NO. 64231-6

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

DAVID L. MARTIN
APPELLANT

VS.

LORETTA D. WILBERT, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF WILLIAM E. WILBERT AND INDIVIDUALLY
RESPONDENTS

BRIEF OF APPELLANT

&

CERTIFICATE OF SERVICE

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ASSIGNMENT OF ERROR AND ISSUES

ASSIGNMENT NO. 1: THE TRIAL COURT MADE AN ERROR OF LAW IN GRANTING WILBERT'S SUMMARY JUDGMENT MOTION.

Issues Related to Assignment No. 1:

- Where a probate administration fails to inventory or administer certain of the estate's assets, does an estate's closing order preclude the later administration of those assets or estop the heir from bringing claims in pursuit of the assets or their values?

- Where a probate court assigns claims against an administrator to the heir and orders the successor administrator not to pursue the assigned claims and the court is barred from hearing the separate pending action on those claims within the probate proceeding, does the estate closing order preclude the heir's assignee from pursuit of the claims in another forum after the estate's closure?

- Where the appellate court has previously rejected res judicata as a defense, must the party establish changed circumstances in order to later assert that a claim is barred by res judicata?

- When a defendant dies before the statute of limitations has run as to claims against him and the plaintiff complies with the probate non-claims statute after the defendant's death, may the trial court dismiss the Complaint based upon the statute of limitations?

- Where the Complaint alleges fiduciary fraudulent concealment, may the trial court enter a summary judgment of dismissal based upon the statute of limitations before the fact finder determines the disputed factual issue of fiduciary fraudulent concealment?

- Must a CR 12 motion be denied upon a showing that ". . . it is possible that facts could be established to support the allegations in the complaint?"

- Does a factual finding in an unpublished opinion of the Court of Appeals that describes the causes of action in a complaint become law of the case in the trial court for purposes of CR 12?

- Does RCW 4.16.170 bar dismissal of the Complaint on a statute of limitations allegation where a defendant has been continuously subject to the court's jurisdiction for the prior 13 years defending against breach of fiduciary duty claims brought by the estate's heir?

- May latches properly be the basis for dismissal of a Complaint for damages where the fiduciary defendant's hands were dirtied by

intentional discovery abuse and no damages attributable to delay were shown, and the applicable fiduciary duty statute of limitation was still open?

- May a trial court rely upon a legal precedent in an unpublished opinion where 1) the subject of the legal precedent 2) was specifically excluded from the issues on review and 3) where the record on review did not include the pleadings which were the basis for the precedent?

ASSIGNMENT NO. 2: DENIAL OF TWO MARTIN DISCOVERY MOTIONS WAS AN ABUSE OF DISCRETION

Issues Related to Assignment No. 2:

- Did the trial court abuse its discretion in granting a motion to terminate the deposition of Michael Zeno where he was the only witness known to have knowledge of material facts relevant to the case before the trial court?

- When the defendant-estate-administrator's daughter was his office manager testifies that she transferred file boxes of estate records to the attorney for the defendant, was it an abuse of discretion to deny the plaintiff's motion to compel production of those records from her attorney, who also represented the defendant?

STATEMENT OF THE CASE

The early history of this long term claim for damages against the estate's administrator has been established in three unpublished opinions of Division II.[2]

On January 17, 1997, the last court day before hearing on the Petition for Removal of William Wilbert, the administrator of Gary Delguzzi's father's estate, Gary's Petition for Damages against Mr.

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2 The four Delguzzi appeals are referred to in a prior opinion of this court as "Delguzzi I" through "Delguzzi IV". Appellant's Appendix includes the three relevant Delguzzi opinions. Delguzzi II, February 26, 2001, concerned Gary Delguzzi's trust, and not relevant to this appeal. The three relevant opinions are all included in the record on review.

Wilbert (1996 Complaint) was dismissed based upon Wilbert's representations to the trial court that Gary had only objected to Wilbert's discovery requests, when Gary had actually provided a substantive response to each of the requests. [Delguzzi III at note 5.] Wilbert had provided Gary's four pages of objections to the court, representing that they were Gary's answers, which were 38 pages.

While the dismissal of Gary's 1996 Complaint was under review at Division II, Mr. Wilbert proceeded with the hearing on his Petition for Final Accounting and Decree of Distribution in 1997, which resulted in a Memorandum Decision on October 10, 1997 [CP 832] and an Order Regarding Administrative Expense Reimbursement on June 6, 1998, the "1998 closing order".[CP 838]

After Delguzzi I on January 8, 1999, Gary again noted for hearing his November 1996 motion to compel discovery and Wilbert moved to block that motion which had originally been noted, but not heard, for January 17, 1997, because of the dismissal of Gary's Complaint. [Delguzzi III at *6-7] The trial court granted Wilbert's dismissal motion based upon res judicata, collateral estoppel and law of the case. [Delguzzi III at *14-19.] Gary appealed again, and his case spent another two years in appellate limbo until reinstated by Delguzzi III. Wilbert remained in office, despite the closing order of June 5, 1998 which directed him to promptly close the probate.

Gary and Mr. Wilbert both died in the first quarter of 2004, leaving

the Jack Delguzzi estate still open in its 26th year. [Delguzzi IV at fn.1]. Delguzzi IV at fn. 5, noted that Wilbert's death made Gary's Petition for Removal moot. [CP 870-874] (Delguzzi 1 at *2)

Gary Delguzzi's estate continued to assert his claims against Mr. Wilbert's estate and in 2006, after the probate court assigned the claims of the Jack Delguzzi estate to Gary's estate [CP 1860-2] and when the creditor's claim of Gary's estate was denied in November of 2006, suit was filed. [CP 1867] Thirteen months later, venue of the case was changed from Clallam to King County on Wilbert's motion. [Delguzzi IV at 23-24]

In 2005, Ms. Kathryn Ellis was nominated by Wilbert attorneys Cori Flanders-Palmer and Michael Zeno as the Jack Delguzzi estate administrator. Her order of appointment included the following:

> There is presently pending an action by the Estate of Gary Delguzzi verses the Estate of William E. Wilbert, et al. On or about August 10, 2004, the Estate of Jack Delguzzi, through David Martin acting as interim Administrator, filed a creditor's claim against the Estate of William E. Wilbert in King County Superior Court. To date the claim has neither been approved nor rejected. Unless otherwise ordered by the Court, the Administrator of the Estate of Jack Delguzzi shall not process or pursue the claim against the Estate of William E. Wilbert pending final resolution of the case of Estate of Gary Delguzzi vs. Estate of William E. Wilbert, et al.[CP 2106, ¶ 5]

Ms. Ellis closed Jack Delguzzi's estate on July 27, 2007. ("2007 closing order")[CP 1820-22].

