

72095-3

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No. 72095-3-I

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

LULA S. SLOANS, Appellant,

vs.

**NADINE E. BERRY and ROBERT M. BERRY, in this capacity as
co-administrators of the Estate of Betty Jean Berry, Respondents.**

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

Law Office of Charles R. Horner,
PLLC

Charles R. Horner
WSBA No. 27504
Attorney for Respondents

1001 Fourth Avenue, Ste. 3200
Seattle, Washington 98154
206-381-8454
crhornerpllc@qwestoffice.net

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I. COUNTERSTATEMENT OF ISSUES

1. Did appellant comply with the nonclaims statute, RCW 11.40.100(1), by pursuing her damages suit upon rejected creditor's claims through a judicial proceeding under TEDRA, Chapter 11.96A RCW, brought within a probate case?
2. Is a special proceeding under TEDRA equivalent to an ordinary civil action?
3. Does a damages suit on a rejected creditor's constitute a special proceeding under Title 11 RCW?
4. Must damages suits upon rejected creditor's claims be brought as TEDRA judicial proceedings?
5. May the Superior Court in exercising its jurisdiction within a probate proceeding as prescribed by Title 11 RCW entertain a damages suit upon a rejected creditor's claim?
6. Did the Legislature intend the term "matter" as defined by TEDRA to include lawsuits to establish estates' liability for damages upon rejected creditors' claims?
7. Did appellant found her pleadings upon a TEDRA "matter"?
8. May the Superior Court entertain a TEDRA judicial proceeding that seeks recovery of damages on a rejected creditor's claim?

9. Was the Agreement Regarding Residence between appellant and the decedent relevant to the basis for the trial court's order dismissing the TEDRA Petitions and forever barring appellant's creditor's claims?
10. Was the will of Lula Mae Hunter relevant to the basis for the trial court's dismissal order?
11. Was the Personal Representative's Deed purporting to convey the disputed property to appellant and decedent relevant to the basis for the trial court's dismissal order?
12. Did appellant seek any relief in her TEDRA Petitions other than an award of damages upon her rejected creditor's claims for alleged breach of contract?
13. Even if appellant could pursue her rejected creditor's claims through TEDRA judicial proceeding, did she timely commence such a proceeding where she tried to file it in an existing probate proceeding?
14. Should the trial court have denied the motion to dismiss in favor of permitting appellant to amend her TEDRA Petitions?
15. Were the TEDRA Petitions amendable to dismissal under CR 12(b)(6)?

16. Did the Court err in dismissing the TEDRA Petitions because appellant offered a number of exhibits in response to the motion to dismiss?
17. Did the trial court err in dismissing the TEDRA Petitions in a shorter timeframe than CR 56 provides for summary judgment motions?
18. Has the appellant demonstrated the absence of a valid basis to affirm dismissal of her TEDRA Petitions?
19. Should the dismissal of the TEDRA Petitions be affirmed?
20. Did the appellant waive objection to the basis for the trial court's award of attorneys' fees to respondents?
21. Did the trial court err in awarding attorneys' fees to respondents?
22. Is appellant entitled to an award of fees on appeal?
23. Should this Court award respondents their attorneys' fees on appeal pursuant to RCW 11.96A.150?
24. Should the Court award the respondents their attorneys' fees based on the appeal being frivolous?

II. STATEMENT OF THE CASE

On December 20, 2013, appellant Lula Sloans (“Sloans”) filed and mailed her first Creditor’s Claim to respondents Robert Berry and Nadine Berry in their capacity as co-personal representatives of the Estate of Betty Jean Berry (hereafter “Estate” refers to the Estate or its personal representatives, as the context indicates, and “decedent” refers to Betty Jean Berry in her lifetime).¹ The Claim alleged that the Estate was liable to Sloans for monetary damages for decedent’s breaches of an Agreement Regarding Residence dated July 1, 1991 (hereinafter “the Agreement”), that referenced a residence and personal property (collectively, “the Property”) that had been subjects of the will of Lula Mae Hunter.² The claim alleged that the Estate was liable for at least \$25,000.00 because of decedent’s failure to maintain the Property in accordance with the Agreement’s terms.³ It also alleged, in light of the Estate’s listing of the Property as an asset in the probate case, King County Superior Court Cause No. 13-4-11619-4, that the Estate was liable to Sloans for at least \$400,000 because decedent’s conveyance of an interest in the Property in

¹ CP 158-167; CP 185 ¶ 1.15; CP 186 ¶ 2.2.

² See CP 27-28 ¶¶ 3.1-3.2. The Agreement appears at CP 30-35, among many other places in the record.

³ CP 158: 24-26, CP 159: 1-5.

violation of the Agreement.⁴ The Estate rejected Sloans' claim of December 20 on or about January 22, 2014.⁵

On February 14, 2014, the Estate filed a civil action against Sloans that seeks to quiet title to the Property in the Estate and to eject her from it.⁶ Five days later, Sloans sought to file a Petition on Rejection of Creditor's Claim (hereafter "Petition") in the probate case that referenced her Claim of December 20, 2013, and issued summonses to Robert Berry and Nadine Berry pursuant to the Trust and Estate Dispute Resolution Act ("TEDRA").⁷

Sloans filed and mailed to the Estate her 2nd Creditor's Claim on February 27, 2014.⁸ The second Claim alleged the Estate's liability for damages based on decedent's failure to pay taxes upon the Property in accordance with the Agreement. The Estate rejected the second Claim on March 21, 2014.⁹ On March 25, 2014, Sloans attempt to file a 1st Amended Petition (hereinafter "Amended Petition") on Rejection of

⁴ CP 159: 6-18.

⁵ CP 185-186 ¶ 1.16.

⁶ See CP 128-136.

⁷ CP 1-14; CP 15-16; CP 17-18.

⁸ CP 169-178; CP 26 ¶ 1.18.

⁹ CP 26 ¶ 1.19.

Creditor's Claim in the probate case that embraced her December 20 and February 27 Claims.¹⁰

Each of Sloans' Petitions sought recovery only of damages upon her rejected creditor's claims together with an award of attorneys' fees in connection with those claims pursuant to RCW 11.96A.150.¹¹ The Petitions did not request any other relief, such as a declaratory judgment or a decree requiring Robert Berry or Nadine Berry to specifically perform some term of the Agreement. With the possible exception of the taxes, Sloans' recovery of any the categories of alleged damages would substantially or fully exhaust the Estate.¹²

On March 27, 2014, the Superior Court Clerk, having apparently noticed Sloans' attempt to file a TEDRA Petition in the probate case, mailed a notice to her attorney advising him that TEDRA had been amended effective July 28, 2013, to require that a judicial proceeding under that chapter be commenced as a new action, not filed in an existing

¹⁰ See CP 23. Hereinafter, "Petitions" refers to the first Petition and Amended Petitions collectively.

¹¹ See CP 27-29 §§ 3.1-3.3 and Prayer for Relief ("WHEREFORE, Sloan requests the Court to enter a judgment against Decedent's Estate, through its PR's, for the amount of damages resulting from Decedent's damage to the real and personal property described in the TEDRA Agreement and Deed; for unpaid real property taxes, interest, and penalties; and for any loss of said property and thereby establish the amount of the judgment as an allowed claim pursuant to RCW 11.40.120; all in an amount that will fairly compensate Sloans for all damages sustained, including: a. Awarding Sloans' special, general, economic or other damages including pre- and post-judgment interest

action.¹³ The Clerk assigned a new cause number, 14-4-01898-1, to the Petition and then filed it under that number.¹⁴ The attached Clerk's Alert stated that "[a]ny TEDRA action filed in an existing case will be returned to the filer to commence a new cause of action." and noted that "[s]eparate filing fees have always been required for TEDRA actions."¹⁵ In this instance, however, perhaps because Sloans had already paid a filing fee, the Clerk assigned a new probate/guardianship case number to the first Petition and filed it thereunder instead of returning it to her to file herself.¹⁶ The Clerk's Notice advised, however, that "[i]f there are other documents that you think should go under this new case number, you will need to get a court order directing the clerk to move those documents into the new cause number."¹⁷

On April 18, 2014, without the benefit of any order authorizing it, Sloans filed the previously filed Amended Petition in the present case under a cover sheet.¹⁸ She also filed an identical copy of the Amended

on all sums due . . .") (emphasis added).

¹² See CP 122 (statement of personal property)

¹³ CP 19-20.

¹⁴ CP 19.

¹⁵ CP 20 (emphasis added).

¹⁶ See CP 19.

¹⁷ *Id.*

¹⁸ CP 21-37.

Petition with cause number 14-4-01898-1SEA inscribed on its first page.¹⁹

She took no further action with respect to her rejected creditor's claims.

On May 1, 2014, the Estate moved for dismissal of the Petitions and an order forever barring Sloan's creditor's claims because Sloans had sought to pursue her rejected claims by means of a TEDRA proceeding filed in a probate case, rather than by suing the Estate in a separate civil action within 30 days of its rejecting her claims.²⁰ The Estate also requested an award of its attorneys' fees pursuant to RCW 11.96A.150 for the expense of defending against the Petitions.

Sloans presented twenty-five "exhibits" to the trial court in response to the Motion to Dismiss.²¹ Fifteen of the exhibits were copies of court documents, such as pleadings and their exhibits, summonses, creditor's claims, claim rejections, dockets, and the like.²² Five consisted of secondary materials.²³ One of the items, Exhibit 8, consisted of photos allegedly depicting the Property that were not authenticated by a witness with personal knowledge and upon which hearsay statements had been ascribed.²⁴ Of the remaining four items, along with the Agreement and

¹⁹ CP 42-56.

²⁰ CP 63-71

²¹ See CP 102-239.

²² Exs. 1, 3, 5-6, and 9-19.

²³ Exs. 2, 21-22, and 24-25.

²⁴ If appellant's attorney, as he claimed, see CP 102: 26, was the authenticating witness

the Personal Representative's Deed that were exhibits to the Petitions, only one, Exhibit 23, an alleged shot of a screen of the King County Clerk's e-filing system, had any reference to the means by which Sloans attempted to file her TEDRA Petition in the probate case.²⁵ That screenshot indicated that it was technically possible to submit a TEDRA Petition to the Clerk for filing within the probate proceeding, but did not indicate that such filing would be taken as proper as, indeed, it was not.

