

No. 66793-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

RICHARD STALLWORTHY,

Appellant,

v.

JUDITH DYKES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case is a straight-forward example of the fact that claims asserted outside the applicable statutory time limitations are barred, as well as that summary judgment is proper where the nonmoving party presents no persuasive evidence in response to the moving party's adequate evidence.

In this litigation, Appellant Richard Stallworthy ("Mr. Stallworthy") asserted claims against the estate of Larry Leo Dykes ("Mr. Dykes"). But Mr. Stallworthy's claims are time-barred, for two independent reasons. First, Mr. Stallworthy failed to present his claims in the probate of Mr. Dykes's estate within the four-month claim period mandated by RCW §11.40.051(1)(b)(i). Second, after his claims were rejected in probate, Mr. Stallworthy failed to commence suit within the thirty-day time limit mandated by RCW §11.40.100, given that he did not (and has not) properly served his summons and complaint in this litigation. Accordingly, the trial court did not err in granting summary judgment dismissing Mr. Stallworthy's claims.

II. ASSIGNMENTS OF ERROR

1. Whether the trial court correctly concluded that Mr. Stallworthy was not a "reasonably ascertainable creditor" and that his claims are therefore barred under RCW §11.40.051 because

Mr. Stallworthy did not present his claims in probate within that statute's four-month claim period.

2. Whether the trial court correctly concluded that Mr. Stallworthy's claims are barred for the separate reason that he failed to satisfy RCW §11.40.100's thirty-day time period to commence litigation after rejection of his claims in probate, where Mr. Stallworthy did not (and has not) properly served his summons and complaint in this litigation.

III. STATEMENT OF THE CASE

Mr. Dykes passed away on August 12, 2009. Probate of his will was commenced in King County Superior Court in Seattle on September 14, 2009 (Case Number 09-4-04760-7). Clerks Papers ("CP") at 34. Appellee Judith Dykes ("Mrs. Dykes") — Mr. Dykes's widow and the Personal Representative of Mr. Dykes's estate — reviewed Mr. Dykes's correspondence and financial records, per RCW §11.40.040. CP at 54, 73-79. Mrs. Dykes did not identify Mr. Stallworthy as a creditor of Mr. Dykes. CP at 77.

Mrs. Dykes published a notice to creditors of the probate proceedings in the Seattle Daily Journal of Commerce on the 9th, 16th, and 23rd of October, 2009. CP at 34-35. On or about March 4, 2010 — nearly five months after the first publication of the notice to creditors —

Mr. Stallworthy presented in probate his purported creditor claims against Mr. Dykes's estate.¹ CP at 37-38. Mrs. Dykes rejected Mr. Stallworthy's claims and mailed a notice of the rejection to Mr. Stallworthy on March 18, 2010. CP at 40-46.

On April 19, 2010, Mr. Stallworthy filed the litigation that underlies this appeal, asserting his purported claims against Mr. Dykes's estate. CP at 1-5. But Mr. Stallworthy did not properly serve his summons and complaint on Mrs. Dykes, nor has he done so to date. CP at 60.

Mr. Stallworthy bases his claims on expenditures that Mr. Dykes purportedly made from Mr. Stallworthy's account, as Power of Attorney for Mr. Stallworthy while Mr. Stallworthy was in a coma. CP at 3-4. In particular, Mr. Stallworthy alleges that Mr. Dykes paid legal fees out of Mr. Stallworthy's bank and credit card accounts for litigation commenced by Mr. Stallworthy's wife, Linda Norton Stallworthy, regarding her mother's estate. CP at 3-4. Mr. Stallworthy also alleges that Mr. Dykes used Mr. Stallworthy's funds to repair Mr. Stallworthy's condominium "to get it into saleable condition where its abandonment might have been a better course of action." CP at 4. In addition, Mr. Stallworthy alleges that Mr. Dykes paid legal fees apparently related to the preparation of

¹ Mr. Stallworthy was aware of Mr. Dykes's death long before Mr. Stallworthy presented his claims in probate. CP at 15:21-16:22, 28.

Mrs. Stallworthy's will. CP at 4. Finally, Mr. Stallworthy alleges that Mr. Dykes assured him that Mrs. Stallworthy's DSHS health care would continue after their marriage, but that her DSHS insurance in fact terminated after they married. CP at 4.

Mrs. Dykes moved for summary judgment dismissing all of Mr. Stallworthy's claims, on the grounds that Mr. Stallworthy's claims are time-barred. CP at 13-54. In particular, Mr. Stallworthy was not a "reasonably ascertainable creditor" for purposes of RCW §§11.40.040 and .051. Thus, RCW §11.40.051(1)(b)(i) required Mr. Stallworthy to present his claims against Mr. Dykes's estate within four months after Mrs. Dykes's first publication of the notice to creditors.² As discussed below, Mr. Stallworthy was not "reasonably ascertainable" for several reasons. Given that Mr. Stallworthy did not present his claims until nearly five months after first publication of the notice to creditors, Mrs. Dykes asserted in her motion for summary judgment that Mr. Stallworthy's claims are barred by RCW §11.40.051(1). CP at 19:9-20:4. Mrs. Dykes also argued that Mr. Stallworthy did not properly serve his summons and complaint, and that his claims are barred because he failed to satisfy RCW §11.40.100's mandate that a creditor must bring suit

² In contrast, RCW §11.40.051(1)(b)(ii) provides a longer, twenty-four month claim period for creditors that *are* "reasonably ascertainable" but are not served or mailed notice of the probate.

within thirty days after notification that his claims have been rejected in probate, else the claims are forever barred. CP at 17:15-22, 20:5-21:6.

In support of her summary judgment motion, Mrs. Dykes submitted an affidavit and certificate describing that as Personal Representative of Mr. Dykes's estate, she had reviewed Mr. Dykes's correspondence and financial records and did not ascertain any inkling that Mr. Stallworthy was a creditor.³ CP at 54, 73-79. Per RCW §11.40.040, Mrs. Dykes's affidavit created a presumption that Mr. Stallworthy is not a "reasonably ascertainable creditor." In response to Mrs. Dykes's motion, Mr. Stallworthy did not submit *any* evidence that Mrs. Dykes's review should have identified him as a creditor. CP at 58-72.