Gary's estate had acquired the claims of his father's estate against Wilbert by order of the probate court in 2005 [CP 890-1] and in 2007, those claims and Gary's claims as a partner, creditor, co-tenant and

shareholder in corporations with the estate [CP 828, Exh. 7] were assigned to David L. Martin [CP 1860-1864], the C.P.A. who had served as temporary administrator of the Jack Delguzzi estate after Mr. Wilbert's death in 2004. Mr. Martin is the appellant.

Mr. Martin continued to seek discovery from Mr. Wilbert's estate during pretrial proceedings in King County, but his attempts to secure documents and testimony about estate assets were met with frustration. [CP 797; 1003-1006] The trial court denied his attempts to gather estate documents from Mr. Wilbert's daughter, Laure, who was his office manager Jack Delguzzi's estate administrator. Ms. Wilbert testified that she delivered estate records to the office of Michael Zeno, her attorney who also represented her mother, Ms. Loretta Wilbert, the personal representative for Mr. Wilbert's estate. [CP 655, estate files; CP 676, delivery to Zeno.]

Mr. Zeno refused to produce these files in regular discovery proceedings and successfully resisted a subpoena to his law firm, as a non-party, for the files. Laure Wilbert testified that she delivered the estate files to Zeno's office for the use of Ms. Ellis, as the successor Jack Delguzzi estate administrator. A subpoena duces tecum was utilized to attempt recovery of the files from Mr. Zeno's law firm, as Ms. Laure Wilbert was not a party and claimed to have delivered estate files to Mr. Zeno, who refused to identify or produce them in response to CR 34 discovery requests. The court quashed the subpoena. [CP 1003]

Attempts to secure Mr. Zeno's testimony about the estate's farm in Costa Rica ("Finca Delguzzi"), which was first ordered to be inventoried by the probate court during Wilbert administration in September 1999, [CP 1438] were stubbornly resisted and not successful, as the court ordered that his deposition be terminated before it was completed. [CP 1005] In 2005, Mr. Zeno advised Ms. Ellis in an email which he produced in a related Delguzzi case about the Costa Rica farm or finca. [CP 646; 1442]. When he was directed to appear and testify to complete that testimony in this case, he did so initially and then left the deposition before it was completed, when questions about his knowledge of the Costa Rica farm became imminent.[CP 747]

After Martin sought an order requiring him to return and finish the deposition [CP 681] Zeno moved for an order terminating his testimony [CP 803], which the trial court granted. [CP 1005]

There was no inventory or order of distribution of the Costa Rica farm during either Mr. Wilbert's or Ms. Ellis' administrations and its current status is still unknown to Mr. Martin.

On August 31, 2009, hearing was had on Wilbert's summary judgment motion. [VRP August 21, 2009] which was based on five defenses, primarily on footnote 19 of Delguzzi IV, which alleged a preclusive effect as to Gary's 1996 Complaint (Petition for Damages) against Mr. William Wilbert, as administrator of the estate of Jack Delguzzi. In response to the motion, Martin introduced evidence of

assets of the Jack Delguzzi estate that were not inventoried and for which there was no evidence of their administration or distribution. [CP 1037-1652]

SUMMARY OF ARGUMENT

The Delguzzi IV opinion entered shortly before Wilbert's summary judgment motion was filed in July of 2009 provided the defendant with an opportunity to create confusion with a baseless defense claim of "preclusion" and to so avoid the Complaint of Gary Delguzzi coming to trial once again. The very substantial value of estate assets that were not listed in either of the Jack Delguzzi estate's two closing orders (1998 and 2007) and not administered for the benefit of the estate's heir, creditors and co-tenant are the most obvious matters that cannot be subject to preclusion under any doctrine and which alone require reversal of the summary judgment order that dismissed the Complaint. Mr. Zeno's stuttering admissions and halting argument to challenge Martin's evidence, without rebuttal evidence demonstrates the confusion strategy that Wilbert relied upon throughout this litigation as well as the lack of defense evidence. [VRP, August 21, 2009]

The 2007 closing order could not address or constitute a final and preclusive order as to the 2006 Complaint because those claims were previously assigned to Gary's estate, leaving the probate court without jurisdiction over them at the time of entry of the 2007 closing order.

The probate court has a continuing jurisdiction and duty to

determine the ownership and entitlement to the assets in which Jack and Gary Delguzzi had interests that were not previously administered and the cases that have looked at this issue have uniformly so held.

Since Wilbert's resistance to the issue was based solely on argument, as a matter of law, there could not be a properly granted summary judgment on the omitted assets issue.

Denial of Martin's motions to complete the deposition of Zeno and to compel production of the estate records transferred to him by Ms. Laure Wilbert were abuses of discretion and must be reversed.

ARGUMENT

VALUABLE ESTATE ASSETS WERE NOT ADMINISTERED

Assets identified in Martin's response to Wilbert's motion for summary judgment were not inventoried by Mr. Wilbert and not administered or distributed by either Mr. Wilbert's 1998 closing plan or the 2007 closing order of successor administrator Ellis. These orphan assets were brought to the attention of the trial court, which did not recognize that the probate court still retained jurisdiction over these assets and had a duty to see that they were properly administered. The assets included, but were not limited to the following:

- An unaccounted for estate receivable of $7.35 millions. [Delguzzi III at * 3. [CP 1042-3, 1177, 1179, 1181, 1080-1175; Declaration of CPA Beaton & exhibits concerning $7.35 million missing receivable.]
- The estate's missing Costa Rica farm ("Finca Delguzzi") ordered to be inventoried in 1999 [CP 1438-41] and which was also evidenced by Mr. Zeno's emailed advice about it to successor administrator, Kathryn Ellis.[CP 696;1442]
- The estate's real property in Pacific County, Washington that was

in Wilbert's estate inventories and then transferred to his family without court approval, explanation or payment to the estate. [CP 1508-9, 1510, 1512 & 1636-48].3

- Checks payable to Wilbert [CP 1505-7] for $1.466 million in December 1993 from Costa Rica asset sales, which included payments for Finca Delguzzi and other Jack Delguzzi properties in Costa Rica which were not reflected in Wilbert's accountings.

