

~~No. 67277-1-I~~ and No. 67195-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RHODA CASSELL, individually, and as Personal Representative
of the ESTATE OF DAVID FINCH,

Appellant,

v.

DOUGLAS A. PORTELANCE, M.D.; and EASTSIDE INTERNAL
MEDICINE, PLLC, a Washington Corporation,

Respondents.

In re Estate of:

DAVID DANIEL FINCH,

Deceased.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The essence of appellant's argument is that lying to a trial court to obtain relief must be excused if the person who secured the relief could have obtained it honestly. In November 2008, Rhoda Cassell secured appointment as personal representative of David Finch's estate based on her nomination and appointment in a will that she swore Mr. Finch had signed in the presence of two witnesses. In 2011, Ms. Cassell admitted that neither witness had actually seen Mr. Finch sign the proffered will and that Mr. Finch had "technically" died intestate, and the probate court vacated the 2008 order appointing her as personal representative based on her nomination in the will. Ms. Cassell then secured appointment as personal representative again on the ground that she was Mr. Finch's surviving spouse and because Mr. Finch's relatives consented.

Invoking equity, Ms. Cassell asks this Court to contrive a way to backdate her 2011 appointment as representative of an intestate decedent's estate to the date of her fraudulently secured appointment as representative of a decedent whom she falsely swore died testate. Ms. Cassell seeks such equitable relief for the sole purpose of reviving a wrongful death action she filed against Dr. Portelance in December 2008 and that was dismissed in 2011 after her November 2008 appointment as personal representative was vacated. Making Ms. Cassell's 2011 reappointment as personal

representative retroactive to 2008 would condone a fraud upon the court for her benefit alone, because she is Mr. Finch's only heir. Instead, and to do justice, this Court should affirm the trial court orders from which Ms. Cassell appeals.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court properly consider evidence proffered by Dr. Portelance that the purported will of David Finch had not been properly witnessed?

2. Did the Superior Court properly vacate the November 25, 2008 order appointing Ms. Cassell as personal representative of Mr. Finch's estate that Ms. Cassell had fraudulently obtained by falsely swearing that Mr. Finch had died testate?

3. Did the Superior Court properly not make its April 22, 2011 order appointing Ms. Cassell as personal representative, which was based upon her status as Mr. Finch's surviving spouse and the consent of his relatives, retroactive to November 25, 2008 *nunc pro tunc*?

4. With the vacation of the fraudulently obtained 2008 order appointing Ms. Cassell as the personal representative, did the Superior Court properly dismiss the medical malpractice action that had been brought in 2008 on grounds that Ms. Cassell's 2008 appointment as

personal representative had never been valid and she thus lacked the capacity to bring the 2008 medical malpractice action?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Summary.

David Finch died intestate on September 2, 2007, leaving no separate property or descendants. Because she was his surviving spouse and their property was all community property, Rhoda Cassell could have sought appointment as personal representative of Mr. Finch's estate under RCW 11.28.110 and .120(1), which provide for administration of the estate of a person who dies intestate and give preference to the surviving spouse as personal representative.

Instead, Ms. Cassell secured appointment as personal representative of Mr. Finch's estate not as surviving spouse, but as the nominee under what she represented to the court, in a verified petition filed November 25, 2008, was a Will that Mr. Finch had executed on August 27, 2007 (six days before he died) in the presence of witnesses. Ms. Cassell, however, knew that neither person signing the purported Will as a witness had actually seen Mr. Finch sign anything on August 27, 2008. She knew that the will had been drafted by a lawyer at her request and had been emailed to her earlier that day, and that both "witnesses" to the purported Will had not even looked, much less ventured, into the

bedroom where Mr. Finch lay dying at home, sedated, in a condition that a hospice nurse characterized that day as “comatose.”

After getting the purported Will admitted to probate and securing her appointment as Personal Representative based on it, the only things Ms. Cassell did as Personal Representative were to file on December 1, 2008, and then to litigate to the eve of trial in September 2010, a medical malpractice lawsuit against Dr. Douglas Portelance for Mr. Finch’s alleged wrongful death. Ms. Cassell was the only RCW 4.20.020 beneficiary of any wrongful death recovery by the Estate, and the complaint identified no other statutory beneficiaries.

Three weeks before the scheduled September trial of the medical malpractice lawsuit, Ms. Cassell belatedly produced Mr. Finch’s hospice records. Dr. Portelance’s counsel saw an entry in the records characterizing Mr. Finch as “comatose” on the day he supposedly executed the purported Will that Ms. Cassell had used to secure her appointment as personal representative, and noticed that Mr. Finch’s “signature” was an indecipherable squiggly line. Dr. Portelance’s counsel inquired and learned that neither person who signed the purported Will as a witness had actually seen Mr. Finch sign the document.

On September 10, 2010, Dr. Portelance moved for dismissal of the action, arguing that a wrongful death action may be prosecuted only by a

duly appointed personal representative and that, because the statute of limitations had expired on September 3, 2010, any re-filed wrongful death claim would be time-barred.

The court vacated the 2008 order that had admitted the purported Will to probate and that had appointed Ms. Cassell as personal representative based on her nomination and appointment in the Will. With Mr. Finch's relatives' consent, the court then granted Ms. Cassell's application for appointment as personal representative of Mr. Finch's estate, based upon her status as his surviving spouse, but the court did not make that appointment retroactive to November 25, 2008 *nunc pro tunc*. The court then dismissed the malpractice action with prejudice. Ms. Cassell has appealed from the orders vacating her 2008 appointment as personal representative and dismissing the wrongful death complaint.

B. Detailed Statement of Facts.

1. Ms. Cassell secures appointment as Personal Representative of her late husband's estate by presenting the court with a document purporting to be his Will.

