

No. 75148-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MICROCURRENT TECHNOLOGY, INC.,  
a Washington State Company,

Respondent/Cross Appellant,

v.

CHRISTINE SUZUKI, Personal Representative of  
the ESTATE OF JAMES Y. SUZUKI,

Appellant/Cross Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY

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**REPLY BRIEF OF APPELLANT and  
RESPONSE BRIEF OF CROSS RESPONDENT**

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THOMPSON HOWLE VAUGHN  
Suzanne C. Howle, WSBA #12977  
Carol Vaughn, WSBA #16579  
601 Union Street, Suite 3232  
Seattle WA 98101  
(206) 682-8400  
[Carolv@thompsonhowle.com](mailto:Carolv@thompsonhowle.com)

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## I. INTRODUCTION

Washington law favors fact finding over summary resolution of contract disputes. Respondent/cross appellant Microcurrent Technology, Inc. (“MCT”) turns this canon of contract law on its head, arguing that factual disputes are “irrelevant” and “of no consequence,”<sup>1</sup> and urging this Court to resolve competing inferences in its favor based on the self-interested declaration of its co-owner David Suzuki, critical portions of which are barred by the dead man statute, RCW 5.60.030. In addition to urging this Court to affirm based on contested inferences from the factual record, MCT erroneously asserts that the dead man statute does not apply to testimony by a corporate shareholder for the benefit of their corporation. This Court should reverse the summary judgment that enforced the interest provisions of the Note and dismissed the Estate’s counterclaim for compensation.

If this Court does not reverse the trial court’s enforcement of the interest-provisions of the Note, it should still reject MCT’s cross appeal of the trial court’s decision that denied MCT’s request to order the payment of debt principal before it is due. There are three parts to the trial court’s ruling on the acceleration issue, all of which are correct. First, the trial court found that it could not order acceleration because the Note does not

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<sup>1</sup> Brief of Respondent Cross-Appellant Microcurrent Technology, Inc. (“MCT Brf.”) at 13, 14, 16, 19, 26.

contain an acceleration clause. This ruling was correct because no Washington case authorizes acceleration absent agreement by the parties. Second, the trial court declined to consider whether maturity of the debt should be accelerated under the probate code, RCW 11.76.180, and directed MCT to file a petition under Title 11 RCW if it wished to pursue this remedy. This was not an abuse of discretion. Third, the trial court declined to award attorneys' fees under RCW 11.96A.150 to MCT, which was the correct outcome because MCT's request to accelerate lacked merit.

Regardless of how this Court rules on the merits, MCT's request for attorneys' fees should be denied. MCT wrongly argues that it is entitled to an award of attorneys' fees under RCW 11.96A.150, which applies to proceedings "governed by" Title 11 RCW, in this civil action to enforce a promissory note and compensation agreement. The Court should rule as follows on fees: (1) deny MCT's request for fees under RCW 11.96A.150 for claims to enforce the Note and the compensation agreement, because RCW 11.96A.150 applies only to matters "governed by" Title 11, and neither of these claims is procedurally or substantively governed by Title 11; (2) award the Estate its reasonable attorneys' fees and costs for replying to MCT's arguments relating to the scope of RCW 11.96A.150, because this issue is governed by Title 11 RCW; (3) deny

MCT's request for attorneys' fees in its cross appeal under RCW 11.96A.150, because it would not be equitable to award fees to MCT when its acceleration claim lacks merit; and (4) award the Estate attorneys' fees in the cross appeal under RCW 11.96A.150 based on the equitable considerations discussed below.

## II. REPLY ARGUMENT

### **A. Summary Judgment Is Inappropriate Where The Moving Party Controls The Evidence Due To The Death Of The Adverse Party.**

MCT repeatedly emphasizes that the Personal Representative has no testimonial knowledge or evidence to refute MCT's contentions regarding the promissory note and compensation agreement, the evidentiary basis of which is the Declaration of David Suzuki. *See* MCT Brf. at 6, 8, 13, 21, 27. This argument is incorrect, because the Estate does cite evidence in the record that refutes MCT's claims. *See* Estate Brf. at 6-14. Moreover, MCT's argument ignores the established principal that summary judgment is not appropriate when material facts are particularly within the knowledge of the moving party. Balise v. Underwood, 62 Wn.2d 195, 200, 381 P.2d 966 (1963);<sup>2</sup> Arnold v. Saberhagen Holdings,

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<sup>2</sup> In Balise v. Underwood, 62 Wn.2d 195, the plaintiff needed to prove that one defendant was in the course of employment of the other defendant at the time of the accident in order to recover against the other defendant. Washington's Supreme Court noted that the plaintiff would need to rely on more than an attack on the credibility of defense witnesses to prevail at trial. Nevertheless, since only

Inc., 157 Wn. App. 649, 661-62, 240 P.3d 162 (2010); Riley v. Andres, 107 Wn. App. 391, 395, 27 P.3d 618 (2001). “In such cases, the matter should proceed to trial ‘in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.’” Arnold, 157 Wn. App. at 662 (quoting Mich. Nat’l Bank v. Olson, 44 Wn. App. 898, 905, 723 P.2d 438 (1986)).<sup>3</sup>

The purpose behind this rule echoes the reason behind the dead man statute, RCW 5.60.030, which is to prevent a fraud upon the court by allowing interested parties to give self-serving testimony that the adverse party has no opportunity to rebut. In re the Estate of Cunningham, 94 Wash. 191, 193, 161 P. 1193 (1917) (death having closed the lips of one party, the law closes the lips of the other); *accord* Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). Undisputed evidence from an interested party is not necessarily credible evidence. Rea v. Rea, 19 Wn.

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the defendants possessed information as to employment, the court reversed a summary judgment granted the employer and remanded the case for trial.

<sup>3</sup> In Mich. Nat’l Bank v. Olson, 44 Wn. Ap. 898, the trial court granted the bank summary judgment against Annikki Olson for charges for the purchase of gems in Bangkok, Thailand, on her credit card. Olson denied any knowledge of the credit transaction. Olson speculated that her late husband's Bangkok lover purchased the gems. When Olson noticed the charge, she confronted her husband, who denied knowledge of the transaction, and she cancelled the credit card. The bank relied on a deposition of the Bangkok merchant who sold the gems. The merchant identified Mr. Olson as receiving the gems. The Court of Appeals considered the statement of the merchant as self-serving. Since the statement could only be disproved by cross-examination, it reversed the summary judgment in favor of the bank.

App. 496, 501, 576 P.2d 84 (1978)<sup>4</sup> (citing In re Estate of Shaner, 41 Wn.2d 236, 243, 248 P.2d 560 (1952)). The trial court should not consider as verity a self-serving statement of a litigant when the opposing party lacks access to the information found in the statement, particularly when the lack of access is due to death of the party.

In this case, MCT exclusively possesses testimonial knowledge about the Note and compensation agreement;<sup>5</sup> it controls the corporate records, which it asserts date back only to 2009 (CP 203);<sup>6</sup> it denies the existence of any documentary evidence relating to the life insurance policy that it alleges provided the consideration for the debt (CP 194, 204); it cannot recall the name of the insurance company that issued the policy or the purchaser of the policy (CP 203); and it took possession of Mr. Suzuki's corporate records after his death (CP 123). It was improper to

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<sup>4</sup> In Rea v. Rea, 19 Wn. App. 496, 501, the plaintiff asserted he was entitled to prevail because his evidence of an oral loan agreement was confirmed by a writing signed by the deceased debtor and was "undisputed." The Court of Appeals held this argument lacked merit because "undisputed evidence from an interested party is not necessarily credible evidence, nor is it necessarily consistent and convincing." *Id.* at 501 (internal citations omitted).

