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No. 68749-2-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

WASHINGTON FEDERAL SAVINGS,
Appellant,

v.

MICHAEL P. KLEIN, Personal Representative
of the Estate of ROBERT KLEIN, Deceased,
Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Michael P. Klein, Personal Representative ("PR") of the Estate of Robert Klein ("Estate") asks this Court to affirm the trial court's order dismissing on summary judgment Washington Federal Savings ("WaFed")'s complaint for breach of contract. The contract at issue is a Promissory Note that the decedent, Robert Klein, executed with WaFed to finance the purchase of a condominium at 404 N. D St. #11W, Tacoma, Washington ("Condo 11W"). After the decedent's death, the PR of the Estate gave statutory probate notice to creditors, including WaFed, of the pendency of probate. WaFed then failed to file a timely creditor's claim with the PR.

RCW 11.40.051 (1)(a) and (c) provide that a creditor who fails to file a creditor's claim within the statutory period is forever barred from collecting a debt from the estate. The policy underlying the probate statute is to bring finality and settlement to the probate of an estate. The non-claim statute necessarily bars creditors from asserting claims against an estate where creditors miss the claim-filing deadlines set forth in RCW 11.40.051. This is precisely what happened to WaFed. The undisputed evidence shows that the PR sent WaFed "actual notice" — as defined in the statute, and WaFed failed to file a creditor's claim within the statutory time period. Because the deadline for WaFed to file its

creditor's claim had lapsed, any unsecured deficiency on the Promissory Note is unenforceable, and this Court should affirm the trial court's order dismissing WaFed's claims on summary judgment.

Before explaining why this is so, it is critical to understand that nothing prevents WaFed from enforcing the Deed of Trust on Condo 11W, which was recorded as security for the Promissory Note. A creditor need not file a creditor's claim to enforce a deed of trust and realize on the security. RCW 11.40.135. In most circumstances, banks do not need to file creditor's claims when their loans are secured by deeds of trust on real property. During normal circumstances — and especially during a real estate boom — it is understandable that banks do not worry about filing creditor's claims because so long as banks do not overestimate the value of a property during the underwriting process, the amount owed on the note will not be at risk of exceeding the value of the property secured by the deed of trust. But when real estate values decline, there is a risk to banks that the security (the market value of the property as secured by the deed of trust) could be less than the amount owing on the loan. This is particularly true if a bank engages in less-than-rigorous underwriting practices, overestimating the value of its security. In making the loan to Robert Klein, WaFed took the risk that the security would be sufficient to cover its losses in the event of a default, but that turns out to have been a

poor business decision. Here, Condo 11W's market value is now significantly less than the amount owed on the Promissory Note.

This unsecured ***deficiency*** — the amount owed on the note that exceeds the current value of the condo property — is no longer collectible because WaFed failed to file a timely creditor's claim to collect on the Promissory Note. Because WaFed failed to file its creditor claim within the statutory period, its complaint is barred by the non-claim statute.

II. UNDISPUTED FACTS

A. Decedent Robert Klein Executed a Note and a Deed of Trust to Buy Condo 11W

On June 23, 2006, WaFed and Robert Klein executed an agreement whereby WaFed loaned him $375,000. Clerk's Papers ("CP") 66, 98. That same day, Robert Klein executed a Promissory Note. CP 66. To secure payment of the Promissory Note, Robert Klein also executed and delivered to WaFed a Deed of Trust on Condo 11W. *Id.* At the time of the disposition below, the balance of the mortgage was $356,088, plus fees and interest. *Id.*; *see also* CP 98, 104.

B. Condo 11W Lost Significant Value

The PR petitioned for an order to probate the decedent's Last Will and Testament under King County Superior Court Case No. 09-4-06471-4 SEA (the "Probate Matter") and the Court appointed him as Personal Representative of the Estate to serve with non-intervention powers. CP

67, 98. In the course of probating the Estate, the PR attempted to sell Condo 11W. The PR was unable to sell Condo 11W for an amount equivalent to what is owed on the Promissory Note, and evidence showed that the market for condominiums in Tacoma was diminishing. CP 67, 94, 99, 128-148. After reducing the price of Condo 11W five times and rejecting three offers that fell significantly short of the listing price, the listing agent was unable to sell the condo. CP 67. Condo 11W would not sell for enough to repay the note amount of $353,324, and it was unlikely to sell for more than $200,000 at any time in the near future. CP 67, 95; *see also* CP 99-100, 128-148. Condo 11W was listed at $220,000, and there was an open offer from a potential buyer for $200,000. CP 67, 95, 99. Though the PR had attempted to offer to WaFed a deed in lieu of foreclosure, WaFed rejected that offer, insisting that it would seek to collect on any deficiency owed above the value of the property. CP 67, 99-100.

