

70953-4

70953-4

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 12, 2013, 1:05 pm
BY RONALD R. CARPENTER
CLERK

70953-4
No. 88500-1

RECEIVED BY E-MAIL *bjh*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Estate of
MARGARET L. PERTHOU-TAYLOR,
Deceased,

ALISON PERTHOU,
Petitioner/Appellant,

v.

CORNELIA PERTHOU MacConnel, individually and as Executor and
Notice Agent for the Estate of Margaret L. Perthou-Taylor,
Respondent.

BRIEF OF APPELLANT

Mark G. Olson, WSBA # 17846
Christopher M. Constantine, WSBA # 11650
Attorney for Appellant Alison Perthou

P.O. Box 836
Everett, WA 98206
(425) 388-4516

P. O. Box 7125
Tacoma, WA 98417-0125
(253) 752-7850

 ORIGINAL

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES..... ii

III. ASSIGNMENTS OF ERROR.....1

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

V. NATURE OF CASE AND DECISION3

 A. Facts3

 B. Procedural History6

VI. ARGUMENT.....9

 A. Standards of Review9

 B. The Court should recognize tortious interference with a
testamentary expectancy or gift.10

 C. Appellant presents evidence on each element of an inter vivos gift.
.....20

 D. Appellant’s claim for intentional interference with a gift is not
barred by the Probate Code.....22

 E. The trial court erred in dismissing appellant’s claim for punitive
damages under California law.25

 F. The trial court erred in denying appellant’s motion for revision. ...27

 G. The trial court erred in denying appellant’s motion for
reconsideration.....29

VI. CONCLUSION.....31

VII. APPENDICES32

VIII. CERTIFICATE OF SERVICE33

II. TABLE OF AUTHORITIES

Federal Cases:	
<i>Marshall v. Marshall</i> , 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006).....	13
<i>Owen v. C.I.R.</i> , 53 F. 2d 329 (9th Cir. 1931)	22
<i>Peffer v. Bennett</i> , 523 F. 2d 1323 (10th Cir. 1975)	13
Washington Cases:	
<i>Bennett v. Hardy</i> , 113 Wash. 2d 912, 784 P.2d 1258 (1990)	12
<i>Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1</i> , 124 Wash. 2d 816, 881 P.2d 986 (1994)	11
<i>Buckerfield's Ltd. v. B. C. Goose & Duck Farm, Ltd.</i> , 9 Wn. App. 220, 511 P. 2d 1360 (1973).....	21
<i>Campbell v. ITE Imperial Corp.</i> , 107 Wash. 2d 807, 733 P.2d 969 (1987)	12
<i>Dunlap v. Wayne</i> , 105 Wn. 2d 529, 716 P. 2d 842 (1986).....	29
<i>Eastwood v. Horse Harbor Found., Inc.</i> , 170 Wash. 2d 380, 241 P.3d 1256 (2010)	11
<i>Felsman v. Kessler</i> , 2 Wn. App. 493, 469 P. 2d 691 (1970).....	28
<i>Gorman v. City of Woodinville</i> , 175 Wash. 2d 68, 283 P.3d 1082 (2012)	9
<i>Hadley v. Cowan</i> , 60 Wash. App. 433, 804 P.2d 1271 (1991)	11
<i>Henderson v. Tagg</i> , 68 Wn. 2d 188, 412 P. 2d 112 (1966).....	20
<i>Hesthagen v. Harby</i> , 78 Wash. 2d 934, 481 P.2d 438 (1971)	15
<i>Hunsley v. Giard</i> , 87 Wash. 2d 424, 553 P.2d 1096 (1976)	12
<i>In re Irrevocable Trust of McKean</i> , 144 Wn. App. 333, 183 P. 2d 317 (2008).....	24

<i>In re: 1934 Deed to Camp Kilworth,</i> 149 Wn. App. 82, 201 P. 3d 416 (2009).....	23
<i>In re: White's Estate,</i> 129 Wash. 544, 225 P. 415 (1924)	22
<i>Jewett v. Budwick,</i> 145 Wash. 405, 260 Pac. 247 (1927).....	21
<i>Kammerer v. Western Gear Corp.,</i> 96 Wn. 2d 416, 635 P. 2d 708 (1981).....	25
<i>Lunsford v. Saberhagen Holdings, Inc.,</i> 166 Wn. 2d 264, 208 P. 3d 1092 (2008).....	19
<i>Marriage of Moody,</i> 137 Wn. 2d 979, 976 P. 2d 1240 (1999).....	29, 30
<i>McCarton v. Estate of Watson,</i> 39 Wn. App. 358, 693 P. 2d 192 (1984).....	22
<i>Melville v. State,</i> 115 Wn. 2d 34, 793 P. 2d 952 (1990).....	28
<i>Old National Bank & Union Trust v. Kendall,</i> 14 Wn. 2d 19, 126 P. 2d 603 (1942).....	22
<i>O'Steen v. Wineberg's Estate,</i> 30 Wn. App. 923, 640 P. 2d 28 (1982).....	23
<i>Reid v. Pierce Cnty.,</i> 136 Wash. 2d 195, 961 P.2d 333 (1998)	9
<i>Riley v. Andres,</i> 107 Wn. App. 391, 27 P. 3d 618 (2001).....	28
<i>Ruvalcaba v. Kwang Ho Baek,</i> 175 Wn. 2d 1, 282 P. 3d 1012 (2012).....	10
<i>Schaaf v. Highfield,</i> 127 Wash. 2d 17, 896 P.2d 665 (1995)	11, 12
<i>Sheikh v. Choe,</i> 156 Wash. 2d 441, 128 P.3d 574 (2006)	11
<i>Sinclair v. Fleischmann,</i> 54 Wn. App. 204, 773 P. 2d 101 (1989).....	21
<i>Slavin v. Ackman,</i> 119 Wash. 48, 204 Pac. 816 (1922).....	21
<i>State v. Ramer,</i> 151 Wn. 2d 106, 86 P. 3d 132 (2004).....	10
<i>Thompson v. St. Regis Paper Co.,</i> 102 Wash. 2d 219, 685 P.2d 1081 (1984)	13
<i>Ueland v. Reynolds Metals Co.,</i> 103 Wash. 2d 131, 691 P.2d 190 (1984)	12

<i>Wildman v. Taylor</i> , 46 Wn. App. 541, 731 P. 2d 541 (1987).....	21
Other State Cases:	
<i>Allen v. Hall</i> , 328 Or. 276, 974 P.2d 199 (1999)	14, 16
<i>Barone v. Barone</i> , 170 W. Va. 407, 294 S.E.2d 260 (W. Va. 1982)	14
<i>Beckwith v. Dahl</i> , 205 Cal.App.4th 1039, 141 Cal. Rptr. 3d 142 (2012)	13, 15, 16, 17
<i>Bjork v. O'Meara</i> , 2013 Ill. 114044, 968 N.E.2d 626 (2013).....	14
<i>Bohannon v. Wachovia Bank & Trust Co.</i> , 210 N.C. 679, 188 S.E. 390 (1936)	14
<i>Cardenas v. Schober</i> , 2001 Pa. Super 253, 783 A.2d 317 (2001)	14
<i>Cyr v. Cote</i> , 396 A. 2d 1013 (Me. 1979)	14
<i>DeWitt v. Duce</i> , 408 So. 2d 216 (1981)	13
<i>Doughty v. Morris</i> , 871 P.2d 380 (N.M. 1994).....	14
<i>Estate of Doyle</i> , 177 Mich. App. 546, 442 N.W.2d 642 (1989).....	14
<i>Firestone v. Galbreath</i> , 67 Ohio St. 3d 87, 616 N.E.2d 202 (1993).....	14
<i>Frohwein v. Haesemeyer</i> , 264 N.W.2d 792 (Iowa 1978).....	14
<i>Hammons v. Eisert</i> , 745 S.W.2d 253 (Mo. App. 1988)	14
<i>Harmon v. Harmon</i> , 404 A.2d 1020 (Me. 1979)	14
<i>Harris v. Kritzik</i> , 166 Wis. 2d 689, 480 N.W. 2d 514, 517 (1992),,,,,,,,,,	14
<i>Huffey v. Lea</i> , 491 N.W.2d 518 (Iowa 1992).....	14
<i>In re: Estate of Ellis</i> , 236 Ill. 2d 45, 923 N.E.2d 237 (Ill. 2010)	14
<i>King v. Aker</i> , 725 S.W. 2d 750 (Tex. App. 1987).....	14
<i>Minton v. Sackett</i> , 671 N.E. 2d 160 (Ind. 1996).....	14