Sloans' central argument in opposing the Motion to Dismiss was that TEDRA's enactment either required or permitted her to pursue her rejected creditor's claim through a TEDRA judicial proceeding filed within the probate case, rather than as an ordinary civil action as stated by a number of pre-TEDRA decisions and noted in King County Superior Court's 2011 Probate Policy and Procedure Manual.²⁶ Among her other arguments, Sloans claimed that the Estate had not met its burden under CR 12(b)(6), the trial court had to consider facts outside of the pleadings and, therefore, to handle the Motion to Dismiss as a summary judgment

and person who annotated the photos, he may be disqualified from representing appellant. RPC 3.7.

²⁵ Exs. 1, 3-4, 7, 20, and 23.

²⁶ CP 95: 11-26 to CP 96: 1-2, CP 97-99. See 2011 King County Probate Policy & Procedure Manual, § 8.8.5, at 49 ("**Comment:** A rejected claimant must bring an ordinary civil action for allowance of its claims – it is not part of the probate proceedings. *Schlunegar v. Seattle-First Nat'l Bank*, 48 Wn.2d 188, 292 P.2d 203 (1956)") (boldface in the original)

motion under CR 56 and that “[t]his means that discovery must proceed (as allowed under CR 56(f), and any such motion must be renoted using the CR 56 schedule,” and she should be allowed to amend her Amended Petition in lieu of dismissal.²⁷ She neither moved for a continuance of the hearing under CR 56(f) or otherwise nor moved to amend her pleading. She did not state what facts she expected to adduce if given more time to respond, describe how she would amend the Amended Petition, or explain how either such step would lead to a different result.

The trial court perused and made conversational remarks with Sloans’ attorney regarding some of the additional materials that he had inserted into the record.²⁸ Immediately following this colloquy, however, the following exchange occurred:

MR. BARTLETT: And, as to the applicability of TEDRA and the Creditor’s Claims Statutes.

COMMISSIONER VELATEGUI: That’s what you need to address.²⁹

In the end, the trial court rejected Sloans’ contention that a suit upon a rejected creditor’s claim was a “matter” as defined by RCW 11.96A.030 and dismissed her Petitions because she had failed to filed a separate suit

²⁷ See CP 93-94.

²⁸ RP (5/15/14) 8-11.

²⁹ RP (5/15/14) 11: 17-20 (emphasis added).

upon her creditor's claims within 30 days of their rejection.³⁰ The court pointed out that, under Sloans' reasoning, "we could simply wipe out every chapter of Title 11 except 11.96(A)" and observed as follows:

You know, I just stood in front of the State bar and indicated to them this very problem that lawyer are faced with. And that is, can't use TEDRA to get around the specific requirements of those chapters in Title Eleven that require you to do certain things. It's just not an easy-squeezy way around.³¹

Sloans did not address the attorney fee issue in her written response to the Motion to Dismiss other than to quote RCW 11.96A.150 in full and to assert that "[u]nder TEDRA attorney's fees and cost should be awarded to Lula for successfully defending the PRs meritless motion."³² Nor did she argue in opposition to the Estate's fee request at the hearing on May 15, 2014.³³ After the Court ordered her claims dismissed, she merely requested a continuance of the determination of the award's amount.³⁴ The trial court, therefore, awarded fees on May 15, but reserved the amount for determination on subsequent motion.³⁵

³⁰ See RP (5/15/14) 11-13; CP 251-253

³¹ RP (5/15/14) 13: 13-16 and 14: 23-25 to 15: 1-3

³² CP 101: 7-21.

³³ See RP (5/15/14) generally.

³⁴ RP (5/15/14) 14: 13-16 ("And we would object to that, because that was just filed as the -- in sight of the -- his reply briefing, we would like a chance to then respond to that").

³⁵ CP 252.

Although she had claimed merely a need for more time to review the undersigned's fee affidavit, Sloans responded to the ensuing Motion to Set Amount of Fee Award by raising, for the first time, her argument of "novel issues of statutory construction" and attempting to persuade the court to reverse its dismissal order.³⁶ The Estate objected that this argument amounted to an untimely, un-noted, and improper request for reconsideration.³⁷ The trial court awarded attorneys' fees to the Estate.³⁸

III. ARGUMENT

Sloans has continuously sought to alchemize her rejected creditor's claims into a TEDRA "matter," which, she asserts, would not be subject to the strict requirement of RCW 11.40.100(1) (hereinafter "the nonclaims statute") that suit upon a rejected creditor's claim (hereinafter also referred to as "creditor's suit" or "creditors' suits" for brevity) be pursued as a separate and ordinary civil action, not as a special proceeding within a probate case, such as a judicial proceeding under TEDRA's distinctive, streamlined procedures. At the very least, Sloans seeks to have it both ways by proposing that she could elect to pursue her creditor's suit as

³⁶ CP 262-264.

³⁷ CP 277-279.

³⁸ RP (6/6/14) 6: 19-23 ("And 11.40, of course, under TEDRA 11.40 controls absolutely, because TEDRA doesn't supplement [*sic*], doesn't supplant it. It just supplements it to the extent the Court might find necessary. But otherwise, it doesn't."); CP 301-304.

either an ordinary civil action or a TEDRA proceeding.³⁹ In light of the plain language of the nonclaims statute and TEDRA and controlling authorities construing them, that choice was not available to her.

The resolution of this appeal turns upon the interpretation of statutes through the lens of appellate decisions construing and applying them. A question of statutory construction is reviewed *de novo*.⁴⁰ The Court's goal is to ascertain and give effect to the Legislature's intent.⁴¹ "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."⁴² The plain meaning of a statute should be discerned not just from the words used in a specific code section, but "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."⁴³ Generally, "[i]n construing a statute, it is always safer not to add to, or subtract from, the language of the statute unless imperatively required to make it a rational statute."⁴⁴ "Courts cannot read

³⁹ Opening Br., at 26.

⁴⁰ *Wright v. Jeckle*, 158 Wn.2d 375, 379-80, 144 P.3d 301 (2006).

⁴¹ *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

⁴² *Id.*

⁴³ *Id.*, at 11

⁴⁴ *Applied Indus. Materials Corp. v. Melton*, 74 Wn.App. 73, 79, 872 P.2d 87 (1994).

into a statute words which are not there.”⁴⁵ The principles are applicable principals to the statutes integral to this appeal.

A. The Petitions’ Dismissal Should Be Affirmed Because Sloans Failed to Commence a Separate Civil Action Within 30 Days of Claim Rejection.

1. The Nonclaims Statute Requires That Creditors’ Suits Be Pursued by Ordinary Civil Proceedings, Not Special Proceedings Under Title 11.

The Petitions stated only claims for money damages upon rejected creditor’s claims and were, therefore, subject to the nonclaims statute, which provides 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.”⁴⁶ The construction and enforcement of the nonclaims statutes is informed by the intent of the probate code, “which is to limit claims against the decedent’s estate, expedite closing the estate, and facilitate distribution of the decedent’s property.”⁴⁷ In accordance of with this intent, the nonclaims statute “is mandatory and is strictly construed; compliance with its requirements is essential to recovery.”⁴⁸ “[W]hen the claim of a creditor of an estate is rejected, his only remedy is to bring suit against the executor or

⁴⁵ *Coughlin v. City of Seattle*, 18 Wn.App. 285, 289, 567 P.2d 262 (1977).

⁴⁶ RCW 11.40.100(1) (emphasis added).

⁴⁷ *Nelson v. Schnautz*, 141 Wn.App. 466, 475, 170 P.3d 69 (2007).

⁴⁸ *In re Estate of Earls*, 164 Wn.App. 447, 450-451, 262 P.3d 832 (2011) (emphasis

administrator, and if any judgment is rendered it shall be only to establish the amount thereof as an allowed claim; ... The statutes provide an exclusive remedy to the creditor.”⁴⁹

Only upon a creditor establishing an estate’s liability upon a rejected claim does the claim become subject to administration.⁵⁰ That was the only remedy Sloans sought when she tried to pursue her creditor’s suit through a TEDRA proceeding inside of a probate case.⁵¹

Washington courts have consistently held that the “suit in the proper court” required by the nonclaims statute must be a an ordinary and separate civil action against the personal representatives, not an action within a probate proceeding as Sloans attempted to pursue. In *Schluneger v. Seattle-First National Bank*, the Supreme Court explained this principle as follows:

The probate code of this state contains no provision for a review of the rejection of a creditor's claim. Under the statute an action must be commenced upon the rejected claim. It is an ordinary civil action; it is not a part of the probate proceedings.

* * *

added).

⁴⁹ *Archer Blower & Pipe Co. v. Archer*, 33 Wn.2d 317,319-20, 205 P.2d 595 (1949) (emphasis added).

⁵⁰ See RCW 11.40.120 (“The effect of any judgment rendered against a personal representative shall be only to establish the amount of the judgment as an allowed claim”).

⁵¹ See CP 29: 1-2 (requesting judgment for damages to “thereby establish the amount of the judgment as an allowed claim pursuant to RCW 11.40.120”) (emphasis added).

In *Bailey v. Schramm* . . . , we recognized the nice distinction between matters germane to the administration of an estate, which, under the statute, must be presented to the superior court wherein the executor or administrator was appointed, and a civil action to establish a rejected claim as a charge against an estate. Once the rejected claim is established 'in the proper court, it then becomes subject to the rules of estate administration.⁵²

The Supreme Court has repeatedly pointed out that creditor's suits, which are ordinary civil claims coming under the Superior Court's general civil jurisdiction, have no place within probate proceedings, which are special proceedings under the Superior Court's probate jurisdiction, which is regulated by statute.⁵³ As discussed in the following section, this distinction has survived TEDRA's enactment.⁵⁴

⁵² 48 Wn.2d 188, 189-190, 292 P.2d 203 (1956) (citations omitted) (emphasis added). See *Bailey v. Schramm*, 38 Wn.2d 719, 722, 231 P.2d 333 (1951) ("When a claim is presented against an estate, our statutes provide that if it is rejected, then the claimant must proceed by civil action") (emphasis added).

