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No. 63392-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

VANCE VOLLSTEDT, as Personal Representative of the ESTATE OF
MARIE VOLLSTEDT, JELENA NIKIC, as Trustee of the MARIE
VOLLSTEDT IRREVOCABLE TRUST; BRUCE MOEN, as trustee of
the FRED VOLLSTEDT FAMILY TRUST; and VOLLSTEDT FAMILY
LLC,

Appellants,

v.

DEYONNE TEGMAN, as Personal Representative of the ESTATE OF
CHARLES TED VOLLSTEDT,

Respondent.

BRIEF OF RESPONDENT

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DIVISION I

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I. INTRODUCTION

Charles Ted Vollstedt (“Ted”) was a successful businessman. For at least twenty years before his 2005 death, Ted helped support his brothers, Vance and James Vollstedt. He also accepted loans from his mother, Marie. Early on, Marie’s loans helped Ted establish his business. By the 1990s, however, Ted allowed Marie to lend him and his companies money so that he could pay her interest at rates far higher than any bank account would yield.

Because James apparently cannot work and the only job Vance could hold was one provided by Ted, Marie and Ted managed the family’s finances. In so doing, they consulted with lawyers, CPAs and other professionals. Ted and Marie engaged in a variety of transactions—some complicated, some nothing more than simple loans. Notably, at the same time Marie made loans to Ted, she gave substantial sums to Vance and James. Vance studiously avoids mentioning that Marie was generous with all of her sons and Ted is the only one who ever repaid her generosity.

When Ted died, Vance lost his job. He learned to his dismay that Ted had not provided for Vance’s continued financial support and Ted instead left his entire estate to his own minor children. Rather than trying to become self-supporting, Vance convinced Marie—who by then was near 90 years old—to change her will to leave virtually everything to him and to try to change the terms of her trust to achieve the same goal.

Virtually as soon as Marie died, Vance leaped at the chance to try to wrest funds from Ted’s estate as well from his mother’s. To that end,

Vance brought this suit in his capacity as personal representative of Marie's estate and as manager of the Vollstedt Family LLC (hereinafter, "Vance's claims").

When the quick settlement he hoped for did not occur, Vance retained an accounting expert who, without ever meeting Marie or Ted or reviewing testimony from witnesses who knew Marie and Ted, made "assumptions" and formed opinions about Marie's investment risk tolerance, the nature of Ted and Marie's relationship, what Ted told or failed to tell Marie, and what Marie really wanted to do with her money. Obviously, Vance's accounting expert is not qualified to render such opinions. Yet those opinions – admittedly based on nothing more than conversations with Vance's attorneys and various accounting and other financial documents—provide the entire "evidentiary" basis for this lawsuit. Relying exclusively on his expert's opinions, Vance has asserted a series of ever-evolving claims, none of which are supported by evidence establishing the essential elements of his causes of action, whatever those causes of action may be.

The trial court recognized the dearth of evidence—as opposed to speculation and assumptions—supporting Vance's ill-defined claims. It dismissed his claims, however, for another and far simpler reason, namely, the statute of limitations and/or the doctrine of laches bar them. It is uncontested that the alleged wrongdoing about which Vance complains occurred in the 1980s and 1990s. It is uncontested that Marie was competent and fully aware of her transactions with Ted when they

occurred. Every disinterested witness who knew Marie has testified that she made her own financial decisions and did not hesitate to veto proposals Ted made with which she disagreed. Perhaps most importantly, Vance admits and other witnesses have confirmed that Marie long suspected Ted might be taking financial advantage of her, but took no legal action. As the trial court correctly found, those facts are dispositive.

This case is before the Court pursuant to a CR 54(b) certification. Respondent opposed certification and any stay pending appeal in part because Vance is using money that should be distributed to Ted's children to help fund this lawsuit. Ms. Tegman respectfully asks the Court to affirm the trial court's dismissal of Vance's claims and to issue its mandate so she can pursue her counterclaims against Vance, recover funds due Ted's children, and bring this unfortunate litigation to an end.

II. RESTATEMENT OF ISSUE PRESENTED

Whether the trial court properly entered summary judgment dismissing claims based on an expert's assumptions about transactions that occurred a decade or more before Vance filed suit, when:

- It is undisputed that while Ted was alive, Marie was competent, handled her own affairs, made her own decisions, and had a CPA who tracked her finances and ensured that all loans she made to Ted or his businesses were repaid and she received full value for her real estate transactions;
- Appellants concede Marie had full knowledge of the transactions about which they complain;

- There is no evidence Ted ever failed to repay any loan extended to him or his businesses by Marie or the Vollstedt Family LLC;
- It is undisputed that Marie questioned Ted's financial activities for many years, but never filed an action against him;
- It is undisputed that whereas Marie loaned money to Ted that he repaid with interest, she gave money to Vance and James that they never repaid;
- Vance's claims are based on an accounting expert's opinions and "assumptions" about Ted and Marie's relationship and conversations, Marie's risk tolerance, and on legal analyses contrary to established law; and
- Because Vance waited until both Marie and Ted were dead to file this suit, critical evidence needed to rebut Vance's claims (based on opinions and assumptions an accounting expert made about the motives of and discussions between Vance's deceased family members), is irretrievably lost.

III. RESTATEMENT OF FACTS

A. Procedural Facts

Marie Vollstedt died on April 6, 2007. Two weeks later, Vance Vollstedt, in his capacity as personal representative of the Marie Vollstedt estate and as manager of the Vollstedt Family LLC, filed creditor's claims against Ted's estate. CP 17-26. DeYonne Tegman,¹ the personal

¹ Ms. Tegman is an accountant who, through her employer, Sheehan & Company, P.S., performed accounting services for Ted's company, East Teak,

representative of Ted's estate, denied the claims and Vance filed suit. CP 1-26.

After ascertaining through discovery that Vance could not identify any wrongdoing by Ted, Ms. Tegman sought dismissal of Vance's claims. To that end, she brought a series of summary judgment motions demonstrating that Vance's claims lack evidentiary support and that the statute of limitations and/or laches bar his claims, which are based on an expert's assumptions about transactions completed in the 1980s and 1990s. CP 39-59, 1799-1813, 3032-47. In April 2009, the trial court granted Ms. Tegman's motions and dismissed Vance's claims. CP 3215-19. The court did so on statute of limitation and laches grounds, and because it was unconvinced by Vance's conclusory assertions and his expert's "assumptions" and opinions that Ted's efforts on his family's behalf created a confidential or other special relationship and tolled the statute of limitations. 4/3/09 RP 21, 23, 25, 27, 29, 31-33; CP 3215-19. Despite Ms. Tegman's objections, Vance obtained a CR 54(b) certification from the trial court and a stay of all proceedings. CP 3220-25. On May 28, 2009, this Court allowed Vance to proceed with his appeal.

B. The Vollstedt Family

Marie and Fred Vollstedt had three sons, Ted, Vance, and James Vollstedt. Ted founded what became a very successful teak trading company ("East Teak"). His brothers were unable to find independent and the Vollstedt LLC. Ms. Tegman has no other connection to the Vollstedt family and no interest in any assets or business ventures of Vollstedt family members or entities related to them. CP 36-38.

employment and looked to Ted for financial support. *E.g.*, CP 66-67, 69-71, 1458, 1470, 1472, 1478, 1486, 1492, 1510, 1542, 1544, 1546-61, 2793, 2858. For at least 20 years and until his death in 2005, Ted provided Vance with a job. CP 69-71. James, apparently, was unemployable. CP 66-67. Vance and James received substantial financial assistance from their mother, Marie. CP 78, 86-92, 1753-55, 2891.

In 1985, Fred's sister, Adelle Vollstedt Myers, passed away. Adelle left real property to the Fred Vollstedt Family Trust (the "Fred Trust"), of which Marie was both beneficiary and trustee. CP 123-31. Marie transferred real property from the Fred Trust to Vance, James and herself (but not to Ted), which violated tax laws and was problematic for several other reasons. Beginning in 1994, the Vollstedt family took steps to resolve the transfer-related problems and engage in more organized estate planning. CP 133-38, 140-41, 143-44, 2850-52, 2854. To that end, the family consulted with several attorneys and tax advisors. *Id.*; *see also* CP 180. The attorney handling creation of the trust encouraged all family members to consult with their own legal counsel. CP 137-38.

