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DIVISION II

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STATE OF WASHINGTON
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NO. 38579-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

JAY T. FERGUSON and KELLY L. FERGUSON, husband and
wife, and the marital community comprised thereof,

Appellants,

vs.

TIMOTHY D. PASCHAL, as Personal Representative of the Estate
of KATHERYN E. KURTZ,

Respondent.

RESPONSE

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Appendix 1 Installment Promissory Note (June 5, 2002) (“Note”) CP 21-22

Appendix 2 Undated Letter (“Letter”) CP 31-32

I. STATEMENT OF THE CASE

The trial court did not commit error in this case. The Motion to Strike and the Motion for Summary Judgment were properly granted. The Motion for Reconsideration was properly denied. The trial court's rulings should be affirmed on review.

A. STATEMENT OF RELEVANT FACTS

Respondent, Timothy Paschal ("Estate"), is the Personal Representative of the Estate of Kathryn E. Kurtz ("Decedent"), who resided in Kitsap County, Washington, at the time of her death. [CP 3, CP 15].

On or about June 5, 2002, Appellant Jay T. Ferguson, a grandson of the Decedent [CP 29], and his wife Appellant Kelly L. Ferguson (collectively referred to as "Ferguson") [CP 4, CP 7] executed an Installment Promissory Note (the "Note") in favor of the Decedent [CP 4, CP 7, CP 21-22]. A true and correct copy of the Note is attached hereto as Appendix 1.

Under the terms of the Note, Ferguson promised to pay the principal sum of Eighty-Thousand and no/100 Dollars (\$80,000.00) in monthly installments of One-Thousand Six-Hundred Twenty-Five

and no/100 Dollars (\$1,625.00), or more, including interest on the unpaid principal balance from the date of the Note at the rate of eight percent per annum. [CP 21]. The Note also contained a late charge provision stating that in the event any payment or portion thereof is not paid within 10 days of the date due, a late charge of five cents may be collected for each dollar so overdue. [CP 22].¹

The first installment on the Note was due July 15, 2002, and subsequent installments were due on the 15th day of the month thereafter until the entire principal balance, plus interest, is paid in full. [CP 21].

The Note's default provision stated that if any installment was not paid within 30 days of when due, then all of the principal and interest shall, at the election of the holder, become due and payable at once, and from the date of such default the Note will bear interest at the rate of 12 percent per annum. [CP 21].

The Note also provided that if the Note was not paid when due, and was given to an attorney for collection, or suit filed thereon, the makers of the Note agreed to pay, in addition to the unpaid principal and interest, all costs of collection and such

¹ A copy of the Note is attached as Appendix 1.

additional sum as the Court may adjudge reasonable as attorney's fees in such suit. [CP 22].

Ferguson made sporadic payments under the Note during the period from June 5, 2002 to November 17, 2005, and thereafter made no further payments. [CP 4, CP 23].

As of June 1, 2008, the unpaid balance, interest, and late charges totaled Ninety-Nine Thousand One-Hundred Seventy-Eight and 89/100 dollars (\$99,178.89). [CP 20].

Despite repeated demands by the Estate, Ferguson refused to pay the Estate the sums due and owing. [CP 5].

In response to the Estate's Motion for Summary Judgment, the only evidence submitted by Ferguson was an affidavit submitted by Jay Ferguson. [CP 29 – 32]. In addition to the introductory language of the Affidavit, Mr. Ferguson made the following statements:

- P1. I am one of the Defendant's (*sic*) in the above captioned matter and make this affidavit from my personal knowledge;
- P2. I entered into an agreement with Kathryn F. Kurtz, my grandmother, for a loan;

- P3. I was having a difficult time making the payments on the loan so I spoke with my grandmother about it;
- P4. As a result of the conversation with my grandmother, she agreed to modify the agreement and accept payments of the principal amount loaned and waive all interest.
- P5. I have paid \$35,750.00.
- P6. Pursuant to the modified agreement, I owe the amount of \$44,250.00. [CP 29-30].

Attached to Mr. Ferguson's Affidavit was an undated note (referred to hereinafter as "the Letter" in order to avoid confusion with the Promissory Note), signed "Gram." [CP 31-32, see copy of Letter - Appendix 2]. No reference to the Letter is made in the statements in the Affidavit. [CP 29-30]. No evidence was submitted to attempt to authenticate the Letter.

B. ERRONEOUS FACTS PRESENTED IN APPELLANTS' BRIEF

Ferguson's Appellate Brief (Statement of the Facts Relevant to the Issues Presented for Review) erroneously states, as facts, that subsequent to the Letter [Appendix 2], Ferguson reduced the payments, and the decedent never objected. [Ferguson Appellate Brief, page 3]. Ferguson's citation to the record in support of these statements is CP 10-14, the Estate's Memorandum in support of

Summary Judgment. The record shows that no such statements were made. [CP 10-14].

In fact, the record actually shows that the Letter is undated [CP 31-32, Appendix 2] and that the amount of the monthly payment, when actually made by Ferguson, was reduced on only one occasion (9/10/2005 \$1,600.00 payment) and that the regular payment amount was paid the following month. [CP 23]. Ferguson's first and last payments on the Note were in the amount of \$1,625.00 [CP 23], which was the required monthly installment amount according to the terms of the Note. [CP 21].

C. PROCEDURE

On November 29, 2007, the Estate filed a Summons and a Complaint for Breach of Contract seeking a judgment in favor of the Decedent's Estate against Ferguson for unpaid principal, interest, and late charges on the Note; and for costs and attorney's fees. [CP 1-6].

On February 29, 2008, Ferguson filed an Answer. [CP 7-8].

On April 29, 2008, the Estate filed a Motion for Summary Judgment [CP 9], and the following documents in support of the

Motion: a Memorandum [CP 10-14], the Declaration of Timothy Paschal [CP 15-18], and the Declaration of Christopher Beckham (CPA) [CP19-24].

On May 20, 2008, Ferguson filed Defendant's Reply to Motion for Summary Judgment [CP 25], and a Memorandum in support of their response. [CP 26-32]. The Affidavit of Jay Ferguson was attached as Exhibit "A" to the Memorandum. [CP 29-30].