C. The PR Provided Probate Notice to Creditors as Required by Statute

In the course of the PR's duties, the PR duly provided notice of the decedent's death and the pendency of probate to WaFed under the probate statute, RCW 11.40.020(2).[1]

On January 28, 2011, the PR's counsel sent WaFed a letter enclosing a Probate Notice to Creditors. CP 68, 116. On the same day, an Affidavit of Mailing was executed and filed in the probate matter attesting that actual notice of the notice to creditors had been given to WaFed. CP 68, 119.

D. WaFed Failed to File a Creditor's Claim Until After the Statutory Deadlines

Despite having been sent direct notice, WaFed did not timely file a creditor's claim. WaFed was required to file a creditor's claim for any unsecured deficiency due on the Promissory Note the later of (a) 30 days

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[1] The PR provided other notices contemplated in the statute:

For instance, the PR provided notice by publication as required under RCW 11.40.020 on January 7, 2010. CP 107. Affidavits of Publication were filed with the Court. CP 107-09.

On January 21, 2010, the PR sent WaFed a letter of notification about the decedent's death and the pendency of the probate proceedings. CP 67, 111. This notice is corroborated by an Affidavit of Reasonable Diligence filed by the PR on December 29, 2010, attesting that "all actual and potential creditors who came to my attention were sent actual notice of the decedent's death and were instructed to send any final bills or claims to the attention of the undersigned as Personal Representative...." CP 150. Despite WaFed's complaints, Br. of App. 22-23, these notices are not germane to the disposition of this appeal.

from the PR's mailing of notice, which would have been February 27, 2011 (based on the January 28, 2011 letter), or (b) four months after the date of first publication of the notice, which would have been May 7, 2010 (based on a date of first publication of January 7, 2010). CP 68; *see* RCW 11.40.051(1)(a). But WaFed did not file and serve its creditor's claim until one year after it received notice from the PR, on May 10, 2011. CP 68, 122-23. Thus, WaFed missed the statutory deadline for filing its creditor's claim for the deficiency (the amount owing on the Promissory Note that exceeded the current value of the property). CP 68.

E. Attempts to Address the Untimely Filed Creditor's Claim in the Probate Proceedings

In the probate proceedings, the PR filed a petition under the Trust and Estates Dispute Resolution Act ("TEDRA") seeking a declaration that it did not have to continue paying on the Promissory Note. CP 68-69. At the hearing on that petition, the Commissioner agreed that the PR had provided proper notice under RCW 11.40.020 to WaFed. CP 90 (Commissioner: "Okay. So, they have the proof, that they sent the notice. So, now, what's the next step, that makes the notice ineffective?"); *see* CP 69. The Commissioner erroneously determined, however, that it did not have the authority to issue such an order. CP 90.

The Commissioner ruled as follows:

> Okay counsel. You gave 'em notice. They got the notice, but the notice doesn't cut off the deficiency. That's my ruling.
>
> . . .
>
> There's no way that, having read those cases and, frankly, my understanding of the statutes and how it works, that your client can avoid dealing with the deficiency. ... I can't, I can't, I can't get in the way of the contractual obligation that the decedent agreed to with the bank. And the probate statutes aren't designed to wipe out the deficiency of the secured creditor.

Id.

The PR timely filed a Motion for Revision. *See* CP 307. On June 30, 2011, Judge Douglass North denied the Motion for Revision on different grounds. CP 56-57. He found that the notice provisions in the Deed of Trust applied, and the PR had not provided notice in the matter stated in the Deed of Trust. *See id.; see* CP 68-69. As discussed in the argument section, below, this is incorrect because Robert Klein's contract (the Promissory Note) with WaFed cannot supersede Washington's non-claim statute regarding how notice is provided, and moreover the notice provisions to which Judge North referred are contained in the Deed of Trust, not the Promissory Note. *See* CP 68-69.

The PR then sought to appeal that order, but the Washington Court of Appeals determined that the standards for interlocutory review were not

met because the PR had neither rejected nor accepted WaFed's creditor's claim and because WaFed had not yet petitioned the probate court to have the claim allowed. CP 316.

F. The PR Rejected the Creditor's Claim, and WaFed Filed this Action

On October 27, 2011, the PR's attorney transmitted a Notice of Rejection of Creditor's Claim notifying WaFed that the PR was rejecting WaFed's creditor's claim. CP 126.