Effective January 1, 1995, Marie created the Marie Vollstedt Irrevocable Trust (the "Marie Trust"), with Ted as trustee. CP 146-55. Under the terms of the Marie Trust, income and principal would go to Marie's three sons in equal shares. Trust income could be distributed at any time, but absent special circumstances, the principal was distributable only upon a son's death. CP 147-48. Consistent with these terms, for so

long as he served as trustee Ted made monthly trust income payments to Vance and James. CP 75-76.

Effective July 15, 1996, Marie and Ted, trustees of the Fred and Marie trusts, used their trust assets to establish the Vollstedt Family LLC, an entity that would build a house for Marie on property owned by the Fred Trust. CP 157-78; *see* CP 3081-82. All family members were aware of that action. CP 180. Vance and James, however, disliked the effect of Ted and Marie's estate planning efforts on their personal financial interests. *See* CP 80. Their discontent prompted Ted, in May 1996, to suggest they "look at getting your own professional interpretations at your own expense" of the Fred Trust, the Marie Trust, and the LLC Agreement. CP 180. Ted sent Marie a copy of that communication. *Id.* Vance and James rejected Ted's suggestion. CP 83. Instead, Vance waited until Ted died, and then convinced Marie that her Trust did not reflect her wishes. CP 101, 2791-92.

C. Vance's Assumption of Control

Tragically, Ted committed suicide on April 24, 2005. He left his estate to his two minor children. CP 120. That upset Vance, who no longer had a job at East Teak and believed Ted should have left a substantial portion of his estate to Vance and Marie. CP 71, 2793. Nevertheless, for a time Vance served as co-executor of Ted's estate. CP 182-85. Vance later resigned so he could pursue claims based on Ted's alleged misconduct toward the family. CP 110-11.

Within months of Ted's death, Vance acquired a durable power of attorney over Marie. CP 74, 112. He sent Marie to lawyers who would help revise her will and the Marie Trust. CP 74-75. In July 2005, Marie executed a revised will that benefited Vance to the exclusion of Marie's grandchildren and his brother, James. CP 1769-73. Specifically, the new will left nothing to Marie's four grandchildren, left 60 percent of her estate to Vance, and left the remaining 40 percent to Vance as James's trustee. CP 1769-73. Jelena Nikic, trustee of the Marie Trust (also a plaintiff in this action, CP 4), believes Vance "unfairly or improperly influence[ed] his mother" to make those revisions. CP 2791-92.

Ms. Nikic also testified that Marie told her the Marie Trust, as originally drafted, represented her wishes. CP 2791. Vance, however, wanted to revise the trust so Marie's death would trigger distribution of all the principal to him, to James, and to Ted's estate and to eliminate any provision that might benefit Marie's grandchildren. To that end, he persuaded Marie to file a lawsuit claiming Ted established the Marie Trust on terms contrary to her wishes (the "TEDRA action"). She did so in September 2006. CP 75, 110-11, 197-207, 2791-93. Although clearly untrue, *see* CP 133-44, 2850-52, 2854, the TEDRA petition asserts Ted's attorneys prepared the Marie Trust without consulting Marie, CP 200.

Marie passed away on April 6, 2007. No longer subject to Marie's constraints, Vance filed creditor claims against Ted's estate just days after Marie's death. CP 14-26. This lawsuit soon followed. CP 1-26.

D. Vance's Allegations on Behalf of Marie's Estate

Vance's allegations of Ted's so-called "self-dealing" and other misconduct are ever evolving. On behalf of Marie's estate, Vance currently claims: (a) Ted somehow cheated Marie in a complicated **1988** real estate transfer transaction (although he neglects to say what loss Marie incurred) that Marie's CPA, Gordon Smith, recommended when Marie could not sell her property; (b) it was wrongful for Ted to accept and repay with interest, loans Marie made to East Teak during the **1990s**, and he should instead have given Marie an ownership interest in the company; (c) he somehow cheated Marie when, in **1986**, East Teak paid Marie \$144,295.26 for non-publicly traded stock she had purchased just four years earlier for \$20,000 and failed to document what disclosures were made about the transaction; (d) Ted somehow wronged Marie by, in **1993**, accepting a loan from her that he used to resolve his divorce, memorializing the loan with a promissory note, and repaying the loan in full, with interest, without having documented their discussions about the transaction; and (e) by, in **1993**, having Marie make what Vance now claims was too risky of an investment without documenting his disclosure of the risk, even though the investment was for Vance's benefit and Marie received full repayment.

No evidence supports these hindsight-based claims. More important, however, is the fact that all are premised on wholly unprovable assumptions and speculation about what Ted might, or might not, have discussed with or disclosed to Marie a decade or two before Vance filed

this suit, and how Marie responded. Equally important is the fact Marie knew of these transactions as they occurred and, despite having questions or doubts about some of them, took no action. The trial court recognized these fundamental flaws in Vance's position, which Vance conceded:

THE COURT: Are you maintaining that Ms. Vollstedt was incompetent during this time?

[VANCE'S COUNSEL]: We are not saying – no....

THE COURT: So shouldn't she be held to have a duty to assure herself what is being done with her money was appropriate, absent some proof of intent to deceive, which doesn't seem to be the case here?

4/3/09 RP 19.

THE COURT: [All of these transactions], though, it appears that she was aware that he [Ted] was doing.

[VANCE'S COUNSEL]: She was aware he was doing them....

4/3/09 RP 27.

Vance tries to combat the effect of Marie's conceded knowledge by claiming a relationship between Ted and Marie that he has variously described as fiduciary, confidential or continuing, which, under his interpretation of the law, somehow tolls the statute of limitations and imposes on Ted's estate the burden of disproving all of his allegations no matter how speculative they may be. Again, the trial court saw through that ploy. Regarding the statute of limitations, the court observed:

THE COURT: ...Really, what you are saying here is that I guess there really isn't any statute of limitations. As long as you have a family relationship that basically –

particularly if all the two primary actors are dead, that literally there is no [statute of limitations].

4/3/09 RP 29. The court was also dubious of Vance's claim of a special legal relationship between Ted and Marie:

THE COURT: Is there anything other than the sense of a mother/son relationship ... that you would depend upon to establish this fiduciary relationship?

4/3/09 RP 31. Vance's answer was that Ted hired lawyers and CPAs to assist Marie. 4/3/09 RP 32. The court rightfully believed that undermined Vance's fiduciary relationship claim and observed that since Vance did not claim Ted colluded with the professionals he allegedly retained for Marie, "[t]hat would seem to [the Court] the best thing that someone could do to perhaps hopefully distance themselves from the responsibility of a fiduciary." *Id.*

E. The Evidence Unequivocally Contradicts Vance's Allegations

1. The evidence demonstrates Marie was a knowing participant in transactions with Ted, made her own decisions, and the transactions provided financial benefit to her

Unlike Vance's expert—who never met Ted or Marie or even bothered to read the deposition transcripts of those who had, CP 3002-11—those who knew Marie and Ted agree that while she usually agreed to Ted's financial proposals because it benefited her to do so, she made her own decisions. And while Vance makes much of Marie's trust in Ted, in fact, as long-time family associate Edward Hill testified, "Marie trusted all her kids." CP 2858.

Mr. Hill—a witness Vance virtually ignores in his appeal brief—is is a real estate broker who went to high school with Vance and who, from the 1970s on, worked and socialized with the Vollstedt family. CP 2829-31. Mr. Hill testified that Marie was involved in the family’s financial decision-making, although she did not particularly care about “the nuts and bolts.” CP 2835. Her interest instead was “in the bottom line and [Ted] had been bringing bottom lines to them [Marie, Vance and James] that they were happy with.” CP 2835-36.

Mr. Hill also testified that Marie enjoyed working with Ted on financial matters, did not hesitate to voice her opinions, and exercised influence over financial decisions that affected her:

[H]er interaction with Gordy [Smith, her CPA] and Ted about new adventures excited her. She never said stop, don’t go, I won’t participate, or whatever. ***She was always willing, you know, what do I have to do, maybe I don’t want to do it that way and then they would find a different thing and okay we’ll go for it*** and then she would walk away.

CP 2833 (emphasis added).