Until the party moving for summary judgment identifies sufficient portions of the record and affidavits which demonstrate the absence of a genuine issue of material fact, the burden does not shift to the party defending against the motion to demonstrate a genuine issue of material fact. Indoor Billboard / Washington, Inc. v. Integra Telcom of Washington, Inc., 162 Wn. 2d 59, 71, 170 P.3d 10 (2002). Wilbert's motion failed to shift the burden of proof. The court is required to construe all facts and inferences in favor of Martin as the nonmoving party. Michael v. Mosquera-Lacy, 165 Wn 2d 545, 548, 192 P.3d 886(2008). Since there was no evidence to establish any facts offered by Wilbert in to oppose the defense of the summary judgment motion, Wilbert failed to shift the burden to Martin, as there was no identification of any portions of the record by Wilbert that demonstrated the absence of a genuine issue of material fact.

Since Wilbert offered no evidence to rebut the evidence of the many valuable missing assets and only challenged Martin's evidence with

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3 Mr. Zeno argued that perhaps these missing assets were not what they appeared to be in the summary judgment hearing on August 21, 2009, but he had no evidence to support his speculation. VRP Aug 21, 2009.

argument and ad hominem attacks, it was certainly error for the trial court to grant summary judgment as to the unadministered assets of the Jack Delguzzi estate, as Wilbert never proved administration of the missing estate and jointly owned assets.

A factually very similar situation arose with In re Dyer's Estate, 161 Wash. 498, 297 P. 196(1931), where 200 shares of corporate stock were identified and the executor declined to inventory and include that stock in the final petition. The Supreme Court held that the probate court acted properly in not vacating the Decree of Distribution, as there was no error in the Decree, but ordered the court to conduct a hearing on the ownership and probate administration of the stock. This was the same relief sought by Gary's estate's 2006 Complaint as to assets of his father's estate that were not inventoried and administered and offered as a defense to the Wilbert summary judgment motion.

In an action to determine the ownership of property which the administrator did not inventory or administer, it is necessary for the trial court to receive evidence as to the title of the property not included in the decree of distribution, since the decree was final and conclusive as to the status of the property that was included in the inventory, but was not determinative of the status of property not so included. In the Matter of the Estate of George F. Price, 53 Wn2d 393, 395, 333 P.2d 929(1959), where the opposition to hearing evidence on the ownership of the omitted property claimed that the questioned property was not ". . . within the pleadings and is a collateral attack on the decree of distribution." The Supreme Court disagreed, holding "Had the trial court

acceded to this theory, it could never have reached the unusual facts determinative of the merits of this case." Estate of Price, supra, 395.

Just as with In re Dyer's Estate and In the Matter of the Estate of George F. Price, supra, where the trial court was reversed for its failure to recognize that the closing of an estate without administering certain valuable assets, no order entered in this case precluded the court's later determination of ownership and entitlement of unadministered assets, or damages for their losses, or relieve the trial court of the duty to do so.

MARTIN'S DENIED DISCOVERY MOTIONS

Mr. Zeno's May 13, 2005 email to then-administrator Ellis that disclosed the existence of the estate's Costa Rica farm [CP 696] was accurate. His later claim, under oath, that he did not know if all of the Costa Rica assets had been distributed on June 20, 2008 was false. What else he knew of the farm and where, and what, estate files were delivered to him by Ms. Wilbert in 2005, all justified granting Martin's motions ordering him to complete his deposition. Denial of Martins' motions to compel were abuses of discretion.

On May 13, 2005, Zeno sent an email to Administrator Ellis which detailed not only the existence of the estate's un-inventoried 'finca' or farm, but that he had an English speaking Costa Rica contact who could assist her with the farm's administration. [CP 1442]

On June 20, 2008, Mr. Zeno testified in deposition as follows:

Q: What Costa Rica assets were there at any time to the best of your knowledge in the Estate of Jack–that Jack Delguzzi had an interest in?
A: I don't know.
Q: And I believe that supplement to the final accounting listed

-- well, it was a narrative. It wasn't really an accounting or anything, but it was a narrative. And it gave Mr. Wilbert's verbal -- there were not many numbers in it, but verbal report of the sale of some of the Costa Rica assets of the estate. Do you recall that at all? Tamarindo comes to mind for me.

A: Well, I know that there were some narratives filed on Mr. Wilbert's behalf. But -- and I believe that at least, you know, some of them must have addressed Costa Rica. But as far as what specifically they said, when they were filed, what the purpose of their filing was, I don't remember.

Q: Were those -- were those narratives or whatever dispositive of all the Costa Rica assets?

A: I don't know.

[CP 779, p. 63, ll. 7-25, 780, p. 64, l. 1]

Then in the summary judgment motion which he filed on July 24, 2009, Mr. Zeno included the same Supplement to Final Accounting and Petition for Decree of Distribution [CP 897, Exh. 6] about which he had been so vague only 13 months before, where Wilbert claimed, for the first time, that the farm belonged to the estate.[CP 927, n. 13]. The order that Zeno told Ellis about on May 13, 2005 [CP 1438] confirmed the probate court's recognition of the estate's ownership.

When it was alleged that Ms. Ellis had not properly marshaled and distributed the farm during her administration, she first argued "There was no such farm," then "There was no such order" and finally on September 26, 2008 that the farm was worthless.[CP 698] She offered only her unsupported testimony and no evidence for that conclusion

Zeno also told Ellis that there was an English-speaking attorney, who could assist her in administering the property. He closed with a request that she get this information from him so that she could administer this farm. Had she honored his offer, the 'finca' would have been no longer an issue for her or for Mr. Wilbert. For some unknown

reason, she failed to do so and was later found not to have been liable, leaving Mr. Zeno's client solely liable.

The trial court deemed that the gaps in the critical information withheld by Zeno were insufficient to require him to complete his deposition. This was an abuse of discretion. For example, who was the English-speaking attorney? What was his/her involvement or knowledge about the farm that Mr. Wilbert valued at $150,000 in 1992? Was there any evidence in support of Ms. Ellis's speculation? The only known source of this information is Mr. Zeno.

Io July 1, 2009, Ms. Laurie Wilbert, Mr. Wilbert's daughter and his office manager while he was administrator, testified that after Ms. Ellis' appointment, she had transferred the contents of a file cabinet containing three or four file drawers of estate records to Mr. Zeno for delivery to Mrs. Ellis. Mr. Zeno's discovery responses evaded and denied producing the files had been delivered to him and never produced them in response to discovery requests pursuant to CR 34. [CP 681-86, 527]

Because Laure Wilbert was not a party, and because of the possibility that Mr. Zeno's law firm, to which she transferred the files, could claim that they were files that belonged to a non-party, i.e., Ms. Wilbert, which was Zeno's position, and so not subject to CR 34 production, a subpoena was issued and served upon Mr. Zeno's law firm. The court quashed that and also denied Martin's motion for order compelling production of these files from Zeno other client. CR 26 (b)(6) required the trial court to compel the discovery that Martin and Gary Delguzzi

have been seeking since before 1996, shortly before Wilbert's discovery abuse spun the case off into years of torturous appeals and delay.