<i>Morrison v. Morrison</i> , 284 Ga. 112, 663 S.E.2d 714 (2008)	14
<i>Peralta v. Peralta</i> , 131 P. 3d 81 (N.M. App. 2005)	14
<i>Plimpton v. Gerrard</i> , 668 A.2d 882 (Me. 1995)	14
Washington State Statutes:	
RCW § 49.44.090	12
RCW 11.02.005 (10).....	23
RCW 11.40.051	22
RCW 11.96A.020 (1), (2).....	24
RCW 11.96A.090 (4), (9).....	10
RCW 5.60.060	21
Other State Statutes:	
California Civil Code § 3294.....	26, 32
California Civil Code § 3294 (a)	27
California Civil Code § 3294 (c)	27
Washington Court Rules:	
CR 9 (k) (1).....	27
CR 12 (b).....	9
CR 12 (b) (6).....	9
CR 56 (e).....	28, 29
ER 801 (c).....	29
ER 802.....	29
ER 803 (a) (3).....	20
Other Authorities	
5C Washington Practice, Evidence Law & Practice, § 803.12.....	20
38 Am Jur 2d Gifts § 34	21
Restatement (Second) of Torts, Section 319	11
Restatement (Second) of Torts § 552	11
Restatement (Second) Torts §774B	13, 16, 18, 19
Restatement (Second) Torts §774B, comment b.....	16
Restatement (Second) Torts § 774B, comment d.....	18

Restatement (Second) Torts §774B, comment e.....19

Diane J. Klein, *"Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Pacific States*, 13 Lewis & Clark L. Rev. 209, 210 (2009).....14,15

D. J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference With an Expectation of Inheritance—A Survey of State Approaches in the Fifth and Eleventh Circuits*, 55 Baylor Law Review 79 (2003)24

III. ASSIGNMENTS OF ERROR

- 1. The trial court erred in denying appellant's motion for revision of the commissioner's Order Approving Petition to Dismiss Claims.**
- 2. The trial court erred in declining to recognize the tort of tortious interference with a testamentary expectancy or gift.**
- 3. The trial court erred in concluding that there was no basis to conduct a conflicts of law analysis to apply California law regarding punitive damages to this case.**
- 4. The trial court erred in denying appellant's motion for reconsideration.**

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do Washington courts recognize tortious interference with a testamentary expectancy or gift? (Pertains to Assignments of Error Nos. 1, 2).
2. If tortious interference with a testamentary expectancy or gift is recognized in Washington, is the tort available to Appellant in this case? (Pertains to Assignments of Error Nos. 1, 2).
3. Did the trial court err in concluding that there was no basis to conduct a conflict of laws analysis to apply California law on punitive damages? (Pertains to Assignments of Error Nos. 1, 2).
4. Did the trial court err in affirming the Commissioner's Order Approving Petition to Dismiss Claims? (Pertains to Assignments of Error Nos. 1, 2, 3).
5. Did the trial court err in denying appellant's motion for revision of the commissioner's Ruling? (Pertains to Assignments of Error Nos. 1, 2, 3).
6. Did the trial court err in denying appellant's motion to strike the Declaration of Cornelia P. MacConnel? (Pertains to Assignment of Error No. 1).
7. Did the trial court err in denying appellant's motion for reconsideration? (Pertains to Assignment of Error No. 4).

8. Is Appellant entitled to an order remanding the case to the trial court for further proceedings? (Pertains to Assignments of Error Nos. 1-4).

V. NATURE OF CASE AND DECISION

A. Facts

Appellant Alison Perthou is the ex-wife of Alfred "Perth" Perthou, son of the decedent, Margaret L. Perthou-Taylor (Margaret), and brother to the respondent. CP 59. In August, 1982, Alfred Perthou was engaged in a protracted legal action against Alison over the custody of their twin children, Peter and Stewart, at which time Alfred made numerous slanderous accusations and engaged in a lengthy adversarial battle in an attempt to drain appellant of her money. CP 59. Alison was set to file a lawsuit against Alfred Perthou, seeking substantial sums for the damages he had caused. CP59.

Prior to filing suit against Alfred Perthou, Alison contacted the decedent, her former mother-in-law, for assistance in resolving this dispute. CP 59. Margaret had a close and loving relationship with Alison, and Margaret wrote that she was appalled and angry with her son Alfred over this situation. CP 59.

On December 14, 1982, Margaret prepared and executed a letter giving Alison funds to be set aside each year for her retirement. CP 59, 66-67. In her letter, Margaret wrote the terms of her gift:

As I told you, I will more than adequately fund your retirement. This will require diverting my annual gifting to you, which has always been at the highest allowable by the IRS, and will continue to be, plus additional funds I and my advisors select, as well as the reinvestment of all income generated by these funds. By the time you retire at sixty five, presumably, you should have a very nice nest egg indeed.

CP 66.

Margaret emphasized in her letter that steps would be taken to ensure that the investment account she was setting up for Alison's retirement would be protected to so that there would be no "*possibility of outside interference*" from Alfred Perthou or anyone else. CP 66.

In this letter, Decedent also advised Alison that she had instructed Alfred Perthou to drop his legal actions against her. Margaret closed her letter with the following words:

Even though you are no longer my legal daughter-in-law, you have always been a loyal and wonderful friend. You and I have often said that we never got a divorce, and I do hope that we will continue to be great friends. Under the circumstances, you have been very gracious, and remarkably patient. I appreciate it enormously. With my deepest and most sincere apologies, and with the greatest love and respect...

CP 67.

In conveying this gift of retirement fund promised in her December 14, 1982 letter, Margaret asked Alison to refrain from pursuing any legal actions against her son Alfred and remain living in the Madison Park area in Seattle so that her twin grandsons would be close by. CP 66. As Margaret explained: “*The higher living costs in Madison Park [Seattle], and perhaps lower income will be handsomely compensated for with a fully funded, safe, and very comfortable retirement for you.*” (Emphasis added). CP 66.

Though she had reasonable basis for legal actions against Alfred Perthou and though she had a job offer in southern California, Alison complied with Margaret’s requests and remained in the Madison Park neighborhood. CP 60.

Upon information and belief, Margaret fulfilled her promise and immediately began funding an investment account for Alison’s retirement, and continued to make annual contributions to the maximum extent allowed under IRS gifting rules from 1982 until her death in 2005. At no time did Margaret ever revoke the gift to Alison. CP 60-61.

Alison turned 65 years of age in July 2010, and is now in retirement. CP 61. The following year, Alison contacted defendant Cornelia Perthou MacConnel, Executor of the Estate, to claim her retirement account. CP 61. Ms. MacConnel denied knowledge of Decedent's gift or the presence of any retirement account for the benefit of Alison. CP 61. Furthermore, Ms. MacConnel has refused to cooperate or investigate further as to where such funds may have been located, making this legal action necessary. CP 61.

Upon information and belief, the account established by Margaret for Alison's benefit was dissolved by Ms. MacConnel and/or her legal counsel and representatives and the fund was commingled with other assets. CP 61.

The actions by Ms. MacConnel wrongfully interfered with Alison's expectancy of Margaret's gift of the retirement account. CP 61. Alison has been harmed by Ms. MacConnel's wrongful interference and is entitled to possession of the retirement account. CP 61.

B. Procedural History

In February, 2005, probate of Margaret's estate was filed in King County Superior Court No. 05-4-01094-8. CP 336-42. In May, 2012, Alison filed a petition for judicial review. CP 3-13. In June, 2012, Alison filed an amended TEDRA petition in which she asserted claims against

Ms. MacConnel for breach of fiduciary duty, conversion, tortious interference with a gift, constructive trust, and accounting. CP 57-67.

In August, 2012, Ms. MacConnel moved to dismiss Alison's TEDRA petition. CP 91-102. In October, Ms. MacConnel's counsel requested that Alison's attorney agree to an order for trial assignment. CP 183-184, 186. Alison's attorney replied, giving his agreement, and requested that Ms. MacConnel's attorney send a proposed stipulation. CP 184, 187.

Ms. MacConnel's attorney, Ms. Phillips, replied in an email dated October 4, 2012, advising that the court had a form for that purpose, and that she would simply present the order in the ex parte department then next day:

The court has a form order that is used to assign a matter from ex parte and get a trial date, I have another hearing set in ex parte that morning so will be there.
My position is the matter should be set for a hearing on our 12 (b) (6) motion, and that the hearing should be set as soon as the assigned judge has time on his or her calendar. If we prevail, the case will be dismissed with dismissed with prejudice.

CP 184, 188.