Gordon Smith, described by Vance as a “trusted family advisor,” CP 1761, 2784 (at least until Mr. Smith refused to support this lawsuit, *see* CP 3118), similarly testified that Ted and Marie worked together on transactions, that Ted did his best to explain financial matters to Marie, and that Marie made her own decisions:

- Q. Did Ted work with [Marie] on her business affairs or financial affairs or investments?
- A. Yes, he was there. I mean not to the extent that he was trying to manipulate her in a sense, in the sense

that he was trying to manipulate for his benefit but more to the standpoint to make sure she was aware and help her out because he was by far the more intelligent of any of the sons.

And Marie understood clearly what she wanted and didn't want, and she expressed herself, I mean you knew, she would tell you, whatever. She was very self-expressing and up to the last few months of her death she was very mentally alert and had full faculties.

CP 2871.

Mr. Smith further confirmed Mr. Hill's testimony that while Marie could be described as disinterested in or even "naïve" about complex details (i.e., the "nuts and bolts") of transactions, Ted did all he could to help her understand and ultimately it was Marie who "made the final decisions." CP 2871-72. For example:

Ted tried to buy [real property] from her and she refused. She was outspoken. If she didn't want to do something she didn't do it. ***So she was never coerced into making any of those loans. She either did it because she wanted to help her son but there was no question if she didn't want to do it she didn't, she was outspoken.***

CP 2876 (emphasis added).

Jelena Nikic, current trustee of the Marie Trust, testified that Marie paid attention to what was happening and understood her financial affairs until the last two years of her life (i.e., after Ted died). CP 2789.

Interestingly, Ms. Nikic also believes that Vance manipulated Marie after Ted's death. CP 2791-94.

Q. Did you feel that Vance was unfairly or improperly influencing his mother?

A. Yes.

Q. Did you believe that Vance was causing Marie to do things that she either didn't—let's start with that, that she didn't understand?

A. Yes.

Q. Do you believe that Vance was causing his mother to do things she didn't agree with.

A. Yes.

CP 2891-92. The motive for Vance so doing was clear; with Ted dead and Marie in her nineties and in declining health, *see* CP 2776, Vance knew he was about to lose all financial support.

Vance offers no evidence to rebut the testimony of these witnesses—all of whom testified based on personal knowledge. He relies instead on documents that do nothing more than evidence a series of financial transactions (including sizeable payments to Vance and James), his expert's assumptions, and name-calling. That is not enough to avoid summary judgment, particularly when, as here, it is undisputed that if any wrongdoing by Ted had occurred (which it did not), Marie had inquiry notice of claims she might have against Ted for many, many years, but chose not to pursue them.

2. The evidence establishes that Marie had inquiry notice of the claims Vance now pursues on her behalf, many years before Vance filed suit

In addition to uniformly testifying that Marie knowingly engaged in transactions with Ted and made her own decisions, individuals who knew the family testified that Marie, Vance and James were concerned that Ted was somehow profiting at their expense. Mr. Hill, for example, testified that Marie, Vance and James worried about and questioned Ted's

financial activities, but in the end did nothing because of the financial benefits yielded by those activities. CP 2835-36. Gordon McFadden, a family friend who rented a floor of Marie's house, CP 2776, testified that in 2003, Marie complained to him about loans she had made to Ted. CP 2776-77, 2779. Ms. Nikic similarly testified that Marie believed Ted was not repaying the loans she had made to him. *See* CP 2793. Even Vance admits that for years, Marie questioned her transactions with Ted. CP 2993-94. Yet despite these worries and concerns, and despite repeated invitations to consult with their own attorneys, none of Ted's family members—including Marie—ever took action. *See* CP 137-38, 180.

3. It is undisputed that Ted tried to help Marie and his brothers and would never have intentionally harmed them

While the evidence discussed above is enough to affirm the trial court, affirmance is also warranted on the alternative ground that Vance's claims are baseless—they are based entirely on expert opinions and assumptions about subjects the expert is not qualified to address, and are contradicted by the evidence. As the following testimony by three different witnesses with personal knowledge of Ted's family and business interactions confirms, the family's suspicions of wrongdoing were unfounded. Ted loved and cared for his family, was generous to them, fully disclosed financial information, and would never knowingly or intentionally have caused them harm.

One such witness, Gordon McFadden (Marie's tenant), testified:

Q. ...[I]s it your belief that Ted would want the best for all the family, is it your belief Ted had everybody's interests at heart?

A. ...I mean he looked after them for God's sake....He took care of Jimmy even though Jimmy is a mess. Vance was not much better...

They are both helpless. Vance is brighter than he seems, I guess, but Jimmy is—I don't know, but they are all human beings and ... Ted cared for them, Ted had a good heart. He loved Marie....

CP 2778.

Edward Hill testified that Ted did not withhold information from Marie, Vance or James, CP 2838, and put Marie's interests first:

Q. At any point did you see Ted cheating his mother, Marie?

A. Never.

Q. Did you see [Ted] at any time trying to take advantage of his mother, Marie?

A. Never. I would say a lot of his dealings were always in her best interest first.

Q. Did he help his brothers with jobs?

A. Yes.

Q. And were those ways he could get money to Jim and to Vance?

A. Yes, because they weren't doing anything and they needed something to do, and I think Marie was worried about them, so Ted had work so they got jobs.

CP 2838.

Marie's CPA, Gordon Smith, reiterated that Marie "wanted to be generous with her sons," and so gave substantial sums to Vance and

James. CP 1754. Mr. Smith also confirmed that Ted would not have taken advantage of Marie, testifying that Ted “releged on a lot of deals with a lot [of] people *but he never did* [with Marie], *he loved his mother, so he was always very fair*. Like I say, I don’t recall any deal where she didn’t ever get her full value back.” CP 2873 (emphasis added). Indeed, Mr. Smith testified not only that Ted or East Teak repaid every loan made by Marie,² e.g., CP 1753-55, 2873, 2875, 2883-84; *see also* CP 1600-09 (Gordon Smith’s work papers, *see* CP 767 (describing Ex. 71/CP 1600-09)), but that Marie loaned East Teak money so it would repay her at a higher interest rate than she could earn from a savings account. CP 2874-75. Thus instead of earning savings account interest of one or two percent, Marie earned interest as high as ten or twelve percent by making safe, short-term loans to East Teak. CP 2874-75, 2878; *see* CP 752-54, 1072-73, 1077-80, 1113-93, 1263-1587, 1592-94. Since, as Vance admits, Marie’s conservative investment strategy would otherwise have resulted in those monies being left in a savings account, CP 2991-92, Ted’s strategy benefited Marie (and because she helped support them, Vance and James). *See also* CP 1754 (Mr. Smith’s testimony that “Marie was financially conservative.”).

Notably, while Ted’s loan strategy benefited his family, it did little for East Teak. Patty Bridges, East Teak’s controller from 1990-2000, CP

² Ms. Tegman’s analysis confirms this. *See* CP 752-54, 1072-73, 1077-80, 1113-93, 1263-1587, 1592-94. So does the testimony of East Teak’s controller. CP 2954-55. Vance apparently now concedes the loans were repaid in full as he makes no unpaid loan allegations on appeal.

2944, 2952, testified that East Teak paid Marie more favorable interest rates than if it had gotten a bank loan “so she [Marie] could make more money.” CP 2956-57; *accord* CP 2953. Not surprisingly, Marie was not East Teak’s primary lender. CP 2952. Instead the company relied mainly on its line of credit. *Id.* James Brown, who has been East Teak’s controller since 2000, testified that Marie made just two loans to East Teak during his tenure, and the company paid Marie a better interest rate than it would have paid on its line of credit. CP 2969, 2975, 2979. After Mr. Brown complained, Ted stopped accepting loans from Marie to East Teak. CP 2975.

Finally, and perhaps most importantly, Vance admits that any harm caused by Ted would have been inadvertent, not intentional:

Q. You didn’t trust [Ted] to protect [Marie’s] interests?

A. I didn’t necessarily think that Ted’s actions would in the end be of benefit to my mother. They may have been, they may not have been. I didn’t –

Q. So you thought he might harm his own mother?

A. No, I didn’t say that. I said that he had—there was a possibility that that might inadvertently happen.

...

Q. Do you think he would have intentionally hurt Marie?

A. ***No, I don’t think he would have intentionally hurt her.***

CP 82 (emphasis added). That admission notwithstanding, Vance continues to pursue intentional tort claims, i.e., claims alleging fraud and breach of fiduciary duties.

