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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 309100
Consolidated with
No. 312674

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ETHEL BOYD, AS PERSONAL REPRESENTATIVE OF THE ESTATE
OF EDITH CLARK,

Respondent,

vs.

MARY PANDREA,

Appellant

RESPONDENT'S BRIEF

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I. INTRODUCTION

Respondent Boyd requests the court affirm the trial court's granting her motion for partial summary judgment and denying defendant Pandrea's motions for continuance, reconsideration and to remove Boyd. Boyd also requests the court affirm the award of attorney fees and prejudgment interest to her and award attorney fees to her on appeal. Boyd request the court deny Pandrea's request for attorney fees.

II. STATEMENT OF THE CASE

A. CLARK HAD CAPACITY TO SIGN THE POWER OF ATTORNEY.

Decedent Edith Clark was born on March 24, 1913, and died on November 25, 2009. Respondent Ethel Boyd and appellant Mary Pandrea were two of Clark's children. Boyd was appointed the personal representative of Clark's estate. (CP 13).

On November 2, 2001, Clark executed a power of attorney, making Pandrea her attorney-in-fact. (CP 17-19). The power of attorney clearly and expressly informed Pandrea of her fiduciary duties she assumed merely by signing it.

NOTICE TO PERSON ACCEPTING THE POWER OF ATTORNEY-IN-FACT

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. These responsibilities include:

1. The legal duty to act solely in the best interest of the principal and to avoid conflicts of interest.
2. The legal duty to keep the principal's property separate and distinct from any other property owned or controlled by you.

You may not transfer the principal's property to yourself without full and adequate consideration or accept a gift of the principal's property unless this power of attorney specifically authorizes you to transfer property to yourself or accept a gift of the principal's property. If you transfer the principal's property to yourself without specific authorization in the power of attorney, you may be prosecuted for fraud and/or embezzlement. If the principal is 65 years of age or older at the time that the property is transferred to you without authority, you may also be prosecuted for elder abuse under Penal Code Section 368. In addition to criminal prosecution, you may also be sued in civil court.

I have read the foregoing notice and I understand the legal and fiduciary duties that I assume by acting or agreeing to act as the agent (attorney-in-fact) under the terms of this power of attorney.

(CP 18-19).

Pandrea signed the power of attorney. (CP 26-27). In her answer and amended answer to the complaint, Pandrea admitted that "at all times material hereto" she was a fiduciary of Clark. (CP 2, 14, 45).

Within three months of signing the power of attorney, Pandrea breached her fiduciary duties. In early 2002, Clark inherited \$100,000.00 from her brother's estate. Pandrea deposited

the \$100,000.00 into a joint account that she and Clark had. (CP 29-30).

In February of 2002, Pandrea removed \$89,870.89¹ from Clark's account to purchase a home in Hawaii. Pandrea used Clark's inheritance money to purchase the home, which she put in her name and that of her daughter. (CP 31-32, 49).

Clark and Pandrea lived in the house for only six months. (CP 31-32). Since August of 2002, Pandrea's son has lived in the house rent-free. (CP 33).

In addition to breaching her fiduciary duty by taking a gift, Pandrea comingled the remaining \$10,000.00 with her own money.

Q You used the \$89,000 and some change to purchase the property in Hawaii, which left roughly \$11,000 in the account from the original 100,000, right?

...

Q And the \$11,000 that was the difference between the 89,000 and the 100,000, what happened to that money then?

A We used it for living.

Q When you say "we," did you spend it on your personal things or your mom's or both of yours?

¹ The parties often referred to \$90,000.00 as the amount to purchase the house and \$10,000.00 as the remaining part of the \$100,000.00. (CP 61).

A I had received 10,000 at that same time. **And our funds were commingled**, so it would be difficult to extract that money from the money that I had in the account. So we were just using it for living expenses and furnishing the home.

(CP 41).

In her amended answer to the complaint, Pandrea admits she took \$100,000.00 from Clark as a gift. “The funds at issue in this lawsuit were a gift from Edith Clark to Mary Pandrea.” (CP 3).

Pandrea wrongly claims the power of attorney allowed her to accept a gift from Clark. (Appellant brief, p. 18). The power of attorney language Pandrea quotes is in the durable power of attorney section. (CP 18). However, even Pandrea admits this was not a durable power of attorney. (Appellant brief, p. 19).

Several factors establish Clark had capacity to sign the power of attorney. First, Pandrea’s amended answer admitted the power of attorney was valid. Paragraph 9 of the complaint asserted “On November, 20, 2001, Clark executed a power of attorney, granting power of attorney to Pandrea.” (CP 14). Pandrea admitted that assertion was true. (CP 1 and 44).

