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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 309100

Consolidated with
312677

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

**ETHEL BOYD,
AS PERSONAL REPRESENTATIVE OF EDITH CLARK**

Respondent,

vs.

MARY PANDREA

Appellant.

APPELLANT'S REPLY BRIEF

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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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I. ERRORS IN BOYD’S STATEMENT OF THE CASE

DEPOSIT OF FUNDS: On pages 2-3 of her brief, Boyd states: “Pandrea deposited the \$100,000 into a joint account that she and Clark had.” There is no evidence in the record to support this assertion. Boyd cites CP 29-30 for this proposition, but these pages identify the account into which money was deposited, not who deposited it.

VALIDITY OF POWER OF ATTORNEY: On page 4 of her brief, Boyd states that Pandrea admitted the power of attorney was valid in her answer to the complaint. Admitting that Clark executed a document on a particular date is not the same as admitting the document is valid. Further, Boyd never alleged that the document was valid in her complaint; therefore Pandrea cannot have admitted the document was valid in her answer.

EVIDENCE OF INCAPACITY: On page 5 of her response, Boyd states: “there is no evidence that Clark lacked capacity when she signed the power of attorney.” This is inaccurate. There is a great deal of evidence in the record that Clark lacked capacity, most of which was submitted by Boyd herself. In furtherance of her “Abuse of a Vulnerable Adult” claim, Boyd entered many statements questioning Clark’s capacity, including information indicating that Clark had spent time in a mental hospital (CP 52, 56) and that she had

been diagnosed with dementia prior to signing the power of attorney (CP 53).

NON-INTERVENTION POWERS: On page 25 of her response, Boyd states that she had non-intervention powers when she sued Pandrea. She asserts the same by implication on page 20 of her brief, when she argues that she was entitled to sue Pandrea based on a statute that applies to personal representatives with non-intervention powers. Ethel Boyd became personal representative of the estate of Edith Clark through letters of administration. (CP 458-59, 461.) She did not have non-intervention powers when she sued Mary Pandrea on May 19, 2010. She did not have non-intervention powers when she obtained judgment on May 11, 2012. She did not have non-intervention powers at the time judgment was appealed on May 31, 2012. She obtained them on October 19, 2012, (approximately two and a half years after the time she claims in her response brief) when her request for non-intervention powers was granted over the objections of a majority of the beneficiaries to the estate. (CP 915-19, 920-24, 925-27, 928-933, 934; 2 RP 57-66.) The scope of Boyd's authority in the absence of non-intervention powers was the subject of litigation in both of the underlying cases; her statement on appeal asserting that she had non-intervention powers at the time she filed suit is therefore rather astonishing.

BORROWED FEES: On page 19 of her brief, Boyd states that Pandrea “wrongly claimed Boyd borrowed money from Clark’s estate to pay attorney fees related to the law suit against Pandrea.” This is incorrect. Pandrea argued that Boyd borrowed money *on behalf* of Clark’s estate to pay attorney fees because the estate was insolvent. (CP 473-475.) Boyd admits that she borrowed money on behalf of the estate (from herself) both in the record and now again in her response: “Boyd personally has paid the legal expenses related to the lawsuit.” (Respondent’s Brief, pg. 19.)

II. ARGUMENT IN REPLY

II.A: Reply to Boyd’s Section III.A (BREACH OF FIDUCIARY DUTY)

Boyd makes no response to Pandrea’s arguments about the *prima facie* case for a claim of breach of fiduciary duty. She also makes no response to Pandrea’s arguments in sections V.A.1(a), V.A.1(b), V.A.1(c), V.A.2(c), V.A.2(e), V.A.3 (a)-(e), V.A.4, and V.A.5.

II.A.1: Reply to Boyd’s Section III.A.1 (CLARK’S CAPACITY)

a) Pandrea need not prove incapacity. Boyd begins by arguing that Pandrea had the burden of proving by clear, cogent, and convincing evidence that Clark lacked the capacity when she signed the power of attorney (citing *Page v. Prudential Life Ins. Co.*, 12

Wn.2d 101, 109, 120 P.2d 527 (1942.)). (Respondent's Brief, pg. 10.)

