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DIVISION III
STATE OF WASHINGTON
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NO. 300081

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In Re Estates of

HARVEY L. JONES and
MILDRED L. JONES,

Deceased

**BRIEF OF RESPONDENTS/
CROSS APPELLANTS**

Michael Rex Tabler, WSBA #6047
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Attorneys for Respondent
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I.
INTRODUCTION

Mildred L. Jones ("Mildred") died on July 17, 2007. She was survived by her four children, Will J. Jones, Dennis L. Jones, Teresa Engbretson, and Mary Ann Sealock. Mildred's husband, Harvey L. Jones ("Harvey"), died on May 24, 2003. (CP 266).

Mildred was the personal representative of her husband's estate. After Mildred died her son, Will L. Jones ("Mr. Jones"), was appointed to serve as successor personal representative of Harvey's estate. Mr. Jones was also appointed to serve as personal representative of Mildred's estate. Harvey and Mildred's estates ("the Estates") are Respondents/Cross-Appellants in this proceeding.

On November 29, 2007, Appellants, Teresa Engbretson and Mary Ann Sealock ("Mildred's daughters"), filed a joint creditor's claim in Mildred's estate seeking unspecified money damages caused by Mildred's alleged breaches of her fiduciary responsibilities as Harvey's personal representative and as trustee of Harvey's testamentary trust. Mildred's daughters also claimed they were entitled to damages from Mildred's

estate because, in 2003, Mildred was mentally incompetent and a victim of fraud and undue influence exerted by Mildred's sons. (CP 447-451).

Mildred's daughters also filed a TEDRA petition on January 14, 2010. Their TEDRA petition repeated allegations made in the creditor's claim. However, instead of claiming money damages as against Mildred's estate, the TEDRA petition sought rescission or cancellation of documents signed by Mildred in August of 2003 which give rise to this dispute. (CP 1-7).

The Estates filed a summary judgment motion in 2010 requesting dismissal of all claims. The trial court denied the Estates' motion with respect to dismissal of the creditor's claim filed by Mildred's daughters. However, the court ruled Mildred's daughters could not seek money damages and also ask for rescission. Thus, it ordered Mildred's daughters to make an election of remedies before December 15, 2010. (CP 440-442). Mildred's daughters decided they would abandon claims for money damages and, instead, confine their remedy to rescission. (Bf. App. 9).

In view of the election by Mildred's daughters to seek rescission, the Estates filed a second motion for summary judgment on March 17,

2011. (CP 25-27). They asked the trial court to dismiss all claims seeking rescission of the agreements Mildred made in 2003.

The trial court agreed all claims for rescission should be dismissed. (CP 114-116). After entering its order granting the Estates' motion for summary judgment, Mildred's daughters moved for reconsideration. (CP117-124). On May 20, 2011, the trial court entered its order denying reconsideration. (CP 157).

The Estates then moved the trial court for an order awarding judgment as against Mildred's daughters for reasonable attorney's fees incurred in defending claims for damages and rescission. The trial court denied that motion and directed that those fees be paid from the Estates rather than by Mildred's daughters. (CP 443-445).

Mildred's daughters appeal the court's order dated April 21, 2011 dismissing their claims for rescission. (CP 114-116). The Estates have cross-appealed the court's order dated June 17, 2011 denying their motion for a judgment awarding reasonable attorney's fees as against Mildred's daughters. (CP 443-445).

II.
ASSIGNMENTS OF ERROR

A. Trial Court Erred In Denying Estates' Motion For Order Awarding Reasonable Attorney's Fees As Against Teresa Engbretson And Mary Ann Sealock.

ISSUE: Whether trial court abused its discretion by failing to award attorney's fees incurred by the Estates in successfully defending claims for damages/rescission made by Teresa Engbretson and Mary Ann Sealock.

III.
STATEMENT OF CASE

Harvey and Mildred, along with their two sons, Will L. Jones and Dennis L. Jones, owned and operated a family farming business. Their business operated as Harvey L. Jones Farms, Inc. ("the Corporation"). (CP 267).

In the late 1990s the Corporation experienced financial problems resulting from crop disasters and adverse market conditions. In 2002 one of the Corporation's lenders, U.S. Bank, informed the Corporation it would not provide further financing. It advised the Corporation it

intended to file a foreclosure action unless its outstanding loans were paid in full. (CP 267).

The Corporation retained the services of an agricultural financial consultant, Eric Weinheimer (“Mr. Weinheimer”), to provide advice with respect to the Corporation’s financial problems. With Mr. Weinheimer’s assistance, the Corporation obtained financing from the Farm Service Agency (“FSA”). The FSA loan was funded in early 2003. Payment of the FSA loan to the Corporation was personally guaranteed by Harvey, Mildred and their sons and their sons’ wives. All parties were also required to pledge their personally owned farm land as collateral. (CP 187, 267).