4. The evidence contravenes Vance's specific claims of alleged self-dealing

Vance's specific claims of Ted's so-called "self-dealing" are meritless. While some transactions Ted engaged in were complicated, in particular the § 1031 real estate exchange that took place in 1988, Vance offers no evidence of Ted benefiting from those transactions at Marie's expense or, more importantly, that Marie was unaware of the transactions. Nor could Vance make that showing, as the evidence is to the contrary.

a. The § 1031 exchange

The § 1031 exchange about which Vance complains took place because Marie was unable to sell her 108th Street property. Her CPA, Gordon Smith, wrote a letter to Marie suggesting that she exchange her property for property Ted owned that was of equivalent (or greater) value. CP 745-46, 796-97, 1754, 2895-96, 3094-96, 3116. Because the transaction was complicated, Mr. Smith took special care to explore it, and any alternatives, with Marie. CP 2895-96.

The documentary evidence establishes that Ted and Marie quitclaimed properties to one another in December 1998 (Marie later transferred the property she received to the Fred Trust, CP 803), and Marie reported the exchange on her 1988 tax return. CP 745-46, 770-89, 1737-38. While Vance emphasizes that formalities associated with a § 1031 exchange might not have been timely satisfied, that is irrelevant to this lawsuit. What is relevant is that the exchange occurred, Marie knowingly participated in it, and Ted gave Marie at least full value for the 108th St. property. CP 745-46.

b. Loans to East Teak versus investments

Vance also claims Ted should have treated Marie's loans to East Teak as investments. App. Br. at 7-8. That is an odd allegation, given Vance's position that Ted should not have allowed Marie to make unsecured loans to East Teak because that was too risky. CP 2992. Regardless, this claim unquestionably is time-barred as there is no question Marie knew Ted and East Teak were treating the transactions as loans. The promissory notes described the transactions as loans repayable with interest. *E.g.*, CP 1072, 1113, 1130-31, 1134-36, 1146, 1266, 3084. Marie recorded East Teak's interest payments as interest. CP 2881. Mr. Smith treated the transactions as loans in Marie's records and on her tax returns. *E.g.*, CP 773, 1042, 2881. East Teak's controllers treated them as loans. CP 2953, 2976. If Marie believed these transactions (which nearly all took place in the 1990s, *see* CP 2979) were investments, not loans, she had to take action several years before Vance filed this suit. She did not.

In any event, no evidence supports Vance and his expert's assumption/opinion that Marie would have wanted or agreed to invest in East Teak, rather than lending it funds at a favorable rate of interest. Indeed, for Marie to have invested in East Teak would have violated her conservative investment philosophy.³ CP 1754. As Vance testified, Marie favored holding real property and "having a savings account that was

³ Even if Marie had wanted to invest in East Teak, the Internal Revenue Code prohibited her from doing so from June 30, 1986 until June 31, 1996. CP 1033.

certain to grow every year.” CP 2991. The one time Marie did invest in one of Ted’s business ventures, she withdrew because she deemed the investment too risky. CP 1061-63.

In short, while Vance might now want to transform simple loans into an investment worth over three million dollars *to him*, it is far too late for him to assert such a claim on Marie’s behalf and there is no evidentiary basis for so doing. Moreover, Vance’s claim that Ted somehow breached some duty he might have owed to Marie, or profited personally, by giving Marie a safe, lucrative alternative to her savings account is preposterous.

c. East Teak stock

Vance complains Marie did not receive an adequate return on non-publicly traded stock she purchased for \$20,000 in 1982, which East Teak acquired in 1986 for \$144,295.26, after Marie’s attorney told Ted the investment was too risky for Marie. App. Br. at 8-9; *see* CP 750-51, 1050-51, 1061-63. Vance’s expert claims Marie received substantially less for her share than did other East Teak investors, but his claim is primarily based on mathematically indefensible calculations.⁴ CP 1887-88, 1903-

⁴ Instead of using a strictly mathematical model, Vance’s expert, Mr. Roberts, made subjective assignments of value to stock from other non-publicly traded companies that other investors contributed to form East Teak Trading Group (ETTG). His subjective valuations artificially inflated the value of shares he assigned to Marie. The following example is illustrative: Beckton Enterprises received 7 shares of ETTG stock in exchange for 110 shares of ITP stock, while Andrew Walsh received 9 shares of ETTG stock in exchange for 148 shares of ITP stock, plus 60 shares of East Teak Lumber Co. (ETLC) stock, plus 2400 shares of Burma stock. CP 1906, 1904. If Beckton’s 110 shares of ITP stock were worth 7 shares of ETTG, it follows that Mr. Walsh’s 148 shares of ITP were worth *at least* 7 shares of ETTG. That means that the value of Mr. Walsh’s 60 shares of ETLC, on their own, would have been worth *no more than* 2 shares of ETTG ($9 - 7 = 2$). Applying these basic mathematical calculations to Marie’s

08. Correct or not, however, Vance's expert's analysis confirms that valuation of Marie's stock was linked to the value of non-publicly traded stock from several corporations. CP 1903-08. The inherent difficulty of making such valuations means that even if Vance could overcome prohibitions against pursuing twenty-year old claims, he could never meet his burden of establishing that Ted knowingly or intentionally caused Marie to be underpaid when East Teak purchased her stock for seven times more than she had paid just four years before.

d. 5914 Lake Washington Boulevard

Vance's arguments regarding Marie's loan to Ted of monies Ted used to satisfy divorce-settlement related obligations are particularly pointless, as Vance no longer disputes that Ted fully repaid the loan, with interest. CP 749, 756-57, 1235, 1237, 1242-50, 1292. His complaint appears to be that Ted might (in an unsigned letter), have represented the transaction to his ex-wife's lawyer as a sale to Marie, CP 2427, and that Ted later sold the property and failed to document whether he disclosed his profit to Marie. App. Br. at 10. As Mr. Smith explained, however, the documents Vance relies on to establish a sale encompass a broad range of dates, may well involve multiple transactions, and in any event, Marie would have engaged in the transaction knowingly and of her own volition.

contribution of 195 shares of ETLC (CP 1906) means that Marie, at most, would have received 7 shares of ETTG ($195 \text{ [Marie's ETLC stock]} / 60 \text{ [Walsh's ETLC stock]} = 3.25 \times 2 \text{ [maximum value of Walsh's ETLC stock]} = 6.5 \text{ shares of ETTG}$). Mr. Roberts completely disregarded these simple mathematical calculations and, instead, assigned a value of "25" and/or "32" to Marie's 195 shares of ETLC. CP 1903. That indefensible valuation is the primary basis for Vance's claim that Marie was underpaid for her shares of ETLC stock.

CP 3110, 3119.⁵ Regardless, Ted sold the property in 1996. CP 2447. If Marie had concerns about the transaction, she needed to pursue them within a reasonable time. She did not.

e. Brighton East

Vance's last complaint is that Ted might not have fully disclosed to Marie, risks associated with a decision to repay her 1993 \$200,000 loan to East Teak by giving her a secured interest in Brighton East, a teak furniture importing business. *See* CP 1072-89. Vance admits Marie recouped her \$200,000. App. Br. at 10. Thus, Vance's only complaint is "there is no evidence" that Ted made full disclosures to Marie. App. Br. at 10-11. Not only is that of no import given the lack of any evidence of resultant damages, Vance's claim ignores that developing the Brighton East business was in part Vance's idea, CP 3080-81, 3093, and that by acquiring an interest in Brighton East, Marie ensured Vance would have a job. CP 3112; *see* CP 1104-07. The only reasonable inference to draw from that evidence is that Marie's decision was an informed one made to assist Vance. Moreover, given Vance's role in Brighton East, he had as much a duty to advise Marie of the risks of her involvement as did Ted.

F. The LLC Has Not Shown Any Damages Resulting from the Loans or Advances About Which it Complains

The damages Vance seeks on behalf of the LLC are a mystery. His creative theories notwithstanding, even Vance's expert cannot identify any

⁵ Vance's expert previously claimed Marie was entitled to all proceeds from the sale. *See* CP 1886. Vance appears to have abandoned that untenable claim.

damages the LLC incurred as a result of anything Ted did or did not do, other than it supposedly received some \$900 less in interest than (for reasons unknown), it could or should have. CP 1881-93, 1950. That dubious claim does not state a viable cause of action under RCW 25.15.155(a), particularly since it is uncontested that East Teak repaid its loans in full, with interest, within a year of their making. CP 758-59, 1615-24, 1693-97. It is also uncontested that Harry Strouse (misleadingly described by Vance as Ted's "personal business associate," App. Br. at 11) repaid all loans or advances extended to him, with interest. CP 759, 1589-90, 1614-91, 1950. Vance fails to mention that Harry Strouse and his construction business, Westhomes, provided contractor services for the house the LLC built for Marie. CP 3189; *see* CP 759, 1589-99.