On October 29, 2010, the trial court heard oral argument on Mrs. Dykes's summary judgment motion. At the hearing, the trial court granted Mrs. Dykes's motion, dismissing Mr. Stallworthy's claims in their entirety, and requested that the parties present a revised form of order. Verbatim Report of Proceedings before the Honorable Richard Eadie on October 29, 2010 ("RP") at 29:2-30:8. In addition to submitting a proposed form of order, Mr. Stallworthy also filed a "Response to (Proposed) Defendants Order for Summary Judgment" on November 22,

³ The first page of Mrs. Dykes's affidavit was filed with her motion for summary judgment, but the subsequent pages were inadvertently omitted. CP at 54. The error was corrected and her complete affidavit and certificate were filed before the trial court heard oral argument and ruled on the motion. CP at 73-79.

2010, and he filed a “Response to Notice of Presentation (Proposed) Defendants Order for Summary Judgment” on December 20, 2010. CP at 84-89, 93-98. In both filings, Mr. Stallworthy claimed that he was a “reasonably ascertainable creditor,” but he did not provide any supporting evidence. CP at 88, 95-96.

On December 30, 2010, the trial court entered its Order of Summary Judgment, finding that Mr. Stallworthy was not a “reasonably ascertainable creditor” for purposes of RCW §§11.40.040 and .051. CP at 103-105.

Mr. Stallworthy moved for reconsideration of the trial court’s summary judgment order on January 7, 2011. CP at 106-111. In support of his motion for reconsideration, Mr. Stallworthy submitted a copy of a single check, apparently written on his bank account by Mr. Dykes as Power of Attorney for Mr. Stallworthy. CP at 111. Mr. Stallworthy argued in his motion that, given that his name and address appeared on the check, he was, in fact, a “reasonably ascertainable creditor.” CP at 107. Mr. Stallworthy did not submit any additional evidence, nor did he assert (let alone demonstrate) that the check was among Mr. Dykes’s correspondence or financial records — which Mrs. Dykes reviewed, as discussed above.

The trial court denied Mr. Stallworthy's motion for reconsideration, reiterating that Mr. Stallworthy's "claim in probate, upon which this action is based, was not filed in a timely manner, nor was this suit served in a timely manner, either of which is a basis to grant summary judgment of dismissal."⁴ CP at 112. Mr. Stallworthy commenced this appeal of the trial court's order denying his motion for reconsideration.

IV. ARGUMENT

A. Standard Of Review.

This Court reviews decisions granting motions for summary judgment de novo. *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 325 n.1, 254 P.3d 895 (2011) (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)). A trial court's summary judgment should be affirmed when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* The moving party has the initial burden of showing to the trial court that there is no genuine issue of

⁴ During the October 29, 2010 hearing on Mrs. Dykes's motion for summary judgment, the trial court had also considered whether Mr. Stallworthy had filed his complaint in Superior Court — as opposed to his claims in probate — within RCW §11.40.100's thirty-day time limit. *See, e.g.*, RP at 21:5-22:19, 28:13-18. In its order denying reconsideration, the trial court suggested that Mr. Stallworthy may have indeed filed his complaint within the thirty-day time limit. CP at 112. But the trial court correctly concluded that issue was not relevant and did not warrant reconsideration given that, regardless, Mr. Stallworthy's claims are barred for the two, independent reasons discussed herein — namely that (1) Mr. Stallworthy did not file his claims in probate within RCW §11.40.051(1)(b)(i)'s four-month claim period, and (2) he failed to timely serve Mrs. Dykes with his summons and complaint. CP at 112.

material fact. *Id.* Once the moving party has satisfied that burden, the nonmoving party must present evidence to the trial court showing that there are material facts in dispute. *Id.* If the nonmoving party fails to do so, it is proper for the trial court to grant summary judgment. *Id.*

B. The Trial Court Properly Concluded That Mr. Stallworthy's Claims Are Barred By RCW §11.40.051 Because Mr. Stallworthy Did Not Present His Claims In Probate Within The Four-Month Statutory Claim Period.

1. Mr. Stallworthy is not a “reasonably ascertainable creditor” and did not present his claims in probate within RCW §11.40.051(1)(b)(i)’s four-month statutory claim period; thus, his claims are barred.

In Mr. Stallworthy’s first, second, third, and fifth assignments of error, Mr. Stallworthy contends that the trial court erred by concluding that he was not a “reasonably ascertainable creditor” and determining that his claims are barred as a result of his failure to present his claims in probate within RCW §11.40.051’s four-month claim period for creditors that are not “reasonably ascertainable.” Opening Brief of Appellant/Plaintiff, Richard Stallworthy (“Br. of App.”) at 6-8, 10-11, 14-15. However, the trial court did not err.

RCW §11.40.040 provides

(1) For purposes of RCW 11.40.051, a “reasonably ascertainable” creditor of the decedent is one that the personal representative would discover upon exercise of reasonable diligence. The personal representative is deemed to have exercised reasonable diligence upon conducting a reasonable review of the decedent’s correspondence, including correspondence received after the date

of death, and financial records, including personal financial statements, loan documents, checkbooks, bank statements, and income tax returns, that are in the possession of or reasonably available to the personal representative.

(2) If the personal representative conducts the review, the personal representative is presumed to have exercised reasonable diligence to ascertain creditors of the decedent and any creditor not ascertained in the review is presumed not reasonably ascertainable within the meaning of RCW 11.40.051. These presumptions may be rebutted only by clear, cogent, and convincing evidence.

(3) The personal representative may evidence the review and resulting presumption by filing with the court an affidavit regarding the facts referred to in this section. ...

