

66954-1

66954-1

NO. 66954-1

WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

In re Estate of:

MICHAEL J. FITZGERALD, deceased

Respondent,

and

MOUNTAIN WEST RESOURCES, INC.,

Appellant,

On appeal from King County Superior Court, Hon. Catherine Shaffer

REPLY BRIEF OF MOUNTAIN WEST RESOURCES

Gregory M. Miller, WSBA No. 14459
Christine D. Sanders, WSBA No. 40736

Attorneys for Appellant Mountain West
Resources, Inc.

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 12 PM 12:24
W

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION AND SUMMARY	1
II. REPLY ARGUMENT	4
A. The Trial Court Made New Findings and Conclusions on Revision and the Bases for Those Are Properly Before This Court on Appeal.....	4
B. The Trial Court Abused Its Discretion Because Its Discretionary Decision Was Based on “Facts” Unsupported in the Record and by Applying the Wrong Legal Standard.....	5
C. The Trial Court Abused Its Discretion by Refusing to Allow Mountain West Discovery So That it Could Gather Evidence to Rebut the Presumptions Created by the PR’s Affidavit Under RCW 11.20.040.....	8
D. The Conclusion That Mountain West Received Actual Notice Satisfying Statutory Requirements Is Unsupported by Facts in the Record and, Therefore, Must Be Reversed as an Abuse of Discretion.	16
E. The <i>Pro Se</i> Dismissal of Tronox’s Creditor’s Claim Is Properly Before This Court.	20
F. The Commissioner’s April 14, 2011 Order Must Be Vacated Because the January 6 Order He Purportedly “Clarified” and “Confirmed” Had Been Superseded by the Earlier Revision Hearing. It Was a Nullity.....	23
III. CONCLUSION	25

TABLE OF AUTHORITIES

Washington Cases	<u>Page</u>
<i>Bour v. Johnson</i> , 80 Wn. App. 643, 910 P.2d 548 (1996).....	24
<i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 228 (2007).....	3
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	3, 18
<i>Henley v. Henley</i> , 95 Wn. App. 91, 974 P.2d 362 (1999).....	1, 6, 16
<i>In re Dependency of B.S.S.</i> , 56 Wn. App. 169, 782 P.2d 1100 (1989), <i>rev. denied</i> , 114 Wn.2d 1018 (1990).....	2, 5
<i>In re Dorey's Estate</i> , 62 Wn.2d 152, 381 P.2d 626 (1963).....	4, 18
<i>In re Estate of Larson</i> , 103 Wn.2d 517, 694 P.2d 1051 (1985).....	1, 2
<i>In re Estate of Little</i> , 127 Wn. App. 915, 113 P.3d 505 (2005).....	13, 14
<i>In re Marriage of Dodd</i> , 120 Wn. App. 638, 86 P.3d 801 (2004).....	23
<i>Mallicott v. Nelson</i> , 27 Wn. App. 913, 915, fn.3.	19
<i>Marquam v. Ellis</i> , 27 Wn. App. 913, 621 P.2d 190 (1980).....	4, 18, 19
<i>Molsness v. City of Walla Walla</i> , 84 Wn. App. 393, 928 P.2d 1108 (1996).....	11, 12
<i>Momah v. Bharti</i> , 144 Wn. App. 731, 182 P.3d 455 (2008).....	12

	<u>Page</u>
<i>Mossman v. Rowley</i> 154 Wn. App 735, 229 P.3d 812 (2009).....	9
<i>Putnam v. Wenatchee Valley Medical Center,</i> 166 Wn.2d 974, 216 P.3d 374 (2009).....	9, 10
<i>State v. Ramer</i> 151 Wn.2d 106, 86 P.3d 132 (2004).....	4, 21
<i>T.S. v. Boy Scouts of America,</i> 157 Wn.2d 416, 138 P.3d 1053 (2006).....	6
<i>Tongchoom v. Graco Children’s Products, Inc.,</i> 117 Wn. App. 299, 71 P.3d 214 (2003).....	12
<i>Turner v. Kohler,</i> 54 Wn. App 688, 775 P.2d 474 (1989).....	6
<i>Wa. Local Lodge No. 104 v. International Broth. of Boilermakers,</i> 28 Wn.2d 536, 183 P.2d 504 (1947), <i>opinion adhered to on</i> <i>reh’g,</i> 28 Wn.2d 536, 189 P.2d 648 (1948).....	24

Other Cases

<i>United States v. Bentson,</i> 947 F.2d 1353 (9th Cir. 1991).....	17
------------------------------------------------------------------------	----

Statutes, Rules and Constitutional Provisions

CR 56(f).....	6, 11
RAP 2.5(a)(2)	4
RAP 6.1	23
RAP 7.2	23
RAP 7.2(a).....	23
RAP 7.2(c).....	23
RAP 7.2(e).....	24