<sup>5</sup> According to David Suzuki, only David, Jimmy and David's wife were present when the proposed lifetime employment contract was discussed with the Decedent. CP 178. According to MCT's comptroller Mr. Luke, the debt reflected in the promissory note "was between David and his dad[.]" CP 205.

<sup>6</sup> The unsigned compensation agreement bearing the date "2003" was discovered after the Decedent's death in the files of his long-time attorney Roger Lageshulte (CP 77-81, 124), not among the records produced by MCT, even though David Suzuki testified that he had reviewed the proposed agreement. CP 177.

grant summary judgment without an opportunity for cross examination at trial.

**B. MCT Incorrectly Applies The Summary Judgment Standard: The Role Of The Court In Ruling On Summary Judgment Is Not To Weigh Competing Evidence And Inferences.**

Because the trial court granted summary judgment enforcing the Note and dismissing the counterclaim, the evidence and all reasonable inferences from the evidence must be considered in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). For example, in Brogan v. Anensen LLC v. Lamphlear, 165 Wn.2d 773, 777, 202 P.3d 960 (2009), Washington’s Supreme Court reversed summary judgment and remanded for trial, declining to consider the “weight or credibility of extrinsic evidence” on summary judgment and “concluding only that it is admissible and raises material questions of fact making summary judgment inappropriate at this juncture”.

Yet MCT repeatedly draws inferences from competing evidence against the Estate and in its favor. For example, MCT selectively quotes from the Personal Representative’s deposition (MCT Brf. at 5) to erroneously argue that the Estate admitted the debt was owed (*Id.* at 12), construing the Personal Representative’s statements in the light most favorable to MCT and in disregard of other evidence showing the Personal

Representative has no personal knowledge of the alleged debt or MCT operations (CP 65-7, 70-1), she disputed the genuineness of the Note because it was not disclosed to her prior to her father's death (CP 68-9), she disputed the adequacy of the consideration (CP 70), and she rejected MCT's creditor's claims (CP 22-3) for the reasons stated in the pleadings and briefing (CP 24-9, 40-3, 109-115).

Similarly, MCT argues that payroll deductions occurring between 2010 and May 2011 constituted "payments on the Note during his [Mr. Suzuki's] lifetime, which directly refutes the Estate's speculation that Decedent did not intend to pay the debt." MCT Brf. at 13. This conclusion contradicts the following testimony offered by Christine Suzuki: "At the time that the \$900 deductions were started by Microcurrent or David, there is nothing in my father's records to indicate that he had any involvement or awareness. At the time, he was very sick, drugged, and had repeated hospitalizations. It is impossible that he could have meaningfully had any participation regarding those deductions." CP 122-3.

These are just two of many examples from MCT's brief where it asserts that this Court should weigh competing evidence and draw inferences in its favor. MCT's method of ignoring or dismissing unfavorable inferences as "irrelevant" or "of no consequence" (*see supra*

at n. 1) belongs in a trial brief, and it cannot be the basis for upholding the trial court's summary judgment.

**C. Entry Of Summary Judgment To Enforce The Promissory Note As A Matter Of Law Was Improper.**

Summary judgment enforcing the Note was improper because the evidence yields competing inferences relating to the meaning of the Note and whether it reflects a genuine repayment obligation, whether the Note was supported by adequate consideration, and whether MCT waived its right to collect unpaid interest or engaged in undue delay prejudicial to the Estate. MCT makes the following arguments concerning the enforceability of the Note: 1) the signed Note exists; therefore it is enforceable; 2) extrinsic evidence cannot be considered; 3) extrinsic evidence conclusively establishes adequate consideration; 4) the evidence conclusively shows that MCT did not waive collection of interest, and even if it did, the evidence conclusively shows that MCT reinstated its right to collect; and 5) the evidence conclusively shows that MCT did not engage in undue delay in asserting its claim for unpaid interest. MCT's arguments are unsound and improperly rely upon weighing the competing evidence and drawing inferences in MCT's favor.

**1. The existence of the signed Promissory Note does not automatically make it an enforceable contract.**

MCT emphasizes the existence of the Note, conflating "existence"

with “enforceability” as a matter of law. MCT Brf. at 12. In so doing, MCT ignores the obvious contradictions between the contents of the Note and the relief it claims it is due as a matter of law. Ambiguities in a contract are construed against the drafter. Wilkins v. Grays Harbor Community Hosp., 71 Wn.2d 178, 184, 427 P.2d 716 (1967). The Note that MCT drafted<sup>7</sup> stated “the principal balance of \$108,000.00 will be due in-full on September 30, 2021” (CP 7), a date reasonably calculated to fall after Mr. Suzuki’s death given his age and precarious health. CP 113. Nevertheless, the Note contained no provision for accelerating maturity of the debt in the event of default or death. CP 7. The Note recited no consideration, not even a general reference to “value received.” CP 7. These omissions raise ambiguities that must be construed against MCT as the drafting party, require the trier of fact to consider extrinsic evidence, and preclude summary judgment.

MCT’s argument that the signed promissory note is conclusive as to the enforceability of the debt mirrors the unsuccessful argument made by the plaintiff in Rea v. Rea, 19 Wn. App. at 501, where the deceased debtor had signed a document acknowledging the debt. Like MCT, the plaintiff in Rea argued that his evidence was “undisputed” and entitled

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<sup>7</sup> MCT’s comptroller Mr. Luke testified that he prepared the Note. CP 203. David Suzuki testified that if Mr. Luke had drafted the Note, it was likely that David directed the provisions of the Note. CP 181.

him to prevail. *Id.* However, the Court of Appeals disagreed, holding that it was up to the trier of fact to determine the credibility and weight to be afforded to the evidence.

**2. The Estate did not make “unsupported bald-faced assertions.”**

MCT’s accusation that the Estate made “unsupported bald-faced assertions” (MCT Brf. at 12) at pages 20-21 of its Opening Brief is unavailing because the Estate’s Statement of the Case provided specific citations to the record for each factual statement. Nevertheless, the citations to the record, *again*, are as follows:

- The Note is discussed in the Estate’s Statement of the Case at 11-12, which provides the following citations to the record: CP 7.
- The Checks are discussed in the Estate’s Statement of the Case at 9-10, which provides the following citations to the record: CP 194, 196, 203.
- The record does not contain any other contemporaneous writings relating to the loan. This fact is discussed in the Estate’s Statement of the Case at 12. If such writings exist, RAP 10.3(a)(5) requires MCT to provide citations to the record.
- The life insurance policy is discussed in the Estate’s Statement of the Case at 9-10, which provides the following citations to the record: CP 47, 68, 70, 83, 194, 203, 204.

- The email from David Suzuki that first mentioned the loan in 2011 is discussed in the Decedent's Statement of the Case at 11-12, which provides the following citations to the record: CP 200.
- The Personal Representative's lack of knowledge regarding the purported loan is discussed in the Estate's Statement of the Case at 12, which provides the following citations to the record: CP 69, 122-3.
- The record does not contain any evidence of interest payments prior to the Decedent's death. This fact is discussed in the Estate's Statement of the Case at 12-13, which provides the following citations to the record: CP 93, 123, 205. If evidence of interest payments exists, RAP 10.3(a)(5) requires MCT to provide citations to the record.
- David Suzuki's instructions to MCT's comptroller to not book any interest on the purported loan are discussed in the Estate's Statement of the Case at 12-3, with the following citation to the record: CP 205.
- The record does not contain any evidence that MCT demanded payment on the loan prior to Mr. Suzuki's death. This fact is discussed in the Estate's Statement of the Case at 13. If evidence of a prior demand for payment exists, RAP 10.3(a)(5) requires MCT to provide citations to the record.
- The fact that the Note does not require payments of principal until September 30, 2021 is discussed in the Estate's Statement of the Case

at 11, with the following citation to the record: CP 7.