⁵³ *Spokane v. Costello*, 57 Wash. 183, 189-190, 106 P. 764 (1910) ("A reading of the statute relating to the presentation and establishing of claims against an estate renders it plain that, upon the rejection of a claim, it is to be established, if at all, by an ordinary civil action brought and prosecuted by the claimant against the administrator, the same as against any other defendant. It is in no sense a special proceeding, nor is it a part of the probate proceeding . . . It is apparent then that a suit upon a rejected claim against an administrator is nothing more than a civil action . . .") (emphasis added); *In re Gorkow's Estate*, 28 Wash. 65, 70, 68 Pac. 174 (1902) (in reversing judgment in probate proceeding ordering payment of fees to legatee's attorneys from her share of estate funds held administrator, held that trial court, acting in its probate jurisdiction, lacked authority to decide controversy between third parties "that in no way effect the interests of the estate itself" because "powers of the superior courts in the exercise of their jurisdiction as to matters of probate are limited and defined by statute" and "confined to matters incidental to the settlement of the estate of deceased persons . . .," and noting that "[e]ven when a claim is asserted adversely to the estate itself, . . . the court acting in the probate proceeding cannot hear and determine the controversy; but suit must be regularly brought thereon 'in the proper court,' and the matter heard as other disputes." (citing Bal. Code §§ 6075 and § 6233) (emphasis added); *compare*

Although the Superior Court's jurisdiction in probate and other special proceedings under Title 11 may be broader than before TEDRA's enactment, the Title 11 jurisdictional statute, codified at RCW 11.96A.040, remains consistent with older statutes in referring for the Superior Court's exercise of its probate jurisdiction with respect to matters of estate administration. In contrast, litigation of matters outside of the scope of administration, such as creditor's suits, proceeds under the Civil Rules, which are prescribed by the Supreme Court, and do not come under the Superior Court's exercise of jurisdiction under Title 11.⁵⁵

Sloans has neglected both in the trial court and on appeal to address the above-discussed authorities, many of which were also cited in the Estate's filings in the trial court and which the trial court appears to have accepted as controlling. Her silence should be taken as admitting the Estate's summation of those authorities. She, instead, appears to believe

RCW 11.40.100(1)). See also *In re Estate of Black*, 116 Wn.App. 476, 485, 66 P.3d 670 (2003), *affirmed*, 153 Wn.2d 152, 102 P.3d 796 (2004) (quoting *State ex rel. Wood v. Superior Court*, 76 Wn. 27, 31, 135 P. 494 (1913) (internal citation omitted) (jurisdiction of Superior Court as to will contest is "derived exclusively from the statute, ... [and] can only be exercised in the mode and under the limitations therein prescribed . . .").

⁵⁴ RCW 11.96A.090(1) ("A judicial proceeding under this title is a special proceeding under the civil rules of court. The provisions of this title governing such actions control over any inconsistent provision of the civil rules)" (emphasis added).

⁵⁵ See RCW 2.04.190 (grant of authority to Supreme Court "generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits . . .") (emphasis added).

that TEDRA's enactment has rendered them irrelevant, excusing her from addressing them.

As discussed in the following section, TEDRA did not permit Sloans to elect to pursue her creditor's suit through a TEDRA proceeding within a probate action instead of a separate, ordinary civil action. The trial court properly dismissed her Petitions.

2. Sloans Was Not Entitled to Pursue Her Claims Through a TEDRA Proceeding Within a Probate Action.

TEDRA provides that "any party may have a judicial proceeding for . . . the resolution of any other case or controversy that arises under the Revised Code of Washington and references judicial proceedings under [Title 11]," but a suit on a creditor's claim, as explained above, is not a judicial proceeding under Title 11.⁵⁶ TEDRA is, furthermore, merely supplemental to, but does not supersede other provisions of Title 11, expressly including the nonclaims statute.⁵⁷ TEDRA, therefore, in no respect abrogated the long established and strictly enforced requirement of compliance with the nonclaims statute.⁵⁸

⁵⁶ RCW 11.96A.080(1) (emphasis added).

⁵⁷ RCW 11.96A.080(2) ("The provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title, including without limitation those contained in chapter . . . 11.40 . . .") (emphasis added).

⁵⁸ Cf. *In re Estate of Earls*, 164 Wn.App. 447, 262 P.3d 832 (2011) (TEDRA petition in pursuit of money claim dismissed).

The Court of Appeals explained over 14 years ago that TEDRA does not displace or permit a procedure parallel to existing procedures that already address particular proceedings.⁵⁹ Invited by a litigant to proceed under TEDRA despite express restrictive language in Title 11, the Court explained that TEDRA “gives courts the power to act in a probate proceeding in situations where the provisions of the probate code are ‘inapplicable, insufficient, or doubtful,’” but “does not give courts the power to ignore the express language of a statute . . .”⁶⁰ In no respect does the case at bar involve a situation where the applicability of other provisions of Title 11 could be deemed “inapplicable, insufficient, or doubtful” so as to so as to justify proceeding under TEDRA.

Because nothing in TEDRA authorizes (or, in light of RCW 11.96A.080(2), could authorize) litigation of a creditor’s claim within a probate proceeding, Sloans’ minute focus on whether or not a suit upon a creditor’s claim might be deemed a “matter” under RCW 11.96A.030(2) has no bearing upon, and cannot excuse, her failure to timely pursue an independent civil action against the Estate. An examination of the distinctive, statutory procedures that govern TEDRA judicial proceedings

⁵⁹ *Henley v. Henley*, 95 Wn.App. 91, 97, 974 P.2d 362 (1999).

⁶⁰ *Id.* (citing former RCW 11.96.020, the cited substance of which was recodified in RCW 11.96A.020(2))

gives further confirmation, if any were needed, that a TEDRA proceeding is not the ordinary civil action mandated by the nonclaims statute.

a. Litigation of the Estate's Potential Liability for a Creditor's Claim is Not a "Matter" That May Be Pursued in a TEDRA Proceeding.

Although Chapter 11.40 RCW states the prerequisites for bringing a civil suit upon a creditor's claim, an ensuing suit to establish estate liability upon a creditor's claim is not a judicial proceeding under Title 11 RCW.⁶¹ Such a suit may not be prosecuted as a TEDRA proceeding.

Considering that creditor's suits are not Title 11 proceedings, Sloans' farfetched characterizations of her lone claim for breach of contract damages in order to shoehorn it into TEDRA's definition of "matter" strains the meaning of that term beyond its breaking point and cannot be reconciled with strict construction of the nonclaims statute.⁶² Her reference to the Property as a "nonprobate asset" is irrelevant because her Petitions did not seek recovery of property and the nonclaims statute would not apply even had she done so.⁶³ Although the definition refers to

⁶¹ See RCW 11.96A.090(1) ("A judicial proceeding under this title is a special proceeding under the civil rules of court) (emphasis added); see *Schluneger, supra*, 48 Wn.2d at 189-90, *Bailey, supra*, 38 Wn.2d at 722, *Costello, supra*, 57 Wash. at 189, and *Gorkow's Estate, supra*, 28 Wash. and 70 (suits on creditor's claim not within Superior Court's probate jurisdiction).

⁶² See Opening Brief, at 20-24 (discussing RCW 11.96A.030(2)).

⁶³ Opening Br., at 21-22, 23 ¶ 5; see RCW 11.96A.030(2)(a), (c), and (g); *O'Steen v. Wineberg's Estate*, 30 Wn.App. 923, 640 P.2d 28 (1982) (citing *Compton v.*

“creditors,” it does so in connection with questions of administration, such as identifying classes of creditors and determining creditors’ rights in with respect to particular property interests.⁶⁴ The Petitions do not allege that Robert Berry or Nadine Berry has fiduciary duties to Sloans or seek direction to them in that connection, but, again, the nonclaims statute would have been irrelevant to such request.⁶⁵ The other aspects of RCW 11.96A.030(2) that Sloans cites concern matters of administration, not litigation of a matter, such as a rejected creditor’s claim, that may never become part of administration.⁶⁶ She did make any request with regard to the administration of the Estate.⁶⁷

The fact that TEDRA’s definition of “matter” does not mention creditors’ suits constitutes strong evidence that the Legislature had no intention of permitting litigation of such claims in TEDRA proceedings. That the Legislature did not simply add creditors’ suits to the list of “matters” is very telling considering (1) the routine nature of such suits; (2) the Legislature’s explicit statement that TEDRA supplements, but does

Westerman, 150 Wash. 391, 273 P. 524 (1928)) (nonclaim applies only to general charge against estate, not claim for specific property).

⁶⁴ Opening Br., at 23 ¶ 1; see RCW 11.96A.030(2)(a).

⁶⁵ Opening Br., at 23 ¶ 2; see RCW 11.96A.030(2)(b); *Baird v. Knutzen*, 49 Wn.2d 308, 310, 301 P.2d 375 (1956) (nonclaims statute does apply to action for specific performance).

⁶⁶ Opening Br., 23 ¶¶ 2-3; see RCW 11.96A.030(c) and (g).

⁶⁷ Opening Br., at 23 ¶ 3.

not supersede “otherwise applicable provisions” of Title 11; (3) its perpetuation of the nonclaims statute in its crucial aspect with presumed knowledge the courts’ construction of that statute relative to the Superior Court’s probate jurisdiction; and (4) its delimitation of the Superior Court’s jurisdiction as to Title 11 matters generally.⁶⁸ Neither TEDRA nor any of the secondary materials appended to Sloans’ Opening Brief suggest the Legislature had any concern about the clarity or efficacy of the nonclaims statute or intended the radical step of transforming creditors’ suits from ordinary civil actions into Title 11 proceedings under the Superior Court’s probate jurisdiction applying TEDRA’s procedures.

b. The Mere Fact that the Contract that Decedent Allegedly Breached Referenced Former TEDRA is Not Material.