In her email, Ms. Phillips gave no indication that Ms. MacConnel's motion to dismiss would be heard before a commissioner on October 10, 2012. Instead, Ms. Phillips stated her position that the hearing on the motion to dismiss should be held before the assigned trial judge. *Id.*

Based upon that exchange, Alison's attorney understood that Ms. MacConnel's motion to dismiss would not go forward on October 10, 2012, and that instead, Ms. MacConnel's counsel would obtain a trial assignment. CP 184, 189

At the hearing, Ms. MacConnel's counsel failed to mention to the court that the parties' counsel had achieved an agreement the previous day, and instead she informed that the parties' counsel disagreed whether the claim should progress beyond the day of the hearing. RP I at 3.

Alison's counsel did not appear at the hearing, due to the representations by Ms. MacConnel's counsel. CP 184, 189. On October 10, 2012, an order of dismissal was signed, not by the assigned trial judge, but by a commissioner pro tempore. CP 125-127; App. 1; RP I at 1-6. Alison's attorney learned later that Ms. MacConnel's attorney had the order of dismissal entered instead of the order for trial assignment. CP 184.

Alison sought revision of the commissioner's order of dismissal. CP 178-182. The trial court denied revision. CP 280-83; App. 2; RP II. In its Order Denying Motion for Revision, the trial court declined to

recognize the tort of tortious interference with a gift on the grounds that recognition of a new tort was more properly the role for this Court. CP 281. The trial court also concluded that there was no basis to apply California law on punitive damages. CP 281. Alison sought reconsideration of the trial court's order denying revision. CP 292-297. The trial court denied reconsideration. CP 323. Alison thereafter timely filed a notice of appeal from that order. CP 324-218.

VI. ARGUMENT

A. Standards of Review

Dismissal for failure to state a claim upon which relief can be granted is reviewed *de novo*. *Gorman v. City of Woodinville*, 175 Wash. 2d 68, 71, 283 P.3d 1082 (2012); *Reid v. Pierce Cnty.*, 136 Wash. 2d 195, 200-01, 961 P.2d 333 (1998). Dismissal under CR 12 (b) (6) is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Reid v. Pierce County*, 136 Wn. 2d 200-01. The Court accepts as true the allegations in a plaintiff's complaint and any reasonable inferences therein. *Id.*

Ms. MacConnel submitted declarations in support of her petition to dismiss Alison's claims. CP 348-85. Submission of such materials outside the pleadings converted respondent's motion to a motion for summary judgment. CR 12 (b) ("*If, on a motion asserting the defense*

numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.”). The procedural rules of court apply in a TEDRA proceeding. RCW 11.96A.090 (4), (9). The standard of review from an order granting summary judgment is *de novo*. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn. 2d 1, 6, 282 P. 3d 1012 (2012).

In its order denying revision, the trial court entered conclusions of law. CP 281. Conclusions of law are reviewed *de novo*. *State v. Ramer*, 151 Wn. 2d 106, 113, 86 P. 3d 132 (2004).

The Court should undertake review with the foregoing principles in mind.

B. The Court should recognize tortious interference with a testamentary expectancy or gift.

Alison assigns error to the trial court’s order denying motion for revision. CP 280-83; App. 2. The trial court declined to recognize the tort of tortious interference with a gift. CP 281; App. 2. No reported

Washington decision has yet addressed whether this tort is recognized in this State.¹

The absence of authority in Washington recognizing the tort of tortious interference with a gift does not prevent this Court from exercising its inherent authority to declare the law. “[I]t is the unique role of this court to decide what the law is and what tort duties are recognized in this state. (Citations omitted)” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash. 2d 380, 406, 241 P.3d 1256 (2010) (Chambers, J., concurring).

The Court has repeatedly exercised its role to declare whether a tort is recognized in Washington. In *Sheikh v. Choe*, 156 Wash. 2d 441, 128 P.3d 574 (2006), the Court addressed whether the State owed a duty under Restatement (Second) of Torts, Section 319 to persons harmed by the tortious acts of dependent children. In *Schaaf v. Highfield*, 127 Wash. 2d 17, 896 P.2d 665 (1995), the Court addressed whether a third party in Washington may state a claim for negligent misrepresentation against a real estate appraiser pursuant to Restatement (Second) of Torts § 552. In *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash. 2d

¹ In *Hadley v. Cowan*, 60 Wash. App. 433, 804 P.2d 1271 (1991), the Court of Appeals held that the plaintiff’s claim for tortious interference with the parent/child relationship was barred by the language of a settlement agreement executed by the plaintiff in a related probate action involving the estate of the plaintiff’s mother. No similar facts are present here. The court in *Hadley* also did not directly address whether the tort was recognized in Washington. Nor was the court in *Hadley* asked to recognize tortious interference with a testamentary expectancy or gift.

816, 881 P.2d 986 (1994), the Court determined whether the economic loss rule prevented a general contractor from recovering purely economic damages in tort from an architect, an engineer and an inspector, none of whom were in privity of contract with the general contractor. In *Bennett v. Hardy*, 113 Wash. 2d 912, 784 P.2d 1258 (1990), the Court decided whether a cause of action for age discrimination is implied under RCW § 49.44.090. In *Campbell v. ITE Imperial Corp.*, 107 Wash. 2d 807, 733 P.2d 969 (1987), the Court decided whether the negligence of the plaintiff's employer in failing to warn of or protect the plaintiff from the defendant's allegedly unsafe product constitutes an intervening act legally sufficient to operate as a superseding cause. In *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 691 P.2d 190 (1984), the Court decided whether a child has an independent cause of action for loss of the love, care, companionship and guidance of a parent tortiously injured by a third party. In *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976), The Court decided whether negligent infliction of emotional distress is a recognized tort in Washington.

Whether Washington courts should recognize tortious interference with a testamentary expectancy or gift is an issue equally deserving of this Court's consideration as those torts recognized by this Court in *Schaaf*, *Bennett*, *Ueland*, and *Hunsley*.

Tortious interference with a testamentary expectancy or gift is a widely recognized tort. *See* Restatement (Second) Torts §774B (“*One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.*”).

Washington courts frequently refer to the Restatement of Torts in defining the contours of Washington tort law. *See, e.g., Schaaf v. Highfield*, 127 Wn. 2d 22-27. It is therefore appropriate in the case at bar for the Court to consider Restatement (Second) Torts §774B.

In recognizing a new cause of action, this Court may be persuaded by the trend of authority in other jurisdictions. *See, e.g. Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232, 685 P.2d 1081 (1984) (“*We join the growing majority of jurisdictions and recognize a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy.*”).

Tortious interference with a testamentary expectancy or gift has been recognized by a majority of the courts that have considered it. *See Marshall v. Marshall*, 547 U.S. 293, 312, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006); *Beckwith v. Dahl*, 205 Cal.App.4th 1039; 141 Cal. Rptr. 3d 142 (2012); *Peffer v. Bennett*, 523 F. 2d 1323, 1325 (10th Cir. 1975);

DeWitt v. Duce, 408 So. 2d 216 (1981); *Morrison v. Morrison*, 284 Ga. 112, 663 S.E.2d 714 (2008); *Bjork v. O'Meara*, 2013 Ill. 114044, 968 N.E.2d 626 (Ill. 2013); *In re: Estate of Ellis*, 236 Ill. 2d 45, 923 N.E.2d 237, 240-44 (2010); *Minton v. Sackett*, 671 N.E. 2d 160, 162 (Ind. 1996); *Huffey v. Lea*, 491 N.W.2d 518, 520 (Iowa 1992); *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 794-95 (Iowa 1978); *Cyr v. Cote*, 396 A. 2d 1013, 1018-19 (Me. 1979); *Harmon v. Harmon*, 404 A.2d 1020 (Me. 1979); *Plimpton v. Gerrard*, 668 A.2d 882, 884-85 (Me. 1995); *Estate of Doyle*, 177 Mich. App. 546, 442 N.W.2d 642, 643 (1989); *Hammons v. Eisert*, 745 S.W.2d 253, 256-58 (Mo. App. 1988); *Doughty v. Morris*, 117 N. M. 284, 871 P.2d 380, 383-84 (1994); *Peralta v. Peralta*, 139 N. M. 231, 131 P. 3d 81, 82-83 (2005); *Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390, 393-94 (1936); *Firestone v. Galbreath*, 67 Ohio St. 3d 87, 616 N.E.2d 202 (1993); *Allen v. Hall*, 328 Or. 276, 974 P.2d 199 (1999); *Cardenas v. Schober*, 201 Pa. Super 253, 783 A.2d 317, 325-26 (2001); *King v. Aker*, 725 S.W. 2d 750, 754 (Tex. App. 1987); *Barone v. Barone*, 170 W. Va. 407, 294 S.E.2d 260, 264 (1982); *Harris v. Kritzik*, 166 Wis. 2d 689, 480 N.W. 2d 514, 517 (1992). See also, Diane J. Klein, "Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance-A Survey with Analysis of State Approaches in the Pacific States, 13 Lewis & Clark L. Rev. 209, 210 (2009).