**3. MCT's contention that extrinsic evidence cannot be considered disregards Washington contract law and is precluded by its Motion for Summary Judgment that relied heavily on extrinsic evidence.**

MCT argues for the first time on appeal that extrinsic evidence not appearing on the face of the Note cannot be considered. Its position disregards 25 years of Washington contract law and the record of this case, which reflects that MCT introduced much of the extrinsic evidence that it now argues cannot be considered. Having introduced and relied on extrinsic evidence, MCT cannot credibly assert that this Court may not draw inferences favorable to the Estate from extrinsic evidence.

Over 25 years ago, Washington's Supreme Court in Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), disapproved the "plain meaning rule" for contract interpretation and reversed the trial court for refusing to consider the circumstances surrounding the contract:

We now hold that extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent.... In discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract.... We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled.

Berg v. Hudesman, 115 Wn.2d at 667-669, 671. “Extrinsic evidence for this purpose includes (1) the situation of the parties at the time the instrument was executed, (2) the circumstances under which the instrument was executed, and (3) the subsequent conduct of the contracting parties.” Watkins v. Restorative Care Ctr., 66 Wn. App. 178, 191, 831 P.2d 1085 (1992) (citing Berg v. Hudesman, 115 Wn.2d at 669).

The case that MCT relies on, Hearst Communications, Inc., v. Seattle Times Co., 154 Wn.2d 493, 115 P.3d 262 (2005), did not limit or change the Berg holding, which is still a cornerstone of contract interpretation in Washington.<sup>8</sup> Cases after Hearst continue to apply the context rule to deny summary judgment in contract disputes based on extrinsic evidence and to affirm the principle that Washington law “tends to favor fact finding rather than summary resolution of ... contract disputes.” Neuson v. Macy’s Dept. Stores, Inc., 160 Wn. App. 786, 796, 249 P.3d 1054 (2011) (remanding to trial court on a motion to compel arbitration where fact finding was required with respect to the arbitration agreement). *See also* Brogen & Anensen, LLC v. Lamphier, 165 Wn.2d 773, 202 P.3d 960 (2009) (holding extrinsic evidence could be considered to interpret a purchase and sale agreement). When interpretation of a

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<sup>8</sup> *Shepard’s* indicates Berg has been questioned four times, distinguished 14 times, followed 104 times, and cited in 33 law review articles, 34 treatises, and 709 “court documents.”

contract depends on the use of extrinsic evidence and more than one reasonable inference can be drawn from the extrinsic evidence, interpretation presents a question of fact, not law, and summary judgment is not appropriate. Brogan, 165 Wn.2d at 777; SAS America, Inc. v. Inada, 71 Wn. App. 261, 857 P.2d 1047 (1993).

MCT took advantage of the context rule in its motion for summary judgment, which relied heavily on extrinsic evidence. MCT offered extrinsic evidence consisting of David's declaration to argue the existence of facts relating to MCT and its operations (CP 44, 46-7, 82-3); the alleged loan (CP 45, 47, 83); the alleged consideration (CP 44-5, 47, 83); and the alleged course of payment (CP 47, 83). MCT also relied on extrinsic evidence from Christine Suzuki's deposition testimony to argue the existence of facts relating to the repayment of the loan (CP 49), the life insurance policy (CP 49), and MCT operations (CP 52). In its reply brief supporting summary judgment, MCT cited additional extrinsic evidence from the declaration of David Suzuki, including dissolution paperwork (CP 214), the life insurance policy checks (CP 214), and the payment of taxes (CP 214). MCT also offered answers to the written discovery it propounded and deposition excerpts in support of its summary judgment reply. CP 226-235, 237-8.

In response to MCT's offer of extrinsic evidence to support summary judgment, the Estate was entitled to offer extrinsic evidence to rebut MCT's claim, and to draw inferences that are favorable to the Estate from MCT's evidence as well as its own. The Estate offered excerpts from the testimony of MCT's comptroller Mr. Luke as well as copies of emails relating to the alleged consideration and context of the transaction, which were either not objected to or were admitted over MCT's objections. In the present case, there is more than one reasonable inference to be drawn from the contents of the Note and the extrinsic evidence offered by both parties, including the inference that the Note was not intended to be an enforceable obligation between the parties.

**4. The evidence does not conclusively establish adequate consideration as a matter of law; genuine issues of fact exist.**

The Note recites a promise to pay \$108,000, without stating that any value or consideration was received for this promise. CR 7. MCT argues that Mr. Suzuki's signature on the Note creates a presumption that he received adequate consideration, based on a case from 1939. MCT Brf. at 18. However, a signature on a promissory note does not foreclose inquiries into the adequacy of the consideration given for the loan. Even if the Note expressly recited that Mr. Suzuki had received a loan of \$108,000 in exchange for the promise to pay \$108,000, it would nevertheless be

proper to consider extrinsic evidence to determine if the recital of the consideration was accurate:

Proof of the real consideration, or lack of it, is an exception to the general rule that oral or extrinsic evidence cannot be asserted to vary the terms of a written instrument. Recitals of consideration in a written instrument are not conclusive. It is competent to inquire into the consideration and show, by parol evidence, the real or true consideration.

Malacky v. Scheppler, 69 Wn.2d 422, 425, 419 P.2d 147 (1966).

MCT argues that the checks totaling \$108,000 are conclusive evidence of adequate consideration. MCT Brf. at 17-8. But to reach this conclusion, this Court would have to weigh competing evidence and draw inferences in favor of MCT and against the Estate, which it cannot do on summary judgment. Nothing on the face of the checks indicates that they were a loan (CP 196). MCT's conclusion requires the trier of fact to ignore the Personal Representative's belief, offered in evidence by MCT, that the transfer of \$108,000 was in fact repayment of a loan owed *to Mr. Suzuki*. CP 233. It also requires the Court to refrain from inferring that Mr. Suzuki was entitled to receive the \$108,000 insurance pay-out because he had purchased the insurance policy before transferring the company to his sons. CP 194. MCT's conclusion also precludes the Court from drawing any inferences that Mr. Suzuki was entitled to receive the pay-out from the wording of Dena Suzuki's email, which did not refer to the payments as a loan but as "JYS Life Policy Payout." CP 194. MCT's

argument that adequate consideration has been established as a matter of law simply ignores or dismisses competing inferences drawn from the evidence, which is improper at this stage.

Crow v. Crow, 66 Wn.2d 108, 401 P.2d 328 (1965), shows the error of MCT's argument that payment of the funds conclusively establishes adequate consideration. In Crow, the Washington Supreme Court reversed summary judgment in an action to recover money between former spouses. The wife had allegedly loaned money to her former husband. The husband admitted receiving the money, but asserted the payment was not a loan, but was payment on a contract. However, the written contract did not reflect the payment. The trial court granted summary judgment enforcing the loan as a matter of law. The Supreme Court reversed, holding that trial was necessary for the trier of fact to consider the adequacy of the consideration.