On November 23, 2011, WaFed filed this new action challenging the PR's rejection of its creditor's claim. *See* Br. of App. 12.

G. WaFed's Motion for Summary Judgment and Judge Armstrong's Order

The PR moved for summary judgment on WaFed's claims. CP 65. WaFed's opposition contended, among other things, that the PR failed to provide "actual notice" to WaFed. CP 152, 166. However, at no time during the proceedings below did WaFed seek discovery from the PR or suggest that discovery would be necessary to resolve a factual dispute as to whether it (WaFed) received actual notice of the pendency of the probate proceedings from the PR. In its summary judgment briefing, the PR argued that because WaFed had missed its opportunity to file a creditor's claim against the estate, it was barred from later collecting on it under the non-claim statute. CP 65, 72-73. The trial court, Judge Sharon

Armstrong, was the first court to consider the issue after the PR had rejected the creditor's claim. *See* CP 316 (Division I commissioner's order noting that appeal — and therefore prior proceedings before Commissioner Velategui and Judge North — occurred before creditor's claim had been rejected and before WaFed petitioned to have the claim allowed). The trial court agreed with the PR and granted his motion for dismissal of WaFed's claims on summary judgment. CP 388-90. The trial court ruled, "Plaintiff's claim to enforce the promissory note, above the value secured in the deed of trust, is DISMISSED." CP 389.

H. Attorney Fees For PR and Appeal

The trial court awarded attorney fees and costs to the PR. *See* Supplemental Clerk's Papers, Sub. No. 41. WaFed appealed to this Court.

III. ARGUMENT

WaFed's failure to file a creditor's claim for the debt owed on the Promissory Note until well after the deadlines set forth in RCW 11.40.051 precludes it from enforcing any unsecured deficiency against the Estate.

A. Standard of Review

This Court reviews summary judgment orders *de novo*, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Ensley v. Mollmann*, 155 Wn. App. 744, 750-51, 230 P.3d 599, *review denied*, 170 Wn.2d 1002 (2010). Summary

judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 125-26, 138 P.3d 1107 (2006) (citing CR 56(c)). A material fact is one on which the outcome of the litigation depends. *Zedrick v. Kosenski*, 62 Wn.2d 50, 54, 380 P.2d 870 (1963). The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795 (2009). Once the moving party satisfies the initial burden of establishing the absence of a material fact issue, the inquiry shifts to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the moving party's motion for summary judgment. *Id.* (holding that because the plaintiff did not present competent evidence to rebut the defendants' initial showing of the absence of a material issue of fact, the defendants are entitled to summary judgment). "Conclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment." *Turngren v. King*

County, 33 Wn. App. 78, 84, 649 P.2d 153 (1982) (concluding that the trial court did not err in granting summary judgment), *remanded*, 100 Wn.2d 1007 (1983); *see also Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008).

B. The Probate Code and Probate Non-Claim Statute Are Meant to Reach Finality and Settle Estates

The intent of the probate code and the non-claim statute is to limit *in rem* claims against the decedent's estate, expedite the settling of estates, and facilitate the distribution of decedent's property to the Estate's heirs and devisees. *Bellevue Sch. Dist. v. Brazier Constr. Co.*, 103 Wn.2d 111, 120, 691 P.2d 178 (1984) (noting that allowing parties to bring *in rem* claims against estates long after the claim period has expired would frustrate the purpose of settling estates and distributing a decedent's property to designated heirs). As the United States Supreme Court noted, "Giving creditors a limited time in which to file claims against the estate serves the State's interest in facilitating the administration and expeditious closing of estates." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 479-80, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

An estate's personal representative is tasked with marshaling the estate's assets and ascertaining liabilities. Thus, the general procedure is that unsecured creditors of an estate must present their claims. The

personal representative must then determine whether such claims are separate or community in character, and determine if each claim is valid and enforceable. The personal representative also determines the extent of claims against the estate, determines the extent of assets, and properly charges estate debts against estate property. *See generally*, Wash. State. Bar Ass'n, WASHINGTON PROBATE DESKBOOK at §5.1, §5.3 (2005). A critical step is that the personal representative must accept or reject the claims made against the estate. If the personal representative rejects a claim, the general unsecured creditor must file suit or lose the claim. RCW 11.40.100 (personal representative may compromise claims if it is in the best interest of the estate).