> The purpose of civil discovery is to disclose to the opposing party all information that is relevant, or potentially relevant or reasonable calculated to lead to the discovery of admissible evidence in the trial at hand. . . . Where there is an indication that a serious potential exists for abuse of civil discovery, the courts are obliged to act. In re Firestorm, 129 Wn2d 130, 916 P.2d 411(1996).

Both of these acts of the trial court, in terminating Mr. Zeno's deposition early and in not ordering production of the estate files that Ms. Wilbert transferred to Mr. Zeno were abuses of discretion by the trial court. Granting Martin's discovery motions could have resolved the uncertainties of these and other issues related to the huge number of missing estate assets that were not administered.

THE ILLUSION OF PRECLUSION

Ms. Wilbert argued in her summary judgment motion in August 2009 [CP 820] that Delguzzi IV "precluded" the 2006 Complaint against the William Wilbert estate, of which she was the personal representative, by the mere mention of a "preclusive effect" as to Gary Delguzzi's July 16, 1996 Petition for Damages[4], although that footnote only addressed the 1996 Complaint and did not mention the 2006 Complaint. Since the probate court had assigned those claims to Gary's estate a year earlier, it no longer had jurisdiction in the probate to issue a final order that could have a "preclusive effect".

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4 "We note that many of these issues overlap with those in the still-pending July 1996 complaint, as described by the parties. See note 2, *supra* (describing 1996 action). We recognize that this opinion disposing of these issues has a preclusive effect on the unresolved July 1996 action."[Delguzzi IV at n. 19.]

The court's prohibition of pursuit of the Wilbert claims by Ms. Ellis, and the later assignment of the claims all demonstrate that the probate court had washed its hands of the claims even before the ribbon was tied on the package with an affidavit of prejudice, blocking Judge Costello, the assigned judge, from any further action as to the claims in the 2006 Complaint on June 29, 2007. Only close attention to these details and the other history of the Delguzzi case will provide answers to its unique questions.

HISTORY OF THE DELGUZZI APPEALS

Because only passing attention was given to the elements of the "preclusive effect" noted by Delguzzi IV, the logical first step would be to look for a qualifying 'event' to satisfy the threshold requirement for preclusion.5

Gary Delguzzi filed a Complaint against Wilbert in 1994. He amended this pleading on July 16, 1996 with 1) a Petition for Removal and 2) a Petition (Complaint) for Damages, herein "1996 Complaint" [Delguzzi I at *2], also mentioned in Delguzzi IV's footnote 19.

Mr. Wilbert's discovery abuse caused the dismissal of Gary's 1996 Complaint on January 17, 1997[Delguzzi III at n. 5] when Mr. Wilbert misrepresented to the trial court Delguzzi's responses to Wilbert's discovery. Because of that dismissal, Gary's motion to compel discovery was continued by the trial court, as there was no matter then pending upon which to base the motion until after the reversal of the dismissal

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Please see "Preclusive Events" argument at page 22 of this Brief.

and the remand. Gary again noted his November 1996 motion to compel discovery for hearing in July of 1999, but the trial court continued the hearing until after Wilbert's second motion to dismiss the 1996 Complaint, which was based on several preclusive doctrines, and which was granted on September 14, 1999, causing Gary to be again deprived of a hearing on his motion to compel.[Delguzzi III at *6-7 & 13-14]

Gary's 1996 Complaint was in the trial court's jurisdiction for only about 9 of the 54 months between January 17, 1997, the first dismissal, and August 31, 2001, when Delguzzi III reversed the second dismissal. The remainder of that 4½ years, the 1996 Complaint was solely under jurisdiction of Division II, effectively denying Delguzzi opportunity for discovery or the ability to note the case for trial. That period of appellate limbo also denied the trial court jurisdiction over those claims during Wilbert's 1997 accounting hearing. RAP 7.2(l). Delguzzi III also held that Delguzzi had no opportunity to present his claims at that hearing and that Gary's due process rights had been violated by the trial court's grant of Wilbert's second dismissal motion after the 1997 Petition for Final Accounting and Decree of Distribution hearing. The 1998 closing order resulted from that hearing and thus it could not be preclusive of Gary's claims.[Delguzzi III at *14]

The 1996 Complaint has never been tried on the merits and therefore never been resolved by a final judgment. The second dismissal based on res judicata, collateral estoppel and law of the case, was based upon Wilbert's claims that the 1997 accounting hearing and the resulting 1998 closing order precluded them. [Delguzzi III at *14-19]

Division II explained in early, great and profuse detail why no preclusion doctrines applied, as follows:

> [H]e (DelGuzzi) argues that the trial court erred in dismissing on grounds of res judicata, collateral estoppel, and the law of the case doctrine. [Delguzzi III at *2]
> * * *
> DelGuzzi had no opportunity to compel the discovery that he claims was necessary to litigate his claim for wrongful administration of his father's estate. [Delguzzi III at *5]
> * * *
> [After remand from DelGuzzi-I] DelGuzzi again moved to compel discovery. But Wilbert urged the court to dismiss DelGuzzi's claim, this time based on res judicata, collateral estoppel, and law-of-the-case doctrine. Wilbert argued that, although DelGuzzi's wrongful estate administration claims had originally been dismissed as a discovery sanction, DelGuzzi was nevertheless barred from relitigating them on remand because the same issues had been decided in the probate hearing following the dismissal and before we heard the previous appeal. [Delguzzi III at *6]
> * * *
> A different superior court judge again dismissed Del Guzzi's claim, reasoning that at the January 21, 1997, hearing on Wilbert's final report and accounting for the estate, Del Guzzi had adequate opportunity to raise any and all claims and had lost. The superior court reasoned that at the previous probate proceeding: (1) the superior court found Wilbert's Administrator fee reasonable; (2) this finding thereby necessarily included that the Administrator did not breach his fiduciary duty to the estate; and (3) this finding necessarily included DelGuzzi's claims of fraud/self-dealing and necessarily decided the claims in Wilbert's favor. The superior court did not address how DelGuzzi could have effectively mounted a challenge to the estate's administration without his discovery requests having been heard or granted. DelGuzzi amended his appeal to include this ruling and dismissal of his claims on remand. [Delguzzi III at *7]
> * * *
> (Res Judicata.) Wilbert contends that res judicata bars DelGuzzi's claims because DelGuzzi had a chance to litigate fully those claims in the Final Accounting hearing of January 21, 1997. The record is to the contrary. Because another judge had dismissed DelGuzzi's wrongful-estate-administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to Wilbert's final accounting of the estate. DelGuzzi neither presented nor had an opportunity to present his claims at that hearing. [Delguzzi IV. *4]
> * * *
> For the reasons we mention in our discussion of res judicata, supra,