**5. Genuine issues of material fact made it improper to dismiss the affirmative defense of waiver as a matter of law.**

The Estate argued that the course of performance differed from the terms of the Note, which required semi-monthly interest payments, and raised a fact question as to whether MCT waived the right to collect interest on the Note. MCT countered by asserting RCW 62A.3-304(c) applies only to holders in due course; that this case is controlled by

Cornerstone Equipment Leasing, Inc., v. MacLeod, 159 Wn. App. 899, 247 P.3d 790 (2011); that MCT's election to forego the collection of interest between 2006 and May 2011 was an act of compassion not waiver of MCT's right to collect interest; and that even if waiver occurred, it was without consideration and could be unilaterally revoked by MCT at any time upon reasonable notice, provided the Decedent had not relied to his detriment on the waiver. MCT Brf. at 19-23.

In response to these arguments: First, RCW 62A.3-304(c) defines when an instrument becomes "overdue." This provision of the UCC does not state that it only applies to holders in due course.

Second, Cornerstone Equipment Leasing, Inc., v. MacLeod, 159 Wn. App. 899, does not justify upholding the trial court in this case. Cornerstone affirmed summary judgment against a debtor who had raised several affirmative defenses, including waiver; however, there are key factual differences that distinguish Cornerstone from the present case. Furthermore, Cornerstone did not change the established legal principles governing waiver that support reversal in this case: (1) Waiver may be shown by a course of conduct. RCW 62A.1-303(f); Michel v. Melgren, 70 Wn. App. 373, 379, 853 P.2d 940 (1993); (2) Waiver is a question of fact, unless reasonable minds could reach but one conclusion. *Id.*; Central Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 353, 779 P.2d 697

(1989); and (3) Waiver can be unilateral and without consideration. Cornerstone, 159 Wn. App. at 909 (citing Panorama Residential Protective Ass'n v. Panorama Corp. of Wash., 97 Wn.2d 23, 28, 640 P.2d 1057 (1982)).

Under these principles, the course of conduct whereby MCT applied the Decedent's payroll deductions to principal rather than interest, even though principal does not fall due until 2021, and David instructed MCT's comptroller not to book any interest on the loan (CP 205), raises the reasonable inference that MCT intended to forego its right to collect interest. This inference is further supported by the fact that MCT made no demand for interest payments between 2006 and 2014. Furthermore, it cannot be conclusively inferred that the waiver was unilateral or without consideration, as it was in Cornerstone, because MCT did receive a benefit that it was not otherwise entitled to in the form of principal payments, and the monthly deductions from the Decedent's salary (\$1,800 per month) substantially exceeded 5% of the principal on the Note, which would only have been \$450 per month.

The particular facts that make Cornerstone distinguishable from the present case cluster around the implausibility of the waiver claim in that case. The debtor was a business developer and investor, engaged in an arms-length transaction with the lender, Cornerstone, which was in the

business of lending money to other business ventures. The promissory note bore “a statement, in boldface underlined capital letters just above MacLeod’s [the debtor’s] signature, that oral agreements to forbear repayment of a debt are not enforceable under Washington law.” *Id.* at 903. Yet the debtor, who unlike the Decedent could testify in his own behalf, alleged that the lender had waived the principal balance of more than \$120,000. Fourteen months after the payment of principal was due, the lender demanded payment. Unlike the present case where waiver can be inferred from an undeniable course of conduct, waiver in Cornerstone was dependent on the highly implausible and self-interested testimony that the lender had orally waived the debt notwithstanding the boldface anti-waiver language in the note.

MCT also continues to rely upon inferences drawn in its favor, instead of the Estate’s, to support summary judgment. It denies that it intended to waive collection of interest and asserts that it did not request payment of interest during Mr. Suzuki’s lifetime (although it deducted \$1,800 per month from his salary) because David and Jimmy did not want to be “harsh” with their “elderly father.” MCT Brf. at 21. Could the trier of fact reasonably infer that MCT’s inaction was the result of compassion and sympathy, notwithstanding MCT’s decision to terminate compensation to Mr. Suzuki when he was terminally ill? CP 160, 162.

Perhaps. But that is not an appropriate inference to draw at the summary judgment stage of this case.

**6. Genuine issues of material fact made it improper to dismiss the affirmative defense of laches as a matter of law.**

Whether the affirmative defense of laches can be shown raises questions of fact. 1000 Virginia Ltd. Partnership v. Vertecs, 158 Wn.2d 566, 589, 146 P.3d 423 (2006) (affirming that issues of material fact preclude summary judgment on the asserted defense of laches). MCT's discussion of the laches defense, like most of the rest of its brief, relies upon competing inferences being drawn in favor of MCT and against the Estate. Arguing about whether delay was, or was not, "reasonable" is quintessentially a fact question that cannot be resolved as a matter of law on summary judgment. This form of argument is improper at this stage and belongs in a trial brief. For the reasons stated in the Estate's Opening Brief, the trial court erred in dismissing the laches defense as a matter of law. *See* Op. Brf. Estate at 26-29.

Regarding the damage element of laches, MCT incorrectly argues that the Estate must show that the Decedent "significantly changed his position in reliance on MCT's decision not to pursue collection against him." MCT Brf. at 25. Reasonable reliance is a necessary element of equitable estoppel. It is not a necessary element of laches. Laches and

equitable estoppel are different affirmative defenses. *See* CR 8(c). Davidson v. State, 116 Wn.2d 13, 26, 802 P.2d 1374 (1991), held “laches commonly recognizes the unavoidable loss of defense evidence as establishing material prejudice.” MCT’s argument that the loss of defense evidence is immaterial is a question of fact, and its conclusions rely upon drawing inferences from the competing evidence in its favor. This is not proper on summary judgment.

**D. Entry of Summary Judgment To Dismiss The Estate’s Counterclaim For Compensation Was Improper.**

The Estate argued in its Opening Brief that summary judgment was improper because 1) the evidence yields competing inferences as to the existence of an enforceable compensation agreement between the parties and whether MCT breached its promise to make regular payments to the Decedent; and 2) the trial court committed reversible error by admitting portions of David Suzuki’s declaration that violated the dead man statute, RCW 5.60.030. MCT counters: 1) the absence of a written agreement precludes enforcement; 2) even if a compensation agreement can be established, enforcement is time-barred under the three-year statute of limitations applying to oral contracts; 3) the dead man statute does not apply to testimony from shareholders of a corporation; and 4) the trial court did not err by considering the declaration of David Suzuki because the Estate waived protections of the dead man statute by offering excerpts

from David's deposition to rebut the statements set forth in his declaration.

These arguments lack merit for the reasons set forth below.

**1. Material issues of disputed fact preclude dismissal of the counterclaim.**

MCT's primary argument is that the compensation agreement cannot be established because it was not in writing and Christine Suzuki has no direct evidence to prove its existence. However, circumstantial evidence is entitled to the same weight as direct evidence and is "equally reliable." State v. Quintanilla, 178 Wn. App. 173, 178, 313 P.3d 493 (2013). *See, e.g., In re Estate of Barnes*, 185 Wn2d 1, 16, 367 P.3d 580 (2016) (holding circumstantial evidence alone can be sufficient to support a finding of undue influence where the burden of proof is clear, cogent and convincing evidence). Here, the circumstantial evidence and reasonable inferences therefrom, viewed in the light most favorable to the Estate, establish the necessary elements of an implied contract making summary judgment inappropriate. *See Op. Brf. Estate at 29-36.*

MCT's denial of the contractual relationship between MCT and Mr. Suzuki relies upon the inference that after Mr. Suzuki transferred MCT to his sons, they made gratuitous payments to him "to support their elderly father, not out of any obligation." MCT Brf. at 28. But this contention is refuted by the testimony of David and the comptroller Mr. Luke. When David was deposed, he testified that the Decedent was

compensated “for being an advisory director” (CP 177), and that the Decedent “began as an employee, and at one point he was a contractor[,]” estimating that the transition occurred “in the later part of 2010, ’11, ’12, somewhere in that range.” CP 254. The Decedent received a regular salary from MCT through May 2011, from which MCT deducted the \$1,800 per month which was credited to the principal balance of the Note. CP 84, 93, 153, 177, 18, 205. Certainly, on summary judgment where reasonable inferences must be drawn in favor of the Estate, it was improper to infer that the payments MCT made to Mr. Suzuki were mere gratuities.