Second, Pandrea vigorously defended Clark’s capacity to sign the power of attorney. In describing Clark, Pandrea stated that Clark’s “personality quirks did not mean she was disabled or

incompetent all of her life. She was quite the opposite.” (CP 120). Adding further support is that “Clark signed the power-of-attorney for in the store before a notary.” (CP 116).

Third, Nellie Gilbertson, one of Clark’s daughters, clearly supported Clark’s capacity to sign the power of attorney. “Edith Clark did have some limitations over her life, but she was not incapacitated.” (CP 72).

Finally, there is no evidence that Clark lacked the capacity when she signed the power of attorney. Accordingly, the court must affirm that Clark had capacity to sign the power of attorney.

B. THE TRIAL COURT DID NOT REMOVE BOYD AS THE PERSONAL REPRESENTATIVE.

Three weeks after Boyd secured a \$227,425.00 judgment against Pandrea, Pandrea moved the court to remove Boyd as the personal representative. Pandrea alleged several reasons to remove Boyd. (CP 402-03 and 623).

First, Pandrea claimed Boyd borrowed money from Clark’s estate to pay attorney fees related to the lawsuit against Pandrea. (CP 475) Boyd personally has paid the legal expenses related to the lawsuit. (CP 611).

Second, Pandrea claimed Boyd should have filed the estate's tax returns. (CP 474). Boyd did not file estate tax returns because the estate has had no income to justify filing tax returns. (CP 611).

Third, Pandrea alleged that Boyd had a conflict of interest in that "she administered the estate with an eye toward her long-pursued goals of obtaining ownership of [Pandrea's] land in Idaho." (CP 476). Nearly one year before the trial, Boyd made numerous settlement offers. All of the offers did not include Pandrea's Idaho property. (CP 612).

Judge Sypolt considered the evidence and heard oral argument. He commented that "There's no palpable allegation here, substantive allegation or meritorious allegation to this point that Ms. Boyd has been cheating the heirs or causing them harm, causing the estate harm." Accordingly, Judge Sypolt denied the motion to remove Boyd. (2 RP 40-41).

C. THE TRIAL COURT DENIED PANDREA'S MOTION FOR RECONSIDERATION.

The trial court denied Pandrea's motion for reconsideration. Pandrea filed for reconsideration of the partial summary judgment

and the directed verdict (CP 167). However, Pandrea did not file the required note for hearing. (1 RP 30).

As for the merits of the motion for reconsideration, Pandrea submitted new records to try to establish that Clark became incapacitated after signing the power of attorney. (CP 171-175). Pandrea's exhibits 3,4, 6, 8, 9 and 10 were new documents she submitted in her motion for reconsideration. (CP 354).

Pandrea's motion for reconsideration also argued for the first time the power of attorney had lapsed when Clark allegedly became incapacitated, the statute of limitations had run, and Boyd was an improper personal representative. (CP 169-84, 355). Those issues were not part of Boyd's partial summary judgment motion. (59-69, 355).

D. THE TRIAL COURT DENIED PANDREA'S MOTION TO AMEND HER ANSWER AFTER TRIAL.

Three weeks after trial, Pandrea moved to amend her answer to add two affirmative defenses – statute of limitations and that Boyd was an improper party. (CP 364, 402). Before trial, Pandrea filed an answer and an amended answer to the complaint. Her answers did not plead statute of limitations or that Boyd was an improper party. (CP 1-3, 44-46, 424).

Boyd replied that the statute of limitations affirmative defense did not apply. Boyd contended that Clark was in a fiduciary relationship with Pandrea until 2009 when Clark died. Boyd filed this lawsuit in 2010. Consequently, the statute of limitations did not run. (CP 424).

Thus, the trial court denied her motion to amend her answer. (CP 431).

E. THE TRIAL COURT DENIED PANDREA'S REQUEST TO CONTINUE THE HEARING ON ATTORNEY FEES.

On April 16, 2012, Boyd noted the motion for attorney fees to be heard on May 11, 2012. (CP 262; 1 RP 28-29). Pandrea filed an objection to the motion but did not request to continue the hearing. (CP 416).

After Judge Sypolt granted attorney fees to Boyd, Pandrea asked "for a continuance to allow time to retain legal counsel to further this action." (1 RP 37). Pandrea did not offer a reason why she had not obtained new counsel, what arguments new counsel would make that she could not, and whether new counsel would have changed the hearing's outcome. (1 RP 37). Judge Sypolt denied her motion to continue the hearing. (1 RP 39).

