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DIVISION III
STATE OF WASHINGTON
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NO. 30799-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In the Matter of the Estate of: RICHARD OBERDORFER.

APPELLANT ROBIN MERRILL'S REPLY BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT.....	1
	A. ATTORNEY FEES UNDER RCW 11.96A.150 ARE PROPER ONLY IF THE PARTY AGAINST WHOM THEY ARE ASSESSED ACTED WITH “FAULT.”.....	1
	B. THE COURT IMPROPERLY AWARDED ATTORNEY FEES BECAUSE MR. MERRILL DID NOT HAVE “FAULT.”.....	2
	C. THE TRIAL COURT’S ORDER IS INCONSISTENT WITH ATTORNEY FEES UNDER RCW 11.96A.150...3	3
	D. MR. MERRILL IS ENTITLED TO ATTORNEY FEES ON APPEAL.....	3
VI.	CONCLUSION.....	4

TABLE OF AUTHORITIES

WASHINGTON CASES

Estate of Ehlers, 80 Wn.App 751, 911 P.2d 1017 (1996).....4

Gillespie v. Seattle-First Nat'l Bank, 70 Wn.App. 150, 855 P.2d 680
(1993).....1 and 2

In re Estate of Black, 153 Wn.2d 152, 173, 102 P.3d 796 (2004).....4

In re Guardianship of McKean, 136 Wn.App. 906, 151 P.3d 223
(2007).....1, 2 and 4

In re Jolly's Estate, 3 Wn.2d 615, 626-27, 101 P.2d 995 (1940).....4

WASHINGTON STATUTES

RCW 11.96A.150.....1 and 4

COURT RULES

RAP 18.1.....4

I. INTRODUCTION

Respondent Oberdorfer fails to prove that trial court properly awarded attorney fees because Mr. Merrill acted with fault. Thus, Mr. Merrill requests the court of appeals reverse the trial court's improper award of attorney fees against him. Mr. Merrill also requests attorney fees and costs under RCW 11.96A.150.

II. ARGUMENT

A. ATTORNEY FEES UNDER RCW 11.96A.150 ARE PROPER ONLY IF THE PARTY AGAINST WHOM THEY ARE ASSESSED ACTED WITH "FAULT."

Mr. Oberdorfer wrongly claims that "fault" is not required to award attorney fees under RCW 11.96A.150. (Respondent Oberdorfer's Opening Brief, p. 6). Mr. Oberdorfer, however, failed to discuss the very case - *In re Guardianship of McKean*, 136 Wn.App. 906, 151 P.3d 223 (2007) - that held a party must have "fault" before attorney fees may be awarded against it.

In its careful analysis of whether to award attorney fees under RCW 11.96A.150, the *McKean* court held:

. . . Rather, equity requires some finding of fault that in fairness requires a party to pay.

Id. at 920 (emphasis added).

In addition to ignoring the *McKean* ruling, Mr. Oberdorfer wrongly relies on *Gillespie v. Seattle-First Nat'l Bank*, 70 Wash.App. 150, 177-78, 855 P.2d 680 (1993).

Gillespie actually supports Mr. Merrill that the trial court should award attorney fees under RCW 11.96A.150 only against a party that had acted improperly. *Gillespie* awarded attorney fees under RCW 11.96A.150 because “But for the breach of fiduciary duty, there would have been no need for the beneficiaries to incur the fees.” *Id.* at 178. In other words, Seattle First’s improper conduct justified the attorney fees under RCW 11.96A.150.

Thus, attorney fees under RCW 11.96A.150 are proper only if the party against whom they are assessed acted with “fault,” which includes breaching a fiduciary duty.

B. THE COURT IMPROPERLY AWARDED ATTORNEY FEES BECAUSE MR. MERRILL DID NOT HAVE “FAULT.”

Unlike in *McKean* and *Gillespie*, Mr. Merrill acted properly. The trial court did not find Mr. Merrill had acted improperly. (CP 141). Thus, it had no basis to award attorney fees under RCW 11.96A.150.

