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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 34545-9-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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In re the Estate of

ANNE MARIE ROE, Deceased:

WILLIAM J. ROE,

Respondent, and

KATHLEEN ROE BENNIS,

Appellant and Cross Respondent

vs.

GERALD F. ROE, Personal  
Representative of the Estate of  
ANNE MARIE ROES, Deceased,

Respondent and Cross Appellant.

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BRIEF OF RESPONDENT AND CROSS APPELLANT  
Gerald F. ROE, Personal Representative  
of Estate of ANNE MARIE ROE, Deceased

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Brian G. Hipperson, WSBA #6177  
1403 South Grand Boulevard  
Spokane, Washington 99203  
(509) 455-3713  
Attorney for Estate of ROE

**TABLE OF CONTENTS**

**A. ASSIGNMENTS OF ERROR RE: CROSS APPEAL . . . . .1**

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR . . . . .1**

**C. STATEMENT OF THE CASE . . . . .2**

**E. ARGUMENT IN RESPONSE AND ON CROSS APPEAL . . . . .9**

**F. REQUEST FOR AWARD OF ATTORNEY FEES ON APPEAL . . . 20**

**G. CONCLUSION . . . . . 22**

## TABLE OF AUTHORITIES

### Cases

<u>Amer. Universal Ins. Co. v. Ranson</u> , 59 Wn.2d 811, 814-15, 370 P.2d 867 (1962)	7
<u>Bonneville v. Pierce Cy.</u> , 148 Wn.App. 500, 202 P.3d 309 (2008)	8, 11, 16
<u>Cook v. Vennigerholz</u> , 44 Wn.2d 612, 296 P.2d 824 (1954)	7, 10, 16, 17
<u>Estate of Jones</u> , 170 Wn.App. 594, 289 P.3d 650 (2012)	17
<u>Estate of Sherry</u> , 158 Wn.App. 69, 250 P.3d 1182 (2010)	17
<u>Ferrin v. Donnellefeld</u> , 74 Wn.2d 283, 285, 444 P.2d 701 (1968)	8, 10, 16
<u>Gordon v. Gordon</u> , 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954)	8, 20
<u>Grimwood v. Univ. of Puget Sound</u> , 110 Wn.2d 355, 359, 753 P.2d 517 (1988)	14
<u>Hafer v. Spaeth</u> , 22 Wn.2d 378, 384, 156 P.2d 408 (1945)	13
<u>Heath v. Uraga</u> , 106 Wn.App. 506, 24 P.3d 413 (2001), <u>review denied</u> , 145 Wn.2d 1016 (2002)	7
<u>In re Braden's Estate</u> , 122 Wash. 669, 671, 221 P.743 (1929)	18
<u>In Re Estate of Black</u> , 153 Wn.2d 152, 173, 102 P.3d 796 (2004)	19
<u>In Re Estate of Evans</u> , 181 Wn.App 436, 450-52, 326 P.3d 755 (2014)	19
<u>In re Estate of Miller</u> , 134 Wn.App. 885, 895, 134 P.3d 315 (2006)	13

<u>In re Jackson’s Estate</u> , 200 Wash. 116, 119, 93 P.2d 349 (1939)	12, 18
<u>In re Larson’s Estate</u> , 71 Wn.2d 349, 428 P.2d 558 (1967)	15
<u>In re Marriage of Spreen</u> , 107 Wn.App. 341, 346, 28 P.3d 769 (2001)	9
<u>In re Marriage of Tang</u> , 57 Wn.App. 648, 654, 789 P.2d 118 (1990)	8, 20
<u>In re Smith’s Estate</u> , 179 Wash. 417, 418-19, 38 P.2d 244 (1934)	18
<u>JDFJ Corp. v. Int’l Raceway, Inc.</u> , 97 Wn.App. 1, 970 P.2d 343 (1999)	8,
	11
<u>LaPlante v. State</u> , 85 Wn.2d 154, 158, 531 P.2d 299 (1975)	13
<u>Leonard v. Pierce Cy.</u> , 116 Wn.App. 60, 65, 65 P.3d 28 (2003)	15
<u>Meyer v. Univ. of Washington</u> , 105 Wn.2d 847, 852, 719 P.2d 98 (1986)	
	14
<u>Mountain Park Homeowners Ass’n v. Tyding</u> , 125 Wn.2d 337, 341, 883	
P.2d 1383 (1988)	7
<u>Pagnotta v. Beal Trailers of Oregon, Inc.</u> , 99 Wn.App. 28, 991 P.2d 728	
(2000)	14
<u>Reid v. Dalton</u> , 124 Wn.App. 113, 100 P.3d 349, <u>review denied</u> , 155	
Wn.2d 1005 (2004)	22
<u>Riordan v. Commercial Travelers Mut. Ins. Co.</u> , 11 Wn.App 707, 715, 525	
P.2d. 804 (1974)	16
<u>Ross v. State Farm Mut. Ins. Co.</u> , 132 Wn.2d 507, 940 P.2d 252 (1997)	7,