F. THE TRIAL COURT AWARDED ATTORNEY FEES TO BOYD.

Boyd requested attorney fees for several reasons. First, Boyd claimed that Pandrea breached her fiduciary duty, causing \$100,000.00 in damages to Clark. (CP163).

Second, Boyd requested attorney fees, claiming that Pandrea acted in bad faith. Boyd alleged that after the court found Pandrea caused \$100,000.00 in damages to Clark, Pandrea made not attempts to resolve the matter. (CP 277).

As for interest, Boyd requested interest because the amount at issue - \$100,000.00 - was a liquidated amount. The interest rate on tort claims was 12% from February of 2002 when Pandrea took the money until June 10, 2004. (CP 267, 275). The interest rate on tort judgments was 5.25% from June10, 2004, thru May 11, 2012. (CP 267-68, 275). Based on this information, the court awarded \$75,875.00 in pre-judgment interest. (CP 900).

III. ARGUMENT

A. THE TRIAL COURT PROPERLY FOUND PANDREA BREACHED HER FIDUCIARY DUTY.

Pandrea makes several desperate allegations to overturn the court's granting partial summary judgment that Pandrea breached her fiduciary duty by accepting a \$100,000.00 gift in direct

violation of the power of attorney. This court should affirm the lower court's ruling for several reasons.

1. CLARK HAD THE CAPACITY TO SIGN THE POWER OF ATTORNEY.

Clark is presumed to have had capacity when she signed the power of attorney. *Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942). Pandrea has the burden of proving by clear, cogent and convincing evidence Clark lacked the capacity when she signed the power of attorney. *Page*, at 109.

Pandrea may not rest upon conclusory allegations or speculation to reverse the summary judgment ruling. "Conclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment." *Turngren v. King County*, 33 Wn. App. 78, 84, 649 P.2d 153 (1982) (*citations omitted*).

Instead, Pandrea must set forth specific facts showing that there is an underlying genuine issue of material fact that Clark lacked capacity when she signed the power of attorney. Pandrea "must set forth specific facts showing there is a genuine issue of material fact for trial if [s]he wishes to avoid a summary

judgment.” *Plaisted v. Tangen*, 72 Wn.2d 259, 263, 432 P.2d 647 (1967) (*citation omitted*).

However, Pandrea has produced no evidence Clark did not understand the power of attorney when she executed it. Pandrea makes broad generalizations but fails to cite to any part of the record establishing Clark was incapacitated on November 2, 2001. Therefore, the trial court properly enforced the power of attorney.

Moreover, the evidence clearly established that Clark had capacity to sign the power of attorney. Pandrea stated that Clark’s “personality quirks did not mean she was disabled or incompetent all of her life. She was quite the opposite.” (CP 120).

Nellie Gilbertson, one of Clark’s daughters, clearly supported Clark’s capacity to sign the power of attorney. “Edith Clark did have some limitations over her life, but she was not incapacitated.” (CP 72).

Finally, Pandrea admitted Clark had capacity in her amended answer. Paragraphs 9 and 10 of Pandrea’s amended answer admits that Clark signed the power of attorney and that Pandrea was a fiduciary at all times. (CP 1 and 13-14)

If Pandrea believed Clark lacked capacity, she had the duty to assert the affirmative defense that Clark lacked capacity to sign

the power of attorney. *Johnson v. Perry*, 20 Wn.App. 696, 703, 582 P.2d 886 (1978). Therefore, she waived the affirmative defense that Clark lacked capacity to sign the power of attorney. *Estates of Palmer*, 145 Wn.App. 249, 258-59, 187 P.3d 758 (2008).

In sum, the evidence proves Clark had capacity when she signed the power of attorney and that Judge Sypolt ruled properly.

2. PANDREA BREACHED THE POWER OF ATTORNEY.

Simply by agreeing to serve as the power of attorney, Pandrea assumed significant fiduciary duties and restrictions.

NOTICE TO PERSON ACCEPTING THE POWER OF ATTORNEY-IN-FACT

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**. These responsibilities include:

...

You may not transfer the principal's property to yourself without full and adequate consideration or accept a gift of the principal's property unless this power of attorney specifically authorizes you to transfer property to yourself or accept a gift of the principal's property.

...

I have read the foregoing notice and I understand the legal and fiduciary duties that I assume by acting or agreeing to act as the agent (attorney-in-fact) under the terms of this power of attorney.

(CP 18).

Pandrea signed the power of attorney. (CP 26-27). Within three months of signing the power of attorney, Pandrea breached her duties. In early 2002, Clark inherited \$100,000.00 from her brother's estate. Pandrea deposited the \$100,000.00 into a joint account that she had with Clark. (CP 29-30).