**2. Enforcement of the compensation agreement was not barred by the statute of limitations.**

MCT’s argument that the counterclaim is time-barred by the three-year statute of limitations for oral contracts relies on the Court drawing inferences in its favor to conclude that the last payment to Mr. Suzuki occurred in May 2011, and not in mid-2013 as the Estate asserts. MCT Brf. at 30. The party asserting that a claim is time-barred has the burden of proving this defense, which in some cases cannot be decided pretrial due to fact disputes. Rivas v. Overlake Hospital Medical Center, 164 Wn.2d 261, 189 P.3d 753 (2008). In Rivas, Washington’s Supreme Court reversed the court of appeals and reinstated the trial court’s order denying summary judgment, finding that a trial was necessary to decide material

issues of disputed fact regarding whether the plaintiff was incapacitated for purposes of tolling the statute of limitations at the time his medical malpractice claim arose.

Although MCT ceased making regular salary payments to the Decedent in May 2011, at least one payment occurred in mid-2013, according to emails from Christine Suzuki to David Suzuki in 2013. On July 19, 2013, Christine Suzuki emailed MCT officers regarding the Decedent's "pay check" (CP 160), followed by an email dated October 22, 2013 that referred to the Decedent's "salary." CP 162. Considering this evidence in the light most favorable to the nonmoving party, it prevents MCT from establishing as a matter of law that the compensation claim is time-barred. The counterclaim was filed April 13, 2015 (CP 24), which was less than three years after the last payment. MCT's statute of limitations defense fails.

Moreover, even if this Court does not agree that the emails raise reasonable inferences of partial payment, the three-year statute of limitations was tolled by Mr. Suzuki's debilitating illness and death. RCW 4.16.190 tolls statutes of limitations during any period of "incompetency or "disability." And RCW 4.16.200 tolls an unexpired statute of limitations for an additional 12 months after a person dies. Rivas, 164 Wn.2d at 12-13, held that the guardianship statute, RCW

11.88.010, provided the substantive definition of incapacity under RCW 4.16.190, but that it was not necessary to “satisfy the temporal and procedural requirements of the guardianship act;” i.e., the plaintiff was not required to show that her incapacity lasted long enough for a guardian to have been appointed under chapter 11.88 RCW to invoke the protections of RCW 4.16.190, merely that she was incapacitated at the time the cause of action accrued. In Rivas, the plaintiff had been in the intensive care unit for four days at the time the medical malpractice allegedly occurred, which was held sufficient to preclude summary judgment on the statute of limitations defense as a matter of law, where the action was filed two days after the limitations period expired.

The record amply supports the inference that the Decedent was incapacitated due to terminal cancer and other illnesses when the breach of contract claim accrued, thereby tolling the statute of limitations under RCW 4.16.190 and .200. The Decedent died September 13, 2014, 40 months after the last regular salary payment occurred in May, 2011. Between May 2011 and the Decedent’s death, he had a “myriad of different health problems” (CP 182), required “substantial assistance” (CP 121), was hospitalized repeatedly (CP 123), and was “heavily medicated” (CP 182). The chronic and systemic nature of the Decedent’s health problems tolled the three-year statute of limitations during his lifetime and

prevented it from expiring prior to his death. The counterclaim was then filed in April 2015 (CP 24), less than 12 months after Mr. Suzuki died, within the tolling period created by RCW 4.16.200.

**3. The trial court committed reversible error by allowing David Suzuki to testify that no compensation agreement existed between MCT and his father – the dead man statute applies to the testimony of corporate shareholders who have a direct pecuniary interest in the outcome of the litigation.**

MCT attempts to avoid the reach of the dead man statute by erroneously arguing it does not apply in cases where the adverse party is a corporation. This argument is at odds with 121 years of Washington case law, which focusses on whether the witness has a pecuniary interest in the litigation, not the corporate form of the adverse party. Gilmore v. H.W. Baker Co., 12 Wash. 468, 472, 41 P. 124 (1895), held that the precursor to RCW 5.60.030 barred testimony from a corporation's president because he had a pecuniary interest in the outcome of the litigation:

The conversation in question occurred before the appellant corporation was organized. It related to a transaction in which the witness was at that time the *real party in interest* and in which *the witness was representing himself*. The fact that the present corporation (appellant) succeeded to the business of Bacon & Baker and H.W. Baker Co., and that the witness became its president and one of its stockholders, did not remove the disability which the law imposes upon him as a party in interest. To hold otherwise would, for practical purposes, be to ignore the spirit of the statute, by permitting one, whom the law from considerations of public policy requires to remain silent as to any transaction had by him with a deceased person, to

evade the statute and void the disability imposed by it and become an effective witness merely by assigning his interest in the subject matter of the action, or by forming a corporation in which he might be the president and only stockholder, and thus by indirection accomplish that which the law prohibits to be done. For this reason alone, we think the testimony was properly excluded, and we do not feel called upon to pass on the question of whether an officer of a corporation can be permitted to testify to a transaction with a deceased person, in a suit between such corporation and the representative of such deceased person.

Gilmore, 12 Wash. at 472 (emphasis in original).

Cases after Gilmore have held:

To be a party in interest a witness must have a direct pecuniary interest in the outcome of litigation. In accord with this rule shareholders of a corporation have been held to be interested parties because of their pecuniary interest in the corporation, Archer v. Archer Blower & Pipe Co., 32 Wn.2d 246, 201 P.2d 191 (1948), while officers have been held not to be interested parties, mere agency not being enough.

Deacy v. College Life Ins. Co., 25 Wn. App. 419, 422-3, 607 P.2d 1239 (1980). *See also* Conlan v. Spokane Hardware Co., 117 Wash. 378, 201 P. 26 (1921); Parks v. Sterling Box Mach. Co., 186 Wash. 269, 57 P.2d 1032 (1936); Carter v. Curlew Creamery Co., 16 Wn.2d 476, 134 P.2d 66 (1943); Adams Marine Service, Inc. v. Fishel, 42 Wn.2d 555, 257 P.2d 203 (1953).

In the present case, the testimony at issue is the declaration of David Suzuki. David Suzuki is not merely an employee and a corporate officer; he is a 50% shareholder of MCT. CP 45, 47, 82-3. Therefore,

RCW 5.60.030 applies to testimony and sworn written statements by David Suzuki, which are offered in this case where the decedent “is a natural person who is a principal in the contract.” Thor v. McDearmid, 63 Wn. App. 193, 200, 817 P.2d 1380 (1991) (quoting Northern Bank & Trust Co. v. Harmon, 126 Wash. 25, 217 P. 8 (1923)). MCT’s citation of Thor for the proposition that the dead man statute does not apply when a corporation offers testimony from a shareholder adverse to the interests of the deceased (MCT Brf. at 31) is an incorrect reading of Thor, and is rebutted by the cases discussed above.