In early 2003, Harvey, Mildred and their sons executed a written agreement whereby they would contribute all of their respective land to their joint farming operation until such time as all real estate debt, operating debt and term financing was completely paid. They agreed the Corporation would not pay rent and would receive all income from the joint farming effort. (CP 188, 268).

Harvey died on May 24, 2003. At the time of his death, Mildred was experiencing health issues that required daily assistance from a caregiver. However, Mildred was adamant about her desire to continue living in the family home after her husband's death. Mildred and her sons turned to their financial consultant, Mr. Weinheimer, for advice regarding how they could continue the Corporation's farming business while providing Mildred with the financial ability to live in her home as long as she wanted to. (CP 188, 268).

Mildred's sons and Mr. Weinheimer contacted the Corporation's accountant, David Schelert ("Mr. Schelert"), for assistance with valuation of the assets in Harvey's estate. Since the Corporation's liabilities exceeded the value of its assets, Mr. Schelert concluded Harvey's stock in the Corporation had a negative value. He provided Mildred, her sons and Mr. Weinheimer with his opinions regarding asset values and he also prepared an estate tax return for Harvey's estate. (CP 188, 255, 256, 269).

After several meetings with Mildred, her sons, and Mr. Schelert, Mr. Weinheimer proposed a plan he thought would accommodate the parties' desires and needs. His plan was intended to relieve Mildred from

the onerous commitments created by the February 24, 2003 farming agreement; provide Mildred with a stream of income sufficient to pay her monthly expenses, including expenses attributable to the cost of an in-home caregiver; and, enable Mildred to preserve her existing cash and investments. (CP 188, 189, 269).

In order to accomplish these goals, Mr. Weinheimer proposed that Mildred make a gift of all of the stock she and Harvey owned in the Corporation to her sons. Mildred's sons were to hold their mother harmless from the Corporation's debts and liabilities. In addition, the Corporation was to pay Mildred for personal loans made by her and her husband to the Corporation. The Corporation's payments to Mildred were to take the form of paying Mildred's monthly living expenses. (CP 188, 269).

Mr. Weinheimer also suggested that Mildred lease the farm land she owned with her late husband to her sons with an option to buy. He proposed that the monthly rental payment be equivalent to the cost of Mildred's in-home care. As a result, the agreed rental rate was more than double the fair rental value of comparable land in the Roza Irrigation

District. Mr. Weinheimer further suggested that Mildred's sons be responsible for payment of real estate taxes, including taxes on Mildred's home, as well as irrigation assessments and debt service. (CP 188, 189, 271, 414).

As for the purchase price, Mr. Weinheimer relied on a recent FSA appraisal of the property's fair market value as well as his familiarity with recent sales of similar land in suggesting a price of \$800,000.00, *i.e.*, about \$4,500.00 per acre. His proposed sales price was about \$500.00 per acre higher than a recent sale of comparable land located immediately adjacent to Mildred's property. (CP 190, 271, 414).

Mr. Weinheimer insisted that his proposal be discussed with Mildred's daughters. Thus, Mr. Weinheimer met with Mildred's daughters in June of 2003. Mildred's sons also attended that meeting. (CP 190, 269). Mr. Weinheimer explained his proposal to Mildred's daughters in detail and he provided them with his written summary of the material terms of his proposal. (CP 190, 269).

Mildred's sons retained the services of a Yakima lawyer, Don Boyd, to prepare documentation needed to implement Mr. Weinheimer's

proposal. Mr. Weinheimer provided Mildred with copies of the documents drafted by Mr. Boyd and he reviewed those documents with her. Mildred also independently reviewed the documents with a neighbor and long-time friend, Mark Arstein. (CP 190, 191, 270).

Mildred and Mildred's sons met with Mr. Weinheimer at Mildred's home on August 4, 2003 to sign the documents drafted by Mr. Boyd.¹ A Notary Public was also in attendance. Mr. Weinheimer, once again, reviewed the documents with Mildred and her sons before the documents were signed. (CP 190, 227, 228, 270).

It should be noted that the documents prepared by Mr. Boyd were made for signature by Mildred in her personal capacity as well as in her capacity as trustee of Harvey's testamentary trust. Mr. Boyd failed to consider the fact there was no pending action to probate Harvey's estate and that Mildred had not been appointed to act as Harvey's personal representative.

¹ Testimony from Mildred's financial consultant (CP 191); her accountant (CP 256); her neighbor (CP 382); and, her caregiver (CP 375) all agree that Mildred was mentally competent and making decisions of her own free will of August 2003. The Notary Public who was present when Mildred signed the 2003 agreements also testified Mildred did so freely and voluntarily. (CP 227). Mildred's daughters have never come forward with specific facts to create any genuine issue with respect to this testimony.