> the issue before us on appeal is not the same as the issue decided at the January 21, 1997, hearing. Again, that hearing focused on the estate administrator's petition for approval of his fees and plan of distribution. It did not resolve DelGuzzi's tort claims and related issues because the previous judge had dismissed DelGuzzi's action and had not granted his motion to compel Wilbert to produce necessary documents. [Delguzzi III at *17]
>
> As to the fourth element, it would work an injustice to apply collateral estoppel to preclude resolution of DelGuzzi's claims. First, the trial court wrongfully dismissed his claims, in part because it had the wrong documents before it. Second, Wilbert's failure to return to DelGuzzi key source documents from DelGuzzi's original administration of the estate limited his ability to participate fully in the estate accounting hearings and to challenge the accuracy of Wilbert's accounting. Without these documents, DelGuzzi could not effectively impeach or rebut testimony at the hearing that the estate's loss of millions of dollars was not attributable to Wilbert, even though some evidence could have cast doubt on Wilbert's estate administration. Application of collateral estoppel here would be manifestly unjust.[Delguzzi III at *17][Emphasis added.]

Delguzzi I & III recognized that the issues in Gary's 1996 Petition for Damages were tort claims. The July 27, 2007 closing order[6] [CP 1821-2] [Delguzzi IV at *1] only addressed the probate issues. [Delguzzi IV at *7] (See footnote 6 herein, infra.) No decree of distribution was ever entered for the Jack Delguzzi estate.

Wilbert's accounting hearing before Judge Leonard Costello in 1997 was the last hearing in the Jack Delguzzi probate where there was live testimony and thus the last opportunity to resolve issues of disputed material facts. The evidence from that hearing resulted in the Memorandum Decision of October 10, 1997 [CP 832] , and the Order Regarding Administrative Expense Reimbursement of June 5, 1998 [CP

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[6] The 2007 closing order is titled "Final Supplement to [Wilbert's] Final Report and Petition for Decree of Distribution."[Delguzzi IV at *17]

838](1998 closing plan) [Delguzzi IV at *5 & 9] neither of which addressed Gary's tort claims [Delguzzi III at *17] as the evidence was restricted to probate issues as well as because Gary's Complaint was the under review and not reinstated until January 8, 1999. [Delguzzi I]

The 2007 Final Supplement (2007 closing order) could not provide resolution of the tort claims because the hearing did not include testimony, so there could be no fact finding to resolve the disputed material fact issues related to the tort claims. Also, once the claims were assigned in 2006, they were no longer the concern of the probate court.

Delguzzi IV held the 1998 closing plan was interlocutory when entered[7], preventing it from the finality required to be a preclusive event. [Delguzzi IV at *15] "When an order is clearly intended to be interlocutory in nature, res judicata does not apply." Claim and Issue Preclusion in Civil Litigation in Washington, Trautman, Philip A., 60 Wash. L. Rev. 805, p. 822 (1985).

Wilbert's summary judgment motion correctly alleged that Gary "raised" certain issues in the probate proceeding [CP 820], but that is irrelevant. Both Gary and Mr. Wilbert made motions during the later administration of the estate, Wilbert to dismiss and Gary for partial summary judgment, which were denied. Wilbert argued in her summary judgment motion that the five-day trial in 1997 and Gary's

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7 The 1998 closing plan was entered during the time when dismissal of Gary's 1996 Complaint was being reviewed by Division II, so the trial court had no jurisdiction over the Complaint when the 1998 closing plan was entered on June 6, 1998. [CP 840, Ex. 2] RAP 7.2(l).

motions in the probate case in 2003 and 2005 had a preclusive effect because they were denied. Denial of a summary judgment motion has no preclusive effect, as it is not a final judgment on the merits, only a showing of non-entitlement to summary judgment. Claim and Issue Preclusion in Civil Litigation in Washington, supra, p. 822, citing to Leija v. Materne Bros., 34 Wn. App.825, 827, 664 P.2d 527 (1983).

Although Cummings v. Guardianship Services of Seattle, Inc., 128 Wn. App.742,110 P.3d 796 (2005) recognized that the doctrine of res judicata can apply to probate cases, it also addressed limitations, including those which blocked its application in this case:

> While no Washington Court has directly applied the doctrine of res judicata to final guardianship cases, it does apply to probate orders. Bostock v. Brown, 198 Wash. 288, 292, 88 P.2d 445 (1939) [8]. * * * res judicata bars relitigation where an issue has been definitively adjudicated; [9] it does not apply where a plaintiff's right to recover damages "is plainly reserved from adjudication." Case v. Knight, 129 Wash. 570, 225 P. 645 (1924).

Judge Costello at the estate closing hearing on June 29, 2007, stated on the record [CP 1777-8 (Clerk's Minutes, June 29, 2007), CP 2011-12

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8 Delguzzi IV, *11, also cited Bostock v. Brown, ". . . providing that an order approving a final report and distribution is "res judicata of all matters covered by that order and all questions that should have been raised at the hearing upon the final account and petition for distribution").The opinion, at *7: "As of the time the court entered the 2007 closing order in the Estate in July 2007, however, the claims in the July 1996 complaint had not been resolved." Delguzzi III, at *14 also held the tort claims could not have been resolved by the 1997 hearing.

9 See also, Trautman, Philip A., Claim and Issue Preclusion in Civil Litigation in Washington, *supra*, 823, where Prof. Trautman notes that a "judgment expressly stated to be 'without prejudice' should not have preclusive effect". Certainly where the court expressly states, on the record 28 days before the entry of the 2007 closing order that it cannot rule on the tort claims, that more certain than a ruling 'without prejudice' as to its lack of a preclusive effect.

(Judge Costello's letter of July 27, 2007 to Judge Wood)] that the Affidavit of Prejudice filed against him [CP 2022, Affidavit of Prejudice and Recusal of June 26, 2007] allowed him to continue hearing Jack Delguzzi's estate matters in Clallam County file No. 8087 and he recognized the affidavit of prejudice was effective to bar him from hearing the 2006 Complaint. He also knew that he had assigned the claims against Mr. Wilbert to Gary's estate the year before. Twenty-eight days later, on July 27, Judge Costello signed the closing order for the Jack Delguzzi estate (No. 8087). That closing order did not mention the 2006 Complaint in case No. 06-2-01085-2. Since Judge Costello held that he could not rule on the 2006 Complaint because of the Affidavit of Prejudice earlier filed against him during the hearing on the estate closing, so his entry of the 2007 closing order could not provide a preclusive event as to the 2006 Complaint. The lack of any mention of the 2006 Complaint in the July 27 closing order confirms Judge Costello's intentional withholding from ruling on those claims. His July 27 letter to Clallam County Presiding Judge Wood is another reflection of his knowledge. The 2007 closing order was not appealed by Wilbert.

