

64231-6

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

NO. 64231-6

DAVID L. MARTIN,
For his separate estate,
APPELLANT

v.

LORETTA D. WILBERT,
As personal representative of the estate of William E. Wilbert, deceased, and on her own behalf,
RESPONDENT

BRIEF OF RESPONDENT LORETTA WILBERT

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Note on the record and scope of appeal: The record designated by Cruikshank goes far beyond that permitted by RAP 9.12. However, rather than invite and respond to a motion to supplement the record, Wilbert has responded to the Appellant's brief as written and, thus far, has not moved to strike the extraneous part of the record and the corresponding parts of the appellant's brief. She reserves the right to bring such a motion in the future or to move to supplement the record or file additional responsive materials.

Similarly, Wilbert has responded to the Appellant's challenge to a discovery order terminating a deposition, though it is not included in the Notice of Appeal.

I. INTRODUCTION

This appeal is yet another battle in the 16-year legal war prosecuted by attorney Charles Cruikshank against the Wilbert family and those whom he perceives as their allies. The original parties, Gary Delguzzi and William Wilbert, died six years ago. The Jack Delguzzi probate, which was the setting for this conflict, was closed in 2007. The order closing the probate estate was affirmed in a detailed opinion by Division II of the

Court of Appeals on June 30, 2009 (“Delguzzi IV”)¹, attached as Exhibit

1.

One way Cruikshank has perpetuated the conflict has been to advance the same claims over and over again in different lawsuits. When Delguzzi IV was decided there were two such duplicate suits pending—*Martin v. Wilbert*, the subject of the present appeal, and *Martin v. Ellis*, King County case no. 07-2-21635-9. One of these “loose ends” was tied up earlier this year, when Division I affirmed the dismissal of *Martin v. Ellis*, 154 Wn.App 1041, 2010 WL 599625 (2010) on res judicata grounds. See Exhibit 2. Loretta Wilbert asks the Court to tie up this other loose end by affirming the dismissal of the plaintiff’s case.

II. STATEMENT OF THE CASE

(Note: Wilbert’s Statement of the Case is based primarily, though not exclusively, on the “Supplement to Final Report and Petition for Decree of Distribution,” dated December 12, 1996, (CP 894-957), and the

¹ The Respondent is following the Appellant’s numbering system for the prior “Delguzzi” opinions.

recitation of facts in the prior appellate decisions attached as Exhibit 1-4.)

Jack Delguzzi died intestate in 1978. At the time of his death he owned hundreds of properties and several operating businesses, either directly or through closely held corporations and partnerships. Some of the partnerships did not have written partnership agreements.

Jack's son, Gary, was the sole heir. He opened probate in Clallam County Superior Court under case no. 8087 and served as administrator of his father's estate from 1978 to 1982. During his tenure Gary received over \$800,000 from the estate in the form of salary and loans.

A. William Wilbert's administration of the Jack Delguzzi Estate.

In 1982, at Gary's request, William Wilbert took over as administrator of the Jack Delguzzi Estate. At that time there were over 100 disputes with creditors, many of them in litigation. Some of the creditors were owed a lot of money. For example, during Gary's administration the estate had borrowed over \$2 million from Seafirst Bank, collateralized by estate assets. This loan was in default when Wilbert took over as administrator, and Seafirst obtained a judgment

against the estate for approximately \$1.3 million in 1984. The Estate of Bruno Delguzzi was another unsatisfied creditor. Bruno, Jack's brother, had died two years before Jack, leaving behind a tangle of joint ventures. Bruno's Estate obtained a judgment for \$384,462 against the Estate of Jack Delguzzi during Gary's tenure as administrator. The judgment had not been paid when Wilbert took over and, shortly thereafter, Bruno's Estate began legal steps to collect it. These are only two of examples of the many creditors Wilbert had to contend with.

Immediately after Wilbert was appointed successor administrator, another creditor appeared—the IRS, asserting a claim for \$4.6 million estate taxes, not including penalties and interest. This added significantly to the estate's financial difficulties.

The estate needed money to meet its obligations to creditors and to pay the considerable costs of administration, including professional fees. It did not have nearly enough. Wilbert took various steps to solve this problem. He loaned money to the estate; he obtained loans for the estate from private lenders; he accepted interests in real property in lieu of

administrative fees; and he paid some of the estate's attorneys' fees out of his own pocket.

By the mid-1990s Wilbert's work was largely finished. He had managed, sold, developed, and otherwise dealt with a very large number of properties owned by the estate or related corporations. He had negotiated a settlement with the IRS for \$350,000, plus interest of approximately \$17,000, in satisfaction of its \$4.6 million estate tax claim. He had also settled the Washington State inheritance tax claim and resolved most of the lawsuits and other creditor disputes.

B. Gary Delguzzi's suit against William Wilbert.

By 1992 Gary Delguzzi had become dissatisfied with Wilbert's handling of the estate. Gary hired an attorney--Jeanette Cyphers--and, after she withdrew, Charles Cruikshank. In 1994 Cruikshank filed suit on Gary's behalf against William Wilbert, his wife Loretta, his children, and various entities. The suit was filed as part of the Jack Delguzzi probate case under Clallam County case no. 8087. The complaint was amended several times. The last amended pleading in that suit, filed on July 16, 1996, was entitled the "Petition for Orders Removing Administrator,

Appointing Successor, Requiring Surrender of All Books and Records of the Estate, Setting Date and Time of Hearing, Directing Issuance of Citation and Approving Form of Notice.” [CP 870-87.]

In December 1996 Wilbert prepared his Final Report and Petition for Distribution (CP 243-268), supported by voluminous documentation. He presented a comprehensive accounting of his administration of the estate. Gary Delguzzi, through his attorney Charles Cruikshank, objected to the accounting and a trial ensued. Hearings were held on January 21-23, 1997 and March 24-25, 1997. Oral argument was heard on April 22, 1997. Cruikshank represented Gary Delguzzi at those hearings. He cross-examined Wilbert and the witnesses offered on Wilbert’s behalf. He put on various witnesses himself--Craig Kleinman, Jack Policar, Robert Lynch, William E. Wilbert, William D. Wilbert, Laure Ann Wilbert, Larry Johnson, Chris Zook, and Gary Delguzzi--and submitted 62 exhibits. He made oral argument and filed various legal memoranda.

On October 17, 1997 the Court issued its “Memorandum Decision on Wilbert’s Final Report.” [CP 832-3.] While the Court generally approved Wilbert’s accounting, it did not “rubber-stamp” it. For example,

it did not allow Wilbert any administrative fees for the considerable time he spent dealing with Delguzzi's properties in Costa Rica.

The Memorandum Decision invited the parties to agree on a plan for distribution. They could not agree, and the disputants presented their arguments to the Court. On June 5, 1998, over Cruikshank's opposition, the Court entered an order approving legal fees for Short Cressman, accounting fees for Benson McLaughlin, and administrative fees for Wilbert, and setting forth how they would be paid. ["Order Regarding Administrative Expense and Reimbursement Claims and Plan for Distribution," CP 838-44.] The Court disallowed most of the interest on administrative fees requested by Wilbert.

Gary Delguzzi did not appeal either the 1997 Memorandum Decision approving Wilbert's accounting or the 1998 Order on administrative expenses and distributions. This would normally have been the end of the matter. However, Gary was able to revive his claim through a pair of appeals: *In re Estate of Delguzzi*, 93 Wn.App 1048, 1999 WL 10081 (1999) ("Delguzzi I") and *Delguzzi v. Wilbert*, 108 Wn.App 1003,

2001 WL 1001082 (2001) (Delguzzi III”).²

Delguzzi I was Gary’s appeal from the dismissal of his case as a discovery sanction. The Court of Appeals reversed, holding that dismissal was too severe a sanction. At the same time, it affirmed the dismissal of the claims against Wilbert’s children and the award of \$10,174.45 in sanctions against Cruikshank for bringing those claims (CP 759).

The Superior Court then dismissed Gary’s claims again, this time on res judicata grounds. The Court of Appeals, in Delguzzi III, reversed again. It held that under the particular circumstances of the case—including Cruikshank’s supposed lack of opportunity to do discovery—“it would work an injustice” to bar Gary Delguzzi from continuing to pursue his case. The Court based its holding in part on the fact that the res judicata and collateral estoppel may be disregarded if it would work an injustice to apply them. It remanded the case to Clallam County Superior Court on August 31, 2001.

Not much happened in the case between the remand and 2004,

² While unpublished opinions may not be cited as precedent, they may be used as evidence of facts established in earlier proceedings in the same case or in a different case involving the same parties. *State v. Nolan*, 98 Wn.App 75, 77-78

when the parties died.

C. The continuation of the Clallam County suit after the deaths of the parties.

Gary Delguzzi died on February 10, 2004. William Wilbert died on March 24, 2004. Probates for each were opened in King County, Delguzzi's under case no. 04-4-02163-1 and Wilbert's under case no. 04-4-01861-4. Personal representatives were appointed in each probate: Margaret Shaw (Gary's cousin) for the Estate of Gary Delguzzi and Loretta Wilbert (William's widow) for the Estate of William Wilbert. Cruikshank moved to substitute the two personal representatives as the parties in the Clallam County lawsuit—Margaret Shaw for the plaintiff Gary Delguzzi and Loretta Wilbert for the defendant William Wilbert. The Motion was granted on June 21, 2004.

Margaret Shaw died in 2005 and her husband, Sidney Shaw, replaced her as the personal representative of the Gary Delguzzi Estate and the plaintiff in the suit against Wilbert. In 2007 Sidney Shaw assigned his claims against Wilbert to Cruikshank's business associate David Martin, the current plaintiff.

n. 1, 988 P.2d 473 (1999), aff'd 141 Wn.2d 620, 8 P.3d 300 (2000).

D. Katherine Ellis' administration of the Jack Delguzzi Estate.³

Wilbert's death created a vacancy in the position of personal representative of the Estate of Jack Delguzzi. Cruikshank proposed David Martin as successor personal representative, and Martin held the post briefly, from August to October 2004. In January 2005, at Wilbert's suggestion, the Court appointed Kathryn Ellis, a member of the panel of Chapter 7 Bankruptcy Trustees for the Western District of Washington. Drawing on her skills as a bankruptcy trustee, Ellis liquidated the remaining properties of the estate and distributed the proceeds.

In 2005 Ellis applied to make an interim distribution from the proceeds of the property sales. She proposed to distribute funds among the Estate of Wilbert, the law firm of Short Cressman, and the accounting firm of Benson and McLoughlin in the same proportion as the fees awarded to them in the 1998 Order. Cruikshank vigorously objected, asserting that Wilbert was not entitled to receive the distribution because of his many misdeeds (CP 958-71). The Court approved the distribution over

³ The facts set forth below are recited in the Delguzzi IV opinion, Exhibit 1.

Cruikshank's objection (CP 890-93). Loretta Wilbert, as personal representative of her husband's estate, received \$109,543.50 (CP 819, 830, 892-93). Cruikshank did not appeal.

On May 18, 2006 Ellis asked the Court to approve a second distribution of administrative and professional fees, to the same persons and in the same proportions as before. Cruikshank objected. The Court approved the distribution on June 2, 2006. Cruikshank did not appeal.

On July 27, 2007 the Superior Court granted Ellis' motion to make a final distribution and close the estate, over Cruikshank's objection. This time Cruikshank appealed.

E. The June 30, 2009 decision in "Delguzzi IV."

In the appeal Cruikshank mounted a comprehensive challenge to Wilbert's administration of the Jack Delguzzi Estate from 1982 to 2004, as well as to Ellis' activities from 2005 to 2007 (CP 973-99.) The issues he raised were the ones he has raised throughout the litigation against Wilbert, both in the Clallam County and the King County case. Loretta Wilbert, as a party interested in the probate and a recipient of the challenged distributions, was one of the respondents and filed brief.

Kathryn Ellis and Short Cressman also filed briefs.

Division II issued its decision on June 30, 2009. *In re Estate of Delguzzi*, 150 Wn.App 1058, 2009 WL 1893862 (2009) (Exhibit 1). It held that the 2005 and 2006 distribution orders obtained by Ellis were final and appealable. As a consequence, said the Court, any appeal challenging the administration of the estate before the 2006 distribution order was time-barred. In footnote 19 on the last page of the opinion, the Court spelled out its intention to preclude relitigation of the many accusations made against Wilbert during the Jack Delguzzi probate. After reciting a long list of Wilbert's alleged misdeeds, the Court said that its "opinion disposing of these issues has a preclusive effect." *Id.* at 25 n.1.

As for the matters that were not time-barred—those relating to administration between the 2006 distribution order and the 2007 estate closing order--the Court found no error and affirmed the order closing the estate. Cruikshank's petition for review was denied by the Washington Supreme Court on December 2, 2009. 167 Wn.2d 1015 (2009).

F. Duplicate litigation against Wilbert in *Martin v. Wilbert*, the subject of the present appeal.

As noted above, when William Wilbert died Cruikshank moved for and obtained an order in Clallam County Superior Court substituting Loretta Wilbert as defendant. He also filed a claim in Wilbert's probate, which was pending in King County under case no. 04-4-01861-4. By doing so he spawned a duplicate lawsuit. Loretta Wilbert, as personal representative of the William Wilbert estate, was obliged to reject Cruikshank's probate claim or concede its validity. She gave notice of her rejection of the claim in November 2006 (CP 830). After she did so, Cruikshank filed suit in Clallam County Superior Court under case no. 06-2-01085-2 (CP 830). This was the wrong venue, because litigation concerning a claim filed in a King County probate must be prosecuted in King County (CP 830). Accordingly, Wilbert moved for and obtained a change of venue to King County (CP 830). The case was given case no. 08-2-10290-4 (CP 830). David Martin later substituted for Sidney Shaw as the plaintiff.

In this new case, currently known as *Martin v. Wilbert*, Cruikshank retraced and repeated the steps he had taken in the Jack Delguzzi probate case. The latest version of the Complaint, filed on July 13, 2009 (CP 619-

28), shortly before Wilbert's Motion for Summary Judgment (CP 813-1002), alleges wrongdoing similar to that alleged in the July 1996 Petition filed 13 years earlier in the Jack Delguzzi probate (CP 870-87). His Interrogatories, Requests for Production, and Requests for Admission are almost identical to those filed four years earlier in the Jack Delguzzi case (CP 59-60, 534-46, 583-603).

On July 24, 2009, Loretta Wilbert brought a summary judgment motion for dismissal on the grounds that (a) Delguzzi IV, decided by Division II a few weeks earlier, was dispositive; (b) the plaintiff's claims were barred by the statute of limitations and laches, and (c) there was no competent evidence that would raise a genuine issue of fact about whether Wilbert had breached any legal duty to the plaintiff (CP 813-1002). The Court granted Wilbert's motion and dismissed the plaintiff's case on August 25, 2009 (CP 1722-23). Cruikshank appealed on September 23, 2009 (CP 1724-27).

G. Duplicate litigation against Ellis in King County case no. 07-2-21635-9, dismissed on res judicata grounds, with sanctions.

In addition to appealing the Ellis' order closing the Jack Delguzzi

probate, Cruikshank sued her personally in the case of *Martin v. Ellis*, King County case no. 07-2-21635-9. This suit was dismissed on summary judgment on October 3, 2008. The Court awarded sanctions of approximately \$115,000 against Cruikshank and Martin.

Cruikshank appealed. The Court of Appeals affirmed on February 28, 2010, on res judicata grounds, citing Delguzzi IV. *Martin v. Ellis*, 154 W 1041, 2010 WL 599625 (2010) (Exhibit 2). A copy of the decision is attached as Exhibit 2. The Washington Supreme Court denied review on September 7, 2010 (citation unavailable).

I. Two other suits brought by Cruikshank about the same subject matter.

In addition to Clallam County case no. 8087, *Martin v. Wilbert*, and *Martin v. Ellis*, Cruikshank has prosecuted two other related and overlapping cases:

Delguzzi v. Wilbert ex. rel. Delguzzi Trust, King county case no. 99-4-00054-1 (1999-2001). Around the time Gary Delguzzi asked Wilbert to take over as administrator of the Jack Delguzzi Estate, he also made Wilbert trustee of a trust created to hold certain assets. He later removed

Wilbert as trustee and sued him. The King County Superior Court dismissed the suit as untimely. Cruikshank appealed. Division I affirmed the dismissal on February 26, 2001. *Delguzzi v. Wilbert ex. rel. Delguzzi Trust*, 105 Wn.App 1004, 2001 WL 180995 (“Delguzzi II”) (Exhibit 3).

Shaw v. Short Cressman et. al., King County case no. 06-2-27262-5 (2006 to 2010). In 2006 Cruikshank sued the law firms that had represented William Wilbert: Short Cressman, Chicoine and Hallett, individual attorneys at each firm, and attorney Larry Johnson. The case was dismissed on November 9, 2007. The Court awarded attorneys fees of nearly \$1 million under CR 11 and the frivolous lawsuit statute, RCW 4.84.185. The Court of the Appeals affirmed the dismissal of the case on May 18, 2009, reversed the CR 11 award on procedural grounds, affirmed the propriety of an award under the frivolous lawsuit statute, and remanded for entry of findings to support the fee award. *Shaw v. Short Cressman*, 150 Wn.App 1017, 2009 WL 1366272 (2009) (Exhibit 4). The Washington Supreme Court denied review on December 2, 2009. 167 Wn.2d 1016.

J. Facts pertaining to the appellant’s second Assignment of

Error--order terminating the deposition of G. Michael Zeno, Jr. and quashing subpoena,

On June 20, 2008, Cruikshank deposed Wilbert's attorney, G. Michael Zeno, Jr., in the case of *Martin v. Ellis*. Wilbert was not a party in that case. [CP 759.]

On May 27, 2009, Cruikshank noted Zeno's deposition in the present case, *Martin v. Wilbert*. Zeno expressed misgivings by email on June 30, 2009:

I do not believe it is appropriate for you to take my deposition. While it may be appropriate to depose opposing counsel in certain circumstances, I am not aware of any such circumstances are present here [sic]. I was not involved in the administration of the Jack Delguzzi estate. I never represented William Wilbert. You have already deposed me in *Martin v. Ellis*, a related case.

Cruikshank insisted on taking Zeno's deposition. The deposition commenced on July 9, 2009. As it proceeded it became clear that Cruikshank was covering exactly the same topics as he had a year earlier when he deposed Zeno in *Martin v. Ellis*. Zeno then exercised his right under CR 30(d) to suspend the deposition so he could bring a motion to terminate it. [CP 760-61.]

On or around July 13, 2009, Cruikshank served a Subpoena upon the “Records Custodian of the Law Offices of Zeno, Drake, et. al.” asking it to produce certain documents (CP 760-61, 796-800).

On July 22, 2009, Zeno moved to terminate the deposition and quash the subpoena (CP 757-800, 803-10). The Court granted the motion on July 30 (CP 1005-06).

III. ISSUES

Since the Issues, as described in the Appellant’s brief, contain false statements, the Respondent will reframe them:

A. Are the plaintiff’s claims barred by res judicata and collateral estoppel?

B(i) Are the plaintiff’s claims barred by the statute of limitations?

B(ii) Should the plaintiff’s claims be dismissed because he has failed to come forth with legally competent evidence to establish each element of his case?

C. Should the plaintiff’s be barred by laches from pursuing this stale case, considering the circumstances and equities?

D. Has the plaintiff failed to show that the trial judge abused her discretion when she terminated his deposition of Wilbert’s attorney?

IV. ARGUMENT

A. The plaintiff's case should be dismissed under res judicata and collateral estoppel.

The King County case on appeal here duplicates a Clallam County case that has already been litigated to its conclusion. The legal system generally does not tolerate such duplication. Repetitive litigation wastes judicial resources, burdens those compelled to undergo it, and undermines the legal process by failing to give due respect and weight to its judgments and decisions. Accordingly, the law has developed principles to preclude repetitive litigation. Sometimes the principles are collected under the single term “res judicata.” Sometimes they are differentiated into claim preclusion (or “res judicata” in the narrower sense) and issue preclusion (known as “collateral estoppel”). The Superior Court correctly dismissed Cruikshank’s case under these preclusive principles.