**4. The trial court committed reversible error by finding the Estate had waived the protections of the dead man statute – rebutting testimony that was improperly admitted in violation of the statute does not constitute waiver.**

MCT wrongly asserts that the Estate waived protections of the dead man statute by offering testimony by David Suzuki that rebutted the barred testimony offered by MCT. Waiver under the dead man statute, RCW 5.60.030, operates in general as follows:

The deadman's statute may be waived when the protected party introduces evidence concerning a transaction with the deceased. **Once the protected party has opened the door, the interested party is entitled to rebuttal.** A waiver by introduction of testimony about one transaction does not extend to unrelated transactions and conversations. Engaging in pretrial discovery, including taking depositions or propounding interrogatories, does not waive the deadman's statute unless a representative of the estate introduces the deposition or interrogatories into evidence.

Estate of Lennon v. Lennon, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001) (emphasis added). In a case directly on point, McGugart v. Brumback, 77 Wn.2d 441, 443, 463 P.2d 140 (1969) held that the offer of testimony in response to barred testimony that was erroneously admitted does not constitute a waiver of the statute. In McGugart, the plaintiff was asked a question by his counsel at trial concerning his oral agreement with the deceased. Defendant objected, contending the proffered testimony was incompetent under the dead man statute. The objection was erroneously overruled on the ground that the submission of the interrogatories constituted a waiver of the bar of the statute. By analogy, in the present case, the Estate's objection was erroneously overruled on the ground that the mere counterclaim constituted a waiver of the bar of the statute. CP 261. McGugart then went on to hold that cross examination regarding the testimony that had been improperly introduced did not constitute waiver of the dead man statute:

It would be palpably unfair and in violation of the purpose of the deadman's statute to hold that the decedent's representative, who has properly objected to the direct testimony of the adverse party as to transactions or conversations with the decedent, waives the statutory protection b cross-examination of the witness solely on matters which the court permitted on direct examination. There is no waiver of the protection of the deadman's statute by cross-examination of the adverse party unless the cross-examination goes beyond the scope of the direct examination and into transactions or conversations between

the decedent and the adverse party not testified to on direct examination.

McGugart, 77 Wn.2d at 451.

In the present case, MCT moved for summary judgment, offering in support a declaration from David Suzuki dated February 5, 2016, which contained quintessentially impermissible testimony. CP 82-85. Also in support of its motion for summary judgment, MCT offered extensive excerpts from the deposition of Christine Suzuki. CP (52-4, 64-76). At the time that MCT offered this inadmissible evidence, the Estate had not waived the protections of the statute. As of February 5, 2016, the only materials filed by the Estate were its answer and counterclaim. Therefore, this case is distinguishable from waiver cases like Estate of Lennon, 108 Wn. App. at 173, 178-9, Johnston v. Medina Improvement Club, 10 Wn.2d 44, 116 P.2d 272 (1941), and Bentzen v. Demmons, 68 Wn. App. 339, 842 P.2d 1015 (1993),<sup>9</sup> where the Estate “opened the door” by offering testimony from the adverse party relating to transactions or conversations with the deceased.

The present case falls within the scope of the McGugart case, because the evidence that MCT asserts constituted a waiver of the dead man statute by the Estate was offered in direct response to David’s inadmissible declaration. David stated in the declaration “there was never

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<sup>9</sup> MCT relies on Bentzen in its brief. MCT Brf. at 32.

any agreement between my father and MCT for compensation of any kind” and “prior to the counterclaim, neither my father, nor anyone on his behalf, attempted to make any claim of his [sic] nature.” CP 84. The Estate filed a timely objection under RCW 5.60.030 (CP 119) and in opposition to summary judgment offered excerpts from David’s deposition that relate to the written compensation agreement that was discussed between the Decedent and MCT in 2003. CP 100. These deposition excerpts were offered to rebut the objectionable testimony that MCT had already introduced into the record through David’s declaration. CP 99-100. Therefore, the claimed waiver falls squarely within the holding of McGugart and is without merit. It would be fundamentally unfair to allow an adverse party to offer barred testimony by an interested party and then claim that the offer of rebuttal evidence, consisting of inconsistent testimony by the same interested party, waived the protections of the statute.

MCT nonsensically contends that the Estate “opened the door” to the impermissible testimony by David Suzuki through the testimony of Christine Suzuki “in her deposition and her declaration.” MCT Brf. at 32. As noted *supra*, it was MCT that offered Christine Suzuki’s deposition transcript as evidence, not the Estate. *See* CP 64-76. In support of its claimed waiver, MCT cites to page 71 of the Clerk’s Papers, which is a

portion of the Christine Suzuki transcript that MCT itself introduced. The Personal Representative could not waive the protections of the dead man statute by sitting for a deposition, as the dead man statute cannot be waived by propounding or answering discovery questions “unless a representative of the estate introduces the deposition or interrogatories into evidence.” Estate of Lennon v. Lennon, 108 Wn. App. at 175.

The trial court committed reversible error by allowing MCT to introduce David’s self-interested testimony that no agreement existed between MCT and Mr. Suzuki; it was not “harmless” error as MCT contends. MCT Brf. at 32-3. The dead man statute precludes both positive assertions that a transaction or conversation occurred and negative assertions denying a transaction or conversation. Botka v. Estate of Hoerr, 105 Wn. App. 974, 980, 21 P.3d 723 (2001); Martin v. Shaen, 26 Wn.2d 346, 352-53, 173 P.2d 968 (1946). Based on David’s testimony, MCT argued in its motion for summary judgment that “the Estate cannot rebut MCT’s claim that a compensation agreement never existed.” CP 53. It repeats this contention on appeal. See MCT Brf. at 29. The trial court relied on David’s statements in its oral ruling. See RP 22:19-22. This case is distinguishable from In re Rakestraw’s Estate, 28 Wn. App. 585, 587, 624 P.2d 1175 (1981), where the subject of the inadmissible testimony – the nonpayment of alimony – was established by certified

court judgments showing the debts owed. Here, David's impermissible testimony that no compensation agreement existed goes to the heart of the Estate's counterclaim, and justifies reversal and remand to the trial court. *See Estate of Lennon*, 108 Wn. App. at 180-181 (trial court's error in ruling that the Estate had not waived the dead man statute justified reversal in part and remand).

**E. The Trial Court Properly Denied MCT's Request To Mature The Principal Debt.**

MCT argues in its cross appeal that the trial court erred by not maturing the debt and not finding the principal balance due as a matter of law. Even if this Court rules that the Note is enforceable, it would be error to order acceleration of the debt because 1) the Note does not provide for acceleration upon default or death; 2) no extrinsic evidence was presented showing that the parties intended the debt to be accelerated in the event of Mr. Suzuki's death or default; and 3) MCT did not file a petition under chapter 11.96A RCW to accelerate maturity of the debt under the probate code. Because the cross appeal involves one issue governed by Title 11 – the applicability of RCW 11.76.180 – attorney fees can be awarded as this Court deems equitable under RCW 11.96A.150, and the Estate respectfully requests an award of fees in the cross appeal, as discussed in more detail below.

