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No. 69546-1-I

ORIGINAL

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

IN RE THE ESTATE OF T. MARK STOVER, Deceased,

TERESA VAUX-MICHEL,

Respondent/Cross-Appellant,

v.

ANNE VICTORIA SIMMONS, as Personal Representative of the Estate of T. MARK STOVER, Deceased,

Petitioner.

ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF TERESA VAUX-MICHEL

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TABLE OF AUTHORITIES

Cases

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I. INTRODUCTION

Mark Stover, known as the dog whisperer and dog trainer to the stars, knew his life was in danger. In the late summer and fall of 2009, he told friends that he feared his ex-wife, Linda Opdycke, and her father, were going to have him murdered. He also told these friends that he loved and planned to marry Teresa Vaux-Michel and that he had left a check for her in case he was murdered. On October 28, 2009, Mr. Stover disappeared, and on October 22, 2010, a Skagit County jury convicted Michiel Oaks, the live-in boyfriend of Linda Opdycke, of murdering Mark Stover.

After his murder, two checks made out to Ms. Vaux-Michel, each in the amount of $150,000, were found in Mr. Stover's home. One check, not attached to a check register, was found on October 29, 2009, on Mr. Stover's desk where he said it would be, by Detective Luvera of the Skagit County Sheriff's Office, another check was found approximately a month later by Mr. Stover's estranged sister, Anne Victoria Simmons. That check was found in the desk drawer and it was attached to a check register. Detective Luvera called Ms. Simmons and told her about the check. He then mailed it to her. Ms. Simmons, though, denied that the detective had told her about the check. Ms. Simmons also flatly denied Ms. Hearon's testimony about conversations she had with Ms. Simmons while searching

Mr. Stover's house together. Her denials cannot be reconciled with Detective Luvera's and Ms. Hearon's testimony.

Ms. Vaux-Michel timely filed and presented a creditor claim, and when Ms. Simmons failed to timely accept or reject the claim, Ms. Vaux-Michel petitioned the court to allow the claim. The trial court ruled that the check found by Ms. Simmons and the check found by Detective Luvera were authentic, but relied upon the check found by Detective Luvera in its analysis of the facts in the case and in awarding Ms. Vaux-Michel $150,000.

Both checks should have been awarded because the only difference between the two checks is that the Luvera check was found on Mr. Stover's desk and the other check, the one found by Ms. Simmons, was found in his desk drawer. The same facts of the case, the same arguments and the same findings and conclusions set forth by the trial court in support of its award of the Luvera check to Ms. Vaux-Michel apply with equal force to the Simmons check.

The court awarded Ms. Vaux-Michel fees, but erred in reducing the lodestar by one-third. The trial court made some inaccurate findgs and acknowledged, but did not consider in its lodestar calcualtion, as it should have, the high risk of non-payment to counsel. And finally, Ms. Vaux-Michel is entitled to her fees in connection with this appeal.

II. ASSIGNMENTS OF ERROR ON CROSS APPEAL

1. The trial court erred in its Conclusion of Law No. 5 in its September 24, 2012, decision on the merits to the extent that it referred only to the check discovered by Detective Luvera, and not also the one discovered by Ms. Simmons, for purposes of its analysis of the facts of the case.

2. The trial court erred in its Conclusion of Law No. 7 in its September 24, 2012, decision on the merits to the extent that it did not also refer to the check discovered by Ms. Simmons.

3. The trial court erred in its Conclusion of Law No. 8 in its September 24, 2012, decision on the merits to the extent that it did not also refer to the check discovered by Ms. Simmons.

4. The trial court erred in its Conclusion of Law No. 9 in its September 24, 2012, decision on the merits to the extent that it did not also refer to the check discovered by Ms. Simmons.

5. The trial court erred in its Conclusion of Law No. 10 in its September 24, 2012, decision on the merits to the extent that it did not also refer to the check discovered by Ms. Simmons.

6. The trial court erred in its Conclusion of Law No. 11 in its September 24, 2012, decision on the merits to the extent that it did not also refer to the check discovered by Ms. Simmons.

7. The trial court erred in its Conclusion of Law No. 12 in its September 24, 2012, decision on the merits to the extent that it did not also refer to the check discovered by Ms. Simmons.

8. The trial court erred in its Conclusion of Law No. 7 in its September 24, 2012, decision on the merits to the extent that it did not also award to Ms. Vaux-Michel the proceeds from the check discovered by Ms. Simmons.

9. The trial court erred in entering its amended TEDRA order on October 1, 2012 to the extent it did not award Ms. Vaux-Michel the proceeds from the check discovered by Ms. Simmons.

10. The trial court erred in its Conclusion of Law No. 1 in its October 18, 2012 decision on fees to the extent that the trial court concluded that the hours listed may reflect duplicated or unproductive time such as travel time portal to portal.

11. The trial court erred in its Conclusion of Law No. 2 in its October 18, 2012, decision on fees.

12. The trial court erred in its Conclusion of Law No. 8 in its October 18, 2012, decision on fees to the extent that it did not award Ms. Vaux-Michel the fees she requested.

13. The trial court erred in its October 18, 2012, decision on fees to the extent it did not award Ms. Vaux-Michel $60,000 in fees as she requested.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR ON MS. VAUX'S CROSS-APPEAL

1. Did the trial court err by not also awarding Ms. Vaux-Michel the proceeds of the check discovered by Ms. Simmons, where the trial court found the parties stipulation as to the authenticity of that check to be clear and convincing evidence of an intended gift by Mr. Stover and where exactly the same substantial evidence relied upon by the trial court to award the proceeds of the check found by Detective Luvera applies with equal force to the Simmons' check?

2. Did the trial court err by reducing Ms. Vaux-Michel's attorney's fee request by one-third?

3. Whether Ms. Vaux-Michel is entitled to attorney fees on appeal?

IV. COUNTER-STATEMENT OF THE CASE

A. Mr. Stover Feared That He Would Be Murdered

Mark Stover, a renowned dog trainer, and Teresa Vaux-Michel intended to marry, but that marriage never took place because he was murdered in October 2009 by Michiel Oakes, the live-in boyfriend of his ex-wife, Linda Opdycke. CP 21, 114; 2RP at 30-31. During the late

summer of 2009, Mr. Stover began to suspect that his ex-wife and her father, Wally Opdycke, were going to have him murdered. CP 112. Mr. Stover shared this concern about the Opdyckes with his attorney, Jeffrey Kradel, and private investigator, Leigh Hearon, and with at least five close friends. CP 112-114; 1RP at 34, 69-71, 103-104, 110, 114, 121-122; 2RP at 9-10.

B. Mr. Stover Wanted to Marry Ms. Vaux-Michel and to Provide For Her if He Was Murdered as He Feared He Would Be

Mr. Stover and Ms. Vaux-Michel first met and began to date in the fall of 2008. 1RP at 72. Ms. Vaux-Michel, though, began to become less enthused about the relationship and she and Mr. Stover stopped dating for a about a month, then resumed dating until the spring of 2009, when they again stopped dating because Ms. Vaux-Michel wanted to slow things down. 1RP at 73, 130-131; CP 112. They began to date again in August 2009. 1RP at 131. Ms. Vaux-Michel helped Mr. Stover with his business and had access to his home and in-home office. CP 113. They communicated several times per day. CP 113. Mr. Stover wanted to marry Ms. Vaux-Michel and to provide for her if he was murdered. CP 113-114. He told at least six people, including close friends, that he intended to marry Ms. Vaux-Michel and that he wanted to provide for her in the event he was murdered.

Mr. Stover told Jeannie Nordstrom that Ms. Vaux-Michel had "saved his life and that they were going to get married." 2RP at 4-5; CP 113. The day before he went missing, he told Shelly Hyrkas, a friend for more than 14 years, that he had proposed to Ms. Vaux-Michel and he then showed Ms. Hyrkas the ring he had purchased for her. 1RP at 93-96, 103-104. Mr. Stover told Mr. Kradel he wanted to marry and take care of Ms. Vaux-Michel. 1RP at 32; CP 113. He told Ms. Hearon that, in the event the Opdyckes were successful in having him killed, he had left a check for Ms. Vaux-Michel in plain sight on his desk. 2RP at 10; CP 113. Mr. Stover told Andrea Franulovich that Ms. Vaux-Michel was "the love of his life," that he had asked her to marry him, that she said yes, and that he had left her a check because he wanted to take care of her in case something happened to him. 1RP at 109-113; CP 113-114. And he often told Elizabeth Dorris, a 10 year employee of his, of his love for Ms. Vaux-Michel and that he was going to marry her and wanted to take care of her if something happened to him. 1RP 113-115; CP 113.

C. Ms. Simmons

1. Estranged from her brother

There was estrangement to some extent in Mr. Stover's family. CP 112. In the 14 years Ms. Hyrkas had known Mr. Stover, she never heard him mention or talk about his sister or anyone in his immediate family,

including his mother. 1RP at 104-105; CP 112. And Ms. Simmons told Ms. Hearon that the only communication she had with her brother in 20 years was one she had in 2008. 2RP 15-16; CP 112. Ms. Simmons told Ms. Hearon that she had been estranged from her brother for 20 years. 2RP 15-16. Though her 90 year old mother, who is in a nursing home, is Mr. Stover's only heir, Ms. Simmons and her step-brother are the only heirs of their mother. 1RP at 54; CP 112. Ms. Simmons says her step-brother is aware that Mr. Stover has died, but she admitted that she has not told him what the estate is worth. 1RP at 54-55. At the time of trial, Mr. Stover's estate was worth between $740,000 and $760,000. 1RP at 53. Counsel for Ms. Simmons stipulated that, if there were an adverse ruling, there are sufficient assets to take care of Mr. Stove's mother. 1RP at 58.