The fact that the contract that is the source of the decedent’s alleged contractual duty to Sloans happens to refer to former TEDRA does not aid her because “Washington’s nonclaim statute, RCW 11.40.010, encompasses every species of liability a personal representative can be

⁶⁸ RCW 11.96A.080(2); RCW 11.96A.040. *See Ashenbrenner v. Department of Labor and Industries*, 62 Wn.2d 22, 380 P.2d 730 (1963) (quoting 50 Am.Jur., Statutes § 340, at 332) (legislature is presumed to be familiar with prior legislation on a subject and court decisions construing that legislation and “legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction”).

called upon to pay out of the estate's general funds,” including claims arising out of obligations, as Sloans alleges, that the decedent incurred during her lifetime.⁶⁹ Sloans did not seek any remedy other than breach of contract damages, such as declaration of the relations between her and Robert Berry or Nadine Berry under the Agreement in service of administering the Estate or a determination of the parties’ relative interests in an asset, as the definition of “matter” contemplates.⁷⁰ Although the Superior Court would have had to construe the Agreement had Sloans filed a separate breach of contract action as required, such a step would have been solely in order to assess the decedent’s liability for damages for an alleged breach in her lifetime.⁷¹ Sloans fails to describe any principled basis to treat her breach of contract claim differently from other creditor’s claims or to demonstrate that the Legislature intended such a result.

⁶⁹ *Estate of Earls*, 164 Wn.App. at 450-51 (emphasis added).

⁷⁰ Compare *In re Guardianship of Wells*, 150 Wn.App. 491, 208 P.3d 1126 (2009) (TEDRA proceeding to enforce terms of settlement agreement, including forcing payment of agreed sums) with *In re 1934 Deed to Camp Kilworth*, 149 Wn.App. 82, 201 P.3d 416 (2009), review denied, 166 Wn.2d 1021 (2009) (interpretation of a written deed conveyed during the grantors' lifetime in action to reform deed not a matter of administration of an estate so as to constitute a TEDRA matter under RCW 11.96A.030(c)(1)).

⁷¹ Opening Br., at 23 ¶ 3-4. It should be noted, before appellant filed her TEDRA Petition, respondents’ had already commenced a quiet title action in which the questions of construction to which she refers were likely to be addressed. She elected not to use that ordinary civil proceeding to pursue her rejected creditor’s claim as a clearly permissive, if not compulsory counterclaim. CP 128-136.

c. TEDRA procedures are distinct from those of ordinary civil actions.

Sloans' effort to obscure the distinction between special proceedings under TEDRA and ordinary, non-Title 11 civil actions founders further in view of the distinctive procedures that TEDRA prescribes for judicial proceedings pursuant to 11.96A.090. In a revealing counterpoint to TEDRA's deference to conflicting provisions of Title 11, RCW 11.96A.090 mandates that the Civil Rules, the purely judicial procedures that regulate civil suits, are merely supplemental to, and must yield to, conflicting procedural provisions of the control TEDRA.⁷² The procedures that TEDRA provides for resolving Title 11 "matters" further disclose the critical distinction between special proceedings under TEDRA and ordinary civil suits.

Prominent among TEDRA's special procedures are initial hearings on the merits of petitions within as little as 20 days of service on the basis of affidavits, an expedited process for summarily resolution on the merits that is very different from ordinary civil action procedures.⁷³ Under this expedited process, disputes may be resolved with limited or no opportunity for discovery, without other ordinary and routine civil pre-trial

⁷² RCW 11.96A.080.

⁷³ RCW 11.96A.100(8); RCW 11.96A.110(1).

procedures, and without trials and their attendant opportunities for cross examination of witnesses and observation of their demeanor. With similar dispatch and effect, parties may be compelled to engage in mediation (as Sloans attempted to require) or, without regard to the issues or the amounts at stake (in this case, she has pled over \$430,000 of damages), to arbitrate their dispute.⁷⁴ To deem such TEDRA procedures as applying to creditors' suits would be impermissibly to supersede the nonclaims statute and its requirement that rejected claims be litigated in ordinary civil actions and to confer additional and significant procedural advantages upon creditors. Such a scenario would clearly be in derogation of the nonclaims statute's purpose of strictly regulating claims against estates.

Despite her efforts to portray her Petitions as the suit required by the nonclaims statute, Sloans deliberately attempted to pursue her creditor's suit by means of a special proceeding under Title 11 within a probate proceeding and to use TEDRA's special procedures to override the civil procedure rules applicable to suits on creditor's claims. She inscribed the probate case number on her pleadings and then attempted to file them in the probate case in the document category of "TEDRA

⁷⁴ RCW 11.96A.300; RCW 11.96A.310.

Petition.”⁷⁵ Under King County local rules, this meant that, unlike when an ordinary civil suit is filed, no judge was pre-assigned, no trial date was set, and no pre-trial schedule was ordered, all further indications of her failure to commence an ordinary civil suit.⁷⁶ Beyond merely bearing a probate/guardianship case number, however, the Petitions also invoked TEDRA as the basis of the trial court’s subject matter jurisdiction, as well as personal jurisdiction and venue.⁷⁷

Sloans’ actions after her attempt to commence a creditor’s suit further establish her intent to proceed under TEDRA. She asked the trial court to order mediation under TEDRA.⁷⁸ She has repeatedly argued to the trial court and to this Court that she was entitled to elect to pursue her claim under TEDRA instead of under the Civil Rules. She extols the virtues of deciding her claims under TEDRA’s special procedures without acknowledging or discussing contrary, controlling authorities or the personal representatives’ right, indeed their obligation, to require that she comply with the nonclaims statutes and have her claim decided an ordinary civil action pursuant to the Civil Rules.⁷⁹ The trial court and this

⁷⁵ CP 1; CP 19.

⁷⁶ LCR 4(b)(18); *see* CP 181 (no reference to assigned judge, trial date, or case scheduling order).

⁷⁷ CP 45-46 ¶¶ 2.1-2.4.

⁷⁸ CP 72-73.

⁷⁹ Opening Br., at 32-33.

Court may not excuse Sloans' failure to comply with the strict requirements of the nonclaims statute over the Estate's objection and to its detriment.

d. Estate of Kordon supports affirmance.

Estate of Kordon, contrary to Sloans' representation, does not stand for the proposition that a creditor must comply with all of the procedures in both the nonclaims statute and TEDRA in order to pursue a creditor's suit.⁸⁰ Rather, it verifies the rule that a creditor may not use TEDRA procedures to circumvent the requirements of other chapters of Title 11 of the RCW, which was the principal which the trial court properly applied in dismissing the Petitions.

The Supreme Court held in *Estate of Kordon* that, although it applies to will contests, TEDRA, being merely supplemental to the will contest statutes, did not excuse the complainant from causing a citation to be issued to the executor in compliance with the former version of RCW 11.24.020, notwithstanding TEDRA's incorporation of a seemingly conflicting provision regarding service of summonses.⁸¹ This was the rule

⁸⁰ 157 Wn.2d 206, 137 P.3d 16 (2006).

⁸¹ 157 Wn.2d at 211-212. The Legislature's subsequent amendment of RCW 11.24.020 to require service of a TEDRA summons in a will contest, in lieu of a citation under the former procedure affirms the Legislature is fully cognizant of the relationship between TEDRA and other Title 11 statutes and deliberately adjusts that relationship when it deems necessary, which it has not done in the case of the nonclaims statute.

even though, unlike a creditor's suit, a will contest could be brought as either an independent action or an action incidental to an existing probate proceeding.⁸² Because of the complainant's failure to issue a citation, the court affirmed dismissal of her will contest.

Just as TEDRA did not initially eliminate the independent requirement for a citation in a will contest, it has never eliminated the requirement of the nonclaims statute and decisions construing it that a creditor's suit must be brought through an independent civil action and never as part of the probate proceeding. Nothing in TEDRA directs or permits a contrary course and Sloans fails to present any authority to the contrary. *Estate of Kordon*, therefore, supports the Estate's position that the Petitions were properly dismissed for failure to comply with the nonclaims statute.

e. Estate of Stover is not in point.

The question of whether a creditor's suit could be pursued through a TEDRA proceeding within a probate action, the key issue before this Court, was not at issue in *In re Estate of Stover*.⁸³ The issue in *Estate of Stover* was whether the trial court should have dismissed a petition seeking allowance of a creditor's claim where the personal representative had

⁸² See 157 Wn.2d at 212.

previously rejected the claim and the putative creditor failed to commence any form of suit within 30 days of the postmark of the rejection. Key distinctions between the situation in *Estate of Stover* and that in the case at bar were that the claimant therein filed a petition for allowance of a claim which, unlike a creditor's suit, may be brought within a probate action and that, at that time, RCW 11.96A.090 still permitted TEDRA petitions to be filed in existing cases.⁸⁴ These points demonstrate *Estate of Stover's* inapplicability to the issues before this Court. It appears that the personal representative did not ask the Court to decide if a TEDRA judicial proceeding was an appropriate vehicle to litigate a creditor's suit nor did the Court need to reach that question. Whether or not the creditor's petition to allow a claim could be deemed the "suit" required by the nonclaims statute simply did not matter for the purpose of decision because her petition, no matter how characterized, was not filed within the 30-day limit established by the nonclaims statute.

Sloans' contention that the court in *Estate of Stover* "construed both TEDRA and the creditor's claim statute together" is incorrect.⁸⁵ The court cited just two provisions of TEDRA, 11.96A.090(1), in connection

⁸³ 178 Wn.App. 550, 315 P.3d 579 (2013), *review denied*, 180 Wn.2d 1005 (2014).

⁸⁴ RCW 11.40.080(2).

⁸⁵ Opening Br., at 31.

with the question of whether CR 6 applied to TEDRA proceedings pursuant to Title 11 RCW, which is not pertinent to this case, and RCW 11.96A.150, the attorney fee provision, in relation to whether the aforementioned question of CR 6's applicability constituted a "novel" issue.⁸⁶ In the end, the court construed only the applicability of CR 6 to the nonclaims statute, but did not reach the question of TEDRA's applicability to creditors' suits. *Estate of Stover* does not support the propositions for which Sloans cites it.