10, 16	
<u>Sander v. City of Seattle</u> , 160 Wn.2d 198, 153 P.3d 874 (2007)	7
<u>Smith v. Preston Gates Ellis, LLP</u> , 135 Wn.App. 859, 865, 147 P.3d 600 (2006)	15
<u>Sneed v. Barna</u> , 80 Wn.App. 843, 912 P.2d 1035 (1996)	8
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)	8
<u>State v. Chapman</u> , 140 Wn.2d 436, 454, 998 P.2d 282, <u>cert. denied</u> , 531 U.S. 984, 148 L.Ed.2d 444, 121 S.Ct.438 (2000)	21
<u>State v. Robinson</u> , 79 Wn.App. 386, 396-97, 902 P.2d 652 (1995)	8, 20
<u>Wakefield v. Wakefield</u> , 59 Wn.2d 550, 551, 368 P.2d 909 (1962)	13
<u>Wash. Fed. v. Azure Chelan, LLC</u> , 195 Wn.App. 644, 622 (2016)	14
<u>Wilcox v. Lexington Eve Inst.</u> , 130 Wn.App. 234, 122 P.3d 729 (2005)	8, 10
<u>Young v. Key Pharmaceutical, Inc.</u> , 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989)	13
<b>Statutes</b>	
Chapter 11.96A RCW	2
RCW 11.96A.150	2, 4, 6, 19, 21
RCW 11.96A.150(1)	19
RCW 2.44.010(1)	7

RCW 4.84.185 2, 19, 22

**Rules**

CR 11 2, 19, 22

CR 2A 3, 7, 16

CR 56 9

CR 56(c) 5, 7, 17

CR 56(d) 9

CR 56(e) 14

CR 59(a) 4, 5, 8, 11

RAP 12.2 18, 20

RAP 18.1(b) 20

RAP 18.9(a) 21, 22

RAP 2.5(a) 11

**Treatises**

5 K. Tegland, "Evidence law and Practice," Wash.Prac., Rule 301

§301.15, at 243-44 (2007 & Supp. 2015) 13

### **A. ASSIGNMENTS OF ERROR RE: CROSS APPEAL**

1. The Superior Court erred on October 23, 2015 in consolidated cause nos. 14-04-00134-9 and 14-04-01033-0 [CP 43-44, 41-42], when denying in its Findings of Fact, Conclusions of Law and Order re: Summary Judgment of that same date, the request of the Respondent and cross Appellant, ESTATE OF ANNE MARIE ROE (hereinafter “ESTATE”), for the entry of terms and fees against the Petitioner, and Appellant and cross Respondent herein, KATHLEEN ROE BENNIS (hereinafter “Bennis”). [RP 34-35; CP 167; 325-28].

2. The Superior Court erred on April 15, 2016 in consolidated cause nos. 14-04-00134-9 and 14-04-01033-0 [CP 43-44, 41-42], when in turn denying in its “letter opinion” of that same date, the request of the ESTATE for entry of terms and fees against BENNIS. [CP 258-59].

3. The Superior Court, similarly erred on May 27, 2016 in consolidated cause nos. 14-04-00134-9 and 14-04-01033-0 [CP 43-44, 41-42], when denying once again in its subsequent, Order Denying Motion For Reconsideration of that same date, the request of the ESTATE for the entry of terms and fees against BENNIS. [CP 264-66].

### **B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Superior Court should have granted the request of the ESTATE for the entry of terms and fees against BENNIS, on the basis

of RCW 11.96A.150, or on other warranted grounds including CR 11 sanctions and terms under RCW 4.84.185, given the frivolous nature of these proceedings? [Assignments of Error Nos. 1 and 3].

### **C. STATEMENT OF THE CASE**

The underlying matter concerning this appeal was brought by BENNIS, and her brother, WILLIAM J. ROE, as a statutory proceeding under the Washington trust and estate dispute resolution act [TEDRA][Chapter 11.96A RCW] wherein they challenged the final distribution in the ESTATE OF ANNE MARIE ROE in July 2014. During the course of this case, cross-motions for Summary Judgment were filed by the ESTATE and Ms. BENNIS along with her brother, William J. Roe – who is now a disinterested party in terms of this appeal insofar as the ESTATE’s cross appeal as against him has since been voluntarily dismissed by Stipulation filed herein on September 20, 2016. [Spindle].