2. Ms. Simmon's testimony contradicted by a detective and a private investigator

After learning of Mr. Stover's death, Ms. Simmons did not make plans right away to come to Washington. 1RP at 19. When she came to Washington in early December 2009, she went to Mr. Stover's house with Ms. Hearon to go through Mr. Stover's personal effects and to look for a will. 1RP at 21; 2RP at 10-11; CP 114. Ms. Simmons' testimony about what happened thereafter, both in her declaration opposing Ms. Vaux-Michel's petition, and at trial, was sharply contradicted by Detective

Luvera and Ms. Hearon. As she was searching Mr. Stover's bedroom, Ms. Hearon found a letter to Mr. Stover on the nightstand. CP 115. The letter, from close friend Gerri Franz, explained to Mr. Stover how he could "win [Ms. Vaux-Michel's] heart. CP 115 (internal editing marks in original). Ms. Hearon testified that as they were going through Mr. Stover's effects, Ms. Simmons screamed when she found the check made out to Ms. Vaux-Michel, and that Ms. Simmons told her she found the check somewhere on Mr. Stover's desktop. CP 27; 2RP at 12-15. The trial court described it as follows: "Respondent either found or represented that she had found a check in the amount of $150,000. . . ." CP 114. Ms. Hearon then told Ms. Simmons of Mr. Stover's intent to marry Ms. Vaux-Michel, of his fear that he would be murdered, and that he had written the $150,000 check to Ms. Vaux-Michel because he wanted her to be taken care of if he was murdered. CP 26-27; 2RP 14-15; CP 115. Ms. Hearon also testified that Ms. Simmons told her that she had been estranged from her brother for 20 years. 2RP 15-16. Ms. Simmons responded by claiming that she was not estranged from her brother, that she found the check, not on the desktop, but hidden in a drawer, and that Ms. Hearon didn't say anything about prior knowledge of the $150,000 check nor did Ms. Hearon tell her about Mr. Stover's love for Ms. Vaux-Michel and his desire for her to have the check. CP 80-81; 1RP 21-22.

Ms. Simmons, in her declaration, and at trial, stated several times that no one, including Detective Luvera said anything to her during that period about Mr. Stover writing a check in any amount to Ms. Vaux-Michel. CP 80-81; 1RP at 65. Detective Luvera testified at trial that in late October 2009 he searched Mr. Stover's home and found on top of Mr. Stover's desk a check in the amount of $150,000 made out to Ms. Vaux-Michel. 1RP 86; CP 114. The check was found along with some other checks. 1RP at 86-87; CP 114. Detective Luvera called Ms. Simmons and told her about the check and she told him to mail the check to her in a pre-paid envelope she had provided. 1RP at 87-88; CP 114. Detective Luvera mailed the check to Ms. Simmons. 1RP at 88; CP 114.

Detective Luvera testified that the check made out to Ms. Vaux-Michel that he found on Mr. Stover's desk was a single check that was not attached to a check register. 1RP at 91; CP 114. Ms. Simmons testified that the check she found made out to Ms. Vaux-Michel was attached to the check register (Plaintiff's Exhibit No. 2). 1RP at 23, 36-37; CP 114-115. Detective Luvera testified that he had never seen the check that Ms. Simmons said she found. 1RP 91; CP 115. The check register containing the check made out to Ms. Vaux-Michel was missing checks Nos. 1001, 1003 and 1005. 1RP at 37; CP 114-115. There were no notes or writings in

the check register recording Ms. Vaux-Michel's check or the missing checks. 1RP at 37; CP 115.[1]

On September 21, 2009, Mr. Stover "rescinded" a writing dated November 21, 2007, wherein he expressed his intent to leave his business to two employees if he were to die. 1RP at 47; CP 115. Mr. Stover never revoked the $150,000 check he wrote to Ms. Vaux-Michel. CP 115.

3. Statements Made by Stover to Attorney Kradel and Private Investigator Leigh Hearon were not Protected by Attorney-Client Privilege, and Even if they were, the Privilege was Waived

The trial court ruled that the testimony and declarations of attorney Jeffrey Kradel and private investigator Leigh Hearon regarding statements by to them by Mr. Stover did not contain communications protected by the attorney-client privilege. CP 118. Assuming arguendo that Mr. Stover's communications were made in confidence and were privileged, he waived that privilege by disclosing the substance of the communications to others. CP 118-119.

D. Vaux-Michel's Creditor Claim and Petition

On September 16, 2011, after nearly two years had passed and Ms. Simmons had not given Ms. Vaux-Michel actual notice that she had been appointed personal representative of Mr. Stover's estate, Ms. Vaux-Michel

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[1] Cross-examination of Ms. Simmons about the contradiction of her testimony by Detective Luvera and Ms. Hearon is located at 2RP at 63-69.

timely filed her creditor claim. CP 14-17, 41, 116. When Ms. Simmons did not allow or reject her claim within thirty days from presentation of the claim, Ms. Vaux-Michel, on October 19, 2011, timely served written notice on Ms. Simmons informing her that she would petition the court to have the claim allowed. CP 36, 116. Ms. Simmons failed to notify Ms. Vaux-Michel that she was either allowing or rejecting her claim within the statutory twenty day period after her receipt of the notice. CP 116. Ms. Simmons did file a purported rejection of the creditor claim on December 20, 2011, nearly two months after she received written notice. CP 18, 116. Ms. Vaux-Michel timely filed her petition in the trial court on January 23, 2012. CP 19-42, 116. There was no evidence of fraud or undue influence by Ms. Vaux. CP 116. There are no conflicting interests by creditors or other assignees or donees of Mr. Stover. CP 117. The estate began and has remained solvent and will continue to remain solvent upon the payment or provision for payment of all creditor's claims lawfully filed and allowed, including Ms. Vaux-Michel's. CP 117

E. The Trial Court Ruled for Vaux-Michel, But Reduced by One-Third Her Attorney's Fee Request

1. Both checks are authentic, but only one was awarded to Vaux-Michel

The case was tried to the bench over two days before the Honorable John M. Meyer. 1RP at 3-140; 2RP at 3-100. The trial court

ruled that the check found by Ms. Simmons and the check found by Detective Luvera were authentic, but relied upon the check found by Detective Luvera in its analysis of the facts in the case and in awarding Ms. Vaux-Michel $150,000. CP 118-120.

2. Mr. Stover's Check to Ms. Vaux-Michel were gifts causa mortis

Regarding the check, the trial court concluded that the constructive delivery by Mr. Stover was "the best which the nature and situation of the property and the circumstances of the parties admit of," that "the evidence of Mr. Stover's donative intent is concrete and undisputed," that Mr. Stover "did all that, in his opinion, was necessary to do to accomplish delivery of the gift" and that "by clear and convincing evidence it has been shown that the check is a gift causa mortis, and that Ms. Vaux-Michel is the donee of the gift." CP 119-120. Ms. Vaux-Michel requested that the trial award her $300,000, the total amount of both checks Mr. Stover had intended for her, 2RP 77-78, but the trial court awarded the proceeds of only the check found by Detective Luvera. CP 120.

3. Attorney's fees reduced

The trial court entered findings and conclusions, a judgment, and an order on attorney's fees on October 18, 2012. The trial court reduced

Ms. Vaux-Michel's fee request by one-third, from $60,000 to $40,000. Ms. Vaux-Michel filed a timely notice of cross-appeal from the judgment.

V. ARGUMENT FOR ANSWERING BRIEF

A. The Trial Court Correctly Ruled that Vaux-Michel Timely Filed her Petition

1. Standard of Review

A trial court's legal conclusions are reviewed de novo. *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). And challenges to the trial court's findings of fact are reviewed for substantial supporting evidence. *Id.* at 176. Evidence is substantial if it is sufficient to persuade a rational, fair-minded person of the factual finding. *Id.* If the standard is satisfied, the appellate court will not substitute its judgment for that of the trial court. *See Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 685, 314 P.2d 622 (1957). Additionally, "[c]redibility determinations are for the trier of fact and are not subject to review." *In re Estate of Bussler*, 160 Wn. App. 449, 247 P.3d 821 (Wn. App. 2011) (quoting *State v. Thomas,* 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "[W]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding." *In re Estate of Lint,* 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

The clear, cogent, and convincing burden of proof contains two components, the burden of production and the burden of persuasion. *Colonial Imps., Inc. v. Carlton Nw., Inc.,* 121 Wn.2d 726, 734-35, 853 P.2d 913 (1993). To meet the burden of production, there must be substantial evidence, i.e., evidence sufficient to merit submitting the question to the trier of fact. *Id.* at 734-35, 853 P.2d 913. The burden of persuasion is met if the trier of fact is convinced that the fact in issue is "'highly probable.'" *Endicott v. Saul,* 142 Wn. App. 899, 909-10, 176 P.3d 560 (2008) (quoting *Colonial Imps.,* 121 Wn.2d at 735). In determining whether the evidence meets the clear, cogent, and convincing standard of persuasion, the trial court must make credibility determinations and weigh and evaluate the evidence. *Estate of Bussler,* 160 Wn. App. 449 (quoting *Thomas,* 150 Wn.2d at 874-75.