After Mildred signed the subject documents in August of 2003, she began to receive all payments required by the terms of those documents. (CP 43, 271).

In December of 2003, Mildred and her sons met with Mr. Boyd to specifically discuss the status of Harvey's estate. Although Mr. Boyd filed a probate action and undertook to represent Mildred in her capacity as Harvey's personal representative, he did not address issues related to improperly identifying Mildred as a trustee in the documents that predated the probate action.

From August 2003 until the time of her death on July 17, 2007, Mildred received all payments required by the terms of the subject documents. At no time did Mildred, her daughters or anyone else make any complaints about the transactions that were agreed to in 2003. (CP 43, 191). Mr. Jones and his brother continued to make all of the required payments to, or for the benefit of, Mildred's estate after her death, including payments occurring during the pendency of this appeal. (CP 43, 271).

After Mildred's death, her daughters filed a creditor's claim against their mother's estate. As to Mildred's gift of Harvey's community property interest in the Corporation's stock and her lease of Harvey's community property interest in the farm land, Mildred's daughters alleged that Mildred breached fiduciary duties thus causing them to suffer unspecified money damages. As to Mildred's community property interest in these transactions, her daughters claimed they were entitled to money damages from her estate resulting from fraud, undue influence, misrepresentation and mental incompetency. (CP 447-451).

Mildred's daughters also filed a TEDRA petition on January 14, 2011 seeking rescission of the various agreements that had been in place since August of 2003. (CP 1-7).

As explained above, the estates filed a summary judgment motion on March 4, 2010 requesting dismissal of all claims. (CP 177, 178). Although the trial court denied summary judgment with respect to damage claims, it agreed Mildred's daughters could not seek damages and also ask for rescission. Thus, it ordered Mildred's daughters to make an election of remedies before December 15, 2010. (CP 440-442).

Mildred's daughters elected to abandon all damage claims and to limit their remedy to rescission of the 2003 agreements. (Bf. App. 9). After Mildred's daughters informed the Estates of their election, the Estates filed a second summary judgment motion requesting dismissal of all claims for rescission. (CP 25-27).

The trial court granted the Estates' motion and dismissed the rescission claims made by Mildred's daughters. However, the trial court did not grant the Estates' request that they have judgment against Mildred's daughters for reasonable attorney's fees incurred in successfully defending all claims for damages and rescission. (CP 443-445).

Mildred's daughters appeal the trial court's summary judgment determination that their rescission claims must be dismissed, as a matter of law. The Estates respectfully ask that the trial court's summary judgment order be affirmed.

The Estates have cross-appealed the trial court's order refusing to grant judgment in favor of the Estates as against Mildred's daughters for reasonable attorney's fees incurred in successfully defending all claims for damages and rescission. The Estates respectfully ask that that order be

reversed. The Estates also ask that they have judgment against Mildred's daughters for reasonable attorney's fees.

IV **ARGUMENT**

A. Pretial Rulings in 2010 Did Not Preclude Summary Judgment in 2011.

Mildred's daughters devote most of their appellate brief to discussion of their disagreement with the manner in which the trial court arrived at its decision to grant summary judgment dismissing all claims for rescission. However, disagreement with a trial court's analysis is of no consequence in an appeal from a summary judgment decision. The court has frequently explained motions for summary judgment are reviewed de novo. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706, 50 P.3d 602 (2002). The reviewing court will engage in the same inquiry as a trial court and it will make its own determination if summary judgment is appropriate, as a matter of law. *Id.* at 707.

Mildred's daughters do not address the substantive legal reasons that support the trial court's summary judgment order. Instead, at pages 13 through 20 of their Brief of Appellants, they state the trial court made

findings of fact in 2010 that Mildred was in a confidential relationship with her sons in 2003 and that she was a victim of undue influence. (Bf. App. 13, 14). Mildred's daughters continue at pages 20 through 28 of the Brief of Appellants with argument that, because the trial court "...decided and ruled on ..." the issue of rescission in 2010, it could not grant summary judgment dismissing rescission claims in 2011. (CP 24). These statements and arguments made by Mildred's daughters are not true.

The Estates did not ask the court to decide any factual issues in the first summary judgment proceeding in 2010. Summary judgment motions are not intended to resolve questions of fact. Rather, summary judgment will not be allowed if there are genuine issues of material fact. Summary judgment can be granted only when it is appropriate to do so as a matter of law. CR 56; *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 152, 570 P.2d 348 (1977)

The Estates' first summary judgment motion asked the trial court to address specific legal issues - not factual ones. Those legal issues were listed for the court as follows:

1. Whether the creditor's claim filed by Mildred's daughters is unenforceable by reason of its failure to comply with the requirements of RCW 11.42.070(1);
2. Whether Mildred's estate has any liability to Mildred's daughters arising from mental incompetency, fraud, misrepresentation or undue influence;
3. Whether claims for rescission/ cancellation are barred by the doctrine of election of remedies;
4. Whether claims arising from breach of fiduciary duty, fraud, undue influence, and misrepresentation are time barred; and,
5. Whether Mildred's daughters are estopped from claiming damages. (CP 421).