In order to keep costs down, the parties in the underlying TEDRA matter agreed that their opposing Motions for Summary Judgment would be submitted to the Superior Court upon Stipulated Facts which were made an integral part of the Trial Court record therein. [CP 80-105]. The principle issue on Summary Judgment was whether certain distributions

made to Ms. BENNIS and her brother, William, prior to the death of their mother, ANNE MARIE ROE, were inter vivos gifts or loans.

As to the amounts pertaining to Ms. BENNIS, an original writing in the decedent's own handwriting specifically identified these sums as a "loan" to said Petitioner and that over the course of time a specified amount had already been repaid. Immediately below this writing and memorial of the decedent, Ms. BENNIS had herself made the written notation that "I verify that the above information is true," and she then signed this acknowledgement of the debt or loan.

The Summary Judgment hearing on the parties' cross-motions was held on September 2, 2015. [RP 4, et seq.; CP 110]. During its oral ruling, the Superior Court found that, based upon the undisputed evidence associated with the Stipulated Facts [CP 80-105], the amounts pertaining to Ms. BENNIS were, in fact, loans. [RP 19-25]. During the hearing, Ms. BENNIS rested solely upon the CR 2A Stipulated Facts before the court. Moreover, she did not argue or make any suggestion whatsoever that the outstanding balance of this loan or debt to the estate had at any time been repaid or forgiven by her mother. [RP 10-17]. The issue as to an award of attorney fees and costs to the ROE ESTATE were left in abeyance for the time. [RP 26].

Prior to the court entering its formal order on Summary Judgment, Ms. BENNIS retained new counsel, Rodney M. Reinbold. [CP 111-12].

Ms. BENNIS then attempted, by way of a motion for reconsideration under CR 59(a) to introduce “new evidence” beyond that found in the Stipulated Facts [CP 80-105] via an unsworn declaration of her son, Brian Bennis, wherein he claimed to have overheard, as a young child, ANNE MARIE ROE (his grandmother) forgive the balance on the subject loans years before when Ms. ROE visited him and his mother in Chicago, Illinois. [CP 117-19].

On October 23, 2015, before acting upon Ms. BENNIS’ CR 59(a) motion, the Superior Court held a presentment hearing and entered its Order on Summary Judgment notwithstanding Attorney Reinbold’s objections to the same. [RP 32; 42-45; CP 325-28]. In so doing, the court once again held, as a matter of law, that the statute of limitations does not apply to this matter, since under the common law doctrine of retainer, the ESTATE has the right of offset as to those disbursements to Ms. BENNIS which had been proven to be loans under the Stipulated Facts. [Id.]. The Order granted judgment against Ms. BENNIS in terms of the remaining stipulated loan balance of twelve thousand and nine and no/100 dollars [\$12,009.00]. [Id.]. However, the ESTATE’s request for an award of terms and fees under RCW 11.96A.150 as against Ms. BENNIS was once again denied. [RP 42-25; CP 325-28].

With the entry of Summary Judgment, the court determined, aside from not considering the October 7, 2015 Declaration of Brian Bennis that

the ESTATE's motion to strike the same had thus been rendered moot. [RP 45]. Prior to the presentment hearing, the ESTATE had argued the Declaration of Brian Bennis was on its face untimely and should not impact entry of the court's Summary Judgment Order. [RP 46]. In addition, the ESTATE pointed out Ms. BENNIS never raised the issue of loan forgiveness during the earlier Summary Judgment hearing. In this regard, neither party had moved for partial summary judgment at oral argument on September 2, 2015, as was now being suggested by Petitioner's current counsel, Rodney M. Reinbold. [RP 40-41]. Rather, the parties had anticipated a final resolution of the entire controversy as contemplated under CR 56(c). [Id.].

On the same date as the October 23, 2015 hearing, Ms. BENNIS moved for reconsideration under CR 59(a). [CP 168-69, 170-75]. The ESTATE opposed the motion. [CP 176-87]. On November 16, 2015, by letter ruling the Superior Court granted the motion and advised the parties it would accept additional briefing on the following issues: (1) which party bears the burden of proving that the subject debt of \$12,009.00 had been forgiven, and (2) do the Stipulated Facts contain circumstantial evidence from which debt forgiveness can be inferred? [CP 188-89].