2. Simmons Improperly Conflated Vaux-Michel's Creditor's Claim with Her Petition to have the Claim Allowed

As she did in her motion for discretionary review, Ms. Simmons once again improperly conflates Ms. Vaux-Michel's creditor claim with her petition to have the claim allowed. This mistake is not without significance. In her opening argument, Ms. Simmons asserts, "Vaux-

Michel Did Not Timely Submit a Creditor Claim to the Estate under RCW 11.40.100". Brief of Appellant at 9. But it is not RCW 11.40.100 that provides the time period in which a creditor claim must be submitted. Time limits for submitting a creditor claim are governed by RCW 11.40.051,[2] not RCW 11.40.100. And it has never been disputed that Ms. Vaux-Michel was a reasonably ascertainable creditor who properly and timely presented her creditor claim within the two year statute of limitations set forth in RCW 11.40.051.

There is an important difference between the standards applied when determining whether a creditor claim has been timely filed and whether a petition to allow the claim has been timely filed. The distinction is well-described in *Van Duyn v. Van Duyn*, 129 Wash. 428, 225 P. 444 (1924), discussed more fully *infra*, where it was contended by the administratrix "that the action [was] barred because not commenced within 30 days following the notification of the rejection of respondents' claim." *Id.* at 430-31.

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[2] RCW 11.40.051(1) states in pertinent part:

> (b)(ii) If the creditor was reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within twenty-four months after the decedent's date of death; and
>
> (c) If notice was not provided under this chapter or chapter 11.42 RCW, the creditor must present the claim within twenty-four months after the decedent's date of death.

In ruling against the administratrix, the court found that the 30 day time period for *filing a petition* after being notified the claim is rejected "is not a general statute of limitation prescribing the period within which the action may be commenced after its accrual, but is a special and very short statute of limitation, and *manifestly one under which the court should not contract the prescribed period except as the statute clearly and unmistakably compels*." *Id.* at 433-34 (emphasis supplied).

3. When Simmons Failed to Accept or Reject Vaux-Michel's Claim as Required, Vaux-Michel Proceeded Under RCW 11.40.080 and Timely Filed Her Petition

It is undisputed that Ms. Simmons had nearly two years to expedite settlement of Mr. Stover's Estate by providing actual notice to Ms. Vaux-Michel, a reasonably ascertainable creditor, before she presented her claim. CP 14, 41, 116. It is also undisputed that on September 16, 2011, in compliance with RCW 11.40.070, Ms. Vaux-Michel timely presented and served her creditor's claim. CP 14, 41, 116. It is further undisputed that after more than 30 days passed and Ms. Simmons had failed to accept or reject her claim as provided for in RCW 11.40.080, CP 116, Ms. Vaux-Michel sought relief under RCW 11.40.080, which provides,

> (1) The personal representative *shall* allow or reject all claims presented in the manner provided in RCW 11.40.070. The personal representative may allow or reject a claim in whole or in part.

> (2) If the personal representative *has not allowed or rejected a claim within . . . thirty days* from presentation of the claim, the claimant may serve written notice on the personal representative that the claimant will petition the court to have the claim allowed. *If the personal representative fails to notify the claimant of the allowance or rejection of the claim within twenty days after the personal representative's receipt of the claimant's notice, the claimant may petition the court for a hearing to determine whether the claim should be allowed or rejected,* in whole or in part. If the court substantially allows the claim, the court may allow the petitioner reasonable attorneys' fees chargeable against the estate.

Id. (emphasis supplied). CP 116.

It is undisputed, too, that on October 19, 2011, Ms. Vaux-Michel served, via certified mail, written notice on Ms. Simmons that she would petition the court to have her claim allowed. CP 116. And finally, it is undisputed that, once again, Ms. Simmons chose not to allow or reject the claim, but rather, elected to do nothing during the additional twenty days provided her under RCW 11.40.080(2). CP 116. Clearly, time was not of the essence to Ms. Simmons who was in no hurry to deal with Ms. Vaux-Michel's creditor claim.

The language of RCW 11.40.080(1) is mandatory, "the personal representative *shall,*" but when a personal representative fails to do what is mandated by the statute after a claimant has presented her claim, the legislature provided a mechanism to ensure that a claimant would not be left without the ability to recover on her claim. Therefore, when a personal

representative fails to allow or reject a claim within the additional twenty day period provided by RCW 11.40.080(2), the statute allows the claimant to petition the court to determine if her claim should be allowed or rejected. *Id.* In other words, the claim is then deemed ripe for adjudication and rejection of the claim by the personal representative no longer serves any purpose. And because the statute does not specify a time within which the court may be petitioned, a reasonable time period is granted. *See, e.g., In re Estate of Kordon*, 126 Wn.App. 482, 486 (2005) (where no statutory time limit for citation in will contest, the citation must be issued within a reasonable time).

Moreover, "RCW 11.40.100(1) clearly contemplates a sequence in which a claimant will notify an estate of a claim, the estate will notify the claimant of the claim's rejection, and the claimant will then sue within 30 days or be forever barred from such action." *Johnston v. Von Houck*, 150 Wn.App. 894, 903, 209 P.3d 548 (2009). Thus, when a personal representative fails to invoke and act within the clearly contemplated procedure set forth in RCW 11.40.100 and RCW 11.40.080 after notice of a claim is given, as Ms. Simmons failed to do, a claimant may elect to invoke and act within the clearly contemplated procedure set forth in RCW 11.40.080(2), as Ms. Vaux-Michel did.

Ms. Simmons' failure to allow or reject Ms. Vaux-Michel's claim within the time period provided by RCW 11.40.080(2) necessarily rendered untimely any subsequent effort by Ms. Simmons to reject Ms. Vaux-Michel's claim-Ms. Simmons cannot take advantage of her own failure to comply with the statutory provision. *See Johnston*, 150 Wn.App. at 902 (citing *Malicott v. Nelson*, 48 Wn.2d 273, 275, 293 P.2d 404 (1956)) (administratrix may not take advantage of her own failure to comply with the statutory provision as to the method of notifying respondent of her rejection of his claim).

Without RCW 11.40.080(2), Ms. Vaux-Michel might never have had the opportunity to have a court adjudicate her claim because Ms. Simmons was content simply to do nothing. But because the legislature provided for that circumstance, where, as occurred here, a personal representative does not reject a claim in the time-frame required by law, the claim is deemed rejected in order to make the claim ripe for adjudication and ensure that claimants have access to the courts.

Furthermore, if the time-to-act provision of RCW 11.40.080(2) requiring the personal representative to allow or reject a claim within the periods prescribed is not to be rendered meaningless or superfluous, Ms. Simmons's purported rejection of Ms. Vaux-Michel's claim must be deemed untimely. *See, City of Seattle v. State,* 138 Wn.2d 693, 701, 695

P.2d 619 (1998) (statutes must be construed to give effect to all the language used, with no portion rendered meaningless or superfluous). If a personal representative can "reject" a claim after disregarding the time-to-act provisions, then those provisions are meaningless and superfluous.

The legislature provided a consequence for the personal representative, like Ms. Simmons, who disregards the mandatory language and time-to-act provisions of RCW 11.40.080, and that consequence is that she can no longer reject a claim and thereby dictate when a claimant must file suit. The legislature could have, but did not require a claimant to file suit within thirty days after a personal representative allowed the twenty day period to expire, instead it chose to make the time to file a reasonable time. Ms. Vaux-Michel filed her petition timely and she filed it within a reasonable time after the twenty days expired.

4. The Trial Court Correctly Ruled that CR 6 is Applicable to RCW 11.40.080 and RCW 11.40.100

In 1967, Civil Rule 6 became applicable to all civil actions, including cases in equity: "These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81." CR 1;[3] *Canterwood Place, L.P. v. Thande*, 106 Wn.App. 844, 5 P.3d 495 (2001). And CR 81

[3] "The goal of the revision of the rules of civil procedure was to eliminate the many procedural traps existing in Washington practice." *Petrarca v. Halligan*, 83 Wn.2d 773, 775, 522 P.2d 827 (1974).

provides, in relevant part, "Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings. . . . Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict."

A TEDRA proceeding "is a special proceeding under the civil rules of court," RCW 11.96A.090(1), and it is clear that CR 6 is not inconsistent or in conflict[4] with statutes applicable herein, *i.e.*, RCW 11.40.080 and 11.40.100. Indeed, entirely consistent with Title 11 and in furtherance of its goals, CR 1 provides that the civil rules, including CR 6, "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Id.*

Moreover, applying CR 6 to RCW 11.40.080 and RCW 11.40.100 is consistent with the principle that "the law favors the resolution of legitimate disputes brought before the court rather than leaving parties without a remedy." *In re Estate of Palucci*, 61 Wn.App. 412, 415, 810 P.2d 970 (1991). Similarly, in *In re Estate of Van Dyke*, 54 Wn.App. 225, 772 P.2d 1049 (1989), the court ruled that RCW 11.24.020 does not supersede CR 19(b) because there are no inconsistencies between them. The court also determined that a CR 19(b) analysis was required because

[4] "The provisions of this title governing such actions control over any inconsistent provision of the civil rules." RCW 11.96A.090(1)

doing so is "consistent with the strong policy of resolving legitimate disputes brought before the court rather than leaving parties without a remedy." *Van Dyke*, 54 Wn.App. at 231.