In February of 2002, Pandrea removed \$89,870.89 from Clark's account to purchase a home for herself in Hawaii. Pandrea used Clark's money to purchase the home and put the house in her name and that of her daughter. (CP 31-32, 49).

Clark and Pandrea lived in the house for only six months. (CP 31-32). Since August of 2002, Pandrea's son has lived in the house rent-free. (CP 33).

Pandrea admits she took the \$89,870.89 from Clark as a gift. Paragraph 14 of her amended answer denies she has "any obligation to repay Clark as the funds were a gift." (CP 2). Pandrea's second affirmative defense in the amended answer admits "The funds at issue in this lawsuit were a gift from Edith Clark to Mary Pandrea." (CP 3).

The power of attorney prohibited Pandrea from accepting gifts. (CP 18). She accepted a \$89,870.89 gift in violation of the

power of attorney. Thus, she breached her fiduciary duty by accepting the gift. (1 RP 26).

For the first time, Pandrea now claims she did not use the power of attorney to accept the money. (Appellant brief, pp. 19, 20). The court should strike her new argument for two reasons. One, in violation of RAP 10.3 (a)(5), she fails to cite to any part of the record in making this assertion. Two, RAP 2.5 prohibits her from raising new issues on appeal. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). Thus, the court should reject it.

Moreover, the court should disregard her new allegation because it conflicts with her amended answer in which she admitted that she was a fiduciary “at all times material hereto.” (CP 1, 2, 14). “A statement in a complaint, answer . . . is a judicial admission, as is a failure in an answer to deny an allegation.” *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (*citations omitted*).

Pandrea’s answer binds her throughout this lawsuit.

Facts admitted by a party "are judicial admissions that bind th[at] [party] throughout th[e] litigation." *Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.*, 440 F.3d 571, 578 (2d Cir. 2006).

Hoodho v. Holder, 558 F.3d 184, 191 (2d Cir. 2009).

Pandrea’s admission even prevents this court from second-

guessing her admission.

Admissions by parties are not subject to judicial scrutiny to ensure that the admissions are fully supported by the underlying record. *Cf. Gibbs*, 440 F.3d at 578 ("Having agreed on a set of facts, the parties who adopted the stipulation, and this Court, must be bound by them; we are not free to pick and choose at will.").

Hoodho, at 191.

Her new defense ignores the power of attorney's clear terms. Simply by agreeing to act as the attorney in fact, Pandrea became a fiduciary and agreed not to accept a gift. "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, bold added). Once Pandrea agreed to act as a power of attorney, she agreed not to accept a gift.

Finally, even without the power of attorney, the law presumes a principal's gift to the fiduciary was improper and a breach of fiduciary duty.

As a general rule, the party seeking to set aside an *inter vivos* gift has the burden of showing the gift is invalid.... But if the recipient has a confidential or fiduciary relationship with the donor, the burden shifts to the donee to prove "a gift was intended and not the product of undue influence." . . . "[E]vidence to sustain the gift between such persons 'must show that the gift was made freely, voluntarily, and with a full understanding of the facts.... If the judicial mind is left in doubt or uncertainty as to exactly what the status of the transaction was, the donee must be deemed to have failed in the discharge of his burden and

the claim of gift must be rejected.”. . . The donee’s burden of proof is clear, cogent, and convincing evidence.

Endicott v Saul, 142 Wn.App. 899, 922, 176 P.3d 560 (2008)

(*citations omitted*).

Even without the power of attorney and applying Washington fiduciary principles, Pandrea breached her fiduciary duty by accepting the gift unless she proves Clark “freely, voluntarily and with a full understanding of the facts.” There is no evidence in the record to support that. Thus, Pandrea breached her fiduciary duty by accepting the gift. *Endicott*, 922.

Thus, Boyd requests the court affirm the trial court’s granting partial summary judgment.

3. PANDREA ADMITTED SHE COMINGLED FUNDS AND MAY NOT CHANGE HER SWORN TESTIMONY.

Contrary to her own sworn testimony, Pandrea now claims she did not comingle funds with Clark. (Appellant brief, p. 22).

Under oath, Pandrea admitted she comingled the remaining \$10,000.00 with her own money.

Q You used the \$89,000 and some change to purchase the property in Hawaii, which left roughly \$11,000 in the account from the original 100,000, right?

. . .

Q And the \$11,000 that was the difference between the 89,000 and the 100,000, what happened to that money then?

A We used it for living.

Q When you say "we," did you spend it on your personal things or your mom's or both of yours?

A I had received 10,000 at that same time. And our funds were commingled . . .

(CP 41).