1. *Martin v. Ellis* precludes relitigating the question of the preclusive effect of the Jack Delguzzi probate case.

As noted above, the current case (*Martin v. Wilbert*) is one of several in which Cruikshank has been relitigating the Jack Delguzzi probate. Another is *Martin v. Ellis*, described above in Subsection G of

the Statement of the Case, pages 15-16. Cruikshank's claim in *Martin* The Court of Appeals affirmed the dismissal of Martin's case on collateral estoppel grounds. See Exhibit 2. This decision had not yet been issued at the time of the summary judgment motion in *Martin v. Wilbert*.

Like Ellis, Wilbert argued on summary judgment that the prior litigation in the Jack Delguzzi probate precludes relitigating matters relating to the administration of the estate. Cruikshank has addressed this issue in both cases. See Exhibit 2 and Appellant's brief in the present case. The decision in *Martin v. Ellis* settles the matter--that is, *it precludes relitigating the question of preclusion*. This, by itself, is sufficient reason to affirm the summary judgment in the present case.

Furthermore, even if *Martin v. Ellis* were not dispositive, it is clear that the prior litigation in the Jack Delguzzi probate precludes suing Wilbert a second time, under the doctrines of and collateral estoppel.

2. The dismissal of Martin's case against Wilbert should be affirmed on res judicata grounds.

Res judicata, also known as "claim preclusion," ensures the finality of decisions. The doctrine provides that when a case results in a "final

judgment on the merits,” the same parties, or those in privity with them, may not relitigate claims that were litigated in or *might have been* litigated in the case. *Pederson v. Potter*, 103 Wash. App. 62, 67-69, 11 P.3d 833, 835 (2000); Karl Teglund, 14A Wash. Prac., Civil Procedure § 35:24; Phillip Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985). Martin’s suit was properly dismissed on res judicata grounds.

(a) There was a final judgment on the merits in the Jack Delguzzi probate case.

In res judicata jurisprudence, “final judgment on the merits” is a term of art with broad meaning:

In order to be a judgment on the merits, it is not necessary that the litigation be determined on the merits in the moral or abstract sense of those words. *It sufficient that the status of the prior litigation was such that the parties might have had their suit disposed of, if they had properly presented and managed their respective cases.*

The clearest instance of a judgment on the merits is a judgment entered after a full trial on the issues, both parties having presented evidence and made argument. However, judgments entered after a more summary investigation of the issues are often treated as judgments on the merits, as discussed in later sections. As a general rule, and subject to the limitations discussed in later sections, res

judicata and/or collateral estoppel effects attach to default judgments, summary judgments, declaratory judgments, judgments on the pleadings, dismissals, stipulated or consent judgments, judgments by confession, *in rem-type judgments*, criminal judgments admissible in civil cases, administrative determinations, and arbitration awards.

Karl Teglund, 14A Wash. Prac., Civil Procedure § 35:23 (italics added, footnotes omitted). “In rem-type judgments,” referred to in the quotation above, include probate orders approving accountings and distributions. These orders are special. Because of the comprehensive and cumulative nature of probate accountings—which analyze and present the entire prior history of the estate’s administration—they are res judicata as to all that has gone before in the course of the probate, if entered on proper notice. *Bostock v. Brown*, 198 Wash. 288, 292 (1939). *Ryan v. Plath*, 18 Wash. 2d 839, 857, 140 P.2d 968, 977 (1943). Distribution orders, which are derived from accountings and presuppose their legitimacy, have the same force.

As explained in *Delguzzi IV*, there were three distribution orders entered in the Jack Delguzzi probate case while Ellis was administrator—interim distribution orders in 2005 and 2006 and the final one that closed

the estate in 2007. Each order, by following the 1998 Order on Administrative Expenses and Distribution Plan, presupposed that Wilbert was entitled to a substantial amount of fees (CP 892) —something that would not have been true if Cruikshank’s attack on Wilbert’s conduct were well-founded. Each such order constituted an adjudication and rejection of the challenges that Cruikshank made, or might have made, during the course of probate. Under Washington law, each was a “final judgments on the merits” precluding Cruikshank from attacking Wilbert’s administration a second time by prosecuting the King County action.

It should be noted that while Delguzzi IV held that the 2005 and 2006 interim distribution orders were final and appealable, the res judicata effect of the Jack Delguzzi probate case does not depend on that holding. The 2007 order that closed the estate and approved the final distribution is also res judicata and, by itself, requires the dismissal of the plaintiff’s claims in the present case.

(b) The Clallam County and King County cases involve the same parties and their predecessors and successors.

Sidney Shaw was the plaintiff in both cases during 2006-2007,

when the “King County case” was filed (though not in King County) and when the distribution orders appealed from in Delguzzi IV were entered. All the other plaintiffs in each case were persons in privity with Sidney Shaw, either as a predecessor or successor. The defendant in each case has been either William Wilbert or Loretta Wilbert, as personal representative of her deceased husband’s estate. Thus, the parties in each case were either the same persons or persons in privity with them.

(c) The claims in the King County case were litigated or might have been litigated in the Jack Delguzzi probate.

While sometimes the question of res judicata turns on whether a claim *might* have been litigated in a prior case, the claims in the current King County lawsuit were *actually litigated* during the Jack Delguzzi probate. The essence of each case is Cruikshank’s suspicion that Wilbert stole from the Jack Delguzzi estate. The Complaints in each case contain the same vague allegations of wrongdoing.

In summary: The elements of res judicata are clearly present here-- the same parties, the same claims, and a final judgment denying those claims in a prior action. This is a sufficient reason to affirm the dismissal

of the plaintiff's case.

3. The dismissal of Martin's claim against Wilbert should be affirmed on the basis of collateral estoppel.

Collateral estoppel differs from res judicata in that (a) its formal requirements are looser—for example, the parties need not be identical, and (b) it applies only when the precluded party has had a “full and fair opportunity to present its case”—i.e., it requires more than that the precluded claim *might have been* litigated. *Pederson v. Potter*, 103 Wash. App. 62, 69, 11 P.3d 833, 835 (2000); Karl Teglund, 14A Wash. Prac., Civil Procedure § 35:32; Phillip Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985). However, that distinction is unimportant here, because Cruikshank's grievances against Wilbert were actually litigated in the Clallam County case. Thus collateral estoppel also warrants dismissal of the King County case.

4. Applying res judicata or collateral estoppel would not work an injustice here.

The court may decline to apply res judicata or collateral estoppel if to do so would work an injustice. *Nielsen v. Spanaway General Medical Clinic*, 135 Wn.2d 255, 263, 956 P.2d 312, 316 (1998). This exception to

preclusion does not apply here. It would not work an injustice to put an end to this duplicative, stale litigation.

Cruikshank should have brought this case to a conclusion long before now. Although he persuaded the Court of Appeals to revive his claim ten years ago on the grounds that he had not had an adequate opportunity to do discovery, he did not take advantage of his second chance. Over two and a half years elapsed between the remand in *Delguzzi III* in 2001 and Wilbert's death in 2004, without Cruikshank doing that additional discovery and obtaining a decision in the case. Another three years passed between Wilbert's death and the commencement of this action in March 2007.

At this point William Wilbert has been dead for six years, making it hard to reconstruct exactly what happened and hard to provide thorough refutations of the plaintiff's vague allegations and suspicions. This is especially true because of the vast scope of this case. The plaintiff's allegations stretch back over 30 years. The mass of documents and transactions pertaining to the Jack Delguzzi estate is mind-boggling. The docket sheet from the Clallam County Superior Court case no. 8087 has

approximately 1500 entries, and that is only one of the group of cases initiated or kept alive by Cruikshank in his crusade against Wilbert. The relevant documents fill hundreds of boxes. Yet Loretta Wilbert now has to defend what her dead husband did, even though he is not around to explain the meaning of the documents or the circumstances of the hundreds of transactions. She is severely prejudiced by Cruikshank's delay in bringing this case to a conclusion.

Furthermore, justice would not be served by reversing summary judgment to allow a trial, because there is no one to give relevant testimony. The evidence at any trial would be the same mass of documents already filed with the various motions in the King County and Clallam County cases. Testimony about dealings with Wilbert—if there is anyone competent to give such testimony—would be barred by the Deadman's Statute.

In addition, it would be inequitable to allow this litigation to proceed when there is no longer any client but Cruikshank himself (aided by his agent, David Martin). After Gary Delguzzi died in 2004, Cruikshank arranged to have Margaret Shaw appointed personal

representative. When she died in August 2004, Cruikshank arranged for her husband, Sidney Shaw, to succeed her. The current plaintiff, David Martin, admits that Sidney Shaw was only a “nominal plaintiff” with no knowledge of the case being prosecuted in his name. (David Martin’s Amended Motion and Declaration for Order Granting Leave to Amend Complaint, dated April 2, 2008, par. 8-11, CP 4.) David Martin, in turn, merely serves as a placeholder for Cruikshank.

The stirring up and perpetuation of litigation by an attorney for the benefit of the attorney used to be called “barratry.” Whatever it is called, it is an abuse of the legal system and an embarrassment to the legal profession. It would be just to use preclusive principles to put an end to this behavior.

5. The “assignment of claims” does not change the preclusion analysis.

The appellant refers several times to an assignment of claims from the successor administrator (Ellis) to Sidney Shaw. The assignment was premised on the fact that a probate administrator can pursue claims against a prior administrator for bad conduct. Of course, a beneficiary of a

probate estate, like Gary Delguzzi, also has the right to sue a miscreant administrator. The successor administrator's right to sue his or her predecessor does not enlarge the predecessor's duties; it simply adds another person to whom the predecessor may have to answer.

The order appointing Ellis administrator excused her from joining in Cruikshank's legal proceedings against Wilbert (CP 2106). However, in order for the Estate of Jack Delguzzi to finally be closed after almost 30 years, any hypothetical claims that Ellis might have had against Wilbert needed to be dealt with. Ultimately, this was accomplished by the sale of any such claims to Sidney Shaw.

It should be noted that neither Ellis, in assigning the hypothetical claims, nor the Court, in approving the assignment, said anything about whether the *choses in action* being assigned had any merit, or even what they might be. The assignment simply eliminated a technical impediment to the closing the Jack Delguzzi Estate.

In any case, the assignment of claims does not change the preclusion analysis, which is based on the fact that the King County case is simply a re-hash of Clallam County case no. 8087. Any issues that might

have been raised in the assigned *choses in action* were raised in the Clallam County case and vigorously litigated.

B. Summary judgment was proper because Cruickshank failed to come forward with competent evidence of a legally cognizable, timely claim.

1. A motion to dismiss on summary judgment requires the plaintiff to come forward with competent evidence for each element of its case.

A party seeking to dismiss a case on summary judgment need not set forth its own version of what occurred and show it to be free from genuine issues of material fact. It may also seek dismissal based on the weakness of the plaintiff's case, requiring the plaintiff to "come forward with competent evidence" of each element of its claim. *Guile v. Ballard Community Hospital*, 70 Wn.App 18, 21-22, 851 P.2d 689, 691-92 (1993); *Young v. Key Pharmaceuticals*, 112 Wn.2d 225-27, 770 P.2d 182, 187-88 (1989). The moving party need not support the motion with affidavits. CR 56(a); *Guile*, supra; *Young*, supra. To defeat such a motion, the plaintiff may not rest on his or her allegations. It must adduce evidence which, if true, would establish each element of its causes of action.

It is especially appropriate to require Martin to come forward with

competent evidence on each element of a legally cognizable claim because of the vagueness of his Complaint. As noted in Wilbert’s Statement of the Case, the current version of the Complaint was not filed until July 13, 2009, shortly before her motion for summary judgment. Given the obligation to plead fraud with specificity (CR 9(b)) and the fact that Cruikshank has had 15 years to develop his claims, this vagueness is indefensible. It puts an unwarranted burden on Loretta Wilbert, who is asked to defend against vague allegations covering nearly 30 years of estate administration by her husband and Ellis. Wilbert should not have the burden of imagining what causes of action might have been pled. Nor should the Court speculate or infer that any necessary element has been pled and supported by competent evidence, unless the plaintiff has clearly done so.⁴

2. Applying the statute of limitations to this case.

⁴ The vagueness is intentional and tactical. When asked to identify the causes of action he was asserting, Cruikshank plaintiff refused (CP 830-31). He took the position that Wilbert’s request asked for “work product”—in other words, that the law permitted him to keep his causes of action secret! But the sort of summary judgment motion that requires the plaintiff to come forward with evidence defeats this gambit, because the plaintiff has to articulate a legally cognizable claim to avoid dismissal.

At the outset, it is important to note that the pendency of the original claims in Clallam County case no. 8087 suit does not toll the statute of limitations for the King County suit.⁵ *Dowell Co. v. Gagnon*, 36 Wash. App. 775, 775, 677 P.2d 783, 784 (1984).

As noted above, the plaintiff filed his latest Complaint on July 13, 2009. Wilbert will assume, for statute of limitations purposes, that it relates back to the Complaint Cruikshank filed under Clallam County case no. 06-2-01085-2 before venue was changed to King County. Cruikshank filed that complaint on December 7, 2006 and effected service on or around March 7, 2007 (CP 831). If the pleading had been served within 90 days, the date the suit commenced for statute of limitations purposes would have been the date of filing—December 7, 2006. Because service was not effected until the 91st day, the date the suit commenced the date of service, March 7, 2007. This difference turns out not to matter, however.

⁵ If the earlier, duplicate suit in the Jack Delguzzi probate case had been consolidated with the King County action, it would not have affected the statute of limitations analysis. Consolidation, by itself, only has an administrative effect; it means that there are multiple lawsuits administered under the same case number.

As noted above, the plaintiff has refused to identify his causes of action. Because they have a tort-like character, Wilbert will apply a three-year statute of limitations.

Counting back three years from March 7, 2007 means the causes of action must have accrued on or before March 7, 2004, two weeks before William Wilbert died. The misdeeds complained of by the plaintiff occurred long before that.

3. Response to plaintiff's legal arguments about the statute of limitations.

The plaintiff raises various arguments to expand the limitations period or to postpone its accrual:

(1) Citing RCW 11.96A.070(2), Cruikshank argues that there is no statute of limitations for claims against a personal representative who dies before being discharged. But RCW 11.96A.070(2) does not say that. It says only that claims “must be brought before the personal representative is discharged”—i.e., it sets discharge as the outer limit for bringing suit. It does not purport excuse a plaintiff from bringing his or her suit within the applicable limitations period.

(2) Cruikshank also contends that the statute of limitations for a claim against a decedent does not continue to run after the decedent dies. He says, in effect, that the statute of limitations is tolled during the time between the death of the defendant and the filing of the probate claim and continues to be tolled thereafter until rejected by the personal representative. This means the statute of limitations could be tolled indefinitely, because the time period for rejecting a probate claim is not limited by probate law.

Cruikshank is incorrect. In fact, the passage he cites from the Washington Practice Manual on this issue contradicts his position. It says, “Death itself does not toll the statute of limitations,” 15A *Wash. Prac. Series* section 4.10 (2009); *Craig v. Ludy*, 95 Wn.App 715, 716 n. 1, 976 P.2d 1248 (1999); *Young v. Snell*, 134 Wn.2d 267, 271-282, 948 P.2d 941 (1998).⁶

Given the undisputed chronology of events, the fact the plaintiff’s

⁶ RCW 4.16.200, which speaks to the running of the statute of limitations after death, says that RCW 11.40 governs. The section of RCW 11.40 that addresses the issue, RCW 11.40.051(2), says that the statute of limitations continues to run after death: “An otherwise applicable statute of limitations applies without regard to the tolling provisions of RCW 4.16.190.” The cases construing the

claims are time-barred does not depend heavily on the legal analysis of the two issues set forth above. Even if the statute of limitations were tolled by William Wilbert's death, none of the misdeeds complained of are alleged to have occurred during the 3 years before his death on March 24, 2004.

(3) Finally, Cruikshank also argues that the statute of limitations did not begin to run when the alleged misdeeds occurred. But a discovery rule of accrual would not save the plaintiff's case, because he bears the burden of proof to establish when he discovered or should have discovered the requisite facts. *Clare v. Saberhagen Holdings*, 129 Wn.App 599, 603, 123 P.3d 465 (2005); *G. W. Construction Corp. v. Professional Service Industries*, 76 Wn.App 360, 367, 853 P.2d 484 (1993); *Interlake Porsche & Audi v. Bucholz*, 45 Wn.App 502, 518, 728 P.2d 597 (1986).

Cruikshank needed to bring forth specific facts to meet that burden, and he has not done so.

4. Consideration of a specific accusation of wrongdoing.

The Estate of Jack Delguzzi is like a giant jigsaw puzzle with many thousands of pieces. The pieces are faded and some are missing. It is

statute, cited above in the text, confirm this reading of the relevant statutes.

extremely unlikely that the puzzle can ever be put together properly. What Cruikshank does, over and over, is hold up one piece of the gargantuan puzzle and say “I can’t figure out how this fits into the puzzle--therefore, Wilbert stole a lot of money.” This is a gigantic and unwarranted leap. The only inference one can draw from “I can’t figure out how this fits” is that Cruikshank cannot figure out how it fits. Perhaps no one can; perhaps someone else could; perhaps Cruikshank can but is pretending he cannot. It does not matter, because “I can’t figure out how this fits” is not probative and does not create a genuine issue of material fact.

Here is a specific example of how Cruikshank attempts to create the appearance of wrongdoing where there is none: Exhibit I to Cruikshank’s Response to Wilbert’s Motion for Summary Judgment is a group of checks five checks written to William Wilbert, dating from 1993 and 1995 (CP 1505-07). Three are written on the Banco Nacional de Costa Rica. All Exhibit I shows is that five checks were written to William Wilbert. It does not establish the circumstances surrounding the checks, whether they were cashed, or the ultimate disposition of the funds.

Cruikshank then makes the bald, unsupported assertion, without

foundation, that these moneys “were never reported to the probate court.” He does not show that he has personal knowledge of this fact or explain why, as attorney, his testimony on such substantive matters would be admissible. But, in any event, there is no question that Wilbert informed the Court about the sale of Costa Rican assets for a gross price exceeding the sum of the checks adduced by Cruikshank (\$1.466 million). Wilbert did so in the Supplemental Report filed in December 1996 in support of his final accounting. The Supplemental Report describes the sale of Costa Rican properties for a gross price of \$1.6 million at pages 23-34 (CP 919-30). Cruikshank does not offer any accounting of the numerous and complicated Costa Rican transactions that would demonstrate wrongdoing. *Young v. Key Pharmaceuticals*, supra, precludes this sort of gambit by requiring the party resisting summary judgment to come forward with competent evidence for every element of its case. Cruikshank offers only innuendo and suspicion, without context, about complex transactions from the past.

C. The plaintiff’s case should be dismissed on the basis of laches.

The plaintiff's claims are stale and barred by laches. The elements of laches are knowledge by the plaintiff of "the facts constituting the cause of action or a reasonable opportunity to discover such facts," unreasonable delay, and damage to the defendant. *Dicus v. Dicus*, 110 Wn.App 347, 357, 40 P.3d 1185 (2002); CJS *Equity* sec. 142. Laches is a flexible, equitable doctrine. "There is no absolute rule as to what constitutes laches, and each case must be determined according to its own particular circumstances." CJS, *supra*.

As explained above, it would be extremely unfair to require Wilbert's widow to defend against Cruikshank's stale, repetitive, and vague allegations. Based on this and other equitable considerations set forth above, the Court should apply laches to bar the continuation of this suit.