3. Even if TEDRA Applies, Sloans Failed to Timely Commence the TEDRA Proceeding.

Even were the Estate to concede for the sake of argument only, and without regard to foregoing discussion, that a TEDRA petition could be an acceptable vehicle for pursuing a creditor's suit, Sloans failed to comply with TEDRA by commencing a new action as mandated by RCW 11.96A.090(2) within the nonclaims statute's 30-day limit. Section 11.96A.090 RCW requires that "[a] judicial proceeding under this title must be commenced as a new action," not by filing a TEDRA petition in an existing action, and that a judicial proceeding under Title 11 may not become part of an existing action unless consolidation is later shown to be appropriate. Sloans' contention that her attempt to file a TEDRA petition

⁸⁶ 178 Wn.App. at 561-564.

within an existing probate case, even if she tinkered with the caption, was commencement of a creditor's suit holds no water in light of the plain purpose of the statute's amendment, which was to require filing of judicial proceedings as new actions. Sloans' failed filing does not constitute a mere defect in a pleading submitted an action properly commenced.⁸⁷ It precludes the action from existing at all such that no amendment of the pleading can save it.

Contrary to Sloans' argument to the trial court that the 2013 amendment of RCW 11.96.090 was only for recordkeeping purposes and that TEDRA continues to recognize the distinction between original and "incidental" actions, creditors' suits are never "incidental" to probate proceedings.⁸⁸ The 2013 amendment serves only to further highlight the error of Sloans' course and does not constitute a change of the law controlling creditor's claims.

Sloans' account of how she was able to use the Clerk's e filing system to upload her Petitions and to pay a filing fee indicates only that the Clerk's computer system was not programmed to advise her against, or to prevent her from, attempting to file in the precise manner she did and

⁸⁷ Compare RCW 4.32.250 and RCW 4.36.240.

⁸⁸ "Incidental" is not defined in TEDRA, but is principally defined in the Merriam-Webster Unabridged Dictionary as "subordinate, nonessential, or attendant in position

would likely have tried to do even had she filed in-person. She was charged with notice of RCW 11.96A.090 and indisputably had the ability to file her Petitions in the manner required by law.

That the Clerk ultimately filed the Petition under a separate TEDRA case number over two months after the Estate rejected the claim on which it is based could not cure Sloans' failure to commence a separate action, whether a civil or TEDRA action before the statutory deadline. Because RCW 11.96A.090(2) requires that TEDRA cases be commenced as separate actions and the Clerk, apparently as a courtesy, proceeded to file the Petition under a new case number, rather than to return it to Sloans to file herself, the date of commencement of the TEDRA action must be taken to be March 27, 2014, after the 30-day deadline prescribed by the non-claims statute. The largest money claims, which were set forth in the original Petition, were also could not have been saved by the filing of the Amended Petition filed in the TEDRA case on April 18, 2014, nearly two months after their rejection.

Sloans did not timely commence action on her claims in the proper court with a separate civil action against the personal representatives. The enactment of TEDRA did not permit or excuse her failure to comply with

or significance.”

the requirements prescribed by the nonclaims claims statute and authorities construing it.

B. Sloans Did Not Move to Amend Her Petitions, But Any Amendment Would Have Been Futile.

In contending that amendment of Petitions “should have been ordered,” Sloans appears to tacitly concede the propriety of dismissing her Petitions in their then-current state pursuant to CR 12(b)(6).⁸⁹ Even had a saving amendment been possible, she waived objection to immediate dismissal by failing to move for amendment and to provide a copy of her proposed amended pleading and an explanation of what the amendment would accomplish.⁹⁰ Nor has she done so in this Court.⁹¹

Even had Sloans sought it, any amendment of her Petitions would have been futile because there was no properly commenced action upon which an amendment could act.⁹² What would have needed to resurrect Sloans’ creditor’s claims would have been impermissible under the nonclaims statute, as strictly construed in accordance with its intent and

⁸⁹ Opening Br., at 36.

⁹⁰ *Washington Co-op. Chick Ass'n v. Jacobs*, 42 Wn.2d 460, 466, 256 P.2d 294 (1953) (“Plaintiff did not offer or request leave to file any additional amendments to its pleading and did not attempt to show that any successful amendment could be made. We cannot consider the question this claim of error presents because it was not submitted to the trial court”).

⁹¹ Opening Br., at .36-37.

⁹² *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997) (futility is grounds for denying amendment).

policy. Sloans attempted pursued her creditor's suit as a special proceeding under TEDRA within a probate case, not as a separate civil action and contrary even to TEDRA's own requirement that TEDRA Petitions be filed in separate actions. She hailed the Estate into court using a summons issued pursuant to, and containing the language prescribed in, RCW 11.96A.100(3), including the special procedures and time frames for judicial proceedings under TEDRA, and not the procedures provided for civil actions.⁹³ Revival of her creditor's claims would necessarily have entailed the supplanting of the special proceeding she attempted to commence under TEDRA with a newly commenced and, therefore, untimely civil action under the Civil Rules.⁹⁴ Such a change would have transcended a mere amendment of a pleading in a properly commenced action to constitute a second chance to pursue an already-barred creditor's claim, contrary to the intent of the nonclaims statute.⁹⁵

⁹³ CP 15-18; *compare* CR 4(b) and CR 12(a).

⁹⁴ *Compare* 11.96A.090, RCW 2.04.190 ("The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process . . ."), RCW 4.28.020 ("From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings"), and CR 4.

⁹⁵ *Compare* RCW 4.32.250 and RCW 4.36.240.

C. Under the Standards of either CR 12(b) or CR 56, Dismissal of the Petitions Was Correct and Should Be Affirmed.

The differing approaches to motions to dismiss under CR 12(b) and under CR 56 that Sloans highlights constitute a distinction without a difference under the circumstance of this case. Sloans fails to show either that (1) the trial court's procedure was improper; or (2) its use of a different authorized procedure would have led to a different result.

1. Dismissal Under CR 12(b) was Proper.

The Estate contends that, because of Sloans' failure to pursue her creditor's suit in an ordinary civil action, as strictly required by the nonclaims statute, the Superior Court, acting in its probate jurisdiction in a special proceeding under Title 11 RCW lacked jurisdiction of her creditor's suit and, therefore, she had not timely commenced suit and her claims were forever barred. Dismissal was, therefore, proper and mandatory because the trial court lacked subject matter jurisdiction and because the Petitions did not state a claim upon which it could grant relief.⁹⁶ Washington courts have applied CR 12(b)(6) to dismiss untimely actions under statutes of limitation, which are analogous to the timing requirements of the nonclaims statute.⁹⁷ If anything, CR 12(b)(6)'s

⁹⁶ CR 12(b)(1), (6).

⁹⁷ See *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007) (affirming CR 12(b)(6) dismissal on statute of limitations grounds).

applicability to creditor's claims is even clearer because "nonclaims statutes create and destroy rights . . ."98

2. Sloans' Submission of Exhibits Did not Require the Motion to Dismiss to Be Treated in Accordance With CR 56, but the Record Also Supports Dismissal Under that Rule.

Sloans' belief that she could transform the CR 12(b) proceeding into a CR 56 proceeding simply by inserting a large volume of largely irrelevant documents into the record, in an apparent attempt to sway the court with irrelevant matters, is misplaced. The trial court, although it perused and made conversational remarks in *dictum* regarding some of the materials (such as the unauthenticated photos of alleged damage to the Property), neither relied upon nor had any need to consider them in connection with the issue actually before it, which was indisputably disclosed by the pleadings themselves.⁹⁹ Because the Petitions revealed the insuperable bar to recovery on their face, the trial court had no need to look beyond them in order to dismiss them for failure to state a claim upon which relief could be granted.¹⁰⁰

⁹⁸ *Williams v. State*, 76 Wn.App. 237, 247, 885 P.2d 845 (1994).

⁹⁹ See RP (5/15/14) 11: 17-20.

¹⁰⁰ See *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987) (" While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR

A basic principal of Washington appellate law is that an appellate court may affirm a trial court decision on any proper ground, even if it is not a ground mentioned or relied upon by the trial court.¹⁰¹ Even if the proceeding were treated as one subject to CR 56 because of Sloans' offer of additional documents, the dismissal may still be upheld if she failed to make the requisite showing to avoid dismissal under that rule.¹⁰²

Sloans cannot demonstrate that the Court would have decided differently had the Estate moved under CR 56. That conclusion follows from her failure to present the standards set forth in CR 56 and to make a showing satisfying those standards either in the trial court or on this appeal.¹⁰³

Citing CR 56 in purely rote manner, Sloans has failed to present to both trial court and this Court the standards for motions under that rule or admissible evidence and argument demonstrating why judgment should

12(b)(6)").

¹⁰¹ RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground"); *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978) ("we will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof").

¹⁰² RAP 9.12; *Gontmakher v. City of Bellevue*, 120 Wn.App. 365, 369, 85 P.3d 926 (2004).

¹⁰³ See *Bellevue School Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967) (argument not presented to trial court may not be considered upon appeal); RAP 10.3(a)(6), *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration").

not have been granted. To avoid summary judgment, Sloans was required to respond with specific facts that would be admissible as evidence at trial and that establish a legitimate dispute of material fact under the evidence and the reasonable inferences from it.¹⁰⁴ A material fact is one on which the outcome of the litigation depends.¹⁰⁵ Sloans could not establish a legitimate issue of material fact by simply relying on the mere allegations and denials stated in her pleadings or conclusory allegations, speculative statements, consideration of affidavits she presented at face value, or argumentative assertions that there are unresolved legitimate issues.¹⁰⁶

Sloans' treatment of CR 56 before both the trial court and this Court does not mount even a colorable showing under the applicable standards. The totality of Sloans' treatment of CR 56 in the trial court covered eight lines of her Response to PR's 12 (b) Motion and consisted solely of a paraphrase of the last sentence of CR 12(b), an unexplained assertion that the Court had to proceed under CR 56 in light of the twenty-five "exhibits" that she placed in the record, and a naked assertion that "[t]his means discovery must proceed (as allowed under CR 56(f)) and any

¹⁰⁴ *Coggle v. Snow*, 56 Wn.App. 499, 509-510, 784 P.2d 554 (1990).