In *In re Estate of Toth*, 138 Wn.2d 650, 981 P.2d 439 (1999), the Supreme Court observed that "[t]here is no controlling authority to support the . . . position that CR 6(e) applies to probate proceedings," but as this Court pointed out in *Capello v. State*, 114 Wn.App. 739, 60 P.3d 620 (2002),

> the issue in *Toth* is whether CR 6(e) applied to extend the time period for contesting a will under RCW 11.24.010 if notice of the will's admission to probate is sent by mail. The applicability of CR 81 was not at issue in that case, nor was the question of whether the civil rules were 'inconsistent' with an applicable statute. Rather, the Court held that *CR 6(e), by its very language, did not apply to will contests because CR 6(e) is limited to cases in which a party is required to respond within a certain time after being served or notified. The court concluded that CR 6(e) does not apply when the period of time in which the parties are required to respond is triggered by an event other than service of notice on a party.*

Id. at 748-50 (emphasis supplied). Unlike *Toth*, the issue in this matter does not concern a will contest, but rather, it concerns the applicability of the civil rules to a case in which Ms. Vaux-Michel was required to respond within a certain time after being served with notice that her creditor claim was rejected. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 376, 173 P.3d 228 (2007) ("The overall purpose of CR 6(a) is to ensure

that the party with the duty to act within the allotted time period is accorded the full number of days specified in the court rule, court order, or applicable statute").

To be sure, there is no controlling authority that Rule 6 applies to probate proceedings, but neither is there controlling authority to support the position that it does not apply; there is, however, plenty of analogous authority supporting the position that Rule 6 should and does apply. The cases closest to the point are those dealing with special proceedings under CR 81. This Court's cases on the subject are particularly apposite.

In *Canterwood Place*, the court was presented with an issue of first impression: whether the method of computation of time set forth in Civil Rule 6 applies to the computation of time for the return date on an unlawful detainer summons issued under RCW 59.12.070 which is a special proceeding within the meaning of Civil Rule 81. 106 Wn.App. at 847, 848. The court noted that because it is a special proceeding, "complete rules in Chapter 59 RCW will generally prevail over the civil rules," *id.* at 848; however, the court then observed: "Chapter 59 does not contain a complete rule regarding the calculation of days for the purpose of return of service deadlines, there is no method for computing time, nor is there a provision regarding whether the 'days' referred to in the statute are business days, court days, or calendar days." *Id.* Because RCW

59.12.070 is incomplete, the court held that CR 6 applies. *Id.* at 849. This analysis was favorably noted by the Supreme Court in *Christensen.* 162 Wn.2d at 375.

The court determined that applying the method for computation of time in CR 6 is sound public policy because "[l]itigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights." *Canterwood Place,* 106 Wn.App. at 848 (internal quotation marks omitted) (citing *Stikes Woods Neighborhood Ass'n v. City of Lacey*, 124 Wn.2d 459, 463, 880 P.2d 25 (1994) (quoting, *McMillon v. Budget Plan of Va.*, 510 F.Supp. 17, 19 (E.D.Va.1980)). The court noted further:

> Courts have a vital interest in maintaining control over the administrative functioning of the litigation process, and computation of time is a fundamental element of that administration. Consistent application of Civil Rule 6 will also lend predictability to the law.

Id. at 849-50.

And in *Capello,* the question before the court was whether Rule 6(a) applies to the computation of time under RCW 71.09.040 which is also a special proceeding within the meaning of CR 81. 114 Wn. App. at 745-46. In ruling that CR 6(a) applies to RCW 71.09.040, the court adopted the reasoning set forth in *Canterwood Place. Id.* at 748-49 ("We

agree with the policy considerations in *Canterwood Place* and conclude that CR 6(a) applies to the computation of time under RCW 71.09.040(2)")

The facts in this case are strikingly similar to those in *Canterwood Place* and *Capello*. Like those cases, this case, too, deals with whether the method of computation of time set forth in Civil Rule 6 applies to the computation of time in a special proceeding where Chapter 11 does not contain any rule, let alone a complete rule regarding the calculation of days for the purpose of determining when a petition should be filed under either RCW 11.40.080 or RCW 11.40.100, and where there is no method for computing time. Because RCW 11.40.080 and RCW 11.40.100, like the statutes at issue in *Canterwood Place* and *Capello,* are incomplete, the trial court properly ruled that CR 6 applies to them.

Applying CR 6 time computation to RCW 11.40.080 and RCW 11.40.100 is sound public policy because litigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights. *Petrarca*, 83 Wn.2d at 775 ("The goal of the revision of the rules of civil procedure was to eliminate the many procedural traps existing in Washington practice").

Despite Ms. Simmons's claim that "that the 30-day time period commences from the date of service of the rejection of Vaux-Michel's claim which is the date of the postmark," Brief of Appellant at 9, controlling authority is precisely to the contrary of that proposition. For example, in *Van Duyn*, the court ruled that first day to be counted in computation of the 30-day period from the date the claim was rejected is the day *following* the receiving of the notification by respondents. *Id.* 129 Wash. at 433. The court said, "[i]n this connection it is to be noted that the action is to be commenced within 30 days '*after notification of rejection*' . . . . This expression, by the overwhelming weight of authority, excludes the day of notification." *Van Duyn,* 129 Wash. at 433. *See also* RCW 1.12.040 (The time within which an act is to be done, as herein provided, shall be computed by excluding the first day . . . ."); CR 6(a) ("In computing any period of time prescribed or allowed by these rules . . . by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included").

As noted, *supra*, the *Van Duyn* Court explained that "[t]his is not a general statute of limitation prescribing the period within which the action may be commenced after its accrual, but is a special and very short statute of limitation, and manifestly one under which the court should not contract

the prescribed period except as the statute clearly and unmistakably compels." *Id.* at 433-34.

Ms. Simmons cites to five cases in favor of her assertion that "Washington courts in the probate setting have treated time deadlines strictly."[5] Brief of Appellant at 14-15. None of the cases cited, however, are apposite. None of them concern or address the time deadlines related to the filing of a petition after the 20 day period applicable to the personal representative has elapsed, RCW 11.40.080, or after the 30 day period for a petitioner to file suit has allegedly passed, RCW 11.40.100. Even so, in *Johnston*, the court did not treat the time deadlines of RCW 11.40.100 strictly. Instead, the court found that even though the claimant filed suit before receiving notification that her claim had been rejected, she had substantially complied with RCW 11.40.100(1). 150 Wn.App. at 903.

Finally, assuming for the sake of argument that Ms. Simmons' rejection of Ms. Vaux-Michel's creditor's claim on December 19, 2011 was valid, Ms. Vaux-Michel had thirty days, plus three days for mailing,

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[5] Simmons cites to *King County v. Knapp's Estate*, 56 Wn.2d 558, 559-60, 354 P.2d 389 (1960) (failure to serve the proper individual with creditor claim); *Rigg v. Lawyer*, 67 Wn.2d 546, 408 P.2d 252 (1965) (no creditor claim was ever presented to the administratix); *Dillabough v. Brady*, 115 Wash. 76, 80, 196 Pac. 627 (1921) (after the time provided by the statute for *presenting claims* had expired, the plaintiff filed an amended creditor claim); *In re Estate of Peterson*, 102 Wn.App. 456, 9 P.3d 845 (2000), *review denied*, 142 Wn.2d 1021 (2001) (contestants filed a petition for revocation of probate of will and codicil more than two months after the statutory four-month period for will contests had expired); *Ruth v. Dight*, 75 Wn.2d 660, 670, 453 P.2d 631 (1969) (creditor claim and action based on it could not be maintained because claim presented after time to present claim had run).

CR 6(e), to file her petition after receiving notice. Since the day of the event, December 19, is not counted, CR 6(a), time computation begins on December 20, 2011. There were twelve days left in December, so the thirtieth day fell on Wednesday, January 18, 2012, add three days for mailing and the date falls on Saturday, January 21, 2012; the next day which was neither a Saturday, a Sunday nor a legal holiday, *id.*, was Monday, January 23, 2012, the date Ms. Vaux-Michel filed her petition in the trial court. The trial court committed no error, Ms. Vaux-Michel's petition was timely filed.

B. The Trial Court Correctly Ruled That the Check Left by Mr. Stover for Ms. Vaux-Michel was a Gift Causa Mortis

1. Evidentiary Standard is Clear and Convincing

"Testimony on the essential elements of a gift causa mortis must be clear and convincing, but need not be beyond dispute or doubt." *McCarton v. Estate of Watson,* 39 Wn.App. 358, 364 (1984) (internal editing marks omitted) (citing *In re Estate of White,* 129 Wash. 544, 547 (1924)).

2. Elements Required to Prove Gift Causa Mortis

Under Washington law, "a gift causa mortis is established when: (1) a gift is made in apprehension of approaching death from some existing sickness or peril; (2) the donor dies from such sickness or peril without having revoked the gift; (3) there is actual, constructive, or symbolical delivery of the gift to the donee or to someone for him; and (4) the evidence reveals the donor's present intent to pass title to the gift." *McCarton,* 39 Wn. App. at 363, 693 P.2d 192 (1984) (citing *In re Estate of McDonald,* 60 Wn.2d 452, 454, 374 P.2d 365 (1962); *In re Estate of White,* 129 Wash. 544, 546, 225 P. 415 (1924); *Phinney v. State,* 36 Wash. 236, 247, 78 P. 927 (1904)).