	<u>Page</u>
RCW 7.70.150(3)	10
RCW 11.20.040	8
RCW 11.20.051	5
RCW 11.40.010	4, 5, 18
RCW 11.40.020	3, 18-20
RCW 11.40.020(1)(c)	3, 8, 16
RCW 11.40.030	4, 18
RCW 11.40.040	9, 14
RCW 11.40.040(2)	7-9
RCW 11.40.051	3, 7, 8, 16
RCW 11.40.051(b)	3, 8, 16
RCW 11.40.051(1)(b)(ii)	14, 15
RCW 11.40.060	4
RCW 11.40.070(1)	21
RCW 11.96A.100(8)	1, 6
RCW 11.96A.100(10)	1, 6
RCW 11.96A.115	6, 8, 11, 14
RCW 11.96A.115(1)	2, 6

I. INTRODUCTION AND SUMMARY

The Superior Court's March 4 Revision Order ("Order") should be reversed for three reasons: **First**, the trial court's discretion regarding discovery and notice to Mountain West was directly limited and controlled by statute and the trial court erred by denying Mountain West discovery when it was entitled to it and by finding actual notice when there was none under the statute. **Second**, trial courts are not empowered to ignore controlling statutes, even when they have plenary authority. *Henley v. Henley*, 95 Wn. App. 91, 97-98, 974 P.2d 362 (1999). TEDRA allows a judge to resolve a case at initial hearing **only** if he or she is **able**. See RCW 11.96A.100(8) and (10). Under TEDRA, a petition cannot be resolved on its merits where, as here, there are unresolved issues of fact or law. See *id.* **Third**, there is no preservation issue. While well-established Washington law holds that in affirming a commissioner's order the superior court does not need to enter new findings, here the trial court entered **six new findings in its Order**. These are not merely an "affirmation" of the commissioner's order. Moreover, entry of its order has the effect of superseding the commissioner's order, even if it does not enter "new" or "different" findings. See, e.g., *In re Estate of Larson*, 103 Wn.2d 517, 520, fn.1, 694 P.2d 1051 (1985) ("The record indicates that the superior court simply

adopted the commissioner's findings of fact and conclusions of law as its own."').¹ The findings in the Order are properly before this Court.

Discovery Issue. Contrary to the Estate's argument that there is no entitlement to discovery, TEDRA requires that "discovery *shall* be permitted" where an initial hearing on a TEDRA petition places one or more specific issues in controversy. RCW 11.96A.115(1). Thus, where an initial hearing creates issues of fact or law that cannot be resolved on the evidence before the court, discovery is not discretionary but mandatory. The Answer to the Estate's petition placed the PR's reasonable diligence and whether Mountain West was reasonably ascertainable specifically at issue. As a result, discovery was required to allow Mountain West to meet its burden of proof as to these issues. The rule the Estate urges would make the rebuttable presumptions conclusive and result in a Catch-22 for creditors whose claims would be dismissed before they have a chance to conduct any discovery on a PR's diligence.

¹ See also, *In re Dependency of B.S.S.*, 56 Wn. App. 169, 170-71, 782 P.2d 1100 (1989), rev. denied, 114 Wn.2d 1018 (1990):

The footnote [in *Estate of Larson*] was merely a suggestion that the superior court enter its own findings of fact after reviewing a commissioner's proceeding. In the absence of a demand for a revision, the commissioner's orders and judgment become the orders and judgment of the superior court; we see no reason why the superior court on a revision cannot adopt the commissioner's orders and judgment, either expressly or by clear implication from the record. After all, a refusal to "revise" leaves the action of the commissioner unchanged. Separate findings and conclusions would be appropriate if the record were viewed by the judge differently from the view of the commissioner.

Notice Issue. In order to time-bar a creditor's claim by giving actual notice, RCW 11.40.051 requires that actual notice be given to the creditor "as provided in RCW 11.40.020(1)(c)." RCW 11.40.051(b). Actual notice under RCW 11.40.020(1)(c) is specific: it requires that the PR serve notice *on the creditor*; or mail the notice *to the creditor at the creditor's last known address*, by regular first class mail, postage prepaid. A statement by counsel that "an attorney who was representing both [Mountain West] and Tronox received notice to creditors from the Estate" is wholly insufficient to meet actual compliance with the statute. It does not establish that *Mountain West* received notice by either personal service or service by mail. Rather, the evidence in the record shows that the Estate mailed notice only to Tronox but did *not* send actual notice to Mountain West. That an attorney representing Mountain West saw the notice to Tronox was a coincidence insufficient to comply with the plain meaning of the statute; it is the court's obligation to comply with that plain meaning.²

While there is not yet published authority confirming the strict compliance requirement with RCW 11.40.020, strict compliance is the rule

² The courts' fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, courts give effect to that plain meaning as an expression of legislative intent. *Id.*, 146 Wn.2d at 9–10. Courts determine the plain meaning of a statutory provision from the ordinary meaning of its language, as well as the general context of the statute, related provisions, and the statutory scheme as a whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

under TEDRA and Title 11.³ Tellingly, the Estate offers no argument for why strict compliance with the notice provisions under the statute is not also mandatory.

II. REPLY ARGUMENT

A. THE TRIAL COURT MADE NEW FINDINGS AND CONCLUSIONS ON REVISION AND THE BASES FOR THOSE ARE PROPERLY BEFORE THIS COURT ON APPEAL.