D. The Court did not abuse its discretion in terminating the plaintiff's duplicative and inappropriate deposition of Wilbert's attorney

The circumstances surrounding Cruikshank's second deposition of Zeno are described above in the Statement of the Case. Given that (1) Zeno was the opposing counsel in the case in which Cruikshank was

deposing him, (2) Zeno had no firsthand knowledge of William Wilbert's administration of the estate and had not represented him, and (3) Cruikshank's deposition inquired about exactly the same matters as in his earlier deposition of Zeno in *Martin v. Ellis*, it was proper for the Court to grant Zeno's motion to terminate the deposition.

It may be that Cruikshank's purpose is to suggest that his efforts to expose Wilbert's thievery have been frustrated by lack of discovery. This argument persuaded the Court of Appeals in Delguzzi's I and III, decided in 1999 and 2001, but it has worn thin. The Delguzzi IV Court rejected it.

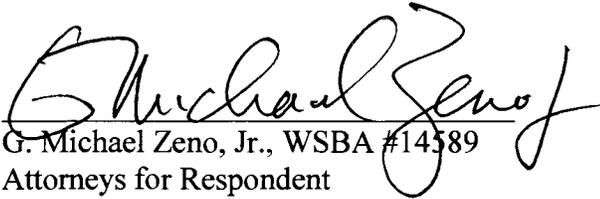
This Court should not be taken in by Cruikshank's pretense that he has not had the chance to do adequate discovery. For a list of records provided to or obtained by Cruikshank and Martin, see Wilbert's Responses to Interrogatories and Requests for Production and supporting documentation (CP 535-36, 550-82).

V. CONCLUSION

Loretta Wilbert entreats the Court to end this nightmare. The decision of the Superior Court should be affirmed.

DATED this 1st day of October, 2010.

ZENO DRAKE BAKALIAN P.S.


G. Michael Zeno, Jr., WSBA #14589
Attorneys for Respondent

APPENDIX to Respondent Loretta Wilbert's brief in
Martin v. Wilbert, case no. 64231-6-I

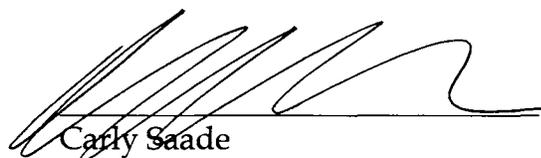
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 1, 2010, I served a copy of the Brief of Respondent Loretta Wilbert on all counsel of record in the manner shown at the addresses listed as follows:

Charles M. Cruikshank, III
ATTORNEY AT LAW
108 S. Washington St., Suite 306
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- By United States Mail
- By Legal Messenger
- By Federal Express
- By Facsimile

DATED: October 1, 2010 at Kirkland, Washington.


Carly Saade

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COMMERCIAL
KIRKLAND, WA 98033

APPENDIX to Respondent Loretta Wilbert's brief in
Martin v. Wilbert, case no. 64231-6-I

EXHIBIT 1 to Respondent Loretta Wilbert's brief in *Martin v. Wilbert*,
case no. 64231-6-I

In re Delguzzi, 150 Wn.App 1058, 2009 WL 1893862 (2009)
("Delguzzi IV")

DELGUZZI IV

2009 WL 1863892

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 2.

In re the ESTATE OF Jack DelGUZZI, Deceased.

No. 36682-7-II. June 30, 2009.

West KeySummary

1 **Executors and Administrators** - Additional or Supplemental Inventory

A trial court did not abuse its discretion in not ordering a court-appointed estate administrator to prepare additional formal inventories and appraisements, in an action challenging the closing of an estate. The estate administrator sent a letter to the former personal representative of the estate, in which she stated that she did not believe a new inventory was needed and explained that the only remaining property in the estate was a parcel of land that all parties knew about and that had a pending purchase offer. The former personal representative could not identify the harm the estate administrator caused by her alleged failure to further inventory and appraise unnamed properties. Moreover, the estate administrator's letter set out reasonable grounds for her decision not to prepare a new inventory and appraisal. RCW 11.44.050.

0 Cases that cite this headnote

Appeal from Clallam Superior Court; Honorable Leonard Costello, J.

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Opinion

UNPUBLISHED OPINION

HOUGHTON, J.

*1 In this third appeal related to the administration of the estate of Jack DelGuzzi (Estate), who died in 1978, Sidney Shaw, the personal representative of the estate of Gary DelGuzzi, Jack DelGuzzi's late son, claims that everyone who has administered the Estate has harmed it. He argues that the trial court erred in closing the Estate and in entering an order changing venue without consolidating two lawsuits. We affirm the trial court's 2007 order to close the Estate and dismiss the remaining issues presented for review as untimely.

FACTS

A. Gary DelGuzzi's Complaint

When Jack DelGuzzi died in 1978, his will appointed his son, Gary DelGuzzi, personal representative of his Estate. Gary served as personal representative until August 13, 1982, when he resigned and William took over. In 1994, Gary sued William in Clallam County Superior Court. The complaint alleged that William, who was a real estate agent and developer, breached his fiduciary duty, engaged in self-dealing, and failed to account for Estate assets. Gary sought an accounting and the return of any improper fees, charges, and distributions. Gary amended his complaint several times, but the matter never went to trial.

Gary's second amended complaint, dated September 14, 1994, named additional defendants, including William's children. This complaint sought orders to void transfers of Estate assets to William, his family members, and their related corporate entities, and to remove William as personal representative. All of his children performed services for the Estate and received compensation for their work. These services included real property sales, property development, property management, appraisal

work, and clerical and administrative services. In addition to cash payments for commissions and fees, at least one of the children received two parcels of real property from the Estate as compensation.

Gary filed another amended complaint on July 16, 1996 (July 1996 complaint). It separated his causes of action. One cause (damages petition) alleged tort claims against William for (1) various breaches of fiduciary duty, (2) violation of a court order requiring reporting and approval of administrative fees, (3) using sham corporations to conceal Estate transactions, (4) improperly borrowing separate trust fund assets to pay Estate liabilities, and (5) failing to close the Estate in a timely manner.² In his damages petition, Gary requested an order setting a trial date on damages, but no date was set. The other cause of action (removal petition) requested orders removing William, requiring him to render an accounting, appointing a successor administrator, and for other related relief. The trial court set an evidentiary hearing on the motion to remove William for January 21, 1997.³

During fall 1996, the parties served interrogatories and requests for production on each other. Gary responded to William's interrogatories with a four-page list of objections. William moved to compel responses to his interrogatories. Gary submitted 36 pages of answers and objections, providing some response to all of William's 85 interrogatories; many of Gary's responses did not provide the requested information. Gary asserted that he could not produce all the requested information and documents because William had the information and William had failed to provide Gary's requested discovery.

*2 William moved for sanctions under CR 11 and CR 37(d), claiming that Gary had provided evasive and misleading discovery. Gary moved to compel discovery, claiming that William had failed to respond to interrogatories, had denied the existence of business records for many of the Estate's corporate assets, and had failed to produce source documents (such as bank statements, check registers, deposit books, and cash journals) for Estate reports and accountings. The trial court set both motions for hearing on January 17, 1997.

At the January 17, 1997 hearing, the trial court granted William's motion for discovery sanctions against both Gary and his attorney, Charles Cruikshank. The trial court found Gary's interrogatory answers evasive, ordered Gary and Cruikshank to pay \$30,000 in attorney fees and costs to William, and dismissed Gary's claims as a CR 37(d) sanction. The trial court based its ruling on Gary's initial four-page objection to William's interrogatories, which William had included with his sanctions motion. The trial court did not consider Gary's later-produced 36 pages of answers and objections. Nor did it consider or rule on Gary's motion to compel discovery.

B. Estate Administration

On January 21, 1997, a different trial court than the one overseeing the July 1996 complaint litigation conducted an evidentiary hearing limited to William's final report⁴ and accounting for the Estate. Neither that judge nor any other judge conducted a hearing on Gary's motion to compel discovery because the previous judge had dismissed Gary's July 1996 complaint against William under CR 37(d). The trial court entered a memorandum decision on the final report on October 16, 1997. This order stated that "[i]t appears to this Court, having heard the testimony and reviewed the documents ... that this Estate is ready to be settled and closed." Clerk's Papers (CP) at 1967. The trial court asked the parties to draft an agreed distribution plan. The parties did not reach agreement, so on June 5, 1998, the trial court entered an order to close the Estate, to set up a distribution plan, and to set up a plan to handle expenses (1998 closing plan).

C. First Appeal and Remand

Gary appealed both the discovery-sanction dismissal of his July 1996 lawsuit for wrongful Estate administration and William's attorney fee award. We reversed the discovery-sanction dismissal of Gary's claims against William and Cruikshank. We affirmed CR 11 sanctions against Gary for his claims against William's children. Nevertheless, because the lower court had not specified what pleading, interrogatory answers, or objections had violated CR 11, we reversed the attorney fee sanction arising from Gary's inadequate responses to William's discovery requests. *In re Estate of DelGuzzi*, noted at 93 Wash.App. 1048, 1999 WL 10081 (*DelGuzzi I*).

We also held, however, that CR 37(d) permits monetary sanctions for failure to respond to discovery. Accordingly, we noted that on remand, the trial court could impose a CR 37(d) sanction for reasonable expenses that William incurred "as a result of [Gary's] failure to respond properly to discovery." *DelGuzzi I*, 93 Wash.App. 1048, 1999 WL 10081 at *9.

*3 On remand, William asked the trial court to reinstate the attorney fee sanctions against Gary and Cruikshank under CR 37(d). The trial court granted the request and re-imposed a \$30,000 sanction, plus \$7,650 in interest. Gary again moved to compel discovery. William urged the trial court to dismiss Gary's claim, this time based on res judicata, collateral estoppel, and law-of-the-case doctrine. William argued that, although Gary's wrongful Estate administration claims had originally been dismissed as a discovery sanction, Gary was nevertheless barred from relitigating them on remand because the same

issues had been decided in the probate hearings leading up to the trial court's issuance of the 1998 closing plan.

A different superior court judge again dismissed Gary's claim, reasoning that at the 1997 hearings on William's final report and accounting for the Estate, Gary had adequate opportunity to raise all claims and he did not prevail. The trial court reasoned that at the previous probate proceeding the superior court found William's administration fees reasonable and that the personal representative did not breach his fiduciary duty to the Estate (including fraud and self-dealing claims). The trial court did not address how Gary could have effectively mounted a challenge to the Estate's administration without the fulfillment of his discovery requests.

D. Second Appeal and Remand

Gary appealed the dismissal of his July 1996 petitions for William's removal as the personal representative and for damages and the imposition of discovery sanctions on remand from the first appeal. As to the petitions, he argued that the trial court erred in dismissing them on grounds of *res judicata*, collateral estoppel, and the law-of-the-case doctrine. As to the sanctions claim, he argued that the trial court failed to follow our remand instructions.

In the second appeal, we agreed with Gary on both claims because the record did not show that the trial court evaluated Gary's discovery objections and responses to determine whether he failed to comply with William's discovery requests and what reasonable expenses William incurred, if any, as a result of any failure to comply. Accordingly, we reversed the trial court's re-imposition of monetary sanctions and remanded for further action on Gary's petitions. *DelGuzzi v. Wilbert*, noted at 108 Wash.App. 1003, 2001 WL 1001082 (*DelGuzzi II*).

E. Present Appeal

The trial court appointed bankruptcy trustee, Kathryn Ellis, as the Estate administrator on January 13, 2005. The order appointing Ellis directed her to liquidate any remaining Estate real estate parcels and to submit an updated accounting. The order also prohibited her from pursuing claims against William (now his estate). Acting according to these limited duties, Ellis liquidated the remaining properties and distributed the proceeds. No one objected to the sales. She obtained an order to close the Estate on July 27, 2007 (2007 closing order).

*4 After Gary's and William's deaths, Gary's attorney, Cruikshank, moved to substitute their estates' personal representatives as parties in the pending case stemming from the July 1996 complaint. The trial court granted the motion. Between 2004 and 2007, Cruikshank filed motions and discovery requests. As of the time the court entered the 2007 closing order in the Estate in July 2007, however, the claims in the July 1996 complaint had not been resolved.

In August 2004, Cruikshank filed a notice of creditor's claim in William's King County probate. Loretta rejected the claim in 2006. Sidney filed suit in Clallam County in December 2006 (2006 case). According to both Loretta and Cruikshank, the claims in this matter resemble the claims in the July 1996 case.⁵

Loretta moved to change venue in the 2006 Clallam County case to King County. Cruikshank moved to consolidate the 1996 case with the 2006 case. In late 2007, Loretta obtained a change of venue of the 2006 case to King County; the venue order does not discuss consolidation.⁶

Sidney appealed, arguing that the trial court erred in entering its 2007 closing order. By an amended notice of appeal, he further argues that the trial court erred in ordering a change of venue without consolidating the two cases.

ANALYSIS

Timeliness of Appeal

A. The 1998 Closing Plan

As a preliminary matter, Ellis, the court-appointed administrator, argues that the 1998 closing plan approved by the trial court was a final order and cannot be appealed at this late date.⁷ Due to the unique procedural history of this matter, we disagree that the order was final at the time it was entered but agree that it is no longer appealable due to the entry of subsequent final and appealable interim distribution orders.

On December 17, 1996, William filed a final report and petition for decree of distribution under RCW 11.76.030, which sets out the procedure for court approval of a final report and petition for distribution. After taking evidence on the petition, the trial court issued a decision that the Estate was ready to be closed and asking the parties to reach an agreement on distribution. The decision addressed challenges to the Estate's administration. For

example, it specifically limited one of William's administration fee claims for real estate commissions to no more than \$130/hour and disallowed expenses related to transactions and property in Costa Rica because William "breach[ed] his duty to the Estate as administrator in that he put himself in a situation where his self-interest could potentially conflict with the Estate." CP at 1970. The parties did not reach agreement, so the trial court issued the 1998 closing plan.

The 1998 closing plan addressed "the administrator's Final Report and Petition for a Decree of Distribution." CP at 1959. The order approved certain administrator, attorney, and accountant fees; listed assets remaining in the Estate; and directed how to dispose of real property and liquidate corporate entities remaining in the Estate. It also authorized distributions to the administrative claimants to satisfy the approved claims so long as sufficient assets remained in the Estate to carry out the distribution and closing plans. The last paragraph of the closing plan stated, in a handwritten addendum, "This order is entered as a final order on this day." CP at 1964.

*5 Ellis relies on RCW 11.76.030, which sets out what constitutes a final report required to close an estate. Ellis contends that the 1998 closing plan qualified as a final report and that the "an order approving a Final Report of an administrator in a probate proceeding is a final order." Ellis Br. at 8. Because Gary did not appeal the 1998 closing plan, Ellis asserts that "it is final and res judicata" on "all matters covered" and "all questions that should have been raised" at the time of the hearing. Ellis Br. at 9-10.

Ellis further argues that the 2005 and 2006 distribution orders (collectively, the interim distribution orders), made in accordance with the closing plan, were also final orders for the purposes of the appeal period. She states that all parties had notice of these interim distributions, that the trial court considered and rejected objections, and that the orders should have been appealed when entered. Consequently, she contends that the only issues we should consider in this appeal are those arising out of the 2007 closing order.

Sidney counters that by asserting a jurisdictional ground, Ellis attempts to distract us from properly appealed issues. He also asserts that in 2001, we recognized that Gary had been unable to litigate issues in 1996 and 1997, that in 2004 he learned of important facts only after William died and that we should not deprive him of the ability to fully litigate his claims related to the Estate's administration.

Ellis relies on *Batey v. Batey*, 35 Wash.2d 791, 215 P.2d 694 (1950), to support her argument that appeal of issues related to the 1998 closing plan are untimely. *Batey* explains that

[t]he order of the probate court approving the guardian's final account is a final judgment and is entitled to the same consideration as any final judgment entered by the superior court.

Our decisions to this effect are referred to in *Ryan v. Plath*, 18 Wash.2d 839, 140 P.2d 968, 977 [1943], where this court said: "Appellant recognizes the settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings upon due notice provided by statute are final adjudications having the effect of judgments *in rem* and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well. See the following recent decisions of this court upon this question, and the many prior decisions cited therein: *Farley v. Davis*, 10 Wash.2d 62, 116 P.2d 263 ... [1941]; *Castanier v. Mottet*, 14 Wash.2d 615, 128 P.2d 974 [1942]; *In re Christianson's Estate*, [16] Wn.[2d 48], 132 P.2d 368 [1942]."

35 Wash.App. at 796, 670 P.2d 663 (some alternations in original). See also *Manning v. Mount St. Michael's Seminary of Philosophy & Science*, 78 Wash.2d 542, 548, 477 P.2d 635 (1970) ("This court has often said that orders and decrees of distribution made by superior courts in probate proceedings ... are conclusive and binding upon all persons having any interest in the estate and upon all the world as well."); *Bostock v. Brown*, 198 Wash. 288, 292, 88 P.2d 445 (1939) (providing that an order approving a final report and distribution is "res judicata of all matters covered by that order and all questions that should have been raised at the hearing upon the final account and petition for distribution"); *In re Ostlund's Estate*, 57 Wash. 359, 364-66, 106 P. 1116 (1910) (determining that a probate court decree distributing property is final).

*6 Sidney primarily relies on *In re Peterson's Estate*, 12 Wash.2d 686, 123 P.2d 733 (1942), to support his argument. Sidney asserts that according to *Peterson*, interested parties can contest distribution orders or periodic reports at any time. 12 Wash.2d at 716, 123 P.2d 733. In *Peterson*, the court noted that

[t]he order with which we are here concerned, however, was not an interim order, nor did it partake of the nature of such an order. It purported to be a *final* order fixing the entire allowance for fees over and above what had already been allowed some years before. No such order should have been made, nor should ever be made, prior to the final accounting, for it is then that all the interested parties are given notice according to the statute and have the right to be heard upon all matters affecting the administration and distribution of the

estate.

12 Wash.2d at 717, 123 P.2d 733. Sidney argues that the 1998 closing plan was either an interim order and not a final order under RCW 11.76.030, or a final order that should not have been entered.

The 1998 closing plan was entered under RCW 11.76.030. Although the law is settled on the finality of orders entered under RCW 11.76 .030, the peculiar circumstances of this case weigh against our simply finding the 1998 closing plan appealable as a final order at the time it was entered. *E.g.*, *Batey*, 35 Wash.2d at 796, 215 P.2d 694.

Days before the hearing on the closing plan on January 21, 1997, the trial court dismissed Gary's claims against William for improper administration of the Estate as a sanction under CR 37, and we reversed this decision and remanded. *DelGuzzi I*, 1999 WL 10081 at *3, 5-6. On remand, the trial court "again dismissed [Gary's] claim, reasoning that at the January 21, 1997, hearing on [William's] final report and accounting for the estate, [Gary] had adequate opportunity to raise any and all claims and had lost." *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *3.

In the second appeal of the dismissal, in 2001, we wrote,

[William] contends that res judicata bars [Gary's] claims because [Gary] had a chance to litigate fully those claims in the Final Accounting hearing of January 21, 1997. The record is to the contrary. Because another judge had dismissed [Gary's] wrongful-estate administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to [William's] final accounting of the estate. [Gary] neither presented nor had an opportunity to present his claims at that hearing.

DelGuzzi II, 108 Wash.App. 1003, 2001 WL 1001082 at *7.

We based our decision that the second dismissal was improper on a number of factors. First, because the claims had already been dismissed by the time of the hearing on the closing plan, Gary had no claims before the trial court for it to rule on. *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *7. "Second, although at the Final Accounting hearing, [Gary] could have alleged that [William] had breached his fiduciary duties, [Gary] had no evidence to support such allegations" because the trial court had previously denied compelling answers to his discovery requests. *DelGuzzi II*, 108 Wash.App. 1003,

2001 WL 1001082 at *7. Consequently, "because he could not compel discovery and because he no longer had an active claim, [Gary] could not have offered crucial evidence in the previous proceeding to establish the necessary facts underlying his dismissed claims." *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *7. We will not disturb this reasoning in the appeal now before us.