¹⁰⁵ *Id.*, 56 Wn.App. at 509.

¹⁰⁶ *Trohimovich v. State*, 90 Wn.App. 554, 558, 952 P.2d 192 (1998), *review denied*, 136 Wn.2d 1018; *Pain Diagnostics and Rehabilitation Associates, P.S. v. Brockman*, 97 Wn.App. 691, 697, 988 P.2d 972 (1999).

such motion must be renoted using the CR 56 schedule.”¹⁰⁷ These paltry, argumentative, and speculative assertions fall far short of the requirements of CR 56 and would amply justify affirmance the dismissal under that rule.¹⁰⁸

With respect to the timing of the hearing, Sloans’ bald claim that submission of materials outside of the pleadings requires that the trial court follow the schedule set forth in CR 56(c) is incorrect. This Court explained in *Foisey v. Conroy* that “although a CR 12(b)(6) motion shall be treated as a motion for summary judgment if matters outside the pleadings are presented to and not excluded by the court, the requirements set forth in CR 56 regarding the time allowed to respond to a summary judgment motion do not apply to motions to dismiss under CR 12(b)(6).”¹⁰⁹ The last sentence of CR 12(b) simply “indicates that if a CR 12(b)(6) motion is treated as a motion for summary judgment, ‘all parties shall be given reasonable opportunity to present all material made

¹⁰⁷ CP 94: 17-25.

¹⁰⁸ See also *Pelton v. Tri-State Memorial Hospital*, 66 Wn.App. 350, 356, 831 P.2d 1147 (1992) (court properly denies motion for continuance under CR 56(f) where requesting party (1) does not offer a good reason for the delay in obtaining the desired evidence, (2) does not state what evidence would be established through the additional discovery, or (3) the desired evidence would not raise a genuine issue of material fact).

¹⁰⁹ 101 Wn.App. 36, 40, 4 P.3d 140 (2000), *reviewed denied*, 146 Wn.2d 1003 (2002) (emphasis added).

pertinent to such a motion by rule 56.”¹¹⁰ Sloans did supply extensive materials without regard to relevancy. Sloans did not move to continue the hearing on the Motion to Dismiss. Although she had less time to respond then for a motion commenced under CR 56, she made no showing to the trial court of why this time was inadequate and what she was unable to present because she did not have more time.¹¹¹ If any party was entitled to more time, it was Estate, which was inundated with twenty-five exhibits just four court days before the hearing, but decided to proceed anyway. Sloans was not entitled to a delay of the hearing of the Motion to Dismiss, which could not have helped her anyway.

D. The Court Should Affirm the Trial Court’s Fee Award to the Estate and Deny Fees to Sloans.

1. Sloans failed to present any timely argument on the fee issue.

This Court should refuse to consider Sloans’ argument on appeal that the trial court should not have awarded the Estate fees based on what she claims to be the existence of “novel issues of statutory construction” because she did not make that argument to the trial court or cite *Estate of*

¹¹⁰ *Id.* (quoting CR 12(b)).

¹¹¹ *See Foisy*, 101 Wn.App. at 40 (“Nor has [appellant] shown that he was prejudiced by having too little time to respond. His arguments to this court are the same ones he made below”).

Stover before the court awarded fees in a reserved amount.¹¹² Sloans did not submit any written or oral arguments in opposition to the Estate's request before the trial court granted fees.¹¹³ The trial court was not only justified in not considering Sloans' untimely contention "novel issues of statutory construction," but would have been constrained from doing so even had Sloans timely moved for reconsideration, which she did not do.¹¹⁴ Her untimely arguments as to the merits of a fee award are not entitled to consideration by this Court, either.

2. This Court should uphold trial court's fee award to the Estate and deny Sloans fees even if she does substantially prevail on appeal.

This Court should find that Sloans waived objection to the trial court's fee award to the Estate by failing to present any timely argument. This Court should also conclude that the trial court properly exercised its discretion in awarding the Estate fees under RCW 11.96A.150. Because Sloans has failed to adequately brief a basis for an award of fees to her on appeal, her bare request for an award of fees should be denied.¹¹⁵

¹¹² See Opening Br., at 39. *Bellevue School Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967) (argument not presented to trial court may not be considered upon appeal).

¹¹³ See CP 101; RP (5/15/14) generally.

¹¹⁴ *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999) (CR 59 "does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case")

¹¹⁵ RAP 18.1; *Austin v. U.S. Bank of Wash.*, 73 Wn.App. 293, 313, 869 P.2d 404 (1994)

Sloans does not and cannot dispute that RCW 11.96A.150 applies to creditors' suits in a supplemental manner since it does not conflict with any provision of Chapter 11.40 RCW.¹¹⁶ Washington decisions have affirmed that the statute supports awards of fees to defendants in creditor's suits that fail under Chapter 11.40 RCW.¹¹⁷ An additional ground for awarding fees was Sloans' failure to prevail on the ground for an award that she herself invoked.¹¹⁸

The appellate court reviews a trial court's award or denial of attorney fees under RCW 11.96A.150 only for a manifest abuse of discretion.¹¹⁹ A trial court abuses its discretion if its decision to award or deny attorney fees under RCW 11.96A.150 is manifestly unreasonable or based on untenable grounds or reasons.¹²⁰

(bald request for fees on appeal is inadequate and party must supply both argument and citation to authority to advise court grounds for fee award).

¹¹⁶ See RCW 11.96A.080(2).

¹¹⁷ See, *inter alia*, *Villegas v. McBride*, 50 P.3d 678, 112 Wn.App. 689 (2002) (affirming fee award under statute upon judgment dismissing suit on defective creditor's claim) and *Laue v. Estate of Elder*, 106 Wn.App. 699, 712-713, 25 P.3d 1032 (2001) (fees for defense in ordinary civil suit after estate was substituted for deceased defendant).

¹¹⁸ Compare *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App. 188, 197, 692 P.2d 867 (1984) ("a party who successfully defends an action on a contract by arguing the contract is void is nevertheless entitled to fees pursuant to the contract") and *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-122, 63 P.3d 779 (2003) (applying *Herzog's* reasoning to uphold fee award to defendant under statute held unconstitutional in other respects). See CP 101 (demanding award of fees under statute for "defending the PRs meritless motion"); Open Br., at 40-41 (requesting award of fees on appeal under statute).

¹¹⁹ *In re Estate of Black*, 116 Wn.App. 476, 489, 66 P.3d 670 (2003).

¹²⁰ *Id.*; *In re Washington Builders Benefit Trust*, 173 Wn.App. 34, 293 P.3d 1206 (2013).

Protection of estates by granting them awards of attorneys' fees in defending their assets is favored in Washington.¹²¹ Parties who engage in legal actions that are reasonably calculated to confer a substantial benefit upon estates or similar bodies of assets, such as trusts, are generally entitled to an award of fees where they protect estate funds.¹²² On the other side of the coin, an award of fees from an estate to a party in litigation having no substantial benefit to the estate, as in this case, is an abuse of discretion.¹²³

Under the foregoing principles, the trial court's exercise of its broad discretion would not be amenable to reversal even had Sloans not waived her objection. The Estate's actions in response to Sloans' putative creditor's suit were reasonably calculated to benefit and did, in fact, benefit the Estate substantially. Considering the substantial damages Sloans claimed, the costs of litigation, and the her demand for an award of fees, her creditor's suit could have largely or entirely depleted the Estate

¹²¹ *Laue v. Estate of Elder*, 106 Wn.App. 699, 712-713, 25 P.3d 1032 (2001), *review denied*, 145 Wn.2d 1036 (2002).

¹²² RCW 11.96A.150 (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"; "[i]n 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" (emphasis added); see *In re Wash. Builders Benefit Trust*, 173 Wn.App. 34, 85-86, 293 P.3d 1206 (2013).

which, apart from the value of the Property, to which title is disputed, amounts to less than \$20,000.00 in probate assets.¹²⁴ The Estate has been compelled to consume a significant fraction of its limited assets in defending against Sloans' improper creditor's suit and her appeal of its dismissal.¹²⁵

The Court should deny Sloans' request for attorneys' fees for two reasons. First, even if this Court reverses the dismissal, Sloans should not be awarded attorneys' fees either on appeal or in the trial court because her suit could not substantially benefit the Estate. Second, this Court should refuse her contingent request for an award of fees on appeal because she fails to present any sufficient argument to support it.

3. *Estate of Stover* does not support Sloans' argument that this case involves "novel questions of statutory construction."

Sloans failed to timely present the trial court with her argument that this case involves "novel questions of statutory construction," when she clearly did not feel that way before her creditor's suit was dismissed.¹²⁶ This Court should decline consider such untimely argument.

¹²³ *In re Estate of Niehenke*, 117 Wn.2d 631, 648-649, 818 P.2d 1324 (1991); *In re Estate of Moi*, 136 Wn.App. 823, 835, 151 P.3d 996 (2006), review denied, 162 Wn.2d 1003 (2007).

¹²⁴ CP 122.

¹²⁵ See CP 283-285.

¹²⁶ CP 101.

Even if the Court were inclined to consider Sloans' argument, *Estate of Stover* does not suggest the presence of any novel question relevant to the trial court's application of the well settled and strictly construed requirements for commencing creditor's suits. *Estate of Stover* give no support for a conclusion that the trial court's dismissal of Sloans' Petitions entailed a novel issue. Considering that the claimant in *Estate of Stover* had filed her "suit" more than 30 days after claim rejection, the Court did not have occasion to examine whether or not a petition to allow a claim filed in the probate case pursuant to RCW 11.40.080 was the required "suit." The Court simply assumed it was. Other key differences between the situations in *Estate of Stover* and in the case at bar are that a petition to allow a claim under RCW 11.40.080, unlike a creditor's suit, could always be brought within a probate proceeding and, at the time of its decision, it was still possible to file a TEDRA petition in a probate case. The only novel question in *Estate of Stover*, whether CR 6 might apply to save the claim, has not relevant to the case at bar. *Estate of Stover* does not aid Sloans even if the Court agrees to consider her untimely argument citing it.