In another blatant violation of Washington law, Pandrea attempts to contract her prior sworn testimony to create an issue of material fact to deny she did not comingle funds.

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Marshall v. AC&S, Inc., 56 Wn. App. 181, 185, 782 P.2d 1107

(1989) (*citations omitted*).

Pandrea clearly admitted she comingled funds with Clark.

(CP 41). The power of attorney prohibited comingling.

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. These responsibilities include:

...

2. The legal duty to keep the principal's property separate and distinct from any other property owned or controlled by you.

(CP 18).

The trial court properly held that she breached her fiduciary duty by commingling funds in violation of the power of attorney.

(1 RP 26-27).

**4. PANDREA'S BREACH OF HER
FIDUCIARY DUTIES DAMAGED CLARK.**

Again for the first time on appeal, Pandrea now claims that her taking \$100,000.00 from Clark did not damage Clark.

(Appellant brief, pp. 24, 26). Boyd requests this court strike this new allegation. RAP 2.5 (a).

To the contrary, Judge Sypolt found Pandrea breached her fiduciary duties when she improperly took the \$100,000.00 from Clark. (1 RP 26).

In sum, this court should affirm Judge Sypolt's granting partial summary judgment because Pandrea breached her fiduciary duty when she accepted a gift and comingled assets.

B. THE TRIAL COURT PROPERLY DID NOT REMOVE BOYD AS THE PERSONAL REPRESENTATIVE.

The trial court properly denied Pandrea's motion to remove Boyd as the personal representative. Three weeks after Boyd secured a \$227,425.00 judgment against her, Pandrea moved the court to remove Boyd as the personal representative. (CP 402-03 and 623).

A court will not remove a personal representative for minor omissions or oversights. *Jones v. Jones*, 152 Wn.2d 1, 16, 93 P.3d 147 (2004). The Supreme Court emphasized that the personal representative's minor errors of driving the estate's car 17,000 miles for personal reasons and reevaluated the estate's piano in a manner unfaithful to the estate did not warrant his removal. *Jones*, at 16.

Pandrea made many claims against Boyd to remove Boyd as the personal representative. Pandrea wrongly claimed Boyd borrowed money from Clark's estate to pay attorney fees related to the lawsuit against Pandrea. (CP 475). Boyd personally has paid the legal expenses related to the lawsuit. (CP 611).

Pandrea wrongly claimed should have filed the estate's tax returns. (CP 474). Boyd did not file estate tax returns because the estate had no income to justify filing tax returns. (CP 611).

Pandrea wrongly alleged that Boyd had a conflict of interest in that "she administered the estate with an eye toward her long-pursued goals of obtaining ownership of [Pandrea's] land in Idaho." (CP 476). During the June of 2011 mediation, Boyd offered to settle for a monetary amount that did not involve Pandrea's Idaho property. (CP 612)

Finally, Pandrea alleged that Boyd required court permission prior to filing the lawsuit against her. (Brief of appellant, p. 8). Boyd had the right to file the lawsuit against Pandrea without court approval. The personal representative with nonintervention powers "may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character." RCW 11.48.010. Thus, Boyd acted properly in filing suit.

Boyd's inadvertent failure to file the annual report does not justify her removal. The annual report is to include information regarding claims against the estate, the disposition of estate property and the status and the estate's finances. RCW 11.28.250.

Clark's beneficiaries (her children) have known for years Clark had no assets of any kind. Clark received less than \$1,000.00 per month in retirement and owned no stocks, bonds, CDs, or property. Consequently, Boyd has had nothing to report. (CP 611).

Judge Sypolt properly considered the evidence and heard oral argument. He commented that "There's no palpable allegation here, substantive allegation or meritorious allegation to this point that Ms. Boyd has been cheating the heirs or causing them harm, causing the estate harm." (2 RP 40-41).

C. THE TRIAL COURT PROPERLY DENIED PANDREA'S MOTION FOR RECONSIDERATION.

The trial court correctly denied Pandrea's motion for reconsideration. Pandrea filed for reconsideration of the partial summary judgment and the directed verdict. (CP 167). She had numerous improper arguments.

She first submitted new records to try to establish that Clark became incapacitated after signing the power of attorney. (CP 171-175). Pandrea's exhibits 3,4, 6, 8, 9 and 10 were new documents she submitted in her motion for reconsideration. (CP 354). As new records are not allowed on reconsideration, the court properly denied her motion. CR 59 (a)(4).