The need to recognize tortious interference with a testamentary expectancy or gift as a tort in Washington is both obvious and acute. Klein, *supra*, 13 Lewis & Clark Law Review 210 (“[T]he need for such a cause of action is obvious, and acute: a variety of wronged persons, who lack standing in the probate court or are otherwise unable to prove up their legacy there, are left remediless without the tort, while wrongdoers can act with impunity.”).

Recognition of the tort of intentional interference with a testamentary expectancy or gift will foster important public policy in allowing a remedy to injured parties. Note *Beckwith v. Dahl*:

The tort of IIEI developed under the “general principle of law that whenever the law prohibits an injury it will also afford a remedy.” (*Allen v. Lovell's Adm'x* (1946) 303 Ky. 238, 197 S.W.2d 424, 426; see also *Morton v. Pettit* (1931) 124 Ohio St. 241, 177 N.E. 591, 593; *Dulin v. Bailey* (1916) 172 N.C. 608, 90 S.E. 689, 690.)

141 Cal. Rptr. 3d 152.

The expectancy of an inheritance is an interest deserving of this Court's protection. *Hesthagen v. Harby*, 78 Wash. 2d 934, 942-43, 481 P.2d 438 (1971). Other courts as well have recognized that an expectancy of an inheritance is an interest no less deserving of protection than

interests protected by the tort of intentional interference with prospective economic advantage. *See Allen v. Hall*, 974 P. 2d 202.

The expectancy of a gift is likewise a protectable interest. Restatement (Second) Torts §774B, comment b. (“*Gift*” is used to include in the broad sense any donation, gratuity or benefaction that the other would have received from the third person. It includes, for example, the designation of the other as a beneficiary under an insurance policy, with which the actor interferes by tortious means.”).

The elements of a claim for tortious interference with a testamentary expectancy or gift were recently stated in *Beckwith v. Dahl*:

To state a claim for IIEI, a plaintiff must allege five distinct elements. (*Munn, supra*, 185 Cal.App.4th at p. 588, 110 Cal.Rptr.3d 783.) First, the plaintiff must plead he had an expectancy of an inheritance. It is not necessary to allege that “one is in fact named as a beneficiary in the will or that one has been devised the particular property at issue. [Citation.] That requirement would defeat the purpose of an expectancy claim. [¶] ... [¶] It is only the expectation that one will receive some interest that gives rise to a cause of action. [Citations.]” (*Plimpton v. Gerrard* (Me.1995) 668 A.2d 882, 885–886.) Second, as in other interference torts, the complaint must allege causation. “This means that, as in other cases involving recovery for loss of expectancies ... there must be proof amounting to a reasonable degree of certainty that the bequest or devise would

have been in effect at the time of the death of the testator ... if there had been no such interference.” (Rest.2d Torts, § 774B, com. d.) Third, the plaintiff must plead intent, i.e., that the defendant had knowledge of the plaintiff’s expectancy of inheritance and took deliberate action to interfere with it. (See *Carlson v. Warren* (Ind.Ct.App.2007) 878 N.E.2d 844, 854.) Fourth, the complaint must allege that the interference was conducted by independently tortious means, i.e., the underlying conduct must be wrong for some reason other than the fact of the interference. (*Doughty v. Morris* (N.M.Ct.App.1994) 117 N.M. 284, 871 P.2d 380, 383–384.) Finally, the plaintiff must plead he was damaged by the defendant’s interference. (*Munn, supra*, 185 Cal.App.4th at p. 588, 110 Cal.Rptr.3d 783.)

Additionally, an IIEI defendant must direct the independently tortious conduct at someone other than the plaintiff.

141 Cal. Rptr. 3d 157.

In her Amended TEDRA Petition, Alison alleges the expectation of receiving a retirement benefit (CP 59, 60-61, 66-67), intentional interference by respondent (CP 61, 63), interference that was independently wrongful or tortious (CP 61-respondent’s dissolution of the account, contrary to Margaret’s expressed intent), a reasonable certainty that but for the interference, Alison would have received the gift (CP 59-61, 66-67), and damages (CP 61,63). Alison thus states a claim for tortious interference with a gift. *Beckwith v. Dahl, supra*.

Alison must prove with reasonable certainty that the gift would have been made inter vivos if there had been no such interference. Restatement (Second) Torts § 774B, comment d. Absolute certainty is not required:

...If there is reasonable certainty established by proof of a high degree of probability that the testator would have made a particular legacy or would not have changed it if he had not been persuaded by the tortious conduct of the defendant and there is no evidence to the contrary, the proof may be sufficient that the inheritance would otherwise have been received. The fact that it was the defendant's tortious act that makes it not possible to prove with certainty may be taken into consideration by the court.

Id.

Here, Margaret Perthou's December 14, 1982 letter reveals a history of gifting to Alison. CP 66-67. In her letter, Margaret also promised Alison "*very nice nest egg*" when Alison retired at age 65. *Id.* Further, as set forth in paragraph 3.8 of her Amended TEDRA Petition, Alison entertains a good faith belief that Margaret fulfilled her promise and immediately began funding an investment account for Alison's retirement, that Margaret continued to make annual contributions to the maximum extent allowed under IRS gifting rules from 1982 until her death in 2005, and that Margaret never revoked her gift to Alison. CP

60-61. This issue should therefore have been left for the trier of fact to decide.

The remedies for tortious interference with a testamentary expectancy or gift include restitution or damages. Restatement (Second) Torts §774B, comment e. In her Amended TEDRA Petition, Alison seeks imposition of a constructive trust. CP 63. Alison also seeks damages. CP 62, 63, 65.

In the event the Court recognizes the tort of tortious interference with a testamentary expectancy or gift, Alison requests the Court to allow her to pursue her claim in the trial court. The Court's decisions of law apply retroactively to all litigants not barred by procedural requirements unless the Court expressly limits its decision to purely prospective application. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn. 2d 264, 285, 208 P. 3d 1092 (2008). Nevertheless, in order to avoid any confusion, Alison requests the Court to indicate affirmatively whether she may pursue her claim.

C. Appellant presents evidence on each element of an inter vivos gift.

The elements of a valid inter vivos gift are set forth in *Henderson v. Tagg*, 68 Wn. 2d 188, 192, 412 P. 2d 112 (1966): “*The essential elements of a valid gift are: (1) an intention on the part of the donor to presently give; (2) a subject matter capable of passing by delivery; and (3) an actual delivery at the time.*”

Margaret Perthou-Taylor’s donative intent is clearly set forth in her letter of December 14, 1982 to Alison:

As I told you, I will more than adequately fund your retirement. This will require diverting my annual gifting to you, which has always been at the highest allowable by the IRS, and will continue to be, plus additional funds I and my advisors select, as well as the reinvestment of all income generated by these funds. By the time you retire at sixty five, presumably, you should have a very nice nest egg indeed.

CP 66.

Margaret’s letter is evidence of her plan to gift her property to Alison, and is therefore admissible under ER 803 (a) (3). 5C Washington Practice, Evidence Law & Practice, § 803.12 (“*[A] statement indicating a design or plan to do a specific act is admissible to show that the act was probably done as planned. The rule is often called the Hillmon rule, referring to the leading pre-rule case. (Footnote omitted)*”).

Margaret's letter is not subject to the Dead Man's Statute, RCW 5.60.060, as that statute does not apply to documents. *Wildman v. Taylor*, 46 Wn. App. 541, 553, 731 P. 2d 541 (1987). Nor does the Dead Man's Statute bar testimony by Alison regarding her receipt of that letter or Margaret's signature thereon. *Wildman*, 46 Wn. App. 553-54; *Slavin v. Ackman*, 119 Wash. 48, 50, 204 Pac. 816 (1922); *Jewett v. Budwick*, 145 Wash. 405, 260 Pac. 247 (1927).

The existence or absence of Margaret's intent to make a gift is an evidentiary issue to be resolved by the finder of the fact. *Buckerfield's Ltd. v. B. C. Goose & Duck Farm, Ltd.*, 9 Wn. App. 220, 224, 511 P. 2d 1360 (1973). From her letter, it may reasonably be inferred that Margaret intended to gift money to Alison, especially in view of her history of annual gifting.