This conclusion is incorrect as a matter of law. *Boyd v. Pandrea* was decided on summary judgment. The existence of an issue of material fact precludes the entry of an order granting summary judgment. CR 56(c). Whether Clark had the capacity to sign the power of attorney is a question of material fact. This question was introduced by Boyd and acknowledged (and inexplicably ignored) by the trial court (“[S]o if she was having competency issues before signing the Power of Attorney, is the Power of Attorney itself valid?” (1 RP 11).

b) A question of material fact exists. Boyd argues that no such question of fact exists because “Pandrea makes broad generalizations but fails to cite to any part of the record establishing Clark was incapacitated on November 2, 2001.” (Respondent's Brief, pg. 11.) This is also incorrect. Through the Declaration of Geoffrey D. Swindler (filed on February 17, 2012), Ethel Boyd entered evidence showing that Edith Clark was required to be examined by a physician and to execute a power of attorney prior to being admitted entry into the nursing facility in 2001. (CP 52.) Clark was examined by Dr. Dan (Ethel Boyd's physician) and diagnosed with dementia. (CP 51-52.) She signed the power of attorney and was admitted into a nursing home within days of that diagnosis. (CP 52-53.) Further, Boyd herself admits that “[w]hile my mother's cognitive abilities

have always been limited, they worsened as she aged.” (CP 57.) Boyd concludes that during Clark’s “final decade of her life” (which was 1999-2009), she “was diagnosed with dementia, her eyesight weakened, and she became nearly deaf.” (CP 57.) Clark signed the power of attorney in 2001.

c) Pandrea did not admit capacity. Boyd argues that Pandrea admitted Clark’s capacity in her Amended Answer when she admitted that Clark signed the power of attorney and that Pandrea was a fiduciary. Admission that a party signed a document does not constitute agreement that the document is valid as a matter of law. Further, simply because Pandrea admitted a fiduciary relationship to Clark in some capacity does not mean she admitted that she had a fiduciary duty arising from the power of attorney. Pandrea cannot admit to facts in her answer that were not alleged in Boyd’s complaint.

d) Boyd’s argument regarding waiver is without merit. Boyd argues that because Pandrea failed to assert Clark’s lack of capacity as an affirmative defense, Pandrea waived the argument. This does not protect Boyd from the question of material fact that she herself introduced. She is required to prove each element of her *prima facie* case. She introduced evidence that raised an issue of material fact as to an element of that case. Boyd must affirmatively prove the factual

evidence on which she relies; she is not entitled to “rest on formal pleadings.” *Leland v. Frogge*, 71 Wn.2d 197, 200-01, 427 P.2d 724 (1967).

II.A.2: Reply to Boyd’s Section III.A.2
(POWER OF ATTORNEY)

a) Pandrea did not use the power of attorney. On page 14 of her brief, Boyd claims that Pandrea asserts for the first time on appeal that she did not use the power of attorney. This is incorrect.

First, it is Boyd’s burden to prove her case; it is not Pandrea’s burden to disprove it. *Carle v. McChord Credit Union*, 65 Wn.App. 93, 98, 827 P.2d 1070 (1992); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Boyd presented no evidence in the record that Pandrea used the power of attorney improperly or to obtain a gift. (A fact that Boyd does not dispute in her response.) It is not a new argument on appeal for Pandrea to argue that Boyd did not prove her case and was not entitled to summary judgment.