By way of this unnecessary courtesy to Ms. BENNIS, the court allowed her to address the newly raised issue of debt forgiveness which she neglected to timely raise during the Summary Judgment hearing. [Id.].

However, the court emphasized once more that it was bound by the Stipulated Facts [CP 80-115]. [Id.].

The parties then submitted additional briefing as requested by the Superior Court on November 16. [CP 170-75, 176-87]. Contrary to the court's instructions, Ms. BENNIS filed another declaration of her son, Brian Bennis, with respect to the court's additional issues. [CP 201-25]. As before, the ESTATE once more moved to strike the same insofar as it went beyond the Stipulated Facts which the court had already ruled was controlling of this case. [CP 226-33, 234-36].

After having reviewed the foregoing additional materials and briefing filed by the parties, the Superior Court on April 15, 2016 entered its letter opinion denying BENNIS' motion for reconsideration. [CP 258-59]. Under this decision, the court once again denied the request of the ESTATE for an award of fees under RCW 11.96A.150 as against Ms. BENNIS. [CP 259].

On May 27, 2016, a formal order denying Ms. BENNIS' Motion For Reconsideration was entered and again the ESTATE's request for terms and fees was denied. [CP 264-65]. These appeals follow the entry of this final order. [CP 277-85, 286-97; spindle]. Additional facts and circumstances are set forth below as they pertain to a particular argument or issue at hand.

#### **D. STANDARD OF REVIEW**

When reviewing a Summary Judgment order, the Appellate Court engages in the same inquiry as the Superior Court. Mountain Park Homeowners Ass'n v. Tyding, 125 Wn.2d 337, 341, 883 P.2d 1383 (1988). In this regard, the record on appeal is confined to exactly those documents that were considered by the Trial Court in making its ruling. Amer. Universal Ins. Co. v. Ranson, 59 Wn.2d 811, 814-15, 370 P.2d 867 (1962). It is clear that a Summary Judgment motion may be supported by evidence other than affidavits such as admissions on file or, as in this case, an agreed statement of stipulated and undisputed facts. See, CR 56(c).

Stipulated Facts are considered correct and complete. Cook v. Vennigerholz, 44 Wn.2d 612, 296 P.2d 824 (1954). They are binding on the parties and the court. Ross v. State Farm Mut. Ins. Co., 132 Wn.2d 507, 940 P.2d 252 (1997). See also, CR 2A and RCW 2.44.010(1).

Errors of law involving the entry of Summary Judgment are reviewed de novo. See, Sander v. City of Seattle, 160 Wn.2d 198, 153 P.3d 874 (2007) Heath v. Uruga, 106 Wn.App. 506, 24 P.3d 413 (2001), review denied, 145 Wn.2d 1016 (2002). However, in addition to being restricted to only that evidence considered by the Superior Court, the Appellate Court will not entertain arguments or new theories of law which were not raised before the Trial Court at the time of the hearing on Summary Judgment. Ferrin v. Donnellefeld, 74 Wn.2d 283, 285, 444 P.2d

701 (1968); Wilcox v. Lexington Eve Inst., 130 Wn.App. 234, 122 P.3d 729 (2005); Sneed v. Barna, 80 Wn.App. 843, 912 P.2d 1035 (1996). Those arguments or new theories of law are deemed waived after entry of Summary Judgment. Bonneville v. Pierce Cy., 148 Wn.App. 500, 202 P.3d 309 (2008). The same holds true insofar as CR 59(a) does not permit a party to propose new grounds of relief after an adverse decision of the Superior Court. Wilcox v. Lexington Eve Inst., *supra.*; *see also*, JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn.App. 1, 970 P.2d 343 (1999).

Finally, in reviewing a discretionary decision, the standard is whether there has been a manifest abuse of discretion committed by the lower court. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The Superior Court will be deemed to have so abused its discretion when it can be said it acted on untenable grounds or for untenable reasons, or has erroneously interpreted, applied or chose to ignore the governing law. Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); State v. Robinson, 79 Wn.App. 386, 396-97, 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990). In other words, a misapplication of the law, or ignoring the same by the Trial Court, constitutes a manifest abuse of discretion warranting

reversal on appeal. In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

## **E. ARGUMENT IN RESPONSE AND ON CROSS APPEAL**

### **1. Argument in Response to Appellant's Assignment of Error.**

Initially, the ESTATE will attempt to respond to the various, misguided, claims of BENNIS which she argues support her present request for relief on appeal:

**a. Appellant's Assignment of Error No. 1.** First, on pages 24 through 36 of her "Brief of Appellant," Ms. BENNIS claims that she was somehow not bound by the Stipulated Facts [CP 80-105] with respect to the issue of debt forgiveness and was, therefore, free to introduce extrinsic matters including, but not limited to, the declaration of her son, Brian Bennis [CP 117-19]. Essentially, she is arguing that the original CR 56 matter before the Superior Court was not intended to dispose of the entire controversy but only amounted to a partial Summary Judgment proceeding as contemplated under CR 56(d). This is a total distortion and misrepresentation of the TEDRA proceedings as well as the dispositive nature and purpose for which the parties entered into the Stipulated Facts [CP 80-115]. Once again, Stipulated Facts are considered correct and

complete. Cook v. Vennigerholz, 44 Wn.2d 612, 296 P.2d 824 (1954).

They are binding on the parties and the court. Ross v. State Farm Mut. Ins. Co., 132 Wn.2d 507, 940 P.2d 252 (1997).

In this vein, the Superior Court was not in any sense imposing any sanction associated with discovery when excluding the untimely declarations of Brian Bennis and his mother [CP 113-16, 117-19].

Thus, Appellant's argument in this regard on pages 32 through 34 of her Brief is totally contrived and disingenuous. The same is true with respect to her misrepresentation on page 28 through 29 that the subject stipulation via her attorney was neither authorized, nor binding on her. Even if an issue in this regard existed, it is purely a matter between attorney and client, and does not in any way impact the TEDRA proceedings herein.

Furthermore, Ms. BENNIS' assertion that she was entitled to introduce evidence beyond the Stipulated Facts [CP 80-115] likewise runs afoul of the rule that new arguments or theories of law not raised at the time of hearing on Summary Judgment are barred and will not be entertained thereafter. Ferrin v. Donnellefeld, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); Wilcox v. Lexington Eve Inst., 130 Wn.App. 234, 122 P.3d 729 (2005); Sneed v. Barna, 80 Wn.App. 483, 912 P.2d 1035 (1996).

The same holds true insofar as CR 59(a) does not permit a party to propose new grounds for relief after entry of an adverse decision by the Superior Court. JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn.App. 1, 970 P.2d 343 (1999). As such, those arguments or new theories of law now being raised by Ms. BENNIS for the first time on appeal are equally deemed barred and waived. RAP 2.5(a); see also, Bonneville v. Pierce Cy., 148 Wn.App. 500, 202 P.3d 309 (2008).

**b. Appellant's Assignment of Error No. 2.** Next, on pages 36 through 43 of the Brief of Appellant, Ms. BENNIS appears to question the long established doctrine of retainer. Contrary to her characterization, this was not a “new rule of law,” adopted by the Superior Court, preventing the application of the statute of limitations. By the same measure, it goes without saying that such rule does not in any sense offend public policy, nor impose an undue burden on an acknowledged debtor such as Ms. BENNIS to prove forgiveness of the loan at issue.

**c. Appellant's Assignment of Error No. 3.** Finally, on pages 43 through 45 of the Brief of Appellant, Ms. BENNIS once more attempts to introduce her earlier argument that the Stipulated Facts [CP 80-115] were

not fully integrated and that she was, thus, entitled to introduce extrinsic evidence which went beyond those facts.

As discussed below, in Part E.2.c., the Superior Court merely required Ms. BENNIS to do equity before allowing her to share in the proceeds of the estate. Contrary to her protestations, the equitable doctrine of retainer is not affected by the mere passage of time as Ms. BENNIS would like to convince this court. In re Jackson's Estate, 200 Wash. 116, 119, 93 P.2d 349 (1939). Instead, it was incumbent upon her to show by way of the agreed Stipulated Facts that her debt to the ESTATE had been paid or otherwise forgiven. This she simply did not do.