Pandrea's motion for reconsideration also argued for the first time the power of attorney had lapsed when Clark allegedly became incapacitated, the statute of limitations had run, and Boyd was an improper personal representative. (CP 169-84, 355). As those issues were not part of Boyd's partial summary judgment motion (59-69, 355), Pandrea's motion was improper. "CR 59 does not permit a [party] to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 241 P.3d 729 (2005). Thus, the court properly denied "reconsideration" of new legal theories.

Finally, Pandrea did not properly note her motion for reconsideration because she failed to file the required note for hearing. (1 RP 30). Without the note for hearing, the motion may not proceed. "The Note for Hearing/Issue of Law... must be served and filed no later than twelve days prior to the hearing (CR 6 and CR 40)...Failure to comply with the provisions of this rule will result in the motion being stricken from the motion calendar and terms considered." LCR 50 (b)(10); see also CR 59 (b) and LCR 59. Accordingly, Judge Sypolt properly denied the motion for reconsideration.

**D. THE TRIAL COURT PROPERLY DENIED
PANDREA'S MOTION TO AMEND HER ANSWER
THREE WEEKS AFTER TRIAL.**

Three weeks after trial, Pandrea improperly moved to amend her amended answer to assert statute of limitations and that Boyd was unauthorized to file suit as affirmative defenses. (CP 402-03). The trial court properly denied her motion for six reasons.

First, Pandrea failed to assert statute of limitations or that Boyd was an improper party as affirmative defenses in her answer or amended answer. (CP 3, 46). Her failure to timely assert these affirmative defenses constitutes a waiver of them. *Estates of Palmer*, 145 Wn.App. 249, 258-59, 187 P.3d 758 (2008).

Second, Pandrea waived both affirmative defenses because she acted inconsistently from them. She litigated this matter for 18 months and then asserting weeks after trial. (CP 424). A party that asserts a defense that is inconsistent with her behavior waives that defense. *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002) (*citations omitted*). Thus, Pandrea waived the affirmative defense that the statute of limitations had run and that Boyd was an improper party.

Third, the statute of limitations did not run because it tolled while Pandrea acted as Clark's fiduciary. *Gillespie v. Seattle-First*

National Bank, 70 Wn.App. 150, 158, 855 P.2d 681 (1993). Clark was in a fiduciary relationship with Pandrea until 2009 when Clark died. Boyd filed suit in 2010. (CP 424). The statute of limitations for breach of fiduciary duty is three years. *Steinberg v. Seattle-First National Bank*, 66 Wn.App. 402, n.4 404-05, 832 P.2d 124 (1992). Thus, Boyd timely filed the lawsuit.

Fourth, Pandrea did not properly note her motion because she failed to file the required note for hearing. (CP 424; 1 RP 30). Without the note for hearing, the motion may not proceed. “The Note for Hearing/Issue of Law... must be served and filed no later than twelve days prior to the hearing (CR 6 and CR 40)...Failure to comply with the provisions of this rule will result in the motion being stricken from the motion calendar and terms considered.” LCR 50 (b)(10).

Fifth, Pandrea also failed to establish she called the hearing in ready. (1 RP 30). Failure to call the hearing in ready by noon two days before the hearing “will result in the motion being stricken from the motion calendar and terms considered.” LCR 50 (b)(10). As Pandrea did not call it in ready, the court properly denied her motion to amend.

Six, amending the answer after the court granted partial judgment and two weeks after trial would have prejudiced Boyd. Courts should deny a motion to amend filed after the party has moved for summary judgment because of undue delay. *Wallace v. Lewis County*, 134 Wn.App. 1, 25, 137 P.3d 101 (2006); *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn.App. 126, 130-31, 639 P.2d 240 (1982) (“When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.”). The court properly denied the motion to amend filed 18 months after the suit was filed and two weeks after trial ended.

Even if Pandrea properly and timely note the hearing, the trial court properly denied her motion that Boyd was not permitted to sue Pandrea. Boyd had nonintervention powers. (CP 179-84). The personal representative with nonintervention powers “may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.” RCW 11.48.010.

In sum, Judge Sypolt acted properly in denying the motion to amend.

E. THE COURT PROPERLY DENIED THE UNTIMELY MOTION TO CONTINUE.

On April 16, 2012, Boyd noted the motion for attorney fees to be heard on May 11, 2012. (CP 262; 1 RP 28-29). Pandrea timely filed an objection to the motion and did not request to continue the hearing. (CP 416).

After Judge Sypolt granted the attorney fees to Boyd, Pandrea then asked “for a continuance to allow time to retain legal counsel to further this action.” (1 RP 37).

A party may not wait until after losing a ruling to then request continuance. *See Nelson v. Martinson*, 52 Wn.2d 684, 689, 329 P.2d 703 (1958) (a party asking for a mistrial must timely request it and may not wait until after the verdict to request a mistrial.)

