud statute of limitations where the complaint was brought eight years after the allegedly fraudulent conveyance); *Deering v. Holcomb*, 26 Wash. 588, 594 (1901) (applying the three-year statute of limitations to bar a claim to recover property that had allegedly been fraudulently transferred some eight years before the commencement of the action). None of these courts considered, or were required to consider, whether the claim in question would be barred by the ten year statute, because all were brought within the ten year period. The courts considered only whether the claim should be barred by the fraud statute of limitations, where the fraud statute yielded a shorter limitation period. The instant case, however, presents the question whether such a claim should be barred by the ten year statute, even if the combination of the three year fraud statute plus the application of the discovery rule would extend the fraud statute to more than ten years. So far as we can tell, this is a case of first impression in Washington.

The court should hold in these circumstances that the ten year statute applies. The language of the statute plainly encompasses this situation. Ken and Kitty once had possession of Cranberry Lake, and in this action they are “seeking the recovery of the possession thereof,” in the words of RCW 4.16.020(1). Yet the plaintiffs were not (again, in the

words of RCW 4.16.020(1)), “seized or possessed of the premises in question within ten years before the commencement of the action.” The statute provides that in such a case “no action shall be maintained”

The ten year period is absolute; the discovery rule does not apply to

RCW 4.16.020. *Doyle v. Hicks*, 78 Wn. App. 538, 544 (1995).

RCW 4.16.020 is a statute of repose, and repose is particularly important with respect to the ownership of land:

“Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose, by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.”

Deering, 26 Wash. at 594 (quoting *Wood v. Carpenter*, 101 U. S. 135 (1879)); *see also Doyle v. Hicks, supra*, 78 Wash. App. at 543 (“title to land should not long be in doubt”). By holding otherwise, the court would in essence be carving out an exception to the adverse possession cases, because the Foundation has “adversely possessed” Cranberry Lake for more than ten years by virtue of its possession of the land. *See El*

Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 855 (1962) (“When real property has been held by adverse possession for ten years, such possession ripens into an original title.”).

Finally, plaintiffs in their Amended Complaint do not (and in their original complaint did not) assert any claim of fraud against the Foundation. CP 284-96. The plaintiffs were very clear in their Amended Complaint in limiting their claims of misrepresentation, undue influence and the like to the Professional Defendants, a defined term that does not include the Foundation. The *only* claim that the plaintiffs asserted against the Foundation with respect to possession of Cranberry Lake was the claim to a right to rescind the conveyances as a consequence of the conduct of the Professional Defendants. *See Hutchinson Realty Co. v. Hutchinson, supra*, 136 Wash. 184 (1925) (statute of limitations applicable to a claim of fraud does not apply to an action [brought eight years after the conveyance] to recover real property from a grantee who took title as a consequence of fraud committed against the plaintiff by a third party but not by the grantee); *Doyle v. Hicks, supra*, 78 Wn. App. at 545-46 (holding, in an adverse possession action, that the three year statute of limitations for fraud was inapplicable in the absence of fraud by the party in possession of the property). The character of the allegations provides

an independent basis on which to hold that RCW 4.16.020(1) is the applicable statute of limitations.

C. David Frank Has No Standing to Maintain Suit for Rescission/Quiet Title

David Frank individually and as PR lacks standing to assert the claims of rescission and/or quiet title as to the Foundation. Even if David Frank were to succeed in the Negligence Action in persuading the court to quiet title to Cranberry Lake in the plaintiffs as against the interest of the Foundation, title would revert to the original grantors, Ken and Kitty. Because Ken and Kitty are deceased, however, title would vest in their estates. Under Article VII of their wills, Ken and Kitty specifically devised Cranberry Lake to the Foundation. The court has held that David Frank as PR would therefore ultimately be required to distribute Cranberry Lake back to the Foundation. The Foundation's time and expense incurred in defending against David Frank's quiet title and rescission claims, and the Court's time devoted to adjudicating them, would have been wasted.