B. Interim Distribution Orders Entered Pursuant to 1998 Closing Plan

*7 Even assuming that the 1998 closing plan could not be appealable as a final order when entered, however, we still must decide whether it is proper to address Gary's (now Sidney's) appeal in 2009, eleven years after the entry of the 1998 closing plan. Ellis argues that the interim distribution orders made under the terms of the closing plan cannot now be appealed. We agree that these orders were final when entered and Sidney cannot now raise issues on appeal that arose before the entry of the second interim distribution order, on June 2, 2006.

In 2005, Ellis moved to approve a disbursement to the administrative claimants. Sidney objected and requested that the trial court deny the disbursement, order a constructive trust on all assets until "the Estate of Gary DelGuzzi has been fully compensated for its property that has been converted, disappeared or gone missing during the probate," deny motions to quash subpoenas for estate records, allow the parties to meet to resolve some procedural issues, and set the matter for trial.⁸ The trial court granted the motion for the disbursement and quashed the subpoenas. Sidney did not appeal.

Ellis filed an annual report in January 2006, summarizing fund distributions and properties sold. She filed a second interim distribution motion on May 18,⁹ 2006, again to make a distribution to the administrative claimants. The trial court approved the distribution on June 2, 2006. Sidney did not appeal.

Ellis cites *Tucker v. Brown*, 20 Wash.2d 740, 800, 150 P.2d 604 (1944), for the proposition that "interim orders made during the course of probate after notice of the hearing are final in their nature and cannot be attacked or litigated at the hearing upon the final report." Sidney counters, citing *Peterson*. That case is inapposite.

The trial court entered its order in *Peterson* on an ex parte basis. Our Supreme Court refused to declare the order final and appealable in part because the affected parties had not been notified and, thus, could not object. *Peterson*, 12 Wash.2d at 717-18, 123 P.2d 733. Here, in contrast, Gary (and later, Sidney) does not argue lack of

notice or opportunity to object as to any order. Moreover, as noted, multiple cases stand for the proposition that probate distribution orders made with proper notice and opportunity to object are final and appealable when entered. *Manning*, 78 Wash.2d at 548, 477 P.2d 635; *Batey*, 35 Wash.2d at 796, 215 P.2d 694; *Bostock*, 198 Wash. at 292, 88 P.2d 445; *Ostlund*, 57 Wash. at 364-66, 106 P. 1116.

In order to determine the finality of the 2005 and 2006 orders, we must decide whether an order that the parties consider an “interim” order, contemplating further action (as opposed to an order that closes an estate), can be a final order. Here, the trial court entered the 2005 and 2006 interim distribution orders pursuant to the 1998 closing plan and neither order fully dismissed the action.

As noted, the *Tucker* case addresses orders issued by a trial court in probate matters. 20 Wash.2d at 800-01, 150 P.2d 604. In that case, an administrator filed an accounting and report on December 15, 1937, but the action remained open. *Tucker*, 20 Wash.2d at 794, 150 P.2d 604. The court recognized the legal rule that “interim orders made during the course of probate after notice of the hearing are final in their nature.” *Tucker*, 20 Wash.2d at 800, 150 P.2d 604. Although the *Tucker* court did not find the 1937 order final on factual grounds, it repeated “[t]here can be no quarrel” with the legal rule of finality. 20 Wash.2d at 800, 150 P.2d 604; see also *In re Merlino’s Estate*, 48 Wash.2d 494, 496, 294 P.2d 941 (1956) (stating that “[a]n interim order made during the course of probate, after notice of the hearing, is final in its nature”); *In re Krueger’s Estate*, 11 Wash.2d 329, 351, 119 P.2d 312 (1941) (determining that interim order of approval of periodic report of estate estops those with notice of the proceedings from “objecting thereto at the final hearing”).

*8 We apply this probate rule here and note that, but for the peculiar procedural background of this case discussed in the second appeal, the 1998 closing plan would have been final at the time it was entered. This is because the parties had notice and an opportunity to challenge the closing plan order. Further, the order addressed the propriety of William’s administration, analyzed past distributions, and set up a plan for future distributions.

When we view the 2005 and 2006 interim distribution orders in conjunction with the 1998 closing plan, we see that the interim distribution orders became final when entered. That is, because Sidney had notice of the interim actions and, in fact, filed a full objection to the 2005 proposed distribution that addressed the underlying problems that he identified with the overall administration of the Estate, the orders became final when entered.¹⁰

Thus, the only issues Sidney can raise in this third appeal are those arising out of Ellis’s actions taken between the date of the 2006 interim distribution order through the 2007 final closing order. We now address Sidney’s

challenges to the 2007 final closing order.¹¹

The 2007 Closing Order

Ellis filed a supplemental report on June 11, 2007, and the trial court entered an order approving the final distribution, closing the case on submission of certain receipts, and discharging the bond of the personal administrator. The 2007 closing order also addressed a \$15,643.45 distribution and the disposition of a parcel of real estate. This order is appealable.

A. Standards of Review

In general, because proceedings for probate of wills are equitable, we review the record de novo. *In re Estate of Black*, 116 Wash.App. 476, 483, 66 P.3d 670 (2003), *aff’d on other grounds*, 153 Wash.2d 152, 102 P.3d 796 (2004). *Black*, however, sets out a more lenient standard of review for the award of attorney fees in probate:

RCW 11.96A.150 gives the court discretionary authority to award attorney fees from estate assets. And we will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion. Discretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. Because of the “almost limitless sets of factual circumstances that might arise in a probate proceeding,” the legislature “wisely” left the matter of fees to the trial court, directing only that the award be made “ ‘as justice may require.’ ”

116 Wash.App. at 489, 66 P.3d 670 (citations omitted).

Ellis asserts that she acted in accordance with the 1998 closing plan and that the trial court did not abuse its discretion in approving the closing of the Estate. Sidney disputes this assertion on numerous grounds.

B. Closing Procedure

Sidney first contends that Ellis failed to follow the procedures set forth in RCW 11.76.020-.050 and RCW 11.28.240. Sidney argues that these statutory requirements are mandatory and that the trial court erred in closing the Estate.¹² In particular, he claims that RCW 11.76.030, .040, and RCW 11.28.240 require that all devisees be named and informed of the closing, and RCW 11.76.030 also requires description of undisposed estate

property.

*9 These procedural issues relate to entry of an order to close an estate under RCW 11.76.030 and should have been fully litigated by Gary at the time the trial court entered the closing order under this statute in 1998. The 2005 and 2006 interim orders, as well as the 2007 closing order, all proceeded on the correct assumption that the trial court had entered a closing plan under RCW 11.76.030 in 1998.

Although, as previously discussed, we recognize that the 1998 closing plan could not have been final as to claims of William's incompetence, Sidney's predecessor could have previously litigated these procedural claims. In addition, in 2006, Sidney himself moved to close the Estate and he did not allege any procedural errors or administrator incompetence. His argument about Ellis's closing procedures fails.

C. Attorney Fees

Sidney next contends that Ellis failed to comply with the 1998 closing plan when paying fees to William and to the Short, Cressman & Burgess law firm.¹³ The majority of Sidney's argument regarding fees, however, does not discuss these payments and, instead, argues that earlier payments under the 1998 closing plan intentionally, by private agreement, violated the 1:4 fee ratio set out in the plan.¹⁴ To the extent that these objections regarding previous payments address events occurring *before* 2006, we do not entertain them. As previously discussed, this appeal may only raise issues occurring *after* the 2006 interim distribution order.

In 2007, Ellis distributed the following funds: \$3,130.13 to William's estate and \$2,343.97 to Short, Cressman & Burgess. Although Sidney attacks multiple earlier and larger payments to William and Short, Cressman & Burgess, he does not raise any specific assignment of error related to the two 2007 payments. Therefore, we do not address this argument because it has not been properly presented for review. RAP 10.3(a)(4), (6); *State v. Stubbs*, 144 Wash.App. 644, 652, 184 P.3d 660 (2008).

D. Receipt Filings

Sidney further contends that Ellis failed to file proof of receipts and disbursements as required by the 2007 closing order. The 2007 final closing order states "that this estate shall be closed upon the filing of receipts showing disbursement and distribution of the remaining

property of this estate." CP at 1784-85. The remaining real property listed in the order and in the Ellis declarations was a piece of real estate known as "9999 Bumpy Rd, Port Angeles, WA," that Ellis proposed distributing to an administrative creditor in lieu of additional payment. CP at 268. A handwritten addition to the order addressed property that could not be profitably sold and allowed Ellis to dispose of the property for \$1,200 if no fees or costs of the sale were paid by the Estate. The final cash in the Estate amounted to approximately \$15,000, to be paid out to various administrative claimants as set out in Ellis's declaration.

It is apparent to us that Ellis cannot file the receipts because she states she has not yet made the final disbursements under the order. Thus, this argument lacks merit and we do not address it further.

E. Account for Property Sales

*10 Sidney also contends that Ellis failed to account for various property sales during her administration. As discussed, the 2007 closing order covers only certain pieces of real property and a small sum of cash. Sidney argues extensively about other property sales and specifically challenges the sale of property known as "999 Three Sisters Road." Appellant's Amended Br. at 33. Ellis responds that this sale occurred in 2005 and was covered by the 2005 interim distribution order.

Sidney objected to the property sale in 2005, before the trial court entered the 2005 distribution order. The trial court ordered distribution of the proceeds of the property in the 2005 order and Sidney did not appeal. For the reasons previously discussed regarding the need to appeal the interim distribution orders at the time the trial court enters them, we do not address this issue.

F. Inventory and Appraisal

Finally, Sidney contends that Ellis failed to provide a verified inventory and appraisal. RCW 11.44.015, .025, and .050. Sidney requested an inventory and appraisal from Ellis in 2006. Specifically, he argued that, because William's prior inventory did not list certain properties that Ellis stated she had sold, she had a duty to re-inventory the missing parcels.¹⁵

Before Sidney filed a motion for an inventory, Ellis sent him a letter dated June 7, 2006, in which she stated that she did not believe a new inventory was needed but asked him to consider the letter as a new inventory and appraisal. She explained that the only remaining

property in the Estate was the Bumpy Road parcel, that had a pending purchase offer of approximately \$25,000. She added that she expected to receive an additional \$4,500 from a secured promissory note. She attached tax returns to the letter.

Neither party mentions whether the trial court explicitly considered Sidney's 2006 motion. Nevertheless, Sidney cannot identify the harm Ellis caused by her alleged failure to further inventory and appraise unnamed properties. Neither does he request any remedy on remand for this alleged neglect. As stated in Ellis's letter, all parties knew of the Bumpy Road property and that she was not going to expend Estate funds preparing additional formal inventories and appraisements.

Any remedy for Ellis's failure to file an inventory is discretionary. *Clancy v. McElroy*, 30 Wash. 567, 568, 70 P. 1095 (1902) (stating that court has discretion to retain executor even when executor fails to file a required inventory in a timely manner). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *In re the Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005).

Here, the trial court did not abuse its discretion in not ordering an inventory or appraisal or otherwise penalizing Ellis because her letter sets out reasonable grounds for her decision not to prepare a new inventory and appraisal. *See* RCW 11.44.050; *Clancy*, 30 Wash. at 568-69, 70 P. 1095.¹⁶ The argument fails.

G. Change of Venue Order without Consolidation

*11 Sidney next contends that the trial court erred in entering its change of venue order moving Sidney's 2006 claim to King County.¹⁷ He asserts that the trial court also should have consolidated the July 1996 and 2006 cases before moving them to King County. Otherwise, he asserts, that failure to consolidate the July 1996 case with the nearly identical 2006 case "makes an orphan of the 1996 ... complaint" and we should not allow both matters to continue in two different counties. Appellant's Amended Br. at 37-38.

In December 2007, the Clallam County Superior Court changed venue of the 2006 case to King County. The order did not address consolidation of the 1996 and 2006 cases. By an amended notice of appeal, Sidney appeals the trial court's change of venue without also consolidating the two cases.

Footnotes

¹ Both Jack and Gary DelGuzzi have now died. To avoid confusion because there are now two DelGuzzi estates, we use Gary's

Sidney filed his initial notice of appeal, addressing the issues related to Ellis's administration and the trial court closing plan, on August 21, 2007. (Clallam County case No. 8087.) He filed an amended notice of appeal on January 9, 2008. The amended notice of appeal refers to Clallam County cause number 8087, but the order attached to the amended notice of appeal was entered in Clallam County cause number 06-2-01085-2, the 2006 case.

Loretta challenges our authority to review the consolidation issue. She argues that RAP 2.2 bars appeal of an interlocutory order as a matter of right. We agree. Orders addressing venue as final judgments are not appealable under RAP 2.2. But a party who seeks to challenge venue and other key non-final issues may seek discretionary review under RAP 2.1(a)(2) and RAP 2.3, instead of waiting until a trial court issues a final order. *Lincoln v. Transamerica Inv. Corp.*, 89 Wash.2d 571, 577-78, 573 P.2d 1316 (1978); *Hauge v. Corvin*, 23 Wash.App. 913, 915-16, 599 P.2d 23 (1979); 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 6.26, at 174-75 (2003). Sidney did not seek discretionary review, and we decline to address this argument further.¹⁸

ATTORNEY FEES

Ellis requests fees and costs under RAP 18.9(a). She argues that because the Estate is administratively insolvent, the administrator and other professionals assisting with the Estate have been harmed by the costs of a frivolous appeal. We cannot say that the appeal is so lacking in merit as to be frivolous, and we decline to award attorney fees on that basis.

Affirmed in part (issues related to events arising between the entry of the 2006 interim distribution order and the 2007 closing order); and dismissed in part (time-barred issues¹⁹ and the appeal of the trial court's failure to order consolidation).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: VAN DEREN, C.J., and HUNT, J.

first name. The same use of a first name applies for William Wilbert, a former administrator of the Estate; Loretta Wilbert, the current representative of William's estate; Margaret Shaw, a past personal representative of Gary's estate; and Sidney Shaw, the current personal representative of Gary's estate and an appellant.

Gary died in 2004. Margaret served briefly as Gary's estate's personal representative but died in August 2004. Her husband, Sidney, then replaced her.

William died in 2004. Loretta Wilbert serves as William's personal representative. Loretta is a respondent.

After William's death, David Martin served briefly as the Estate's administrator. Retired Judge Gary Velie replaced Martin for a short time, starting in October 2004. The trial court appointed Kathryn Ellis, a respondent, on January 13, 2005.

- 2 We describe the July 1996 complaint based on *DelGuzzi v. Wilbert*, noted at 108 Wash.App. 1003, 2001 WL 1001082. No party attached the July 1996 petition and complaint to briefing, nor did any party provide an accurate record citation for this document. We note that an unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *Island County v. Mackie*, 36 Wash.App. 385, 391 n. 3, 675 P.2d 607 (1984). Unpublished cases can also be cited to establish facts in a different case that are relevant to the current case involving the same parties. *In re Pers. Restraint of Davis*, 95 Wash.App. 917, 920 n. 2, 977 P.2d 630 (1999), *aff'd*, 142 Wash.2d 165, 12 P.3d 603 (2000).
Loretta provided an additional complaint against her as Appendix 10 to her brief. She states, "The allegations in th[is] suit are similar to those in the July 1996 Petition." Loretta Br. at 12. The allegations included that William (1) engaged in improper self dealing with the Estate; (2) abused his fiduciary relationship; (3) acted only to benefit him, his family, and his own businesses; (4) used assets from the Estate to fund business ventures in Costa Rica and Panama and shielded information and accounting related to these venture from Estate beneficiaries; (5) never provided an accurate inventory and accounting of the Estate; (6) wrongfully disposed of assets at less than fair market value; and (7) improperly retained real estate commissions.
- 3 William later moved for a hearing on his final report and petition for decree of distribution after filing an order of solvency, inventory of appraisal of the Estate assets, and comprehensive accounting of the Estate. The trial court entered a stipulated order setting this hearing for the same dates as the previously set hearing on the removal petition. After conducting hearings, the trial court entered a decision, which we discuss in more detail in this opinion.
- 4 The trial court held hearings on the final report on January 21-23 and March 24-25, 1997.
- 5 We agree with Ellis that the claims raised in the removal petition are moot due to William's death; only the damages petition remains potentially viable. See footnotes 2 and 19, herein, for further discussion.
- 6 In April 2008, Martin moved to amend the 2006 complaint, substituting himself for Sidney based on Martin's having purchased the claims from Sidney. At the time of argument, this motion remained pending.
- 7 RAP 5.2(a) requires an appeal be filed within 30 days of the entry of the trial court's order.
- 8 In the earlier appeals, we determined that Gary had been unable to fully pursue his claims due to discovery issues. *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *7. In the current appeal, however, Sidney's attorney, Cruikshank, states that he received a "big discovery break" in 2004, after William died and Martin temporarily served as the administrator for the Estate. Cruikshank Reply Br. at 11, 5. We note that this "big discovery break" occurred *before* the trial court entered the 2005 distribution order, such that issues related to Gary's earlier alleged inability to pursue his claims do not control here. *See also Shaw v. Short, Cressman & Burgess, PLLC*, noted at 150 Wash.App. 1017, 2009 WL 1366272, at *4 (stating that Shaw knew or should have known of alleged irregularities prior to 2004).
- 9 When Sidney moved to close the Estate on May 8, 2006, he did not raise any issues of administrator incompetence.
- 10 Moreover, as discussed in footnote 8, herein, the alleged restrictions on the representative's inability to fully pursue claims against William (or his estate) that arguably existed in 1998, no longer existed by 2005.
- 11 After oral argument, Sidney filed supplemental documents retrieved from earlier DelGuzzi appeal archives to further address

Ellis's arguments regarding the appealability of the 1998 closing plan and the interim distribution orders. The documents include a notice for discretionary review dated July 19, 2004; a ruling denying review; a second motion dated November 5, 2004, with additional documents related to that motion, including a ruling denying review.

The July 19, 2004 motion sought to appeal the trial court's continuance of a hearing Margaret requested on motions to appoint an administrator for the Estate, to vacate the 1998 closing plan, and for other relief. Our commissioner denied review on the grounds that the trial court had "not yet made a decision or entered an order" granting or denying the requested relief. Commissioner's Ruling (July 29, 2004) at 3.

The November 5, 2004 motion sought review of an order denying partial summary judgment to Margaret via an order to show cause. In the trial court, Margaret sought summary judgment on portions of the claims presented in the July 1996 complaint. The commissioner denied the motion because "[t]his court has been provided very little record and cannot fairly review the trial court's decision," and because factual disputes remained with respect to certain allegations, making summary judgment inappropriate. Commissioner's Ruling (Nov. 5, 2004) at 2-3.

Neither of these motions for discretionary review concern the interim distribution orders (both motions were submitted before the interim distribution orders were issued). Further, the motion that references the 1998 closing plan appeals only an alleged scheduling error. Consequently, these supplemental authorities have no impact on our analysis of the appealability of the 1998 closing plan or the interim distribution orders.