On June 4, 2008, the Estate filed a Motion to Strike Portions of the Declaration of Jay T. Ferguson [CP 33-37]. The relief requested by the Estate was that the Court strike all of paragraph 4, all of paragraph 6, and all of the documents (the Letter²) attached to the Jay Ferguson Declaration; on the grounds that the statements and the Letter were barred as inadmissible hearsay and barred by the Deadman's Statute.³ [CP 33].

On June 13, 2008, a hearing on the Motion to Strike and the Motion for Summary Judgment was held in front of the Honorable

² The only document attached to the Jay Ferguson Declaration was the Letter.

³ The document is actually an affidavit but is referred to herein as a declaration as that term was used below by the Estate and the Court to identify the pleading.

M. Karlynn Haberly of the Kitsap County Superior Court [CP 38; RP, June 13, 2008, page 2, lines 15-17].

On the Motion to Strike, Judge Haberly initially orally ruled striking paragraphs four and six of the Jay Ferguson Declaration on the grounds of hearsay. [RP, June 13, 2008, page 6, lines 14-15]. Judge Haberly then signed and entered a written order handed forward by the Estate. [RP, June 13, 2002, page 6, lines 16-17; CP 39-40]. The entered written order stated as follows: "ORDERED, ADJUDGED AND DECREED that all of paragraphs 4 and 6 of the Declaration of Jay Ferguson and the attached document thereto are stricken." [CP 39-40]. Ferguson raised no objection to the trial court at the hearing regarding entry or the written order striking the Letter, nor did they raise an objection in their Motion for Reconsideration.⁴

On the Motion for Summary Judgment, Judge Haberly took the matter under advisement for two weeks [RP, JUNE 13, 2008, page 10, lines 13-14] to allow Ferguson to submit a Declaration setting forth documentation of the amount owed. [RP, June 13,

⁴ Ferguson also failed to raise the issue on appeal.

2008, page 10, lines14-15].⁵ Prior to this statement, Judge Haberly stated that she was granting the Motion for Summary Judgment subject to documentation. [RP, June13, 2008, page 10, lines 1-2].⁶

On June 18, 2008, Ferguson filed an affidavit of Richard T. Roats, attorney for Ferguson. The Roats' Affidavit stated, in part, that prior to the hearing Mr. Roats had not received notice of the Motion to Strike [CP 42-43], that at the hearing the Court allowed him to review the Court's copy, and that the Estate subsequently provided a copy to Mr. Roats. [CP 42]. Mr. Roats had also advised the Court at the hearing that he had not received the Motion to Strike. [RP, June 13, 2008, pages 2-3]. The Court took a recess to allow Mr. Roats an opportunity to review the Motion and the Court file. [RP, June 13, 2008, page 3, line 7-11]. Mr. Roats did not object to the hearing going forward. [RP, June 13, 2008, page 3 (no objection made after returning from recess)]. At the end of the hearing, Mr. Roats again raised his concern that he had not

⁵ The amounts stated in the Ferguson Declaration, with no supporting documentation, as paid and owed on the Note are different than the amounts shown in the Estate's evidence. [CP 29 -30, CP 19-24].

⁶ Ferguson had the burden of proof of payment on the Note. *West Coast Credit Corporation v. Robert L. Pedersen et al*, 64 Wn.2d 33, 35, 390 P.2d 551 (1964).

received the Motion to Strike; the Court responded that Mr. Roats could file a Motion for Reconsideration [RP, June 13, 2008, page 11, lines 7-9].

On June 18, 2008, Ferguson filed Defendant's Motion for Reconsideration [CP 41] and Defendant's Memorandum in Support of Objection to Plaintiff's Motion to Strike. [CP 45-47].

On June 24, 2008, the Estate filed a Declaration of Nathaniel M. Berwind, attorney for the Estate, in response to Ferguson's Motion for Reconsideration. [CP 48-52]. Mr. Berwind's Declaration provided evidence that the Estate's Motion to Strike was mailed to Mr. Roats, prior to the hearing. [CP 48-52]. Mr. Berwind's Declaration states [CP 48-49], and the documentation attached to his Declaration shows [CP 50-52 USPS Shipping and Tracking Confirmation)], that a copy of the Motion to Strike was mailed by overnight Express Mail to Mr. Roats on June 4, 2008.

On June 25, 2008, Mr. Roats filed a second Affidavit addressing the transmission of the Motion to Strike, including his efforts to access his mail. [CP 53-54].

On August 4, 2008, the Estate filed a Memorandum in response to Defendant's Motion for Reconsideration. [CP 55-66].

On September 19, 2008, the Trial court entered a Memorandum Opinion Denying Ferguson's Motion for Reconsideration and reaffirmed the earlier ruling striking portions of Ferguson's Declaration. [CP 67-68].

On October 7, 2008, a Note for Motion Docket was filed setting an October 17, 2008 hearing for Entry of Order on Summary Judgment. [CP 69-70, CP 74].

On October 17, 2008, an Order on Summary Judgment was entered granting summary judgment in favor of the Estate. [CP 75-77].

On November 17, 2008, Ferguson filed their Notice of Appeal with the Kitsap County Superior Court Clerk's office [CP 78].

II. STANDARD OF REVIEW

The standard of review on motions for summary judgment, and all trial court rulings made in conjunction with a summary

judgment motion, is de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The standard of review on the denial of a Motion for Reconsideration is abuse of discretion. *Lian v. Stalick*, 106 Wn. App. 811, 823-24, 25 P.3rd 467 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or reasons. *Lian v. Stalick at 823-24*.

III. ARGUMENT

PARAGRAPHS 4 AND 6 OF THE JAY FERGUSON DECLARATION AND THE LETTER WERE PROPERLY STRICKEN.

The Trial court did not err in its ruling striking portions of Jay Ferguson's Declaration because the statements and document were either barred as hearsay or barred by the Deadman's Statute.

Before addressing hearsay and Deadman's Statute arguments, the issue as to whether the oral ruling or the written order granting the motion to strike controls is addressed.