On November 25, 2008, in an *ex parte* proceeding, the King County Superior Court, Judge Richard Eadie, entered an Order ("the 2008 Order") finding that David Finch died testate in King County on September 2, 2007, having executed six days earlier, while of sound mind, a will attested to by competent and subscribing witnesses in the manner

provided by law, CPE 13,¹ admitting to probate a document purporting to be Mr. Finch's Will, and appointing Rhoda Joy Cassell Personal Representative of Mr. Finch's Estate, CPE 14.

The 2008 Order was entered because (1) Ms. Cassell represented in her verified Petition for Appointment of Personal Representative, CPE 1-3, that the Will had been "attested to by competent witnesses who subscribed their name[s] to the Will in the presence of the decedent at his request," CPE 1 (¶ 2); (2) the purported Will appears, on its face, to have been witnessed properly by Timothy and Gwendolyn McClellan and notarized by Judie Skagen, *see* CPE 11-12; and (3) the purported Will nominates and appoints Ms. Cassell personal representative, CPE 2 (¶ 4), 5.

2. Ms. Cassell sues Dr. Portelance for Mr. Finch's alleged wrongful death.

A week after securing appointment as Personal Representative, Ms. Cassell filed a wrongful death complaint on behalf of herself and the Finch Estate against Dr. Douglas Portelance and his employer, Eastside Internal Medicine, PLLC (hereafter collectively "Dr. Portelance"). CPM

¹ Respondents adopt the convention appellant has used for citing to the two sets of clerk's papers in these consolidated appeals. "CPE" refers to the clerk's papers in Court of Appeals No. 67195-2-I, the appeal in the Estate case before Judge Eadie below, and "CPM" refers to the clerk's papers in Court of Appeals No. 67277-1-I, the appeal in the medical malpractice/wrongful death case before Judge Middaugh below.

3-12. Filing of that lawsuit was apparently the only thing Ms. Cassell did as Personal Representative.²

Ms. Cassell alleged that Dr. Portelance committed malpractice by telling Mr. Finch in December 2004 that he had rectal bleeding due to hemorrhoids when he actually had colorectal cancer. CPM 4 (¶ 2.3), CPM 9-10 (¶ 3.3). Dr. Portelance has denied that he committed malpractice. CPM 30-33. Trial of the malpractice case was initially scheduled for May 24, 2010, before Judge John Erlick, CPM 19, but ultimately was rescheduled for September 13, 2010, before Judge Laura Gene Middaugh, *see App. Br. at 12*.

3. Dr. Portelance learns that a hospice nurse noted that Mr. Finch was comatose on the day he supposedly signed his will and that the witnesses to the purported will did not actually see Mr. Finch sign it.

On September 9, 2010, Dr. Portelance moved to dismiss on the ground that Ms. Cassell had not secured her 2008 appointment as Personal Representative of Mr. Finch's estate legally and thus could not lawfully have filed the wrongful death action. CPM 35-41. The motion to dismiss was based on evidence that Dr. Portelance's counsel had gathered after

² Because Mr. Finch, in the purported Will, bequeathed what little, if any, separate property he had to Ms. Cassell, CPE 6 and 12 (*see "X" and "NA" at bottom of page*), CPE 145 (lines 3-4), CPE 193-94 (¶ 5), CPE 396 (¶ 1.4), there was little else for Ms. Cassell to do, except give the notice required by RCW 11.28.237(1) to known and potential heirs, which she did not do. *See* 4/1/11 RP 19-20 and 25, CPE 186 (¶ 2), and CPE 392(¶ 2).

noticing, on one page of hospice records that Ms. Cassell had belatedly produced 14 days earlier, on August 26, 2010, CPE 67, a nurse's entry, CPM 57,³ indicating that Mr. Finch had been "comatose" on August 27, 2007, the day he had ostensibly signed his will, CPM 35, 38. Dr. Portelance's counsel's follow-up investigation led not only to the discovery of a purported deathbed "will" that Mr. Finch had allegedly signed (with an unrecognizable scribbled line) 5 days before his death when the belatedly produced hospice records reveal that he was comatose, but also that the purported witnesses to the deathbed will had not actually seen Mr. Finch sign or make a mark on it. CPM 36-39.

Judge Middaugh entered an order continuing trial of the malpractice lawsuit to April 18, 2011, and allowing defense counsel "to investigate, take discovery and address . . . with the Probate Court," *i.e.*, Judge Eadie, "the propriety of the appointment of [Ms. Cassell] as Personal Representative of the Estate of David Finch." CPM 95-96. Dr. Portelance's counsel thereafter took the depositions of Timothy and Gwendolyn McClellan, the two purported witnesses to Mr. Finch's signing of the will document. The McClellans testified that Ms. Cassell alone had gone into Mr. Finch's bedroom with the will document, that

³ The same hospice record page can be found at CPE 116. The same nurse characterized Mr. Finch as "alert" on August 20 and 23, CPE 121 and 126, and as "comatose" on August 28 and 30, CPE 130 and 135.

they did not see Mr. Finch sign the will document, that they did not speak with Mr. Finch or enter the room he was in on August 27, 2007, CPE 39-41, CPM 214-17, 221-22, 231, 241, that they would not have recognized Mr. Finch's signature, CPE 40, 51, and that they could not say that Mr. Finch was competent, CPE 41, 52. Hospice nurse Sarah Spangler, R.N., who had made the chart entry characterizing Mr. Finch's condition on August 27, 2007 as "comatose," CPE 116, signed a declaration, CPE 111-13, attesting, among other things, that Mr. Finch was incapable of arousal to consciousness when she visited him on August 27, 2007, CPE 112 (¶ 6), had been receiving "significant doses of a narcotic Morphine, a strong pain medication along with a benzodiazepine, Lorazepam, a sedative/hypnotic," CPE 112 (¶ 7), and in her opinion had not been competent to execute a will that day, CPE 112 (¶ 6).