- 12 The parties do not clearly refer to the Estate as either closed or not closed. Sidney argues that the trial court erred in closing the Estate and that the Estate is not yet closed. Ellis states that she has not distributed the funds and property that were the subject of the 2007 final closing order. The 2007 closing order states that the Estate shall be closed upon the filing of receipts that show final disbursements have been made. As of oral argument before us on this current appeal, this had not been done.
We note that Division One observed that the Estate is closed. *Shaw v. Short, Cressman & Burgess, PLLC*, noted at 150 Wash.App. 1017, 2009 WL 1366272, at *2 n. 5. Because the probate court entered a closing plan and a closing order that the administrator has substantially complied with, and because the status of the Estate was not relevant to the Division One matter, we do not consider ourselves bound by this statement.
- 13 Short, Cressman & Burgess represented Gary and William in their capacity as personal representatives between 1982 and 1991. In 1994 and 1996, Gary asserted tort claims against the law firm. The trial court dismissed the claims based on lack of standing under *Trask v. Butler*, 123 Wash.2d 835, 845, 872 P.2d 1080 (1994), and Gary did not appeal. We granted Short, Cressman & Burgess leave to file an amicus brief in this matter concerning claims as to their attorney fees.
- 14 Specifically, he argues that the 1998 closing plan set out a certain ratio of payments to two parties, William and Short, Cressman & Burgess, and that the parties subsequently entered into a private agreement for a different ratio in violation of the plan. The 1998 closing plan authorized the administrator to make pro rata distributions to the administrative claimants and stated, "[a]ny pro rata interim distribution shall be based on the ratio of the amount of each administrative claim to the total amount of all three administrative claims." CP at 1964.
Sidney observes that the 1998 plan payments for past work to William and Short, Cressman & Burgess resembled a 1:4 ratio, approximately \$400,000 to Short, Cressman & Burgess and \$1.6 million to William. Sidney alleges that in exchange for tolling the applicable statutes of limitations related to possible disputes between them, William and Short, Cressman & Burgess changed the payment ratio from 1:4 to 1:1. We note that the ratio of \$3,130.13 to William's estate and \$2,343.97 to Short, Cressman & Burgess is not 1:1 and that Sidney does not address whether these payments are within the specified ratio set out in the 1998 closing plan.
- 15 Sidney's motion did not identify the missing properties nor does he list them on appeal.
- 16 Sidney also contends that Ellis filed deficient bookkeeping records for the period 1997-2004. Sidney bases his argument on gaps in the accounting occurring up to 2004. As previously discussed, we do not address issues pertaining to actions prior to the 2006 interim order.
- 17 The events leading up to the trial court's decision to move the 2006 case to King County do not clearly demonstrate that Sidney requested consolidation in conjunction with Loretta's November 2007 request to change venue. On November 2, 2007, Loretta moved to change the venue of the 2006 case to King County. The supporting materials indicate that Loretta unsuccessfully sought attorney Cruikshank's stipulation to the change. Cruikshank instead moved for a change of venue "and other relief" on October 26, 2007, two weeks before Loretta's motion was filed, but this "other relief" is not described. Loretta Br. Append. 11, at 3. In the record, there is also a motion dated October 19, 2007, in which Martin requested consolidation of the cases and a change of venue to King County.

Attached to Sidney's reply brief is a different, earlier motion prepared (but apparently not filed) by Loretta discussing venue of the 2006 case *and* consolidation of the 2006 and 1996 cases. This motion requested consolidation of the 1996 and 2006 cases. This motion was noted for hearing on June 29, 2007, and is signed by Loretta's attorney, but it does not have a "filed" stamp and does not appear in the Clerk's Papers at 1416, as stated in the handwritten notation on the first page of the copy attached to the reply brief.

- 18 Loretta argues that other procedural irregularities require us to reject review of this issue. These include a claim that the trial court's consolidation order was entered in another matter, the 2006 case, and that Sidney attempted to consolidate a trial-level matter (the 2006 case) with an appellate matter (the underlying Estate administration, that was already on appeal at the time the trial court denied the consolidation request). Because we do not address Sidney's argument, we also do not address the other procedural claims that Loretta asserts.
- 19 Sidney's amended opening brief identifies the following as problems with orders entered from 1982-2004: fees for estate administration that were greater than proven, fees paid to William even though he breached fiduciary duties, improperly document attorneys fees, overhead and expense reimbursements contrary to contracted amounts, improperly paid real estate commissions, improper interest on fees and expenses, interest payments on loans made to the estate that were the result of self dealing, and interest paid to attorneys in violation of a probate court order and fiduciary duties, unexplained payments. The brief provides additional detail of pre-2006 activities: (1) the estate made unjustified payments to the law firm of Chicoine & Hallett and other entities in the time period around 1993-1994; (2) Short, Cressman & Burgess and William, at some point before 1998, entered into an unauthorized "private agreement" to reapportion fees and harmed the estate because the agreement purported to toll any tort claims related to the estate as between these two parties, Appellant's Amended Br. at 19-21; (3) a report issued in 1996 (the Kleinman report) showed that William was overpaid for his work and received unauthorized real estate commissions; (4) William's accounting of May 15, 1998, requested compensation for unexplained overhead and fees; (5) William sold a Malcolm Island property for significantly less than its actual value; (6) the 1998 closing plan miscalculated fees owed to Short, Cressman & Burgess; (7) loans should not have made to the estate by William and Short, Cressman & Burgess in the mid-1980s and that there was no business justification for the loans; and (8) the Kleinman report shows missing assets. As for administrator Ellis's early activities, Sidney claims she failed to investigate the above claims and that she did not properly account for various sales of property.
- We note that many of these issues overlap with those in the still-pending July 1996 complaint, as described by the parties. *See* note 2, *supra* (describing 1996 action). We recognize that this opinion disposing of these issues has a preclusive effect on the unresolved July 1996 action.

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EXHIBIT 2 to Respondent Loretta Wilbert's brief in *Martin v. Wilbert*,
case no. 64231-6-I

Martin v. Ellis, 154 W 1041, 2010 WL 599625 (2010)

MARTIN v ELLIS

Martin v. Ellis, Not Reported in P.3d (2010)

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Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 1.

DAVID L. MARTIN, a married man as his separate
estate, Appellant,
v.

Kathryn A. ELLIS, Personal Representative of the
Estate of Jack DelGuzzi; and Doe Defendants 1
through 20, Inclusive, Respondent.

Nos. 62598-5-I, 63493-3-I.Feb. 22, 2010.

Appeal from King County Superior Court; Honorable
Monica Benton, J.

Attorneys and Law Firms

Charles Malcolm Cruikshank, III, Attorney at Law,
Seattle, WA, for Appellant.

Rosemary Jane Moore, Sam Breazeale Franklin, Lee
Smart PS Inc, Seattle, WA, for Respondent.

Opinion

UNPUBLISHED OPINION

DWYER, A.C.J.

*1 A superior court's order closing an estate is a final judgment that precludes a litigant from bringing claims in a collateral action that could have been brought in the probate proceeding. David Martin could have raised all of the claims that he brought in this case in the Estate of Jack DelGuzzi probate proceeding. In accordance with the doctrine of res judicata, Martin is precluded from bringing the claims constituting this action. Moreover, any reasonable investigation by Martin's attorney, Charles Cruikshank, would have revealed that there was no proper legal basis for advancing these claims. Thus, the trial court correctly awarded Kathryn Ellis attorney fees pursuant RCW 4.84.185 and imposed sanctions on Cruikshank pursuant to CR 11. Accordingly, we affirm.

I

This appeal is the sixth concerning claims relating to the administration of the Estate of Jack DelGuzzi (the "estate"). See *In re Estate of DelGuzzi*, noted at 150 Wn.App. 1058, No. 36682-7-II, 150 Wash.App. 1058, 2009 WL 1863892 (Wash.App. June 30, 2009) (*DelGuzzi IV*); *Shaw v. Short & Cressman*, noted at 150 Wn.App. 1017, No. 60995-5-I, 150 Wash.App. 1017, 2009 WL 1366272 (Wash.App. May 18, 2009); *In re Estate of DelGuzzi*, noted at 108 Wn.App. 1003, No. 24860-3-II, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Aug. 31, 2001) (*DelGuzzi III*); *DelGuzzi v. Wilbert*, noted at 105 Wash.App. 1004, No. 45022-1-I, 105 Wash.App. 1004, 2001 WL 180995 (Wash.App. Feb. 26, 2001) (*DelGuzzi II*); *DelGuzzi v. Wilbert*, noted at 93 Wash.App. 1048, No. 21752-0-II, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Jan. 8, 1999) (*DelGuzzi I*). These earlier opinions explain in detail the underlying probate proceeding and the various challenges made to the estate's administration.¹ Our discussion of the facts will be limited to those necessary to explain our disposition of this cause.

The parties involved in this case and the individuals and entities implicated in the earlier litigation are as follows.² The Estate of Jack DelGuzzi constitutes the property at the center of the underlying dispute herein and in those related cases listed above. Kathryn Ellis, the defendant-respondent in this action, is the personal representative of the estate. Ellis was appointed to serve as such in 2005 by the Clallam County Superior Court, which conducted the probate proceeding concerning the estate beginning in 1978 and ending with its closure in 2007. See *DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *3. Ellis replaced David Martin, the plaintiff-appellant in this action, who had briefly served as the estate's personal representative in 2004. See *Shaw*, 150 Wash.App. 1017, 2009 WL 1366272, at *2. Prior to Martin's service, William Wilbert served as the estate's personal representative from 1982 until his death in 2004. The law firm of Short Cressman & Burgess (SCB) served as the estate's legal counsel from 1982 to 1991. See *Shaw*, 150 Wash.App. 1017, 2009 WL 1366272, at *1-*2. Thereafter, the firm of Chicoine & Hallett (CH) represented Wilbert in his capacity as the estate's personal representative. See *Shaw*, 2009 WL 1366272, at *1-2*.

*2 The following individuals have challenged the administration of the estate. Gary DelGuzzi, Jack's son and sole heir, first challenged Wilbert's administration of the estate in 1994. See *DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *1. Until his death in 2004, Gary

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continued to litigate claims against Wilbert and the law firms representing Wilbert and to challenge the administration of the estate in the probate proceeding. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *1-*3. Upon Gary's death, Sidney Shaw became the personal representative of Gary's estate and was substituted for Gary in both the lawsuits that Gary had instituted and in the probate proceeding. *See Shaw*, 150 Wash.App. 1017, 2009 WL 1366272, at *2. As explained below, in 2007, Shaw assigned certain interests and claims held by Gary's estate to Martin. It is on the basis of this assignment that Martin brought the claims constituting the subject matter of the action that is presently before us. At all pertinent times, attorney Charles M. Cruikshank represented Gary, Shaw, and Martin in both the probate proceeding and the collateral lawsuits.

In July of 2007, the Clallam County Superior Court entered an order closing the probate of Jack's estate, approving Ellis's final report, and granting her motion for final distribution of estate assets. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *3. Shaw objected to Ellis's motion and challenged her administration of the estate in the probate proceeding. The superior court's 2007 closing order came nine years after the same court had entered a closing plan. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, *1-*4. It also followed the same court's approval, in 2005 and 2006, of interim reports and interim distributions of estate assets, to which Shaw objected, but from which he did not directly appeal. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, *1-*4. In her 2007 final report and motion for final distribution, Ellis listed the estate properties she had sold, the proceeds from those sales, and the creditor and administrative disbursements she had made upon providing notice to interested parties. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *8.

In May of 2007, two months prior to the closing of the estate, Shaw assigned certain claims and interests held by Gary's estate to Martin. In November of 2007, Martin brought causes of action against Ellis for negligence and breach of fiduciary duty.³ Martin subsequently prosecuted his claims against Ellis after Shaw had objected to Ellis's administration in the probate proceeding and while Shaw appealed from the 2007 closing order.

For the purposes of this appeal, the critical fact is that Shaw and Martin pursued parallel actions concerning Ellis's administration of the estate in different judicial forums. That they did so raises the core issue in this case: whether Martin is precluded from litigating the claims brought in this action.

Because Shaw challenged the administration of the estate

in the probate proceeding prior to Martin's commencement of this action, we describe the issues raised by Shaw before describing the claims brought herein by Martin. As Shaw had done with the 2005 and 2006 reports and related motions for interim distributions, he objected in the probate proceeding to the 2007 report and the motion for final distribution and closure, alleging that Ellis had been negligent and had breached her fiduciary duty to the estate. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, *8-*10. Shaw asserted that Ellis had failed to follow statutory notice requirements set forth in RCW 11.28.240 and that she had failed to follow statutory procedures for submitting the final report set forth in RCW 11.76.020-.050. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *8. In particular, Shaw claimed that Ellis failed to notify all devisees of the proposed closing and failed to describe estate property that had not been disposed. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *8. Further, Shaw claimed that Ellis should not have authorized the payment of attorney fees from the estate to SCB. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *9. However, Shaw did not assign specific error to administrative payments made to Wilbert's estate and to SCB in 2007. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *9.

*3 In addition, Shaw asserted that Ellis had failed to properly account for various estate properties near Port Angeles, Washington, in Costa Rica, and in British Columbia. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *9-*10, *11 n. 19. Shaw claimed that Ellis had failed to provide a verified inventory and appraisal of estate property in violation of RCW 11.44.015, .025, and .050. Shaw also raised issues concerning the 1998 closing plan and the superior court's 2005 and 2006 interim orders from which he had not appealed. In addition, he asserted many of the contentions that had been previously raised by Gary in the litigation commenced in 1994 and in various challenges to the administration of the estate, including the allegedly unjustified payment of fees to SCB, that various of Wilbert's actions had constituted breaches of his fiduciary duty, and that Wilbert had mishandled estate property. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *11 n. 19.

The Clallam County Superior Court, in the probate proceeding, and Division II of this court, on appeal, rejected all of Shaw's contentions. On June 30, 2009, Division II affirmed the superior court's 2007 closing order and dismissed as untimely Shaw's challenges to the superior court's pre-2007 approval of interim distributions. *See DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *11. With respect to all actions taken before or in conjunction with the 2006 interim order, Division II concluded that either Shaw or Gary

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should have raised issues concerning those actions at appropriate earlier times and that Shaw was time-barred from raising them on appeal because of his and Gary's failure to appeal directly from the various challenged orders. See *DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *8-*11. With respect to the issues raised by Shaw concerning Ellis's actions in 2006 and 2007, the court found no merit to Shaw's contentions. See *DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *8-*11. Further, the court noted that its decision had "a preclusive effect" on the unresolved issues contained in the litigation commenced in 1994. *DelGuzzi IV*, 150 Wash.App. 1058, 2009 WL 1863892, at *11 n. 19.

We turn now to describing the claims brought by Martin in this action. Again, Martin brought causes of action against Ellis for negligence and breach of fiduciary duty. Martin generally alleged that Ellis violated statutory requirements and orders of the Clallam County Superior Court relating to the accounting and disbursement of estate assets and the general administration of the estate. Specifically, Martin alleged that Ellis improperly disbursed payments to SCB based on erroneous fee requests, effectively overpaying SCB for legal services rendered from 1982 to 1991 during Wilbert's tenure as personal representative.

With respect to the marshaling and accounting of estate assets, Martin alleged that Ellis had failed to properly investigate and account for estate property in British Columbia, which Wilbert had disposed of while administering the estate and which was the subject of an objection raised by Shaw in 2005 to an interim distribution of estate assets. Martin further alleged that Ellis mishandled the sale of various parcels of property located near Port Angeles, Washington. Martin alleged that Gary's estate held partial interests in these properties, which were also part of the 2005 interim distribution. Martin further alleged that Ellis mishandled the assets of different business organizations held by the estate in which Gary's estate also allegedly held partial interests. In addition, Martin alleged that Ellis failed to take steps to recover from Wilbert's estate allegedly improper real estate sales commissions and payments that Wilbert had assigned to himself while representing Jack's estate. Finally, Martin also alleged that Ellis failed to comply with procedures for closing the estate set forth in RCW 11.28.240 and RCW 11.76.020-.050. Martin's claims do not relate to any action taken by Ellis in her capacity as personal representative of the estate subsequent to the 2007 closing order.⁴

⁴ In answering Martin's complaint, Ellis asserted numerous affirmative defenses, including the preclusive defenses of *res judicata* or claim preclusion and collateral estoppel or issue preclusion, as well as the preclusive defenses of judicial estoppel and equitable estoppel. Ellis also averred in her answer that Martin's complaint was

frivolous, indicating that she would seek an award of attorney fees pursuant to RCW 4.84.185.

Ellis subsequently moved for summary judgment of dismissal as to all claims. She argued both that Martin had failed to adduce evidence raising a genuine issue of material fact, resulting in her entitlement to judgment on the merits, and that various preclusion doctrines barred Martin from prosecuting these claims against her. The trial court granted summary judgment in Ellis's favor, concluding both that Martin had failed to raise a genuine issue of material fact and that the doctrine of collateral estoppel precluded him from attempting to recover against Ellis.

After the grant of summary judgment, Ellis moved for an award of attorney fees pursuant to RCW 4.84.185 and for the imposition of CR 11 sanctions against Cruikshank. The trial court granted Ellis's motion, expressly finding that Martin's action against Ellis "was frivolous in its entirety and advanced without reasonable cause," (1) because Ellis's powers as personal representative were restricted, (2) because Ellis had a duty to guard against the wastage of estate assets, (3) because Martin had failed to show injury, and (4) because Martin's claims were precluded by the outcomes of collateral judicial proceedings. The court also found that Cruikshank had violated CR 11 by failing to conduct a reasonable inquiry into Martin's claims to ensure that they were "well grounded in fact, warranted by existing law, or warranted by a good faith argument for the alteration of existing law." At the trial court's direction, Ellis subsequently filed a motion for an award of fees, requesting approximately \$115,000. She supported her request with a declaration and various billing documents. Martin and Cruikshank did not challenge Ellis's request or her calculation, other than to argue that summary judgment was inappropriate and that, therefore, an award of fees and sanctions was unwarranted. The trial court entered a final judgment awarding fees and imposing sanctions in the amount requested by Ellis, holding Martin and Cruikshank jointly and severally liable for the full amount of fees.

Martin timely appealed from the trial court's orders. Before the parties submitted their briefing, Division II of this court affirmed the 2007 closing order.

II

Martin contends that he should be allowed to prosecute his claims against Ellis in the trial court, asserting that the collateral proceedings in the Clallam County Superior Court do not preclude him from doing so. We disagree.

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Under the doctrine of res judicata or claim preclusion, a party is barred from relitigating “claims and issues that were litigated, or might have been litigated, in a prior action.” *Pederson v. Potter*, 103 Wash.App. 62, 69, 11 P.3d 833 (2000). The doctrine “ ‘puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.’ ” *Marino Prop. Co. v. Port Comm’rs*, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wash.2d 285, 287, 201 P.2d 215 (1949)). Although the trial court did not grant summary judgment on the basis that Martin’s claims were precluded under the doctrine of res judicata, relying instead on the doctrine of collateral estoppel, we may apply res judicata because we may affirm on any basis supported by the record. *State v. Carter*, 74 Wash.App. 320, 324 n. 2, 875 P.2d 1 (1994) (citing *State v. Grundy*, 25 Wash.App. 411, 415-16, 607 P.2d 1235 (1980)).

*5 Res judicata applies “where a prior final judgment is identical to the challenged action in ‘(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.’ ” *Lynn v. Dep’t of Labor & Indus.*, 130 Wash.App. 829, 836, 125 P.3d 202 (2005) (quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887 P.2d 898 (1995)). The doctrine applies to a collateral challenge to a judicial order closing an estate. *Norris v. Norris*, 95 Wash.2d 124, 131, 622 P.2d 816 (1980). Whether an action is barred by res judicata is a question of law that we review de novo. *Lynn*, 130 Wash.App. at 837, 125 P.3d 202.

Each element necessary to apply the doctrine in this case is met. In July of 2007, the Clallam County Superior Court entered a decree for the final distribution of estate assets and an order closing the estate. Division II of this court affirmed the superior court’s closing order. First, Martin’s causes of action involve the same subject matter as that at issue in the probate proceeding: Ellis’s administration of the estate and the estate assets. Second, as explained above, many of the causes of action brought by Martin are identical to those unsuccessfully raised by Shaw in both the probate proceeding and on appeal. Regardless of whether Shaw brought all of the causes under which Martin seeks recovery in this case, the causes that Martin has brought herein *could have* been raised in the probate proceeding. Neither in his briefing nor during oral argument was Martin able to point to a single cause of action that could not have been brought as a challenge to the probate of the estate.

Third, there is concurrence of identity between the persons and parties both in this action and in the probate proceeding because Martin is in privity with Shaw in Shaw’s role as personal representative of Gary’s estate. When different parties in separate suits are in privity with

one another, they are the same parties for purposes of res judicata. *Ensley v. Pitcher*, 152 Wash.App. 891, 902, 222 P.3d 99 (2009) (citing *Kuhlman v. Thomas*, 78 Wash.App. 115, 121, 897 P.2d 365 (1995)). Our Supreme Court has explained that

“[p]rivity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property. The binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in the hands of the former owner.”