PRECLUSIVE EVENTS

The threshold preclusive event that is necessary to find the application of a "preclusive doctrine" is a final order or judgment from an earlier proceeding. There are four elements required, which are:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not

work an injustice. Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000).

In this case, only element number three, the parties, is satisfied. The remaining three are notoriously and absolutely absent. In addition, the preclusive event must satisfy certain criteria:

> Wash. Practice, Civil Procedure §35.23: A judicial determination must generally be (1) fina1 and (2) on the merits to have res judicata effect.
> * * *
> Incomplete judgments, reserved issues. Occasionally when a trial court deliberately chooses not to address certain issues at trial, but the trial nevertheless ends in a final judgment, the courts have held that the judgment is not res judicata as to the issues not addressed. If it affirmatively appears on the record that issues that would have properly been a part of prior litigation were in fact not tried therein, res judicata will not apply to such issues[10]. On occasion, the court in the first action will expressly reserve issues.

Where a trial court's ruling in the first decision is not clear, the later court is to "view all of the circumstances surrounding the controversy" in order to determine whether the issues were resolved by the first decision. Case v. Knight, supra, 574. The circumstances included Judge Costello's acknowledgment that the affidavit of prejudice against him for the 2006 Complaint barred him from hearing that case 28 days before he signed the 2007 closing order to close the Jack Delguzzi estate. Effectually, the affidavit of prejudice 'precluded' the 2007 closing order from addressing the 2006 Complaint.

The holdings in Delguzzi III and IV, the limitation of the 1997

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10 Woeppel v. Simanton, 53 Wn. 2d 21, 330 P.2d 321 (1958) (trial court expressly found that no evidence was received on the issue and that the issue was not considered). Case v. Knight, 129 Wash. 570, 225 P. 645 (1924). International Development Co. v. Clemans, 66 Wash. 620, 120 P. 79 (1912), aff'd, 76 Wash. 698, 135 P. 660 (1913) (dictum).

accounting hearing to only issues in Wilbert's Petition and the 2007 closing order, where Judge Costello admitted his disability to rule, conclusively establish that the 2007 closing order cannot be constituted a "preclusive event" as to the 2006 Complaint.

FOOTNOTE 19 ALLEGES A LEGAL PRECEDENT BASED ON ISSUES AND EVIDENCE SPECIFICALLY EXCLUDED BY THE OPINION

Delguzzi IV's footnote 19 alleges a legal precedent, but one that is based on issues identified that were specifically excluded from review in that appeal: "We affirm the trial court's 2007 order to close the Estate and dismiss the remaining issues presented for review as untimely." [Delguzzi IV at *1]

Nor did the Delguzzi IV panel have Gary's 1996 Petition for Damages (at *3, n.2) or the operative version of the 2006 Complaint (at *8, n.6) in their record on review. The decision also does not mention the assignment of the claims by the probate court one year before the 2007 closing order. Wilbert did not bring any objection to that issue to the Delguzzi IV court. Reliance on footnote 19 would thus be based on issues not reviewed (obiter dictum) and upon an incomplete record[11]. The opinion also included another finding that is contrary to its imprecise, offhand footnote at page 7, infra. There thus could be no finding on the merits of the 2006 Complaint because Division II not only stated that it

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11 The Delguzzi IV court did not have the 1996 Complaint in its record on appeal. See n. 2: "We describe the July 1996 complaint based on DelGuzzi v. Wilbert, noted at 108 Wn. App.1003, 2001 WL 1001082. No party attached the July 1996 petition and complaint to briefing, nor did any party provide an accurate record citation for this document." Also missing from the record was the 2006 Complaint which was dismissed on Wilbert's summary judgment motion. Delguzzi IV at n.6.

was not been accepted for review, but also that the issues were not resolved by the 2007 closing order, without mention or recognition that the claims had been assigned to Mr. Martin.

Where a trial court specifically stated that it would not address some claims (competency and undue influence) and then granted summary judgment that included those claims, the Supreme Court reversed, because " . . . these claims were not addressed nor could they be addressed in the summary judgment trial." In the Matter of the Estate of Black, 153 Wn.2d 152, 171, 102 P.3d 796 (2004). These situations are so similar that there is no room for doubt that there was no legal possibility of a prior final order or judgment on either of Gary's Complaints. Delguzzi III could not have been more precise in its holding that the 1998 closing plan was not a "preclusive event" as to Delguzzi's July 16, 1996 Complaint:

> Because another judge had dismissed DelGuzzi's wrongful-estate-administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to Wilbert's final accounting of the estate. DelGuzzi neither presented nor had an opportunity to present his claims at that hearing. Delguzzi III at *14.

Delguzzi IV at *7, confirmed this:

> As of the time the court entered the 2007 closing order in the Estate in July 2007, however, the claims in the July 1996 complaint had not been resolved.

Wilbert's interpretation of the dichotomy between Delguzzi IV's footnote 19 and the contrary language at page 7 was that footnote 19 trumped the wealth of case law requiring a final order or judgment on the merits in order to create an initial necessary element of preclusion is not only mistaken, but it is irrelevant. Footnote 19 referenced only the

1996 Complaint and it is the trial court's dismissal of the 2006 Complaint that is the primary issue in this appeal. Footnote 19's lack of relevance, factual or legal support and specificity as well as its obiter dictum character renders it meaningless as well as irrelevant.

STATUTE OF LIMITATIONS AND RCW 11.96A.070(2)

The July 16, 1996 Petition for Removal, the sibling of Gary's 1996 Complaint was held to have been mooted by the death of Wilbert in 2004 [Delguzzi IV at *8, n.5] even though Wilbert was never discharged, his death constructively removed him as administrator.

Since Mr. Wilbert was never discharged as administrator of the Jack Delguzzi estate, his (Wilbert's) estate still has continuing liability for his actions while he was the administrator of the Jack Delguzzi estate. The 1998 closing plan Delguzzi IV at *5 [CP 840(Ex. 2)] required him to continue with his duties and did not mention discharge. Only a court ordered discharge could trigger the statute of limitations. RCW 11.96A.070(2), below:

> (2) Except as provided in RCW 11.96A.250 with respect to special representatives, an action against a personal representative for alleged breach of fiduciary duty by an heir, legatee, or other interested party must be brought before discharge of the personal representative.