Mrs. Dykes exercised the reasonable diligence required under the statute and did not discover Mr. Stallworthy's purported claims against Mr. Dykes's estate. Mrs. Dykes evidenced the same in an affidavit and a certificate filed with the trial court. CP at 54, 73-79. Per RCW §11.40.040(2) and (3), Mrs. Dykes's affidavit established a presumption that she exercised the requisite reasonable diligence and that Mr. Stallworthy is not a "reasonably ascertainable creditor."⁵ The burden

⁵ In Mr. Stallworthy's fifth assignment of error, he contends that the trial court erred by accepting Mrs. Dykes's praecipe (CP at 73-79) correcting the inadvertent omission of certain pages from her affidavit. Br. of App. at 8-9, 12-13. But Mrs. Dykes's praecipe was filed before oral argument on her summary judgment motion, and the trial court did not err in exercising its discretion to accept that evidence. *See, e.g., Lampson Universal Rigging, Inc. v. WPPSS*, 44 Wn. App. 237, 241, 721 P.2d 996 (1986) (allowing presentation of additional evidence at summary judgment hearing). Moreover, the trial court did not enter its summary judgment order until two months after it heard oral argument. CP at 103-105. During those two months, Mr. Stallworthy filed two lengthy objections to the trial court's oral ruling, asserting in both that he was not a reasonably ascertainable creditor but without submitting any supporting evidence to rebut Mrs. Dykes's affidavit. CP at 84-89, 93-98.

then shifted to Mr. Stallworthy to rebut this presumption by “clear, cogent, and convincing evidence.” *See* RCW §11.40.040(2); *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (“A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.”).

Mr. Stallworthy did not present *any* evidence for the trial court’s consideration in deciding Mrs. Dykes’s motion for summary judgment. *See, e.g.*, CP at 58-72. Since Mr. Stallworthy failed to present any evidence to rebut RCW §11.40.040’s presumption that he is not a “reasonably ascertainable creditor” — let alone the “clear, cogent, and convincing evidence” required by RCW §11.40.040(2) — the trial court properly concluded that Mr. Stallworthy was not a “reasonably ascertainable creditor.” CP at 105 (“the claims and the above entitled lawsuit of Richard Stallworthy, a non-ascertainable creditor, is hereby dismissed”).

RCW §11.40.051 establishes a four-month claim period for creditors that are not “reasonably ascertainable,” such as Mr. Stallworthy.

Mr. Stallworthy presented his claims outside this four-month claim period, and they are therefore barred. The statute provides:

(1) Whether or not notice is provided under RCW 11.40.020, a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent, if the claim or action is not already barred by an otherwise applicable statute of limitations, unless the creditor presents the claim in the manner provided in RCW 11.40.070 within the following time limitations:

(a) If the personal representative provided notice under RCW 11.40.020 and the creditor was given actual notice as provided in RCW 11.40.020(1)(c), the creditor must present the claim within the later of: (i) Thirty days after the personal representative's service or mailing of notice to the creditor; and (ii) four months after the date of first publication of the notice;

(b) If the personal representative provided notice under RCW 11.40.020 and the creditor was not given actual notice as provided in RCW 11.40.020(1)(c):

(i) If the creditor was not reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within four months after the date of first publication of notice;

(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

There is no dispute that (1) the date of first publication of Mrs. Dykes's notice to creditors was October 9, 2009; (2) Mr. Stallworthy did not present his claims in probate until March 4, 2010, nearly five months after the date of first publication of the notice; and (3) Mr. Stallworthy therefore failed to meet RCW §11.40.051(1)(b)(i)'s four-month claim period governing the claims of creditors that are not

“reasonably ascertainable.” CP at 34-35, 37-38; RP at 19:7-20:3 (Mr. Stallworthy conceding that he did not meet RCW §11.40.051(1)(b)(i)’s four-month claim period). Accordingly, having properly concluded that Mr. Stallworthy was not a “reasonably ascertainable creditor,” the trial court did not err in granting summary judgment dismissing Mr. Stallworthy’s claims as barred under RCW §11.40.051(1)(b)(i). CP at 105

Although Mr. Stallworthy did not present any evidence before the trial court entered its summary judgment order, in his motion for reconsideration of that order Mr. Stallworthy included a copy of a single check written on his account by Mr. Dykes as Mr. Stallworthy’s Power of Attorney, arguing that the check proved he was a “reasonably ascertainable creditor.” CP at 111. But Mr. Stallworthy did not timely submit the check to the trial court, as he did not present the check before the trial court ruled on Mrs. Dykes’s motion for summary judgment and he made no showing that the check was not available to him before the trial court’s ruling. *See Wagner Dev., Inc. v. Fid. & Deposit Co.*, 95 Wn. App. 896, 907, 977 P.2d 639 (“Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.”). The trial

court therefore properly concluded, in its discretion, that reconsideration of its summary judgment order was not warranted.⁶ CP at 112; *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988) (“A motion for reconsideration based upon CR 59 is addressed to the sound discretion of the trial court whose judgment will not be reversed absent a showing of manifest abuse.”).

Moreover, even if Mr. Stallworthy had timely presented the check to the trial court before it granted summary judgment, the check falls far short of the requisite “clear, cogent, and convincing evidence” to rebut RCW §11.40.040’s presumption that he is not a “reasonably ascertainable creditor.”

As an initial matter, Mr. Stallworthy made no showing that the check was among Mr. Dykes’s correspondence and financial records, which Mrs. Dykes reviewed in her search for creditors. CP at 107. Instead, Mr. Stallworthy suggests that the check was among *his own* records. *Id.* But RCW §11.40.040(1) provides that “reasonably ascertainable creditors” are only those creditors the personal representative would discover upon conducting a reasonable review of *the decedent’s*

⁶ Mr. Stallworthy’s *pro se* status did not require the trial court to overlook the fact that Mr. Stallworthy had not timely presented the check to the trial court. *See, e.g., In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983) (“the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel-both are subject to the same procedural and substantive laws”).

correspondence and financial records. Since Mr. Stallworthy did not describe, let alone show, that the check was among Mr. Dykes's correspondence and financial records, the check not only fails to supply the requisite "clear, cogent, and convincing evidence" that Mr. Stallworthy was a "reasonably ascertainable creditor," the check does not provide *any* basis to suspect that he was a "reasonably ascertainable creditor."

More importantly, even if Mrs. Dykes had reviewed the check, the check provides no suggestion of Mr. Stallworthy's purported claims against Mr. Dykes's estate. Mr. Stallworthy argues that the check should have sufficed to put Mrs. Dykes on notice of Mr. Stallworthy's purported claims and creditor status merely because Mr. Stallworthy's *name and address* appear on the check. Br. of App. at 6-7, 10-11, 14. In other words, Mr. Stallworthy asserts that any individual whose name and address appeared among Mr. Dykes's correspondence and financial records is a "reasonably ascertainable creditor" of Mr. Dykes's estate. Under that standard, a decedent's former high-school classmate would be a "reasonably ascertainable creditor" if the decedent's correspondence included a friendly letter from that classmate containing the classmate's name and address. Likewise, a decedent's employer would be a "reasonably ascertainable creditor" if the employer's name and address

appeared on the decedent's paystubs. However, that is not the applicable standard.