As documented to the record in the Estate's Statement of Procedure, the trial court's oral ruling on the Motion to Strike and its

entered written order were inconsistent in that the entered written order struck paragraphs four and six of the Jay Ferguson Declaration and the Letter [CP 39-40], but the oral ruling struck only paragraphs four and six. The oral ruling granted the Estate's motion, in part, striking only the two Declaration paragraphs on the basis of hearsay. [RP, June 13, 2008, page 6, lines 14-15].⁷ The written order, which did not state ground(s), granted the Estate's motion in full, striking the two Declaration paragraphs and the Letter.

The Court of Appeals may consider oral rulings of a Trial court so long as there is no inconsistency. See *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 127, 30 P.3rd 446 (2001) (allowing an appellate court to refer to a trial court's oral decision to eliminate speculation regarding legal theory used to reach decision). As the oral ruling in this case provided the grounds for the trial court's decision as hearsay, this Court can look to the oral ruling concerning the ground(s) underlying the written ruling, which granted the Estate's motion to strike. However, because the trial court's Memorandum Opinion Denying Motion for Reconsideration

⁷ The Estate sought entry of an order striking paragraphs 4 and 6 of the Jay Ferguson Declaration and the Letter. [CP 33-37].

reaffirmed the court's earlier ruling striking portions of Jay Ferguson's Declaration [CP 67], after considering Ferguson's arguments on reconsideration, which only addressed the Deadman's Statute, [CP 45-47], the grounds for granting/reaffirming the Motion to Strike remain unclear.

As to the inconsistency between the oral ruling and written order, regarding what evidence was excluded by the trial court, pursuant to *City of Lakewood v. Pierce County* the court on appeal, because of the inconsistency, should not consider the part of the trial court's oral ruling granting the motion to strike only paragraph four and six of Jay Ferguson Declaration. The written order, striking the Letter as well, controls.

Without analyzing the inconsistency between the oral and written decisions, it appears that Ferguson has taken the position that the oral ruling controls. Ferguson states in the Appellate Brief that the Trial court granted Plaintiff's motion to strike only on the basis of hearsay and then quotes the oral ruling [Appellate Brief, page four]. Ferguson concludes the discussion by stating, "Accordingly, Defendants appeal the trial court's ruling." The inference to be drawn is that Ferguson is appealing the oral ruling.

Later in the Appellate Brief, fn1 at page 6, Appellant states: “Recall that the trial court did not strike the message from Ms. Kurtz but rather two paragraphs from Mr. Ferguson’s affidavit,” again appearing to take the position that the oral ruling is controlling. Ferguson makes no argument to support its position.

On appeal, the oral rulings of the trial court may be considered only if not inconstant with the entered written order. Therefore, the written order striking the Letter (in addition to paragraphs 4 and 6 of the Declaration) controls and should be addressed on appeal.

1. The Hearsay Rule Barred Paragraphs 4 and 6 of the Ferguson Declaration and the Letter.
 - a. This Court Should Not Consider Ferguson’s Hearsay Arguments.

As a threshold argument on the hearsay issue, the Estate argues that this Court should not consider any arguments made by Ferguson as Ferguson failed to make any arguments to the trial court regarding hearsay.

The appellate court will not consider a theory as grounds for reversal unless the issue was first presented to the trial court. *John Doe v. Blood Center*, 117 Wn.2d 772, 780, 819 P.2d 370

(1991). The general rule prevailing in Washington is that issues not raised in the trial court cannot be raised for the first time on appeal. *State of Washington v. Charles Fredrick Tradewell*, 9 Wn. App. 821, 825, 515 P.2d 172 (1973) [citing *Peoples Nat'l Bank v. Peterson*, 82 Wn.2d 822, 514 P.2d 159 (1973); *State ex rel. Cosmopolis Consol. School Dist. 99 v. Bruno*, 61 Wn.2d 461, 472, 378 P. 2d 691(1963).]

Ferguson's attorney, Richard Roats advised the trial court at the hearing on summary judgment that he had not received the Motion to Strike. [RP, June 13, 2009, page 2, line 18, CP 42]. The court recessed to allow Mr. Roats an opportunity to review the pleadings and provided him with the court file for review. [RP, June 13, 2008, page 3, lines 7-11]. After the recess, the hearing went forward without any request by Mr. Roats to continue the hearing to a later date. [RP, June 13, 2008, page 3].⁸ Mr. Roats made no hearsay argument in the hearing. [RP, June 13, 2008].

⁸ Mr. Roats did question the court as to whether the court wanted him to brief the matter. [RP, June 13, 2008, page 5, lines 21-24]. Mr. Roats later asked the court if he could file a motion for reconsideration and brief the issue if he found case law contrary of the court's decision. [RP, June 13, 2008, page 11, lines 2-6]. The court advised that he could file a motion for reconsideration, [*Id.* lines 7-9], which he did, as well as a memorandum. [CP 41, CP 45-47].

Mr. Roats filed a Motion for Reconsideration of the court's order granting the Estate's Motion to Strike [CP 41] and contemporaneously filed Defendant's Memorandum in Support of Objection to Plaintiff's Motion to Strike. [CP 45-47]. Ferguson made no hearsay arguments and did not raise any issues regarding hearsay in their Memorandum. [CP 45-47]. The only argument advanced by Ferguson to the trial court concerned the admissibility of the Letter under the Deadman's Statute. [CP 45-47].

Ferguson made no hearsay arguments, and raised no issues as to hearsay, for the trial court to consider at the hearing on the Motion to Strike or in their Memorandum in support of reconsideration.

If Mr. Roats did not receive the Motion to Strike prior to the hearing it was not because the Estate failed to send the pleadings. [CP 48-52]. They were sent via overnight express mail, nine days before the hearing, as proven by the USPS documents attached to attorney Nathaniel Berwind Declaration [CP 48-52].

Ferguson had opportunity at the hearing, and via the Motion for Reconsideration, to make hearsay arguments, but simply failed to do so. The trial court and the Estate had no opportunity to

address the issues and theories Ferguson now presents to the appellate court for review.

As an appellate court will not consider a theory as grounds for reversal unless the issue was first presented to the trial court, any issues and arguments raised by Ferguson concerning hearsay should not be heard by this Court.

- b. Paragraphs 4 and 6 of the Ferguson Declaration and the Letter are Inadmissible Hearsay.