Money is property that is capable of passing by delivery. *Buckerfield's*, 9 Wn. App. 224; 38 Am Jur 2d Gifts § 34 ("*Money or other property, as well as services, may be the subject of gifts inter vivos.*").

Delivery need not be actual delivery. Instead, in order to constitute a gift, it is necessary that there be a delivery, actual, constructive or symbolical, which will pass the dominion and control of the subject-matter from the donor to the donee. *Sinclair v. Fleischmann*,

54 Wn. App. 204, 207, 773 P. 2d 101 (1989) (“*No absolute rule can be laid down as to what conduct will constitute a sufficient delivery to support a gift in all cases; whether what was done was sufficient to constitute a delivery will depend on the nature of the property and the attendant circumstances.*”)

Margaret’s letter contemplates delivery of the gifted money to an investment account for Alison’s benefit. Delivery need not be made directly to the donee to constitute a valid delivery. *McCarton v. Estate of Watson*, 39 Wn. App. 358, 363-68, 693 P. 2d 192 (1984); *Old National Bank & Union Trust v. Kendall*, 14 Wn. 2d 19, 126 P. 2d 603 (1942); *In re: White’s Estate*, 129 Wash. 544, 547-48, 225 P. 415 (1924); *Owen v. C.I.R.*, 53 F. 2d 329, 332 (9th Cir. 1931).

D. Appellant’s claim for intentional interference with a gift is not barred by the Probate Code.

The trial court erred in affirming the commissioner’s order of dismissal. CP 281; App. 2. The trial court thereby upheld the commissioner’s conclusion that Alison’s claim was barred by RCW 11.40.051. CP 126. Alison’s claim for intentional interference with a gift is not barred by RCW 11.40.051. That statute applies to probate and nonprobate assets. It remains unresolved, however whether the money gifted by Margaret to Alison meets the definition of a nonprobate asset in

RCW 11.02.005 (10). Excluded from the definition of a nonprobate asset in that statute are “*a right or interest if, before death, the person has irrevocably transferred the right or interest, the person has waived the power to transfer it or, in the case of contractual arrangement, the person has waived the unilateral right to rescind or modify the arrangement....*” In her letter of December 14, 1982, Margaret did not place any condition of survival upon the funds gifted to Alison. CP 66-67. Instead, the only condition placed by Margaret upon the funds gifted to Alison was that she reach age 65. *Id.* The evidence before the Court thus suggests that during her lifetime, Margaret made an irrevocable gift to Alison. If so, then Margaret’s inter vivos gift falls outside the definition of a nonprobate asset in RCW 11.02.005 (10). Nor could such an inter vivos gift qualify as a probate asset, as it did not belong to Margaret as of the date of her death. *In re: 1934 Deed to Camp Kilworth*, 149 Wn. App. 82, 87-88, 201 P. 3d 416 (2009).

Alternatively, the Probate Nonclaim Statute “*does not apply where the claim is for specific property in the estate.*” *O’Steen v. Wineberg’s Estate*, 30 Wn. App. 923, 934, 640 P. 2d 28 (1982). Alison’s claims include a claim for imposition of a constructive trust in those assets gifted by Margaret to Alison which have been acquired by respondent. CP 63.

Nor is Alison's invocation of TEDRA inconsistent with her claim for tortious interference with a gift. The trial court was invested with plenary authority to hear Alison's claims under RCW 11.96A.020 (1), (2); *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P. 2d 317 (2008).

More fundamentally, the focus of tortious interference with a testamentary expectancy or gift is far different than traditional probate remedies. Note D. J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference With an Expectation of Inheritance—A Survey of State Approaches in the Fifth and Eleventh Circuits*, 55 *Baylor Law Review* 79, 89-90 (2003):

The legal differences between a will contest and the tort are far-reaching. The tort, an action at law, allows compensatory and punitive damages. The parties must "pay their own way" as far as legal costs are concerned, and if the tortfeasor-defendant is found liable, the judgment is paid from his own assets, not those of the estate. Prejudgment interest, attorney's fees, and punitive damages beyond the lost legacy are potentially recoverable. In contrast to a will contest or probate claim, the tort defendant must answer. Importantly, a jury is also available to hear the tort. When proper requirements are met, a federal forum may be employed. In all, the tort's substantive and procedural tools for obtaining bequests for would-be beneficiaries and punishing wrongdoers make it "a powerful weapon" in

the arsenal of the disappointed heir.
(Footnotes omitted).

In light of the foregoing, nothing in the Probate Code bars recognition by the Court of the tort of tortious interference with a testamentary expectancy or gift.

E. The trial court erred in dismissing appellant's claim for punitive damages under California law.

Alison assigns error to the trial court's conclusion that, based upon the facts presented, there was no basis to conduct a conflicts of law analysis to apply California law regarding punitive damages to this case. CP 281; App. 2. To the extent that the trial court's conclusion rests upon its refusal to recognize a cause of action for tortious interference with a gift, the foregoing discussion and authorities supporting such a cause of action renders untenable the trial court's refusal to recognize Alison's claim for punitive damages under California law.

Washington courts follow the rule that when another state has the most significant relationship to a controversy, a Washington court may allow punitive damages when such damages are allowed by the law of the other jurisdiction. *Kammerer v. Western Gear Corp.*, 96 Wn. 2d 416, 423, 635 P. 2d 708 (1981).

In her amended TEDRA petition, Alison alleged that respondent, Ms. MacConnel, was a resident of California (¶1.2; CP 58), that her actions in this case occurred in California (¶2.4; CP 59), that she denied knowledge of the gift to Alison or the presence of any retirement account for her (¶ 3.9; CP 61), that she dissolved the account established by Margaret for Alison and commingled the fund with other assets (¶ 3.10; CP 61), that she wrongfully interfered with Alison's expectancy of Margaret's gift of the retirement account (¶ 3.11; CP 61), that Alison has been damaged as a result of Ms. MacConnel's wrongful conduct (¶ 3.12; CP 61), that Ms. MacConnel breached fiduciary duties owed to Alison (¶¶ 4.2-4.4; CP 62), that Ms. MacConnel converted Margaret's gift to Alison with the intent of depriving her of that asset (¶¶ 5.2, 5.3; CP 62), that Ms. MacConnel tortiously interfered with Margaret's gift to Alison (¶¶ 6.2, 6.3; CP 63), that Ms. MacConnel holds in constructive trust for Alison those gifts that had been gifted by Margaret to Alison during Margaret's lifetime (¶¶ 7.2, 7.3; CP 63), and that Ms. MacConnel should be held to account to Alison for such property. (¶ 8.2; CP 63). In paragraph 11.8 of her Amended TEDRA Petition, Alison requested an award of punitive damages pursuant to California Civil Code § 3294.² CP 65. As in *Kammerer*, the State of California has an interest in protecting against

² App. 4

such conduct occurring within its borders. 96 Wn. 2d 422-23. Under such circumstances, a Washington court can award punitive damages under California law. *Id.*

California Civil Code § 3294 (a) allows a court to award punitive damages upon a showing of malice, fraud or oppression. “*Malice*” is defined as a “*willful and conscious disregard of the safety or rights of others.*” California Civil Code § 3294 (c). In paragraph 3.11 of her Amended TEDRA petition, Alison alleged that Ms. MacConnel wrongfully interfered with Alison’s expectancy of Margaret’s gift of the retirement account. CP 61. In paragraph 5.2, Alison alleged that Ms. MacConnel willfully interfered with the chattel created by Margaret’s gift to Alison with the intent of depriving Alison of that chattel. CP 62. Alison thereby alleged sufficient facts to support her claim for punitive damages. CR 9 (k) (1).

F. The trial court erred in denying appellant’s motion for revision.

Alison assigns error to the trial court’s Order Denying Motion for Revision. CP 280-83; App. 2. In her motion for revision, Alison moved the trial court to revise the commissioner’s error in refusing to strike portions of the declaration of Ms. MacConnel. CP 179. Alison objected to portions of the declaration of Ms. MacConnel filed in support of the

motion to dismiss. CP 108-09. Alison also moved the commissioner to strike the offending portions of Ms. MacConnel's declaration. CP 115-17. Ms. MacConnel offered her self-serving testimony regarding her alleged review of Margaret's tax returns, account statements, bank ledgers, receipts and other statements. CP 366-67. Ms. MacConnel's testimony involved matters peculiarly within her own knowledge. The trial court erred in affirming dismissal of Alison's amended TEDRA petition on such testimony. Instead, the trial court should have allowed Alison the opportunity to cross-examine Ms. MacConnel regarding such matter. *Felsman v. Kessler*, 2 Wn. App. 493, 496-97, 469 P. 2d 691 (1970) (“*[W]here material facts averred in an affidavit are particularly within the knowledge of the moving party, it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.*”); *Riley v. Andres*, 107 Wn. App. 391, 398, 27 P. 3d 618 (2001).