The non-claim statute is an important component of that scheme. It provides a bright-line cutoff of claims in order to accomplish this process of settling estates. *Nelson v. Schnautz*, 141 Wn. App. 466, 475, 170 P.3d 69 (2007) ("The intent of the probate code is to limit claims against the decedent's estate, expedite closing the estate, and facilitate distribution of the decedent's property.") (citing *Bellevue Sch. Dist.,* 103 Wn.2d at 120).

Because the purpose of the probate code is to obtain early and final settlement of estates so that those entitled may receive the property free from any encumbrances and charges that could lead to long litigation, the

non-claim statute, RCW 11.40.010 *et seq.*, is more strictly enforced than general statutes of limitation. "***The statute is mandatory, not subject to enlargement by interpretation, and cannot be waived.***" *Judson v. Associated Meats & Seafoods*, 32 Wn. App. 794, 798, 651 P.2d 222 (1982) (emphasis added) (internal citation omitted). Courts have held that the non-claim statute applies to the settlement of estates, supersedes all other statutes of limitation, and applies to every kind and character of claim against an executor and administrator. *See Turner v. Lo Shee Pang's Estate*, 29 Wn. App. 961, 963, 631 P.2d 1010 (1981)); *see also In re Estate of Earls*, 164 Wn. App. 447, 453 n.9, 262 P.3d 382 (2011) (citing *Davis v. Shepard,* 135 Wash. 124, 125, 237 P. 21, 41 A.L.R. 163 (1925) (stating that the non-claim statute applies to claims of every kind and nature, both those established and contingent)).

C. Probate Procedure is Exclusive, and Failure to Abide by it Bars a Claim

The non-claim statute provides specifically that "[a] person having a claim against the decedent may not maintain an action on the claim unless a personal representative has been appointed and the claimant has presented the claim as set forth in this chapter." RCW 11.40.010. The non-claim statute further provides that "a person having a claim against the decedent ***is forever barred*** from making a claim or commencing an

action against the decedent . . . unless the creditor presents the claim in the manner provided ...." RCW 11.40.051 (1) (emphasis added). If the PR provides "actual notice" pursuant to RCW 11.40.020 (1)(c), the creditor must present the claim within the later of thirty days after the PR's service or mailing of notice to the creditor and four months after the date of first publication of the notice. RCW 11.40.051(1)(a).

It is "well-settled" in this jurisdiction that the non-claim statute, RCW 11.40.010, "is mandatory and is strictly construed; compliance with its requirements is essential to recovery." *Estate of Earls*, 164 Wn. App. at 450-51 (citing *Messer v. Shannon's Estate,* 65 Wn.2d 414, 415, 397 P.2d 846 (1964)); *see Rigg v. Lawyer*, 67 Wn.2d 546, 553, 408 P.2d 252, 257 (1965) (noting that the failure to file a claim is an effective bar to any attempt to collect on a promissory note). As courts have observed, creditor's claim statutes are, in essence, statutes of limitation. *Bakke v. Buck*, 21 Wn. App. 762, 767, 587 P.2d 575 (1978). "They mandate that if a creditor's claim is not timely filed, the claim against the estate is barred." *Id.* (citing RCW 11.40.010). Probate law is the exclusive procedure under the present circumstances. Even if WaFed had obtained a judgment after suing on the contract against the Estate before decedent's death — which it did not — WaFed still could not have ***executed*** on the judgment without going through probate procedures. RCW 11.40.130; *In*

re Trustee's Sale of Real Property of Whitmire, 134 Wn. App. 440, 448, 140 P.3d 618 (2006) (in cases where creditor already had a lien against specific estate assets, court nonetheless held: "Unless specific property has already been executed or levied upon, a person who obtains a judgment against the decedent is subject to probate procedures [i.e., the non-claim statute]."). In order to exempt its claim for breach of contract from probate procedure, WaFed would have had to sue on the Promissory Note, obtain a judgment, complete execution by following writ of garnishment procedures, and obtain a writ of garnishment on the judgment against what normally would have been unsecured estate property — all before the death of the decedent. That was not done.

Unless another statute, case law, or other authority provides otherwise, probate statutes generally apply and probate procedure is the exclusive procedure that must be followed by a creditor that wants to assert a claim against unsecured and unperfected estate property. 134 Wn. App. at 448-49. As discussed more fully below, the Deed of Trust and the Promissory Note may not purport to impose greater notice than is required by the probate statutes. "Under Title 11 RCW, a [party] must present [its] claim against the decedent according to the procedures set forth under the probates statutes; otherwise, the claimant may be barred from collecting from the estate. RCW 11.40.010 and .051." *Id.* 448 n.7.