An out of court statement offered for the truth of the matter asserted is inadmissible hearsay. ER 801(c). Hearsay is not admissible except as provided by the evidence rules, by other court rules, or by statute. ER 802.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Statement is defined by the evidence rules as an oral or written assertion. ER 801(a).

- i. Paragraph 4 of the Ferguson Declaration is inadmissible hearsay:

Paragraph 4 states as follows:

As a result of the conversation with my grandmother, she agreed to modify the agreement and accept payments of the principal amount loaned and waive all interest. [CP 29].

Paragraph 4 is a statement (an oral assertion) made by someone other than the declarant testifying at the hearing (the Decedent) and is offered in evidence to prove the matter asserted (to prove the assertion that the Decedent agreed to modify terms of the Note and accept payments of the principal amount loaned and waive all interest).

Ferguson's rephrasing of the Decedent's statement to avoid a direct quote does not avoid the barring of evidence as hearsay. *State v. Martinez*, 105 Wn. App. 775, 782, 20 P.3rd 1062 (2001) (overruled on other grounds by *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3rd 157, (2003)).

In *State v. Martinez* the trial court allowed detectives to first testify that they had a conversation with an individual, and then to testify as to what their own understanding was after the individual had talked to them. The State had persuaded the trial court that it had phrased the questions in a way that avoided direct quotes from

the individual. *State v. Martinez* at 781-782. The appellate court, stating that inadmissible evidence is not made admissible by allowing the substance of the testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify, found that the testimony was hearsay and that the trial court erred in admitting the testimony. *State v. Martinez* at 782 (citing *United States v. Sanchez*, 176 F. 3rd 1214, 1222 (9th Cir. 1999)).

Paragraph 4, in essence actually says: As a result of the conversation with my grandmother, she said that we could modify the agreement and she would accept payments of the principal amount loaned and waive all interest. The statement is inadmissible hearsay. Just as in *State v. Martinez*, Ferguson's rephrasing to avoid a direct quote does not make the statement admissible.

- ii. Paragraph 6 of the Ferguson Declaration is inadmissible hearsay.

Paragraph 6 states as follows:

Pursuant to the modified agreement, I owe the amount of \$44,250.00. [CP 30].

Paragraph 6 is also inadmissible hearsay. Ferguson's reference to the modified agreement (to the hearsay in Paragraph

4) attempts to bring inadmissible evidence through the backdoor by referring again to a modification of the Note in order to offer proof of the balance owed.

iii. Relevant Statements in the Letter attached to Ferguson Declaration are Hearsay.

The relevant statements in the Letter are as follows:

“I read your little red note, Jay.”

“Are you having trouble with the size of the payments, the interest, or what?”

“Let me know if there is something I can help with.”

In oral argument, Ferguson’s attorney states:

Thank you, your Honor. My client will testify that pursuant to a discussion he had regarding financial difficulties (sic). The contract was modified. Subsequent to that modification he made payments of the principal as he could. ... [RP, June 13, 2008, page 7, lines 20-24].

Ferguson offers the Letter as evidence that there was communication between Jay Ferguson and the Decedent concerning Ferguson’s financial difficulties and that there was an agreement to modify the terms of the Note.

These statements are hearsay as they were made by an out of court declarant (the Decedent), and offered to prove the truth of the matter asserted.

"I read your little red note, Jay."

Offered to prove that the Decedent read Jay Ferguson's note, that Ferguson had communicated with the Decedent.

"Are you having trouble with the size of the payments, the interest, or what?"

Offered to prove that Decedent was aware that Ferguson was having difficulty with the terms of the Note/repayment.

"Let me know if there is something I can help with."

Offered to show the Decedent was willing to help.

The second statement, "Are you having trouble with the size of your payments, the interest, or what," phrased as a question, is hearsay. See, *State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (in prosecution for rape, hearsay evidence of victim's question to her son, was admissible because the question was not offered to prove the truth of the matter asserted). In this case, the second statement is offered to prove the truth of the matter asserted and is, therefore, hearsay.

The third statement, "Let me know if there is something I can help with," is essentially a question (Can I help?) and is inadmissible hearsay.

2. The Statements Are Not Admissible as Admissions by a Party Opponent, under ER 801(d)(2), Because Decedent is Not a Party.

ER 801(d)(2) provides, in relevant part, that a statement is not hearsay if it is offered against a party and is the party's own statement.

The parties to this action are Ferguson and Timothy D. Paschal, as personal representative of the Decedent's estate. Decedent is not a party, therefore, ER 801(d)(2) does not apply.

In a decedent's Estate, actions for the recovery of any property or for the possession thereof, and all actions founded upon contracts, may be maintained by and against personal representatives in all cases in which the same might have been maintained by and against their respective testators or in estates. RCW 11.48.090. In this case, the Personal Representative in the Decedent's estate filed the action to recover on the Note. The Personal Representative and Ferguson are the petitioner/respondent and defendants/appellants, the parties in this

action. Decedent is not a party. See *Sutton v. Hirvonen*, 113 Wn.2d 1, 6, 775 P.2d 448 (1989) (decedent was not a party in action between insurance company and Estate of decedent); *Craig v. Ludy*, 95 Wn. App. 715, 717, 976 P.2d 1248 (1999) (Unaware of decedent's death, Petitioners mistakenly filed a personal injury accident against the decedent instead of decedent's Estate).

The fact that there may be some sort of privity between the personal representative and the decedent; does not make the decedent a party, and does not make decedent's statements admissions of a party opponent. In a medical practice action brought by a surviving husband on behalf of the Estate of his wife, the appellate court found that the trial court should not have allowed a defense witness to recount statements (to the effect that her husband was abusive and tight with money) by the decedent as they were hearsay and did not constitute admissions by a party opponent, even though the deceased might have been considered a predecessor in interest. *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 192, 883 P.2d. 313 (1994).

In this case, unlike the parties in the case, Decedent cannot testify as to the statements and Letter offered into evidence.

Decedent cannot controvert any inferences Ferguson might attempt to draw from the statements or Letter: she cannot testify, and cannot be cross-examined.

As shown, the Jay Ferguson Declaration statements are inadmissible hearsay as are the relevant portions of the Letter. Ferguson offered no argument on hearsay to the trial court. Ferguson argues no exceptions to the hearsay rule on appeal.⁹ The trial court did not err in granting the motion to strike.