Likewise, Pandrea gambled and lost. She filed a reply to the motion for attorney fees and argued against the attorney fee request. After Judge Sypolt ruled against her Pandrea asked for a continuance. (CP 416, 1 RP 35). This court should not reward her with another bite at the apple.

Finally, Pandrea improperly relies on *Coggle v. Snow*, 56 Wn.App. 499, 784 P.2d 554 (1990) in alleging the denial was improper. (Appellant brief, pp. 34-35) *Coggle* concerned when a party is entitled to continue a summary judgment hearing under CR 56 (f).

Coggle held CR 56 (f) requires Pandrea to prove three elements to justify a continuance. “However, the trial court may deny a motion for a continuance when 1) the moving party does not offer a good reason for the delay in obtaining the evidence; 2) the moving party does not state what evidence would be established through the additional discovery; or 3) the evidence sought will not raise a genuine issue of fact.” *Coggle*, at 507.

Pandrea did not offer a reason why she had not obtained new counsel, what arguments new counsel would make that she could not, and whether new counsel would have changed the hearing’s outcome. (1 RP 37). Accordingly, Judge Sypolt properly denied her motion to continue the hearing. (1 RP 39).

F. THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES AND PREJUDGMENT INTEREST.

The trial court properly awarded attorney fees to Boyd.

Courts may award attorney fees when the defendant breached her fiduciary duties, as Pandrea did. (CP 163).

Attorney fees may, however, be authorized by a recognized ground of equity. . . . Breach of partnership fiduciary duty is such an equitable ground.

Generally, even when breach of fiduciary duty is established, the court has discretion to award attorney fees. . . . Especially when the plaintiff is suing to recover for himself alone, fiduciary breach does not mandate an award of attorney fees. . . .

However, the innocent partner is entitled to his fees if the conduct constituting the breach violates the partnership agreement, or is "tantamount to constructive fraud." . . . "A partner should share the expense of a lawsuit when he breaches his fiduciary duty to the other partners." . . .

Green v. McAllister, 103 Wn.App. 452, 468-69, 14 P.3d 795 (2000) (citations omitted); see also *Simpson v. Thorslund*, 151 Wn.App. 276, 288, 211 P.3d 469 (2009) ("Thorslund's conduct was so egregious and persistent in violating his fiduciary duties, the equities justify the court's award.").

As an attorney in fact, Pandrea held a position of honor and trust. Pandrea's breach of fiduciary duties justify her paying Cohn's attorney fees. See, e.g., *In re Estate of Jones*, 152 Wn.2d 1, 20-21, 93 P.3d 147

(2004) (personal representative/beneficiary of a will ordered to pay other beneficiaries' attorney fees personally "because the litigation was necessitated by his multiple breaches of fiduciary duty" to those beneficiaries).

Clark was an innocent victim of Pandrea. In direct violation of the power of attorney, Pandrea improperly took the \$100,000.00 gift from Clark. (163). Thus, the court properly awarded attorney fees.

Moreover, attorney fees are proper when the litigation is due to a fiduciary's inexcusable breach of fiduciary duty and when the litigation benefitted the estate. *Allard v. Pacific Nat. Bank*, 99 Wn.2d 394, 407-08, 663 P.2d 104 (1983).

We also hold that since defendant breached its fiduciary duty plaintiffs should be granted their request to recover all attorney fees expended at both the trial and on appeal on behalf of the plaintiffs and all minor beneficiaries and unknown beneficiaries. . . . Where litigation is necessitated by the inexcusable conduct of the trustee, however, the trustee individually must pay those expenses.

Id. at 407-08.

Likewise, Pandrea's conduct was inexcusable. She signed the power of attorney three short months before she took the \$100,000.00 gift. Since she refused to return the gift, sell the property or admit her error in this lawsuit, Clark was forced to

litigate this matter. (CP 269-71). This litigation benefited Clark's estate as Clark prevailed. (CP 900). Thus, Pandrea is entitled to her attorney fees.

In addition, Clark was entitled to attorney fees due to Pandrea's egregious bad faith and wantonness.

Washington has recognized a number of equitable exceptions to the no-attorney-fee rule. A court may grant attorney fees to the prevailing party if the losing party's conduct constitutes bad faith or wantonness.

Pud v. Kottsick, 86 Wn.2d 388, 390, 545 P.2d 1 (1976).

A party is entitled to attorney fees and costs when conduct unnecessarily prolonged or produced litigation. *Gander v. Yeager*, 167 Wn.App. 638 282 P.3d 1100 (2012); *State ex rel. Marci v. City of Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941). When adversarial conduct has become unreasonable or demonstrates a disregard for the legal process, a court should award attorney fees to enforce order and provide justice. *Marci*, at 93.