It is clear from a reading of the cases that have addressed gifts causa mortis that "it is impossible to lay down a rule to cover all cases,

and each case must be determined by its own peculiar facts and circumstances." *MacKenzie v. Steeves,* 98 Wash. 17, 23 167 P. 50 (1917)). Moreover, "the circumstances under which such gifts are made must of necessity be varied and infinite, and each case must be determined on its own peculiar facts and circumstances." *Id.* "The delivery may be actual or constructive, but it should be the best which the nature and situation of the property and the circumstances of the parties admit of." *Id.*

a. The law regarding delivery and donor's intent

"In shifting the judicial focus from manual or possessory delivery to the circumstances surrounding delivery of the gift, courts have paid increasing attention to the donor's intent to deliver. *McCarton,* 39 Wn. App. at 364, 365 (citing *Whitney v. Canadian Bank of Commerce,* 232 Or. 1, 374 P.2d 441 (1962); *MacKenzie,* 98 Wash. at 21-23. The *MacKenzie* court stated:

> There is much discussion in the books, but it is the common holding of the courts that, where the intent to bestow is obvious and clear and there is no evidence of fraud or undue influence, and the circumstances show that the donor has done all that, in his opinion, is necessary to do to accomplish his purpose, the intent of the donor will answer for the act of delivery.

McCarton, 39 Wn.App. at 365 (quoting *MacKenzie* at 23). The *MacKenzie* court also quoted W. Thornton, *Gifts and Advancements* § 145 (1893):

> Not only is the application of the rule requiring a delivery to be mitigated and applied according to the situation of the

> subject of the gift, but the conditions and intention of the donor at the time of making the gift must be considered; and this is especially true of a gift *causa mortis*. `The intention of the donor,' says the Supreme Court of Indiana, `in peril of death, when clearly ascertained and fairly consummated, within the meaning of well established rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery. The rule which requires delivery of the subject of the gift is not to be enforced arbitrarily.'

McCarton, 39 Wn. App. at 365 (citing *MacKenzie,* at 22).

Thus, "the donor's intent to deliver and his belief that he has successfully delivered the gift may, in certain circumstances, validate an otherwise less than perfect delivery. This is in keeping with the general rule that delivery by the donor, and possession by the donee, need only be as complete and perfect as the nature of the property and the circumstances and conditions permit." *McCarton,* 39 Wn. App. at 365 (citing *Newsome v. Allen,* 86 Wash. 678, 683, 151 P. 111 (1915)).

In *Dingley v. Robinson,* 149 Wash. 301, 270 P. 1018 (1928), for example, the alleged donor arranged for herself and her son to each have a key to a safe deposit box containing stocks and bonds. The son's wife testified that the mother told the son "all of the property is in the deposit box in your name, you have the key and it is yours." *Dingley*, at 304. After the mother died, the son went to the box and removed the gift items, "[t]he relatively weak evidence of donative intent apparently

prompted the court to require a stronger showing with respect to delivery." *McCarton*, 39 Wn. App at 367. Also, "since delivery and donee possession may, depending on the circumstances, be actual or constructive, the *Dingley* decision is best understood as a proper balancing of intent and other factors relevant to the question of delivery." *Id.* Similarly, the *McCarton* court distinguished *Newsome,* noting that there delivery was not found because "any present intent to deliver was equivocal in light of (1) the fact that the contents of the box *were to be delivered,* and (2) the fact that the box was held in partnership by the donor and her sisters." *McCarton* at 366 (emphasis in original).

In *McKenzie*, the court cited to and quoted favorably from, *Waite v. Grubbe*, 43 Or. 406, 73 P. 206, 99 Am. St. Rep. 764 (1903), "where a gift of money buried by the donor to his daughter was sustained, although there had been no actual delivery. The court said: 'The taking of the money subsequently by her would not have been attended with the commission of a trespass, and the gift would assuredly have been complete if she had taken manual possession thereof during his lifetime.' The court then asks this question: 'Was the delay in this respect a fatal oversight on her part?' And it answers it as follows: 'She accepted the money when he made his declaration of the gift to her, and it was so understood between them. It seems to us, therefore, that the delivery was

as perfect and complete as the nature of the property, the situation of the parties, and the circumstances of the case would permit.'" *McKenzie*, 98 Wash. at 22-23.

"This balancing approach takes into account the purposes served by the requirement of delivery in determining whether that requirement has been met. It would find a constructive delivery adequate to support the gift when the evidence of donative intent is concrete and undisputed, when there is every indication that the donor intended to make a present transfer of the subject-matter of the gift, and when the steps taken by the donor to effect such a transfer must have been deemed by the donor as sufficient to pass the donor's interest to the donee.... [T]his approach ... reflects the realities which attend transfers of this kind." *McCarton,* 39 Wn.App. at 366. "Courts must scrutinize such transactions carefully and judge each case on its own facts. *An individual's wishes regarding the disposition of property should be respected unless there are facts bringing into question the existence of intent.*" *Id.* at 368-69 (emphasis supplied).

b. The law regarding acceptance of a gift

In Washington, as elsewhere, the acceptance of a gift beneficial to the donee will be presumed. *Leipham v. Adams*, 77 Wn. App. 827, 894 P.2d 576 (1995) (citing *Sinclair v. Fleischman,* 54 Wn. App. 204, 209, 773 P.2d 101, *review denied*, 113 Wn.2d 1032, 784 P.2d 531 (1989)). The

Leipham Court also found that presumption in favor of acceptance is further supported by the absence of evidence indicating that the donee did not want or need the gift for her own financial security. *Leipham*, 77 Wn. App. at 832. And, although a gift causa mortis "does not come to the knowledge of the donee, and is not accepted by him, until after the death of the donor . . . [t]he acts of the trustee or third person receiving the property for the benefit of the donee are deemed to be in the interest of the latter, and the acceptance of the gift is presumed. *Hamlin v. Hamlin*, et al., 59 Wash. 182, 189-90, 109 P. 362 (1910) (citation and internal editing marks omitted).

3. The Evidence for the Gift Causa Mortis was Beyond Substantial, it was Conclusive

Ms. Simmons claims that "the trial court's finding number 36 regarding 'delivery' an [sic] essential element of a gift causa mortis was not supported by the evidence." Brief of Appellant at 17-18. Ms. Simmons is wrong. Indeed, applying the above principles of law to the facts of this case leads to but one conclusion: The checks written by Mr. Stover to Ms. Vaux-Michel were gifts causa mortis; the evidence for each and every element, including constructive delivery of the checks, was beyond substantial, it was conclusive. Mr. Stover's intent to marry Ms. Vaux-Michel and his intent that she receive the checks he had written to her if he

was murdered was obvious and clear. CP 113-114. He told at least two people specifically that he left a check for Ms. Vaux-Michel, and six people, including close friends, that he intended to marry Ms. Vaux-Michel and that he wanted to provide for her if he was murdered.

He told Jeannie Nordstrom that Ms. Vaux-Michel had "saved his life and that they were going to get married." 2RP at 4-5; CP 113. The day before he went missing, he told Shelly Hyrkas, a friend for 15 years, that he had proposed to Ms. Vaux-Michel and he then showed Ms. Hyrkas the ring he had purchased for her. 1RP at 93-96, 103-104. Mr. Stover told Mr. Kradel he wanted to marry and take care of Ms. Vaux-Michel. 1RP at 32; CP 113. He told Ms. Hearon that, in the event the Opdyckes were successful in having him killed, he had left a check for Ms. Vaux-Michel in plain sight on his desk. 2RP at 10; CP 113. Mr. Stover told Andrea Franulovich that Ms. Vaux-Michel was "the love of his life," that he had asked her to marry him, that she said yes, and that he had left her a check because he wanted to take care of her in case something happened to him. 1RP at 109-113; CP 113-114. And he often told Elizabeth Dorris, a ten year employee of his, of his love for Ms. Vaux-Michel and that he was going to marry her and wanted to take care of her if something happened to him. 1RP 113-115; CP 113. The trial court's finding number 36, that "there is no evidence of fraud or undue influence, and the circumstances

show that Mr. Stover did all that, in his opinion, was necessary to do to accomplish delivery of the checks," CP 116-117, is supported by substantial evidence.

And though possessing its own peculiar facts and circumstances, this case bears similarity to the facts in *Phinney v. State,* 36 Wash. 236, 78 P. 927 (1904), where a severely ill donor gave his friend a check for $4,000 drawn on the donor's bank in another town. *Id.* at 238. The donor stated that if he didn't get over his illness, he wanted his friend to get his money. *Id.* A check made out to the friend was sent to the donor's bank, but did not arrive at the bank until after the donor died. *Id.* The friend claimed the money in the bank account was his because of the donor's gift. The State of Washington, though, claimed the funds escheated because it argued a check is not an assignment of funds and, therefore, the gift was not delivered. *Id.* at 238-40.