D. Pursuant to the Non-Claim Statute, WaFed is Forever Barred From Filing a Creditor's Claim Because it Missed the Mandatory Deadlines

1. The PR Provided "Actual Notice" to WaFed

The PR provided "actual notice" to WaFed by regular first class mail, postage pre-paid, as required by the non-claim statute. RCW 11.40.020 expressly establishes that "actual notice" as set forth in RCW 11.40.051 may be satisfied by "mailing the notice to the creditor at the creditor's last known address, by regular first class mail, postage prepaid . . .." RCW 11.40.020 (c). Notably, the triggering event for actual notice is the personal representative's act of "mailing" the notice to creditors. RCW 11.40.051; RCW 11.40.020. The statute does not require receipt or confirmation of mailing, as WaFed asserts. *Cf.,* Br. of App. 19-20. WaFed provides no legal authority whatsoever to support its position that actual notice requires proof of notice beyond that which is expressly set forth in the probate statute. Because WaFed's argument is unsupported by the evidence and contrary to probate law, this Court should reject it.

WaFed's argument, Br. of App. 18, that constitutional Due Process requires more than notice by mail is meritless. The U.S. Supreme Court has repeatedly recognized that "the mails are an 'efficient and inexpensive means of communication' that generally may be relied upon to deliver notice where it is sent." *Orix Fin. Servs. v. Phipps*, 72 Fed. R. Serv. 3d

400, 2009 WL 30263, at *10 (S.D.N.Y. Jan. 6, 2009) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, 70 S. Ct. 652, 94 L. Ed. 865 (1950)); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983); *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982). The cases following *Mullane* have held that "actual receipt of notice by a party is not required to satisfy the dictates of due process." *Orix Fin. Servs.*, 72 Fed. R. Serv. 3d 400, 2009 WL 30263 at *9-10 (concluding that even if the Court were to accept defendant's affidavit averring that she had never received notice from any party, the certificate of mailing notice was all that was necessary to satisfy Due Process). "[T]he relevant inquiry for due process purposes focuses on the party providing the notice, and asks whether that party has provided 'notice reasonably calculated' to inform interested parties." *Id.* (noting that both the United States Supreme Court and the Second Circuit have ruled that under most circumstances notice "sent by ordinary mail is deemed reasonably calculated to inform interested parties" of an impending action) (citing *Weigner v. City of New York,* 852 F.2d 646, 649 (2d Cir. 1988)). "Indeed, the Supreme Court has applied this rule — that

due process is satisfied upon the proper mailing of notice — in a wide array of proceedings where a defendant's property rights are at issue." *Id.*[2]

To hold otherwise would allow any creditor whose claim has been barred to resurrect that claim simply by asserting the mail was never delivered. Because WaFed's argument that notice by mail violates Due Process is contrary to the law, this Court should reject it.

Furthermore, contrary to WaFed's assertion, the mailbox rule has no bearing on the issues in this case. In its brief, WaFed urges this Court to apply the common law mailbox rule to its analysis of the issues in this case. Br. of App. 31. But the probate statute — not the mailbox rule — governs the determination of whether actual notice was mailed. If the legislature had intended for the mailbox rule to apply to probate proceedings it would have codified the rule or its language in the probate statute. As it stands, the probate statute contains no such language, and WaFed provides no legal authority to support its argument for applying

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[2] *See, e.g., Tulsa Prof'l Collection Servs.,* 485 U.S. at 490 (notice to creditors in probate proceedings); *Mennonite Bd. of Missions,* 462 U.S. at 799-800 (notice of mortgagee of tax foreclosure); *Greene v. Lindsey,* 456 U.S. 444, 455, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982) (notice to public housing tenants of forcible entry and detainer actions); *Schroeder v. City of New York,* 371 U.S. 208, 214, 83 S. Ct. 279, 9 L. Ed. 2d 255, 89 A.L.R.2d 1398 (1962) (notice of condemnation proceedings); *Walker v. City of Hutchinson,* 352 U.S. 112, 116, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956) (notice of condemnation proceeding).

the mailbox rule in this case. Indeed, there is no case in Washington that applies the mailbox rule in the context of a probate proceedings, or that otherwise invalidates a probate notice based on this rule. WaFed tacitly concedes this point by characterizing the mailbox rule as "instructive," Br. of App. 31, rather than controlling. Because the mailbox rule does not apply, this Court should reject WaFed's argument on this point.