Second, Pandrea did in fact argue this point in Superior Court. There is a section in her brief opposing Boyd’s motion for summary judgment that is entirely devoted to this issue. It is entitled: “Plaintiff cannot demonstrate that the power of attorney was used for the purposes alleged.” (CP 138-140.)

b) Boyd's waiver argument is without merit. Boyd argues that Pandrea cannot now claim that she did not use the power of attorney because it conflicts with her amended answer wherein she admitted that she was a fiduciary "at all times material hereto." (Respondent's Brief, pg. 14.) Boyd alleged a general legal conclusion. Boyd did not allege a fact (that Pandrea used the power of attorney to undertake a particular act); therefore Pandrea cannot have admitted any such fact. Further, Boyd must affirmatively prove the factual evidence on which she relies, she is not entitled to "rest on formal pleadings." *Leland* at 200-01.

c) Boyd fails to identify a breach of fiduciary duty: Boyd again fails to identify the act by which Pandrea allegedly breached her duties. Boyd places the "breach" at numerous points in time as it suits her argument (e.g., the moment when the money was deposited; the moment when it was withdrawn; the moment when the house was purchased, etc.), but neither Boyd nor the trial court ever determined what specific action actually constituted a violation of Pandrea's fiduciary duties. This is important because there are distinct issues that arise specific to each act. It is unjust to determine that Pandrea "generally" violated the power of attorney without clearly identifying the act that made her liable.

d) Boyd's argument regarding a *per se* breach is without merit. Boyd argues that the breach of fiduciary duty can be concluded *per se* pursuant to the language contained in the power of attorney document. This is incorrect. The language referenced by Boyd is not a contractual term. The language referenced by Boyd is not law. The language referenced by Boyd is notice language. It says, "By acting or agreeing to act as the agent (attorney-in-fact) under this power of attorney, you assume the fiduciary and other legal responsibilities of an agent." (CP 18.) It puts the reader on notice that she is subject to legal responsibilities then it purports to summarize those responsibilities. This language refers to the duties imposed by law, but this language is not itself law. A claim based on breach of fiduciary duty sounds in tort, and it is Boyd's burden to prove each element of her *prima facie* case (which Boyd has failed to do). The inclusion of a notice in the power of attorney does not relieve Boyd of her burden.

e) Boyd's argument regarding Pandrea's agreement to act as attorney-in-fact is without merit. Boyd argues that when Pandrea signed a document that included the language "by acting or *agreeing to act* as the agent (attorney-in-fact)," she therefore agreed that the rules of agency governed her actions not only as an agent but in all realms of her life regardless of whether she was acting as an agent or

using the power of attorney. In other words, since she couldn't gift her mother's property to herself as her mother's agent, she could never receive a gift of any kind or any value from her mother ever again. According to Boyd, this language (contained only in the notice section) serves not only to constrain Pandrea's actions, but also Clark's, who would give up her rights regarding her own property and would be prevented (by operation of law) from ever giving her child so much as a cup of coffee or a peppermint.

f) Boyd's argument regarding *inter vivos* gifts is without merit and made for the first time on appeal. Boyd's arguments related to *inter vivos* gifts are made for the first time on appeal and should therefore be disregarded. RAP 2.5. As Boyd herself points out, Pandrea argued that Clark had made her a gift in her answer and her amended answer, and at no time did Boyd ever dispute that Clark made the gift; rather Boyd fully embraced Pandrea's gift defense because she believed that it created a *per se* violation of the power of attorney document. She cannot now on appeal raise objections as to whether Clark made the gift.

Further, at no time (in her complaint or at any time since) has Boyd ever sought to set aside the gift or alleged undue influence. "A gift by a principal to his agent may be valid and be sustained, if the absolute good faith, knowledge, and intent of both parties is clearly

established.” *Zvolis v. Condos*, 56 Wn.2d 275, 278, 352 P.2d 809 (1960), citing 3 Pomeroy’s Equity Jurisprudence, § 959 c, pp. 825, 828. All of the evidence in the record, *without exception*, shows that Edith Clark intended to give the gift to Mary Pandrea. It is undisputed. Not only that, but the gift was made openly with the knowledge and approval of all family members, including Ethel Boyd herself. (CP 41, 71-74, 75-77, 78-83, 84-87, 97-98, 101, 113-25, 117, 589-93.) Finally, despite the many investigations instigated by Boyd, Clark never made any indication that she recanted her intention to make the gift or regretted having made the gift, in fact she expressed great pride about having made the gift to Pandrea. (CP 118, 120, 500, 537-39, 591.)