4. Dr. Portelance moves to have Ms. Cassell's appointment as Personal Representative vacated.

As directed by Judge Middaugh, CPM 96, Dr. Portelance put his evidence of fraud before Judge Eadie, filing a Motion to Intervene and Vacate Order Appointing Personal Representative under the cause number of the probate case, CPE 411-22. In response, Ms. Cassell argued that Judge Eadie should not consider Dr. Portelance's motion because it was too late for anyone to contest the will, CPE 140-41, and because Dr.

Portelance lacked standing to do so, CPE 141-42. She asserted (without any supporting declarations) that her intent had not been fraudulent, CPE 142-44, that Mr. Finch had not been completely comatose all day on August 27, 2007, CPE 143, that Mr. Finch had “ma[d]e his mark” on the will document in *her* presence, CPE 143 (line 8), but admitted that the McClellans had not been in the same room as Mr. Finch, CPE 143. Ms. Cassell claimed that she and the McClellans had “acted simply as lay persons would act,” CPE 143 (lines 23-24), that she had tried to obtain Mr. Finch’s signature “without disturbing him or inconveniencing the kind witnesses who agreed to be present for the signing,” CPE 143-44 (to line 2), and that she had “had no knowledge that witnesses needed to see Mr. Finch sign the Will,” CPE 144 (line 9).

Ms. Cassell further argued that, even if the will were to be held invalid, she nonetheless should be allowed to continue acting as personal representative because she “is the appropriate personal representative for Mr. Finch’s estate regardless of the existence of a valid Will or whether Mr. Finch died intestate,” CPE 142 (lines 16-17) and 145, and because Dr. Portelance was “trying to take advantage of a potential technical error, CPE 145 (lines 2-3), in order to “destroy the estate’s claim against him,” CPE 146 (line 8), by “back-dooring a statute of limitations defense to a replacement personal representative,” CPE 139 (lines 16-17).

Judge Eadie heard argument on Dr. Portelance's motion on April 1, 2011. 4/1/11 RP. Counsel for Dr. Portelance explained that he did not regard the motion as a "will contest," but rather as a proceeding to point out that Ms. Cassell's appointment as Personal Representative in 2008 had been void because Mr. Finch had not been of sound mind on the day he supposedly had signed the will and because the purported witnesses to the will had not actually seen him sign it and could not say he had been competent to do so. 4/1/11 RP 6-8.

Judge Eadie rejected Ms. Cassell's counsel's argument that it was too late for anyone to object to admission of the will to probate, explaining, *sua sponte*, that Ms. Cassell had not given required notice to heirs, such that the time period within which to contest the will had never started to run. 4/1/11 RP 19-20. When Judge Eadie noted that Ms. Cassell's brief had indicated that the malpractice suit could not be filed again if she was disqualified as Personal Representative, 4/1/11 RP 21, Ms. Cassell's counsel suggested that if the court were to conclude that Mr. Finch had died intestate, it should use its "power to do equity" and appoint her as personal representative as the surviving widow "in a manner that preserves the rights of the estate" to continue the wrongful death claim against Dr. Portelance. 4/1/11 RP 21. Judge Eadie noted that issues

concerning appointment of a new Personal Representative had not been briefed. 4/1/11 RP 23.

Ruling orally on Dr. Portelance's motion, Judge Eadie stated that "it appears to me at this time that the will was improperly admitted to probate," that Ms. Cassell "then failed in her duties as a PR," which "removes the bar of the four month limitation." 4/1/11 RP 25. In the ensuing discussion, counsel for Ms. Cassell declined to agree to entry of Dr. Portelance's proposed order, 4/1/11 RP 35, and indicated an intention to "address" in briefing the "downstream effect" of the court's ruling, 4/1/11 RP 36, and Judge Eadie commented that it appeared Ms. Cassell could seek to be appointed administrator of the estate because she is Mr. Finch's surviving spouse, but that she would have to file a new petition and oath, 4/1/11 RP 36-37.

On April 4, 2011, Judge Eadie entered written findings on Dr. Portelance's motion to intervene and vacate, including findings that the purported will of David Finch "was invalid and should not have been admitted to probate," and that, because Ms. Cassell's appointment had been "based on her nomination in the Will, . . . that appointment is invalid." CPE 187. Judge Eadie concluded in his April 4 Order that "the admission of the will is withdrawn and the will is rejected, and the appointment of the Personal Representative is withdrawn." CPE 187.

Judge Eadie then directed the parties to “present their proposed orders effectuating the findings above and addressing any other issues appropriate to be addressed in the Court’s order.” CPE 187.

After the April 4 hearing and before the hearing on April 22 at which Dr. Portelance presented his order, Ms. Cassell filed (1) a memorandum re-contesting Dr. Portelance’s right to bring his motion, CPE 176-181; (2) an Application for Letters of Administration notwithstanding the revocation of her previous appointment, CPE 182-85; (3) a previously unfiled affidavit, dated September 13, 2010, attempting to explain the actions she had taken and not taken in 2007 and 2008, CPE 193-96; (4) various consents of Mr. Finch’s relatives to her appointment as personal representative, CPE 197-201, or to her counsel’s appointment as administrator of the estate, CPE 361-70; (5) attorney Michael K. DuBeau’s declaration, CPE 246-48, concerning his preparation of “estate planning documents” including a will, that he drafted and e-mailed to Ms. Cassell on August 27, 2007; (6) declarations by relatives asserting that Mr. Finch had been competent at times before, on, and after August 27, 2007, CPE 290-94; (7) a memorandum in opposition to Dr. Portelance’s proposed order, CPE 221-230; (8) a memorandum in support of her application for reappointment as personal representative in which she argued that the appointment should be *nunc pro tunc* so Dr. Portelance

could not “derail [the] malpractice case,” CPE 242; and (9) a sur-reply in which she also argued for *nunc pro tunc* re-appointment, CPE 384-86, and made a new argument that she should be recognized as having served as a *de facto* personal representative whose actions – *i.e.*, filing the wrongful death lawsuit against Dr. Portelance – should be held effective and not void, CPE 386-87.