Although the court denied the Estates' summary judgment motion as to damage claims made by Mildred's daughters, it agreed Mildred's daughters were required to make an election of remedies. (CP 440-442). Mildred's daughters did so when they elected to abandon all claims for damages and, instead, to confine their remedy to one of rescission. In view of that election by Mildred's daughters, none of the trial court's

rulings in June of 2010 with respect to damage claims were of any consequence in the 2011 proceeding that sought dismissal of all rescission claims.

Not only are Mildred's daughters wrong in claiming the trial court made factual findings of undue influence/confidential relationship in 2010, their statement that the trial court granted their request for rescission is also incorrect. (Bf. App. 20, 28). The record does not include any opinion or order to that effect.

The 2010 summary judgment proceeding resolved the issue of whether the doctrine of election of remedies applied to the damage and rescission claims made by Mildred's daughters. After Mildred's daughters proceeded to elect their remedy, i.e., rescission, the trial court was asked in 2011 to decide if Mildred's daughters could have rescission, as a matter of law.

Mildred's daughters cite the doctrine of stare decisis, the law of the case doctrine, and res judicata in support of their argument that the trial court could not dismiss their rescission claims in 2011. Their argument is not persuasive.

As previously stated, the issues presented in 2010 were different than those raised in 2011. Thus, neither the doctrine of stare decisis or res judicata apply. *Greene v. Rothschild*, 68 Wn.2d 1, 8, 402 P.2d 356, 414 P.2d 1013 (1965) (stare decisis only applies in cases involving identical or substantially similar facts); *Civil Service Com'n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474 (1999)(res judicata does not apply if claims/issues are not identical).

The more specific issue Mildred's daughters attempt to articulate is whether the law of the case doctrine precludes a judge from reaching a different pretrial ruling than was made by another judge in the same case. This issue has been addressed and decided by the court on a number of occasions.

Initially, it should be noted that a trial court is at liberty to change, modify or reconsider its pretrial rulings anytime before making a final decision. *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 37, 874 P.2d 921 (1993)(trial court may reverse or modify a pretrial ruling at any time prior to entry of final judgment); *Hubbard v. Scroggin*, 68 Wn.App. 883, 887, 846 P.2d 580 (1993)(trial court may alter,

amend or reverse its rulings at any point before final judgment); *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 301, 840 P.2d 860 (1992)(trial court has plenary authority to afford such relief as justice requires anytime before entry of final judgment).

The court has refused to extend the law of the case doctrine to cases involving multiple summary judgment motions with different outcomes on the same issue. In *MGIC Financial Corporation v. H.A. Briggs Company*, 24 Wn.App. 1, 600 P.2d 573 (1979), the trial court denied a party's motion for summary judgment. Several days later, a second summary judgment involving the same issues raised in the first motion was heard by a different judge. The second motion was granted.

On appeal, the court was asked to decide if the trial court violated the law of the case doctrine by granting summary judgment several days after another judge denied a similar motion. At page 8 of its decision, the court said:

“In another assignment of error, *MGIC* argues that the trial court violated the ‘law of the case doctrine’ by granting the motion for summary judgment several days after another trial judge had denied a similar motion. The law of the case doctrine generally applies only to parties

who raise identical issues on successive appeals of the same case, *Greene v. Rothschild*, 68 Wash.2d 1, 10, 402 P.2d 356 (1965); *Pierce County v. Desart*, 9 Wash.App. 760, 761, n.1,515 P.2d 550 (1974), *MGIC* presents no relevant authority for extending the doctrine to apply to motions raised several times at the trial court level. We see no reason to extend the doctrine here.”

Justice Cox’s concurring opinion in *Central Puget Sound Regional Transit Authority v. Heirs and Devisees of Eastey*, 135 Wn.App. 446, 144 P.3d 322 (2006), relied on the court’s decision in *MGIC Financial Corporation* in emphasizing that the law of the case doctrine does not prohibit reexamination of pretrial rulings made by a different judge. There, Justice Cox opined that a trial court erred in its reliance on the law of the case doctrine as a basis for refusing to reexamine pretrial rulings made by a different judge. *Id* at 465.

Thus, even if the issues raised by the Estates in 2010 were the same as those raised in 2011, the law of the case doctrine did not prohibit the trial court from granting the 2011 motion.