II.A.3: Reply to Boyd’s Section III.A.3
(COMMINGLING FUNDS)

On page 16 of her response, Boyd argues that Pandrea “now” claims that she did not commingle funds with Clark “contrary to her sworn testimony.” First, Pandrea made this argument to the Superior Court, so any suggestion that it is new on appeal is incorrect. (1 RP 20-21.) Second, Pandrea filed a sworn statement that did not attempt to change her prior testimony, but rather to clarify it. (CP 115.) Boyd argues that after making a clear answer in a deposition, a party “cannot thereafter create [an issue of material fact] with an affidavit

that merely contradicts, without explanation, previously given clear testimony. (Respondent's Brief, pg 17, citing *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).) In this case, Pandrea did not contradict her previous testimony; rather she clarified it and provided bank records that corroborated the truth of her clarification. (CP 123-25.)

II.A.4: Reply to Boyd's Section III.A.4
(DAMAGES)

On page 18 of her response, Boyd argues that Pandrea's contention that Boyd failed to prove damages is a new allegation on appeal and that the Court should therefore strike the allegation. This is incorrect. Boyd has the burden of proving her *prima facie* case, and whether Pandrea's action caused damage to Clark is an element of that case. Boyd claims that she proved this element because "Judge Sypolt found Pandrea breached her fiduciary duties when she improperly took the \$100,000.00 from Clark." (Respondent's Brief, pg. 18.) This is exactly the point. Finding a breach of duty is only one element of the *prima facie* case. Boyd must prove all elements. She made no attempt to prove damages in the underlying case nor does she make any effort to identify proof of damages in her response on appeal.

II.A.5: CONCLUSION

Boyd fails to prove the elements of a *prima facie* case. She fails to clearly identify the duty owed by Pandrea and to support her assertion with law. She fails to clearly identify an act that constitutes a breach of Pandrea's duty. She fails to identify *any* evidence of injury to Clark or to respond to any of Pandrea's arguments on that element. She fails to even acknowledge Pandrea's arguments on causation or to recognize it as an element of the *prima facie* case. Finally, Boyd makes no attempt to argue a theory of damages beyond her assertion that she is automatically entitled to "liquidated damages," which are only available in contract (this matter having been brought in tort) and require a contract term that provides for liquidated damages (which is not present here). Pandrea is entitled to summary judgment in her favor as a matter of law. *Leland* at 201.

II.B: Reply to Boyd's Section III.B (PERSONAL REPRESENTATIVE)

Boyd's arguments about whether she should have been removed as personal representative are largely unresponsive to Pandrea's opening brief. Boyd fails to respond to Pandrea's argument in Sections D-1, D-2(b), D-2(d), and D-2(e). She inaccurately responds to Section D-2(a) and partially responds to D-2(b) and D-2(c).

In her response to Pandrea's Section D-2(a) ("*Failure to obtain court permission to administer an insolvent estate is grounds for removal*"), Boyd argues that she had non-intervention powers at the time she sued Pandrea. She did not. The record is crystal clear on this point, and Boyd engaged in substantial litigation on this matter so it is hard to understand why she would misrepresent this fact on appeal.

In her response to Pandrea's Section D-2(b) ("*Neglect of statutory duties is grounds for removal*"), Boyd essentially argues that because a court "will not remove a personal representative for minor omissions or oversights," (Respondent's Brief at 19, citing *Jones v. Jones*, 152 Wn.2d 1, 16, 93 P.3d 147 (2004)), the fact that Boyd fulfilled *none* of her statutory duties is not cause for removal. Boyd fails to explain how the authority she cites (which does not concern a personal representative's failure to fulfill statutory duties) overcomes the requirements of RCW 11.44.050 or RCW 11.28.250.