3. The Deadman's Statute Barred Paragraphs 4 and 6 of the Ferguson Declaration and the Letter.

As previously argued in this brief, it is unclear from the record whether the trial court excluded evidence in this case on the grounds of hearsay or the Deadman's Statute. As appellate courts generally sustain/affirm a decision of the trial court on any theory established by the pleadings and supported by the proof, *Gross v. Lynwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978), the uncertainty of the grounds relied on by the trial court in this case does not impact the appellate court's ability to exclude evidence under the Deadman's Statute.

⁹ As pointed out by Ferguson, Appellate Brief page 11, ER 801(d)(2) is not a hearsay exception: an admission by a party opponents is not hearsay.

The Deadman's statute, RCW 5.60.030, reads, in relevant part:

In an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person.

The purpose of the Deadman's statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased. *In Re the Matter of the Estate of Miller*, 134 Wn. App. 885, 890, 143 P.3rd 315 (2006). A "party in interest" is a person who stands to gain or lose by the operation of the action or judgment in question.¹⁰ *Estate of Miller at 890*.

The test for determining whether a witness's testimony concerns a transaction with a deceased, is whether the deceased, if living, could contradict the witness. *In Re Estate of Wind*, 27 Wn.2d 421, 426, 178 P.2d 731 (1947).

¹⁰ The Deadman's Statute applies to probate proceedings, *In Re Estate of Wind*, 27 Wn.2d 421,428-29,178 P.2d 731 (1947).

A party cannot testify indirectly to create an inference as to what did or did not transpire between the party and the deceased. *Lappin v. Lucurell*, 13 Wn. App. 277, 289-91, 534 P.2d 1038 (1975).

- a. The Deadman's Statute bars paragraphs 4 and 6 of the Jay Ferguson Declaration.

Jay Ferguson is a party in interest (one who would gain or lose by the action on the Note) attempting to testify in his own behalf as to a transaction with Decedent (Declaration containing statements concerning an alleged oral modification of the terms of the Note). The statements in Jay Ferguson's Declaration, repeated below, are textbook examples of testimony barred under the Deadman's Statute:

Paragraph 4:

As a result of the conversation with my grandmother, she agreed to modify the agreement and accept payments of the principal amount loaned and waive all interest. [CP 30].

Paragraph 6:

Pursuant to the modified agreement, I owe the amount of \$44,250.00. [CP 29-30].

As a party in interest, Ferguson cannot make himself the vehicle to carry the words of Decedent into the record of the proceeding.

b. Barring the Letter Fulfills the Purpose the Deadman's Statute.

There is no State Supreme Court Case on point as to whether or not a letter is a document admissible under the Deadman's Statute. (The general rule, based on State Supreme Court Decisions, is that the Deadman's statute does not apply to documents written or executed by the deceased). *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 188, 883 P.2d 313 (1994).

Several Court of Appeals Division III Decisions have extended the general rule regarding documents to include letters written by a decedent to be admissible. (See *Wildman v. Taylor*, 46 Wn. App. 546, 553, 731 P.2d 541 (1987) and *Thor v McDermid*, 63 Wn. App. 193, 202, (1991) (relying on *Wildman v. Taylor*). These decisions were not appealed.

Although this Court is bound to follow the majority decision of the State Supreme Court, *In Re Le*, 122 Wn. App. 816, 820, 95

P.3rd 1254 (2004), it is not required to follow the decision of other Divisions, *State v. Schmitt*, 124 Wn. App. 662, 669, 102 P.3rd 856 (2004).

In the Division III case, *Wildman v. Taylor*, the Appellate Court narrowly reads the Deadman's Statute's prohibition on testifying to mean only prohibiting the interested person from testifying on his or her own behalf.¹¹ *Wildman v. Taylor*, 46 Wn. App. at 552-553. The Court relies on Black's Law Dictionary definition of testimony to mean evidence given by a competent witness under oath or affirmation, as distinguished from evidence derived from writings, and other sources. *Wildman* at 552. *Wildman* also states that the Deadman's Statute does not explicitly prohibit the interested party from introducing documents or other written statements by the deceased, which support a claim of ownership of property by the interested party against the decedent's Estate. *Wildman* at 552. At issue in the case was the ownership of two tractor trailer units. *Wildman* at 546.

The question for this Court, in this case, is whether the Decedent's Letter should be admissible. The primary purposes of

¹¹ *Thor v McDearmid*, 63 Wn. App. 193, 202, (1991) simply relies on *Wildman v. Taylor*.

the Deadman's Statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with a decedent, *Wildman* at 550; and to give protection to the writings and documents of a decedent or persons claiming thereunder, so that decedent's purposes in making a conveyance in writing will not be defeated by parol description of his acts and purposes after his death. *Wildman* at 552.

Broadening the definition of testimony to include the Letter attached to the Jay Ferguson Declaration, thereby excluding it under the Deadman's Statute, would meet the purpose of the Deadman's Statute of protecting the writings and documents of the Decedent or persons claiming thereunder, her Estate/beneficiaries, so as not to allow parol descriptions of the Decedent's acts and purposes relating to the written agreement after her death.

If the Letter is allowed into evidence it cannot be explained by the Decedent, or by Ferguson. It can only stand alone with the inference hanging, simply by its submission into evidence by Ferguson, that is means something in his favor otherwise he would not have offered it as proof in the first place. This does not serve the purpose of protecting the Decedent's transactions as

contemplated by the statute. The Letter should be barred from admissibility. This Court should not extend the admission of documentary evidence to include a letter.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901. Ferguson offered no evidence to support a finding that he received the Letter and/or that the Letter was from Decedent. Ferguson simply appended the Letter to the Jay Ferguson Declaration with no authenticating statements in the Declaration. The Letter was inadmissible on this basis alone.

c. The Deadman's Statute Prevents Ferguson From Testifying as to His Feeling or Impressions Concerning the Letter.

Ferguson argues that with an adequate foundation, Jay Ferguson may testify as to his feelings and impressions of the Letter. [Appellate Brief Pages 13-14].¹² He cannot. This argument is only at issue if this Court determines that a letter is admissible as documentary evidence under the Deadman's Statute.