The court disagreed, ruling that there had been a gift. *Id.* at 241, 253. It held that in cases where the donor's intent is clear and where there are no conflicting interests by creditors or other assignees or donees of the deceased, the giving of the check is an assignment of the interest. 36 Wash. at 242-43. So too, in this case, Mr. Stover's intent was clear and there are no conflicting interests by creditors or other assignees or donees of Mr. Stover. CP 117.

In sum, the checks were constructively delivered by Mr. Stover to Ms. Vaux-Michel. By putting the checks on his desk and in his desk drawer and telling others about the checks and their purpose, and because Ms. Vaux-Michel helped Mr. Stover with his business and worked at the same desk the checks were located, and though there is no direct evidence that Mr. Stover told Ms. Vaux about the checks or their purpose, it is a conclusion well supported by the evidence that Mr. Stover told Ms. Vaux-Michel about the checks and their purpose, that the gifts were accepted by Ms. Vaux-Michel, thereby ensuring that if he was murdered the checks would be retrieved by or given to Ms. Vaux-Michel. CP 113, 119; *See also Wilson v. Joseph*, 101 Wash. 614, 172 P.745 (1918) (even in the absence of any direct evidence about the intent of the donor, the court concluded she intended a gift and that she believed her recovery from her sickness was unlikely). The trial court did not err in finding the check was a gift causa mortis.

4. Stover's statements to Vaux-Michel's witnesses were not hearsay and they were not within the dead man statute

Ms. Simmons argues that because "most of Vaux-Michel's witnesses testified as to what Stover had told them regarding his relationship with Vaux-Michel," the testimony was hearsay and improperly admitted. Brief of Appellant at p. 23. To the contrary, ER

801(d) excludes the admission by party opponents from the hearsay definition: "The death of a party-opponent does not affect the admissibility of that party's admissions under Rule 801, but under some circumstances the admissions may be barred by the dead man statute." *In Re the Estate of Miller*, 134 Wn. App. 885, 143 P.3d 315 (2006) (citation omitted). Moreover, "[t]he deceased is a party to this lawsuit and his admissions are not inadmissible hearsay pursuant to ER 801(d)(2)." *Id.* The witnesses testimony about statements made to them by Mr. Stover were not hearsay and the trial court did not err in admitting those statements. The dead man statute had no application to Mr. Kradel, Ms Hearon or any of the witnesses who testified on behalf of Ms. Vaux-Michel because none of them were "a party in interest," that is, "a person who stands to gain or lose by operation of the action or judgment in question." *Estate of Miller* 134 Wn.App. at 890.

Neither were Mr. Stover's statements to Mr. Kradel and Ms. Hearon barred by the attorney-client privilege as Ms. Simmons suggests. The attorney-client privilege is defined as follows: Where legal advice of any kind is sought from an attorney in his capacity as such, "*the communications relating to that purpose, made in confidence by the client*, are . . . protected from disclosure by [the client] or by the legal adviser, except the protection be waived." 8 JOHN HENRY WIGMORE, EVIDENCE IN

TRIALS AT COMMON LAW § 2292, at 554 (McNaughton 1961 & Supp. 1991) (emphasis supplied); *see also Ramsey v. Mading,* 36 Wn.2d 303, 311-312, 217 P.2d 1041 (1950) (The attorney-client privilege only applies to communications that are intended by the party to be confidential); *State v. Sullivan,* 60 Wn.2d 214, 217-218, 373 P.2d 474 (1962) (If the communication is intended to be disclosed to others, it is not protected by the attorney-client privilege).

The trial court determined that the declarations and testimony of attorney Jeffrey Kradel and private investigator Leigh Hearon regarding statements by Mr. Stover to them do not contain communications protected by the attorney-client privilege. CP 118. Even assuming for the sake of argument that Mr. Stover's communications were made in confidence and were privileged, the trial court correctly ruled that he waived that privilege by disclosing the substance of the communications to others. CP 118-119. Mr. Stover made no secret of his love for Ms. Vaux-Michel or his desire to take care of her if he were murdered. CP 119. The trial court properly ruled that because Mr. Stover's declarations of love for Ms. Vaux-Michel, his intent to marry her and the corresponding desire to take care of her by leaving a check for her in case he was murdered cannot be reasonably considered to be quiet confidences Mr. Stover intended to be silenced by an attorney-client privilege. CP 119. Mr.

Stover hired Jeff Kradel to represent him because someone had planted drugs in his car, CP 119, not to be his Dr. Phil. The trial court did not err in admitting Mr. Stover's statements through Ms. Vaux-Michel's witnesses.

C. The Trial Court Did Not Err in Awarding Attorneys Fees

Ms. Simmons objects that even if a gift causa mortis occurred, "this is not the type of case in which fees should be awarded against the estate." Brief of Appellant at 24. Ms. Simmons is wrong. The claimant/petitioner in *Johnston*, for example, a case quite similar to this one, was awarded attorneys fees pursuant to RCW 11.96A.150(1). 150 Wn.App. 903-904. This is precisely the type of case in which fees should be awarded. The trial court did not commit error.

VI. ARGUMENT FOR MS. VAUX'S CROSS-APPEAL

A. The Trial Court Erred when it Failed to Award the Check Found by Simmons to Vaux-Michel

1. The Evidence Relied Upon by the Trial Court in Concluding the Check Found by Detective Luvera was a Gift Causa Mortis Supports the Conclusion that the Check Found by Ms. Simmons is a Gift Causa Mortis

The only difference between the two checks Mr. Stover made out to Ms. Vaux-Michel is that the Luvera check awarded by the court to Ms. Vaux-Michel was found on Mr. Stover's desk and the other check, the one found by Ms. Simmons, was found in his desk drawer. The same facts of

the case, the same arguments and the same findings and conclusions set forth by the trial court in support of its award of the Luvera check to Ms. Vaux-Michel apply with equal force to the Simmons check. CP 111-118. The trial court even found that "circumstances show that Mr. Stover did all that, in his opinion, was necessary to do to accomplish delivery of the *checks*." CP 116-117 (emphasis supplied). The trial court should be directed to award the Simmons check as well.

B. The Trial Court Erred in Reducing Vaux-Michel's Attorney's Fees Request

1. Standard of Review

Whether the amount of fees awarded was reasonable is reviewed under an abuse of discretion standard. *American Nat'l Fire Ins. Co. v. B & L Trucking & Const. Co.,* 82 Wn. App. 646, 669, 920 P.2d 192 (1996). A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion. *Scott Fetzer Co. v. Weeks,* 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). A determination of reasonable attorney fees begins with a calculation of the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632, 966

P.2d 305 (1998). To establish the reasonableness of the fee award, the attorney's documentation of the work performed must satisfy at least a minimum level of detail. "The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 597, 675 P.2d 193 (1983). After the lodestar figure is calculated, the court may consider an adjustment based on additional factors under two broad categories: "the contingent nature of success, and the quality of work performed." *Bowers*, 100 Wn.2d at 598.

An adjustment for the contingent nature of success "should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case." *Bowers*, 100 Wn.2d at 599. "In adjusting the lodestar to account for this risk factor, the trial court must assess the likelihood of success at the outset of the litigation." *Bowers*, 100 Wn.2d at 598.

2. The Trial Court Abused its Discretion in Reducing the Lodestar

a. Findings of fact and conclusions of law

In pertinent part, the trial court made the following findings of fact in its attorney's fee ruling: 1) "Ms. Vaux-Michel did not have the financial

ability to hire an attorney on an hourly basis and that the only way she could obtain representation was on a contingency basis." CP 186. 2) "Mr. Fahling would be compensated only if he achieved a successful outcome." CP 186-187. 3) "Respondent engaged in a vigorous defense and had significant resources." CP 187. 4) "The novelty and difficulty of the questions in this case required some additional time and labor to properly address. While gifts causa mortis cases are rare, the law is relatively clear. The case was relatively simple to try." CP 187. 5) "Respondent also challenged the Petition, claiming that it was untimely. This challenge resulted in two questions of first impression concerning the application of RCW 11.40.080 and RCW 11.40.100. The questions were briefed and argued before this Court, and, when her motion to dismiss based on untimely filing of the petition was denied . . . . No hours spent on the discretionary appeal were included in Mr. Fahling's time sheet." CP 187. 6) Immediate attention to this case was required because only approximately two months remained on the statute of limitations when Mr. Fahling accepted the case." CP 187.

In its conclusions of law, the trial court reduced the contingent fee request by one-third, from $60,000 to $40,000, because it believed Mr. Fahling's "documentation of the work performed was somewhat detailed, but insufficiently so to allow a thorough analysis by the Court of usage of

the time spent; there were no unsuccessful claims." CP 188. The trial court also concluded, "[t]he hours listed may reflect duplicated effort or other unproductive time. For example, travel time portal to portal is claimed at full rate; some meetings and pleading drafting seem to have taken a great deal of extra time; a significant amount of time for an attorney of Mr. Fahling's experience was spent on last minute trial prep; and it is unclear whether paralegal or secretarial functions were undertaken by counsel" CP 188. The trial court concluded that "[t]he above and other general factors justify a lodestar reduction of 1/3. The time claimed by counsel was excessive in light of the overall circumstances. This was not a particularly complex case to try." CP 188.