2. The Deed of Trust Does Not Trump the Non-Claim Statute's Requirements

WaFed has highlighted that the Deed of Trust contains enhanced notice provisions (which benefit the bank, but not the borrower), and that under those provisions the PR's notice was not effective until actually received. Br. of App. 4. WaFed suggests that its duty to file a creditor's claim in the probate matter was, therefore, never triggered. This is incorrect. Notably, only the Promissory Note is the basis of this breach of contract lawsuit. The Deed of Trust is not at issue. Moreover, neither the Deed of Trust nor the Promissory Note can alter or trump the notice requirements of the non-claim statute. *See* RCW 11.40.010; *Bakke v. Buck*, 21 Wn. App. 762, 767, 587 P.2d 575 (1978) (if a creditor's claim is not timely filed, its claim against estate is barred); *Hanks v. Nelson*, 34 Wn. App. 852, 855-56, 664 P.2d 15 (1983) ("Compliance with the statutory non-claim requirements is essential for recovery."); *Estate of*

Earls, 164 Wn. App. 447, 262 P.3d 832 (2011) (strict compliance with the statutory requirements was "essential to recovery"). A contract "which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable." *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 26-27, 182 P.2d 643 (1947). In sum, no contractual provision between the parties which contradicts the mandatory non-claim statute may be enforced.

Logic also compels this rule. As a matter of practical necessity and sound policy, the way estates are administered in probate must be the same for all estates. The probate statute, discussed above, controls the manner of notice of the pendency of probate. If WaFed were allowed to require greater notice, every other creditor to an estate could also impose its own byzantine notice rules that would undermine the purposes of the probate statute. Imposing other notice provisions would be impractical also because a personal representative has the duty to ascertain known creditors, but may not even be aware of a given debt owed by the estate. Yet a personal representative could not adhere to notice provisions of which he or she is not even aware. Probate law requires, and imposes, the same notice of all estates in probate, and no provision of the Promissory Note that is the subject of this action (let alone the Deed of Trust, which is not the subject of this action) may change those notice requirements.

Judson v. Associated Meats & Seafoods, 32 Wn. App. 794, 798, 651 P.2d 222 (1982) (the non-claim statute, RCW 11.40.010 *et seq.*, is more strictly enforced than general statutes of limitation, is mandatory, is not subject to enlargement by interpretation, and cannot be waived). Because the non-claim statute supersedes the notice requirements set forth in the Promissory Note and Deed of Trust, WaFed's argument fails.

3. WaFed Missed the Deadline for Filing Its Creditor's Claim

It is undisputed that, after the PR provided actual notice in the January 28, 2011 mailing, WaFed failed to file a creditor's claim until May 10, 2011. *Compare* CP 116-20 *with* CP 122-24. Because WaFed's creditor's claim was not timely filed, WaFed is forever barred from asserting its creditor's claim against the Estate. *See* RCW 11.40.010; *Bakke*, 21 Wn. App. at 767 (if creditor's claim not timely filed, claim against estate is barred); *Hanks v. Nelson*, 34 Wn. App. at 852 ("Compliance with the statutory non-claim requirements is essential for recovery."). Thus, the Promissory Note is not enforceable, and the trial court properly granted summary judgment for the PR. WaFed's ability to collect the debt on the Promissory Note is now limited to the amount secured by the Deed of Trust, which amount is determined by the market value of Condo 11W.

4. *In re Estate of Earls* Directs the Outcome of this Case

This Court recently reiterated the foregoing principle in *In re Estate of Earls*, 164 Wn. App. 447, 262 P.3d 832 (2011). There, the Court rejected a creditor's attempt to enforce a personal guaranty and ruled that the claim was barred because the creditor failed to timely present the claim against the estate by the deadlines set forth in the statute. *Id.* 447. The Court found that the creditor's claim to enforce the decedent's personal guaranty was subject to the non-claim statute, and that strict compliance with the statutory requirements was "essential to recovery." *Id.* 450-51 (citing *Messer v. Shannon's Estate*, 65 Wn.2d 414, 415, 397 P.2d 846 (1964)). On this basis, the Court held that the creditor's claim was barred and affirmed the trial court's dismissal of the creditor's action to enforce the personal guarantee. Like the creditor in *Earls*, WaFed's failure to comply with the probate laws bars it from filing a creditor's claim against the Estate.