United States v. Deaconess Med. Ctr., 140 Wash.2d 104, 111, 994 P.2d 830 (2000) (quoting *Owens v. Kuro*, 56 Wash.2d 564, 568, 354 P.2d 696 (1960)); *see also Woodley v. Myers Capital Corp.*, 67 Wash.App. 328, 337, 835 P.2d 239 (1992) (citing *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir.1990) (explaining that a nonparty in one suit is in privity with a party in an earlier suit for res judicata purposes if the nonparty has succeeded to the party’s interest in property, if the nonparty controlled prior litigation, or if the party adequately represented the nonparty’s interest in the prior proceeding)).

*6 Although Martin did not challenge Ellis’s administration of the estate in the probate proceeding, he obtained the ostensible right to do so as the assignee of claims held by Gary’s estate. These claims originate from Gary’s status as the sole heir of the estate. Shaw possessed power over these claims as the representative of Gary’s estate. Therefore, Martin is in privity with Shaw in Shaw’s role as personal representative of Gary’s estate.

The fourth element is closely related to the third, and it is also satisfied. For the persons for or against whom the claim is made to be of the same quality, the parties in the collateral action must be bound by the judgment in the prior proceeding. *Ensley*, 152 Wash.App. at 905, 222 P.3d 99 (citing 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27, at 464 (1st ed.2007)). There is no question that Martin and Ellis are bound by the 2007 closing order. The order discharged the probate of the estate and concluded Ellis’s duties as personal representative. Martin derives his claims from the interests in Jack’s estate that were held by Gary’s estate and assigned to Martin by Shaw. Further, the nature of a probate proceeding makes the final order closing the estate binding as to all parties claiming an interest in the estate. “ ‘[O]rders and decrees of distribution made by

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superior courts in probate proceedings upon due notice provided by statute are final adjudications having the effect of judgments *in rem* and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well.’ ” *Batey v. Batey*, 35 Wash.2d 791, 796, 215 P.2d 694 (1950) (quoting *Ryan v. Plath*, 18 Wash.2d 839, 857, 140 P.2d 968 (1943)). Division II concluded that Ellis provided sufficient notice of the petition for distribution. Therefore, Martin is bound by the 2007 closing order.

Martin’s claims amount to challenges to the manner in which Ellis administered the estate. Any challenge to Ellis’s administration of the estate should have been brought in the probate proceeding conducted in the Clallam County Superior Court. To allow Martin to collaterally attack the final order of distribution and the order closing the estate would prevent the superior court from ever bringing the probate of Jack’s estate to a close. By instituting this action against Ellis in the King County Superior Court, Martin, represented by Cruikshank, has engaged in nothing short of blatant forum shopping. The doctrine of *res judicata* bars him from doing so. The trial court correctly granted summary judgment of dismissal in Ellis’s favor.

III

Martin and Cruikshank contend that the trial court erred in awarding attorney fees to Ellis pursuant to RCW 4.84.185 and in the form of CR 11 sanctions.⁵ Again, we disagree.

“The decision to make an award of attorney’s fees under RCW 4.84 .185 [6] is left to the discretion of the trial court and will not be disturbed in the absence of a clear showing of abuse.” *Rhinehart v. Seattle Times, Inc.*, 59 Wash.App. 332, 339-40, 798 P.2d 1155 (1990) (citing *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 131-33, 783 P.2d 82 (1989)). “A trial court cannot be said to abuse its discretion in awarding attorney’s fees under RCW 4 .84.185 if the facts alleged do not state a cause of action that can be supported by any rational argument on the law or facts.” *Rhinehart*, 59 Wash.App. at 340, 798 P.2d 1155 (citing *Camer v. Seattle Sch. Dist. No. 1*, 52 Wash.App. 531, 539, 762 P.2d 356 (1998)).

*7 Each of the causes of action advanced by Martin is precluded either by the interim distribution orders or the 2007 final distribution order. As discussed above, it is a well-established principle that a final distribution order in a probate proceeding is binding as to all persons. *See Batey*, 35 Wash.2d at 796, 215 P.2d 694. Even a modicum of legal research would have uncovered this rule of law. There is no suggestion that any of the claims brought by

Martin arose after the entry of the 2007 order closing the estate. The trial court did not abuse its discretion in awarding fees under RCW 4.84.185.

Further, although Cruikshank appears to contend that the trial court erred by awarding attorney fees in the amount requested by Ellis because of a lack of evidence that Ellis incurred the fees requested,⁷ in his briefing he offers no argument as to why the amount of the award is improper. Accordingly, we will not further consider this assignment of error. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

Nor did the trial court abuse its discretion in imposing CR 11 sanctions against Cruikshank. A trial court may impose CR 11 sanctions against an attorney who signs a complaint upon finding that the action lacks a basis in fact or is unwarranted by existing law and that the attorney failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220, 829 P.2d 1099 (1992) (citing *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir.1990)). “The determination of whether a violation of CR 11 has occurred is [also] within the sound discretion of the trial court.” *Rhinehart*, 59 Wash.App. at 341, 798 P.2d 1155 (citing *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash.App. 106, 110, 780 P.2d 853 (1989)). Sanctions are mandatory if the court determines that a violation has occurred. *Rhinehart*, 59 Wash.App. at 341, 798 P.2d 1155 (citing *Miller v. Badgley*, 51 Wash.App. 285, 301, 753 P.2d 530 (1988)). A trial court has broad discretion regarding the nature and scope of sanctions it imposes. *Rhinehart*, 59 Wash.App. at 341, 798 P.2d 1155 (citing *Badgley*, 51 Wash.App. at 303, 753 P.2d 530).

We see no reason to disturb the trial court’s exercise of discretion. Contrary to Cruikshank’s assertions, the trial court expressly found that Martin’s claims were neither factually warranted, warranted by existing law, nor warranted by a good faith argument to change existing law and that Cruikshank failed to conduct a reasonable inquiry into the basis for Martin’s claims. As explained above, the 2007 closing order precludes Martin’s claims. *Res judicata* is a fundamental legal doctrine. Cruikshank, as the attorney who has represented numerous challengers to the administration of the estate since 1994, was well-positioned to comprehend the preclusive effect of the 2007 closing order. The trial court did not err.

IV

Finally, Ellis requests an award of attorney fees on appeal pursuant to RAP 18.1, CR 11, and RCW 4.84.185 for having to defend against a frivolous appeal. An appeal is

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frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall of City of Concrete Mayor Robin Feetham*, 149 Wash.2d 860, 872, 72 P.3d 741 (2003). Martin's appeal is frivolous. Well-established legal principles precluded him from bringing any of the claims herein asserted. Upon Ellis's further compliance with RAP 18.1, a commissioner of this court will enter an appropriate order.

*8 Affirmed.

We concur: LEACH and BECKER, JJ.

Parallel Citations

2010 WL 599625 (Wash.App. Div. 1)

Footnotes

- 1 We may rely on unpublished opinions as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *Island County v. Mackie*, 36 Wash.App. 385, 391 n. 3, 675 P.2d 607 (1984). We may also consider unpublished opinions in examining issues such as the law of the case, collateral estoppel, and res judicata. *State v. Sanchez*, 74 Wash.App. 763, 765 n. 1, 875 P.2d 712 (1994).
- 2 For clarity and simplicity, we refer by first name to those persons involved in the litigation with the same last names.
- 3 Martin labeled his causes as (1) "Breach of Duty to Preserve Property and Invest in a Prudent Manner," (2) "Breach of Duty to Account and Furnish Information to Beneficiaries and Creditors," (3) "Negligence," (4) "Breach of Duty of Loyalty," and (5) Breach of "Duty to Test Market or Obtain Appraisals."
- 4 At oral argument, Martin's attorney, Cruikshank, was unable to identify any claim that related to an action taken by Ellis after the closing of the estate in July 2007.
- 5 In the notice of appeal from the trial court's order awarding attorney fees and imposing sanctions that he filed on behalf of Martin, Cruikshank did not identify himself as an aggrieved party in order to personally seek appellate relief. As we have explained previously, an attorney is an aggrieved party for purposes of appealing from an order imposing sanctions against him or her. *Polygon N.W. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wash.App. 753, 768, 189 P.3d 777 (citing *In re Guardianship of Lasky*, 54 Wash.App. 841, 848-50, 776 P.2d 695 (1989)), review denied, 164 Wash.2d 1033, 197 P.3d 1184 (2008). Although Cruikshank did not properly designate the sanction order in the notice of appeal for our review, as is required by RAP 2.4(a), the parties have briefed this issue as though he had. Accordingly, we elect to review the CR 11 sanction order.
- 6 RCW 4.84.185 provides:
In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.
- 7 In his assignments of error, Martin contends that "[t]he trial court erred in granting R.C.W. 4.84.185 sanctions [*sic*] against Martin and Cruikshank, because: ... [the statute] only permits recovery of attorney fees and costs to parties who have incurred those expenses."

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EXHIBIT 3 to Respondent Loretta Wilbert's brief in *Martin v. Wilbert*,
case no. 64231-6-I

Delguzzi v. Wilbert ex. rel. Delguzzi Trust, 105 Wn.App 1004, 2001 WL
180995 ("Delguzzi II")

105 Wash.App. 1004

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 1.

Gary DelGUZZI, Appellant,
v.

William E. WILBERT, individually and, as Trustee of the Gary DelGUZZI TRUST and Loretta Dickson Wilbert, spouse of William E. Wilbert, Respondents.

No. 45022-1-I.Feb. 26, 2001.

Appeal from Superior Court of King County, Docket No. 99-4-00054-1, judgment or order under review, date filed 07/15/1999; Linda Lau, Judge.

Attorneys and Law Firms

Charles M. Cruikshank III, Attorney At Law, Seattle, WA, for appellant(s).

Larry N. Johnson, Attorney At Law, Seattle, WA, for respondent(s).

Opinion

UNPUBLISHED OPINION

WEBSTER.

*1 Gary Delguzzi sued William Wilbert in Clallam County Superior Court for breach of fiduciary duties as administrator of his father's estate while he was trustee of a trust benefiting Delguzzi. The trial court granted his motion to amend his complaint to add new claims relating to the trust as well as to change venue to King County Superior Court. Yet, he never filed his amended complaint in King County Superior Court, except later as an attachment to a motion to compel discovery and for default. He also never served the amended complaint upon Wilbert except previously as an unsigned proposed amendment in his motion for leave to amend. King County Superior Court dismissed his case for failure to file and serve a valid complaint. Delguzzi appeals arguing (1) he filed and served a valid Third Amended Complaint in King County and (2) the Third Amended Complaint

relates back to his original pleading. We affirm because there is no proof in the record to demonstrate that Delguzzi complied with service requirements.

FACTS

Gary J. Delguzzi is the sole heir of his father's estate, the Estate of Jack Delguzzi. Although the Clallam County Superior Court appointed him as personal representative of his father's estate, Delguzzi later resigned and requested the court to appoint William E. Wilbert as administrator. Then in 1983, Delguzzi established two separate trusts with Wilbert named as trustee of each.

Nine years later, Delguzzi and his attorney asked Wilbert to resign as trustee. Delguzzi succeeded as trustee of his own trusts. Two years later, Delguzzi served a complaint upon Wilbert requesting an accounting for the estate and trusts. He never filed this complaint in court. Within two months, he filed his First Amended Complaint in Clallam County Superior Court and served a copy upon Wilbert. After receiving an answer from Wilbert, he moved for leave to amend his complaint with new claims and additional defendants. Before the trial court granted leave to amend, Delguzzi served a Second Amended Complaint.

On or about February 5, 1996, Delguzzi filed another motion for leave to amend along with a motion to change venue to King County. He served the motion upon Wilbert's counsel on February 6, 1996. Attached to the motion was an unsigned, proposed Third Amended Complaint. The trial court granted leave to amend the complaint and ordered the court clerk to transfer to the King County Superior Court only that portion of the file containing the Third Amended Complaint. Thereafter, the Clerk of the Clallam County Superior Court wrote a letter to counsel for both parties requesting payment of the filing fee before the official transfer could take place. For two and one half years, no filing fee was paid nor actual service of the Third Amended Complaint made. For this reason, Wilbert did not formally answer the complaint but instead filed a motion to dismiss the case for lack of prosecution. The trial court denied it. At that point, Delguzzi finally paid the filing fee to transfer the case. Later, Wilbert's counsel informed Delguzzi's counsel that the Third Amended Complaint did not contain a signature or date. Delguzzi's counsel, Charles M. Cruikshank III, obtained the court file and signed the Third Amended Complaint on March 24, 1999. Cruikshank then mailed only the signature page of the Third Amended Complaint to Wilbert's counsel. When Wilbert did not respond to Delguzzi's requests for discovery, Delguzzi filed a motion for default and motion to compel discovery. The trial court denied these motions. In the meantime, Wilbert had

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filed a motion to dismiss for failure to file and serve the Third Amended Complaint, or in the alternative, summary judgment for failure to file and serve that complaint within the statute of limitations period. The trial court granted Wilbert's motion to dismiss, and in the alternative, summary judgment. Delguzzi appeals.

DISCUSSION

*2 Delguzzi argues that the trial court erred in finding that he failed to file and serve a valid, signed Third Amended Complaint. CR 5(a) and (b)(1) require a party to serve upon the attorney of an opposing party a copy of every pleading subsequent to the original complaint. An amended complaint is such a pleading subsequent to the original complaint that requires service under CR 5(a). A party may mail a copy of the amended complaint to the last known address of the attorney or hand deliver it to the attorney, the attorney's office or the attorney's usual place of abode. CR 5(b). A party may prove mail service by affidavit of the person who mailed the papers, by certificate of an attorney, or by written acknowledgment of service. CR 5(b)(1)(B).

I.

Service of Proposed Pleading

According to Delguzzi, he satisfied the service requirement four different times. He contends that he satisfied it the first time when his attorney served the Motion for Leave to Amend upon Wilbert's counsel. His attorney attached an unsigned, proposed Third Amended Complaint to the motion. At a hearing that Wilbert's counsel attended, the trial court granted the motion for leave to amend. When a trial court grants a motion for leave to file an amended pleading, the moving party must actually effect service of the new pleading, even if the party had previously served the motion with a copy of the proposed amended pleading attached. 1 Washington State Bar Ass'n, Civil Procedure Deskbook sec.sec. 15.5(3), 15.8 (1992). Because service of the motion for leave to amend did not consummate service of the amended pleading itself, the service was ineffective. Delguzzi never actually served the Third Amended Complaint.

II.

Transfer by the Clerk

He argues that he later satisfied the service requirement when the Clallam County Superior Court Clerk served Wilbert's counsel with the combined motion for leave to amend and change of venue that included the proposed Third Amended Complaint. Wilbert contends that these

documents did not contain a valid, signed, dated, and filed complaint. For all pleadings after the complaint that require service, CR 5(d) directs a party to file such pleadings with the court either before service or promptly thereafter. Filing pleadings with the court means filing such papers with the clerk of the court or, alternatively, with the judge who notes the filing date and transmits such papers to the clerk's office. CR 5(e). In King County Superior Court, the filing of any paper requiring service is inoperative until its service. LR 5(a). At the time the court clerk transferred the file to King County and served such papers upon Wilbert, Delguzzi had not filed a valid, signed, and dated Third Amended Complaint in either King County Superior Court or Clallam County Superior Court. This service was ineffective. Service by the court clerk did not constitute valid service of the Third Amended Complaint because a valid pleading was not on file at the time or shortly thereafter.

III.

Service of Signature Page

*3 Delguzzi maintains that his attorney, Charles M. Cruikshank III, served the Third Amended Complaint by mailing the last page of the pleading to Wilbert's attorney after placing his signature upon it belatedly. Under CR 11, at least one attorney of record must sign and date every pleading along with his or her address and Washington State Bar Association membership number. If an attorney fails to sign a pleading, the court shall strike the pleading unless the attorney signs it promptly after the omission is called to his or her attention. CR 11. After Wilbert's counsel informed Cruikshank that there was no signature or date on the proposed Third Amended Complaint, Cruikshank obtained the court file and signed the document with his name and date of signature as well as the date of filing the motion for leave to amend: 'Signed 24 March 1999 as of: Dated this 5th day of Feb, { sic} 1996. Charles M. Cruikshank III WSB 6682.' Clerk's Papers (CP) at 144. He then mailed a copy of the signature page to Wilbert's counsel. But, he did not serve the entire Third Amended Complaint. We conclude that merely mailing the signature page of a pleading is insufficient service.

IV.

Service of Motions with Amended Pleading Attached

Finally, Delguzzi says that he served Wilbert's counsel with the Third Amended Complaint along with the motions to compel discovery and for default. A review of the record shows that Cruikshank filed a declaration on April 12, 1999, in support of the motions to compel

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discovery and for default. Attached to that declaration as Exhibit D is the Third Amended Complaint signed by Cruikshank in the manner described above. But, nowhere in the record is there proof of service upon Wilbert's counsel. The appellant has the burden of perfecting the record so that the appellate court has all the evidence relevant to the issues raised on appeal. *Starzewski v. Unigard Ins. Group*, 61 Wn.App. 267, 276, 810 P.2d 58 (1991). The appellate court will decline to reach the merits of an issue if the record is inadequate to permit review. *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993).

CR 5 requires a party to serve an amended complaint upon the attorney of the opposing party. Thereafter, the opposing party has ten days in which to respond to the amended complaint. CR 15(a). Without service of the amended complaint, it is difficult for the opposing party to know the period of time he has to respond. Without proof of service, it is difficult for a court to determine whether service has been made. See CR 5(b)(1)(B) (proof of service by mail). Even if we assume that Delguzzi properly filed the Third Amended Complaint as an exhibit to the Motion to Compel Discovery and for Default, there is no proof of service upon Wilbert's counsel. We affirm the trial court's dismissal for failure to serve a complaint.¹

Because the trial court properly dismissed the case for

Footnotes

- 1 Contrary to Delguzzi's position, RCW 4.32.250 does apply because it only gives the court the power to enlarge the time within which a pleading must be filed or served upon a showing of good cause. Here, there is no proof in the record to indicate when Delguzzi served the Third Amended Complaint upon Wilbert's counsel. Thus, there is no date to extend.

failure to serve the Third Amended Complaint, we need not decide the statute of limitations question.

CONCLUSION

*4 We hold that service of a motion for leave to amend with a proposed amended complaint attached does not constitute valid service of the amended complaint. Mailing the signature page to opposing counsel is also insufficient. Service of the transferred file by the court clerk did not remedy the problem because a valid, signed and dated amended complaint was not on file in King County. Finally, Delguzzi has failed to prove service of the amended complaint as attached to his motions to compel discovery and for default. The trial court was correct in dismissing this case for failure to serve the amended complaint upon Wilbert.

We affirm.

Parallel Citations

2001 WL 180995 (Wash.App. Div. 1)

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EXHIBIT 4 to Respondent Loretta Wilbert's brief in *Martin v. Wilbert*,
case no. 64231-6-I

Shaw v. Short Cressman, 150 Wn.App 1017, 2009 WL 1366272 (2009)

SHAW v. SHORT CRESSMAN

Shaw v. Short & Cressman, Not Reported in P.3d (2009)

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NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 1.

R. Sidney SHAW, Personal Representative of the
Estate of Gary Delguzzi, and Charles M.
Cruikshank, III, Appellants,
v.

SHORT & CRESSMAN, Short Cressman & Burgess
& Short Cressman & Burgess, PLLC, Paul R.
Cressman, Sr., Jane Doe Cressman, John O.
Burgess, Jane Doe Burgess, Robert E. Heaton, Jane
Doe Heaton, Robert J. Shaw, Jane Doe Shaw,
Andrew W. Maron, Jane Doe Maron, Christopher J.
Osborn, Jane Doe Osborn, James A. Oliver, Jane
Doe Oliver, Chicoine & Hallett, Inc., P.S., Darrell D.
Hallett, Jane Doe Hallett, Larry N. Johnson,
Respondents.