G. Vance's Claims Lack Evidentiary Support and Rely on Conclusory Averments, Assumptions, and Name-Calling

Marie Vollstedt had assets far in excess of those most people enjoy and shared them with her children. She lent money to Ted that he used to develop a successful business and prosper. Vance and James failed to achieve financial independence, let alone success, so for as long as Ted and Marie were alive, Vance and James looked to them for support.

Vance does not want this arrangement to end and so seeks to take assets Ted left to his own children. Lacking any evidence of wrongdoing, and particularly of any wrongdoing occurring within the applicable statutes of limitation, Vance relies on name-calling and conclusory assertions. Thus on appeal he states over and over that Ted engaged in

“self-dealing” and owed fiduciary duties to Marie. Yet Vance cites not one piece of evidence establishing a fiduciary relationship between Ted and Marie, or showing any action Ted took that benefited him but not Marie or the LLC. *See Black’s Law Dictionary* 1481 (9th ed. 2009) (defining self-dealing as participating in a transaction that benefits oneself instead of another who is owed a fiduciary duty).

Vance takes the same tack with Marie’s CPA, Gordon Smith. Until Mr. Smith refused to provide support for Vance’s claims, Vance described Mr. Smith as an honest and trusted family advisor who served the family for 30-35 years, and whose communications were “careful and accurate.” CP 1761-62, 2784. Once Mr. Smith filed a declaration rebutting Vance’s claims against Ted’s Estate, CP 1753-55, however, Vance changed his tune. He quit communicating with Mr. Smith, CP 3118, and began alleging that Mr. Smith cannot be trusted, is not credible, and was in cahoots with Ted. CP 3056-62. Now, for the first time on appeal, Vance also claims Mr. Smith’s testimony is inadmissible. App. Br. at 31. Vance waived that extremely dubious claim by failing to assert it to the trial court. CP 3053-73; *see Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 692, 106 P.3d 258, *review denied*, 155 Wn.2d 1026 (2005).

Unlike Vance, Mr. Smith has nothing to gain from this lawsuit. He advised, observed and worked with the family for over three decades. CP 1753-54, 1761. He discussed Marie’s finances with Vance, as well as

with Marie. CP 1754, 1761-62, 2784. He summed up Marie and Ted and Vance's relationship as follows:

[W]hen you look [at] all these transaction[s], you would say, gee, you know, Ted must have been manipulating, but then again, as I said, *Marie spoke her own mind.*

She had her own beliefs in what she would do and wouldn't do and so you can turn it around the other way and say, gee, all the time she could have said no, no, no instead of doing the deals. So *all the deals all the way back to day one she wanted to do them.*

As a matter of fact if you want to turn it around the other way *she was not only paid in full she was paid with full market interest, far better than she could have gotten anywhere else because it was bank rates.*

And secondly and finally, *the irony is here's Vance and Jim suing and they were the ones getting the free gifts all the time....*

CP 2892-93 (emphasis added). Based on such testimony, the trial court properly dismissed Vance's claims. On behalf of Ted's estate, Ms. Tegman respectfully asks this Court to affirm.

IV. LEGAL ARGUMENT

A. Standard of Review

The function of summary judgment is to avoid a useless trial. *Johnson v. Rothstein*, 52 Wn. App. 303, 307, 759 P.2d 471 (1988). A trial is useless if it is clear a properly instructed jury could reach only one result upon applying the law to the facts. When reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *E.g., Enter. Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551,

988 P.2d 961 (1999). This Court's inquiry thus is whether Vance presented sufficient evidence to support every essential element of his claims, or to establish some genuine dispute over material facts that precludes judgment as a matter of law for Ms. Tegman. CR 56(c); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993).

In assessing whether Vance presented sufficient evidence to avoid summary judgment, the Court can consider only admissible evidence. CR 56(c). Speculation, argumentative assertions, or conclusory statements of fact are not evidence and cannot defeat summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). The same is true of an expert opinion on a subject for which the expert is not qualified, or which is unsupported by specific facts. *Doty-Fielding v. Town of S. Prairie*, 143 Wn. App. 559, 566-67, 178 P.3d 1054, *review denied*, 165 Wn.2d 1004 (2008).

Here, based on the evidence presented, the trial court concluded that the statute of limitations or laches bar Vance's claims. CP 3215-19. In so doing, the Court ruled correctly. It is undisputed that every transaction at issue was completed nearly a decade or more before Vance filed suit, and every witness with personal knowledge testified that Marie was a knowing, willing and fully informed participant in her transactions with Ted. There is no evidence the LLC incurred any harm whatsoever as a result of fully repaid loans made in the late 1990s, so even if claims premised on those loans were not time-barred, they would not be

actionable. Given this evidence or the lack thereof, the trial court properly entered summary judgment and this Court should affirm. *E.g., Douglass v. Stanger*, 101 Wn. App. 243, 254-57, 2 P.3d 998 (2000); *Guile*, 70 Wn. App. at 27.

B. Vance Has Failed to Assert Any Viable Basis for Tolling the Statute of Limitations

1. The statute of limitations bars Vance's claims

Statutes of limitation protect defendants and the judicial system from stale claims. Stale claims cannot fairly be pursued because critical evidence may be lost and witnesses' memories may fade during the years plaintiffs delay making their claims. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). Pursuant to RCW 4.16.080, Marie's estate and the LLC were required to bring their tort claims against Ted's estate within three years of accrual.

Tort claims such as Vance asserts on behalf of Marie accrue when, in the exercise of due diligence, plaintiff should have discovered the basis for a cause of action against defendant "even if *actual* discovery did not occur until later." *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992); *accord Douglass*, 101 Wn. App. at 254-57. The exercise of due diligence by plaintiff is imperative. *E.g., In re Estates of Hibbard*, 118 Wn.2d 737, 746-53, 826 P.2d 690 (1992); *Douglass*, 101 Wn. App. at 254-57. Otherwise, the discovery rule would always delay accrual until plaintiff consulted an attorney. *Allen*, 118 Wn.2d at 758.

Plaintiffs need not know the extent of damages or even that they have a legal cause of action for a claim to accrue. *Allen*, 118 Wn.2d at 758. “A prospective plaintiff who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken.” *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 451, 6 P.3d 104 (2000). Put differently, the discovery rule does not toll a limitation period after a party is aware of essential facts, but lacks the details:

A smoking gun is not necessary to commence the limitation period. An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. At that point, the potential harm with which the discovery rule is concerned—that remedies may expire before the claimant is aware of the cause of action—has evaporated.... ***If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time barred.***

Beard v. King County, 76 Wn. App. 863, 868, 889 P.2d 501 (1995) (emphasis added).

Here, Vance admits that Marie long suspected (wrongly) that Ted was not repaying loans or somehow otherwise cheating the family, but was unaware of “the extent” of that misconduct. As he repeatedly conceded in interrogatory answers about his claims:

Marie Vollstedt and Vance Vollstedt became aware of some of these events at or about the time they occurred; however, Vance did not become aware of the extent of Ted’s self dealing, breach of fiduciary duty and fraudulent conduct until ... March and April 2007. Marie never became aware of the extent of Ted’s fraudulent conduct.

CP 1821-25. Mr. McFadden, Mr. Hill and Ms. Nikic confirmed that for far more than three years before Vance filed this suit, Marie (and Vance) questioned whether Ted was fully repaying loans, making good on

investments, or giving fair value for real property. CP 82-83, 90, 2776-77, 2779, 2793, 2835-36, 2993-94. Vance concedes Marie was competent and fully aware of the transactions in which she engaged with Ted. 4/3/09 RP 19, 25, 27; CP 1821-25. It is undisputed that Marie never took action. These undisputed facts permit just one conclusion: Marie, as an individual and as trustee of an LLC member, suspected for many years that Ted was invading her interests and did nothing. The familial relationship notwithstanding, her inaction is fatal to Vance's claims:

Natural reluctance to sue a member of the family is indistinguishable from sleeping on one's rights. One either chooses to enforce his rights in court in a timely manner, or he does not, regardless of family relationships.