Mildred’s daughters fail to present any justifiable basis to claim the summary judgment proceedings in 2010 prohibited the court from

granting summary judgment and dismissing their claims for rescission in 2011. Therefore, the trial court's summary judgment order dated April 21, 2011 must be affirmed.

B. Mildred's Daughters Have No Legal Or Equitable Right To Seek Rescission.

1. Strangers Cannot Cancel/Rescind Contracts With Which They Have No Privity.

Pages 25 through 45 of the Brief of Appellants are mostly concerned with an attempt to convince the court genuine issues of fact exist such as require reversal of the trial court's summary judgment order. However, those alleged issues of fact do not establish any right to rescind by Mildred's daughters.

Mildred's daughters argue they are entitled to rescission because they are "...acting on behalf of the Estates." (Bf.App. 36). They direct the court to various excerpts from the TEDRA statute, Ch. 11.96A RCW, as support for the proposition they can invoke that statute in order to determine the validity of the 2003 agreements in which they have an interest as heirs of their parents' estates. Mildred's daughters do not support their argument with citation to legal authority. It is well

established that the court will not consider any argument not supported by citation to legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

As the duly appointed personal representative of his parents' estates, only Mr. Jones is vested with authority to represent those estates in litigation. RCW 11.48.010; *Rummens v. Guaranty Trust Co.*, 199 Wn. 337, 92 P.2d 228 (1939) (only a duly appointed personal representative can bring an action to recover assets of an estate).

Mildred's daughters rely on RCW 11.96A.020 in claiming they are empowered to represent the Estates in a rescission action. RCW 11.96A.020 is a jurisdictional statute confirming the court's authority to resolve disputes affecting trusts and estates. But there is no issue here with respect to the court's jurisdictional authority. The issue here is whether Mildred's daughters are entitled to rescind agreements made in 2003 to which they are not parties.

If Mildred's daughters believe RCW 11.96A.020 somehow abrogates statutes confirming Mr. Jones' exclusive authority as personal representative, such as RCW 11.48.010, they are wrong. The court has

previously ruled that RCW 11.96A.020 does not enable a trial court to ignore the express language of other statutes. *Henley v. Henley*, 95 Wn.App. 91, 97, 974 P.2d 362 (1999).

Although Mildred's daughters are strangers to the 2003 agreements between Mildred and her sons, they insist they have some personal right to demand rescission. But there are no cases that permit cancellation or rescission by a stranger to a contract. Instead, the court has held that "...one cannot cancel an agreement to which he is not a party and with which he has no privity... ." *Henry v. Lind*, 76 Wn.2d 199, 204, 456 P.2d 927 (1969); accord *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal.App.4th 949, 959-60 (2005) (third party beneficiary not entitled to seek rescission).

Thus, Mildred's daughters cannot establish any legal or equitable right to rescind agreements made by Mildred on behalf of herself and her husband's estate. Mildred's daughters are strangers to those agreements and, as such, they may not seek rescission. Therefore, the trial court's order dismissing all claims for rescission must be affirmed, as a matter of law.

2. Rescission Not Allowed Where There Is Failure To Act Promptly, Without Delay.

Many cases explain the purpose of rescission is to restore the parties as nearly as possible to their original positions as if no contract occurred. *Simonson v. Fendel*, 101 Wn.2d 88, 93, 675 P.2d 1218 (1984); *Busch v. Nervik*, 38 Wn.App. 541, 547, 687 P.2d 872 (1984). Since the court is obliged to restore the parties to their original positions, an action seeking rescission must be pursued promptly, without delay. *Darnell v. Noel*, 34 Wn.2d 428, 435, 208 P.2d 1194 (1949). In cases where a party fails to act promptly, the court regards such conduct as an election to continue the contract and refuses to allow rescission. *Prager's Inc. v. Bullitt Co.*, 1 Wn.App. 575, 586, 463 P.2d 217 (1969).

Since Mildred's daughters did not file a petition seeking rescission until some six and a half years after the agreements had been signed, their claim for rescission must be dismissed, as a matter of law.

Mildred's daughters incorrectly state the trial court's summary judgment decision in June of 2010 considered their rescission claim to be timely. (Bf. App. 28). This issue was never addressed in the June 2010 proceedings.

The issue addressed to the trial court in 2010 was whether it should dismiss damage claims made by Mildred's daughters based on allegations of breach of fiduciary duty, fraud, undue influence and misrepresentation under authority of the three-year statute of limitations set out in RCW 4.16.080. That statute has nothing to do with the issue now before the court, i.e., the failure to seek rescission promptly, without delay.

Furthermore, any previous consideration by the trial court of the damage claims made by Mildred's daughters is irrelevant in view of their election to abandon those claims in favor of an action for rescission.