E. The Court Should Award the Estate Its Attorney's Fees and Costs on Appeal.

Rule of Appellate Procedure 18.1 supplies authority to the Court to award reasonable attorneys' fees on appeal where "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before . . . the Court of Appeals . . ." The applicable law authorizing this Court to award fees to the Estate is RCW 11.96A.150 and the authorities that the Estate discussed in the preceding section of this brief, which it hereby incorporates by reference in support of an award of their fees on appeal.¹²⁷

If this Court upholds the trial court's dismissal of the Petitions, the Estate respectfully submits that it is clear that it should exercise its discretion by awarding them their fees and costs on appeal. Even if it does not affirm dismissal, however, the Estate submits that an award of its fees on appeal would be just and equitable because the personal representatives have defended the trial court's judgment in good faith and in order to substantially benefit the Estate.

This case no more involves novel questions of statutory interpretation on appeal than it did in the trial court. There is no basis on

¹²⁷ *In re Estate of Frank*, 146 Wn.App. 309, 327, 189 P.3d 834 (2008), *reviewed denied*, 165 Wn.2d 1030 (2009) ("RCW 11.96A.150 provides both the trial court and this court

which to conclude that TEDRA altered the strict and long-established requirement that creditors' suits may only be pursued in separate, ordinary civil actions under the Superior Courts general civil jurisdiction. TEDRA is explicitly supplemental to, and does not supersede requirements of other parts of Title 11, namely the requirement that a creditor's claim, once rejected, be pursued through an separate, ordinary civil action before it might be the proper subject of a judicial proceeding under Title 11, *i.e.*, a special proceeding conducted in accordance TEDRA's distinct procedures. This requirement should be, as it always has been, strictly construed for the benefit of estates. Indeed, so crucial is this requirement that it is laid out in a text box in the 2011 edition of the King County Superior Court's Probate Policy and Procedure Manual, which was adopted some twelve years after TEDRA's enactment.

An additional or alternative ground upon which to award the Estate its reasonable attorneys fees on appeal is that Sloans' appeal is frivolous under RAP 18.9(a).¹²⁸ An appeal is frivolous "if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of

with broad discretion to award attorney fees in a trust dispute.")

¹²⁸ Court "may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms or compensatory damages to any other party who has been harmed by . . . the failure to comply . . ."

merit that no reasonable possibility of reversal exists.”¹²⁹ In light of the strict requirement of the nonclaims statute and the decisions, never overruled or recognized as abrogated, construing it, none of which Sloans has acknowledged, let alone attempted to distinguish, the Estate respectfully submits that her appeal is frivolous and that it has been unjustifiably forced to incur a substantial expense to respond to it.

IV. CONCLUSION

The Estate requests that the Court grant it the following relief:

- (1) Affirmance of the trial courts Order Dismissing Sloans’ TEDRA Petitions and Forever Barring the Claims Referenced Therein and Awarding Attorneys’ Fees;
- (2) Affirmance of the trial court’s Order and Judgment on Personal Representative’s Motion to Set Amount of Awarded Attorneys’ Fees.
- (3) An award of its reasonable attorneys’ fees for this appeal or a remand to the trial court for a determination of such fees; and
- (4) An award of its costs upon this appeal.

¹²⁹ *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 619, 94 P.3d 961 (2004) (considerations in determining frivolousness of appeal are: “(1) an appellant has a right to appeal, (2) we resolve any doubts about whether an appeal is frivolous in the appellant's favor, (3) we consider the record as a whole, (4) an unsuccessful appeal is not necessarily frivolous, and (5) an appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no

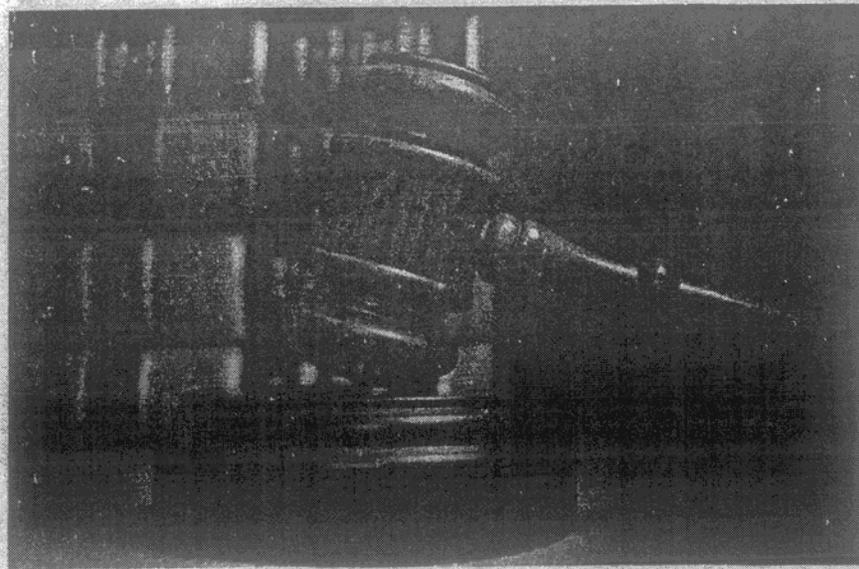
RESPECTFULLY SUBMITTED this 3rd day of November, 2014.

A handwritten signature in black ink, appearing to read "Charles R. Horner". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Charles R. Horner, WSBA No. 27504
Attorney for Respondents

reasonable possibility of reversal exists”).

**2011
King County
Probate Policy
& Procedure
Manual**



8.8.5 Suit on Rejected Claims. A claimant whose claim is rejected must commence an action against the Personal Representative within thirty days after notification of rejection. RCW 11.40.100. In the case of a claim that is not allowed or rejected within the later of four months from the date of first publication of the notice to creditors or thirty days from presentation of the claim, the claimant may serve written notice on the Personal Representative that the claimant will petition the court to have the claim allowed. RCW 11.40.080(2). If the Personal Representative fails to notify the claimant of the allowance or rejection of the claim within twenty days after the Personal Representative's receipt of the claimant's notice, the claimant may petition the court for a hearing to determine whether the claim should be allowed or rejected, in whole or in part. *Id.*

Comment: A rejected claimant must bring an ordinary civil action for allowance of its claims—it is not part of the probate proceedings. *Schluneger v. Seattle-First Nat'l. Bank*, 48 Wn.2d 188, 292 P.2d 203 (1956).

8.8.6 Compromise of Claims. If it appears to the Personal Representative that a compromise of the claim is in the best interests of the estate, then the Personal Representative may compromise the claim, either before or after rejection of the claim, whether the claim is due or not, and whether the claim is absolute, contingent, liquidated or unliquidated. RCW 11.40.100(2).

8.9 Allowance or Rejection of Claims by Notice Agent.

8.9.1 Allowance or Rejection of Claims by Notice Agent. Claims may be allowed or rejected in part, and compromised by the Notice Agent. The Notice Agent shall notify the claimant of the rejection by personal service or certified mail addressed to the claimant, or claimant's agent, if applicable, at the address stated in the claim, and the Notice Agent shall file with the court an affidavit showing the notification and the date of the notification. RCW 11.42.100. Any rejection must advise the claimant that suit on the claim must be brought against the Notice Agent within thirty days of the notification of rejection or the claim will be forever barred. RCW 11.42.100(1).

8.9.2 Suit on Rejected Claims. A claimant whose claim is rejected must commence an action against the Notice Agent:

(a) Within thirty days after notification of rejection.

(b) If the Notice Agent has not allowed or rejected a claim within the later of four months from the date of first publication of the notice to creditors and thirty days from presentation of the claim, the claimant may serve written notice on the Notice Agent that the claimant will petition the court to have the claim allowed. RCW 11.42.100. If the Notice Agent fails to notify the claimant of the allowance or rejection of the claim within twenty days after the notice agent's receipt

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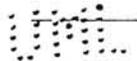
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HON. RICHARD A. BALLINGER,

EX-JUDGE OF THE SUPERIOR COURT, AND AUTHOR OF "BALLINGER ON COMMUNITY
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APPENDIX 3

TITLE XXXV.

OF PROBATE LAW AND PROCEDURE.

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CHAPTER I.

OF JURISDICTION AND POWERS OF THE COURT.

§ 6075. Powers of Court.

The superior courts, in the exercise of their jurisdiction of matters of probate, shall have power,—

1. To take proof of wills, and to grant letters testamentary and of administration, and to bind apprentices as by law provided;

2. To settle the estates of deceased persons, and the accounts of executors, administrators, and guardians;
3. To allow or reject claims against the estates of deceased persons as hereinafter provided;
4. To hear and determine all controversies between masters and their apprentices;
5. To award process, and cause to come before them all persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be intrusted with or in any way accountable for any property belonging to a minor, orphan, or person of unsound mind, or estate of any deceased person;
6. To order and cause to be issued all writs which may be necessary to the exercise of their jurisdiction. [Cf. L. '54, p. 309, § 3; L. '73, p. 253, § 3; Cd. '81, § 1299; L. '91, p. 380, § 1; 2 H. C., § 845; Abb. R. P. S., pp. 360-373.]

See Const., Art. 4, § 6.
Where the court acquires jurisdiction of a decedent's estate through a petition to appoint an administrator, which it denied, the court has power to proceed regularly to final distribution, although the widow may protest against any administration: In re Wilbur's Estate, 8 W., 35; 40 Am. St. Rep., 886.

The probate court has no jurisdiction to try title to real estate as between the representatives of an estate and the husband of the decedent, where the latter claims an interest adverse thereto: Stewart v. Lohr, 1 W., 341; 22 Am. St. Rep., 150; and where the probate court had no jurisdiction of the subject matter the appellate court could gain none: Id.

Under this section probate courts were invested with jurisdiction over the estates of deceased persons, and when such powers have been invoked by petition setting forth the jurisdictional facts, among other, absence of a party for more than seven years, and that there is no evidence that he is still living, the court is warranted in finding that he is dead, and in ordering administration on his estate: Scott v. McNeal, 6 W., 309.