**1. The evidence does not support acceleration of the debt as a matter of law on summary judgment.**

MCT filed a creditor's claim requesting payment of principal totaling \$84,600.00 and accrued interest of \$16,227.47.<sup>10</sup> CP 9. After the Estate rejected MCT's creditor's claim, it filed suit and requested summary judgment that "the Creditor's Claim is a valid debt of the Estate." CP 54. MCT requested summary judgment for \$84,600.00 in principal and \$49,914.00 in interest. CP 59. However, the Note as discussed already, did not require any payment of principal until September 30, 2021, and it did not contain any provision that allowed for acceleration of the principal due based on death or default. CP 7. MCT acknowledges that outstanding principal is not due until 2021. MCT Brf. at 34. The trial court properly ruled that it could not accelerate the debt in the absence of an agreement between the parties.

Under the context rule of contract interpretation discussed *supra*, the Court could look to extrinsic evidence to determine if the parties intended to allow acceleration of the debt upon death or default; however, MCT did not offer any such evidence, or provide the trial court with any authority or briefing in favor of accelerating the principal debt in its motion for summary judgment (CP 44-59). MCT did not request that the

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<sup>10</sup> \$16,227.47 is the difference between the principal balance claimed by MCT and the total value of its claim, which was \$100,827.47.

maturity of the debt be accelerated until its supplemental briefing after the trial court had ruled the Note was enforceable. CP 263-6. Therefore, under CR 56(c), it did not establish that it was entitled to judgment as a matter of law on the principal of the Note.

The contextual facts do not support an inference that the parties intended MCT to be able to accelerate maturity of the debt. As discussed *supra* at n. 8, MCT prepared the Note. MCT's owners are the Decedent's sons, and were well aware of his age and infirmities at the time the Note was drafted. The payment of principal was not due until 2021, when Mr. Suzuki would have been 85 years old. CP 113. From these facts, the trial court could not determine as a matter of law that MCT was entitled to payment of the unpaid principal.

**2. No Washington authority authorizes acceleration of the debt absent an acceleration clause in the contract.**

Because the promissory note does not include an acceleration clause, it cannot be accelerated. The trial court did not err in denying MCT's motion to accelerate the debt. Counsel for the Estate could find no Washington authority recognizing the right of a holder of a promissory note to accelerate the debt where an acceleration clause is not included in the promissory note or written contract. One case, Smith v. King, 106 Wn.2d 443, 450, 722 P.2d 796 (1986), cites a Minnesota Supreme Court case (Kirk v. Welch, 212 Minn. 300, 305, 3 N.W.2d 426 (1942)), where

there is recognition of the existence of a rule “that, absent an acceleration clause, future installments do not become due and payable upon default of payment of one installment”.

Even when the parties included an acceleration clause in their agreement, a promissory note is not automatically accelerated due to default. Washington courts have held that “default in payment alone does not work an acceleration.” A. A. C. Corp. v. Reed, 73 Wn.2d 612, 616, 440 P.2d 465 (1968) (citing Puget Sound Mut. Sav. Bank v. Lillions, 50 Wn.2d 799, 803, 314 P.2d 935 (1957)). “The law is settled in this jurisdiction that even if the provision in an installment note provides for the automatic acceleration of the due date upon default, mere default alone will not accelerate the note[.]” *Id.* at 615 (citing White v. Krutz, 37 Wash. 34, 79 P. 495 (1905); First Nat'l Bank of Snohomish v. Parker, 28 Wash. 234, 68 P. 756 (1902)).

**3. The trial court did not abuse its discretion when it directed MCT to file its claim to mature the Note under Title 11 in the probate.**

Having no factual or legal basis to accelerate the Note, as shown *supra*, MCT’s only recourse to collect principal was to petition under RCW 11.76.180 to mature the debt prior to its due date in 2021. In response to MCT’s “Supplemental Summary Judgment Motion Briefing” that requested the trial court exercise its discretion to mature MCT’s claim

for principal (CP 263-266), the trial court directed MCT to present the issue in the probate proceeding related to the Decedent's estate. CP 285. This ruling was not an abuse of discretion.

The claim to mature a debt that is not yet due is fundamentally different than a creditor's claim demanding payment of a debt that was owed by the deceased prior to his death. RCW 11.76.180 provides: "If there be any claim **not due** the court may in its discretion, after hearing upon such notice as may be determined by it, mature such claim and direct that the same be paid in the due course of the administration." (Emphasis added.) Deciding whether to mature a claim or debt that is not yet due raises different issues than what MCT presented in its Petition and Motion for Summary Judgment, which requested that the trial court affirm the validity of the Note and order payment of the amount that it claimed was due under the Note.

Any hearing seeking to mature a claim that is not yet due is a new proceeding that must comply with the procedural requirements of TEDRA, not simply be tacked on the end of a summary judgment hearing to enforce a creditor's claim that is due. TEDRA governs any judicial proceeding commenced for the "determination of any question arising in the administration of an estate or trust[.]" RCW 11.96A.030(2)(c). Thus, to address the issue of debt maturity under TEDRA, MCT must comply

with the petition and notice requirements of RCW 11.96A.090, .100, and .110, which require in pertinent part as follows:

- “A judicial proceeding under this title must be commenced as a new action.” RCW 11.96A.090(2).
- “Once commenced, the action may be consolidated with an existing proceeding upon the motion of a party for good cause shown, or by the court on its own motion.” RCW 11.96A.090(3).
- “A judicial proceeding under RCW 11.96A.090 is to be commenced by filing a petition with the court;” RCW 11.96A.100(1).
- “Subject to RCW 11.96A.160, in all judicial proceedings under this title that require notice, the notice must be personally served on or mailed to all parties or the parties’ virtual representatives at least twenty days before the hearing on the petition unless a different period is provided by statute or ordered by the court.” RCW 11.96A.110.

There are significant differences between a proceeding under Title 11 RCW and a regular civil action:

The probate court is not merely a referee in a contest between private disputants. Instead, it is the agency primarily charged with the important function of administering decedents’ estates and of distributing to the proper parties in each case the balance left after paying the debts of the decedent, the expenses of his last illness and funeral, and the expenses of administration.

In re Peterson's Estate, 12 Wn.2d 686, 722, 123 P.2d 733 (1942); CP 270.

Although TEDRA provides a streamlined process for addressing questions relating to estate administration, *see* Estate of Berry, 189 Wn. App. at 374-5, it also requires that notice be given to all parties who have a beneficial interest in the estate, including other creditors. *See* RCW 11.96A.030(5).<sup>11</sup>

In the present case, MCT did not follow the TEDRA procedures for asking the trial court to consider whether to exercise its discretion to mature the

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<sup>11</sup> RCW 11.96A.030(5) defines party or parties to include:

- (a) The trustor if living;
- (b) The trustee;
- (c) The personal representative;
- (d) An heir;
- (e) A beneficiary, including devisees, legatees, and trust beneficiaries;
- (f) The surviving spouse or surviving domestic partner of a decedent with respect to his or her interest in the decedent's property;
- (g) A guardian ad litem;
- (h) A creditor;
- (i) Any other person who has an interest in the subject of the particular proceeding;
- (j) The attorney general if required under RCW 11.110.120;
- (k) Any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney-in-fact;
- (l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;
- (m) Any notice agent, resident agent, or a qualified person, as those terms are defined in chapter 11.42 RCW;
- (n) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary's liability to a decedent's estate or creditors under RCW 11.18.200; and
- (o) A statutory trust advisor or directed trustee of a directed trust under chapter 11.98A RCW.

principal debt. This Court should find there was no abuse of discretion by the trial court and dismiss MCT's cross appeal.