E. WaFed Submitted No Evidence That Would Raise a Genuine Issue of Material Fact

There is no genuine issue of material fact in dispute. WaFed complains that (1) the PR lacked "personal knowledge" of the mailing of the notice, and (2) the signed affidavit of mailing from the PR's attorney's office is insufficient to establish the fact of mailing notice to creditors. In support of the motion for summary judgment, the PR's declaration

included the probate notice to creditors that his former attorney, George L. Smith, had mailed to WaFed and the affidavit of mailing signed by Mr. Smith's legal assistant, Anne Favretto, attesting to the fact that she caused the notice to creditors to be mailed to WaFed on January 28, 2011. CP 116, 119.

Tracking the language of RCW 11.40.020(1), Ms. Favretto's affidavit stated, "On January 28, 2011, I have given, or caused to have given, the creditors listed on said Exhibit A, actual notice by mailing to the creditor's last known address, by regular first class mail, postage prepaid true and correct copy of the notice to creditors filed herein." CP 119. Exhibit A lists WaFed as a creditor. CP 120. Nonetheless, WaFed complains for the first time on appeal that the affidavit of mailing "is at best ambiguous" about whether "Ms. Favretto herself put anything into the mail." Br. of App. 27.

Because WaFed did not raise any issue with regard to Ms. Favretto's affidavit in the trial court, this Court should decline to address its attempt to do so for the first time on appeal. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12; RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); *see*

Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985, 989 (2008) ("An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.").

In the alternative, if the Court decides to address WaFed's new allegations regarding Ms. Favretto's affidavit on appeal, it should reject WaFed's argument on the merits.

As discussed above, the declarations and affidavits filed by the PR's attorney and the attorney's legal assistant, in addition to the declaration filed by the PR, are sufficient to demonstrate that notice to WaFed was mailed exactly as the statute requires—"by regular first class mail." RCW 11.40.020; CP 119. "Where a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Brackman v. City of Lake Forest Park*, 163 Wn. App. 889, 262 P.3d 116 (2011) (holding that an affidavit of mailing is sufficient proof of service under the Mandatory Arbitration Rules, where the affidavit was made under oath or under penalty of perjury) (citation and quotes omitted).

The evidence shows that the PR provided actual notice by directing the mailing of notice to WaFed. The affidavit of mailing attests that a witness, Ms. Favretto, caused notice to be mailed to WaFed on January 28, 2011. CP 119. This affidavit was executed near the time of the events it memorializes. *Id.* This notarized affidavit of mailing is sufficient

evidence of service. Its language satisfies the requirements of legal service in other contexts. *See* RCW 11.76.040 (PR required to provide notice of place and time of hearing by caus[ing] a copy of the notice "to be mailed"). It would be news to law offices across Washington that notice is inadequate where a declarant attests that he or she "caused to be served" a pleading or notice. WaFed's argument would require that lawyers and their legal assistants escort every pleading to the mail room and then on to the post office box in order to competently certify that service was effected.

WaFed also appears to take the position that a signed affidavit of mailing notice is insufficient proof of mailing unless the affidavit's author can confirm, based on first-hand knowledge, that the notice was subsequently received by the creditor. But this contention is inconsistent with the probate statute, which provides that actual notice is satisfied by "mailing" the probate notice to creditors by regular first class mail. The probate statute does not require that the creditor's receipt of notice be witnessed in person or otherwise confirmed.

WaFed complains (incorrectly) that the PR, his attorney Mr. Smith, and Ms. Favretto lacked personal knowledge of mailing the Probate Notice to Creditors to WaFed. Br. of App. 25-28. But the declaration that WaFed itself submitted demonstrates that bank officer Betsy Nelson

lacked personal knowledge of the facts in her declaration, including whether WaFed employees received the PR's probate notice to creditors. CP 191-94. Ms. Nelson's declaration includes statements about an "investigation" into whether pertinent employees received the PR's notice and how "such employees" responded to questions apparently asked during the investigation. *See* Br. of App. 30-31; CP 191-94. However, it is unclear whether Ms. Nelson was involved in the investigation, how she obtained the information about the investigation and whether she communicated with "every employee . . . who was a possible recipient" of the notice. CP 193. She lacks personal knowledge sufficient to testify to all the facts she submits. Ms. Nelson's declaration also relies on inadmissible hearsay. *See* CP 191-194. While it is clear that Ms. Favretto has sufficient personal knowledge of causing the Probate Notice to Creditors to be mailed, it is WaFed's evidence which is not admissible and not based on personal knowledge as required by CR 56(e).[3]