In such a case, the supposed deceased person, after his return to this state, cannot, as against an innocent purchaser or his grantees, maintain an action of ejectment to recover property sold under the decree of the probate court: Id.; overruled in 154 U. S., 34.

The power given probate courts by the legislature of Washington territory to make distribution of testator's estate to his minor children when they were not provided for in his will, was not in contravention of the organic act (10 U. S. at L., 172) creating such courts: Webster v. Seattle Trust Co., 7 W., 642.

Under § 6196 infra, where the testator directs the management and settlement of his estate without the intervention of the probate court, the acts of the trustees cannot be called in question by any court, so long as they faithfully comply with the provisions of the will: Newport v. Newport, 5 W., 114.

A finding that a decedent was a resident of this state, with property therein, authorizes the court to administer thereon, and if the fact of residence is erroneously determined the remedy is by appeal: State v. Superior Court, 11 W., 111.

§ 6076. Records to be Kept.

There shall be kept in the office of the clerk of the superior court the following books of record of probate matters:—

1. A journal, in which shall be entered all orders, decrees and judgments made by the court, or the judge thereof, and the minutes of the court, in probate proceedings;
2. A record of wills, in which shall be recorded all wills admitted to probate;
3. A record of letters testamentary and of administration, in which all letters testamentary and of administration shall be recorded;
4. A record of bonds, in which all bonds and obligations required by law to be approved by the court or judge in matters of probate shall be recorded;
5. A record of petitions, in which all petitions for orders of sale of real estate shall be recorded;
6. A record of claims, in which at least one page shall be given to each estate, or case, wherein shall be entered, under the title of each estate, or case, in separate columns properly ruled,—1. The names of claimants against the

§ 6233. Claim Barred, When.

When a claim is rejected by either the executor, administrator, or the court, the holder must bring suit in the proper court against the executor or administrator within three months after its rejection, otherwise the claim shall be forever barred. [Cf. L. '54, p. 281, § 84; L. '69, p. 166, § 665; L. '73, p. 285, § 159; Cd. '81, § 1472; 2 H. C., § 984; Cal. C. C. P., § 1498.]

See supra § 4804, same subject.

See infra § 6236, suspension of statute.

A note not due at the death of the maker was presented to the administrator Mar. 5, 1859, and rejected, and suit brought thereon Mar. 12, 1859; letters of administration having issued Dec. 4, 1856, no notice to creditors having been published, it was held not barred: *Smith v. Hall*, 19 Cal., 85. A claim was presented May 8, 1865, and the administrator retained the claim for more than ten days, refusing to indorse upon it either his allowance or rejection; it was held that the rejection was not earlier than the 18th of May; and the complaint, which was filed Aug. 14, 1865, was held in time: *Rice v. Inskeep*, 34 Cal., 225. The period of

three months within which an action upon a rejected claim against the estate of a deceased person must be brought does not commence to run until the actual rejection of the claim by an indorsement to that effect: *Bank of Ukiah v. Shoemaker*, 67 Cal., 147. The complaint need not allege the facts showing how the defendant became invested with his representative character; an allegation that he is the executor or administrator is sufficient: *Wise v. Williams*, 72 Cal., 544; *Moseley v. Henry*, 66 Cal., 478.

Alleging presentation of claim sufficient averment: See *Janin v. Browne*, 59 Cal., 37. This allegation is material: *Rowland v. Madden*, 72 Cal., 17.

§ 6234. No Claim to be Allowed if Barred by Statute.

No claim shall be allowed by the executor, administrator, or court which is barred by the statute of limitations. [L. '54, p. 281, § 85; Cd. '81, § 1473; 2 H. C., § 985; Cal. C. C. P., § 1499.]

Claim outlawed cannot be allowed: *Dorland v. Dorland*, 66 Cal., 189.

§ 6235. No Action on Unpresented Claim.

No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator. [L. '54, p. 281, § 86; Cd. '81, § 1474; 2 H. C., § 986; Cal. C. C. P., § 1500.]

See supra § 6228 and notes.

See supra § 6230, allowance or rejection of claims.

See infra § 6239, effect of judgment.

The provisions of this section have no application to claims against a partnership estate: *Barlow v. Coggan*, 1 W. T., 257. They are applicable in case of foreclosure of laborer's lien on saw logs: *Casey v. Ault*, 4 W., 167. No action can be maintained against the representative of a deceased person until the claim has been first presented and rejected: *Strong v. Eldredge*, 8 W., 595, 599; but the rule does not apply where no executor or administrator is in existence: *Id.*

Where, pending an appeal from a judgment, the appellant dies and his executors are substituted by stipulation, they cannot, on a retrial of the cause after reversal, demand a non-suit on the ground that the claim in action had never been presented to them as executors: *Megrath v. Gilmore*, 15 W., 558; *Strong v. Eldredge*, supra.

Failure to present a claim to the executors of one joint debtor will not release the other joint debtor. In cases where the law excuses, or does not require, presentment to the executors: *Megrath v. Gilmore*, supra.

If a demand against a decedent's estate is merely for equitable relief or for uncertain and unliquidated damages, it is not necessary to present it to the administrator for allowance prior to suit thereon: *Neis v. Farquharson*, 9 W., 508; and the objection that there was no presentation of plaintiff's claim to the administrator for

allowance cannot be raised for the first time in the appellate court: *Id.*

Where one of the makers of a promissory note, a partner, dies, before maturity of the note, presentment and demand should be made of the surviving maker, and not of the executor of the deceased partner. This section has no application in such a case: *Barlow v. Coggan*, 1 W., 257.

While the holder of a mortgage, lien or other security may bring an action to enforce the same against the property of the estate subject thereto, without first presenting the claim to the executor or administrator, he cannot, without the presentment required by this section, bring such an action against any other property of the estate, or have judgment entered up for any deficiency in the action brought: *Scammon v. Ward*, 23 Pac. Rep., 439 (W.); *Pechaud v. Rinquet*, 21 Cal., 67; *Security Savings Bank v. Connell*, 65 Cal., 574; 3 West Coast Rep., 681; *Christy v. Dana*, 42 Cal., 174; *Willis v. Farley*, 24 Cal., 499; *Fallon v. Butler*, 21 Cal., 24; *Sichel v. Carrillo*, 42 Cal., 493; *Schadt v. Heppie*, 46 Cal., 436. A pledgee is not obliged to present his claim to the administrator of the pledgor, unless he seeks recourse against other property of the estate than that pledged: *Estate of Kibbe*, 57 Cal., 407. A mortgagee's rights are not barred by a failure to present his claim, secured by mortgage, to the executrix. Such failure only operates to prevent him from making any deficiency out of the decedent's other estate after exhausting the land mortgage: *Scammon v. Ward*, supra.

Merriam-Webster Unabridged Dictionary

¹in·ci·den·tal *adjective*

1 : subordinate, nonessential, or attendant in position or significance: such as

a : occurring merely by chance or without intention or calculation : occurring as a minor concomitant

<allowing a few dollars extra for *incidental* expenses>

<the *incidental* gain which such a policy may win — J. A. Hobson>

<man may be an *incidental* host of the sheep liver fluke>

b : being likely to ensue as a chance or minor consequence — usually used with *to*

<labor problems *incidental* to rapidly expanding factories — *American Guide Series: Massachusetts*>

c : lacking effect, force, or consequence : not receiving much consideration or calculation

<a cool, purely *incidental*, and passive contempt — Herman Melville>

d : presented purposefully but as though without consideration or intention; *often* :

DIGRESSIVE

<an *incidental* allusion, purposely thrown out, to the day of the week — Charles Dickens>

2 : met or encountered casually or by accident : CHANCE

<*incidental* traveling companions>

<an *incidental* shipboard acquaintance>

Origin of INCIDENTAL

¹*incident* + *-al*; probably influenced in meaning by Medieval Latin *incidenter* incidentally, adverb, from Latin *incident-*, *incidens*

First Known Use: 1644 (sense 1)

Related to INCIDENTAL

Synonyms: casual, chance, fluky (*also* flukey), fortuitous, inadvertent, accidental, unintended, unintentional, unplanned, unpremeditated, unwitting

Antonyms: calculated, deliberate, intended, intentional, planned, premeditated, premeditative, prepense, set

Related Words: coincidental; freak, odd; aimless, arbitrary, desultory, haphazard, random; uncertain, unexpected, unforeseeable, unforeseen; coerced, forced, involuntary; unconscious, unprompted

Near Antonyms: certain, destined, expected, fixed, foreordained, foreseeable, foreseen, inevitable, predestined, predetermined, predictable, preordained, prescribed, sure; conscious, freewill, knowing, unforced, voluntary, volunteer, willful (*or* wilful)

See Synonym Discussion at accidental

Pronunciation Symbols

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

LULA SLOANS,

Appellant

v.

NADINE E. BERRY and
ROBERT M. BERRY,

Respondents.

NO. 72095-3

DECLARATION OF SERVICE

2014 NOV -6 PM 12: 14
COURT OF APPEALS
STATE OF WASHINGTON

I, Charles R. Horner, declare the following matters to be true and correct under penalty of perjury under the laws of the state of Washington:

1. On November 3, 2014, I served appellant with Brief of Respondent (the Table of Authorities of which was incomplete to as to court decisions only) by delivering it to her attorney, Robert Bartlett, at Cook & Bartlett, PLLC, 3300 West McGraw Street, Suite 230, Seattle, Washington.

2. On November 4, 2014, I served appellant a complete Table of Authorities with respect to Brief of Respondent by delivering it to her attorney, Robert Bartlett, at Cook & Bartlett, PLLC, 3300 West McGraw Street, Suite 230, Seattle, Washington.

3. On November 5, 2014, in accordance with the Court's instructions, I served appellant with another copy of the Brief of Respondent that included the complete Table of Authorities, a copy of which I had delivered to her on November 4, by mailing it to her attorney, Robert Bartlett, at Cook & Bartlett, PLLC, 3300 West McGraw Street, Suite 230, Seattle, Washington, 98199, by first class U.S. Mail, postage prepaid.

SIGNED this 5th day of November 2014, at Tacoma, Washington.


Charles R. Horner, WSBA No. 27504