The Estate recognizes that under *State v. Ramer*, 151 Wn.2d 106, 86 P.3d 132 (2004), this appeal is limited to the issues which were the subject of the Order. *See* Response Brief, p. 31. Additionally, under RAP 2.5(a)(2), Mountain West is entitled to challenge the sufficiency of the factual basis for the conclusions in the Order for the first time on appeal. The Estate argues that Mountain West attempts to “sidestep” preservation by “mischaracterizing” the Order as entering new findings. But the trial court entered five “findings,” including (1) that the PR made a reasonable review; (2) that Mountain West was not reasonably ascertainable; (3) that Mountain West received actual notice to creditors effective January 14,

³ *See* Opening Brief, pp. 21-23, citing many cases requiring strict compliance with other creditor claims provisions under Title 11, RCW, especially *In re Dorey's Estate*, 62 Wn.2d 152, 155, 381 P.2d 626 (1963) and *Marquam v. Ellis*, 27 Wn. App. 913, 915, 621 P.2d 190 (1980). In *Dorey's Estate*, the court stated in no equivocal terms that “compliance with the statute [RCW 11.40.010] is mandatory. The administrator or executor cannot waive the requirements of the statute.” *Id.*, 62 Wn.2d at 155. In *Marquam*, the court held that “the statutory provisions regarding to whom and in what manner a notice of rejection must be given are for the protection of the claimant. Absent a showing of compliance with RCW 11.40.030, the limitation period of RCW 11.40.060 does not commence to run.” *Id.*, 27 Wn. App. at 915.

2010; (4) that Mountain West's claim was time-barred under RCW 11.40.010 and RCW 11.20.051; (5) and that Mountain West received proper notice of the initial hearing.⁴ CP 235-36.

Not only is the Estate simply wrong that the trial court's Order "is merely an affirmation of a determination by the Commissioner," Response Brief, p. 34, its argument is not supported by Washington law. In order to affirm the commissioner's order, the superior court did not need to enter new findings. "After all, a refusal to 'revise' leaves the action of the commissioner unchanged." *In re Dependency of B.S.S., supra*, 56 Wn. App. at 170-71. The trial court entered new findings on revision and those findings and conclusions are properly before this Court on appeal.

B. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE ITS DISCRETIONARY DECISION WAS BASED ON "FACTS" UNSUPPORTED IN THE RECORD AND BY APPLYING THE WRONG LEGAL STANDARD.

An appellate court will find an abuse of discretion "on a clear showing" that the trial court's exercise of discretion was

manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A trial court's discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.

⁴ As argued in its opening brief, Mountain West asserts that these are, at best, mixed findings of fact and conclusions of law. Because the "findings" do not specify the facts supporting the conclusion, they are not supported by genuine and adequate findings of fact and must be vacated. Opening Brief, p. 10.

T.S. v. Boy Scouts of America, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006) (internal quotations omitted).⁵ The Estate argues that the trial court's decision was made pursuant to the plenary authority under TEDRA. But plenary authority does not give courts the power to ignore the express language of a statute. *Henley v. Henley*, 95 Wn. App. at 97-98. Ignoring controlling law is an abuse of discretion. *T.S.*, *supra*. The trial court's plenary power and discretion were bound by statute in three fundamental regards, which are the lynchpins of Mountain West's appeal.

First, TEDRA allows a judge to resolve a case at initial hearing *only* if he or she is able and it cannot be resolved on its merits where there are unresolved issues of fact or law. RCW 11.96A.100(8) and (10). TEDRA requires that "discovery *shall* be permitted" where an initial hearing on a TEDRA petition places one or more specific issues in controversy. RCW 11.96A.115(1) (emphasis added). Thus, where an initial hearing creates issues of fact or law that cannot be resolved on the evidence before the court, discovery must be permitted. *Id.*

Second, the Estate erroneously argues throughout its brief that the affidavit "establishes" that the PR exercised reasonable diligence and that

⁵ *Turner v. Kohler*, 54 Wn. App 688, 775 P.2d 474 (1989), and other CR 56(f) cases cited by the Estate, do not control the standard of review or the standard for allowing discovery in this case. Although the CR 56(f) continuance may be helpful and was argued by Mountain West simply by way of analogy, its request for discovery was not made under CR 56(f) but pursuant to TEDRA's discovery provision, RCW 11.96A.115.

Mountain West was not a reasonably ascertainable creditor. Not so. As the Estate concedes at page 13 of its brief, if the PR merely files an affidavit that it reviewed the correspondence and financial records of the deceased reasonably available to him or her, then the PR is *presumed* to have exercised reasonable diligence and any creditors not identified in the review are *presumed* to not be reasonably ascertainable, whether or not the PR understood what was reviewed. However, the presumptions created under RCW 11.40.040(2) are *not* irrebutable; they may be rebutted by “clear, cogent and convincing” evidence from the creditor.

This creates a tension in the statute that it is the key issue before this Court: if the PR files the affidavit raising the rebuttable presumptions against the creditor(s), and a creditor asserts that it was in fact reasonably ascertainable or that the PR did not exercise reasonable diligence, it must be error to summarily dismiss the case at the initial hearing as time-barred before the creditor is allowed discovery to attempt to meet its high burden of proof to rebut the statutory presumptions. Permitting such a dismissal transforms the “rebuttable” presumption into a *conclusive* presumption that gives every PR the ultimate trump card and rewrites the statute.