In addition to the above conclusions of law, the trial court also held, in pertinent part, the following: 1) The likelihood of success at the outset of the litigation was low to moderate. CP 189, 2) The contingency agreement between Petitioner and Mr. Fahling provides for a 40% contingency fee of any judgment. CP 189, 3) The contingency fee and hourly rate charged by Mr. Fahling are reasonable in view of his skill and experience, the nature of the case, the questions presented and the time limitations imposed. CP 189, and 4) The contingency fee charged by Mr. Fahling reflects the agreement between him and Petitioner and it

appropriately accounts for the risk that there would be no fee recovery. CP 189.

b. The trial court abused its discretion by not considering the high risk of non-payment

The findings and conclusions simply do not support a reduction of the lodestar amount where the trial court found that the likelihood of success at the outset of the litigation was low to moderate, CP 189, the contingency agreement between Petitioner and Mr. Fahling provides for a 40% contingency fee of any judgment, CP 189, the contingency fee and hourly rate charged by Mr. Fahling are reasonable in view of his skill and experience, the nature of the case, the questions presented and the time limitations imposed, CP 189, the contingency fee charged by Mr. Fahling reflects the agreement between him and Petitioner and it appropriately accounts for the risk that there would be no fee recovery. CP 189.

Though the trial court found that the contingency fee was reasonable and accounted for the risk that there would be no fee recovery, it does not appear that the trial court even considered that risk in its analysis. Instead, the court reduced the lodestar amount because the hours listed may reflect duplicated effort or other unproductive time. For example, the court said travel time portal to portal is claimed at full rate and some meetings and pleading drafting seem to have taken a great deal

of extra time. The time sheet submitted by Mr. Fahling, however, reflects that he red-lined a total of 28.1 hours including two of the four entries that included travel time, and the two he billed also included time spent in a hearing and interviewing Detective Luvera, a total of 6. 5 hours. CP 154-159; Appendix at 6-10. Duplicated time was not included. CP 146; Appendix at 2. The trial court also found that the documentation of the work performed was somewhat detailed, but insufficiently so to allow a thorough analysis by the Court of usage of the time spent. The documentation work performed was detailed

While the lodestar represents a presumptively reasonable fee, "occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case." *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 542, 151 P.3d 976 (2007). "The contingency adjustment is based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services." *Pham*, 159 Wn.2d at 541 (citation omitted). An adjustment for the contingent nature of success "should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case." *Bowers*, 100 Wn.2d at 599; *see also, Durand v. Himc Corp.*, 151 Wn.App. 818, 214 P.3d 189 (Wn. App. 2009) (trial court did not abuse its discretion in adding a 1.5 multiplier

because of the high risk of nonpayment). "In adjusting the lodestar to account for this risk factor, the trial court must assess the likelihood of success at the outset of the litigation." *Bowers,* 100 Wn.2d at 581.

In addition to utilizing the risk multiplier, courts can also consider the contingency agreement between a petitioner and her attorney. In *Allard v. First Interstate Bank of Washington*, 112 Wn.2d 145, 768 P.2d 998 (1989) (en banc), for example, the Court upheld an award of $596,646 that was based upon the contingent fee agreement between the plaintiffs and their attorneys. *Id.* at 151. The trial court erred and abused its discretion by not adjusting the lodestar to account for the high risk of nonpayment.

VII. ATTORNEY'S FEES ON APPEAL

Pursuant to RAP 18.1, Ms. Vaux-Michel requests that this Court award her attorney's fees on appeal. If Ms. Vaux-Michel prevails on her cross-appeal, The Court should also grant her attorneys' fees for her cross-appeal if she is successful because, "[i]n general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees if [she] prevails on appeal." *Martin v. Johnson*, 141 Wn.App. 611, 623, 170 P .3d 1198 (2007)). Ms. Vaux-Michel was awarded fees in the trial court. Ms. Simmons' request for attorneys fees should be denied.

VIII. CONCLUSION

What Mark Stover wanted most in life, and in death, was to care for Teresa Vaux-Michel. There can be no question that he believed he had done everything necessary to ensure that she would be taken care of. For the reasons set forth herein, therefore, the Court should deny Ms. Simmons' appeal in all its parts and allow Ms. Vaux-Michels' appeal in all its parts, including ruling that the trial court erred in not awarding her the proceeds of the second check and in reducing her attorney's fees by one-third. The case should be remanded to the trial court with instructions to enter judgment for Ms. Michel in the amount of $300,000 and attorney's fees in the amount of $60,000 plus costs.

DATED this 21st day of April, 2013.

Respectfully submitted,

Brian Fahling WSBA #18894
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Kirkland, WA 98033
(425) 202-7092

Attorney for Teresa Vaux-Michel

APPENDIX

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

IN RE THE ESTATE OF T. MARK, STOVER, Deceased. TERESA VAUX-MICHEL, Petitioner, v. ANNE VICTORIA SIMMONS, as Personal Representative of the ESTATE OF T. MARK STOVER, Deceased, Respondent.	NO. 09-4-00411-1 **DECLARATION OF BRIAN FAHLING IN SUPPORT OF AWARD OF REASONABLE ATTORNEYS' FEES TO PETITIONER**

I, Brian Fahling, declare as follows:

1. I am over the age of 18 and competent to be a witness in this matter

2. I am counsel of record for Petitioner Teresa Vaux-Michel.

3. I have twenty three years of experience as a trial and appellate attorney and have been lead counsel in over 300 cases. I have also served as a judge pro tem in Snohomish County Superior Court for the past three years.

4. In addition to being a member of the State Bar of Washington, I am also admitted to and have practiced before the United States Supreme Court (by brief only) and numerous federal appellate courts, including the First, Second, Third, Fourth, Fifth, Sixth,

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Appendix 1

Seventh, Eighth, Ninth, Tenth, Eleventh and D.C Circuits. I am also admitted to and have practiced before the U.S. District Court for Western District of Washington, U.S. District Courts for Eastern, Western and Northern Districts of Texas, U.S. District Court for Colorado, U.S. District Court for Arizona, U.S. District Court for Central District of Illinois and the U.S. District Courts for Eastern and Western District of Wisconsin. In addition to full admission to the courts listed *supra,* I have been admitted *pro hac vice* to at least 30 more state trial and appellate courts as well as federal district courts and administrative tribunals.

5. I have lectured nationally and internationally on trial and appellate practice at continuing legal education seminars.

6. Taking this case was extremely risky because Ms. Vaux-Michel did not have the financial ability to retain counsel on an hourly fee arrangement. The only way she could obtain legal representation was on a contingency basis. *See,* Declaration of Teresa Vaux-Michel. Therefore, I entered into a contingency agreement with Ms. Vaux-Michel that states I would be compensated only if I achieved a successful outcome. The fee agreement is attached to this Declaration as Exhibit A.

7. Attached as Exhibit B is my time-sheet in this case. I have been careful to exclude duplicative time. I have omitted entirely any work undertaken on this case over which there might be any disagreement concerning the necessity or justification for the time claimed, including extensive legal research.

8. The work undertaken in this case was necessary in order to obtain the highly favorable result. Such work was necessitated by the Respondent's vigorous defense, seemingly unlimited resources, and because of Respondent's effort to cover-up the fact that

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Detective Luvera told her about, and mailed to her, another $150,000 check made out to Petitioner that he found on top of Mr. Stover's desk, precisely where Mr. Stover said it would be. Respondent lied about her knowledge of the existence of the check in her declaration filed in February 2011 in opposition to Ms. Vaux-Michel's Petition, and she lied at trial.

9. Respondent's effort to cover-up the $150,000 check found by Detective Luvera almost succeeded. I only interviewed Detective Luvera on August 28, 2012 to follow-up on Respondent's deposition testimony that she had contacted him about the check she found. When I asked the Detective if the Respondent had told him about the check made out to Ms. Vaux-Michel, he looked at me quizzically, and said, "she didn't find the check, I did." He then went on to tell me how he found the check on Mr. Stover's desk, that he called Respondent and told her about the check in early November 2009, and that he sent the check and other mail to her in a pre-paid envelope or box she provided. Respondent produced a copy of the $150,000 check after I met with Detective Luvera, so, on September 4, 2012, I emailed a copy of the check to Detective Luvera, and he responded on September 5:

> Brian,
> Thanks, I did look at the photo of the check. This one is definitely attached to a ledger type checkbook. The one that I found was a single check all by itself in a pile of other checks and documents on the desk top in the upstairs loft area. I recall the check was on the Vanguard account made payable to Theresa Vaux-Michael in the amount of $150 thousand dollars. As far as Vickie's answers to the check she claimed to find I don't recall Vickie telling me that she found a check or her offering that check to me. but I did tell her that I had found a check on Stover's Vanguard account made payable to Theresa Vaux-Michael in the amount of $150 thousand dollars and did mail that check to Vickie along with other mail that belonged to Stover. I would like to believe that Vickie did find this check as she claims and if that is the case there is a second check made payable to Theresa Vaux-Michael in the amount of $150 thousand dollars that I had found and told her about and sent that check to her.

Exhibit C (email from Detective Luvera to Brian Fahling) (Sept. 4, 2012).

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10. The skill requisite to successfully perform the legal services in a case involving a *gift causa mortis* is high because such cases are rare (as Respondent's counsel noted, this is the first case in the country where murder was the peril feared by the donor) and intensely fact specific.

11. The novelty and difficulty of the questions in this case required significant time and labor to properly address, as well as a high level of skill to recognize and understand, and to prepare and execute a successful litigation strategy. The law on *gifts causa mortis*, which dates back to the 19th Century, was not extensive; it was, though, remarkably fact specific and often seemed to require one standard, while resulting in a decision that suggested a different standard. Deep research and analysis was required to properly and successfully frame the issues and facts in this case.