No. 60995-5-I.May 18, 2009.

Appeal from King County Superior Court; Honorable
Glenna S. Hall, J.

Attorneys and Law Firms

Charles Malcolm Cruikshank III, Attorney at Law,
Seattle, WA, for Appellants.

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Baumgardner & Pree, Robert M. Sulkin, Barbara Himes
Schuknecht, McNaul Ebel Nawrot & Helgren, Thomas
Jeffrey Keane, Keane Law Offices, Seattle, WA, for
Respondents.

Opinion

Unpublished Opinion

LAU, J.

*1 R. Sidney Shaw, personal representative of the estate of Gary DelGuzzi, appeals the trial court's summary judgment dismissal of the estate's numerous claims against Short Cressman & Burgess (SCB), Chicoine & Hallett (C & H), and other individual attorneys. Shaw's

complaint alleged that the attorneys' various acts of malfeasance harmed Gary DelGuzzi's interest in the estate of his father, Jack DelGuzzi. Shaw and his attorney Charles Cruikshank also appeal the trial court's imposition of sanctions against them. We conclude that Shaw's claims are conclusively barred by the statute of limitations. And the trial court did not abuse its discretion in determining that the lawsuit was frivolous. But the notice and findings were not sufficient to support the trial court's award of all attorney fees and costs as a sanction under CR 11 and RCW 4.84.185. Accordingly, we affirm the summary judgment dismissal of the case, and we affirm in part, reverse in part, and remand the sanctions awards.

FACTS

Jack DelGuzzi, a successful real estate developer, died in 1978. The Clallam County Probate Court appointed Jack DelGuzzi's son and sole heir, Gary DelGuzzi, as personal representative (PR) of the estate. In April 1982, Gary DelGuzzi retained law firm SCB to represent him in his role as PR. Four months later, Gary DelGuzzi resigned and the probate court appointed William Wilbert as PR.¹ SCB then represented Wilbert as PR until 1991, when it withdrew due to nonpayment of attorney fees.

In 1991, after the Internal Revenue Service asserted multimillion dollar tax claims against the estate for which Wilbert faced potential personal liability, Wilbert retained law firm C & H to represent him personally. Because Gary DelGuzzi also faced potential personal tax liability, C & H referred him to another lawyer, Jeanette Cyphers.

Cyphers represented Gary DelGuzzi individually and as beneficiary² from 1992 to 1993. She concluded that Gary DelGuzzi and/or his trust might have claims against SCB and Wilbert. She also warned Gary DelGuzzi that the statute of limitations already had or might soon bar a lawsuit. In July 1993, Cyphers withdrew due to nonpayment of attorney fees. She reiterated her advice to Gary DelGuzzi and gave him all her records concerning the potential claims.

Gary DelGuzzi, represented by his new attorney Charles Cruikshank, then proceeded to commence a series of lawsuits and petitions against Wilbert and the attorneys and accountants who had worked with him. In February 1994, Gary DelGuzzi sued Wilbert in the Clallam County probate proceedings, alleging self-dealing and breach of fiduciary duty and seeking an accounting. In August 1994, he added SCB and attorney Paul Cressman as defendants in the probate action, seeking repayment of

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attorney fees. In July 1996, Gary DelGuzzi petitioned to remove Wilbert as administrator. The petition alleged malpractice and breach of fiduciary duty by SCB, malfeasance by Wilbert, and a conspiracy by SCB, Wilbert, and others to “milch the estate.” Although C & H was not named as a defendant in that action, the petition asserted that C & H refused to make the final accounting or move to close the estate; rather, C & H attorneys “will assist Wilbert in selling off all of the estate properties and then distributing all of the sales proceeds to Wilbert and to his attorneys.”

*2 In October 1996, the Clallam County Superior Court dismissed without prejudice under CR 12(b)(6) the claims Gary DelGuzzi raised against SCB in his capacity as a beneficiary of the Jack DelGuzzi estate.³ In a memorandum opinion, the court explained that under *Trask v. Butler*, 123 Wash.2d 835, 872 P.2d 1080 (1994), “[t]he law is clear that an heir does not have an action against the attorneys for the personal representative for legal malpractice. There is no duty owed from an attorney to an heir of the estate.” Gary DelGuzzi did not appeal this dismissal. He did, however, continue litigation in the Clallam County probate proceedings.

In 1996, Wilbert petitioned to close the estate of Jack DelGuzzi. The probate court held a trial on the accounting. Gary DelGuzzi challenged the accounting on numerous grounds. He asserted that Wilbert had mishandled the estate’s assets, particularly its Costa Rica holdings. He also asserted that C & H “advised Wilbert in structuring offers to the heir, Gary DelGuzzi” and “assisted Wilbert in claims made against him ... related to questionable transactions in the Gary DelGuzzi Trust.” The trial court approved Wilbert’s final accounting in 1997.⁴ Nevertheless, litigation continued and the probate court did not close the estate of Jack DelGuzzi until July 2007.⁵

Gary DelGuzzi died in February 2004, and Shaw became PR of the estate of Gary DelGuzzi. Wilbert died in March 2004. David Martin became interim PR of the estate of Jack DelGuzzi for two months in 2004.⁶ In August 2004, Martin gained access to Wilbert’s storage locker, removed certain files, and transported them to another storage facility where Cruikshank examined them. According to Shaw, these files were found to contain “smoking gun” documents that for the first time established that SCB and C & H colluded with Wilbert in “converting, embezzling, and milking the Estate, particularly as regards to the Costa Rica properties....”

In August 2006, Shaw (represented by Cruikshank) filed a new action against SCB, C & H, and certain individual attorneys. Shaw’s core allegations were that Wilbert, C & H, and SCB conspired to (1) hide and abandon Wilbert’s professional negligence claims against SCB in exchange for SCB’s silence regarding Wilbert’s malfeasance in

administering the estate and (2) support the nondisclosure, concealment, and misrepresentation of missing, undervalued, and converted estate assets in exchange for a fee agreement. Shaw further alleged breach of fiduciary duty, conversion, self-dealing, interference with business expectations, and violation of the Consumer Protection Act, and he challenged SCB’s attorney fees as excessive and unwarranted.

A series of discovery disputes ensued, with the trial court ruling in defendants’ favor on nearly every motion. In October 2007, SCB, C & H, and attorney Larry Johnson⁷ moved for summary judgment dismissal of Shaw’s claims. Shaw moved for partial summary judgment. In November 2007, the trial court granted SCB, C & H, and Johnson’s motions, denied Shaw’s motion, and dismissed all of Shaw’s claims. The order granting summary judgment to the SCB defendants stated that Shaw’s claims were barred by the applicable statutes of limitations and *res judicata*.⁸ The order granting summary judgment to the C & H and Johnson defendants stated that Shaw’s claims were barred by the applicable statutes of limitations, absence of duty, and failure to identify legally sufficient facts that C & H actually harmed Shaw through the alleged activity.⁹

*3 After dismissing Shaw’s claims, the trial court granted the defendants’ motions for an award of all attorney fees and costs against Shaw and Cruikshank under RCW 4.84.185 and CR 11. Shaw responded by filing a CR 60 motion to vacate the sanctions awards along with a CR 11 motion to sanction the defendants. The trial court denied Shaw’s motions and entered orders granting the full amount of defendants’ attorney fees and costs incurred in defending against Shaw’s claims, beginning with commencement of the lawsuit in August 2006. These awards came to a total of \$935,375.47.

Shaw now appeals the summary judgment dismissal of his claims, several related discovery orders, and the sanctions awards.¹⁰

ANALYSIS

Statute of Limitations

The trial court granted summary judgment to all respondents and dismissed Shaw’s claims because they were time barred. Shaw argues that this was error. “In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court.” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash.2d 841, 847, 50 P.3d 256 (2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court will consider the facts

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and reasonable inferences in the light most favorable to the nonmoving party. *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wash.2d 403, 406, 997 P.2d 915 (2000). “Resolution of disputed factual issues can be sustained when reasonable minds could reach but one conclusion from the evidence accompanying a summary judgment motion.” *Sundquist*, 140 Wash.2d at 406-07, 997 P.2d 915. “To defeat summary judgment, [the nonmoving party’s] evidence must set forth specific, detailed, and disputed facts; speculation, argumentative assertions, opinions, and conclusory statements will not suffice.” *Sanders v. Woods*, 121 Wash.App. 593, 600, 89 P.3d 312 (2004).

The purpose of the statute of limitations is to prevent stale claims. *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wash.App. 655, 662, 37 P.3d 309 (2001). The statute of limitations “does not begin to run until the cause of action accrues—that is, when the plaintiff has a right to seek relief in the courts.” *Sabey v. Howard Johnson & Co.*, 101 Wash.App. 575, 592-93, 5 P.3d 730 (2000). “The discovery rule provides that a cause of action does not accrue until an injured party knows, or in the exercise of due diligence should have discovered, the factual bases of the cause of action.” *Beard v. King County*, 76 Wash.App. 863, 867, 889 P.2d 501 (1995). The rule “does not require knowledge of the existence of a legal cause of action itself.” *Richardson v. Denend*, 59 Wash.App. 92, 95-96, 795 P.2d 1192 (1990). “[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.” *Clare v. Saberhagen Holdings, Inc.*, 129 Wash.App. 599, 603, 123 P.3d 465 (2005) (quoting *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909)). The plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period. *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wash.App. 360, 367, 853 P.2d 484 (1993). Whether a party exercised due diligence is a factual issue that may be determined as a matter of law when reasonable minds could reach but one conclusion. *Clare*, 129 Wash.App. at 603, 123 P.3d 465. See also *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wash.App. 810, 818, 120 P.3d 605 (2005) (second suit against attorney who facilitated transactions at issue in first suit was time barred because it involved “in part” the same transactions, thus demonstrating plaintiff’s knowledge of facts).

*4 SCB represented Wilbert as PR of the Jack DelGuzzi estate from 1982 until 1991. C & H commenced its representation of Wilbert in 1991. Shaw’s complaint raised claims of conspiracy, breach of fiduciary duty, conversion, self-dealing, interference with business expectations, Consumer Protection Act (CPA) violations, excessive attorney fees, and legal malpractice. The

limitations period for the CPA claim is four years. RCW 19.86.120. The limitations period for the remaining claims is three years. RCW 4.16.080. The events that form the basis of Shaw’s complaint took place in the 1990s. Thus, Shaw’s 2006 claims are time barred unless he can demonstrate that the discovery rule or a related doctrine tolled the statute of limitations.

Shaw argues that the discovery rule applies because he could not have discovered his claims within the limitations period. He does not dispute that he learned about the alleged injuries more than three years before filing his 2006 complaint. But he contends that prior to 2004—when Martin and Cruikshank discovered the “smoking gun” documents—the only known evidence indicated that Wilbert, acting alone, was solely responsible for losses to the estate.

We disagree. The record conclusively demonstrates that Shaw knew or should have known the factual basis of his claims many years ago, including the alleged involvement of SCB and C & H. First, in 1993, Jeanette Cyphers expressly informed Gary DelGuzzi about the concerns raised by C & H regarding SCB’s tax advice, as well as her concerns regarding Wilbert’s estate transactions. Second, Gary DelGuzzi’s 1994-96 lawsuits against SCB alleged a conspiracy based on secret agreements between SCB and Wilbert and the charging of excessive fees by SCB. Third, even though C & H was not named as a defendant in the prior actions, Gary DelGuzzi and Cruikshank have long asserted that Wilbert mishandled the estate’s assets while C & H represented him, particularly the Costa Rica properties. The 1996 complaint asserted that C & H intended to assist Wilbert in selling off the estate properties and distributing the proceeds to the attorneys. Similarly, Gary DelGuzzi’s 1997 trial brief, which detailed Wilbert’s alleged mishandling of the estate’s Costa Rica assets, also asserted that C & H “advised Wilbert in structuring offers to the heir, Gary DelGuzzi.” Fourth, Martin admitted that the 2006 lawsuit involves the “same parties, same conspiracy, same damages, just a continuation” of the prior litigation.

The 2004 discovery of the so-called “smoking gun” documents does not change this result. Contrary to Shaw’s assertion, “the law does not require a smoking gun in order for the statute of limitations to commence.” *Giraud v. Quincy Farm & Chem.*, 102 Wash.App. 443, 450, 6 P.3d 104 (2000).

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

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the claimant is aware of the cause of action-has evaporated. The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. If the discovery rule were construed as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time barred.

*5 *Beard*, 76 Wash.App. at 868, 889 P.2d 501.

Cruikshank asserted that “it seemed like Mr. Wilbert was acting alone until those documents surfaced in 2004,” and that “until those documents were discovered in 2004, it was my belief that the attorneys were not part of Mr. Wilbert’s activities.” But Gary DelGuzzi, represented by Cruikshank, actually sued SCB in 1994 for allegedly conspiring with Wilbert. And many of the same issues were raised in the 1997 trial. They knew or should have known the factual basis of their claims in the 1990s. The later discovery of additional evidence does not trigger the discovery rule.¹¹

Shaw further argues that the discovery rule should be tolled by (1) the fraudulent concealment doctrine, (2) an alleged fiduciary relationship between Gary DelGuzzi and C & H, and (3) the continuing representation doctrine. Shaw did not raise these arguments at the trial court, and we need not address them. RAP 9.12; *Van Dinter v. Orr*, 157 Wash.2d 329, 333-34, 138 P.3d 608 (2006). Nevertheless, even if Shaw had raised these issues below, our decision would not be different. “Fraudulent concealment cannot exist if a plaintiff has knowledge of the evidence of an alleged defect. Additionally, they are required to demonstrate that they were reasonably diligent in their efforts to discover” the allegedly withheld information. *Giraud*, 102 Wash.App. at 455, 6 P.3d 104 (citation omitted). And a fiduciary relationship does not abrogate the due diligence requirement of the discovery rule. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash.App. 502, 517, 728 P.2d 597 (1986). As discussed above, Shaw knew or should have known the facts giving rise to the 2006 lawsuit. And Gary DelGuzzi, whose estate Shaw represents, was never a client of C & H. Rather, C & H represented Wilbert. The continuing representation doctrine “tolls the statute of limitations until the end of an attorney’s representation of a client in the same matter in which the alleged malpractice occurred.” *Janicki*, 109 Wash.App. at 661, 37 P.3d 309. The continuing representation doctrine does not apply to nonclient adversaries.

Shaw also argues that the trial court erred in granting summary judgment (1) to SCB based on lack of standing and *res judicata*, (2) to C & H because he submitted

sufficient evidence of C & H’s involvement in a conspiracy, and (3) to Johnson because the doctrine of judicial proceedings immunity does not apply. Because we hold that Shaw’s claims against all respondents are time barred, we need not reach these arguments.

Shaw’s Motions to Strike

Shaw challenges the trial court’s denial of his motion to strike exhibits attached to (1) Guy Michelson’s declaration in support of SCB’s motion for summary judgment and (2) Gregory Schwartz’s declaration in support of C & H’s motion for summary judgment. The Michelson and Schwartz declarations stated that the attached documents were true and correct and based on personal knowledge. Shaw argues that the challenged documents were not properly authenticated because Michelson and Schwartz failed to make an affirmative showing of personal knowledge as required by CR 56(e) and ER 602.12 “[W]e review the trial court’s evidentiary rulings made for summary judgment *de novo*.” *Seybold v. Neu*, 105 Wash.App. 666, 678, 19 P.3d 1068 (2001).

*6 “CR 56(e) is explicit in its requirements which serve the ultimate purpose of a summary judgment motion. Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 359, 753 P.2d 517 (1988). But personal knowledge is not necessarily required.

“Authentication is a threshold requirement designed to assure that evidence is what it purports to be.” *State v. Payne*, 117 Wash.App. 99, 106, 69 P.3d 889 (2003). “CR 56(e) allows an attorney to base his or her affidavit on documents properly before the court. And this includes documents already in the court files, as well as additional documents presented by the parties in a motion for summary judgment.” *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wash.App. 736, 745, 87 P.3d 774 (2004). CR 56(e)’s “requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact finder to find in favor of authenticity.” *Int’l Ultimate*, 122 Wash.App. at 746, 87 P.3d 774; ER 901(a) (authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”). If the challenged documents “are properly authenticated [under ER 901 or 902] and are not excluded because of hearsay, then an attorney may rely on them in a summary judgment motion regardless of any lack of personal knowledge.” *Int’l Ultimate* 122 Wash.App. at 746, 87 P.3d 774. “[A]uthentication may be satisfied when the party challenging the document originally provided it

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through discovery.” *Int’l Ultimate* 122 Wash.App. at 748, 87 P.3d 774.

C & H and SCB responded to Shaw’s motion to strike by clarifying that all of SCB’s challenged documents and all but five of C & H’s challenged documents were authenticated because they were produced by Shaw in discovery, authenticated by deposition testimony, or relied on by Shaw. C & H also argued that Shaw had no basis to dispute the authenticity of the remaining documents, all of which related to tax matters concerning the estate of Jack DelGuzzi. SCB and C & H contend that this showing was sufficient to establish the authenticity of the challenged documents under *International Ultimate*. C & H further argues that the authenticity of the five remaining documents was established because they were copies of public documents filed in the Clallam County probate case, were Gary DelGuzzi’s tax-related filings, or were official communications from the IRS subject to judicial notice.

We conclude that the trial court did not err in denying Shaw’s motion to strike. Any concern about the adequacy of the initial declarations was eliminated by SCB and C & H’s response to Shaw’s motion to strike.¹³ Moreover, Shaw did not argue below or on appeal that the trial court abused its discretion in admitting the documents because they were inadequately authenticated under ER 901 or the rules enunciated in *International Ultimate*. He argued only that the documents were not adequately authenticated by personal knowledge.

SCB’s Motion to Strike

*7 SCB moved to strike certain exhibits filed in support of Shaw’s motion for partial summary judgment, arguing that they constituted inadmissible hearsay or were improperly authenticated. The trial court granted the motion and struck the exhibits. Shaw argues that this was error because his authenticating declaration was made on his “personal knowledge and with proper foundation.” Br. of Appellant, at 18. Shaw has not supported this claim of error with adequate argument or references to the record, and we will not address it.¹⁴ RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

Discovery Master

Shaw moved for appointment of a discovery master, specifically requested the individual who was appointed, participated in drafting the order of appointment, and signed the order. Shaw now argues that the trial court erred by denying his subsequent motion to amend the order by imposing numerous procedural requirements on

the discovery master. Pretrial discovery orders are reviewed for manifest abuse of discretion. *Gillett v. Conner*, 132 Wash.App. 818, 822, 133 P.3d 960 (2006).

Shaw’s argument lacks merit. CR 53.3 requires only that the discovery master be a lawyer admitted to practice in the state of Washington and that the compensation of the master be fixed by the court. Whether to impose additional procedural requirements on the discovery master is a matter within the trial court’s discretion. CR 53.3(d) (the order “may specify the duties of the master”). The trial court did not abuse its discretion in denying Shaw’s motion.¹⁵ Moreover, Shaw invited the alleged error by participating in drafting the order appointing the discovery master. He cannot now complain of it on appeal. *Humbert/Birch Creek Constr. v. Walla Walla County*, 145 Wash.App. 185, 192, 185 P.3d 660 (2008).

Discovery Order-Sanctions

During discovery, David Martin resisted C & H’s repeated discovery requests and attempts to subpoena him. The day before his deposition, Martin sought a continuance for medical reasons, which C & H allowed. Three weeks later, shortly before his rescheduled deposition, Martin moved for a protective order and failed to appear. Defendants opposed the protective order, moved to compel Martin’s deposition, moved to compel him to produce documents, and moved for an award of attorney fees under CR 26(c) and CR 37(a)(4) and/or sanctions under CR 11.¹⁶ The trial court found that Martin “has engaged in bad-faith refusals to participate in or respond to discovery.” CP 1843. It denied Martin’s motion for a protective order, granted the defendants’ motion to compel Martin’s deposition, and granted the defendants’ request for sanctions “in the amount of their reasonable attorney fees and costs incurred in connection with these combined motions.”