Mildred's daughters cannot rely on RCW 11.96A.070(2) in claiming their rescission action is timely. (Bf. App. 30). RCW 11.96A.070(2) requires that actions against a personal representative for breach of fiduciary duty occur before discharge of the personal representative. The instant proceeding does not include any action against Mr. Jones for an alleged breach of fiduciary duty. Instead, the matter at bar seeks rescission of agreements made by Mildred in 2003. Therefore, RCW 11.96A.070(2) has nothing to do with determining whether

Mildred's daughters have acted promptly, without delay, in seeking rescission.

At pages 42 through 44 of the Brief of Appellants, Mildred's daughters make the additional argument, that, although they did not state a claim for rescission until filing their TEDRA petition in January of 2010, their TEDRA petition should be treated as "...merely an amendment of their creditor's claim..." that was filed with the court in November of 2007. Mildred's daughters believe their rescission action is timely if it is considered to be an amendment of a creditor's claim filed more than four years after the subject agreements were signed.

Mildred's daughters cite *Grant v. Morris*, 7 Wn.App. 134, 498 P.2d 336 (1972) in support of the proposition that their 2010 petition "relates back" to their 2007 creditor's claim. They argue the *Grant* decision would enable a contracting party to seek rescission after accepting contract benefits for more than four years. That is not the case.

In *Grant*, a purchaser bought an apartment complex in June of 1967. In September of 1968, the purchaser sued the seller for damages resulting from alleged fraud and misrepresentation. The purchaser then

filed an amended complaint in June of 1969 requesting rescission as an alternative remedy. In September of 1969, the purchaser abandoned the apartment complex before dismissing his claim for damages in November of 1969 and limiting his remedy to rescission.

The trial court ruled that the purchaser waived any right to rescission because he did not act promptly. It concluded the purchaser's conduct which included possession, use and control of the property until September of 1969 also demonstrated an intent to waive any right to rescind.

On appeal, the purchaser argued his June 1969 amendment related back to the date of his original complaint for damages, i.e., September of 1968. Since his June 1969 amended pleading "related back" to the original September 1968 complaint, the purchaser claimed the trial court could not consider any conduct after September of 1968 as evidence of a waiver of the right to rescind. The court of appeals disagreed and affirmed the trial court's decision.

It commented that the legal fiction of "relation back" does not change the facts of a case. It held the trial court properly considered the

purchaser's conduct as evidence of an intent to waive any right to rescind.

At pages 137 and 138 the court stated:

“Delays and other actions which might not constitute waiver of a right to claim damages can evidence an intent to waive a right to rescind. *Thomas v. McCue*, 19 Wn. 287, 53 P. 161 (1898); *Fines v. West Side Implement Co.*, 56 Wn.2d 304, 310, 352 P.2d 1018 (1960).

The rule is that the party who desires to rescind the contract on the ground of fraud must, upon discovery of the facts, at once (or at least reasonably quickly) announce his purpose and adhere to it. [Purchaser] did not, upon discovery of the grounds upon which they relied at trial, promptly or within a reasonable time seek rescission, the trial judge properly interpreted plaintiff's contract to be circumstantial evidence of an intent to waive the right to claim rescission.”

Mildred's daughters have no legal or equitable right to rescind agreements that have existed since 2003 regardless of whether their TEDRA petition relates back to their 2007 creditor's claim. The court's analysis in *Grant* explains why the rescission claim made by Mildred's daughters cannot be allowed as a matter of law.

Therefore, the trial court's order dismissing all rescission claims must be affirmed.

3. **Continuing Acceptance Of Contract Benefits Without Promptly Asserting Claim For Rescission Constitutes Waiver Of Any Right To Do So.**

Mildred's daughters claim an issue of fact exists as to whether Mildred and her estate have actually received payments required by the terms of the 2003 agreements. At page 41 of the Brief of Appellants, they state Mr. Jones has never produced evidence of payments made to the estates by him, his brother and their corporation.

In fact, Mr. Jones and his brother testified about the various payments that have occurred since August of 2003 (CP 43, 271). Mr. Jones also provided Mildred's daughters with copies of bank records confirming receipt of the payments that have been made as well as the deposits of those payments into the Estates' bank account since August of 2003. Payments to Mildred's estate have continued throughout the litigation, including payments occurring during the pendency of this appeal. However, Mildred's daughters have not come forward with specific facts sufficient to show the existence of a genuine issue on this

subject such as is their responsibility. *Bankhead v. City of Tacoma*, 23 Wn.App. 631, 597 P.2d 920 (1979); *Dwinnell's Central Neon v. Cosmopolitan Chinook Hotel*, 21 Wn.App. 929, 587 P.2d 191 (1970).