Instead, for an individual to be a "reasonably ascertainable creditor," the decedent's correspondence and financial records must reasonably suggest the individual's *claims* — not just the individual's name and address — and claims that are merely conjectural or future are not sufficient. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) ("Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in *Mullane*, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims."); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S. Ct. 652, 94 L. Ed. 865 (1950) ("Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee.").

Although there is a dearth of Washington authority interpreting RCW §11.40.040, the Washington Supreme Court has applied the same standard in determining whether creditors in bankruptcy are reasonably ascertainable, concluding that the debtor must have specific information that reasonably suggests the creditor's claim, not just the creditor's name

and address. *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 198, 165 P.3d 4 (2007) (“Creditors are considered reasonably ascertainable if the debtor has some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.”) (quotation omitted); *See also Chemetron Corp. v. Jones*, 72 F.3d 341, 348 (3d Cir. 1995) (debtors “cannot be required to provide actual notice to anyone who potentially could have been affected by their actions”).

Accordingly, the check Mr. Stallworthy submitted with his motion for reconsideration is not evidence that he was a “reasonably ascertainable creditor” because the check provides no suggestion of Mr. Stallworthy’s purported claims against Mr. Dykes’s estate. Specifically, the gravamen of Mr. Stallworthy’s claims is that expenditures made by Mr. Dykes as Power of Attorney for Mr. Stallworthy — to repair Mr. Stallworthy’s condominium and for Mr. Stallworthy’s wife’s legal fees — may have been unwise or improper.⁷ CP at 3-4. In contrast, the check that

⁷ As an aside, Mr. Stallworthy’s purported claims do not appear to even rise to the level of conjectural claims. For instance, Mr. Stallworthy contends that it may have been unwise to repair the condominium for sale, in light of an assessment against the condominium. CP at 4. But Mr. Stallworthy concedes that Mr. Dykes was not aware of that assessment. CP at 4 (Mr. Dykes “proceed[ed] in total ignorance of this fact”). Likewise, Mr. Stallworthy in fact received funds recovered in his wife’s litigation. CP at 16:2-14, 28. Thus, he would be hard-pressed to show that spending funds to pursue the litigation was unwise and that “there is no possibility that [he] would ever benefit from the spending.” CP at 3.

Mr. Stallworthy submitted with his motion for reconsideration suggests only that Mr. Dykes was acting as Mr. Stallworthy's Power of Attorney, but the check does not create any suspicion that those actions were improper. Thus, the check is wholly insufficient to render Mr. Stallworthy a "reasonably ascertainable creditor." *See, e.g., Jones v. Sun Bank/Miami, N.A.*, 609 So. 2d 98, 103 (Fla. App. 1992) (affirming trial court's conclusion that purchaser of allegedly contaminated gasoline station was not "known or reasonably ascertainable creditor" of seller's estate because purchaser never told seller about alleged environmental contamination, and telephone calls to seller's residence were requests for information, not notification of any dispute); *see also U.S. Trust Co. of Fla. Sav. Bank v. Haig*, 694 So. 2d 769 (Fla. App. 1997) (buyer/mortgagee of residence, with mortgage offset rights against deceased seller/mortgagor for structural defects in residence, was not reasonably ascertainable creditor of deceased seller/mortgagor because buyer/mortgagee's offset claims were merely contingent).

In short, Mr. Stallworthy did not submit any timely or viable evidence — let alone the requisite "clear, cogent, and convincing evidence" — to rebut RCW §11.40.040's presumption that he is not a "reasonably ascertainable creditor." The trial court therefore properly

concluded that RCW §11.40.051(1)(b)(i)'s four-month claim period governs and bars Mr. Stallworthy's claims.

2. The form of the trial court's summary judgment order was proper.

In his sixth and seventh assignments of error, Mr. Stallworthy contends that the trial court's summary judgment order listed "too few documents" considered by the trial court and failed to include findings of fact. Br. of App. at 9, 13. However, the form of the trial court's order was entirely proper.

First, the order specifically described that "[o]ral argument was heard from all parties," that "the motion, memoranda of law, [and] response to the motion by the opposing party were submitted in addition to oral argument," and that "[t]he Court considered Defendant's motion, memorandum and attachments, and Plaintiff's response with attachments." CP at 103-104. The order sufficiently identified the materials reviewed by the trial court, which comprised the documents and evidence presented to the trial court related to the summary judgment motion. *See* CR 56(h).

Second, it is well settled in Washington that summary judgment orders need not include findings of fact. *See, e.g., Wash. Optometric Ass'n v. Pierce County*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968) ("we have held on numerous occasions that findings of fact and conclusions of

law are superfluous in both summary judgment and judgment on the pleadings proceedings”); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) (“[f]indings of fact and conclusions of law are not necessary on summary judgment”).

Accordingly, the form of the trial court’s summary judgment order was proper.

C. **Mr. Stallworthy’s Claims Are Barred By RCW §11.40.100 Because He Did Not Properly Serve Mrs. Dykes With His Summons And Complaint.**

In his fourth assignment of error, Mr. Stallworthy contends that the trial court erred by concluding that Mr. Stallworthy’s claims are barred as a result of his failure to properly serve Mrs. Dykes with his summons and complaint. Br. of App. at 8, 11-12. Mr. Stallworthy’s failure to properly serve Mrs. Dykes does, in fact, render his claims barred under RCW §11.40.100.

RCW §11.40.100 provides: “If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection or the claim is forever barred.” On March 18, 2010, Mrs. Dykes notified Mr. Stallworthy by mail that his claims were rejected. CP at 40-46; RCW §11.40.100(1) (“The personal representative shall notify the claimant of the rejection by personal service or certified mail addressed to the

claimant or the claimant's agent, if applicable, at the address stated in the claim. The date of service or of the postmark is the date of notification.”). Mr. Stallworthy filed this litigation on April 19, 2010. CP at 1-4. But it is undisputed that he has not served Mrs. Dykes personally with his summons and complaint. Br. of App. at 8, 11-12, A-4; CP at 60.