Volume 15A of the Washington Practice Manual, at § 4.10, "Death-Defendant" explains the law and procedures for making a claim under these circumstances after his death, as follows:

> Commencement of a claim against a would-be defendant who dies before the expiration of a limitations period is governed by the probate nonclaim statutes. RCWA 4.16.200 (limitations of actions against a person who dies before the expiration of the applicable limitations period are as set forth in RCWA chapter 11.40).

> * * *
>
> Hence, at death, the statute of limitations continues to run, and the time limits contained in the probate nonclaim statutes on the filing of claims against an estate come into play. To preserve a claim that is not already barred by the statute of limitations, it must be presented to the personal representative and filed with the court in the manner described in RCWA 11.40.070.12
>
> * * *
>
> In general, a claim must be presented within the later of 30 days after the personal representative's service of actual notice to creditors or 4 months of first publication of notice to creditors. If notice is not provided, or a reasonably ascertainable creditor did not receive actual notice, the creditor must present the claim within 24 months after the decedent's death. RCWA 11.40.051. Any claim not properly presented within the designated time limits is barred, and this bar is effective against both the decedent's probate and nonprobate assets. RCWA 11.40.051(3). If the personal representative rejects the claim in whole or part, the holder must commence suit against the personal representative in the proper court within 30 days after notification of rejection, or the claim will be forever barred. RCWA 11.40.100. [Emphasis added.]

As shown above, the statute of limitations for claims against estate representatives for fiduciary duty breach remains open until the estate's representative is discharged. Once a claimant complies with the probate non-claim statute, the next trigger to a statute of limitations is RCW 11.40.100, which starts the 30 day period after the estate representative serves and files denial of the creditor's claim and, when service in compliance with that statute was accomplished, as both the court and Wilbert's attorney acknowledged, the statutes of limitation have been tolled by the filing and service of the summons and complaint pursuant

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12 Ms. Wilbert's summary judgment motion had a different view of the procedure and also quoted from §4.10 of Washington Practice, Vol. 15A, reading its meaning differently: "It is important to note that Wilbert's death does not toll the statute of limitations for any such claims." This generalization neglects to consider RCW 11.96A.070(2), RCW 11.40.070 and RCW 4.16.200, discussed above, which changes the applicable statute of limitations to RCW 11.40.100. [CP 825.]

to RCW 4.16.170. [CP 1728, VRP, August 21, 2009.]

Since the probate statutes of limitation are a comprehensive scheme, they govern over the general statutes of limitation once a potential defendant dies, as Washington Practice, 15A, §4.10 points out, notwithstanding Wilbert's attempts to rewrite it. Since Mr. Wilbert never secured an order of discharge, the statute of limitations never ran for him as the applicable statue of limitations for fiduciary duty breaches, RCW 11.96A.070(2), only expires when the estate representative is discharged. Until then, the claim period remains open.

The events related to the denial of the Delguzzi creditor's claim under the non-claim statute and the filing and service of the Complaint in Clallam County Superior Court on December 5, 2006, are displayed in Martin's demonstrative time line exhibit that was referred to at the summary judgment hearing. [Appendix 4; VRP, August 21, 2009.]

After Ms. Wilbert denied Gary's Delguzzi's estate creditor's claim, and included notice which started the thirty day period after which the claim would be time-barred, the creditor's claims became the 2006 Complaint filed in Clallam County. Ms. Wilbert was then served four times, by mail on March 3, 2007, by constructive (estoppel) service upon Ms. Wilbert's attorney on March 5th, 2006, after he had agreed to accept and acknowledge service and then refused to do so,[13] and then on March 6, service again was accomplished when he accepted and acknowledged the service, as he had earlier agreed to, which was also

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13 Crisman v. Crisman, 85 Wn App. 15, 931 P.2d 163(1997).

the date of the first publication of the summons.[CP 1696, 2075, 2077, 2080, 2081.]

In November 2007, eight months after service of the Summons and Complaint had been accomplished on Ms. Wilbert, her attorney moved to change venue of the 2006 Complaint from Clallam to King County. Gary's estate did not oppose the venue change, but requested that the 1996 and 2006 Complaints be consolidated.

Delguzzi IV, in addressing that issue, held that the venue motion had not been timely appealed and that therefore that court would not consider the venue of the 1996 Complaint on appeal. [Delguzzi IV at *22-23.] The 2006 Complaint, now cause number 08-2-10290-4 SEA, was moved to King County by Wilbert's motion, having previously complied with the probate non-claim statute and the other procedures that tolled the statute of limitations.

Once the preclusion confusion is examined and applied to the facts as determined by prior appellate opinions, application of any preclusion doctrine as to the 2006 Complaint can be seen to be an illusion, unidentified and unrecognized by precedent or statute.

With the 2006 Complaint filed and served before the Clallam County court entered its closing order for the Jack Delguzzi probate, there has been no gap in the jurisdiction of the courts over Mr. Wilbert and his estate as to the Delguzzi allegations of breaches of fiduciary duty during the period between the first service of the 1994 Complaint and the July 26, 2007 closing order of the Jack Delguzzi estate. The statute of limitations was tolled as to all claims in the 2006 Complaint after service

and filing by operation of the comprehensive probate statutes of limitation.

STATUTE OF LIMITATIONS – ESTOPPEL

Gary's 2006 Complaint, at paragraphs 14, 18 and 19 [CP 6-32, 1885] details several fiduciary relationships between Gary and Mr. Wilbert. Paragraphs 15 and 16 list general partnerships of which Gary was a partner with his father and into which Mr. Wilbert succeeded as administrator of Gary's father's estate, which is another fiduciary realtionship. The entire complaint is rifled with allegations that Wilbert concealed, and misrepresented the assets under his management and control while he was acting as fiduciary.

The finder of fact must determine the impact of fraudulent fiduciary concealment on the statute of limitations, as the issue is factual rather than legal and not to be decided by summary judgment:

> Because the underlying motion is a summary judgment motion, we must determine whether the court erred by determining that there was no issue of material fact concerning Nick's claim of fraudulent concealment.
> * * *
> The Bank argues that the failure to provide information does not establish fraudulent concealment. But Thorman held that silent or passive conduct is not deemed fraudulent unless there is a fiduciary relationship; under these circumstances, there is a duty upon the defendant to make a disclosure. Thorman, 421 F.3d at 1096. * * * Nick's duty to be diligent relies on the factual determination as to when Nick knew, or should have known, the elements of a cause of action. The question as to what Nick knew is a question of material fact that cannot be resolved here. August v. U. S. Bancorp, 146 Wn. App. 328, 348-9, 190 P.3d 86 (2008).