On April 22, 2011, Judge Eadie announced his intention to enter Dr. Portelance’s proposed order revoking Ms. Cassell’s 2008 appointment as Personal Representative, but asked first to hear argument on Ms. Cassell’s application for letters of administration. 4/22/11 (Eadie) RP 7-8.⁴ When counsel for Dr. Portelance objected to Ms. Cassell’s request for *nunc pro tunc* reappointment, counsel for Ms. Cassell argued that Dr. Portelance lacked standing to object, and Judge Eadie stated that he thought the question of *nunc pro tunc* reappointment should be taken up with Judge Middaugh, 4/2/11 (Eadie) RP 10-11, and that he considered the granting of Judge Portelance’s motion and entry of the order appointing Ms. Cassell personal representative pursuant to RCW 11.28.110 “the end of [his] jurisdiction in this case.” 4/22/11 (Eadie) RP 15. After further

⁴ Because there are two separate transcripts of proceedings that occurred on April 22, 2011, the transcript of the hearing before Judge Eadie is being cited as “4/22/11 (Eadie) RP [page number],” and the transcript of the hearing before Judge Middaugh is being cited as “4/22/11 (Middaugh) RP [page number].”

colloquy, Judge Eadie explained that he had not made a finding as to whether Mr. Finch had “moved his hand across the paper,” because he considered such a finding unnecessary, but that he had found that the will had not been properly executed and that “therefore the appointment of the personal representative, relying on the admission of the Will, shouldn’t have been made.” 4/22/11 (Eadie) RP 22-23.

Judge Eadie signed Dr. Portelance’s proposed order, finding that the document Ms. Cassell had represented to be Mr. Finch’s last will was not properly witnessed, CPE 392 (Finding 3), concluding that the will had to be rejected, and that, because Ms. Cassell’s appointment had been based on her nomination in the purported will, she should be removed as Personal Representative, CPE 393 (Conclusions 2, 3), and granting Dr. Portelance’s motion to intervene and vacate the appointment. That order is one of two to which Ms. Cassell has assigned error. *App. Br. at 4.*

Judge Eadie also entered an order granting Ms. Cassell’s application for letters of administration under RCW 11.28.110. CPE 395-97. He used the form of order that Ms. Cassell had proposed, but struck out (and initialed the strike through of) the following provision:

~~2.5.— The Personal Representative is a Plaintiff in *Estate of Finch vs. Portelance, M.D.*, Cause No. 08 2 41085 4 SEA, King County Superior Court. *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 734 P.2d 533 (1987) holds that the Personal Representative so appointed is the~~

~~real party in interest in a case of this nature. Consequently, this order is intended to allow the Personal Representative to continue with the litigation and nothing herein shall adversely affect the pending litigation and all prior decision [sic] of the of the [sic] former Personal Representative in such litigation are [sic] hereby deemed to be the decisions of the Personal Representative appointed by this order and all such prior decisions shall be deemed effective *nunc pro tunc* as of the filing of this estate on November 25, 2008.~~

CPE 396-97. Ms. Cassell has not assigned error to any part (entered or deleted by Judge Eadie) of the April 22, 2011 order granting letters of administration under RCW 11.28.110. *See App. Br. at 4.*

On the afternoon of April 22, 2011, after Judge Eadie's order granting letters of administration had been filed and the clerk had issued letters of administration to Ms. Finch based on that order, CPE 398, Ms. Cassell filed an oath, CPE 394, and a separate Ratification of "all of the prior determinations and decisions of the prior Personal Representative as if they had been made by her," and in which she declared "that such determinations shall relate back to the time the determination was originally made and shall remain in effect as if having been made by the Administrator at the time the determination was first issued," CPE 399.

Still later on April 22, 2011, Judge Middaugh then took up with counsel the matter of Dr. Portelance's motion to dismiss. 4/22/11 (Middaugh) RP. Judge Middaugh had copies of the orders Judge Eadie had entered earlier that day. 4/22/11 (Middaugh) RP 6. After colloquy,

Judge Middaugh advised counsel that she would study the case law and whatever briefing and evidence a party wanted her to consider, 4/22/11 (Middaugh) RP 21-31, and would allow the parties one more round of briefing, 4/22/11 (Middaugh) RP at 31-32. She stated her intention to issue a decision as soon as she could and told counsel that “[i]f you have not heard from me in two weeks, please feel free to call and harass me. . . .” 4/22/11 (Middaugh) RP 32

Ms. Cassell thereafter filed a memorandum, CPM 190-98, and declarations, CPM 206-57, and Dr. Portelance filed a reply memorandum, CPM 258-63.

On May 9, 2011, Judge Middaugh signed and filed an order, CPM 266-68, in which she ruled that, because Judge Eadie had granted a motion by Dr. Portelance to *vacate* the 2008 order appointing Ms. Cassell as Personal Representative, Ms. Cassell’s appointment had never been valid and Ms. Cassell had lacked the capacity to bring the malpractice action in December 2008, which action therefore had to be dismissed with prejudice, CPM 267-68. Recognizing that her order was based substantially on an interpretation of Judge Eadie’s order vacating the 2008 order appointing Ms. Cassell personal representative, CPM 268, and noting that Judge Eadie’s April 22, 2011 orders were “somewhat ambiguous in that he finds the will invalid and removes Ms. Cassell as personal representative [and]

then continues the estate under the same case number as an estate without a will and appoints Ms. Cassell as personal representative . . . ,” CPM 267, and that Judge Eadie was on leave until May 17, CPM 268, Judge Middaugh gave the parties more than the ten days allowed under CR 59(b) – until May 25, 2011 – to file any motion for reconsideration of her order, thus allowing time for either party first to seek clarification of Judge Eadie’s April 22 Order from him, CPM 268. Judge Middaugh’s order dismissing the malpractice lawsuit is the second of two orders to which Ms. Cassell has assigned error. *App. Br. at 4.*