It is apparently – and understandably – rare that a plaintiff will pursue a quiet title claim under facts like these, but it has happened before in at least one case, and the court on motion of the defendants dismissed the action on standing grounds. In *Ledbetter v. Ledbetter*, 216 S.W.2d 718

(Tenn. 1949), the plaintiffs alleged that the defendant, their brother, had wrongfully induced their mother to convey property to the defendant at a time when she was incompetent. They sought an order setting aside the deeds. The defendant filed a plea in abatement, alleging that the mother had died, leaving a will in which the defendant was the sole beneficiary of the estate. The defendant argued that even if the court were to set aside the deed, the plaintiffs would have no interest in the real property, which the defendant would inherit under the will. The defendant argued that the plaintiffs therefore lacked standing to bring the action. The court agreed and dismissed the complaint. As in *Ledbetter*, the trial court was correct here to dismiss all claims against the Foundation.

D. David Frank's Arguments Regarding Equitable Objections to Enforcement of the Will and Ademption Are Not Pertinent to This Appeal.

In the first five pages of his argument, David Frank contends that the trial court “made an equitable determination on summary judgment,” Appellant’s Brief at 21, and that the decision was an affront to principles of equity. He argues that the will was a remnant of an earlier estate plan, and, presumably, that it should be disregarded or avoided in some manner. He then segues into a discussion of the doctrine of ademption. *Id.* at 24-29.

Two things may be said in response. First, the question of ademption and of the proper construction of the wills is a probate issue. This issue was decided by the trial court in the probate matters, pursuant to separate petitions filed by the Foundation under TEDRA. Neither ademption nor the proper construction of the wills is at issue in this appeal. In any event, the ademption issue was fully argued in David Frank's appeal from the probate orders. *See briefs in In Re Estates of Frank*, No. 36206-6-II. The Foundation will not repeat those arguments in this brief.

Second, the appeal to principles of equity is an effort to accomplish by indirection what the plaintiffs did not attempt to do directly, and what they are now barred from doing: Contest the wills of Ken and Kitty as the product of mistake, fraud or undue influence. David Frank is surprisingly candid about this fact:

Can the Court do equity by giving to the Foundation by will that which the Franks claimed that they would not give to the Foundation but for mistake based on the tortuous [sic] acts of third parties? . . .

. . . Would the Franks have knowingly devised a property to an entity that they created by mistake and which they claimed should never have been created by them in the first instance? Or is it more likely that the will provision was an anachronism from an earlier plan which was

overlooked due to an assumption on the Franks' part that it would have no effect given that the property had already been deeded to the Foundation and was not owned by the Franks at the time?

Appellants' Brief at 24. The time within which the wills may be challenged has passed. This issue too has been extensively briefed in the appeal from the probate orders. The arguments are pertinent, if at all, only with respect to the interpretation and enforcement of the wills, and will not be repeated here.

E. David Frank May Not Seek To Add New Damage Claims on Appeal in Order to Avoid Summary Judgment.

David Frank argues, for the first time on appeal, that his action against the Foundation should not have been dismissed because, if he could persuade the Court that the Foundation held Cranberry Lake in constructive trust for Ken and Kitty, then he could also pursue a damage claim of some kind against the Foundation arising out its ten plus years of possession of Cranberry Lake. He argues that this is true, even if, as PR, he were required to redistribute Cranberry Lake back to the Foundation, and even if the Foundation's possession of Cranberry Lake was innocent, not wrongful. David Frank does not very clearly specify the nature of the claim: at one point he claims that the Foundation was "unjustly enriched" and that he has "the right to bring such a claim for damages in order to

benefit the estate.” Appellant’s Brief at 29. At another point he says that if a constructive trust exists “the holder of the property could be required to not only return the property but also be required to surrender any profit made from wrongfully disposing of the property.” *Id.* at 35. He also alleges that Ken and Kitty gifted funds to the Foundation, and that he would trace the funds, and if the Foundation wrongfully used those funds, logged the land or took actions detrimental to the Frank’s interest in the property, then Appellant should be allowed to recover the funds and profits earned from the property. *Id.* Finally, he alleges that Ken and Kitty gifted nearly a million dollars in cash and stocks to the Foundation, and argues that he would be entitled to recover those gifts from the Foundation. *Id.* at 35-36.