Shaw does not argue that the trial court erred in finding that Martin engaged in bad-faith refusals to participate or respond to discovery. Rather, he contends that noncompliance with a subpoena by a nonparty had to be enforced through a contempt of court proceeding under CR 45 and *Burlingame v. Consolidated Mines & Smelting Co.* 106 Wash.2d 328, 333, 722 P.2d 67 (1986) (in contempt proceeding, due process requires that show cause order give notice of time and place of hearing). Shaw further contends that the trial court deprived Martin of due process by entering the sanctions order without notice and a hearing.

*8 We disagree. CR 26(c) and CR 37(a)(4) permit the court to award attorney fees and costs incurred in seeking a motion to compel discovery and responding to an unsuccessful motion for protective order. And the record

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shows that Cruikshank had notice that respondents were seeking sanctions. Cruikshank appeared in court and asserted that he was unprepared for oral argument because he did not know the motion was being heard that day. But the trial court gave him an opportunity to speak before announcing its ruling in open court. RP (July 20, 2007) at 6. The trial court did not abuse its discretion or violate Shaw's due process rights by ordering Martin to pay respondents' fees and costs incurred in connection with these motions.

Frivolous Lawsuit-Sanctions

Shaw and Cruikshank argue that the trial court abused its discretion in awarding attorney fees and costs in full to SCB, C & H, and Johnson under both RCW 4.84.185 and CR 11.17 The standard of review regarding sanctions under the statute or rule is abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wash.2d 888, 903, 969 P.2d 64 (1998).

Sanctions Under CR 11

CR 11 provides that the trial court may impose sanctions for two types of problems related to legal filings—those that are not well grounded in fact and warranted by law and filings interposed for any improper purpose. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 217, 829 P.2d 1099 (1992). “The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system.” *Bryant*, 119 Wash.2d at 219, 829 P.2d 1099. “CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings.” *MacDonald v. Korum Ford*, 80 Wash.App. 877, 891, 912 P.2d 1052 (1996). “In deciding whether to impose sanctions, the court should evaluate a party's pre-filing investigation by inquiring what was reasonable for the attorney to have believed at the time he filed the complaint.” *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wash.App. 168, 68 P.3d 1093 (2003). “A trial court may not impose CR 11 sanctions for a baseless filing ‘unless it also finds that the attorney who signed and filed the [pleading, motion for legal memorandum] failed to conduct a reasonable inquiry into the factual and legal bases for the claims.’ ” *MacDonald*, 80 Wash.App. at 884, 912 P.2d 1052 (quoting *Bryant*, 119 Wash.2d at 220, 829 P.2d 1099). “[T]he court must make explicit findings as to which pleadings violated CR 11 and as to how such pleadings constituted a violation of CR 11. The court must specify the sanctionable conduct in its order.” *N. Coast Elec. Co. v. Selig*, 136 Wash.App. 636, 649, 151 P.3d 211 (2007). “ ‘If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision.’ ” *MacDonald*, 80 Wash.App. at 892, 912 P.2d 1052 (quoting *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d

866, 883 (5th Cir.1988)).

*9 Shaw and Cruikshank argue that the trial court abused its discretion in entering CR 11 sanctions because the respondents did not give notice that they intended to seek sanctions until after the trial court dismissed the claims on summary judgment. SCB contends that it provided adequate notice because after the trial court granted summary judgment, counsel called Cruikshank and expressly informed him of their intent to move for fees under CR 11. SCB and C & H further contend that they provided sufficient notice prior to summary judgment because their answers to Shaw's complaint asserted that the action was time barred and stated that they would be seeking fees and costs as appropriate. C & H also points to various filings in which it asserted that Shaw and Cruikshank acted improperly or in bad faith.

Although we agree that Shaw's complaint was frivolous and advanced without reasonable cause, we conclude that SCB and C & H did not provide sufficient notice to support CR 11 sanctions. “[A] party should move for CR 11 sanctions as soon as it becomes aware they are warranted.” *N. Coast*, 136 Wash.App. at 649, 151 P.3d 211. “[W]ithout prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper.” *Biggs*, 124 Wash.2d at 198, 876 P.2d 448.

“[Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.”

Biggs, 124 Wash.2d at 198, 876 P.2d 448 (quoting *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir.1986)). “Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible.” *Biggs*, 124 Wash.2d at 198, 876 P.2d 448. “Without such notice, CR 11 sanctions are unwarranted.” *Biggs*, 124 Wash.2d at 198, 876 P.2d 448.

Our review of the record shows that SCB and C & H did not provide any notice of intent to seek sanctions—formal or informal—until after the trial court granted summary judgment. None of the documents filed by SCB and C & H prior to summary judgment expressly mentioned the possibility of sanctions for filing a frivolous lawsuit. The trial court's findings did not address whether or not SCB and C & H notified Shaw and Cruikshank as soon as possible. SCB and C & H were plainly aware of the facts and circumstances giving rise to their CR 11 motion well

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before the trial court granted summary judgment. Only Johnson provided adequate notice by raising CR 11 in his answer to Shaw's complaint. Because SCB and C & H gave no notice prior to summary judgment, but Johnson did, we conclude that CR 11 sanctions are warranted only for Johnson.

Shaw and Cruikshank also argue that the CR 11 fee award was excessive because (1) the defendants unjustifiably delayed moving for summary judgment while incurring huge fees and (2) only a small fraction of their billable time was spent drafting and arguing the motion for summary judgment. The respondents argue that they were entitled to reimbursement for all fees and costs incurred in defending the action from its inception because the filing of the frivolous action required extensive discovery, legal research, briefing, and court appearances, culminating with the granting of summary judgment 14 months later.

*10 "In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule." *Biggs*, 124 Wash.2d at 197, 876 P.2d 448. "The burden of proving the reasonableness of the fees requested is upon the fee applicant." *Scott Fetzer v. Weeks*, 122 Wash.2d 141, 151, 859 P.2d 1210 (1993). " 'When attorney fees are granted under CR 11, the trial court "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings." ' " *MacDonald*, 80 Wash.App. at 891, 912 P.2d 1052 (quoting *Biggs*, 124 Wash.2d at 201, 876 P.2d 448). "In considering whether a fee is 'reasonable,' the trial court must also consider whether those fees and expenses could have been avoided or were self-imposed." *MacDonald*, 80 Wash.App. at 891, 912 P.2d 1052. "Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly." *Biggs*, 124 Wash.2d at 201, 876 P.2d 448. " 'A party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures.' " *MacDonald*, 80 Wash.App. at 891, 912 P.2d 1052 (quoting *Miller v. Badgley*, 51 Wash.App. 285, 303, 753 P.2d 530 (1988)).

We conclude that Shaw and Cruikshank raise valid concerns regarding the reasonableness and necessity of the CR 11 fee award. The trial court's findings and conclusions supporting the fee award were entirely conclusory. The court awarded the respondents every penny of the attorney fees and costs they requested—nearly a million dollars in total—without considering whether some of those fees and costs could have been avoided or mitigated or finding that an award of all fees and costs was the least severe sanction necessary. And it did not sufficiently explain the basis for its findings that the fees were reasonable and necessary. In addition, our review of the billing records supports Shaw and Cruikshank's contention that the trial court did not engage in the type of

review contemplated by *Mahler*.¹⁸ We cannot determine whether the trial court considered whether any of the fees charged were unnecessary, duplicative, or unproductive. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 597, 675 P.2d 193 (1983) (outlining generally how a trial court should determine "reasonable hours"). These circumstances suggest that the trial court may have improperly used CR 11 sanctions as a fee-shifting mechanism and did not limit the amount to the minimum necessary. See *Biggs*, 124 Wash.2d at 201, 876 P.2d 448.

"[I]n addition to analyzing whether or not the lower court abused its discretion, we also assert our 'supervisory role to ensure that discretion is exercised on articulable grounds.' " *Peterson v. Koester*, 122 Wash.App. 351, 363-64, 92 P.3d 780 (2004) (quoting *Mahler v. Szucs*, 135 Wash.2d 398, 435, 957 P.2d 632 (1998)). "Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler*, 135 Wash.2d at 435, 957 P.2d 632. Accordingly, we vacate Johnson's award of attorney fees and costs under CR 11 and remand for entry of findings and conclusions regarding the scope and amount of the fee award.

Sanctions Under RCW 4.84.185

*11 RCW 4.84.185 allows the trial court to order the nonprevailing party to pay the prevailing party's reasonable expenses, including attorney fees, when the action as a whole is frivolous and advanced without reasonable cause. *Quick-Ruben*, 136 Wash.2d at 903, 969 P.2d 64. A lawsuit is frivolous under RCW 4.84.185 when it cannot be supported by any rational argument on the law or facts. *Smith v. Okanogan County*, 100 Wash.App. 7, 24, 994 P.2d 857 (2000). "The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite. *Skimming v. Boxer*, 119 Wash.App. 748, 756, 82 P.3d 707 (2004) (citing *Suarez v. Newquist*, 70 Wash.App. 827, 832-33, 855 P.2d 1200 (1993)). The award must be supported by written findings. *Havsy v. Flynn*, 88 Wash.App. 514, 521, 945 P.2d 221 (1997).

Shaw does not challenge the adequacy of the trial court's findings regarding the respondents' entitlement to sanctions under RCW 4.84.185. He merely argues that "the Complaint shows substantial merit, thus vitiating any award of sanctions." Appellants' Br. at 49. He further contends that under *Roberts v. Bechtel*, 74 Wash.App. 685, 875 P.2d 14 (1994), the trial court erred in awarding sanctions under RCW 4.84.185 because the defendants' fees and costs were covered by their insurers.

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We disagree. Shaw's claims were plainly time barred. Furthermore, *Roberts* is inapposite. That case involved a fee request that was barred by a stipulation and settlement agreement. The court held that the insurer's attorney, who did not sign the agreement, could not recover fees under RCW 4.84.185 because the insurer was not a party to the litigation. *Roberts*, 74 Wash.App. at 686-87, 875 P.2d 14. Here, there was no settlement agreement barring a fee award. The trial court did not abuse its discretion in concluding that Shaw's lawsuit was frivolous and advanced without reasonable cause.¹⁹ Shaw, however, correctly asserts that Johnson missed the 30-day statutory deadline for moving for an award of fees under RCW 4.84.185. Accordingly, we affirm the trial court's findings regarding SCB and C & H's entitlement to statutory attorney fees and costs, but reverse as to Johnson's entitlement on this basis.

Shaw also argues that the RCW 4.84.185 fee award was excessive. Unlike CR 11, RCW 4.84.185 does not require prompt notice or an opportunity for mitigation. The statute expressly authorizes the trial court to award payment for "the reasonable expenses, including fees of attorneys, incurred" in defense of the frivolous action. Nevertheless, in awarding reasonable attorney fees under RCW 4.84.185, the trial court must sufficiently explain the objective basis for its fee award to permit appellate review. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wash.App. 307, 202 P.3d 1024, 1029 (2009). As discussed above, the trial court's findings and conclusions were too conclusory regarding the scope and amount of fees to permit appellate review. Accordingly, we vacate the award of attorney fees to SCB and C & H and remand for entry of findings and conclusions to sufficiently explain the basis of the fee award.²⁰

Denial of Shaw's CR 11/CR 60 Motions

*12 Shaw argues that the trial court abused its discretion in denying his motion to vacate the sanctions order under CR 60²¹ and his motion to sanction the defendants under CR 11. Shaw did not assign error to this issue, and we need not address it. RAP 10.3(a)(4); RAP 10.3(g). In any case, the defendants' request did not amount to misconduct and was not frivolous or improper.²²

Motion to Strike Appendix Materials

SCB's respondents' brief contains an appendix consisting of five items that are not available in the trial court record and were not made part of the record on appeal. SCB requested permission to include these materials under RAP 10.3(a)(8), which provides, "An appendix may not include materials not contained in the record on review without permission from the appellate court, except as

provided in rule 10.4(c)." Shaw moved to strike SCB's appendix and requested sanctions against SCB under RAP 18.9.

RAP 10.4(d) and RAP 17.4(d) provide, "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." SCB's motion does not meet this requirement. Accordingly, we deny the request and grant Shaw's motion to strike the appendix.²³ Because SCB's request was not egregious, sanctions are not warranted.

Attorney Fees on Appeal

C & H and Johnson request an award of attorney fees for defending against a frivolous appeal under RAP 18.1(a), RAP 18.9(a), RCW 4.84.185, and CR 11. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall Charges Against Feetham*, 149 Wash.2d 860, 872, 72 P.3d 741 (2003). Because the sanctions issues are not devoid of merit, we decline to award attorney fees on appeal.

CONCLUSION

In sum, we affirm the trial court's summary judgment dismissal of Shaw's claims. Regarding SCB and C & H's entitlement to attorney fees and costs, we reverse the award based on CR 11, affirm the award based on RCW 4.84.185, and remand to the trial court to reconsider the amount awarded and for entry of findings and conclusions consistent with this opinion. Regarding Johnson's entitlement to attorney fees and costs, we reverse the award based on RCW 4.84.185, affirm the award based on CR 11, and remand to the trial court to reconsider the amount awarded and for entry of findings and conclusions consistent with this opinion.

WE CONCUR: LEACH and COX, JJ.

Parallel Citations

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Footnotes

- 1 Wilbert also served as trustee of Gary DelGuzzi's trust until Gary DelGuzzi asked him to resign.
- 2 Gary DelGuzzi's interest in the estate of Jack DelGuzzi was assigned to Gary DelGuzzi's trust.
- 3 The claims that Gary DelGuzzi raised against SCB in his individual capacity were dismissed under CR 12(b)(1) for lack of jurisdiction. Those claims are not at issue in this appeal.
- 4 In a memorandum decision, the court found that Wilbert breached his duty to the estate by placing himself "in a situation where his self-interest could potentially conflict with the Estate" with respect to the Costa Rica transactions. But the court was "not prepared to make a finding" that these actions caused a loss to the Estate that Wilbert would have to repay.
- 5 Litigation concerning the Jack DelGuzzi probate proceedings in Clallam County and related claims brought by Gary DelGuzzi has resulted in three appellate opinions. *DelGuzzi v. Wilbert*, noted at 108 Wash.App. 1003, 2001 WL 1001082; *DelGuzzi v. Wilbert*, noted at 93 Wash.App. 1048, 1999 WL 10081; *DelGuzzi v. Wilbert*, noted at 105 Wash.App. 1004, 2001 WL 180995. Most recently, Shaw (represented by Cruikshank) appealed the probate court's 2007 decision to close the Jack DelGuzzi estate. Division Two heard oral argument on January 6, 2009; the decision is pending.
- 6 Kathryn Ellis subsequently became PR of the estate of Jack DelGuzzi.
- 7 The defendants below, and respondents on appeal, consist of three groups: (1) SCB, plus several of its individual attorneys and their spouses, (2) C & H, plus its attorney Darrell D. Hallett and his spouse, and (3) C & H attorney Larry Johnson and his spouse. The Johnsons joined in some of C & H's arguments and motions below, and adopt portions of C & H's brief on appeal.
- 8 In its oral ruling, the trial court stated that summary judgment in favor of the SCB defendants was also granted on the basis of *Trask*.
- 9 In its oral ruling, the trial court stated that summary judgment in favor of the Johnson defendants was also granted on the basis of judicial proceedings immunity. The court also stated that it did not reach the substance of any of Shaw's claims, despite language in the order suggesting that it did. Report of Proceedings (RP) (Nov. 9, 2007) at 47.
- 10 Despite being the named plaintiff, Shaw's interest in this litigation is tangential at best. In 2007, Martin acquired from Shaw the Jack DelGuzzi estate's claims against Wilbert. Shaw testified that he reviewed no files and had no personal or firsthand knowledge of any matters in the complaint. And Cruikshank testified that any recovery in the present lawsuit would be divided between himself and Martin. If so, the only parties who would benefit from any recovery against respondents are Martin and Cruikshank.
- 11 The so-called smoking gun documents include (1) a 1994 tolling agreement between Wilbert and SCB and (2) a 1998 letter from C & H attorney Darrell Hallett to SCB attorney John Burgess agreeing that court-approved administrative fees would be split 50-50 between Wilbert and SCB. It is not clear how this evidence supports Shaw's conspiracy claims. There is nothing inherently improper about tolling agreements or fee sharing arrangements.
- 12 ER 602 provides, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter...."
- 13 In a footnote, Shaw seems to argue that SCB and C & H failed to cure their deficient authenticating declarations because their clarifying responses were not filed with their summary judgment motion 28 days before the hearing as required by CR 56(c). But Shaw filed his motion to strike on November 1, 2007, eight days before the summary judgment hearing. SCB and C & H's clarifications, submitted on November 7 and 8, were filed in response to Shaw's motion. The trial court has the discretion to accept affidavits filed anytime before issuing its final summary judgment order. *Brown v. Peoples Mortgage Co.*, 48 Wash.App. 554, 559-60, 739 P.2d 1188 (1987); CR 6(b). Shaw did not argue that the trial court abused its discretion in accepting the

clarifications.

- 14 Shaw contends that the stricken evidence included fee invoices that establish SCB's liability as a matter of law. But this evidence, even if considered, cannot overcome summary judgment dismissal of his claims based on the statute of limitations.
- 15 Shaw argued below that Federal Rule of Civil Procedure 53 supported his motion to impose additional requirements on the discovery master. He has abandoned this meritless argument on appeal.
- 16 CR 26(c) provides, "If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion." And CR 37(a)(4) provides that if a motion for order compelling discovery is granted, "the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."
- 17 Courts have interpreted CR 11 and RCW 4.84.185 to authorize an award of both attorney fees and costs to the prevailing party. *See, e.g., State ex rel., Wash. Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wash.App. 277, 295, 150 P.3d 568 (2006).
- 18 For example, Johnson's time records include all expenses associated with clerical tasks.
- 19 We observe that the trial court did not find that the lawsuit was initiated for the purposes of harassment, delay, nuisance, or spite. But Shaw did not challenge the award on this basis.
- 20 Shaw also argues that the trial court erred in entering CR 11 sanctions against him because he did not sign any pleadings, motions, or memoranda in violation of the rule. Similarly, Cruikshank argues that the court erred in entering RCW 4.84.185 sanctions against him. This argument mischaracterizes the trial court's order. The court did not specifically sanction Shaw under CR 11 and Cruikshank under RCW 4.84.185. Rather, it found violations of both CR 11 and RCW 4.84.185 and ordered Shaw and Cruikshank to pay the defendants' attorney fees and costs.
- 21 Shaw relies specifically on CR 60(b)(4) (relief from an order based on fraud, misrepresentation, or other misconduct of an adverse party) and CR(b)(11) (any other reason justifying relief). A trial court's ruling under CR 60(b) is reviewed for abuse of discretion. *Showalter v. Wild Oats*, 124 Wash.App. 506, 510, 101 P.3d 867 (2004).
- 22 Shaw also assigned error to the trial court's order granting SCB's motion for protective order regarding his discovery requests related to attorney fees and costs. But Shaw does not argue the issue in his brief, and we will not address it. RAP 10.3(a)(6); *Timson v. Pierce County Fire Dist. No. 15*, 136 Wash.App. 376, 385, 149 P.3d 427 (2006).
- 23 On May 1, 2009, Shaw submitted an appellants' supplemental authority and declaration of counsel consisting of evidentiary materials. C & H filed a motion to strike. We agree with C & H that these materials do not qualify as additional authorities under RAP 10.8. *See Giedra v. Mt. Adams Sch. Dist. No. 209*, 126 Wash.App. 840, 845 n. 1, 110 P.3d 232 (2005) (arbitrator's decision in related matter "does not qualify as an additional authority under RAP 10.8."). Shaw made no attempt to establish that these materials were before the trial court or included in the clerk's papers. No rule permits Shaw to supplement the record in this manner. We grant C & H's motion to strike.