Under RCW §4.16.170, where a plaintiff commences a lawsuit by filing the complaint, the lawsuit is deemed to not have been commenced for purposes of tolling any statute of limitations, if the plaintiff fails to serve the defendant personally within ninety days after filing the complaint. Since Mr. Stallworthy did not effect service of original process on Mrs. Dykes personally within ninety days after he filed this lawsuit, the lawsuit is “deemed to not have been commenced” for purposes of any applicable statute of limitations. *See* RCW §4.16.170. RCW §11.40.100 is such a statute and provides that Mr. Stallworthy's claims are “forever barred” unless Mr. Stallworthy commenced suit within thirty days after March 18, 2010 — the date Mrs. Dykes notified Mr. Stallworthy that his claims were rejected. CP at 40-46. But Mr. Stallworthy did not commence suit within the statute's thirty-day window, given that he did not serve Mrs. Dykes personally within ninety days after filing this litigation. Thus, his claims are “forever barred” under RCW §11.40.100.

Instead of serving Mrs. Dykes personally, Mr. Stallworthy asserts that he mailed the summons and complaint to Mrs. Dykes's attorney. Br. of App. at 12, A-4. But that mailing did not effect personal service of original process on Mrs. Dykes.

As an initial matter, since Mrs. Dykes did not authorize her attorney to accept service of original process on her behalf (CP at 8:22), Mr. Stallworthy could not effect service of his summons and complaint on Mrs. Dykes through her attorney. *See* Superior Court Civil Rule ("CR") 4(d) (governing service of original process); *Hastings v. Grooters*, 144 Wn. App. 121, 131, 182 P.3d 447 (2008) (CR 5's provisions regarding service on party through attorney do not apply to original service of process). Instead, Mr. Stallworthy was required to serve Mrs. Dykes personally. *See* CR 4(d); RCW §4.28.080(15). Moreover, service of original process solely by mail is proper only in limited circumstances that are not present here, and, even then, such service is proper only after the trial court orders that service may be made by mail, which the trial court did not order here. *See* CR 4(d)(4).

Accordingly, Mr. Stallworthy's claims are barred under RCW §11.40.100, and summary judgment dismissing those claims was proper.⁸

D. Attorneys' Fees and Costs.

In Washington, attorneys' fees may be recovered pursuant to statute, contractual obligations, or equitable grounds. *Weiss v. Bruno*, 83 Wn.2d 911, 912, 523 P.2d 915 (1984). Per RCW 11.96A.150 and Rule of Appellate Procedure ("RAP") 18.1, Mrs. Dykes respectfully requests that this Court award her reasonable attorneys' fees and costs incurred in this appeal.

RCW 11.96A.150 provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it

⁸ Mr. Stallworthy's opening brief lists an eighth and a ninth assignment of error. Br. of App. at 9, 13. But Mr. Stallworthy has not articulated cognizable errors, nor has he propounded discernible arguments or cited any authority in support of these assignments of error. Accordingly, Mrs. Dykes cannot respond to these assignments of error, and they should not be considered by this Court. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignment of error is waived if not supported by argument in opening brief); *Bohn v. Cody*, 119 Wn.2d 357, 368, 832 P.2d 71 (1992) (appellate court will not consider inadequately briefed argument); RAP 10.3(a)(6). This Court has already given Mr. Stallworthy a second chance to properly present his arguments, by allowing Mr. Stallworthy to re-file his brief after the Court rejected his first brief on July 7, 2011 for failing to comply with the Rules of Appellate Procedure. Mr. Stallworthy has had ample opportunity to prepare his brief and the arguments therein.

deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

The costs of this litigation, and this appeal in particular, have unduly burdened Mrs. Dykes's personal finances. Mr. Dykes's estate was closed on or about October 27, 2010. All assets of his estate have been distributed. Thus, Mrs. Dykes has expended her own personal funds to cover her attorneys' fees and costs incurred in this appeal. As discussed above, it was entirely proper for the trial court to grant summary judgment dismissing Mr. Stallworthy's claims. Mr. Stallworthy's prolonging of this litigation, and his pursuit of this appeal in particular, has placed an unnecessary and significant financial burden on Mrs. Dykes, which she should not have to bear.

Therefore, this Court should award Mrs. Dykes her attorneys' fees and costs incurred in this appeal.

V. CONCLUSION

The trial court properly concluded, based on the evidence before it,

that Mr. Stallworthy was not a “reasonably ascertainable creditor,” that he did not present his claims in probate within RCW §11.40.051(1)(b)(i)’s applicable four-month claim period, and that his claims are therefore barred. Likewise, the trial court properly concluded that Mr. Stallworthy’s claims are barred for the independent reason that Mr. Stallworthy did not commence suit within RCW §11.40.100’s thirty-day time period, given that Mr. Stallworthy did not (and has not) properly served Mrs. Dykes with his summons and complaint. Accordingly, the trial court did not err in granting Mrs. Dykes summary judgment and denying, in its discretion, Mr. Stallworthy’s motion for reconsideration.

RESPECTFULLY SUBMITTED this 22nd day of August, 2011.

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Attorneys for Respondent Judith Dykes

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing **BRIEF OF RESPONDENT** was hand-delivered and mailed, postage prepaid, to Appellant Richard Stallworthy, at the address shown below, on August 22, 2011.

Richard Stallworthy
17525 80th Avenue NE #110
Kenmore, WA 98028
Telephone: 425.949.7927

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

Executed at Seattle, Washington, this 22nd day of August, 2011.

A handwritten signature in black ink, appearing to read 'Kit W. Roth', with a long horizontal flourish extending to the right.

Kit W. Roth, WSBA No. 33059

APPENDIX A

RULE 4
PROCESS

(a) Summons--Issuance.

(1) The summons must be signed and dated by the plaintiff or his attorney, and directed to the defendant requiring him to defend the action and to serve a copy of his appearance or defense on the person whose name is signed on the summons.

(2) Unless a statute or rule provides for a different time requirement, the summons shall require the defendant to serve a copy of his defense within 20 days after the service of summons, exclusive of the day of service. If a statute or rule other than this rule provides for a different time to serve a defense, that time shall be stated in the summons.

(3) A notice of appearance, if made, shall be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons. In condemnation cases a notice of appearance only shall be served on the person whose name is signed on the petition.