Ms. MacConnel's failure to attach any of the referenced documents to her declaration also violated CR 56 (e). Therefore, paragraphs 4, 5, 6, 7, 8, 9 of Ms. MacConnel's declaration should have been either stricken or disregarded. CR 56 (e); *Melville v. State*, 115 Wn. 2d 34, 36, 793 P. 2d 952 (1990). Moreover, Ms. MacConnel's testimony regarding the

contents of those documents is hearsay as are the documents themselves. The trial court and the commissioner therefore erred in considering such hearsay evidence on summary judgment. CR 56 (e); ER 801 (c); ER 802; *Dunlap v. Wayne*, 105 Wn. 2d 529, 535, 716 P. 2d 842 (1986).

In connection with her motion for revision, Alison put before the trial court the declaration of her attorney that sets forth the improper actions of Ms. MacConnel's counsel in misrepresenting to the commissioner the agreement of the parties' counsel regarding the date for hearing the motion to dismiss. CP 183-89. While the trial court was not authorized to consider new evidence on a motion for revision, given the seriousness of the actions of Ms. MacConnel's counsel, the appropriate course of action was to remand the case to the commissioner. *Marriage of Moody*, 137 Wn. 2d 979, 992, 976 P. 2d 1240 (1999).

G. The trial court erred in denying appellant's motion for reconsideration.

Alison assigns error to the trial court's order denying her motion for reconsideration. CP 323; App. 3. In her motion for reconsideration, Alison pointed out to the trial court that the order of dismissal entered by the commissioner addressed only Alison's claims for tortious interference and punitive damages. CP 287. Therefore, Alison requested the trial court

to remand to the commissioner her claims for conversion and constructive trust. CP 287.

Alison submitted her supplemental declaration in support of her motion for reconsideration. CP 259-266. Therein, Alison testified to her conversations with Graham Fernald, the former managing partner of the law firm that represented Ms. MacConnel. CP 259-60. Mr. Graham told Alison that while there was no bequest to her in Margaret's will, there were other monies for Alison, but the "family" decided they didn't want to do that. CP 260, 262. Alison also introduced copies of checks written in 1982 by Margaret to her for the benefit of her children, drawn on an account of Martin Nelson & Co, Inc., a Seattle investment house. CP 260, 263-64. Alison testified to her belief that the funds that Margaret promised to set aside for her were also maintained at Martin Nelson & Co., Inc. CP 260. Therefore, Alison requested the trial court to to remand the case to the commissioner for further proceedings, and to allow limited discovery on her unresolved conversion and constructive trust claims. CP 286-87. Remand to the trial court is therefore appropriate under *Marriage of Moody*, 137 Wn. 2d 992.

VI. CONCLUSION

In light of the foregoing, the Court should recognize the tort of tortious interference with a testamentary expectancy or gift, reverse the trial court's orders denying revision and reconsideration and the order of dismissal, and remand the case to the trial court for further proceedings.

Respectfully submitted,

LAW OFFICES OF MARK G. OLSON



Mark G. Olson, WSBA #17846
Attorney for Appellant Alison Perthou

VII. APPENDICES

1. **Order Granting Petition to Dismiss Claims**
2. **Order Denying Motion for Revision**
3. **Order Denying Petitioner's Motion for Reconsideration**
4. **California Civil Code § 3294**

VIII. CERTIFICATE OF SERVICE

I, Mark Olson, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered the foregoing Brief of Appellant including Appendices to the following parties:

VIA EMAIL:

Supreme Court of Washington
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Karen Bertram, Esq.
Kutcher Hereford Bertram Burkhardt, PLLC
705 Second Avenue, Hoge Building, Suite 800
Seattle, WA 98104
kbertram@khbblaw.com

Dated July 10th, 2013 at Everett, Washington



Mark G. Olson

FILED

12 OCT 10 AM 11:41

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Date of Hearing: October 10, 2012
Time of Hearing: 10:30 a.m.
Ex Parte

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

In the Matter of the Estate of

MARGARET L. PERTHOU-TAYLOR,

Deceased,

No. 05-4-01094-8 SEA

~~PROPOSED~~ ORDER APPROVING
PETITION TO DISMISS CLAIMS

ALISON PERTHOU,

Petitioner,

v.

CORNELIA PERTHOU MacCONNEL,
individually and as Executor and Notice Agent
for the Estate of Margaret L. Perthou-Taylor;

Deceased,

Respondents.

This matter came before the Court on the Petition to Dismiss Claims. The Court has considered the *Petition to Dismiss Claims*, the response on behalf of Alison Perthou, the *Reply in Support of Petition to Dismiss*, and the records and files herein. The Court hereby enters the following Findings of Facts, Conclusions of Law and Order:

[PROPOSED] ORDER APPROVING PETITION
TO DISMISS CLAIMS - 1

57504-0100/LEGAL24824799.1

Perkins Cole LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

APP. 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

FINDINGS OF FACT

1. Margaret Perthou Taylor died January 20, 2005.
2. Nonprobate notice to creditors was timely published and proof of publication filed.
3. Alison Perthou did not file a creditor claim in this matter.
4. Alison Perthou has cited no authority under Washington law and has not alleged that a claim for "tortious interference with a gift" is recognized under Washington law.
5. Alison Perthou has cited no authority under Washington law for imposition of punitive damages on the facts alleged here.

CONCLUSIONS OF LAW

1. Alison Perthou's claim is barred by RCW 11.40.051.
2. Washington does not recognize a claim for tortious interference with a gift.
3. Washington does not recognize a claim for punitive damages under the facts alleged here.

ORDER

1. This matter is dismissed with prejudice for failure to comply with RCW 11.40.051.
2. The claim for tortious interference with a gift with a gift is dismissed.
3. This claim for punitive damages is dismissed.
4. Cornelia MacConnel is awarded fees and costs. She shall, within ten days of entry of this order, present supporting documentation and briefing on a request for fees and costs and proposed findings of fact and conclusions of law in support of that request. Within five days thereafter, Alison Perthou shall file a response and within five days of that

**[PROPOSED] ORDER APPROVING PETITION
TO DISMISS CLAIMS - 2**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

response Ms. MacConnell shall file a reply. The Court will then enter Findings of Fact,
Conclusions of Law and any award of fees without oral argument.

3. The order incorporates the Court's oral rulings.
DONE IN OPEN COURT this 14 day of October, 2012.



JUDGE/COURT COMMISSIONER

Presented by:

s/ Deborah J. Phillips
Deborah J. Phillips, WSBA No. 8540
DJPhillips@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Cornelia MacConnel

Approved as to form; notice of
presentation waived:

Mark G. Olson, WSBA No. 17846
Law Offices of Mark G. Olson
2825 Colby Avenue, Suite 302
Everett, WA 98201
Telephone: 425.388.5561
Facsimile: 425.252.4357

Attorneys for Alison Perthou

[PROPOSED] ORDER APPROVING PETITION
TO DISMISS CLAIMS - 3

57504-0100/LEGAL24824799.1

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

The Honorable John P. Erlick
Date of Hearing: November 30, 2012
Time of Hearing: 9:00 am

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

In the Matter of the Estate of
MARGARET L. PERTHOU-TAYLOR,
Deceased,

No. 05-4-01094-8 SEA
~~PROPOSED~~ ORDER DENYING
MOTION FOR REVISION

ALISON PERTHOU,
Petitioner,
v.
CORNELIA PERTHOU MacCONNEL,
individually and as Executor and Notice Agent
for the Estate of Margaret L. Perthou-Taylor;
Deceased,
Respondents.

This matter came before the Court on the Motion for Revision filed on behalf of Alison Perthou. The Court has considered the *Motion for Revision*, the records and files before the Commissioner, the records and files herein and the presentation of counsel on

ORIGINAL

APP 2

~~PROPOSED~~ ORDER DENYING MOTION FOR
REVISION - 1

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 November 15, 2012. The Court hereby incorporates its oral rulings and enters the following
2
3 Order:

4
5 **ORDER**

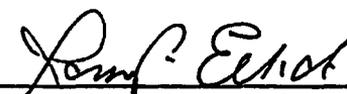
6
7 1. The Commissioner's Order Approving Petition to Dismiss Claims entered
8
9 October 10, 2012 is affirmed.