"Bad faith" in the insurance context is "conduct [that] was unreasonable, frivolous or unfounded." *Am. States Ins. v. Symes of Silverdale*, 150 Wn.2d 462, 469-70 (2003). In the insurance context, refusing to negotiate constitutes bad faith. "The flat refusal to negotiate, under circumstances of substantial exposure to

liability, a demonstrated receptive climate for settlement, and limited insurance coverage may show lack of good faith.” *Tyler v. Grange Ins. Ass’n*, 3 Wn.App. 167, 179, 473 P.2d 193 (1970).

Here, Pandrea acted in bad faith. She initially admitted she took a gift. (CP 2-3). But then took the inconsistent position that she did not breach a fiduciary duty. (CP 2-3). Her refusal to admit she was wrong and to draw out the lawsuit justifies attorney fees.

Boyd is also entitled to attorney fees and costs under RCW 11.96A.150, which provides as follows:

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' 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 nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' 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.

Under RCW 11.96A.150, a court may require any party to pay attorney fees “as the court determines to be equitable.”

The court should ignore Pandrea’s new argument that Boyd was not entitled to attorney fees for legal prior to the lawsuit. Pandrea fails to cite to any authority why Boyd was not entitled to attorney fees prior to

Clark's death. (Appellant brief, p. 36). Of course, before one should file suit, one should first determine if one has a case. That is what the now disputed fees represent. (CP 345).

As Pandrea failed to make that argument to the trial court, this court should disregard it. RAP 2.5 (a).

In sum, Boyd was entitled to attorney fees.

G. BOYD IS ENTITLED TO ATTORNEY FEES ON APPEAL.

Boyd requests attorney fees on appeal. Boyd is entitled to attorney fees because Pandrea breached her fiduciary duties by taking a gift in violation of the power of attorney. (163). *Green*, at 468-69.

Boyd is entitled to attorney fees because Pandrea has acted in bad faith and prolonged this litigation. (CP 269-71). *Marci*, at 93.

Finally, Boyd is entitled to attorney fees Under RCW 11.96A.150 because equity demands it. A court may require any party to pay attorney fees "as the court determines to be equitable." As established, Pandrea prolonged this matter, in bad faith refused to negotiate, and breached her fiduciary duty. (CP 269-71).

Thus, Boyd requests attorney fees and costs on appeal.

H. PANDREA IS NOT ENTITLED TO ATTORNEY FEES.

Pandrea breached her fiduciary duties to her own mother but claims she is entitled to attorney fees because “This litigation is intended to benefit the Estate of Edith Clark pursuant to [RCW] 11.96A.150.” (Appellant brief, p. 44). As usual, Pandrea fails to specify how the litigation she caused benefits Clark’s estate.

Pandrea cites no authority that awards attorney fees to a party who breached her fiduciary duty that caused the litigation. RCW 11.96A.150 awards in equity. Equity does not justify attorney fees to the party that caused the damage.

Finally, Pandrea claims attorney fees under RCW 11.76.070 but fails to even quote the statute. She also fails to provide an analysis to support the request. Nor does she cite to any part of the record to justify attorney fees. Thus, her claim fails for a lack of proof.

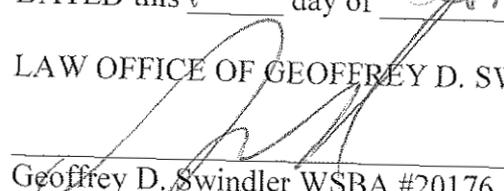
IV. CONCLUSION

Boyd requests this court affirm Judge Sypolt’s rulings and award attorney fees to her on appeal and deny Pandrea’s request for attorney

fees.

DATED this 11th day of Sept, 2013.

LAW OFFICE OF GEOFFREY D. SWINDLER, P.S.

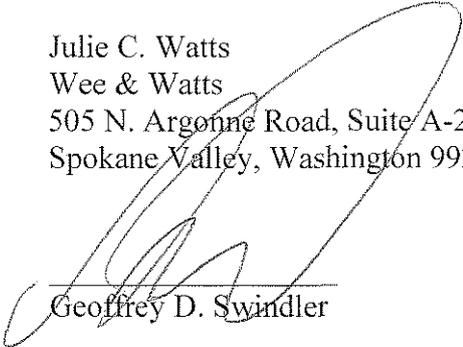

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CERTIFICATE OF SERVICE

I do hereby certify that on the 11th of September, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

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Geoffrey D. Swindler