Ms. Cassell never brought any motion for clarification before Judge Eadie or any motion for reconsideration before Judge Middaugh. Nor did she bring any motion for extension of time to bring either motion before either of them. Instead, on May 20, 2011, she filed a notice of appeal from Judge Eadie’s April 22, 2011 order vacating Ms. Cassell’s 2008 appointment as personal representative, and on June 7, 2011, filed a notice of appeal from Judge Middaugh’s May 9, 2011 order dismissing the wrongful death action.⁵

⁵ In early September 2011, Ms. Cassell filed a motion in this Court to stay the appeals and permit further trial court proceedings to enable her to seek clarification from Judge Eadie of the April 22, 2011 order vacating her 2008 appointment as personal representative based on the purported will and, if appropriate, to then seek reconsideration by Judge Middaugh of the May 9, 2011 order dismissing the wrongful death action against Dr. Portelance. In response, Dr. Portelance pointed out, among other things, that RAP 7.2(e) requires that post-judgment motions to modify a decision must first be brought in the trial court, and that Ms. Cassell had not complied with the rule.

IV. ARGUMENT

A. Ms. Cassell Lacked the Capacity to Bring a Wrongful Death Action Unless She Was the Properly Appointed Personal Representative of Mr. Finch's Estate.

A personal representative, and *only* a personal representative, has the capacity to bring a wrongful death action. RCW 4.20.010; *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007). Thus, if Ms. Cassell was not the properly appointed personal representative, she lacked the capacity to file the wrongful death complaint against Dr. Portelance in December 2008.

For the reasons explained in Part B below, Ms. Cassell was not the properly appointed personal representative of Mr. Finch's estate when she filed the complaint against Dr. Portelance, so the filing of the wrongful death claim in 2008 was ineffective. By 2011, when Ms. Cassell belatedly admitted that Mr. Finch had died intestate and secured a new appointment as personal representative because she was Mr. Finch's surviving spouse⁶

The motion to stay the appeals and permit further trial court proceedings has been referred to the panel of judges that will be considering the appeal on the merits.

⁶ Ms. Cassell overstates things when she asserts, *App. Br. at 36*, that RCW 11.28.120(1) gave her the "right" and "statutory priority" to serve as personal representative by virtue of her status as surviving spouse and "is **absolutely** entitled to administer the estate [bold type in original]." A statute that gives a surviving spouse preference for appointment as estate administrator "is not so hard and fast as to require the court to appoint one as an executor or administrator who has given evidence of dishonesty of purpose in seeking the appointment, or who has betrayed a gross unfitness in other respects to administer the trust, even though he have the preference right given by the statute." *In re Estate of Bredl*, 117 Wash. 372, 375, 201 P. 296 (1921).

and Mr. Finch's other potential heirs formally consented, it was too late to re-file because the statute of limitations had run on any wrongful death claim. And, as explained in Part C below, because Ms. Cassell purported to file the complaint under authority of an appointment she had secured by a fraud upon the court, she may not invoke the aid of equitable principles such as *nunc pro tunc* relief, "*de facto*" representative status, or CR 17(a) ratification and CR 15(c) "relation back" to backdate her appointment to 2008 and avoid the consequences of the fraud she perpetrated on the court.

B. Ms. Cassell Was Not the Properly Appointed Personal Representative of Mr. Finch's Estate When She Filed the Wrongful Death Complaint in December 2008.

1. Ms. Cassell secured her appointment as Personal Representative based upon testimony she knew was false and based upon a will that falsely purported to have been witnessed properly, and thus committed a fraud upon the court.

Ms. Cassell secured her appointment as Personal Representative in 2008 based upon a will document and her affirmative sworn verification to the court that witnesses had "subscribed their name to the Will in the presence of the decedent at his request" on August 27, 2007. CPE 1, 3.⁷

⁷ An action for wrongful death may be commenced within three years of death. *Atchison*, 161 Wn.2d at 379-80. Mr. Finch died September 2, 2007. CPE 4. Any action for his alleged wrongful death thus could have been filed up until September 2, 2010. Ms. Cassell thus avoided no statute of limitations problem by pursuing appointment as personal representative under the purported will in 2008. Ms. Cassell must have had some other reason for having the will admitted to probate and being appointed personal representative under it instead of telling the truth and seeking appointment as

No one (except Ms. Cassell) would have been the wiser but for the hospice record that Ms. Cassell belatedly produced in August 2010, and that recorded Mr. Finch's condition as "comatose" on August 27, 2007, the day he supposedly made his mark on the will document. But production of the hospice record on the eve of trial in the malpractice lawsuit led Dr. Portelance's counsel to investigate further, and that led him to the evidence that was put before the appointing judge, which evidence that judge could hardly have ignored. Although Ms. Cassell offers excuses for what she did, CPE 194-95, she admits that the McClellans did not see Mr. Finch sign the will document and are unable to opine that he was competent, CPE 195. The evidence also establishes that Ms. Cassell knew the will document itself falsely stated that the McClellans had seen Mr. Finch sign the will, CPE 11, and that they had sworn before a notary public that he seemed to them to be of sound mind, CPE 12.

Ms. Cassell thus admits that she secured her 2008 appointment knowing what she was telling the court under oath, and what purported to be sworn affirmations in the will document itself, was not true. Because Ms. Cassell made multiple statements of fact that were material to the court's decision whether to appoint her personal representative and to induce the court's reliance thereon, because Ms. Cassell knew that several

representative of an intestate decedent's estate based on her status as surviving spouse, but Dr. Portelance does not know what reason that might be.

of those material statements of fact – as well as sworn statements in the will itself – were false, and because the court actually did rely on the false statements and cannot be faulted for doing so, the conclusion is inescapable that Ms. Cassell, as a matter of law as well as of fact, committed fraud upon the court on November 25, 2008.⁸

The commission of a fraud on the court surely cannot be overlooked or excused. It must have real consequences. The only way the fraud Ms. Cassell committed will *have* real consequences is if this Court affirms the dismissal of the wrongful death complaint Ms. Cassell filed without having lawfully secured the legal authority to do so.