Mountain West submits that, because the presumptions are *not* conclusive, it was error to refuse it as a creditor the opportunity for discovery prior to dismissing the case under RCW 11.40.051.

Third, in order to time-bar a creditor claim by actual notice, RCW 11.40.051 specifies that actual notice must be given to the creditor “as provided in RCW 11.40.020(1)(c).” RCW 11.40.051(b). Actual notice under RCW 11.40.020(1)(c) requires that the PR serve notice on the creditor or mail the notice to the creditor at the creditor’s last known address, by regular first-class mail, postage prepaid. Actual compliance with the statute is mandatory.

C. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW MOUNTAIN WEST DISCOVERY SO THAT IT COULD GATHER EVIDENCE TO REBUT THE PRESUMPTIONS CREATED BY THE PR’S AFFIDAVIT UNDER RCW 11.20.040.

The Estate argues that Mountain West is “asking the court to render meaningless the presumption created within RCW 11.40.040(2).” But as shown *supra*, denial of discovery makes the filing of the affidavit *conclusive* of whether a creditor was reasonably ascertainable. In shifting the burden of proof to the creditor, creditors must be allowed discovery in order to meet that burden before their case is dismissed. As Commissioner Velategui himself said in this matter, most parties are given an opportunity to do some discovery before their case is dismissed. Denying Mountain West any discovery in this case violated the statute, was an abuse of discretion, and must be reversed.

The Estate argues that Mountain West’s request under RCW 11.96A.115 is inappropriate under the statutory scheme of

RCW 11.40.040,⁶ asserting that “[r]equiring discovery on this issue where a statute explicitly indicates what evidence is sufficient, and where such evidence is supplied, would be inappropriate.” Response Brief, p. 23. This argument is based on the fundamentally incorrect assumption that the filing of an affidavit is **conclusive** of the issue of whether a creditor is reasonably ascertainable. Under TEDRA, the affidavit simply shifts the burden of proof to the creditor by raising two **rebuttable** presumptions. RCW 11.40.040(2). Without a concurrent opportunity to gather clear, cogent and convincing evidence to rebut the presumption, the filing of an affidavit by the PR becomes conclusive of the statute of limitations – a result contrary to the plain language of the statute.

In support of this argument, the Estate cites to *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009). But this case doesn’t support the Estate’s theory – rather, by analogy, it supports Mountain West’s position. In *Putnam*, the Washington Supreme Court held that a statute requiring plaintiffs in medical malpractice actions to file a certificate of merit with the pleadings violated plaintiff’s right of access to

⁶ In fn.5, the Estate argues that Mountain West expanded the scope of its request on appeal and that this is impermissible under *Mossman v. Rowley*, 154 Wn. App. 735, 229 P.3d 812 (2009). Response Brief, p. 25. However, in *Mossman*, the appellant identified **new deponents** for the first time on appeal. See 154 Wn. App. at 744. That is not the case here. Mountain West’s argument that it should be allowed to obtain further documentation and evidence regarding Ms. Fitzgerald’s awareness of Mountain West’s claims is consistent with and discoverable as part of a records subpoena accompanying her deposition, which was requested below.

the courts.⁷ The statute required the certificate of merit to contain a statement from an expert that, “based on the information known at the time of executing the certificate of merit, . . . there is a reasonable probability that the defendant’s conduct did not follow the accepted standard of care. RCW 7.70.150(3).” *Id.* at 983. The court held that the requirement “fundamentally conflicts with the civil rules regarding notice pleading – one of the primary components of our justice system.” *Id.* (emphasis added). The Court declared that the requirement “unduly burdens the right of medical malpractice plaintiffs to conduct discovery and, therefore, *violates their rights to access courts.*” *Id.* at 985. “The court must strike down this law because it violates the right of access to courts and conflicts with the judiciary’s inherent power to set court procedures.” *Id.*

By analogy, with the filing of a simple affidavit, the PR can raise significant presumptions which may be dispositive if not rebutted. If the TEDRA discovery provision is interpreted as the Estate urges, creditors would have to meet their burden of proof *before ever having an opportunity to conduct discovery and obtain such evidence in order to make a claim.* As *Putnam* demonstrates, this result is unacceptable. The trade-off for the presumptions, consistent with the plain language of

⁷ Although *Putnam* raised constitutional issues, Mountain West simply points out that the Court’s rationale applies here by way of analogy.

RCW 11.96A.115 requiring discovery where the initial hearing places specific issues in controversy, must be a lenient policy of allowing discovery for a creditor to let them try to meet their burden of proof under the statute. Otherwise, the presumptions are irrebuttable.

The Estate also argues that Mountain West would not be entitled to discovery under CR 56(f) because “there is not a scintilla of evidence to indicate the PR will say anything other than what already has been set out in her affidavit submitted with the court.” Response Brief, p. 27. This argument misses the point for two reasons. First, Mountain West argued CR 56(f) not as controlling but, by analogy, illustrates that under the civil rules there is leniency allowed for additional time to gather evidence before a dispositive hearing. CR 56(f) is unnecessary where, as here, TEDRA **requires** discovery where the initial hearing places specific issues in controversy. Discovery must be allowed where issues of fact or law preclude a judge from dismissing the case on its merits at the initial hearing.