**2. Argument for Upholding the TEDRA Decision.** With the foregoing frivolous issues having been laid to rest, the remaining and controlling issues which were before the Superior Court are simple and easily resolvable under the controlling law of this case. In this regard, the ESTATE offers the following argument and legal analysis in support of the underlying decision of the Superior Court:

**a. Gift vs. Loan.** While the unexplained transfer of money from a parent to a child raises the presumption that such transfer of funds was intended as a gift, such presumption can be overcome by proof otherwise

leaving no doubt as to the intention of the parties. Wakefield v. Wakefield, 59 Wn.2d 550, 551, 368 P.2d 909 (1962). This process is supported by the commonly accepted theory of shifting burdens of proof recognized in the Summary Judgment process. See, Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

Where, as here, the advancement of funds is both documented and memorialized as a loan by way of a formal, written agreement, the party receiving the subject funds “binds himself to repay at some future time, together with such other sum as may be agreed upon for the use of the money . . . advanced.” Hafer v. Spaeth, 22 Wn.2d 378, 384, 156 P.2d 408 (1945); In re Estate of Miller, 134 Wn.App. 885, 895, 134 P.3d 315 (2006). Clearly, this quantum of proof by way of the Stipulated Facts is sufficient to overcome any initial presumption that the subject funds were a gift as opposed to a loan. See, 5 K. Tegland, “Evidence law and Practice,” Wash.Prac., Rule 301 §301.15, at 243-44 (2007 & Supp. 2015).

Simply put, the burden of proof shifted under the Stipulated Facts [CP 80-115] to Ms. BENNIS to show the subject loan from her mother had been forgiven and was no longer owed. In this vein, Ms. BENNIS had no legal right whatsoever to rely upon any evidence other than that

contained in said Stipulated Facts, and which alone had been submitted for the purpose of Summary Judgment on September 2, 2015. There is absolutely nothing within the four-corners of that document suggesting either circumstantially, or by way of any reasonable presumption, that the subject debt owed by Ms. BENNIS had been forgiven. In other words, wishful thinking on her part will not make the subject debt owed the ESTATE go away. See, Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

To prevent the entry of Summary Judgment, all assertions by the responding party must be supported by competent, admissible evidence as contemplated under CR 56(e). See, Wash. Fed. v. Azure Chelan, LLC, 195 Wn.App. 644, 622 (2016). By the same measure, and as the moving party on reconsideration, Ms. BENNIS could not rely upon her bald assertions of forgiveness of the debt by her mother which amounted to nothing short of speculation, supposition and conjecture on her part. See, Pagnotta v. Beal Trailers of Oregon, Inc., 99 Wn.App. 28, 991 P.2d 728 (2000); see also, Grimwood, at 359-60; Meyer v. Univ. of Washington, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); Smith v. Preston Gates Ellis,

LLP, 135 Wn.App. 859, 865, 147 P.3d 600 (2006); Leonard v. Pierce Cy., 116 Wn.App. 60, 65, 65 P.3d 28 (2003).

Consequently, it remains clear there was no supporting evidence contained in the Stipulated Facts [CP 80-105] providing even the slightest indicia of proof that the subject debt of Ms. BENNIS had in any sense been forgiven or otherwise expunged. See generally, In re Larson's Estate, 71 Wn.2d 349, 428 P.2d 558 (1967). As much as she would like to ignore, contradict or otherwise supplement those facts by way of other forms of extrinsic evidence, including her son's belated and self-serving declaration [CP 117-19], Ms. BENNIS remains bound under Washington law by her stipulation. [CP 80-105].

Bedrock procedure allows and even encourages parties to stipulate to underlying facts and evidence in order to streamline the resolution of a civil case:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence

thereof shall be in writing and subscribed by the attorneys denying the same. CR 2A.

Moreover, a written stipulation signed by counsel for both sides is binding not only on the parties themselves but also the court. Riordan v. Commercial Travelers Mut. Ins. Co., 11 Wn.App 707, 715, 525 P.2d. 804 (1974).

Once again, it is a cardinal rule that the parties on Summary Judgment are restricted to only that evidence considered by the Superior Court. Moreover, the Appellate Court will not entertain arguments not raised before the Trial Court at the time of the hearing on Summary Judgment. Ferrin v. Donnellefeld, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); Sneed v. Barna, 80 Wn.App. 483, 912 P.2d 1035 (1996). Those arguments are deemed waived once the court has ruled on Summary Judgment. See, Bonneville v. Pierce Cy., 148 Wn.App. 500, 202 P.3d 309 (2008).

Without question, Ms. BENNIS knowingly, and voluntarily agreed to be legally bound by the Stipulated Facts for purposes of Summary Judgment and final resolution of this TEDRA matter. See, Ross v. State Farm Mutual Auto. Ins. Co., 132 Wn.2d 507, 940 P.2d 252 (1997); see also, Cook v. Vennigerholz, 44 Wn.2d 612, 296 P.2d 824 (1954). In

other words, under TEDRA, the September 2, 2015 proceeding on Summary Judgment was the contemplated hearing on the merits to resolve “all issues of fact and all issue of law” therein. See, RCW 11.96A.100(8) and (9); see also, Estate of Jones, 170 Wn.App. 594, 289 P.3d 650 (2012); Estate of Sherry, 158 Wn.App. 69, 250 P.3d 1182 (2010).