10
11 2. While the appellate courts can and will recognize new causes of action this is
12
13 not the proper case in which to do so, and the Court declines to recognize a cause of action
14
15 for tortious interference with a gift.

16
17 3. The imposition of punitive damages generally is tied to other conduct and
18
19 would require application of a conflicts of law analysis to apply California law here. Based
20
21 upon the facts presented to the Court, there is no basis to do so.

22
23 4. Cornelia MacConnel is awarded fees and shall submit a request for an award
24
25 of fees and costs to this Court no later than November 21, 2012. Alison Perthou shall file a
26
27 response by November 28, 2012. The matter shall be noted November 30, 2012 without
28
29 oral argument.

30
31 DONE IN OPEN COURT this 30th day of November, 2012.

32
33
34 
35 _____
36 The Honorable John P. Erlick

37
38 4. The Court declines to award attorneys
39
40 fees or costs, pursuant to RCW 11.96. A.150. The
41
42 Court finds that under the facts of this case, and
43
44 considering all equities, and the petitioner presenting
45
46 a novel issue of law in the State of Washington, which
47
48 has been adopted in other jurisdictions, neither side
49
50 should be awarded its fees or costs. 

[PROPOSED] ORDER DENYING MOTION FOR
REVISION - 2

57504-0100/LEGAL25199777.1

Perkins Cole LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Presented by:

s/ Deborah J. Phillips

Deborah J. Phillips, WSBA No. 8540

DJPhillips@perkinscoie.com

Perkins Coie LLP

1201 Third Avenue, Suite 4900

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Cornelia MacConnel

Approved as to form; notice of
presentation waived:

Mark G. Olson, WSBA No. 17846

Law Offices of Mark G. Olson

2825 Colby Avenue, Suite 302

Everett, WA 98201

Telephone: 425.388.5561

Facsimile: 425.252.4357

Attorneys for Alison Perthou

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on November 20, 2012 she caused the foregoing document to be served on the person(s) listed and in the manner shown below:

Via Email and U.S. Mail

Mark G. Olson
2825 Colby Avenue, Suite 302
Everett, WA 98201-3558
Email: mark@mgolsonlaw.com

Dated this 20th day of November, 2012 in Seattle, Washington.

s/Christine F. Zea
Christine F. Zea, Legal Secretary

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

In Re the Estate of
MARGARET L. PERTHOU-TAYLOR,

ALISON PERTHOU,

Petitioner,

v.

CORNELIA PERTHOU MACCONNEL, et al,

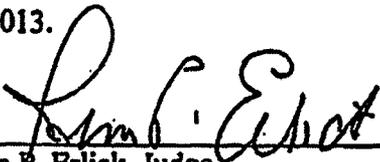
Respondents.

)
)
) No. 11-2-06768-8 SEA
)
) ORDER DENYING PETITIONER'S MOTION
) FOR RECONSIDERATION
)
)
)

THIS MATTER having come on before the undersigned Judge of the above-entitled Court upon
Petitioner's Motion for Reconsideration of this Court's Order Denying Motion for Revision, dated
November 15, 2012, and the Court having considered the motion and the records and files herein, NOW,
THEREFORE, it is hereby

ORDERED, ADJUDGED, and DECREED that the Motion for Reconsideration is DENIED.

DATED this 28th day of January, 2013.



John P. Erlick, Judge

App 3

ORIGINAL

§ 3294. Exemplary damages; when allowable; definitions, CA CIVIL § 3294

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 1. Relief
Title 2. Compensatory Relief
Chapter 1. Damages in General
Article 3. Exemplary Damages

West's Ann.Cal.Civ.Code § 3294

§ 3294. Exemplary damages; when allowable; definitions

Currentness

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

Credits

(Enacted in 1872. Amended by Stats.1905, c. 463, p. 621, § 1; Stats.1980, c. 1242, p. 4217, § 1; Stats.1982, c. 174, § 1; Stats.1983, c. 408, § 1; Stats.1987, c. 1498, § 5; Stats.1988, c. 160, § 17; Stats.1992, c. 178 (S.B.1496), § 5.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1992 Amendment

Section 3294 is amended to revise section references. These revisions are technical, nonsubstantive changes. [22 Cal.L.Rev.Comm.Reports 895 (1992)].

LAW REVIEW AND JOURNAL COMMENTARIES

Attitude adjustment; Case law makes it clear that the attorney-client privilege does not attach when an attorney acts as a claims adjuster. Susan Page White, 32 L.A. Law. 18 (Feb. 2010).

Attorney's fee recovery in bad faith cases: New directions for change. 57 S. Cal. L. Rev. 503 (1984).

Awarding punitive damages in medical malpractice arbitration. 20 Cal. W. L. Rev. 312 (1984).

Bad faith: Defining applicable standards in the aftermath of *Royal Globe v. Superior Court*. 23 Santa Clara L. Rev. 917 (1983).

Bootleg additions and alterations. C. A. Albert, 43 Los Angeles B.Bull. 372 (1968).

California Supreme Court survey a review of decisions: July 1982-November 1982. 10 Pepp. L. Rev. 835 (1983).

California's punitive damages law: Continuing to punish and deter despite *State Farm v. Campbell*. Kathleen S. Kizer, 57 Hastings L.J. 827 (March 2006).

City of Long Beach v. Bozek: Absolute right to sue the government? 71 Cal. L. Rev. 1258 (1983).

Civil actions for damages arising out of violations of civil rights. Nathaniel S. Colley, 17 Hastings L.J. 189 (1965).

Class members who opt out: Should their punitive damage claims survive? C. Delos Putz, Jr., 16 U.S.F. L. Rev. 1 (1981).

Classification of personal injury damages under California community property law: Proposals for application and reform. Kirk H. Nakamura, 14 Pac. L.J. 973 (1983).

The closing of punitive damages' iron cage. Michael L. Rustad, 38 Loy. L.A. L. Rev. 1297 (2005).

Collateral source rule. 7 San Diego L. Rev. 341 (May, 1970).

Collateral source rule and contract damages. John G. Fleming, 71 Cal. L. Rev. 56 (1983).

Comments on the collateral source rule in American Damages Law. Richard C. Maxwell, 37 Los Angeles B.Bull. 228 (1962).

Compulsory arbitration of employment agreements: Beneficent shield or sword of oppression? *Armendariz v. Foundation Health Psychcare Services, Inc.*. 22 Whittier L. Rev. 1107 (2001).

Consumer class action in California--some practical aspects. Alan Goldhammer, 45 Los Angeles B.Bull. 235 (1970).

Corporations, liability of for punitive damages. 13 S. Cal. L. Rev. 140 (1939).

The cost of defiance: Plaintiffs' entitlement to damages under the California civil rights initiative. Cynthia C. Jamison, 33 Sw. U. L. Rev. 521 (2004).

The costs and benefits of letting juries punish corporations: Comment on *Viscusi*. 52 Stan. L. Rev. 1821 (2000).

Demonstrating and preserving the deterrent effect of punitive damages in insurance bad faith actions. Harvey R. Levine, 13 U.S.F. L. Rev. 613 (1979).

Developments in tax law. 14 Golden Gate U. L. Rev. 195 (1984).

Dignified death and the law of torts. Willard H. Pedrick, 28 San Diego L. Rev. 387 (1991).

Emotional distress issues raised by the release of toxic and other hazardous materials. Conrad G. Tuohey & Ferdinand V. Gonzalez, 41 Santa Clara L. Rev. 661 (2001).

Evaluating punitive damages. Mark J. Hancock and Steven D. Wasserman, 30 Cal.Law. 31 (June 2010).

Excluding the exclusionary rule--can there be an effective alternative? Edward J. Horowitz, 47 Los Angeles B.Bull. 91

§ 3294. Exemplary damages; when allowable; definitions, CA CIVIL § 3294

(1972).

Expectation of peace of mind: Basis for recovery of damages for mental suffering resulting from the breach of first party insurance contracts. 56 S. Cal. L. Rev. 1345 (1983).

Exporting United States tort law: The importance of authenticity, necessity, and learning from our mistakes. Victor E. Schwartz & Christopher E. Appel, 38 Pepp. L. Rev. 551 (2011).

Fraudulent transfer: Litigation under the Bankruptcy Code and state law. Helen Ryan Frazer, Laurel R. Zaeske, Lynda T. Bui, 29 Cal. Bankr. J. 255 (2007).

Gertz case: Unbalancing media rights and reputational interests. 2 W. St. U. L. Rev. 227 (1975).