The Estate cites to *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 928 P.2d 1108 (1996), to argue that Mountain West was required to explain what evidence would have been obtained through discovery. However, it was the request for a second continuance that was denied. One two-week continuance was **granted** in that case, based on Mr. Molsness’s request for additional depositions or affidavits from “certain contractors

who had worked on projects for the City of Walla Walla. Their testimony may be critical to the issue of whether or not plaintiff was forced to resign his employment with the City of Walla Walla.” *Id.*, 84 Wn. App. at 399-400. While the superior court “expressed doubt” as to the relevance, it still gave Mr. Molsness two weeks to do discovery. *Id.* *Molsness* thus supports Mountain West, not the Estate. The other cases cited by the Estate are also distinguishable.⁸

The Estate argues that “for the first time on appeal, Mountain West appears to challenge that the PR conducted this review.” Response Brief, p. 14. Mountain West does not argue that the PR did not conduct any review of the decedent’s correspondence and financial records; rather, under

⁸ Citing *Momah v. Bharti*, the Estate also argues that Mountain West’s request for discovery was properly denied because “the requesting party must affirmatively indicate what evidence would be established.” Response Brief, p. 26. However, the court vacated the summary judgment motion in that case and never reached the issue of the correctness of the rulings on the motion to complete discovery. *Momah v. Bharti*, 144 Wn. App. 731, 754, 182 P.3d 455 (2008).

The Estate also cites *Tongchoom v. Graco Children’s Products, Inc.*, 117 Wn. App. 299, 309, 71 P.3d 214 (2003), to argue that Mountain West was required to demonstrate that evidence from the investigator would be favorable to its case. Response Brief, p. 26. In that case, the request was denied because there was not even a bare explanation of the type of information that was sought: “The motion to compel does not include an explanation of what evidence they would have obtained with the additional discovery. *It was merely an assertion that the materials requested in the interrogatories and requests for production were in the scope of discovery because they related to Graco’s knowledge.*” *Id.*, 117 Wn. App at 308-09 (emphasis added).

Here, Mountain West asserted that the PR is reasonably likely to have actual or constructive knowledge of a potential claim by Mountain West through a source other than the decedent’s correspondence and financial records, as well as from the records themselves, depending on what the records are and how she chose to “interpret” them as to whether they are “potential claims.” Deposing the PR, at a minimum, is the best way to determine what she actually knew and was advised about “facts” she knew.

the facts of this case, the limited statutory review is insufficient evidence of reasonable diligence. The presumption of due diligence created by filing the affidavit is not and cannot be absolute, no matter how much the Estate wants it so. Under TEDRA, as a matter of law, it is rebuttable. Mountain West has a right to seek to offer rebuttal proof under TEDRA.

Mountain West requested discovery on two grounds: First, that the information which should have put the PR on notice of Mountain West's claim(s) is outside of the decedent's correspondence and financial records. Second, in light of prior litigation with Mountain West, the PR may have summarily dismissed Mountain West's claims in spite of evidence in the decedent's correspondence and financial records, or received erroneous advice that Mountain West's claims were not valid, and attested that Mountain West was not reasonably ascertainable based on this incorrect advice. That is information that Mountain West can only determine with a deposition of the PR.

The Estate tries to distinguish *In re Estate of Little*, 127 Wn. App. 915, 113 P.3d 505 (2005), on its facts; but in fact it is really trying to dodge the point Mountain West made with it. *See* Response Brief, pp. 28-29. Mountain West cited *Little* for the broad proposition, which the Estate does not dispute, that the PR is a fiduciary of the court and, *as a fiduciary*, has the initial burden of showing reasonable diligence. Opening Brief, p. 34.

Even though the Estate notes that since 1997 the requirement to exercise diligence with regard to finding creditors is optional, Response Brief, p. 29, fn.6, the PR in this case elected to submit an affidavit that it did conduct a due diligence review in this case. Its other option to start the clock running against creditors was to simply wait two years after publishing notice, which it did not choose. RCW 11.40.051(1)(b)(ii).

In choosing to file the affidavit, the PR took on the fiduciary obligation of due diligence and may not simply conduct a superficial search. As *Estate of Little* held, the PR is an officer of the court and a fiduciary. There must be a check on the statutory presumption of reasonable diligence, “otherwise, and *especially where [as here] the executor of an estate has a beneficial interest in it*, the sense of fiduciary duty might give way to a temptation to conduct a superficial search or none at all.” *Estate of Little*, 127 Wn. App. at 925 (emphasis added). This check is the time and the opportunity for the creditor to meet its burden of proof to rebut the statutory presumption via discovery. This is consistent with RCW 11.40.040 and RCW 11.96A.115. Denying discovery was an abuse of discretion.

Finally, the Estate argues that Mountain West could not have been a reasonably ascertainable creditor based on the evidence in the record. Response Brief, p. 18. Again, this argument begs the question raised by this appeal – because it was denied discovery, and its claim was dismissed at the

initial hearing, *Mountain West did not have opportunity to meet its burden to show that it was reasonably ascertainable*. Whether there was sufficient evidence on this record to meet this burden is beside the point and irrelevant to the appeal.