Mildred's daughters complain the Estates objected to discovery requests seeking explanations about the reasons for a creditor's claim filed by Mr. Jones, his brother and their corporation. However, they do not explain why a personal representative has an obligation to answer discovery requests on behalf of a third party creditor. That sort of discovery should obviously be addressed to the creditor - not to the personal representative.

The Estates' ongoing acceptance of contract benefits since 2003 without promptly asserting a right to rescind constitutes waiver of any subsequent attempt to do so. *Grant, supra*, at 134. *Longenecker v. Brommer*, 59 Wn.2d 552, 557, 368 P.2d 900 (1960).

Mildred's daughters do not cite any legal authority in opposition to the above-referenced cases. Their failure to do so entitles the court to disregard their argument based on the rule that the court will not consider

argument which is not supported by citation to legal authority. *Cowiche, supra*, at 118.

The trial court's decision to dismiss all rescission claims is consistent with the cases cited above. Therefore, the trial court's order granting summary judgment must be affirmed.

4. Rescission Not Allowed When Party Alleging Fraud Fails To Make Restitution.

It is well established that a party seeking rescission must do equity and restore that which he has received from the other party. *Morango v. Phillips*, 33 Wn.2d 351, 357, 205 P.2d 892 (1949). Where a party seeks rescission based on allegations of fraud and misrepresentation, he must act promptly and restore the other party to his original position. *Fines v. Westside Implement Co.*, 56 Wn.2d 304, 310, 352 P.2d 1018 (1960); *Lucas v. Andros*, 185 Wn. 383, 386, 55 P.2d 330 (1936).

Mildred's daughters do not dispute the cases cited above. In fact, they offer no citation to legal authority in support of their argument restitution is not required because the other contracting parties have not asked for it. (Bf. App. 44, 45). The court will not consider argument not supported by citation to legal authority. *Cowiche, supra*, at 118.

Mildred's daughters also argue restitution is not necessary because Mr. Jones has failed to file an interim report pursuant to RCW 11.76.010 explaining the capital improvements he, his brother, and their corporation have made to the subject real estate.

However, the report contemplated by RCW 11.76.010 addresses actions taken by the personal representative affecting assets of, or claims against, the estate. It does not impose any obligation on a personal representative to make reports about the ongoing business activities of creditors.

Thus, Mildred's daughters cannot rely on RCW 11.76.010 as a basis for claiming some genuine issue of fact exists on the issue of whether rescission can occur without restoring the party to its original position.

It is undisputed no restitution has occurred and that Mildred's daughters refute any responsibility to do so notwithstanding the cases cited above. Since that is the case, the trial court's decision to grant summary judgment and to dismiss all claims for rescission must be affirmed.

V.
CROSS APPEAL

A. Estates Entitled To Award Of Reasonable Attorney's Fees Incurred In Successfully Defending Claims Made By Mildred's Daughters.

The Estates cross appeal the trial court's order dated June 17, 2011 denying their motion for judgment as against Mildred's daughters for reasonable attorney's fees incurred in defending claims for damages and rescission. A trial court's determinations made under authority of RCW 11.96A.150(1) are reviewable upon a showing of a clear abuse of discretion. *See Barlett v. Betlach*, 136 Wn.App. 822, 146 P.3d 1235 (2006).

RCW 11.96A.150(1) confirms the court is empowered to award reasonable attorney's fees in proceedings such as these. It states:

"Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party: (a) from any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any non-probate asset that is the subject of the proceeding. The court may order the costs, including reasonable attorney's fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its

discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.”

The court has approved an estate’s request for recovery of reasonable attorney’s fees under RCW 11.96A.150(1) in instances where a personal representative successfully defended the estate against claims for money damages. *Villegas v. McBride*, 112 Wn.App. 659, 50 P.3d 678 (2002). It reasoned that such an award was appropriate so as not to force the estate to bear the burden of attorney’s fees incurred in successfully defending a creditor’s claim. *Id.* at 697.

The *Villegas* decision is consistent with the court’s determination in *In Re Estate of Blessing*, 160 Wn.App. 847, 248 P.3d 1107 (2011) that an award of reasonable attorney’s fees under RCW 11.96A.150(1) in favor of an estate is appropriate where the estate is the prevailing party.

Here, the estates successfully defended all claims made by Mildred’s daughters. By raising the doctrine of election of remedies, they forced Mildred’s daughters to abandon claims for money damages. The Estates then obtained summary judgment dismissing claims for rescission.

Since the Estates are the prevailing parties on all issues, the trial court committed an abuse of discretion when it denied the Estates' motion for an award of reasonable attorney's fees. Therefore, the Estates respectfully ask that the trial court's order dated June 17, 2011 denying their request for an award of reasonable attorney's fees as against Mildred's daughters be reversed and that the trial court be directed to enter judgment against Teresa Engbretson and Mary Ann Sealock as originally requested by the Estates.