2. Ms. Cassell is not entitled to assert standing/timeliness objections to kill the messenger.

Ms. Cassell argues that RCW 11.24.010 establishes a four-month limitations period for will contests, that only persons with an “interest” in an estate will be heard in a will contest proceeding, and that Dr. Portelance lacked standing and tried too late to challenge the 2008 order appointing her personal representative under an invalid will. *App. Br. at 19-32*. But

⁸ Dr. Portelance does not contend, and does not mean to imply in this brief, that the attorney(s) who represented Ms. Cassell in drafting and filing the complaint for wrongful death were aware that the purported will had not been not signed by Mr. Finch in the presence of the McClellans or of other circumstances mentioned in this brief surrounding the events of August 27, 2007 that cast substantial doubt on the truth of Ms. Cassell’s assertions that Mr. Finch was competent to understand the terms of a will document drafted earlier that day and had made squiggly lines intending to sign the will as best he could. For example, even aside from the nurse’s description of him as “comatose,” CPE 116, Mr. Finch could not have read the will (or had the will read to him) before August 27, 2007, because it was not drafted until that day, *see* CPE 247 (¶ 3).

Dr. Portelance did not “contest” Mr. Finch’s will.⁹ Dr. Portelance, in his motion to intervene and to vacate Ms. Cassell’s 2008 appointment as personal representative, brought evidence conclusively establishing fraud to the attention of the court that had been defrauded, which is a ground for relief as to which CR 60(b) imposes no time limit (other than “a reasonable time”), and which anyone should be welcome to do, whether because of a personal interest or merely as *amicus curiae*.¹⁰ See *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L. Ed. 1447 (1946) (“The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. . . . The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation”); *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980) (“a claim of fraud

⁹ Contrary to Ms. Cassell’s assertion, *App. Br. at 21*, Judge Eadie never found, or ruled, that Dr. Portelance’s motion to intervene and vacate Ms. Cassell’s appointment as personal representative was a “will contest” governed by RCW 11.24.010. At most, Judge Eadie addressed Ms. Cassell’s claim that Dr. Portelance’s motion was a will contest subject to RCW 11.24.010’s four-month limitations period, by ruling that, if the four-month statute of limitations for a will contest applies, under *Estate of Little*, 127 Wn. App. 915, 920, 113 P.3d 505 (2005), it is tolled when an heir is not served with notice. CPE 187, 393.

¹⁰ See also *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) (same); *Campbell v. Kildew*, 115 P.3d 731, 738 (Idaho 2005) (same); *Selway v. Burns*, 429 P.2d 640, 644 (Mont. 1967) (because it has long been the rule in Montana that a court of equity has inherent power, independent of statute, to grant relief from judgments gained by fraud.” person not party to the judgment does not lack standing to seek to have judgment vacated under Rule 60(b)).

on the court may be raised by a non-party”); *Lawrence v. Wink*, 293 F.3d 615, 627 n.11 (2d Cir. 2002) (nonparty may raise FRCP 60(b) claim of fraud on the court). Alternatively, Dr. Portelance made what amounts to a permissible collateral attack on an *ex parte* 2008 order that affected him. Either way, Dr. Portelance brought his motion while the case in which the fraud had been perpetrated remained open (rather than long after the case had been concluded).

RCW 11.24.010 is not a statute of repose for bringing, to the attention of a court that granted someone relief *ex parte*, the fact that the court did so based on sworn representations that the person who secured the relief knew were not true. No decision that Ms. Cassell cites in her opening brief bars a stranger to a case from seeking to undo actions that affect him and that the court took based on material statements of fact that demonstrably were false. Indeed, contrary to what Ms. Cassell argues, Washington case law specifically recognizes that, unlike parties to a proceeding, a stranger to a judicial proceeding, as Dr. Portelance was to the *ex parte* probate proceeding that produced the 2008 Order, *may* collaterally attack a judgment, decree, or order that a party to the proceeding procured by defrauding the court. As the court explained in *Peyton v. Peyton*, 28 Wash. 278, 68 P. 757 (1902):

“Fraud in procuring a judgment cannot be shown by the parties to such judgment, in any collateral proceeding.” 1 Freeman, *Judgments* (4th ed.), § 132.

. . . A distinction seems to be observed between parties to an action in which a judgment has been obtained by fraud and strangers to the record who may be affected thereby. Thus the same author, at § 336, observes as follows:

“Whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained.”

Peyton, 28 Wash. at 298-99; see also *Batey v. Batey*, 35 Wn.2d 791, 799, 215 P.2d 694 (1950) (quoting 1 *Freeman on Judgments* (5th Ed.) 661, § 331) (“There can be no question as to the vitiating effect . . . of what has been termed fraud upon the court. It . . . precludes the acquisition of that power or jurisdiction without which . . . a judicial determination is a mere nullity”)).

Dr. Portelance’s motion bore a message to the court that Ms. Cassell did not welcome and that she may have wished Judge Eadie or Judge Middaugh could have disregarded or ignored and metaphorically killed the messenger instead. But, when the message establishes that the court was defrauded, the cases cited above recognize that the rule of law is

so important as to demand that the messenger be spared and that the message be heeded and acted upon.

C. Ms. Cassell Is Not Entitled Under Any Equitable Theory to Retroactive Re-appointment as Personal Representative to Keep Her Wrongful Death Complaint from Being Barred by the Statute of Limitations.