David Frank never raised these theories in opposition to summary judgment below. On review of a grant of summary judgment, an appellate court considers “only evidence and issues called to the attention of the trial court.” *Washington Federation of State Employees, Council 28, AFL-CIO v. Office of Financial Management*, 121 Wn.2d 152, 157, 849 P.2d 1201, 1203 (1993), citing RAP 9.12 (1992). As a result, failure to raise issues before the trial court precludes consideration of them on appeal. *Ford v. Hagel*, 83 Wn. App. 318, 322, 920 P.2d 260 (1996).

Not only did David Frank not raise these claims in opposition to the Foundation's Motion for Summary Judgment, he did not even assert such claims in the Amended Complaint. CP 284-96. The Amended Complaint contains no allegation that Ken and Kitty gifted a million dollars in stock to the Foundation. It contains no allegation that any of the defendants wrongfully induced Ken and Kitty to give money to the Foundation. It contains no allegation that the Foundation wrongfully used any gifted funds. It contains no allegation that the Foundation earned a profit, or logged the property, or wrongfully disposed of the property, or took actions detrimental to Ken and Kitty's ownership interest in the property. It asserts no claim of unjust enrichment. The only damage claims it asserts against the Foundation are those in Paragraph 17; and all of these allegations are based on a theory of breach of fiduciary duty, and all relate to the administration of the Foundation, not the use or abuse of Cranberry Lake. CP 288. The Amended Complaint contains no demand that the Foundation restore or pay to the plaintiffs any money originally given to the Foundation by Ken and Kitty, or any other alleged damages related to the use of Cranberry Lake.

A party may not raise a new theory of recovery for the first time on the appeal of a grant of summary judgment. *See, e.g., Boyers v. Texaco Refining and Marketing, Inc.*, 848 F.2d 809 (7th Cir. 1988). In *Boyers*, the

plaintiff appealed the trial court's grant of summary judgment in favor of the defendant on the defendant's damages claim against the plaintiff. The court refused to allow the plaintiff appellant to raise, for the first time on appeal, two alternative causes of action which the appellant contended would, if successful, defeat the defendant's damages claim. The court noted as follows:

To reverse the district court on grounds not presented to it would undermine the essential function of the district court. This rule is not meant to be harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties.

Boyers, 848 F.2d at 812.

F. David Frank's Argument that the Foundation Should Be Reformed Is Without Merit

David Frank argues that he has standing to sue the Foundation because he would be entitled to demand that the court somehow reform the Foundation so that it would be structured in a manner that is consistent with what he contends was Ken and Kitty's intent. Specifically, he claims that the court "should have reformed the Foundation (a trust) to conform to the Franks' intentions in creating the Foundation, i.e. one controlled by the Frank Family" Appellants' Brief at 20. In other words, if David

Frank cannot retrieve Cranberry Lake from the Foundation, he wants the Court to give him control of the Foundation itself. His argument fails for at least two reasons: he never pled the claim or argued it below, and the law does not support his theories of relief.

1. David Frank Failed to Raise the Argument Below, and Did Not Assert the Theory of Relief in His Amended Complaint.

As noted above, failure to raise issues before the trial court precludes consideration of them on appeal. *Ford v. Hagel*, 83 Wn. App. 318, 322, 920 P.2d 260 (1996). At no point in the proceedings on summary judgment did David Frank argue that he had standing to pursue a claim for reformation of the Foundation's organizational documents. Moreover, he did not seek reformation of the Foundation's organizational documents in the Amended Complaint. He is now barred from asserting a new theory of recovery on appeal as a basis for reversing summary judgment.