Peterson v. Groves, 111 Wn. App. 306, 316, 44 P.3d 894 (2002). The trial court recognized this when it pointed out that if Vance's view of the law were to prevail, there would be no statute of limitations whenever there is a family relationship and the primary actors have died. 4/3/09 RP 29.

In circumstances such as exist here, courts routinely reject plaintiffs' attempts to invoke the discovery rule and instead grant summary judgment on statute of limitation grounds. *E.g.*, *Allen*, 118 Wn.2d 753; *Giraud*, 102 Wn. App. 443; *Douglass*, 101 Wn. App. 243; *Wood v. Gibbons*, 38 Wn. App. 343, 685 P.2d 619 (1984). The trial court properly did so here and Ms. Tegman respectfully asks this Court to affirm.

2. Ted's alleged fiduciary relationships do not affect operation of the statute of limitations

Vance tries to avoid the effect of Marie's failure to take timely action by arguing that Ted's alleged fiduciary or confidential relationships tolled the statute of limitations. His arguments are meritless.

a. A fiduciary relationship would not toll the Marie Estate's claims

Vance claims that Ted's fiduciary relationship with Marie tolled the statute of limitations. He is wrong for two reasons. First, as shown below, no such relationship existed. *See* pp. 41-44, *infra*. Second, a fiduciary relationship such as Vance alleges does not affect accrual of a cause of action for statute of limitation purposes. As our courts have repeatedly held:

“[E]ven in an action for fraud where a fiduciary relation exists, the burden is upon the plaintiff to show that the facts constituting the fraud were not discovered or could not [be] discovered until within 3 years prior to the commencement of the action.”

Douglass, 101 Wn. App. at 256 (quoting *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 518, 728 P.2d 597 (1986)); *see also Sherbeck v. Estate of Lyman*, 15 Wn. App. 866, 869-70, 552 P.2d 1076 (1976). That the parties were in a continuing fiduciary relationship has no effect on this rule. In *Interlake*, for example, a minority shareholder brought claims against the majority shareholder of their close corporation. Plaintiff could have discovered the basis for his claims in 1979. Despite the ongoing fiduciary relationship, plaintiff's claims were barred because he failed to

file suit within three years of the date of discovery. 45 Wn. App. at 505-06, 517-18.

Vance tries to avoid this result by invoking *Gillespie v. Seattle-First National Bank*, 70 Wn. App. 150, 855 P.2d 680 (1993), a case involving an express trust.⁶ Vance argues that under *Gillespie*, a cause of action against a fiduciary does not accrue until the fiduciary relationship ends. Vance misapprehends *Gillespie*, which flatly rejected “continuous relationship” tolling such as that Vance seeks, stating:

[T]o the extent that the trial court *may* have believed that the “mere existence” of a continuing fiduciary relationship tolled the running of the period of limitation, we agree with the Bank that this was error.

70 Wn. App. at 160.

This Court recently confirmed the *Gillespie* court’s rejection of tolling until an alleged fiduciary relationship ends. In *Burns v. McClinton*, 135 Wn. App. 285, 295-97, 143 P.3d 630 (2006), *review denied*, 161 Wn.2d 1005 (2007), the court explained that while Washington courts have discussed a continuing relationship rule, they have never adopted one. Instead, the courts of this state recognize only a limited continuous representation rule under which a continuing professional relationship tolls a statute of limitations until the specific matter in dispute is concluded. 135 Wn. App. at 293-99. The *Burns* court rejected any broader tolling based on the parties’ ongoing relationship as contrary to sound policy. *Id.*

⁶ Indeed, Vance relies solely on trust law for his fiduciary relationship tolling argument. Not only have those authorities been statutorily superseded, *see Gillespie*, 70 Wn. App. at 160-61; the plaintiff trusts’ claims are not at issue on this appeal.

In short, as the *Burns* and *Gillespie* courts explained, the *Douglass*, *Interlake Porsche & Audi* and *Sherbeck* courts implicitly held, and the trial court concluded here, the mere existence of an alleged ongoing fiduciary relationship does not toll the statute of limitations. Instead, the discovery rule governs. Thus even if Ted did serve as a fiduciary to Marie, which he did not, this Court must reject Vance's argument that Ted and Marie's relationship tolled accrual of the statute of limitations governing Marie's claims against Ted.

b. The LLC's Claims are not tolled

Equally unavailing is Vance's argument that the adverse domination doctrine tolled the LLC's claims against Ted for so long as he served as LLC manager. That argument is not a basis for reversal because Vance never mentioned the adverse domination doctrine in his summary judgment papers or cited any of the authorities upon which he now relies. CP 715-43, 1954-98, 3053-73. Instead, he relied on his *Gillespie*-based continuing representation argument. CP 1971. "On review of an order granting ... summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. When, as here, a party asserts a legal theory and provides legal argument and supporting authority for the first time on appeal, the Court will not consider it. *E.g., Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 510, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017 (2009).

In any event, Washington has not adopted the adverse domination doctrine, the doctrine is subsumed by the discovery rule of *Interlake*

Porsche & Audi, 45 Wn. App. at 518, and the prerequisites for the doctrine's application, or any other form of equitable tolling, are absent.

Specifically, the adverse domination doctrine applies when a corporate board of directors willfully or intentionally breaches duties owed to the corporation, so controls the corporation that incriminating information of their misconduct is not disclosed and could not have been discovered with due diligence, and the corporation is the only entity with standing to assert the claim. *Resolution Trust Corp. v. Farmer*, 865 F. Supp. 1143, 1151, 1156-68 (E.D. Pa. 1994); *Resolution Trust Corp. v. Grant*, 901 P.2d 807, 811-19 (Okla. 1995); *see also* 3A William M. Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPS § 1306.20 (Sept. 2009 update) (“a corporate plaintiff cannot toll the statute of limitations under the doctrine of adverse domination unless it shows that a majority of its directors was more than negligent for the desired tolling period.”).

Assuming *arguendo* the adverse domination doctrine even applies to LLCs (entities whose members always have a statutory right to sue LLC managers who engage in “gross negligence, intentional misconduct, or a knowing violation of law,” RCW 25.15.155(a)), Vance has made no showing that any of these prerequisites are met here. Nor is it possible for him to do so. His allegations are premised on transactions clearly shown in the LLC's books. CP 2595-96, 2599-2600; *see* CP 758-59. Vance admits Ted kept accurate financial records and did not engage in intentional misconduct. CP 82. Vance makes no claim Ted hid the LLC's records from Marie (the trustee of an LLC member), that she could not have discovered the loans with due diligence, or even that she did not

know of the loans about which Vance now complains. To the contrary, Vance concedes Marie was fully aware of Ted's transactions. 4/3/09 RP 27; CP 1821-25.

Further, the adverse domination doctrine is an equitable one. *Resolution Trust v. Grant*, 901 P.2d at 811. Washington courts allow equitable tolling of a statute of limitations only when justice requires. "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Vance makes no attempt to establish these predicates, makes no claim that Ted deliberately tried to hide transactions, and admits Ted did not engage in intentional misconduct. Thus even if Vance could articulate an actionable claim on behalf of the LLC, namely, one that involved damage suffered by the LLC, there is simply no basis for tolling the LLC's right to pursue those claims.

3. Vance offers no tenable basis for applying the fraudulent concealment doctrine to this case

Alternatively, Vance argues that Ted's fraudulent concealment of Marie's and the LLC's causes of action tolled the statute of limitations. That argument fails for the simple reason that "[f]raudulent concealment cannot exist if a plaintiff has knowledge of the evidence of an alleged defect." *Giraud*, 102 Wn. App. at 455. In addition, plaintiffs alleging fraudulent concealment "are required to demonstrate that they were reasonably diligent in their efforts to discover the information that they allege [defendant] withheld from them." *Id.*; accord *August v. U.S.*

Bancorp, 146 Wn. App. 328, 347, 190 P.3d 86 (2008) (plaintiff alleging fraudulent concealment must show exercise of “due diligence in trying to uncover the facts”), *review denied*, 165 Wn.2d 1034 (2009). As explained above, due diligence requirements apply whether or not the parties were in a fiduciary relationship. *See pp. 31-35, supra.*

Here, the undisputed evidence permits only one conclusion: Marie knew about, or should have discovered, the alleged factual bases for the LLC’s and her own tort claims many years ago. Vance concedes Marie was aware of Ted’s transactions with her and with the LLC. 4/3/09 RP 27; CP 1821-25. It is undisputed that for several years before she died, Marie suspected (wrongly) that Ted was not making full repayment, that she was fully competent, and that she did nothing to attempt to uncover any additional facts. *E.g.*, 4/3/09 RP 19, CP 1821-25, 2776-77, 2779, 2793, 2835-36, 2993-94. Marie’s failure to exercise due diligence precludes application of the fraudulent concealment doctrine. *Giraud*, 102 Wn. App. at 455-56.