(4) No summons is necessary for a counterclaim or cross claim for any person who previously has been made a party. Counterclaims and cross claims against an existing party may be served as provided in rule 5.

(b) Summons.

(1) Contents. The summons for personal service shall contain:

(i) the title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;

(ii) a direction to the defendant summoning him to serve a copy of his defense within a time stated in the summons;

(iii) a notice that, in case of failure so to do, judgment will be rendered against him by default. It shall be signed and dated by the plaintiff, or his attorney, with the addition of his post office address, at which the papers in the action may be served on him by mail.

(2) Form. Except in condemnation cases, and except as provided in rule 4.1, the summons for personal service in the state shall be substantially in the following form:

SUPERIOR COURT OF WASHINGTON
FOR (_____) COUNTY

_____,)
Plaintiff,) No. _____
v.)
_____,)
Defendant.) SUMMONS (20 days)

TO THE DEFENDANT: A lawsuit has been started against you in the above entitled court by _____, plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice

before a default judgment may be entered.

You may demand that the plaintiff file this lawsuit with the court. If you do so, the demand must be in writing and must be served upon the person signing this summons. Within 14 days after you serve the demand, the plaintiff must file this lawsuit with the court, or the service on you of this summons and complaint will be void.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time.

This summons is issued pursuant to rule 4 of the Superior Court Civil Rules of the State of Washington.

(signed) _____

Print or Type Name

() Plaintiff () Plaintiff's Attorney

P. O. Address _____

Dated _____

Telephone Number _____

(c) By Whom Served. Service of summons and process, except when service is by publication, shall be by the sheriff of the county wherein the service is made, or by his deputy, or by any person over 18 years of age who is competent to be a witness in the action, other than a party. Subpoenas may be served as provided in rule 45.

(d) Service.

(1) Of Summons and Complaint. The summons and complaint shall be served together.

(2) Personal in State. Personal service of summons and other process shall be as provided in RCW 4.28.080-.090, 23B.05.040, 23B.15.100, 46.64.040, and 48.05.200 and .210, and other statutes which provide for personal service.

(3) By Publication. Service of summons and other process by publication shall be as provided in RCW 4.28.100 and .110, 13.34.080, and 26.33.310, and other statutes which provide for service by publication.

(4) Alternative to Service by Publication. In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing. Service under this subsection has the same jurisdictional effect as service by publication.

(5) Appearance. A voluntary appearance of a defendant does not preclude his right to challenge lack of jurisdiction over his person, insufficiency of process, or insufficiency of service of process pursuant to rule 12(b).

(e) Other Service.

(1) Generally. Whenever a statute or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or not found within the state, service may be made under the circumstances and in the manner prescribed by the statute or order, or if there is no provision prescribing the manner of service, in a manner prescribed by this rule.

(2) Personal Service Out of State--Generally. Although rule 4 does not generally apply to personal service out of state, the prescribed form of

summons may, with the modifications required by statute, be used for that purpose. See RCW 4.28.180.

(3) Personal Service Out of State--Acts Submitting Person to Jurisdiction of Courts. (Reserved. See RCW 4.28.185.)

(4) Nonresident Motorists. (Reserved. See RCW 46.64.040.)

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state, and when a statute or these rules so provide beyond the territorial limits of the state. A subpoena may be served within the territorial limits as provided in rule 45 and RCW 5.56.010.

(g) Return of Service. Proof of service shall be as follows:

(1) If served by the sheriff or his deputy, the return of the sheriff or his deputy endorsed upon or attached to the summons;

(2) If served by any other person, his affidavit of service endorsed upon or attached to the summons; or

(3) If served by publication, the affidavit of the publisher, foreman, principal clerk, or business manager of the newspaper showing the same, together with a printed copy of the summons as published; or

(4) If served as provided in subsection (d)(4), the affidavit of the serving party stating that copies of the summons and other process were sent by mail in accordance with the rule and directions by the court, and stating to whom, and when, the envelopes were mailed.

(5) The written acceptance or admission of the defendant, his agent or attorney;

(6) In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or before a clerk of a court of record.

(7) In case of service otherwise than by publication, the return, acceptance, admission, or affidavit must state the time, place, and manner of service. Failure to make proof of service does not affect the validity of the service.

(h) Amendment of Process. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served; or (E) pursuant to the means and terms of any applicable treaty or convention; or (F) by diplomatic or consular officers when authorized by the United States Department of State; or (G) as directed by order of the court. Service under (C) or (G) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court or by the foreign court. The method for service of process in a foreign country must comply with applicable treaties, if any, and must be reasonably calculated, under all the circumstances, to give actual notice.

(2) Return. Proof of service may be made as prescribed by section (g) of this rule, or by the law of the foreign country, or by a method provided in any applicable treaty or convention, or by order of the court. When service is made pursuant to subsection (1)(D) of this section, proof of

service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(j) Other Process. These rules do not exclude the use of other forms of process authorized by law.

RULE CR 5
SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service--How Made.

(1) On Attorney or Party. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service on an attorney is subject to the restrictions in subsections (b)(4) and (5) of this rule and in rule 71, Withdrawal by Attorneys.

(2) Service by Mail.

(A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day.

(B) Proof of service by mail. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. The certificate of an attorney may be in form substantially as follows:

CERTIFICATE

I certify that I mailed a copy of the foregoing _____ to (John Smith), (plaintiff's) attorney, at (office address or residence), and to (Joseph Doe), an additional (defendant's) attorney (or attorneys) at (office address or residence), postage prepaid, on (date).

(John Brown)
Attorney for (Defendant) William Noe

(3) Service on Nonresidents. Where a plaintiff or defendant who has appeared resides outside the state and has no attorney in the action, the service may be made by mail if his residence is known; if not known, on the clerk of the court for him. Where a party, whether resident or nonresident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. If the attorney does not have an office within the state or has removed his residence from the state, the service may be upon him personally either within or without the state, or by mail to him at either his place of residence or his office, if either is known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. If the residence of neither the party nor his attorney, nor the office address of the attorney is known, an affidavit of the attempt to serve shall be filed with the clerk of the court.

(4) Service on Attorney Restricted After Final Judgment. A party, rather than the party's attorney, must be served if the final judgment or decree has been entered and the time for filing an appeal has expired, or if an appeal has been taken (i) after the final judgment or decree upon remand has been entered or (ii) after the mandate has been issued affirming the judgment or decree or disposing of the case in a manner calling for no further action by the trial court. This rule is subject to the exceptions defined in subsection (b)(6).