**F. Attorneys' Fees Authorized By RCW 11.96A.150 Are Limited To The Issues Governed By Title 11 RCW. In The Appeal, The Only Issue Governed By Title 11 Is The Applicability Of RCW 11.96A.150. In The Cross Appeal, The Only Issue Governed By Title 11 Is The Applicability Of RCW 11.76.180.**

MCT erroneously requests an award of attorneys' fees under RCW 11.96A.150 for the trial court proceedings, the appeal and the cross appeal. The Estate's position on fees is:

- 1) Appeal. MCT's request for attorneys' fees for the Note and compensation claim/counterclaim should be denied because these claims are not governed by Title 11 RCW either procedurally or substantively. The Estate should be awarded fees for addressing in its reply brief the scope of RCW 11.96A.150, because that issue is "governed by" Title 11 RCW.
- 2) Cross Appeal. MCT's request for attorney fees for the acceleration cross appeal should be denied because MCT's arguments lack merit. The Estate should be awarded its fees in the cross appeal under RCW 11.96A.150, because the issue relating to the scope of RCW 11.76 is governed by Title 11.

**1. RCW 11.96A.150 applies to proceedings “governed by” Title 11 RCW.**

“In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity.” In re Estate of Stover, 178 Wn. App. 550, 564, 315 P.3d 579 (2013) (quoting Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004)). “RCW 11.96A.150 grants broad discretion to courts to award attorney fees ‘in such manner as the court determines to be equitable’ in ‘all proceedings governed by this title,’ i.e. under Title 11 RCW.” In re Estate of Berry, 189 Wn. App. 368, 379, 358 P.3d 426 (2015) (quoting RCW 11.96A.150). “The authority granted by RCW 11.96A.150 to award attorney fees is not limited to actions initiated under chapter 11.96A RCW.” *Id.* However, under the express language of the statute, the proceedings must “be governed by” Title 11 for RCW 11.96A.150 to apply.

RCW 11.96A.150 does not define “governed by.” “In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning.” In re Estate of Stover, 178 Wn. App. at 559 (quoting State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997)). BLACK’S LAW DICTIONARY defines “govern” to mean “to control a point in issue” using the example “the Smith case will govern the outcome of the appeal.” BLACK’S LAW DICTIONARY 764 (9<sup>th</sup> ed. 2009).

**2. The only fees authorized by RCW 11.96A.150 in the appeal are for the work necessary to determine the proper scope of RCW 11.96A.150; no other procedural or substantive issues are governed by Title 11.**

RCW 11.96A.150 should be applied to 1) actions commenced under Title 11; or 2) substantive or procedural issues where Title 11 will govern the outcome or determine the dispositive issue presented. Applying this scope to the appeal, issues relating to the Note and the compensation agreement fall outside the scope of RCW 11.96A.150, because these claims were not asserted in a Title 11 action and the substantive law of contracts will control the outcome and decide the issues presented, not any provisions of Title 11.

The contract claims are not Title 11 actions. In re Estate of Berry, 189 Wn. App. 368, 358 P.3d 426 (2015) held that actions on a creditor's claim are civil actions, not actions under Title 11 subject to the procedural requirements of TEDRA. Accordingly, MCT filed this action as a regular civil proceeding under the civil rules of procedure, not the TEDRA procedures, issuing a summons under Civil Rule 4. CP 300.

Title 11 RCW also does not govern any of the substantive issues relating to the existence and enforceability of the Note and the compensation agreement, which are governed by the Uniform Commercial Code (UCC), chapter 62A.3 RCW, and the common law of contracts. Therefore, regardless of the outcome of the merits of the Note action and

the compensation agreement counterclaim, no attorneys' fees should be awarded relating to the disposition of these claims, because they are not procedurally or substantively governed by Title 11.

Title 11 RCW does, however, govern the issue presented regarding the applicability and scope of RCW 11.96A.150. Therefore, this Court has authority to award fees as it deems equitable on this issue. In the present case, the Estate requests that this Court award it fees for the time spent on the portion of this Brief that addresses the scope of RCW 11.96A.150.

The one case cited by MCT in support of attorneys fees does not concern an action to enforce a creditor's claim or provide any useful guidance in determining the scope of RCW 11.96A.150. In re Estate of Fitzgerald, 172 Wn. App. 437, 433, 445, 294 P.3d 720 (2012) involved a petition filed under chapter 11.96A RCW (TEDRA) by the Personal Representative for a ruling that any creditors unknown to the Personal Representative prior to a certain date were not "reasonably ascertainable" as defined by RCW 11.40.051(1)(b). The specific issue was whether the trial court erred in denying a continuance to conduct discovery in a TEDRA proceeding, which involved interpretation of RCW 11.96A.115. *Id.* at 447-8. Thus, Title 11 governed both the substance and the procedures of Estate of Fitzgerald, distinguishing it on all fours from the

Note claim and the compensation agreement counterclaim, where the substantive issues are governed by contract law and the procedures are governed by the civil rules of procedure.

**3. The only fees authorized by RCW 11.96A.150 in the cross appeal are for the work necessary to determine the applicability of RCW 11.76.180.**

MCT's cross appeal does involve one issue substantively governed by Title 11, which is the applicability of RCW 11.76.180. Therefore, this Court would have discretion to award attorneys' fees in the cross appeal. The Estate prevailed on this issue below, with the trial court ruling that any request for acceleration of the note under chapter 11.76 RCW would have to be raised by separate petition filed under the probate procedures. CP 285. The Estate did not request attorneys' fees below on this issue, which it argued was not properly before the trial court.

The Estate does request an award of attorneys fees under RCW 11.96A.150 in the cross appeal. Such an award would be equitable because 1) the Estate prevailed below on this issue; 2) the Note plainly does not include an acceleration clause; 3) no Washington authority supports acceleration of a promissory note when there is not a written agreement authorizing acceleration; 4) the issue of acceleration was not pled or raised directly in MCT's Petition or motion for summary judgment; 5) no petition to mature the debt was ever filed, which as

argued above, would have to occur in a separate action filed pursuant to RCW 11.96A.090.

While typically the Court would not award attorneys' fees until disposition of the case on remand, it is equitable to award fees on the discrete issues governed by Title 11. The equities of this fee award will not be affected by the trial court's ruling on the substance of the contract claims that are at the heart of this lawsuit because, regardless of the merits of the Estate's and MCT's contract-based claims and defenses, the arguments that MCT made relating to the scope of RCW 11.96A.150 and the applicability of RCW 11.76.180 were without merit and caused the Estate to incur unnecessary attorneys' fees.

### **III. CONCLUSION**

The Estate respectfully requests that this Court reverse the trial court's erroneous summary judgment and remand for trial on the issues relating to enforceability of the Note and the compensation agreement. The Estate further requests that this Court award the Estate attorneys' fees and costs under RCW 11.96A.150 for the time spent replying to MCT's arguments relating to the applicability of RCW 11.96A.150 to the Note claim and the compensation agreement counterclaim, and for the Estate's response to MCT's cross appeal involving interpretation of chapter 11.76 RCW. MCT's arguments relating to Title 11 were without merit and

justify an award of fees under RCW 11.96A.150 regardless of the outcome of the contract-based claims and defenses raised in this lawsuit.

Respectfully submitted this 9<sup>th</sup> day of November, 2016.

THOMPSON HOWLE VAUGHN



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Suzanne C. Howle, WSBA #12977

Carol Vaughn, WSBA #16579

Matthew Parker, WSBA #47307

601 Union Street, Suite 3232

Seattle, WA 98101

Telephone: (206) 682-8400

Fax: (206) 682-9491

[Carolv@thompsonhowle.com](mailto:Carolv@thompsonhowle.com)

Attorneys for Appellant