¹² Ferguson offered no foundation/authentication of the Letter.

In *Jacobs v. Brock*, the State Supreme Court analyzed whether an interested party's testimony regarding his impression was barred by the Deadman's Statute. *Jacobs v. Brock*, 73 Wn.2d 234, 237, 437 P.2d 920 (1968). The Court found that the testimony was not barred, not because impressions are allowed under the statute, but because the testimony did not reveal a statement made by the decedent nor did it relate to a transaction with decedent. *Jacobs at 237*.

Ferguson's reliance on *Wildman* to support the argument that jay Ferguson can testify as to his feelings and impressions regarding the Letter is not persuasive as the Court in *Wildman* mistakenly read/cited *Brock* to stand for the proposition that testimony of an interested party's own feelings or impressions does not come within the ban of RCW 5.60.030. *Wildman v. Taylor at 553*. As explained above, *Jacobs* allowed the feelings/impressions testimony only because the testimony did not reveal a statement made by the decedent or relate to a transaction with the decedent. *Jacobs at 237*.

In *Lappin v Lucurell*, 13 Wn. App. 277, 291, 534 P.2d 1038, review denied, 85 Wn.2d 1018 (1975), the Court found that an

interested party could not testify that it was her impression that an unexplained transfer of money to her, from her uncle, uncle was a gift. The Court found that the interested party, a niece, could not do indirectly (testify) what she was prohibited from doing directly and thereby create inferences as to what did or did not transpire between the niece and the decedent. *Lappin v Lucurell* at 291 (citing *Marten V. Shaen*, 26 Wn.2d 346, 353, 173 P.2d 968 (1947)).

In *Marten*, Appellant's offer of proof that he never delivered a deed to his late wife, the decedent, nor to his knowledge did she ever have possession of the deed, was rejected by the trial court on the ground that appellant, being a party in interest, would not be permitted under the Deadman's Statute to give such testimony. In affirming the trial courts denial of the offer of proof, the State Supreme Court said as follows:

... when it appears that there was a personal transaction by the interested party with the deceased and that the testimony offered tends to show either what did take place between the parties or what did not it must be excluded by force of the statute so long as it concerns the transaction or justifies an inference as to what it really was.

If the witness was not competent to prove what took place at that transaction by direct or affirmative testimony he was not competent to prove it by indirect or negative testimony.

Marten V. Shaen, 26 Wn.2d at 352-353.

The case law addressing Ferguson's ability to testify as to his impressions regarding a transaction with Decedent is clear: doing so is prohibited by the Deadman's statute.¹³ Nor can Ferguson "introduce secondary evidence of the contents of an instrument and testify what happened to it" as argued in Appellate Brief at page 13. Ferguson's cannot testify as to what happened regarding an alleged modification to the Note or introduce "secondary evidence" as argued on appeal. [Appellate Brief, page 13]. Ferguson is

¹³ Despite the fact that the Deadman's Statute remains firmly embedded in the jurisprudence of this State as, shown by the analysis and citations provided in briefing, Ferguson dedicated a significant amount of argument to criticizing the statute.

Similarly in 1975, in *Lappin v. Lucurell*, a party directed the Appellate Courts attention to criticism of the Deadman's Statute. The *Lappin* Court stated that it was mindful of the criticism, but was also cognizant of the fact that the statute had not been repealed or superseded by any duly promulgated court rule. The Court went on to state, "As this court has previously held, the principle that legislative expression will not be derogated by judicial interpretation applies with respect to the deadman's statute." *Lappin v. Lucurell*, *supra* at 291-292. *Lappin* was argued in 1975; thirty-four years later, the statute has not been repealed or superseded by court rule.

prohibited from testifying indirectly what he is prohibited testifying to directly.

IV. GRANTING MOTION TO STRIKE WAS APPROPRIATE BECAUSE EVIDENCE WAS BARRED BY HEARSAY AND/OR DEADMAN'S STATUTE.

As argued extensively in this response, paragraphs 4 and 6 and the Letter were inadmissible and barred as hearsay and/or by the Deadman's statute.

V. GRANTING SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE THERE ARE NO ISSUES OF MATERIAL FACT

- A. If This Court Affirms the Exclusion, on any Grounds, of Paragraphs 4 & 6 and the Letter, Summary Judgment Is Appropriate.

If on appeal, this Court affirms the exclusion, on any grounds, of Paragraphs 4 & 6 and the Letter, then the only evidence offered by Ferguson, to refute the Motion for Summary Judgment, is Jay Ferguson's Declaration testimony stating that he is a defendant, that he entered into an agreement with Decedent for a loan, that he was having difficulty making payments, and that he paid \$35,750.00 on the Note.

The function of a summary judgment hearing is to determine whether there is a genuine issue of material fact by testing whether evidence exists to sustain the allegations in the pleadings. *Vernon*

v. Almy, 63 Wn.2d 326, 329, 387 P.2d 372 (1963) (stating that the object of summary judgment is to separate the wheat from the chaff in evidentiary pleadings).

Among other admissible evidence offered, the Estate has shown the existence of the contract/Note, Ferguson's breach of the contract, and damages (the balance owed under the terms of the Note).

Ferguson offers virtually no admissible evidence to dispute the facts presented by the Estate. Ferguson provides absolutely no proof that he paid any amount on the Note despite several opportunities to do so and despite the fact that he has the burden to prove payment.¹⁴ He admits that he was having trouble making payments. [CP 29]. Ferguson offers no admissible evidence to support his contention that there was an oral agreement modifying the repayment terms of the Note. Bare allegations by the non-moving party will not overcome a motion for summary judgment. [CR 56(e) (a non-moving party may not merely rest on the allegations or denials of its pleading, a response must set forth

¹⁴ The burden to prove that an indebtedness has been paid is on the defendant, not the plaintiff. *West Coast Credit Corp. v. Pedersen et al.*, 64 Wn.2d 33, 35, 390 P.2d 551 (1964).

specific facts showing that there is a genuine issue of material fact)].

B. Even If This Court Finds that Some, or All, of the Evidence Was Stricken By The Trial Court In Error, Summary Judgment is Appropriate.