Further, contrary to the Estate's assertion regarding the Nevada claim, Response Brief, p. 19, Mountain West does claim that it was injured by the Decedent. The Agreement between Tronox and Mountain West explicitly states that Mountain West "may have also similarly been injured and damaged" by the acts and omissions of the Decedent. CP 126. Even more relevant to Mountain West's request for discovery on the PR's knowledge, the Agreement states that Mountain West "has expended substantial resources and time to research, investigate and discover the underlying facts and wrongdoing necessary for an action against the Defendants[.]" CP 126.

With regard to the Wyoming claim, because Mountain West believed it was reasonably ascertainable AND did NOT receive actual notice from the Estate, it had twenty four months from the date of death to file its claims. RCW 11.40.051(1)(b)(ii). It was under no obligation to bring any claims before August 11, 2011. Whether Mountain West believed that Tronox was representing its interests with regard to Nevada claims is irrelevant to whether Mountain West had a cause of action against the

Decedent for mineral claims in Wyoming. There is no evidence that Tronox has any interest in that action. Further, the Tronox claim was brought in state court based on actions and omissions occurring in Nevada. Thus, it makes no sense that the Wyoming claim, based on actions and omissions occurring in Wyoming, would be included in the Nevada claim.

D. THE CONCLUSION THAT MOUNTAIN WEST RECEIVED ACTUAL NOTICE SATISFYING STATUTORY REQUIREMENTS IS UNSUPPORTED BY FACTS IN THE RECORD AND, THEREFORE, MUST BE REVERSED AS AN ABUSE OF DISCRETION.

The Estate concedes there are no facts on the record showing actual notice pursuant to the statute. Rather, the Estate relies on two arguments to support the finding of actual notice: First, that counsel made a “judicial admission” that Mountain West received Tronox’s creditor’s claim; and second, that under the court’s plenary power, informal notice to a creditor is adequate to time-bar that creditor’s claim under RCW 11.40.051. These arguments fail.

First, as already discussed, plenary authority does not give courts the power to ignore the express language of a statute. *Henley*, 95 Wn. App. at 97-98. In order to time-bar a creditor claim by actual notice, RCW 11.40.051(b) requires that notice be given to the creditor “as provided in RCW 11.40.020(1)(c),” which requires that the PR serve notice on the creditor or mail the notice to the creditor at the creditor’s last known address, by regular first class mail, postage prepaid. This was not done.

Second, the statement of counsel that “an attorney who was representing both [Mountain West] and Tronox received notice to creditors from the Estate” is insufficient to constitute “judicial admission” of actual notice. The Estate’s citation to a tax case over whether a tax return was filed, *United States v. Bentson*, 947 F.2d 1353 (9th Cir. 1991), gives it no support.⁹ When it comes to filing a tax return, either you file or you do not. In contrast, TEDRA requires specific steps for actual notice. The fact that Tronox’s notice was seen by an attorney who also represented Mountain West may be a coincidence, but it is not the actual notice required by this statute. Counsel for Mountain West did not state that Mountain West itself was mailed notice directly from the Estate or that it was personally served with notice, concessions that would have met what the statute requires. There is no evidence that the PR personally served Mountain West or Tronox. The *only* evidence in the record of the required statutory actual notice is the Estate’s Affidavit of Mailing Notice to Creditors, CP 35. The *only* recipient on the affidavit of mailing was Tronox, at its corporate headquarters.

⁹ In *Bentson*, Bentson’s counsel stated in closing argument that “[t]he defense is not suggesting that returns were filed for 1983 and ‘84, which the Internal Revenue Service would consider to be valid documents.” *Id.* at 1356. The Ninth Circuit held that this was a binding concession that Bentson did not file tax returns for the years 1983 and 1984, and that Bentson was precluded from claiming that the government failed to prove he did not file valid tax returns. *Id.*

Although there are not now published decisions that confirm the strict compliance requirement of RCW 11.40.020, the Opening Brief pointed out the cases requiring strict compliance with other provisions of the creditor claims provisions under Title 11, RCW. Opening Brief, pp. 21-23. In contrast, the Estate cites to no authority stating that substantial compliance is sufficient under RCW 11.40.020, or that the explicit requirement need not be met. If a statute's meaning is plain on its face, as it is here, the courts are required to give effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell, supra*, 146 Wn.2d at 9–10. That means strict compliance.

Although the Estate tries to distinguish *Dorey's Estate* on its facts, Mountain West cited the case for the general principle relied on by the Court in reaching its decision with regard to the requirement of filing a creditor's claim: **"compliance with the statute [RCW 11.40.010] is mandatory. The administrator or executor cannot waive the requirements of the statute."** *In re Dorey's Estate, supra*, 62 Wn.2d at 155 (emphasis added). The Estate offers no argument for why compliance with the notice provisions under the statute here is not also mandatory and may not be waived by the PR.