**b. Forgiveness of Debt.** For a last time, it should be again be noted that this TEDRA case was submitted to the Superior Court for complete and final resolution by way of a Summary Judgment proceeding under CR 56(c). Ms. BENNIS’ present, disingenuous claim that the September 2, 2015 hearing was only a partial summary judgment matter is nothing more than an after-thought. Once more, Stipulated Facts are considered correct and complete. Cook v. Vennigerholz, 44 Wn.2d 612, 296 P.2d 824 (1954) Ms. BENNIS is now bound by those facts whether she likes it or not. Id.

**c. Equitable Doctrine of Retainer.** As a final matter, it should be pointed out that Ms. BENNIS has no meritorious basis upon which to claim that the mere passage of time amounts to nothing short of a forgiveness of her debt to her mother. Contrary to Ms. BENNIS’ and her counsel’s frivolous accusations, the right of retainer remains a well-recognized, viable equitable doctrine in Washington. In re Smith’s Estate,

179 Wash. 417, 418-19, 38 P.2d 244 (1934). Id. Thus, the Superior Court correctly determined the statute of limitations provided no defense or bar whatsoever to Ms. BENNIS' continuing obligation to repay the ESTATE. Id.

Said Doctrine of Retainer is based upon the equitable principle that no one should share in the distribution of a fund until she has first done equity and discharged her debt or monetary obligation to that fund. In re Jackson's Estate, 200 Wash. 116, 119, 93 P.2d 349 (1939). In other words, equity dictates that the debtor is first required to resolve her financial obligation before having any right to share in the subject estate or funds. In re Braden's Estate, 122 Wash. 669, 671, 221 P.743 (1929); see also, Smith's Estate, at 418-19; Jackson's Estates, at 119.

Thus, if the debtor chooses not to voluntarily make recompense, the law allows for her distributive share in the estate to be retained by the personal representative and applied against the debt owed the estate. Smith, at 418-19. Accordingly, Ms. BENNIS' belabored arguments to the contrary should be flatly rejected as entirely without merit. The Superior Court should now be affirmed. RAP 12.2.

**3. Argument in Support of Cross Appeal.** The ESTATE once again maintains that it was entitled in this TEDRA action to an award of

costs and expenses, including a reasonable attorney fee, as against Ms. BENNIS in this matter as provided under RCW 11.96A.150.

Alternatively, and as requested in its April 1, 2016 briefing on reconsideration [CP 232-33], the ESTATE should have been awarded terms and costs and expenses, including a reasonable attorney fee, as against Ms. BENNIS, insofar as her motion for reconsideration represented a classic case of an abuse of process by her. Simply put, the arguments raised by her on reconsideration were entirely misplaced, and were thus frivolous and totally devoid of any merit whatsoever. Thus, the imposition of terms and sanctions was fully warranted under CR 11 and its statutory counterparts, RCW 4.84.185 and RCW 11.96A.150.

Under TEDRA the Superior Court is allowed discretion to award fees and costs in any amount determined to be equitable, and in so doing can rely upon various factors including a ruling having benefited the ESTATE. RCW 11.96A.150(1). The award or denial of fee awards are reviewed under an abuse of discretion standard. In Re Estate of Black, 153 Wn.2d 152, 173, 102 P.3d 796 (2004); In Re Estate of Evans, 181 Wn.App 436, 450-52, 326 P.3d 755 (2014).

The decision of the Superior Court denying the ESTATE's request for an award of terms and fees [RP 34-35; CP 187, 325-28; 258-59, 264-

66] constituted an abuse of discretion and should now be reversed. RAP 12.2. Clearly, the court misapplied the law governing the imposition of terms and sanctions, or simply chose to ignore it. See generally, Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); State v. Robinson, 79 Wn.App. 386, 396-97, 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990).

In turn, the issue of terms and fees should be remanded with instructions that a determination as to the amount to be awarded shall be determined by the Superior Court and shall be imposed against Ms. BENNIS personally which may be set off against her proportionate share of the ROE estate. See, RAP 12.2.

#### **F. REQUEST FOR AWARD OF ATTORNEY FEES ON APPEAL**

In accordance with Rule 18.1(b) of the Washington Rules of Appellate Procedure [RAP], the ESTATE in having been forced to incur costs and expenses on appeal, respectfully requests the entry of an award by this court for the same, including a reasonable attorney fee, be imposed

as against BENNIS in accordance with the provisions of RCW 11.96A.150.