Even if the statements were admissible, the proof offered is insufficient to overcome summary judgment. The Letter and statements do not support Ferguson's contention that there was an oral agreement to modify the contract. The evidence does not show that there was a modification, does not identify the terms of any modification, and does not demonstrate any agreement by the Decedent as to a modification.

Furthermore, because Ferguson failed to present any argument or authority to support their underlying position that the contract/Note can legally be modified (specifically that a contract subject to the statute of frauds can be modified by an oral agreement), any argument regarding modification of the Note should not be reviewed by this Court.

A contract not to be performed within one year is required by the statute of frauds to be in writing. RCW 19.36.010. The Note in

this case is subject to the statute of frauds as the terms of the Note exceeded one year.

A contract subject to the statute of frauds can be modified by an oral agreement only if the oral agreement has been executed. *Mott v. McDonald*, 147 Wash. 106, 109, 265 P.153 (1928). There must be performance of the oral agreement or substantial performance. *Mott at 109*.

Ferguson offered no proof of even partial performance on the alleged oral modification of the Note. They offer no proof on any payments or performance, period. The record, based on the Estate's evidence, demonstrates that Ferguson's payments were in a consistent amount (with only two exceptions, which were not consecutive payments; when Ferguson paid, they paid the amount required by the terms Note (\$1,625.00) or double that amount when they missed payments). [CP 21-24]. The payment amounts were not reduced to subtract interest as inferred by Ferguson (without reference to the record) in their statement of facts at Appellate Brief, page 3).

As Ferguson offered no evidence to support that they reduced their payments to principal only payments as allegedly

agreed in the oral agreement amending the Note, no performance or part performance has been show. Therefore, an oral agreement, if any existed, did not modify the terms of the original Note.

VI. DENIAL OF MOTION FOR RECONSIDERATION WAS APPROPRIATE IN THIS CASE

The trial court's denial of Motion for Reconsideration should be affirmed on the grounds that the trial court did not abuse its discretion in denying the motion. There is no evidence on the record to support a finding that the trial court's decision was manifestly unreasonable, or based on untenable grounds or reasons.

The Court should not even consider this issue as Ferguson offers no argument or authority to support the assignment of error on this issue.

VII. ESTATE IS ENTITLED TO AN AWARD OF ATTORNEYS FEES AND COSTS PURSUANT TO THE TERMS OF THE NOTE AND/OR PURSUANT TO RCW 11.96A.150.

The Estate requests an award of attorney's fees, and costs, on appeal and at the trial court level pursuant to contract, the Note; and pursuant to RCW 11.96A.150.

Attorney's fees are available on review on the same grounds they are available in the trial court. Reasonable attorney's fees may be claimed where provided for by contract, statute, or recognized grounds in equity. *Lay v. Hass*, 112 Wn. App. 818, 823, 51 P.3rd 130 (2002).

The Note provides for payment of fees and costs, in the event of a default, if the matter is given to an attorney for collection:

If this Note is not paid when due, and is given to an attorney for collection, or suit filed thereon, the makers, endorsers, sureties, guarantors and assigns of this note severally agree to pay, in addition to the unpaid principal and interest, all costs of collections and such additional sum as the Court may adjudge reasonable as attorney's fees in such suit. [CP 22].

Contractual authority as a basis for an award of attorney's fees at trial also supports such an award on appeal. *Marine Enterprises Inc. v. Security Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290, review denied, 111 Wn.2d 1013 (1988).

The Estate is also entitled to an award of fees, under RCW 11.96A.150, on appeal and at the trial court level:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any

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

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's Estates and properties, and guardianship matters RCW 11.96A.150

The Estate is a party in a proceeding to recover Estate assets, and may, therefore, seek fees and costs pursuant to RCW 11.96A.150. RCW 11.96A.150, by its terms does not require that the Estate prevail on appeal. The rule provides that the court in exercising its discretion may consider any and all factors that it deems to be relevant and appropriate.

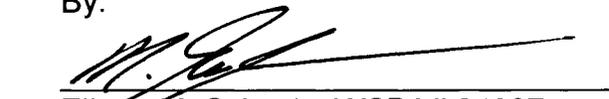
The Estate set out the grounds (contract/Note) for an award of fees and prayed for an award of fees in the Complaint at the trial court level. [CP 5]. Fees are also recoverable under RCW 11.96A.150. The judgment was entered without providing for an award of fees and costs [CP 75-77].

VIII. CONCLUSION

Based on the arguments herein, the Estate respectfully requests this Court to affirm the trial courts granting Motion for Summary Judgment, granting Motion to Strike, and denying Motion for Reconsideration. The Estate also request entry of an order granting an award of fees on appeal and remanding to the trial court for an award and entry of an order granting fees below.

Submitted this 9th day of June, 2009

By:



Eileen M. Schock WSBA# 24937
Of Sanchez, Mitchell & Schock
Attorneys for Respondent

APPENDIX

1. Installment Promissory Note [CP 21-22]
2. Letter attached to FERGUSON Affidavit [CP 31-32]

INSTALLMENT PROMISSORY NOTE

\$80,000.00

Bremerton, Washington, June 5, 2002

PROMISE TO PAY

FOR VALUE RECEIVED, We, the undersigned, jointly and severally, promise to pay in lawful money of the United States to the order of KATHRYN E. KURTZ, a single woman, at the address of 525 Lebo Blvd., #E-4, Bremerton, WA 98310 or at such other place in the United States of America which the holder hereof may designate in writing to the undersigned, the principal sum of Eighty Thousand and 00/100 Dollars (\$80,000.00), in monthly installments of One Thousand Six Hundred Twenty-Five and 00/100 Dollars (\$1,625.00), or more, including interest on the unpaid principal balance from the date hereof at the rate of eight percent (8%) per annum.

PAYMENT

The said monthly installments of \$1,625.00 or more shall be paid as follows: One installment on the 15th day of July, 2002, and one installment on the 15th day of each and every month thereafter until the entire principal balance, plus interest, shall be paid in full.

PREPAYMENT

All or any part of this note may be prepaid at any time without penalty.

RECITAL OF SECURITY

This instrument is issued under the terms of a Security Agreement to which reference is hereby made for a statement of the collateral and security, and the rights of the holder with respect to the collateral and security, for the payment hereof.