Gertz v. Robert Welch, Inc. and its effect on California defamation law. 6 Pac. L.J. 565 (1975).

Implied warranty of habitability: New doctrine raising new issues. Myron Moskovitz, 62 Cal. L. Rev. 1444 (1974).

Injunction as available remedy to protect consumer. 4 U.C. Davis L. Rev. 49 (1971).

Inquiry into wealth of defendant where exemplary damages are claimed. Stuart B. Walzer, 31 Los Angeles B.Bull. 13 (1955).

Insurance for punitive damages. 28 Hastings L.J. 431 (1976); 12 U.S.F. L. Rev. 743 (1978).

Interest as damages in California. 5 UCLA L. Rev. 262 (1958).

Law and motion tips from research attorneys and law clerks. Nicole Heeseman, Marcelo D'Asero, and Theresa McGonigle, 34 L.A. Law. 16 (Oct. 2011).

Liability of insurer for bad faith and malicious refusal to pay benefits due under a policy--Contracting for punitive damages. 4 Loy. L.A. L. Rev. 208 (1971).

Limited right to strike for the public school teacher. 10 Sw. U. L. Rev. 931 (1978).

Liquidated damages clause in contract for sale of real property. 35 S. Cal. L. Rev. 301 (1962).

Malice in wonderland: Taylor v. Superior Court. 8 San Fern. V.L.Rev. 219 (1980).

Managing liability risks in green construction. Jeffrey D. Masters and John R. Musitano, Jr., 30 L.A. Law. 17 (Dec. 2007).

Mass contracts: Lawful fraud in California. W. David Slawson, 48 S. Cal. L. Rev. 1 (1974).

Necessity for a tripartite classification of the law into tort, contract and restitution, concept and terms. 19 Hastings L.J. 1170 (1968).

Negligent infliction of emotional distress arising from a breach of contract: Jarchow v. Transamerica Title Insurance Company. Conrad G. Tuohey, 8 Sw. U. L. Rev. 655 (1976).

New limits, new licenses? Impact of *Adams v. Murakami* on the California punitive damages system. 33 Santa Clara L. Rev. 735 (1993).

Nominal damages as a basis for awarding punitive damages in California is discussed in. 3 Stan. L. Rev. 341 (1951).

A normative theory of nontortfeasor liability and taxonomy for exemplary damages. 48 UCLA L. Rev. 1017 (2001).

Parody or identity theft: The high-wire act of digital doppelgangers in California. Katharine Malone, 34 Hastings Comm. & Ent. L.J. 275 (2012).

Practical approaches to punitive damages cases. Patrick M. Kelly, 1 Cal.Law. No. 1, p. 48 (Oct. 1981).

Pretrial discovery of net worth in punitive damages cases. 54 S. Cal. L. Rev. 1141 (1981).

A primer on punitive damages. Bert C. Cozart, 17 Cal.Law. 64 (Jan. 1997).

Public figures precluded from recovering punitive damages when liability is founded on actual malice. 2 W. St. U. L. Rev. 305 (1975).

Punitive damages. 13 U.C. Davis L. Rev. 357 (1980).

Punitive damages: an exception to right of privacy? 5 Pepp. L. Rev. 145 (1977).

Punitive damages, the common question class action, and the concept of overkill. 13 Pac. L.J. 1273 (1982).

Punitive damages: Their place in the law. 7 Sw. U. L. Rev. 325 (1975).

Punitive damages: Toward a principled approach. Jane Mallor and Barry Roberts, 31 Hastings L.J. 639 (1980).

Punitive damages and deterrence of efficiency-promoting analysis: A problem without a solution? 52 Stan. L. Rev. 1809 (2000).

Punitive damages and nonprofit corporations. 19 U.S.F. L. Rev. 377 (1985).

Punitive damages and the drunken driver. 8 Pepp. L. Rev. 117 (1980).

Punitive damages and the Eighth Amendment: An analytical framework for determining excessiveness. Comment, 75 Cal. L. Rev. 1433 (1987).

Punitive damages and the intoxicated driver. 31 Hastings L.J. 307 (1979).

Punitive damages and the reasonable relation rule: a study in frustration of purpose. 9 Pac. L.J. 823 (1978).

Punitive damages for nondeliberate torts--drunk driving. 68 Cal. L. Rev. 911 (1980).

Punitive damages in admiralty for bad faith refusal to maintain and repair. 15 San Diego L. Rev. 309 (1978).

- Punitive damages in California: Integrity of jury verdicts. Philip Borowsky, 17 U.S.F. L. Rev. 147 (1983).
Punitive damages in California: The drunken driver. 36 Hastings L.J. 793 (1985).
Punitive damages in defamation suits: Ninth circuit survey. 9 Golden Gate U. L. Rev. 54 (1978).
Punitive damages in des market share litigation. 23 Santa Clara L. Rev. 185 (1983).
Punitive damages in mass-marketed product litigation. 14 Loy. L.A. L. Rev. 405 (1981).
Punitive damages in product liability cases. 16 Santa Clara L. Rev. 895 (1977); Mark P. Robinson, Jr. and Gerald H. B. Kane, Jr., 6 Pepp. L. Rev. 139 (1978).
Punitive damages properly awarded against intoxicated drivers. 20 Santa Clara L. Rev. 1013 (1980).
Punitives without actual damages. Sanford M. Gage, 7 Cal.Law. 80 (Sept. 1987).
Remedies of defaulting vendees. 2 U.S.F. L. Rev. 329 (1968).
Respecting our elders. Steven G. Mehta, 23 L.A. Law. 35 (Dec. 2000).
Retroactivity of punitive damages rule in drunk driving cases: Peterson v. Superior Court. 10 Pepp. L. Rev. 232 (1982).
Review of Selected 1992 California Legislation. 24 Pac. L.J. 605 (1993).
Role of California's attorney general and district attorneys in protecting the consumer. 4 U.C. Davis L. Rev. 35 (1971).
Sizing up private securities fraud litigation in California state courts. Hon. D. W. Hunt, 49 Orange County Law. 23 (Sept. 2007).
State actions for wrongful discharge: Overcoming barriers posed by Federal Labor Law preemption. 71 Cal. L. Rev. 942 (1983).
Statutory controls of exemplary damages. Terry Baum, 12 Hastings L.J. 203 (1960).
Strict liability: Conflict regarding insurance litigation awards. 7 Sw. U. L. Rev. 310 (1975).
Supreme court of California, 1981-1982 foreword: Emerging court. Stephen R. Barnett, 71 Cal. L. Rev. 1134 (1983).
Survival of punitive damages in wrongful death cases. Arden C. McClelland and Harold J. Truett III, 8 U.S.F. L. Rev. 585 (1974).
Tax consequences of a punitive damages award. 31 Hastings L.J. 909 (1980).
Time of death of wrongdoer affecting survival of right to punitive damages. 24 Cal. L. Rev. 479 (1936).
To protect you from the medical bills that can ruin you--Silberg v. California Life Insurance Company. 3 San Fern.V.L.Rev. 127 (1974).
Tort principles shaping future of corporation law. 8 U.West L.A.L.Rev. 159 (1976).
Tort remedies for incestuous abuse. 13 Golden Gate U. L. Rev. 609 (1983).
Under the influence: Claims of undue influence are considered under different standards in Family Law and probate matters. Howard S. Klein, Robert C. Brandt, and Geoffrey Murry, 31 L.A. Law. 31 (Sept. 2008).
Use of punitive damages in breach of insurance contract actions. 15 San Diego L. Rev. 287 (1978).
Widening scope of damages for the disability insurer. 7 Cal. W. L. Rev. 496 (1971).

LIBRARY REFERENCES

1997 Main Volume

- Damages ~~8~~-89.
Westlaw Topic No. 115.
C.J.S. Damages § 119 et seq.

RESEARCH REFERENCES

ALR Library

- 44 ALR, Federal 2nd Series 31, Recovery of Punitive Damages Under Americans With Disabilities Act of 1990, 42 U.S.C.A. §§ 12101 et Seq.
136 ALR, Federal 183. Construction and Application of § 10(A)(4) of Federal Arbitration Act (9 U.S.C.A. § 10(A)(4)) Providing for Vacating of Arbitration Awards Where Arbitrators Exceed or Imperfectly Execute...
150 ALR, Federal 601, Punitive Damages in Actions for Violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 1981a; 42 U.S.C.A. §§ 2000e et seq.).
9 ALR 6th 285, Allowance of Punitive Damages in Action Against Attorney for Malpractice.
39 ALR 6th 1, Majority's Fiduciary Obligation to Minority Shareholder of Close Corporation-Breach and Remedy.