In her response to Pandrea's Section D-2(c) ("*Conflict of interest is grounds for removal*"), Boyd ignores the bulk of the information presented and states that Boyd was not interested in Pandrea's land because she offered to settle for a monetary amount in the June 2011 mediation. (Respondent's Brief, pg. 20.) Boyd also

made several offers that *did* include Pandrea's land, so it is unclear what Boyd is arguing. (CP 612.)

**II.C: Reply to Boyd's Section III.C
(RECONSIDERATION)**

Most of Boyd's argument is nonresponsive. The trial court did not provide any reasoning for its denial of Pandrea's motion, therefore Boyd's arguments as to the basis for the denial are speculative.

Boyd argues that Pandrea's motion was properly denied because new records are not allowed on reconsideration. (Respondent's Brief, pg. 21.) She cites CR 59(a)(4) for this proposition, which is the portion of the rule that allows for newly-discovered evidence (i.e., new records). Pandrea did not file her motion under this subsection. This argument does not make sense, and Pandrea cannot properly respond to it.

Further, in a nonjury trial, an issue or theory not dependent upon new facts may be raised for the first time through a motion for reconsideration and thereby be preserved for appellate review. *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986).

On page 22 of her response, Boyd claims that Pandrea "failed to file the required note for hearing." Pandrea filed her motion for

reconsideration without argument (CP 167); therefore, no such notice of hearing was required.

II. D: Reply to Boyd's Section III.D
(MOTION TO AMEND)

Boyd does not respond to or acknowledge any of Pandrea's arguments with respect to the Motion to Amend. Instead, Boyd argues six reasons why she believes the trial court was correct in denying Pandrea's motion. The trial court did not provide any reasoning for its denial of Pandrea's motion, therefore Boyd's arguments as to the basis for denial are speculative.

First, she argues that a failure to assert an affirmative defense in an answer is a waiver of that defense. This may be true, however, failure to assert an affirmative defense can be remedied through a motion to amend, which is to be freely granted. Pandrea presents a great deal of authority on this issue in her opening brief to which Boyd does not respond.

Second, Boyd argues that Pandrea waived the affirmative defenses because she acted inconsistently with them by litigating the case for 18 months. This argument is difficult to understand. Pandrea was the defendant in this matter. She had no choice but to litigate if Boyd did not dismiss her.

Third, Boyd argues that the statute of limitations did not run because it tolled while Pandrea acted as Clark's fiduciary. Boyd does not explain this, and she inexplicably cites authority related to the fiduciary duties of banking entities. Pandrea cannot reasonably respond to this as it is an argument that was neither raised appropriately nor discussed meaningfully with citation to authority. *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008); citing RAP 10.3(a)(6).

Fourth, Boyd argues that Pandrea did not properly note her motion for hearing, because a note for hearing was not served and filed more than twelve days before the hearing. Pandrea did not schedule a hearing and no hearing was had, so this is a perplexing argument. This argument is not raised appropriately nor discussed meaningfully with citation to authority. *Saviano* at 84.

Fifth, Boyd argues that Pandrea also failed to establish that she called the hearing in ready. Pandrea didn't schedule a hearing. No hearing was had. Judge Sypolt denied the motion without warning and without a hearing. Therefore it makes no sense that Pandrea would have called a hearing in ready, much less a hearing on someone else's motion during which she had no reasonable expectation that her motion would be addressed. This argument is not

raised appropriately nor discussed meaningfully with citation to authority. *Saviano* at 84.

Sixth, Boyd claims that amending the complaint would have prejudiced her because of undue delay, but she does not say why nor did she make such an argument before the Superior Court; therefore it is waived on appeal. RAP 2.5.

**II.E: Reply to Boyd's Section III.E
(MOTION TO CONTINUE)**

Boyd does not acknowledge that her motion for attorney's fees was procedurally improper. Therefore the entirety of Boyd's argument is unresponsive and irrelevant. Interestingly, Boyd also does not attempt to explain why her attorney arrived at the hearing for Boyd's motion on fees with a prepared order denying both of Pandrea's motions, neither of which had been scheduled for hearing (as she herself takes pains to point out in her brief on appeal).