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[3] WaFed has technically failed to submit any evidence in this case because it did not properly submit its evidence pursuant to CR 56(e)'s requirements that sworn or certified copies of all papers attached to an affidavit be submitted. Instead, it submitted its evidence via two "requests for judicial notice," pointing the trial court to pleadings filed under other cause numbers. *See* CP 176-320; 379-87. At oral argument the trial court invited WaFed to present its evidence in a proper form, but WaFed failed to resubmit its evidence. Because the evidence on which WaFed relies

Even when viewing WaFed's evidence and all inferences therefrom in the light most favorable to WaFed, there is simply no dispute that the PR provided the probate notice to creditors as required under the non-claim statute, as Ms. Favretto's ***contemporaneous*** signed and sworn affidavit of mailing demonstrates. *See Ensley v. Mollmann*, 155 Wn. App. at 750-51; CP 119. WaFed's speculative assertion that a genuine issue of material fact remains is unsupported by the evidence and contrary to the requirements of the non-claim statute. *See Turngren v. King County*, 33 Wn. App. at 84. No evidence contradicts the affidavit attesting that the notice was mailed; the PR is entitled to judgment as a matter of law.

By contending that the PR must establish the chain of custody of the notice to creditors in order to prove that actual notice was made, WaFed is attempting to change the probate statute's standard for "actual notice." Contrary to WaFed's argument, the probate statute requires no further notice from the PR to trigger the time period for filing a creditor's claim with an estate. *See* RCW 11.40.051. The legislature expressly established the requirements of notice. It presumably sought to allow notice by a means that would reduce the costs for settling estates, and would be affordable for estates large and small alike. The legislature

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was never properly admitted in the trial court, it is not preserved on appeal.

could have required personal service, akin to a summons, but chose not to do this. The legislature presumably hoped to avoid litigation over whether such notice was effected, and so created a simple and efficient system, via first class mail, for establishing that notice was effected. WaFed's argument, if it prevails, would eviscerate the effectiveness of notice by mail as called for by the Washington legislature. It would open the door to any litigant with sufficient resources to defeat the finality contemplated by the non-claim statute by hauling such issues into court in order to argue that "the mail never arrived." Because the probate statute imposes no such enhanced notice requirements, and WaFed provides no legal authority to support its position, this Court should reject its argument.

F. The Evidence Submitted by the PR Demonstrates that the PR Provided Actual Notice

The non-claim probate statute is clear that once the PR provides actual notice to creditors, creditors must file their claims against the estate within 30 days or 4 months. RCW 11.40.051. Here, the PR mailed notice to creditors on January 28, 2011, and WaFed was required to file a creditor's claim by the later of February 27, 2011 (30 days) or May 7, 2010 (four months after the date of first publication of the notice on January 7, 2010). RCW 11.40.051. *See* CP 106. However, it is undisputed that WaFed failed to file a creditor's claim until May 10, 2011,

see CP 122, which is more than 16 months after the first date of publication and more than 70 days after the date of mailing notice.

Where, as here, a creditor misses the deadline for filing a creditor's claim against an estate, it is forever barred from doing so pursuant to the non-claim statute. The undisputed facts demonstrate that because the PR provided actual notice and WaFed failed to file its creditors claim until well after the deadlines set forth in RCW 11.40.051, the claim filing period has lapsed, and WaFed is precluded from filing a creditor's claim to collect the debt owed on the Promissory Note. WaFed's argument to the contrary is unavailing and unsupported by the evidence of record.

IV. CONCLUSION

The probate laws seek to promptly administer estates and settle expectations. There is no material dispute of fact that the PR gave actual notice and WaFed failed to file its creditor's claim in a timely manner. WaFed's apparent failure in this case to adjust its practices to the declining real estate market and abide by the rules it knows well prevents it from recovering on the Promissory Note (though it still can recover on the Deed of Trust). To hold otherwise would award a windfall to WaFed. The Court should affirm the trial court's order granting PR's motion for summary judgment against WaFed and the trial court's award of attorney fees and costs to the PR.

In addition, based on the Promissory Note's unilateral provision for attorney fees and RCW 11.96A.150 (TEDRA), this Court should award attorney fees and costs to the PR pursuant to RAP 18.1(a) for the expense the estate incurred in defending against WaFed's appeal.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 26th day of November, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered by messenger to the following counsel of record:

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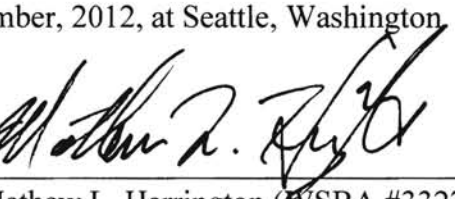
Dated this 26th day of November, 2012, at Seattle, Washington.



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