Alternatively, and in addition thereto, the ESTATE further requests the entry of an award by this court of said terms and costs and expenses, including a reasonable attorney fee, be imposed as against the Appellant and cross Respondent, KATHLEEN M. BENNIS, as well as her attorney, Rodney M. Reinbold, both personally, individually, jointly and severally, insofar as said appeal of Ms. BENNIS represents a classic case of the use of the appellate process for nothing short of an unwarranted, unadulterated abuse of process and merely for the purpose of delay and harassment as contemplated and prohibited under RAP 18.9(a).

As spelled out, above, in Part E.1 of this brief, said appeal of Ms. BENNIS is patently frivolous in nature insofar as the arguments presented by Appellant's opening brief raise "no debatable issues upon which reasonable minds could differ" and the claims raised therein by Ms. BENNIS and her attorney are "so totally devoid of merit" that there is no reasonable possibility of reversal under the established law controlling and governing this case. State v. Chapman, 140 Wn.2d 436, 454, 998 P.2d 282, cert. denied, 531 U.S. 984, 148 L.Ed.2d 444, 121 S.Ct.438 (2000); Reid v. Dalton, 124 Wn.App. 113, 100 P.3d 349, review denied, 155

Wn.2d 1005 (2004); see also, CR 11 and RCW 4.84.185. Thus, the imposition of terms and an award of expenses on appeal is wholly justified, fair and warranted in this matter under RAP 18.9(a). Id.

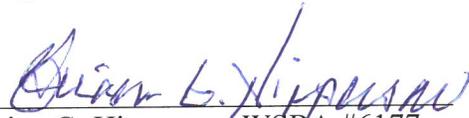
### **G. CONCLUSION**

Based upon the foregoing points and authorities, the ESTATE respectfully requests (1) that the October 29, 2015 Order of the Superior Court on Summary Judgment as entered against BENNIS, be affirmed outright by this court; (2) that this matter be remanded to the Superior Court with instructions that the ESTATE be awarded terms and fees against BENNIS as previously requested in this matter; and finally, (3) in having been forced by BENNIS and her attorney to needlessly incur additional cost and expenses with respect to her meritless appeal, that an award of appellate costs and expenses in this matter, including a reasonable attorney fee, be entered as against BENNIS and her attorney, both personally and individually, jointly and severally, as has been shown to be fully just and warranted under the circumstances presented, and as duly requested above in Part F of this brief. This type of sharp practice

should not be countenanced under our orderly system of justice and the rule of law.

DATED this 16<sup>th</sup> day of November, 2016.

Respectfully submitted:



Brian G. Hipperson, WSBA #6177  
Attorney for the ESTATE OF ANNE  
MARIE ROE

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**DECLARATION OF MAILING**

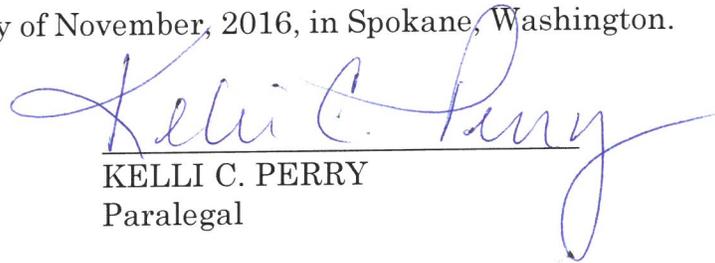
The undersigned declares, under penalty of perjury pursuant to the laws of the State of Washington: That I am over the age of 18, not a party to this action, and otherwise competent to be a witness in the matter, and that on this 15<sup>th</sup> day of November 2016, I both electronically mailed and deposited in the U.S. Mail, with proper postage affixed, an envelope addressed to the following:

Rodney Reinbold  
Attorney for Kathy Bennis  
P.O. Box 751  
Okanogan, WA 98840  
rodreinbold@gmail.com

Gregory L. Decker  
Attorney for William J. Roe  
Decker Law Offices  
1919 N. 3<sup>rd</sup> Street  
Coeur d'Alene, ID 83814  
greg@deckerlaw.com

The envelope contained a copy of the following document: BRIEF OF RESPONDENT AND CROSS APPELLANT, Gerald F. Roe, Personal Representative of the Estate of ANNE MARIE ROE, Deceased.

Signed this 16<sup>th</sup> day of November, 2016, in Spokane, Washington.

  
KELLI C. PERRY  
Paralegal