Since fraudulent fiduciary concealment is an issue of fact, it was an error of law for the trial court to decide if the facts constituted a basis for estoppel barring Wilbert's statute of limitations defense by

motion.

WILBERT'S CR 12 SUMMARY JUDGMENT DEFENSES

Two of Wilbert's summary judgment challenges to the 2006 Complaint were "failure to properly plead" and "no facts have or can be adduced," which is usually called "failure to state a claim upon which relief can be granted" under CR 12(b)(6) or if under CR 12(c), a motion to dismiss on the pleadings.

Neither of these challenges was preceded by a prior defense motion for more specificity under CR 12(e) even though the Complaint was amended twice, without objection [CP 1876, 1885]. Nor did Wilbert seek to compel discovery or take a single deposition before bringing his motion, although the motions require evidence to establish the non-existence of a material fact and Wilbert offered none. Bly v. Pilchuck Tribe No. 42, 5 Wn. App. 606, 607, 489 P.2d 937 (1971).

Even a very quick review of the thirty-nine detailed factual allegations in the Complaint firmly establishes foundation for multiple causes of action and the evidence offered by Martin's motion for partial summary judgment [CP 93, 106, 391, 393] and in Martin's response to Wilbert's summary judgment motion [CP 1037-1653] was unmet by opposing evidence from Wilbert, so that Martin's evidence established material unopposed facts, which is sufficient to require the allegations of the Complaint be resolved by trial and not by motion, as factual issues cannot be resolved by a CR 12 motion. Barnum v. State, 72 Wn. 2d 928, 435 P.2d 678 (1967).

The summary and analysis of the Complaint in Delguzzi IV's note 2

constitutes "law of the case," which must be applied to the Wilbert summary judgment allegations. Division II saw no issue of pleading insufficiency in their analysis of the claims relating to the inadequacy of the pleadings or failure to state a claim and had no problem with summarizing the claims in the complaints and reducing them to their core elements.[Delguzzi IV at *3, n.2] If Wilbert could not do so, it was because she did not look at Delguzzi IV. Granting summary judgment on these CR 12 or "preclusive effect" grounds would require the trial court to impermissibly overrule the law of the case as stated in Delguzzi IV. See State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992). RAP 10.4(h).

On June 24, 2010, the Supreme Court confirmed that "Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint.". McCurry v. Chevy Chase Bank, FSB, __ Wn.2d __, __ P.3d __, No. 81896-7, at *3, June 24, 2010, citing to Halvorson v. Dahl, 89. Wn2d 673, 674, 574 P.2d 1190 (1978). That holding, considered in light of Delguzzi's IV's footnote 2 analysis of the claims in the 2006 Complaint raises those allegations well above the CR 12 standard for granting dismissal, confirmed earlier this year.

DISPUTED MATERIAL FACTS EXIST

For the purposes of a CR 12 motion, the truth of every fact well pled by the opponent is presumed true, as is the untruth of the moving party's own allegations, which have been denied. Pearson v. Vandermay, 67 Wn.2d 222, 407 P.2d 143 (1965). The court must consider even hypothetical facts offered by plaintiff as probative. Gorman v. Garlock,

155 Wn.2d 198, 118 P.3d 311 (2003). Wilbert never even tried to meet her burden of proof with evidence. The same evidentiary materials from Martin that block the application of the Wilbert CR 12 defenses also must be considered to establish multiple disputed material facts for reversal of the summary judgment dismissal.

It is not required that the plaintiff prove that the allegations in the complaint are true in response to a CR 12 motion. If disputed, that issue cannot be resolved by a motion. If the defense wishes to deny the factual allegations, it is a matter for trial. Knapp v. Order of Pendo, 36 Wash. 601, 605, 79 P. 209 (1904). In order to prevail on a motion for judgment on the pleadings or failure to state a claim for which relief can be granted, the proof offered by the defending party must establish the nonexistence of an issue of material fact which is necessary to prove the plaintiff's case.

"CR 12(b)(6) motions should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff included allegations which show on the face of the complaint that there is some insuperable bar to relief.'" Paradise, Inc., v. Pierce County,124 Wn App. 758, 767, 102, P.3d 173(2004).

Wilbert offered no evidence of any kind in support of her CR 12 summary judgment motion, and certainly made no showing of an "insuperable bar" so the grant of summary judgment on that issue is reversible.

LATCHES

Wilbert urges that latches barred Gary's complaint for damages from trial, citing Marriage of Dicus, 10 Wn. App.347, 40 P.3d 1185(2002) quoting from the head note. Deeper within the case, at 357,

is a explanation of the elements of latches, below:

> A person defensively asserting latches must establish (1) the claimant had knowledge of the facts constituting the cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay on the part of the claimant in commencing the action; and (3) damage to the person asserting latches.

Latches is the common law remedy for claims seeking equitable remedies that were not timely pursued. Since Gary's 1996 Complaint had secured unbroken jurisdiction over Wilbert as to the tort claims since it was filed and since he sought only money damages and since it was filed in 1994 and he offered no evidence of damages, latches is not applicable all of these reasons. In re Marriage of Sanborn, 55 Wn. App.124, 777 P.2d 4 (1989).

Even if Wilbert's latches defense was not barred by a failure to prove the necessary elements of the doctrine, RCW 4.16.170 tolls the statute of limitations during litigation and constitutes another impossible hurdle for this defense.

CONCLUSION

If the imprecise language, lack of probate court jurisdiction and foundation that define and limit the impact footnote 19 of the Delguzzi IV opinion could be construed to preclude Gary Delguzzi's' 1996 Complaint, that would not affect the later 2006 Complaint and it would not permit Wilbert's summary judgment to confirm the massive mismanagement and misappropriation of the substantial assets that Martin presented in Response to the Wilbert motion. The evidence surrounding those assets was not opposed with a scintilla of evidence from Wilbert and so the dismissal must be set aside on remand for trial.

The length and complexity, both factual and legal, of this case have confused creditors and court for the entire period of the administration of William Wilbert administration. That was an intentional and consistent strategy and now it is being utilized by his estate. The stubborn and persistent fiduciary refusals to provide full and fair discovery has made that strategy possible earlier, but now the tide has turned. The large value of the unaccounted for and undistributed assets can no longer be concealed or diminished by the persistent discovery abuse and ad hominem attacks on Gary Delguzzi, his successors and representatives.

Respectfully submitted this July 9, 2010.

_____
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CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the foregoing to the parties/attorneys as below listed by placing such in the U. S. Mail, with 1st class postage affixed thereto on this

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