VI.
ATTORNEY'S FEES ON APPEAL

A. Request For Fees By Mildred's Daughters Must Be Denied.

Mildred's daughters have asked for an award of attorney's fees on appeal. (Bf. App. 45-47). They make that request under authority of RCW 11.96A.150(1) and RAP 18.1.

However, the court has refused to allow attorney's fees in cases where the underlying litigation has not provided any benefit to the estate. *In Re Estate of Moi*, 136 Wn.App. 823, 835, 151 P.3d 995 (2006); *In Re Estate of Ker*, 134 Wn.2d 328, 341, 949 P.2d 1031 (1998).

Mildred's daughters cannot characterize their attempt to recover money damages from Mildred's estate as an action intended to benefit the estates. Nor can they claim that forcing the estates to make restitution of the hundreds of thousands of dollars in payments received since 2003 in addition to providing compensation for enhancement of the land's fair market value resulting from reasonable and necessary capital improvements, is beneficial to the estates. In fact, it is undisputed that the Estates do not have the ability to make the required restitution. (CP 45).

Therefore, the court must deny Mildred's daughters' request for an award of fees on appeal.

B. Estates Request Award Of Reasonable Attorney's Fees On Appeal.

The Estates respectfully ask for an award of reasonable attorney's fees incurred in defending the instant appeal. Their request for fees is made under authority of RCW 11.96A.150(1) as well as RAP 18.1(a).

As previously discussed above, the Estates successfully defended all claims made by Mildred's daughters. Should the Estates also prevail in appeal, their request for fees is consistent with the court's analysis in cases such as *In Re Estate of Blessing, supra*, at 847.

VII. **CONCLUSION**

Justice Hale once remarked, “there are times when an attempt by the courts to rescind a contract it is like trying to unring the bell. What’s done is done and cannot be undone.” *Yount v. Indianola Beach Ests., Inc.*, 63 Wn.2d 519, 387 P.2d 975 (1964).

Here, the “bell” has been ringing since August of 2003. In the meanwhile, Mildred’s daughters took no action on their claim, assuming they had one, while Mildred’s sons made payments to Mildred and her estate and while Mildred’s sons also made significant capital investments in the subject real estate. The court will not grant rescission under these circumstances.

The cases cited herein confirm that strangers have no right or standing to demand cancellation or rescission of contracts with which they have no privity. Nor is rescission allowed in instances where the party requesting it has failed to act promptly while continuing to accept contract benefits.

Furthermore, where, as here, a party alleges fraud as a basis for rescission, the court will not grant such relief when that party has done nothing to restore the other to his original position.

Thus, under the circumstances presented here, the trial court could not reasonably be expected, after all this time, to erase the last eight years and place the contracting parties in their original positions as if no contracts ever existed. Such a result would be contrary to the weight of authority standing for the proposition rescission must always be just and equitable.

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Therefore, the Estates respectfully ask that the trial court's summary judgment order dismissing all claims for rescission be affirmed. The Estates further ask that the trial court's order denying judgment as against Mildred's daughters for reasonable attorney's fees in successfully defending claims made by Mildred's daughters be reversed; and, that the court grant the Estates' request for reasonable attorney's fees on appeal.

DATED this 25th day of October, 2011.

SCHULTHEIS TABLER WALLACE, PLLC



WSBA # 26157

for

Michael Rex Tabler, WSBA #6047
Attorneys for Personal Representative
Will L. Jones

FILED

OCT 26 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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6 COURT OF APPEALS, DIVISION III
7 OF THE STATE OF WASHINGTON

8
9 In re the Estates of:

10 HARVEY L. JONES and
11 MILDRED L. JONES,
12 Deceased.

No. 300081

AFFIDAVIT OF MAILING

13
14 STATE OF WASHINGTON)
15) ss.
16 COUNTY OF GRANT)

17 THE UNDERSIGNED, being first duly sworn, on oath, deposes and states:

18 That on the 25th day of October, 2011, Affiant deposited in the mails of the
19 United States of America a properly stamped and addressed priority envelope with tracking
20 confirmation, containing a copy of **BRIEF OF RESPONDENTS/CROSS APPELLANTS** to:

21 Tom Scribner
22 Minnick-Hayner
23 Attorney at Law
24 P. O. Box 1757
25 Walla Walla, WA 99362-0348

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Maxine M. Dieter
MAXINE M. DIETER

SUBSCRIBED AND SWORN to before me this 25th day of October, 2011.



[Handwritten Signature]

Notary Public in and for the State of
Washington, residing at Moses Lake.
My commission expires: 02/17/2015.