1. The trial court could not have reappointed Ms. Cassell retroactive to November 2008 *nunc pro tunc*.

Case law declares that a trial court's decision whether to enter an order *nunc pro tunc* is reviewed under an abuse of discretion standard. *State v. Hendrickson*, 165 Wn.2d 474, 478, 198 P.3d 1029 (2009); *State v. Smissaert*, 103 Wn.2d 636, 640, 694 P.2d 654 (1985). But that applies to situations in which the court *could* have entered a particular type of order *nunc pro tunc*. Not all orders *can* be entered *nunc pro tunc*. In this case, Judge Eadie lacked discretion to re-appoint Ms. Cassell personal representative of Mr. Finch's intestate estate under RCW 11.28.110 and .120(1) retroactive to November 2008 *nunc pro tunc*. Although Judge Eadie struck the *nunc pro tunc* language from his re-appointment order (CPE 396) because he felt that was properly for Judge Middaugh to address (and not because he was ruling on the merits), *see* 4/22/11 RP (Eadie) 11, neither he nor Judge Middaugh had discretion to grant Ms. Cassell such relief.

When a court grants relief *nunc pro tunc*, it essentially declares that the relief it is granting now is the relief it meant to grant in the first place but that the record made in the first place fails to reflect that intent. See *Hendrickson*, 165 Wn.2d at 478 (“A *nunc pro tunc* order allows a court to date a record reflecting its action back to the time the action in fact occurred,” citing Black’s Law Dictionary 1100 (8th ed. 2004)); *State v. Petrich*, 94 Wn.2d 291, 296, 616 P.2d 1219 (1980) (a *nunc pro tunc* order “records judicial acts done at a former time which were not then carried into the record”). Thus, for example, a court may permit amendment, *nunc pro tunc*, of an affidavit of service by publication after completion of a foreclosure of real property, where the amendments reflect what did in fact occur. *First Fed. Sav. & Loan Ass’n v. Ekanger*, 93 Wn.2d 777, 781-82, 613 P.2d 129 (1980). And a judgment may be entered *nunc pro tunc* in favor of a substituted personal representative as of the date of a jury verdict notwithstanding that the plaintiff had since died, where “the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively” *Carl v.*

Dep't of Labor & Indus., 38 Wn.2d 890, 892-93, 234 P.2d 487 (1951)
(citations omitted).

No clerical error made the 2008 Order defective. The court did not intend, in 2008, to find that Mr. Finch died *intestate* or to appoint Ms. Cassell personal representative of his estate pursuant to RCW 11.28.110 and .120(1) because she was his surviving spouse. The court found that Mr. Finch had died testate (CPE 13 (¶ A)) because Ms. Cassell falsely claimed that he had, and the court appointed Ms. Cassell personal representative because of her appointment as such in a purported will that she falsely claimed Mr. Finch had signed in the presence of two witnesses, CPE 14 (¶ E), not because she was the surviving spouse. As Judge Eadie found, the will was not properly witnessed and should not have been admitted to probate, and Ms. Cassell should not have been appointed personal representative based on the will, which was the only basis upon which she sought appointment until 2011. Because Ms. Cassell's 2008 application sought appointment as personal representative based solely on her nomination in the purported will, as a matter of law Ms. Cassell was not entitled in 2011 to appointment effective November 25, 2008 *nunc pro tunc* on the different ground that she was Mr. Finch's surviving spouse.

No legal basis existed for Judge Eadie or Judge Middaugh to say in 2011 that the record made in 2008 failed to reflect some actual intention of

the court in 2008 to appoint Ms. Cassell as personal representative of the estate of an intestate David Finch. Thus, the fact that Ms. Cassell did not receive re-appointment retroactively to November 2008 *nunc pro tunc* was not the product of legal error or abuse of judicial discretion.

2. Ms. Cassell did not qualify to be treated as having acted as a *de facto* Personal Representative.

Based on *In re Guardianship of Bouchat*, 11 Wn. App. 369, 522 P.2d 1168 (1974), *rev. denied*, 85 Wn.2d 1010 (1975), and *In re Irrevocable Trust of Michael A. McKean*, 144 Wn. App. 333, 183 P.3d 317 (2008), Ms. Cassell argues, *App. Br. at 38-40*, that her filing and prosecution of the wrongful death claim against Dr. Portelance may and should be validated under a “*de facto* personal representative” theory despite the “invalidity” of her 2008 appointment as Personal Representative.

Neither *Bouchat* nor *McKean* holds, or even suggests, however, that someone may be deemed to have acted as a *de facto* personal representative when the *reason* the person acted as personal representative is because she secured her appointment as such through a fraud upon the court. Even assuming one might otherwise analogize the role of guardian, which was what *Bouchat* involved, to that of the personal representative of an estate, the court in *Bouchat* made clear that recognizing someone as a *de facto* guardian involves application of equitable principles, and

remanded for findings as to whether, among other things, the putative *de facto* guardian had acted in good faith. *Bouchat*, 11 Wn. App. at 372. Similarly, the court in *McKean*, while extending recognition of *de facto* status from guardians to trustees, characterized the rule as being that “[a] *de facto* trustee’s *good faith actions* are binding on third persons.” *McKean*, 144 Wn. App. at 341 (italics supplied).

Ms. Cassell does not qualify as someone who equity may regard as having acted as *de facto* personal representative, because she did not act in good faith. She acted as personal representative based on an appointment she had secured by lying to the court. She does not come before the court with the good faith and “clean hands” needed for a litigant to be entitled to relief based on principles of equity. *See, e.g., Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940) (“Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy”); *Murry v. Carlton*, 65 Wash. 364, 367, 118 P. 332 (1911) (“[s]he who asks for equity must do equity [and s]he who comes into a court of equity must come in with clean hands, and there must be no circumstances for which [s]he is responsible that would rightfully estop [her] from demanding [her] strict rights . . .”); *Cornish College of the Arts v. 1000 Va. Ltd. P’ship*, 158

Wn. App. 203, 216, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014 (2011) (“Equity jurisprudence requires the party seeking equitable relief to have acted in good faith and to come into equity with clean hands”).

3. CR 15(c) and CR 17(a) do not render effective Ms. Cassell’s attempt to cure her lack of capacity to file a wrongful death claim against Dr. Portelance within the statute of limitations by “ratifying” her prior acts after securing reappointment in 2011, because her lack of capacity was not the product of “honest mistake” or “understandable error”.