2. Neither the Doctrine of Cy Pres Nor the Doctrine of Equitable Deviation Would Permit a Court to Rewrite the Organization Documents to Give David Frank or the Frank Family Control of the Foundation.

The doctrines of cy pres and equitable deviation were developed to allow a court sitting in equity to fully effectuate the charitable intent of the settlor of a charitable trust. *See Niemann v. Vaughn Community Church*,

154 Wn.2d 365, 378, 113 P.3d 463 (2005). The purpose of both doctrines is to effectuate a charitable intent: a court may not use such equitable power to “sanction a diversion of part of the trust res to a third party in order to compromise litigation over the validity of the charity.” *See* Bogert and Chester, TRUSTS AND TRUSTEES, § 431, citing *Morris v. Boyd*, 162 S.W. 69, 110 Ark. 468 (1914). Yet, this is precisely the result that David seeks here: transfer of the control of the Foundation, a nonprofit corporation, to a third party, himself.

A court may apply the doctrine of cy pres only when the trustee of a trust wishes to “modify or redefine the settlor's specific charitable purpose,” *Niemann, supra*, at 378, 113 P.3d 463. Cy pres is available “where a testator has evidenced a dominant intent to devote his property to some charitable use but *the circumstances are such that it becomes impossible to follow the particular method he directs*, and the courts then sanction its use in some other way which will, as nearly as may be, approximate his general intent.” *See Puget Sound Nat. Bank of Tacoma v. Easterday*, 56 Wn. 2d 937, 948-949, 350 P.2d 444 (1960), quoting *Duncan v. Higgins*, 129 Conn. 136, 26 A.2d 849 (emphasis supplied).

Here, David Frank does not overtly seek to modify the Foundation’s charitable purpose, but merely to install himself or his family members in positions of control. Moreover, he has not alleged that

it is impossible for the Foundation, under its current structure, to accomplish Ken and Kitty's charitable purpose, which, according to the Articles of Incorporation, was to "[p]reserve the Foundation property [i.e., Cranberry Lake] in its natural state for the use of youth groups for organized recreation and educational purposes." CP 324. Finally, a court may not apply the doctrine of cy pres simply because a settlor had a charitable intent in establishing a trust. Instead, "the settlor must have had a broad, general intent to aid charity as a whole, or some particular class of charitable objects. His intent must not be narrow and particular."

Niemann, 154 Wn.2d at 378, quoting *Townsend v. Charles Schalkenbach Home for Boys, Inc.*, 33 Wn.2d 255, 205 P.2d 345, 350 (1949). In *Puget Sound National Bank of Tacoma v. Easterday*, 56 Wn.2d 937, 350 P.2d 444 (1960), the court noted that the "doctrine will be applied only where the court finds in the terms of the will, read in the light of surrounding circumstances, a *general intent* to devote the property to a charitable use, to which the intent that it go to the particular organization named is secondary. *Id.* at 949, quoting *Horton v. Board of Educ.*, 32 Wn.2d 99, 201 P.2d 163 (1948). The Franks' intent was not broad at all, but narrowly directed to the preservation and charitable use of the Cranberry Lake property.

Equitable deviation has nothing to do with altering a trust's primary purpose, but rather allows a court to "make changes in the manner in which a charitable trust is carried out." *Niemann*, 154 Wn.2d at 378. The application of the equitable deviation doctrine is only appropriate where a modification of the "administrative or distributive provision of a trust" is necessary to permit the trustees to accomplish the trust's charitable purpose. *Niemann*, 154 Wn.2d at 378, citing RESTATEMENT (THIRD) OF TRUSTS, § 66(1).