Strict compliance is also required with another provision of the claims statute, RCW 11.40.030. *Marquam v. Ellis*, 27 Wn. App. 913, 621

P.2d 190 (1980). The Estate mistakenly represents that the court in *Marquam* “noted that, under certain circumstances, evidence of informal notice of rejection of a creditor’s claim is adequate.” But in *Marquam*, the court specifically limited the holding of *Mallicott v. Nelson* to its facts:

We are aware *Mallicott v. Nelson, supra*, held an informal notice of rejection sent only to the claimant’s attorney was sufficient to permit the claimant to bring suit to enforce her claim; however, ***that case must be strictly limited to its facts.***³ To do otherwise would invite unnecessary litigation of factual issues. The statute is clear and precise; notice of rejection by personal service or by certified mail to the claimant is not burdensome.

³ In *Mallicott v. Nelson, supra*, the claimant filed his claim; it was informally rejected; he promptly and successfully sued to have it allowed; and the administratrix attempted to force a useless relitigation by claiming she did not reject the claim in a statutorily proper fashion. Hence, to allow the administratrix to vitiate the claimant’s actions on the grounds of prematurity would have been unjust.

27 Wn. App 913, 915 & fn.3 (emphasis added).

The Estate also attempts to distinguish *Marquam* by arguing that “the Estate in *Marquam* would have known exactly where to send such notice of rejection, prompting the court to state that following the formalities for a notice of rejection was not burdensome.” Response Brief, p. 35. This reads too much into the Court’s opinion, which simply states: “The statute is clear and precise; notice of rejection by personal service or by certified mail to the claimant is not burdensome.” 27 Wn. App. at 915.

Likewise, the notice provisions of RCW 11.40.020 are clear and precise; notice to creditors by personal service or by certified mail is not

burdensome. The statutory protections for notice to a potential claimant are for the protection of potential creditors and must be construed in favor of creditors and against the Estate. The notice provisions of RCW 11.40.020 already provide a mechanism for notifying creditors who cannot be specifically located – notice by publication. If an Estate knows of a creditor, but cannot locate that creditor for service, its alternative is to simply wait 24 months following notice by publication to see if the creditor presents a claim. RCW 11.40.051(b)(ii). Even if the Estate is aware of the location of the creditor, actual notice is not mandatory. The question of actual notice is really a strategic one. PR's can either notify the creditor or simply wait twenty-four months to see if the creditor comes forward.

E. THE *PRO SE* DISMISSAL OF TRONOX'S CREDITOR'S CLAIM IS PROPERLY BEFORE THIS COURT.

Whether the *pro se* dismissal was valid is relevant to whether Mountain West's claims are time-barred because, if allowed to stand in the shoes of Tronox, Mountain West still has a "live" claim against the Estate, regardless of whether it is reasonably ascertainable. Significantly, the Estate does not dispute the simple rule that a corporation cannot act *pro se*.

Contrary to the Estate's erroneous arguments, because the effect of revision is to supersede the commissioner's order, the commissioner's findings are not before this Court on appeal. The trial court refused to address the issue of the *pro se* dismissal. That refusal is a ruling, and, under

State v. Ramer, supra, that ruling superseded the commissioner's order and is properly on appeal.

The Estate offers no authority for its bare assertion that the Washington claims of Tronox were "entirely tied to the Nevada matters and were not 'stand-alone' actions of Tronox." Response Brief, p. 39. The creditor claims statute, Title 11.40 RCW, makes no such distinction. The statutory requirements for filing creditor's claims are mandatory and apply to all claims against assets of the Estate, irrespective of whether the claim is current, contingent, or due in the future. In order to state a valid claim, the notice must include, in material part, the amount of the claim, whether the claim is secured, unliquidated, contingent or not yet due, and a statement of the facts or circumstances constituting the basis of the claim. RCW 11.40.070(1). Tronox's claim is unliquidated and based upon the "facts and circumstances which are set forth more fully in the [Nevada] complaint." CP 381. These facts and circumstances are the basis of Mountain West's Nevada claim against the Estate, as stated in the Agreement between Tronox and Mountain West and referred to in Mountain West's creditor claim. See CP 160, 174. Thus, the Estate had notice of the underlying facts and amount and nature of the claim. The only issue is whether Mountain West may stand in the shoes of Tronox.

The Estate argues that Mountain West does not have standing to dispute the *pro se* dismissal of Tronox's creditors claim because it is not a real party in interest to Tronox's claims. Response Brief, p. 28. But elsewhere in this case, the Estate also argues that Mountain West and Tronox are the same for purposes of actual notice. The Estate cannot have it both ways. If Tronox and Mountain West were one and the same for purposes of the Estate's notice to creditors, they are one and the same for purposes of the creditor's claim filed by Tronox.¹⁰

Mountain West also has standing to raise the issue because the Agreement with Tronox vested Mountain West with an interest in the Nevada claims against the Estate. Although the agreement entitles Mountain West to a percentage of the litigation proceeds, it is also clear that Mountain West asserts harm and damage caused by the Decedent based on the same underlying facts and circumstances as Tronox. CP 126 ¶ 1 ("Recitals"). The agreement also plainly states the intention of the parties to "employ attorneys to bring an action against the Defendants[.]" *Id.*

¹⁰ Similarly, the Estate argues that the dismissal of the Nevada law suit was entered "on behalf of Mountain West." Response Brief, p. 39. But Mountain West was not a party to the action. The stipulated dismissal was between Tronox, Plaintiff, and Michael J. Fitzgerald. CP 41. To accept the Estate's argument is to agree that Mountain West had an interest in the actual claim.