Conspicuously absent from Mr. Oberdorfer’s brief was the timing of events because they establish that Mr. Merrill acted properly. On behalf of Mr. Merrill, attorney Richard Perednia examined the Trust and concluded that challenging the Trust could result in Mr. Merrill’s forfeiting any rights. Thus, Mr. Merrill decided not to pursue the Trust and did not contact Mr. Oberdorfer after February 19, 2010. (CP 109). After nearly five months of silence, Mr. Oberdorfer unilaterally filed suit. (CP 1).

In sum, Mr. Merrill acted properly at all times. Thus, the trial court abused its discretion in assessing attorney fees against him.

C. THE TRIAL COURT'S ORDER IS INCONSISTENT WITH ATTORNEY FEES UNDER RCW 11.96A.150.

In a desperate attempt to keep the wrongly awarded attorney fees, Mr. Oberdorfer claims the trial court properly entered findings of fact and conclusions of law that justify the award. (Respondent Oberdorfer's Opening Brief, p. 8). The trial court signed an "ORDER GRANTING PETITIONERS' MOTION FOR ATTORNEYS' FEES AND COSTS." (CP 141). The trial court did not sign findings and conclusions.

Nevertheless, the Order proves Mr. Oberdorfer was not entitled to attorney fees. The trial court awarded attorney fees "because the Petitioners were the prevailing parties." (CP 141). Attorney fees are not awarded to the prevailing party under RCW 11.96A.150. Thus, the trial court improperly awarded fees.

D. MR. MERRILL IS ENTITLED TO ATTORNEY FEES ON APPEAL.

Mr. Merrill is entitled to attorney fees on appeal because this litigation benefitted the Trust. Even Mr. Oberdorfer admits that an estate should pay attorney fees when litigation benefits it. "[T]he touchstone of an award of attorney fees **from an estate** is whether the litigation resulted in a substantial benefit to the estate." (Respondent Oberdorfer's Opening Brief, p. 6, emphasis added).

The lawsuit that Mr. Oberdorfer filed benefitted the Trust because it determined who was a beneficiary.

The litigation benefits the estate by establishing the final wishes of Margaret and establishing which alleged beneficiaries have a right to Margaret's estate.

In re Estate of Black, 153 Wn.2d 152, 174, 102 P.3d 796 (2004)(ordering the estate to pay attorney fees to the beneficiaries because the lawsuit determined the beneficiaries' rights).

Further, a losing party that participated in good faith is still entitled to attorney fees. *In re Estate of Black*, 174, citing *In re Jolly's Estate*, 3 Wn.2d 615, 626-27, 101 P.2d 995 (1940). Mr. Merrill is entitled to attorney fees because he participated in good faith. (CP 108-09).

Finally, Mr. Oberdorfer wrongly claims Mr. Merrill is not entitled to attorney fees, citing *Estate of Ehlers*, 80 Wn.App 751, 911 P.2d 1017 (1996). In *Ehlers*, Loraine Bahr and her three daughters filed suit to remove the trustee and for breach of fiduciary duties. The trial court and the court of appeals ruled against them on all issues. *Id.* at 753. The court of appeals denied their request for attorney fees because they selfishly filed suit for their own benefit and lost. *Id.* at 764.

Unlike in *Ehlers*, Mr. Merrill did not file suit; Mr. Oberdorfer did. To penalize Mr. Merrill for merely participating in the legal process violates Washington's fault requirement. *In re Guardianship of McKean*, 136 Wn.App. 906, 151 P.3d 223 (2007).

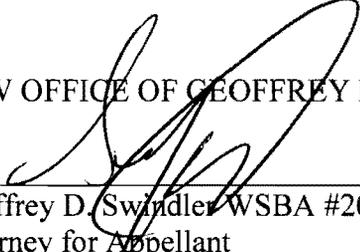
Thus, Mr. Merrill requests attorney fees under RCW 11.96A.150 on appeal.

V. CONCLUSION

The trial court abused its discretion in awarding attorney fees and costs under RCW 11.06A.150. Mr. Merrill requests attorney fees and costs under RCW 11.96A.150 and RAP 18.1.

DATED this 19th day of September, 2012.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 10th of September, 2012, I caused to be served a true and correct copy of the foregoing amended brief per the court of appeals' request by the method indicated below and addressed to the following:

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