"[W]hile courts, in construing the provisions of a charitable trust, ordinarily will not deviate from the plan outlined by the testator, they undoubtedly have the power to do so, if it is reasonably necessary in effectuating the *primary* purpose of the trust." *Reagh [v. Hamilton]*, 194 Wash. [449] at 456 [1938]. . . . The court premised its holding on its finding that "the purpose of the trust will best be subserved" and that such alteration "does [not do] violence to the *primary* object of the testator." *Id.* . . . Thus, recognizing that trust settlors may possess a myriad of intentions in settling a trust, the court must concern itself with their *primary* objective.

Niemann, supra, at 382 (italics in original). In *Niemann*, by way of example, a trustor had granted land to a church for church purposes, with the stipulation that it never be sold. The church outgrew the property over the course of many years. The court applied the doctrine of equitable

deviation to abrogate the restriction, based on findings that continued occupancy of the property would impair rather than promote the trustor's primary charitable purpose. *Id.* at 384-85.

Here the proposed restructuring to give David Frank control of the Foundation is not alleged to have any bearing on the Foundation's ability to accomplish its primary, and indeed its exclusive, charitable purpose, as described in the Articles of Incorporation: the preservation of Cranberry Lake and its use for educational purposes. There is no basis in law for the application of the doctrine of equitable deviation to re-write the Articles of Incorporation or Bylaws to give David Frank control of the Foundation.

Finally, the doctrines of cy pres, equitable deviation, and reformation are equitable doctrines, applicable, if at all, to trusts, which are creatures of equity. All of the cy pres and equitable deviation cases that David Frank cites concern trusts. The Foundation, by contrast, is not a creature of equity, but rather a creature of statute. As the plaintiffs below alleged in their Amended Complaint, the Foundation is a non-profit corporation organized under the Washington Nonprofit Corporation Act, RCW 24.03. The act sets forth in detail how such corporations may be formed, how they are to be administered, and how they are to be dissolved. Specific statutory provisions govern the manner in which Articles of Incorporation may be amended, *see* RCW 24.03.160-.183; and

the power is given to the members, or, in a non-membership corporation like the Foundation, to the Board. RCW 24.03.165. The courts are expressly given only the power to liquidate the assets and affairs of a non-profit corporation, and then only in an action by a member, a director, the attorney-general, a creditor, or the corporation itself. RCW 24.03.265. Oversight of non-profits is vested in the attorney general, not in the incorporators or members of the public at large. *See Lundberg v. Coleman*, 115 Wn. App. 172, 60 P.3d 595 (2002); Deborah A. DeMott, Shareholder Derivative Actions §2:12, at 64, 67-68 (1999); *see also* Henry B. Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 606-07 (1981). Incorporators, when they create a non-profit corporation, create an independent entity, which they thereafter lack the ability to control or dissolve, either as a matter of law or in equity, unless they are members or are a majority of the Board of Directors. David Frank has no standing to ask the trial court to “reform” the Foundation.

G. David Frank Has Waived His Right to Appeal Dismissal Of the Paragraph 17 Breach of Fiduciary Claims

While David Frank assigns error to the trial court’s dismissal of all of his claims as to the Foundation, he nowhere discusses or otherwise addresses the order granting summary judgment on the Paragraph 17 breach of fiduciary claims as to the Foundation. An appellant waives an

assignment of error for which he presents no argument. *See Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 142, 542 P.2d 756 (1975); *see also Smith v. King*, 106 Wn.2d 443, 451-452, 722 P.2d 796 (1986). David Frank has waived the right to appeal the dismissal of the breach of fiduciary claims.

V. CONCLUSION

For the foregoing reasons, the Foundation requests that this Court affirm the trial court's grant of summary judgment in favor of the Foundation.

Dated this 21st day of December, 2007.

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I hereby certify that on the 21st day of December, 2007, I mailed a true and correct copy of the foregoing document titled Brief of Respondent to counsel of record at the following address by depositing the envelope in regularly maintained interoffice mail. This mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, postage thereon being fully prepaid:

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Executed at Seattle, Washington this 21st day of December, 2007.

Lucy Collins
Lucy Collins