CR 15(c) (“relation back”) and CR 17(a) (allowing a reasonable time for “ratification” of commencement of an action by, or substitution of, the real party in interest) may, under certain circumstances, operate retroactively to cure a defect in the filing of a wrongful death action. *See Beal v. City of Seattle*, 134 Wn.2d 769, 778-84, 954 P.2d 237 (1998).

As the court recognized, however, in *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 734 P.2d 533, *rev. denied*, 108 Wn.2d 1026 (1987) – a controlling decision that Ms. Cassell cannot ignore and on which she attempts to rely, *App. Br. at 45-49* – “relation back” to make a validly appointed personal representative the plaintiff in a previously filed wrongful death lawsuit depends on the *reason* why a validly appointed personal representative did not file the complaint to begin with. As Ms. Cassell acknowledges, *App. Br. at 28*, the *Rinke* decision, which involved no contention (much less a basis for finding) that anyone had committed a

fraud upon the court, stands for the proposition that “ratification/relation back” relief is appropriate when “an honest mistake” or “understandable error” accounts for the fact that a wrongful death action was filed by someone other than the validly appointed personal representative. *Rinke*, 47 Wn. App. at 230-32. Ms. Cassell attempts to clothe her own actions in the garb of “understandable error,” comparing herself favorably to the widow in *Rinke*, and asserting:

If it was an understandable error for Ms. Rinke not to have been appointed at all, certainly it is understandable that Ms. Cassell would believe that her husband’s wishes expressed in his will should be followed notwithstanding a technical defect in the witnessing of the will.

App. Br. at 49. The favorable comparison fails, however, because it is one thing to “believe [one’s late] husband’s wishes should be followed” as expressed in a properly executed and witnessed will, and quite another to falsely represent to a court under oath that a “will” had no “technical” defects because it had been signed by one’s late husband in the presence of witnesses, when in fact the purported witnesses had not been present for, and did not see, the purported signing.

D. Ms. Cassell Is Not Entitled to Seek “Clarification” of Judge Eadie’s April 22, 2011 Orders Which Could Not, In Any Event, Change the Fact and Legal Consequences of Ms. Cassell’s Commission of a Fraud Upon the Court.

As noted in footnote 5, *supra*, in September 2010 Ms. Cassell filed in this Court a motion to stay her appeals and to permit further pro-

ceedings in the trial court to allow her to seek clarification of Judge Eadie's April 22, 2011 order (CPE 392-93) and, depending on Judge Eadie's ruling on such a motion, reconsideration of Judge Middaugh's May 9, 2011 order dismissing the wrongful death action against Dr. Portelance (CPM 266-68). That motion has not been ruled on, and should be denied.

RAP 7.2(e) provides in pertinent part that

The trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion.

Ms. Cassell has not complied with RAP 7.2(e). She has never moved in the trial court either for clarification or for reconsideration, and the trial court never made a tentative determination to change a decision being reviewed in this appeal, so there is no action for this court to take. Moreover, the time within which Ms. Cassell had to seek such relief has long since passed. *See* CR 59(b). Ms. Cassell thus has waived any right to

seek clarification and/or reconsideration from the trial court, or is barred by laches from doing so.

Nor could Judge Eadie “clarify” anything in a way that would benefit Ms. Cassell. There is no dispute that Ms. Cassell secured appointment as personal representative not as the surviving spouse of someone who had died intestate but rather based on her affirmatively sworn but false representations to Judge Eadie that a squiggly line on a will document were the “mark” of Mr. Finch that he had made in the presence of the persons who had signed the will document as witnesses at his request and who considered him to have been of sound mind. Neither the facts nor the consequences of committing a fraud on the court can conceivably be “clarified” to Ms. Cassell’s benefit.

E. Dismissal of the Wrongful Death Claim Is Not Unjust.

This Court does not need to be concerned that rights of other heirs will be impacted collaterally if no way is contrived to backdate Ms. Cassell’s appointment and keep a wrongful death claim alive. Mr. Finch had no children, CPE 183 (§ 5), and Ms. Cassell was his surviving spouse, so the only person for whose benefit a wrongful death action could be maintained is Ms. Cassell. RCW 4.20.020. The right to complain about losing that benefit is one she forfeited when she lied to the court in 2008.

Respect for the rule of law demands that anyone who secures relief based on false representations to a court suffer adverse consequences. If Ms. Cassell is permitted to revive the wrongful death claim, her 2008 fraud upon the trial court will have had no consequences adverse to her. The dismissal of the wrongful death complaint was poetic as well as legal justice, and should be affirmed.

F. Ms. Cassell Is Not Entitled to Have the Dismissal of Her Individual Loss of Consortium Claim Vacated.

Ms. Cassell notes parenthetically, *App. Br. at 18*, that Judge Middaugh's dismissal order covers "even Ms. Cassell's pre-death loss of consortium claim, which was personal to her and did not have to be brought by the personal representative." The record, however, does not reflect that Ms. Cassell made any argument to the trial court that she had some pre-death loss of consortium claim that should have been spared dismissal notwithstanding the dismissal of the wrongful death claim. Nor has Ms. Cassell specifically assigned error to the dismissal of any pre-death loss of consortium claim, made any argument that dismissal of any such claim was error, or cited to any authority pertaining to such a loss of consortium claim. "The appellate court may refuse to review any claim of error which was not raised in the trial court," RAP 2.5(a), and, in the absence of cogent argument and briefing citing authority, this Court need

not consider an issue, RAP 10.3(a)(6); *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990). Thus, this Court need not and should not consider any claim Ms. Cassell had some pre-death loss of consortium claim that should not have been dismissed along with the wrongful death claim.

V. CONCLUSION

For the foregoing reasons, the Superior Court's orders should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 27th day of February, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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