Vance tries to avoid this result by focusing on Ted’s alleged breach of a fiduciary’s duty to disclose and trying to analogize the facts of this case to the professional trustee’s alleged deception of unsophisticated investors at issue in *August v. U.S. Bancorp, supra*. That argument fails because, as shown below, Ted’s relationship with Marie was not that of a fiduciary. It fails because Vance concedes Ted would never have intentionally caused harm to Marie, CP 82, which coupled with Ted’s repayment of all loans extended to him by Marie, *see supra* n.1, means there was no wrongdoing for Ted disclose. It fails because Marie

consulted regularly with her professional CPA, who carefully explained her financial affairs to her. *E.g.*, CP 1754. And it fails because Vance offers no evidence that, as was the case in *August*, Ted deceived Marie or caused her to delay taking action by providing false assurances of a “temporary setback” or “market downturn.” 146 Wn. App. at 345-46. (There was no occasion to provide such assurances since Marie did not incur losses in any transaction with Ted).

Indeed, Vance offers no evidence at all to support his nondisclosure assertion and relies instead on assumptions and opinions he asked his expert to make on subjects far beyond the scope of the expert’s training and experience. An accountant’s opinions about the motives of and conversations between people he never met are not evidence and cannot create a question of fact. That is particularly true when, as here, it is undisputed (and plaintiff concedes) that Marie was competent and fully aware while Ted was alive, that she knew where her money went, and made her own financial decisions. CP 1821-25; 4/3/09 RP 19, 27; *see also* CP 1754-55, 2833, 2835, 2871, 2876, 2879.

As stated above, for statute of limitations purposes it is irrelevant whether plaintiffs knew that transactions in which they engaged gave rise to potential legal claims. So long as plaintiffs knew of the underlying facts, believed their rights had been prejudiced, and failed to exercise due diligence, their claims are time-barred.

On a record such as exists here, courts do not hesitate to grant summary judgment on statute of limitations grounds and, if plaintiffs’ claims survive at all, to limit those claims to acts and omissions that

occurred in the statutory limitation period. *E.g.*, *Allen*, 118 Wn.2d at 758-59 (affirming summary judgment against plaintiff who failed to make factual inquiries); *Giraud*, 102 Wn. App. at 449-51 (affirming summary judgment of dismissal; plaintiffs' cause of action had accrued many years earlier, when they should reasonably have suspected they had a claim against defendant); *Douglass*, 101 Wn. App. at 255-57 (summary judgment dismissing fraud claims proper where plaintiff did not show that facts constituting the fraud could not be discovered until three years before commencement of the action); *Wood*, 38 Wn. App. at 345-50 (plaintiff had sufficient notice to trigger statute of limitations when he was informed of possible cause of harm and consulted an attorney; suit filed 11 years later was properly dismissed on summary judgment as time-barred); *see also Burns*, 135 Wn. App. at 299-01 (limiting award to damages incurred from acts accountant committed in the three years before plaintiff filed suit because plaintiff failed to show he could not have earlier discovered necessary facts). Because Vance alleged no wrongdoing occurring within the three years prior to his filing suit, the trial court properly dismissed all of his claims as time-barred.⁷

⁷ Even were that not the case, the discovery rule does not toll the statute of limitations when a party's agent has knowledge of the matters at issue. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 665-66, 63 P.3d 125 (2003) (applying rule and imputing architect's knowledge to principal); *Hill v. Dept. of Labor & Indus.*, 90 Wn.2d 276, 278-80, 580 P.2d 636 (1978) (attorney's knowledge of potential impropriety in administrative proceeding imputed to client; client's objection waived); *Stubbe v. Stangler*, 157 Wash. 283, 285, 288 P. 916 (1930) (knowledge lawyer acquired examining abstract of title imputed to client; client's failure to promptly act on knowledge resulted in loss of remedy); *Deering v. Holcomb*, 26 Wash. 588, 597-600, 67 P. 240, 67 P. 561 (1901) (counsel's knowledge of facts sufficient to put interested party on inquiry

C. The Trial Court Properly Applied Laches as an Alternative Ground for Dismissal

The doctrine of laches applies when three conditions exist: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that it has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; and (3) prejudice to defendant resulting from the unreasonable delay. *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991); *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). The principal consideration in applying laches is the prejudice and damage to others that results from the untimely action. *Citizens for Responsible Gov't v. Kitsap County*, 52 Wn. App. 236, 240, 758 P.2d 1009 (1988). The irrevocable loss of defense evidence due to the deaths of key witnesses establishes that prejudice. *Davidson*, 116 Wn.2d at 26-27.

Here, both Ted and Marie are dead and cannot explain their relationship, their transactions, or their financial strategies. The irrevocable loss of the testimony of these witnesses makes it nearly impossible for defendant to rebut Vance's expert-assumption based claims – particularly since many of those claims are based on a lack of documentary evidence of disclosures Ted may or may not have made to Marie. That was ample reason for the trial court to dismiss Vance's claims on laches grounds, particularly since Vance's only defense to Ms. Tegman's laches arguments was to assert that Ted's estate is not

as to fraud was notice to client and triggered statute of limitations). Under this rule the knowledge of Gordon Smith, Marie's CPA, is imputed to Marie.

prejudiced by the lack of evidence that results from Ted and Marie's deaths. CP 3072-73.

No doubt recognizing the absurdity of his lack of prejudice argument – which in effect argued that Ted and Marie's testimony could not have rebutted Vance's expert's assumptions about nondisclosures – Vance argues for the first time on appeal that Ted's lack of clean hands precludes application of laches. Because Vance did not make that argument below, *see* CP 3072-73, it is improperly before this Court. RAP 9.12; *Sourakli*, 144 Wn. App. at 510.

Even were that not the case, Vance's arguments regarding Ted's conduct make it clear why laches is properly applied here. Vance waited until Marie died to file claims against Ted's estate. Then Vance argued that Ms. Tegman cannot assert laches *because no evidence rebuts his accounting expert's opinions and assumption-based claims about Marie's and Ted's relationship and conversations*. *See* App. Br. at 7 (complaining there is no evidence of a tax-free exchange); *id.* at 8-10, 24-28 (citing the lack of evidence Ted made certain disclosures to Marie), *id.* at 47 (reiterating claim that Ted did not disclose information to Marie). While in fact some such evidence does exist, as is shown by the testimony of Mr. Smith, Mr. Hill, Mr. McFadden, Ms. Nikic, and the East Teak witnesses, the lack of direct rebuttal evidence results from the death of the only people who could fully counter Vance's expert's assumptions. Since Vance delayed filing his claims until Marie died (and even then had no idea what his claims were, *see* CP 37-38, 46-51, 96-99, 101-06, 114-17, 274-78); and since Vance concedes Marie was fully aware of the

transactions at issue, CP 1821-25, 4/3/09 RP 19, 27, application of the laches doctrine to bar his claims is not just proper, it is necessary.

D. Vance's Fiduciary Relationship Claims Are Baseless and Improperly Presented to This Court

Much of Vance's appeal is premised on Ted's alleged fiduciary relationship with Marie. Vance moved for a summary judgment order declaring that Ted was a fiduciary to, or in a confidential relationship with, Marie,⁸ but the trial court denied his motion. This Court then denied Vance's motion for discretionary review of the trial court's denial. Wash. State Court of Appeals No. 63391-1-I (June 4, 2009 Order). Vance's reiteration of those arguments on appeal, and particularly his request that this Court "rule as a matter of law that a confidential and/or fiduciary relation existed between Ted and Marie," App. Br. at 20, is inappropriate.