12. The law on *gifts causa mortis*, which dates back to the 19th Century, is remarkably fact specific and often seemed to require one standard, while resulting in a decision that suggested a different standard. Deep research and analysis was required to properly and successfully frame the issues and facts in this case.

13. Respondent also challenged the Petition claiming that it was untimely. This challenge resulted in two questions of first impression concerning the application of RCW 11.40.080 and RCW 11.40.100. The questions were briefed and argued before this Court, and, when her motion to dismiss based on untimely filing of the petition was denied, Respondent sought discretionary review in Division I of the Court of Appeals, which was denied, as was her motion to modify the commissioner's ruling. No hours spent on the discretionary appeal are included in my time sheet.

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14. Acceptance of this case by me precluded the pursuit of other matters.

15. Immediate attention to this case was required because, when the client retained me, there were approximately two months remaining on the statute of limitations.

16. Awards in similar cases, as reflected in the reported decisions, support a finding that the award sought herein is reasonable.

17. I am familiar with the reasonable hourly billing rates for attorneys in the Seattle area with skill and experience comparable to my own. The billing rates range from $250.00 per hour to more than $400.00 per hour for some experienced trial attorneys. My normal billing rate of $350.00 per hour falls within the range of fees charged by similarly experienced attorneys for similar work. In Snohomish County Superior Court, in a case involving an appeal of a Department of Labor & Industries ruling, my $350.00 hourly rate was found to be reasonable. Exhibit D (Findings of Fact, Conclusions of Law and Order Fixing Reasonable Attorney Fees Due to Petitioner's Counsel, Snohomish County Superior Court, No. 10-2-02984-1 (Nov. 18, 2010))

18. My fee under the contingency agreement with Ms. Vaux-Michel is $60,000 ($150,000 x .40).

19. I have spent 178.4 hours on this matter. At a billing rate of $350.00 per hour, my fee is $62,440.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 30th of September, 2012, in Kirkland, Washington.

_____

Brian Fahling

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TIME SHEET
(Vaux-Michel v. Simmons)

8/23/11	Met with client to discuss case	1.5
8/23/11	Legal research re nature of gift of check upon death	4.4
8/24/11	~~Legal research re availability of attorney's fees in TEDRA actions, can contingency fee be awarded~~	~~1.2~~
8/25/11	Continued research re gift causa mortis, proper procedure to recover gift and statute of limitations	3.6
8/26/11	~~More research re availability of attorney's fees in TEDRA actions, can contingency fee be awarded~~	~~2.3~~
8/29/11	~~Allotetso legal research re gift causa mortis~~	~~2.8~~
8/30/11	~~Allotetso legal research re gifts causa mortis~~	~~4.2~~
8/30/11	Met with client re filing creditor's claim, potential witnesses to support claim	2.2
8/31/11	Analyze local rules for purpose of evaluating future pretrial obligations and deadlines	0.5
9/2/11	Email communications with client re information about witnesses	0.2
9/8/11	Email communications with Leigh Hearon and Jeffrey Kradel	0.6
9/8/11	Legal analysis and begin drafting creditor's Claim	1.4
9/12/11	Continue and complete drafting creditor's claim	2.0
10/17/11	Legal analysis and begin drafting correspondence to Simmons and attorney re intent to petition court because of failure to accept or reject claim, application of RCW 11.40.080 and RCW 11.40.100	4.2
10/18/11	Legal research re application of civil rules to TEDRA, complete drafting correspondence re intent to petition court	3.8

Appendix 6

11/7/11	Legal analysis and draft Hearon declaration	2.4
11/14/11	Legal analysis and draft Kradel declaration	0.6
12/9/11	Legal research and analysis re creditor's petition, RCW 11.40.080 and RCW 11.40.100,	4.8
12/21/11	Review/analyze purported rejection of claim	0.2
1/9/12	Begin draft of petition, draft Vaux-Michel declaration, Legal research and analysis of RCW 11.40.080 and RCW 11.40.100	5.4
1/10/12	Begin draft of memo in support of petition	6.4
1/12/12	Continue drafting petition and memorandum analyze law	4.8
1/12/12	Meeting re petition with client	1.4
1/16/12	Continue drafting memorandum and petition exhibits	7.8
1/17/12	Complete memorandum, petition, exhibits to petition	4.2
1/23/12	~~Drove to Mt. Vernon to file petition~~	~~2.5~~
2/14/12	Analyze, research and reply to respondent's response to petition rec'd today via email	8.5
2/15/12	~~Drove to Mt. Vernon to file reply~~	~~2.5~~
2/15/12	Prepare for hearing on petition: review Pleadings, briefing, case law, finalize reply	4.2
2/16/12	Prepare for hearing on petition and prepare Proposed findings of fact and conclusions of law with proposed order	4.0
2/17/12	Hearing on petition and drive to and from court in Mt. Vernon	3.5
2/22/12	Draft Jeannie Nordstrom declaration	0.2
2/23/12	Draft note for trial docket and notice of conflict dates	0.5

6/5/12	Email communications with Jeannie Nordstrom	0.2
6/12/12	Email communications with Stephanie Poor	0.2
7/16/12	Email communication with Jeannie Nordstrom	0.2
7/29/12	Draft first interrogs and requests for production to respondent	4.5
7/30/12	Email communication with Jeannie Nordstrom	0.2
7/31/12	Prep Client for depo	2.0
8/2/12	Prep to take Simmons depo. Review pleadings and declarations. Prepare outline.	3.5
8/3/12	Took Depo of Simmons and defended client's Depo.	5.0
8/5/12	Email communication with Kenneth Kagan (Hearon's attorney)	0.2
8/7/12	Review and analyze interrogs to client	0.6
8/8/12	Draft second request for production	0.4
8/18/12	Meet with client to discuss, explain and review respondent's interrog's to client	0.8
8/27/12	Email communication with Jeannie Nordstrom	0.2
8/29/12	Email communication with Jeannie Nordstrom	0.2
8/29/12	Email communication with Leigh Hearon	0.2
8/29/12	Email communications with Jeffrey Kradel	0.2
8/29/12	Email communications with client re interrogs, review initial answers	0.8
8/30/12	Email communications with Det. Luvera	0.2
8/30/12	Meet with client to review client documents to determine those responsive to interrogs	4.6
9/3/12	t/c with Leigh Hearon re trial testimony	0.8
9/4/12	Email communications with Gerri Frantz and review statement	0.6
9/4/12	Email communications with Ted Frantz	

	and review statement	0.6
9/4/12	Drive to Mt. Vernon to interview Det. Luvera	3.0
9/4/12	Draft answers to interrogs	2.2
9/5/12	Finalize answers to interrogs and requests for production, review with client	2.8
9/5/12	Email communications with Det. Luvera	0.2
9/7/12	Email communications with Det. Luvera	0.2
9/7/12	Trial prep. Review and analyze pleadings, caselaw, documents; prepare trial notebook	4.6
9/8/12	Continue trial prep. Review and analyze pleadings, caselaw, documents; prepare trial notebook, witness exam outlines	6.4
9/9/12	Continue trial prep. Review and analyze pleadings, caselaw, documents; prepare trial notebook, witness exam outlines	5.0
9/10/12	Continue trial prep. Review and analyze pleadings, caselaw, documents; prepare trial notebook, witness exam outlines	7.2
9/11/12	Continue trial prep. Review and analyze pleadings, caselaw, documents; prepare trial notebook, witness exam outlines	12.4
9/12/12	Day 1 Trial. Legal argument on renewed motions; Direct examination of Simmons, Kradel, Luvera, Frantz, Hyrkas, Franulovich, Dorris, Tonn, client. Prepare for second day: direct of Nordstrom and Hearon and cross-x of Simmons.	13.2
9/13/12	2nd day of trial. Early morning prep; direct exam of Nordstrom and Hearon. Cross-x of Simmons and closing argument.	5.0
9/14/12	~~Begin drafting Proposed Findings of Fact And Conclusions of Law/review trial notes/ analyze law~~	~~4.6~~
9/17/12	~~Finish drafting Proposed Findings of Fact and Conclusions of Law and Proposed Order~~	~~2.6~~

9/19/12	~~Analyze and review respondents proposed findings of fact and conclusions of law with proposed order~~	~~0.4~~
9/24/12	Analyze and review Court's findings of fact and conclusions of law and order	0.4
9/25/12	Begin research and drafting motion and memo for fee app.	3.5
9/26/12	Continue drafting motion and memo; prepare client declaration, begin my declaration	2.8
9/27/12	~~Prepare notice of presentation of judg., judgment, cost bill, exhibits, memo~~	~~4.5~~
	TOTAL	178.40
	x	350.00
		$62,440.00

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of Answer Brief of Respondent/Cross-Appellant in the Court of Appeals, Division I, Cause No. 69546-1-I to the following:

Philip A. Talmadge Talmadege/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188	John Sherwood Peterson Russell Kelly PLLC 10900 NE 4th St Ste 1850 Bellevue, WA 98004-8341

Original filed with:

Court of Appeals
Clerk's Office
600 University St.
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 22, 2013, at Kirkland, Washington.

Brian Fahling
Law Office of Brian Fahling