(5) Required Notice to Party. If a party is served under circumstances described in subsection (b)(4), the paper shall (i) include a notice to the party of the right to file written opposition or a response, the time within which such opposition or response must be filed, and the place where it must be filed; (ii) state that failure to respond may result in the requested relief being granted; and (iii) state that the paper has not been served on that party's lawyer.

(6) Exceptions. An attorney may be served notwithstanding subsection (b)(4) of this rule if (i) fewer than 63 days have elapsed since the filing of any paper or the issuance of any process in the action or proceeding or (ii) if the attorney has filed a notice of continuing representation.

(7) Service by Other Means. Service under this rule may be made by delivering a copy by any other means, including facsimile or electronic means, consented to in writing by the person served. Service by facsimile or electronic means is complete on transmission when made prior to 5:00 p.m. on a judicial day. Service made on a Saturday, Sunday, holiday or after 5:00 p.m. on any other day shall be deemed complete at 9:00 a.m. on the first judicial day thereafter; Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service under this subsection is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) Service--Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own

initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing.

(1) Time. Complaints shall be filed as provided in rule 3(a). Except as provided for discovery materials in section (i) of this rule and for documents accompanying a notice under ER 904(b), all pleadings and other papers after the complaint required to be served upon a party shall be filed with the court either before service or promptly thereafter.

(2) Sanctions. The effect of failing to file a complaint is governed by rule 3. If a party fails to file any other pleading or paper under this rule, the court upon 5 days' notice of motion for sanctions may dismiss the action or strike the pleading or other paper and grant judgment against the defaulting party for costs and terms including a reasonable attorney fee unless good cause is shown for, or justice requires, the granting of an extension of time.

(3) Limitation. No sanction shall be imposed if prior to the hearing the pleading or paper other than the complaint is filed and the moving attorney is notified of the filing before he leaves his office for the hearing.

(4) Nonpayment. No further action shall be taken in the pending action and no subsequent pleading or other paper shall be filed until the judgment is paid. No subsequent action shall be commenced upon the same subject matter until the judgment has been paid.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him or her, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted elsewhere in these or other rules of court, or if authorized by the clerk of the receiving court. The clerk may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules or any local rules or practices.

(f) Other Methods of Service. Service of all papers other than the summons and other process may also be made as authorized by statute.

(g) Certified Mail. Whenever the use of "registered" mail is authorized by statutes relating to judicial proceedings or by rule of court, "certified" mail, with return receipt requested, may be used.

(h) Service of Papers by Telegraph. [Rescinded.]

(i) Discovery Material Not To Be Filed; Exceptions. Depositions upon oral examinations, depositions upon written questions, interrogatories and responses thereto, requests for production or inspection and responses thereto, requests for admission and responses thereto, and other discovery requests and responses thereto shall not be filed with the court unless for

use in a proceeding or trial or on order of the court.

(j) Filing by Facsimile. (Reserved. See GR 17--Facsimile Transmission.)

[Amended effective July 1, 1972; September 1, 1978; September 1, 1983;
September 1, 1988; September 1, 1993; September 17, 1993; October 29, 1993;
September 1, 2005.]

RULE 56
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to

permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

RULE 10.3
CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) Title Page. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) Introduction. A concise introduction. This section is optional. The introduction need not contain citations to the record of authority.

(4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(7) Conclusion. A short conclusion stating the precise relief sought.

(8) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

(b) Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

(c) Reply Brief. A reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be limited to a response to the issues in the brief to which the reply brief is directed.

(d) [Reserved; see rule 10.10]

(e) Amicus Curiae Brief. The brief of amicus curiae should conform to section (a), except assignments of error are not required and the brief should set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus. Amicus must review all briefs on file and avoid repetition of matters in other briefs.

(f) Answer to Brief of Amicus Curiae. The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae.

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed

instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(h) Assignments of Error on Review of Certain Administrative Orders. In addition to the assignments of error required by rule 10.3(a)(3) and 10.3(g), the brief of an appellant or respondent who is challenging an administrative adjudicative order under RCW 34.05 or a final order under RCW 41.64 shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.

[Amended December 5, 2002; September 1, 2006; amended effective September 1, 2010]

RULE 18.1
ATTORNEY FEES AND EXPENSES

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's

preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

[Amended to become effective December 29, 1998; December 5, 2002; September 1, 2003; September 1, 2006; September 1, 2010]

***** CHANGE IN 2011 *** (SEE 5213.SL) *****

Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

(1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

(2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.

(3) If against a school or fire district, to the superintendent or commissioner thereof or by leaving the same in his or her office with an assistant superintendent, deputy commissioner, or business manager during normal business hours.

(4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state.

(5) If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state.

(6) If against a domestic insurance company, to any agent authorized by such company to solicit insurance within this state.

(7) If against a foreign or alien insurance company, as provided in chapter 48.05 RCW.

(8) If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state.

(9) If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

(10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

(11) If against a minor under the age of fourteen years, to such minor personally, and also to his or her father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he or she resides, or in whose service he or she is employed, if such there be.

(12) If against any person for whom a guardian has been appointed for any cause, then to such guardian.

(13) If against a foreign or alien steamship company or steamship charterer, to any agent authorized by such company or charterer to solicit cargo or passengers for transportation to or from ports in the state of Washington.

(14) If against a self-insurance program regulated by chapter 48.62 RCW, as provided in chapter 48.62 RCW.

(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment.

[1997 c 380 § 1; 1996 c 223 § 1; 1991 sp.s. c 30 § 28; 1987 c 361 § 1; 1977 ex.s. c 120 § 1; 1967 c 11 § 1; 1957 c 202 § 1; 1893 c 127 § 7; RRS § 226, part. FORMER PART OF SECTION: 1897 c 97 § 1 now codified in RCW 4.28.081.]

Notes:

Rules of court: Service of process -- CR 4(d), (e).

Effective date, implementation, application – Severability – 1991 sp.s. c 30: See RCW 48.62.900 and 48.62.901.

Severability – 1977 ex.s. c 120: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 120 § 3.]