Regardless, Vance's resort to fiduciary duties offers no basis for reversal. As explained above, even if a fiduciary relationship did exist, that relationship would not affect accrual of the statute of limitations or, particularly in the circumstances of this case where the principal witnesses are dead and Vance relies on assumptions he had his expert draw on subjects beyond the scope of his expertise, application of the laches doctrine. *See* pp. 28-41, *supra*. Moreover, a confidential family relationship does not absolve one from the duty to exercise due diligence:

⁸ It is uncontested that Ted, as manager of the LLC, owed duties to the entity pursuant to statute and the LLC agreement. However, under RCW 25.15.155(a), Ted's liability for any breach of those duties is limited to acts or omissions that "constitute[] gross negligence, intentional misconduct, or a knowing violation of the law." Vance makes no allegations of misconduct by Ted towards the LLC that rise to such a level.

Natural reluctance to sue a member of the family is indistinguishable from sleeping on one's rights. One either chooses to enforce his rights in court in a timely manner, or he does not, regardless of family relationships.

Peterson, 111 Wn. App. at 316.

In any event, Vance's claims of a fiduciary or confidential relationship between Ted and Marie are baseless. As the trial court observed, a mother/son relationship is not enough to create a fiduciary relationship, and the fact Ted had his mother consult with, and be represented by, lawyers and CPAs was the best way for him to relieve himself of fiduciary responsibilities. 4/3/09 RP 31-33. That is especially true here, where counsel and Ted urged Vollstedt family members to review matters with their own attorneys, CP 137-38, 180, and they failed to do so.

To establish a confidential relationship, Vance must show more than that Marie valued Ted's advice. Instead, he must establish that Marie was dependent on Ted's advice to form the basis of her decisions **and** Ted took advantage of the situation.⁹ *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 390-91, 725 P.2d 644 (1986); *see also Peterson*, 111 Wn. App. at 313 (a confidential relationship requires more than a parent-child relationship, such as dependence on advice and customarily abiding by the child's decisions). Vance cannot meet this burden. Regarding the first prong—

⁹ Typically, a confidential relationship involves a situation where a child is shown to have taken advantage of a parent who lacks mental capacity or is English-illiterate. *Pedersen v. Bibioff*, 64 Wn. App. 710, 718-20, 828 P.2d 1113 (1992); *McCutcheon v. Brownfield*, 2 Wn. App. 348, 357-58, 467 P.2d 868 (1970); *see also Endicott v. Saul*, 142 Wn. App. 899, 922-29, 176 P.3d 560 (2008).

Marie's dependency—Gordon Smith and Mr. Hill testified that Marie heeded Ted's financial advice when it benefited her to do so, but she did not hesitate to disagree; and while she was unconcerned about the “nuts and bolts” of transactions, she made her own financial decisions. CP 2789, 2832-36, 2871-72, 2876. Gordon Smith additionally testified that Marie “had her own views about the use of her money and was adamant about what should and should not happen.” CP 1754. It appears that what Marie wanted most was to be able to be generous with all of her sons. As Mr. Smith testified, Marie achieved that goal:

Marie was financially conservative. She did not want to take risks with her money. ***But she wanted to be generous with her sons. It was her practice to give her sons \$10,000 per year, the maximum tax-free gift. Vance and James frequently asked Marie to give them additional money, and she generally did so.*** For example, as soon as the Fred Vollstedt Trust started receiving distributions from the LLC, Marie would immediately give the money to Vance and James, but not Ted. ***Ted on the other hand did not take gifts from Marie, but instead took loans.*** I, as Marie's and Ted's accountant insisted, for tax purposes among other things, that all loans from Marie or the trusts be documented with promissory notes and require interest at fair market rates.

CP 1754 (emphasis added).

As for the second, taking advantage prong, the non-party witnesses agree that Ted did not take advantage of Marie and instead had her best interests at heart. CP 1754-55, 2778, 2838, 2874-75, 2878, 2934-35, 2956-57, 2975. Even Vance concedes Ted would not have intentionally harmed Marie. CP 82.

This *evidence* is dispositive of Vance's attempt to establish a confidential or fiduciary relationship. But even were that not the case,

Vance misapprehends the limited effect such a relationship would have on his claims. A plaintiff who establishes a confidential or fiduciary relationship merely shifts to a donee-defendant the burden of establishing the propriety of a gift from, or gift equivalent transaction with, the donor.

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.” *Lewis*, 45 Wn. App. at 389; *White*, 33 Wn. App. at 368. “[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.” *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970).

Endicott v. Saul, 142 Wn. App. 899, 922, 176 P.3d 560 (2008) (emphasis added). No transaction still being challenged by Vance involves a gift or gift equivalent. Instead, the challenged transactions involve loans repaid with interest, or real property transactions for which Marie received fair value. Thus not only is Vance’s resort to a confidential or fiduciary relationship misplaced because it has no bearing on whether his claims are time-barred, the burden shifting he hopes to achieve does not affect the transactions about which he complains.

E. Vance’s Challenges to Gordon Smith’s Testimony Are Improper

On appeal, Vance seemingly urges the Court to hold that the trial court erred in considering Mr. Smith’s testimony. Vance did not move to strike or otherwise object to the admission of Mr. Smith’s testimony. His failure to do so waived his objection. CP 3053-73; *see Burbo*, 125 Wn. App. at 692. Vance also makes lengthy arguments casting aspersions on

Mr. Smith's veracity and credibility through carefully edited excerpts of Mr. Smith's deposition testimony. As explained above, those arguments are unwarranted. More important, though, is the fact that not one witness has rebutted the fundamental premise of Mr. Smith's testimony, i.e., that Marie was knowledgeable, aware, made her own decisions, and did not hesitate to reject Ted's proposals.¹⁰ No one, not Vance, not Vance's expert (who concedes he never read Mr. Smith's deposition, CP 3002-11), not Ms. Nikic, Mr. Hill, or Mr. McFadden. That unrebutted premise is dispositive of a statute of limitations accrual analysis, and is additional reason to affirm the trial court's ruling.

V. CONCLUSION

After a year of confronting and rebutting Vance's ever-evolving allegations of Ted's wrongdoing, Ms. Tegman was able to demonstrate to the trial court that Vance's 10- to 20-year-old claims are barred by the statute of limitations and/or by laches. Vance cannot, and has not, shown that the trial court erred by rejecting the erroneous legal bases he asserted

¹⁰ Mr. Smith has identified only two transactions that he believed Marie entered into without full understanding: (1) her agreement to the generation-skipping provision of the Marie Trust that, at Vance's urging, she sought to have overturned after Ted died; and (2) her agreement to pay \$4,000 in rent to the LLC. CP 3114. Mr. Smith's belief regarding the Trust is based on conversations with Vance, not with Marie, and on misinformation about the extent to which Marie participated in creating the Trust. CP 3086, 3114; *see generally* CP 133-38, 143-44, 180, 2850-52, 2854. He formed his opinion about Marie's rent obligation not knowing the rent payment helped provide funds to Vance and James (but not Ted). CP 758-59, 1611-12, 3028-29. Vance, of course, could not assert claims based on Marie's rent payments anyway, since Marie obviously knew she had an obligation to pay rent to the LLC—given the fact she made that monthly payment for years—and chose to do nothing to change or escape her obligation.

for tolling the statute of limitations or his conclusory no-prejudice arguments against application of laches. Nor has Vance met his burden of establishing that Marie could not, with due diligence, have discovered her causes of action more than three years before he filed this suit. To the contrary, the evidence establishes that although Marie voiced concern about her transactions with Ted, she chose not to take legal action.

Ignoring this, Vance urges this Court to set aside the trial court's order of summary judgment. He offers no viable legal or evidentiary basis for so doing. For these reasons, and for all the reasons stated herein, Ms. Tegman respectfully asks the Court to affirm the trial court and issue its mandate so that she can pursue her counterclaims and restore to Ted's children funds that belong to them, but which Vance is using to pursue this baseless lawsuit.

DATED this 9th day of September, 2009.

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By 
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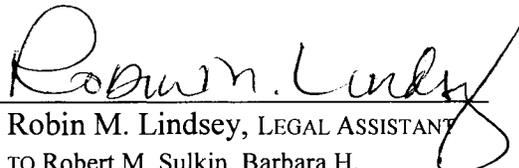
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on September 9, 2009, I arranged for the foregoing Brief of Respondent to be served on the parties to this action as follows:

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