F. THE COMMISSIONER’S APRIL 14, 2011 ORDER MUST BE VACATED BECAUSE THE JANUARY 6 ORDER HE PURPORTEDLY “CLARIFIED” AND “CONFIRMED” HAD BEEN SUPERSEDED BY THE EARLIER REVISION HEARING. IT WAS A NULLITY.

By claiming the commissioner could modify his January 6, 2011, order on April 14 because the case was not formally stayed, the Estate demonstrates a fundamental misunderstanding of the jurisdictional aspects of both RAP 7.2 and the effect of revision on a commissioner’s order. Mountain West was not bound by the January 6, 2011, order because it was superseded by the March 4, 2011, order from the superior court. *In re Marriage of Dodd*, 120 Wn. App 638, 644, 86 P.3d 801 (2004). Under principles of revision, Commissioner Velategui could not “clarify” or “confirm” the January 6 Order. And since the March 4 Revision Order was on appeal as of April 4, 2011, under RAP 7.2, this Court had exclusive jurisdiction over that Order. Once review is accepted, which is as soon as the notice of appeal as a matter of right is filed per RAP 6.1, the trial court’s authority to act is limited to that permitted under RAP 7.2(a). This is a jurisdictional rule, independent of the stay.

However, even in the absence of a stay, the trial court only has the ability to enforce an order on appeal – it has no authority to clarify, modify, or in any other way alter the order on appeal. *See* RAP 7.2(c). With regard to modification, the trial court has leave to modify an order only if the

modification will not change a decision being reviewed by the appellate court, RAP 7.2(e), which is not the case here.

Thus, the April 14, 2011, order not only purported to modify the January 6, 2011, order which had been superseded by the superior court's March 4 order, it modified it in such a way as to change the March 4 order on appeal, if it were given effect. CP 361-363. The April 14 "clarification" order purported to bind Mountain West to the January 6 order, which had since been revised and superseded by the March 4 order. The commissioner simply lacked authority to do so. The fact that this also affects the order as to Steven C. Davis is immaterial to the fact that the commissioner entered an order for which he did not have authority.

Finally, the Estate's "concession" that, if reversed, the April 14, 2011, order would not apply to Mountain West is irrelevant. The parties may not create, or vest the court with jurisdiction. *Wa. Local Lodge No. 104 v. International Broth. of Boilermakers*, 28 Wn.2d 536, 544, 183 P.2d 504 (1947), *opinion adhered to on reh'g*, 28 Wn.2d 536, 189 P.2d 648 (1948). Any order, judgment, or decree entered by a court that lacks jurisdiction is void, even if the parties have stipulated to its entry. *Bour v. Johnson*, 80 Wn. App. 643, 910 P.2d 548 (1996).

Mountain West takes no pleasure in requesting this Court address and vacate the April 14, 2011, order. Any impact on Steven C. Davis is an

unintended consequence, necessitated by the fact that the order was so broad as to purport to bind Mountain West by appearing to revive that defunct order in the guise of the April 14 “clarification.” Even assuming the commissioner could have acted on that order which was then a nullity (which he could not do), the commissioner had no legal authority to take any action on an **un**superseded commissioner’s order that was under appeal without leave of this Court. The April 14, 2011, order is a nullity and must be vacated. If the Estate wants a separate order against Mr. Davis, it should go get a proper one that does not implicate Mountain West.

III. CONCLUSION

For the reasons given above, Mountain West respectfully requests this Court vacate the trial court’s March 4 Order and remand for discovery as to whether Mountain West was a reasonably ascertainable creditor; vacate the commissioner’s April 18 Order purporting to “clarify” and “confirm” the January 6 Order that had been superseded on revision; and vacate the fee award to the Estate.

Dated this 9th day of March, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA #14459
Christine D. Sanders, WSBA #40736
Attorneys for Mountain West Resources, Inc.

NO. 66954-1

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re Estate of:

MICHAEL J. FITZGERALD,

Deceased/Respondent,
and,

MOUNTAIN WEST
RESOURCES, INC.,

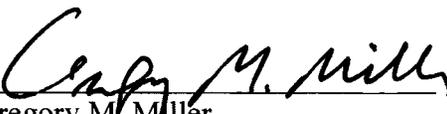
Appellant.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of Appellant Mountain West Resources, Inc.'s REPLY BRIEF and this Certificate of Service to be served upon counsel of record as follows:

<p>Jordan S. Klein Monahan & Biagi, PLLC 701 5th Ave., Ste. 2800 Seattle, WA 98104 Phone: (206) 587-5700 Fax: 206-587-5710 Email: jklein@monahanbiagi.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> email <input type="checkbox"/> Other</p>
<p>James R. Hennessey, Esq. Smith & Hennessey, P.L.L.C. 316 Occidental Avenue S., Suite 500 Seattle, WA 98104-2874 Phone: (206) 292-1770 Fax: (206) 292-1790 Email: jrh@smithhennessey.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> email <input type="checkbox"/> Other</p>

DATED this 9th day of March, 2012.


Gregory M. Miller

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR 12 PM 12:24