Service of process on

foreign corporation: RCW 23B.15.100 and 23B.15.310.

foreign savings and loan association: RCW 33.32.050.

nonadmitted foreign corporation: RCW 23B.18.040.

nonresident motor vehicle operator: RCW 46.64.040.

RCW 4.16.170

Tolling of statute — Actions, when deemed commenced or not commenced.

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

[1971 ex.s. c 131 § 1; 1955 c 43 § 3. Prior: 1903 c 24 § 1; Code 1881 § 35; 1873 p 10 § 35; 1869 p 10 § 35; RRS § 167, part.]

(1) Subject to subsection (2) of this section, a personal representative may give notice to the creditors of the decedent, in substantially the form set forth in RCW 11.40.030, announcing the personal representative's appointment and requiring that persons having claims against the decedent present their claims within the time specified in RCW 11.40.051 or be forever barred as to claims against the decedent's probate and nonprobate assets. If notice is given:

(a) The personal representative shall file the notice with the court;

(b) The personal representative shall cause the notice to be published once each week for three successive weeks in a legal newspaper in the county in which the estate is being administered;

(c) The personal representative may, at any time during the probate proceeding, give actual notice to creditors who become known to the personal representative by serving the notice on the creditor or mailing the notice to the creditor at the creditor's last known address, by regular first-class mail, postage prepaid; and

(d) The personal representative shall also mail a copy of the notice, including the decedent's social security number, to the state of Washington department of social and health services office of financial recovery.

The personal representative shall file with the court proof by affidavit of the giving and publication of the notice.

(2) If the decedent was a resident of the state of Washington at the time of death and probate proceedings are commenced in a county other than the county of the decedent's residence, then instead of the requirements under subsection (1)(a) and (b) of this section, the personal representative shall cause the notice to creditors in substantially the form set forth in RCW 11.40.030 to be published once each week for three successive weeks in a legal newspaper in the county of the decedent's residence and shall file the notice with the superior court of the county in which the probate proceedings were commenced.

[2005 c 97 § 4; 1999 c 42 § 601; 1997 c 252 § 8; 1974 ex.s. c 117 § 34; 1965 c 145 § 11.40.020. Prior: 1917 c 156 § 108; RRS § 1478; prior: 1883 p 29 § 1; Code 1881 § 1468.]

Notes:

Part headings and captions not law – Effective date – 1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Application – 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Application, construction – Severability – Effective date – 1974 ex.s. c 117: See RCW 11.02.080 and notes following.

(1) For purposes of RCW 11.40.051, a "reasonably ascertainable" creditor of the decedent is one that the personal representative would discover upon exercise of reasonable diligence. The personal representative is deemed to have exercised reasonable diligence upon conducting a reasonable review of the decedent's correspondence, including correspondence received after the date of death, and financial records, including personal financial statements, loan documents, checkbooks, bank statements, and income tax returns, that are in the possession of or reasonably available to the personal representative.

(2) If the personal representative conducts the review, the personal representative is presumed to have exercised reasonable diligence to ascertain creditors of the decedent and any creditor not ascertained in the review is presumed not reasonably ascertainable within the meaning of RCW 11.40.051. These presumptions may be rebutted only by clear, cogent, and convincing evidence.

(3) The personal representative may evidence the review and resulting presumption by filing with the court an affidavit regarding the facts referred to in this section. The personal representative may petition the court for an order declaring that the personal representative has made a review and that any creditors not known to the personal representative are not reasonably ascertainable. The petition must be filed under RCW 11.96A.080 and the notice specified under RCW 11.96A.110 must also be given by publication.

[1999 c 42 § 607; 1997 c 252 § 10; 1994 c 221 § 28; 1974 ex.s. c 117 § 36; 1965 c 145 § 11.40.040. Prior: 1917 c 156 § 110; RRS § 1480; prior: Code 1881 § 1470; 1854 p 281 § 83.]

Notes:

Part headings and captions not law – Effective date – 1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Effective dates – 1994 c 221: See note following RCW 11.94.070.

Application, construction – Severability – Effective date – 1974 ex.s. c 117: See RCW 11.02.080 and notes following.

Order of payment of debts: RCW 11.76.110.

(1) Whether or not notice is provided under RCW 11.40.020, a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent, if the claim or action is not already barred by an otherwise applicable statute of limitations, unless the creditor presents the claim in the manner provided in RCW 11.40.070 within the following time limitations:

(a) If the personal representative provided notice under RCW 11.40.020 and the creditor was given actual notice as provided in RCW 11.40.020(1)(c), the creditor must present the claim within the later of: (i) Thirty days after the personal representative's service or mailing of notice to the creditor; and (ii) four months after the date of first publication of the notice;

(b) If the personal representative provided notice under RCW 11.40.020 and the creditor was not given actual notice as provided in RCW 11.40.020(1)(c):

(i) If the creditor was not reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within four months after the date of first publication of notice;

(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.

(2) An otherwise applicable statute of limitations applies without regard to the tolling provisions of RCW 4.16.190.

(3) This bar is effective as to claims against both the decedent's probate and nonprobate assets.

[2005 c 97 § 6; 1997 c 252 § 11.]

Notes:

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

RCW 11.40.100

Rejection of claim — Time limits — Notice — Compromise of claim.

(1) If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection or the claim is forever barred. The personal representative shall notify the claimant of the rejection and file an affidavit with the court showing the notification and the date of the notification. The personal representative shall notify the claimant of the rejection by personal service or certified mail addressed to the claimant or the claimant's agent, if applicable, at the address stated in the claim. The date of service or of the postmark is the date of notification. The notification must advise the claimant that the claimant must bring suit in the proper court against the personal representative within thirty days after notification of rejection or the claim will be forever barred.

(2) The personal representative may, before or after rejection of any claim, compromise the claim, whether due or not, absolute or contingent, liquidated, or unliquidated, if it appears to the personal representative that the compromise is in the best interests of the estate.

[1997 c 252 § 16; 1974 ex.s. c 117 § 47; 1965 c 145 § 11.40.100. Prior: 1917 c 156 § 116; RRS § 1486; prior: Code 1881 § 1476; 1854 p 281 § 88.]

Notes:

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Application, construction – Severability – Effective date – 1974 ex.s. c 117: See RCW 11.02.080 and notes following.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

Notes:

Severability – 2007 c 475: See RCW 11.05A.903.