**II.F: Reply to Boyd's Section III.F
(ATTORNEY'S FEES & PREJUDGMENT INTEREST)**

On appeal, Boyd claims she was entitled to attorney's fees based on a recognized ground of equity, but she made no such argument before the trial court. Therefore she cannot make such an argument on appeal. RAP 2.5.

Boyd again attempts to assert a right to fees based on litigation in bad faith, though she provides no persuasive basis in fact

or law for her assertion. Citing insurance law, Boyd claims that Pandrea litigated in bad faith by admitting she took a gift but denying she breached her fiduciary duty (i.e., by not voluntarily relieving Boyd of her burden to prove her case). This argument is raised for the first time on appeal, and it is not raised appropriately or discussed meaningfully with citation to authority. RAP 2.5; *Saviano* at 84.

Startlingly, Boyd argues that she is entitled to charge her personal attorney's fees (incurred *prior* to her appointment as personal representative and *prior* to the death of Edith Clark) to the Estate of Edith Clark. Further, the ease with which Boyd argues this point only serves to illustrate how long in advance she began making her plans. She hired Mr. Swindler to pursue her private interests while Clark was still living. She is now fraudulently attempting to recover her personal attorney fees in the name of the Estate, and puzzlingly, she readily admits it.

**II.G: Reply to Boyd's Section III.G
(ATTORNEY'S FEES TO BOYD ON APPEAL)**

Boyd simply reiterates the same arguments here as in Boyd's Section III.F above. These arguments are similarly without merit.

**II.H: Reply to Boyd's Section III.H
(ATTORNEY'S FEES TO PANDREA ON APPEAL)**

Boyd makes no substantive challenge to an award of attorney's fees to Pandrea on appeal. Pandrea is entitled to attorney's

fees for litigation at both the Superior Court level and on appeal pursuant to RCW 11.96A.150.

This litigation benefits the Estate of Edith Clark because Ethel Boyd has made it clear that she intends to be reimbursed for the money she lent to the estate for attorney's fees from any amounts collected on behalf of the Estate. (CP 763) A majority of the heirs have indicated that they do not want to pursue litigation or collect on judgment. (CP 915-19, 920-24, 925-27, 928,33; 2 RP 56-67.) Resolution of this litigation in Mary Pandrea's favor would end litigation, avoid collection of an improper judgment against a beneficiary of the Estate, preclude the payment of Ethel Boyd's attorney's fees by the Estate, and allow the probate of Clark's estate to finally close, nearly four years after her death.

II.I: Boyd failed to respond to or acknowledge Pandrea's Section E (Manifest Error Affecting a Constitutional Rights)

Boyd completely ignores Pandrea's section regarding a manifest error affecting a constitutional right.

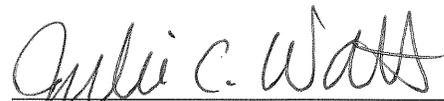
CONCLUSION

In her response brief, Boyd largely ignores the arguments made by Pandrea on appeal. Of primary importance, Boyd fails to persuasively counter Pandrea's argument that summary judgment in favor of Pandrea is proper as a matter of law. Therefore, Pandrea

respectfully requests that this Court reverse the judgment against her and enter summary judgment in her favor. Pandra also requests that this Court award her attorney's fees on appeal and in the underlying proceedings.

DATED this 12th of November, 2013.

WEE & WATTS, Attorneys at Law

A handwritten signature in cursive script that reads "Julie C. Watts". The signature is written in black ink and is positioned above a horizontal line.

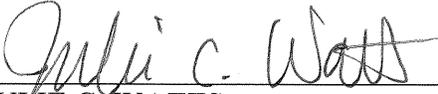
JULIE C. WATTS/WSBA #43729
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of November, 2013, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 FAX TRANSMISSION

GEOFFREY SWINDLER
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JULIE C. WATTS