DEFAULT

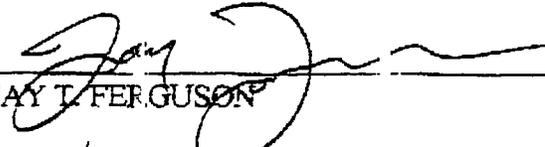
If any installment shall not be paid within thirty (30) days of when due, then all of the principal and interest shall, at the election of the holder hereof, become due and payable at once, and from the date of such default this Note shall bear interest at the rate of twelve percent (12%) per annum. The makers, endorsers, sureties, guarantors and assignors of this Note severally waive demand, presentment for payment, protest and notice of protest, and nonpayment, and agree and consent that the time for its payment may be extended, or said Note renewed from time to time, and for any term or terms by agreement between the holder and any of them without

PROMISSORY NOTE -1-
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notice, and that after such extension or extensions, renewal or renewals, the liabilities of all parties shall remain as if no extension or renewal had been had. If this Note is not paid when due, and is given to an attorney for collection, or suit filed thereon, the makers, endorsers, sureties, guarantors and assignors of this Note severally agree to pay, in addition to the unpaid principal and interest, all costs of collection and such additional sum as the Court may adjudge reasonable as attorney's fees in such suit. At the option of the holder, the venue of said suit may be laid in Kitsap County, Washington.

LATE CHARGES

In the event that any payment or portion thereof is not paid within ten (10) days commencing with the date it is due, the holder hereof may collect, and the makers agree to pay in addition to such payment, a "late charge" of five cents (\$.05) for each dollar so overdue as liquidated damages for the additional expense of handling such delinquent payments. Failure to exercise this option in the event of any default shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.



JAY L. FERGUSON



KELLY L. FERGUSON

A note from...

Ms Kathryn Kurtz

dear Kelly and Joe -
 Hope your day -
 weather wise - is
 better than ours -
 grey, rainy, cold!
 We are looking
 forward to down's
 visit. Maybe she
 can bring over our
 chair with her. And
 you - plus boys -
 we welcome too any-
 time. Our families
 all in agreement that
 it gets harder all the
 time to get us together.
 I read your
 little red note
 Jay Campbell

having trouble

THIS DIDN'T COPY.
 I HAVE THE ORIGINAL

4. th the size of the
payments, the interest, or
what? Let me know
if it is something I
can help with. I
suppose the jokes got
fewer as the weather
gets worse. You are
very important to me,
all 4 of you!

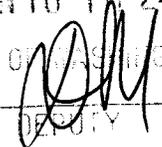
Are you still
doing a little teaching,
Kelly?

Must go and take
my walk - inside
when it is so nasty out.

Love you,
Gram

FILED
COURT OF APPEALS
DIVISION II

09 JUN 10 PM 2:05

STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON**

JAY T. FERGUSON and KELLY L.
FERGUSON, husband and wife, and the
marital community comprised thereof,

Appellants,

vs.

TIMOTHY D. PASCHAL, as Personal
Representative of the Estate of KATHERYN
E. KURTZ,

Respondent.

NO. 38579-1-II

DECLARATION OF SERVICE

On the 10th day of June, 2009, I mailed, via U.S. Mail, Express Mail postage paid, a true and correct copy of Respondent's *Response*, and this *Affidavit of Service*, to counsel for Appellants: Richard T. Roats, Roats Law Office, PLLC, P. O. Box 9811, Boise, ID 83707.

On the 10th day of June, 2009, I mailed, via U.S. Mail, first class postage paid, a true and correct copy of Respondent's *Response*, and this *Affidavit of Service*, to counsel for Appellants: Richard T. Roats, Roats Law Office, PLLC, 702 W. Idaho Street, Suite 321, Boise, ID 83702.

On the 10th day of June, 2009, I transmitted by facsimile a true and correct copy of Respondent's *Response*, and this *Affidavit of Service*, to counsel for Appellants: Richard T. Roats, Roats Law Office, PLLC, Fax: 888-331-7581.

DECLARATION OF SERVICE - 1
S:\EILEEN\Appeals\KurtzEstate\Mailingdeclaration.doc

SANCHEZ, MITCHELL & SCHOCK
Attorneys at Law
4110 Kitsap Way, Suite 200
Bremerton, Washington 98312-2401
Telephone (360) 479-3000

ORIGINAL

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

3 DATED this 10th day of June, 2009, at Bremerton, Washington.

4 

5 _____
6 LORETTA MEEKER for
7 EILEEN M. SCHOCK, WSBA #24937
8 SANCHEZ, MITCHELL & SCHOCK
9 Attorneys for Appellant

10 EMS/lhm

* * * COMMUNICATION RESULT REPORT (JUN. 10. 2009 9:16AM) * * *

FAX HEADER: SANCHEZ PAULSON MITCHELL SCHOCK

TRANSMITTED/STORED : JUN. 10. 2009 9:03AM
FILE MODE OPTION

ADDRESS

RESULT

PAGE

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OK

56/56

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-3) NO ANSWERE-2) BUSY
E-4) NO FACSIMILE CONNECTION

LAW OFFICES OF

SANCHEZ, MITCHELL & SCHOCKJOHN F. MITCHELL
EILEEN M. SCHOCK
DIONNE PADILLA-HUDDLESTONPAUL FJELSTAD
(Of Counsel)J. LARRY PAULSON
(Of Counsel)JAMES B. SANCHEZ
(1921-1987)**FACSIMILE COVER SHEET**

DATE: June 10, 2009

PAGES INCLUDING THIS SHEET: 56

TO: Richard T. Roats, Roats Law Office, PLLC
FAX NO.: 1-888-331-7581SENDER: Eileen M. Schock
REGARDING: Ferguson v. Estate of KurtzDOCUMENTS FAXED: Response
Declaration of Service

COMMENTS:

ORIGINAL DOCUMENT(S): TO FOLLOW RETAINEDIF YOU DO NOT RECEIVE THE ENTIRE TRANSMISSION, OR IF THERE ARE ANY OTHER
PROBLEMS WITH THE TRANSMISSION, CALL LORIE AT (360) 479-3000 IMMEDIATELY.Important Notice

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