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No. 68928-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN THE MATTER OF THE ESTATE OF LYDE L. HERRLE,
DECEASED,

CONNIE MARICH AND THOMAS MARICH, AND THE MARITAL
COMMUNITY COMPRISED THEREOF,

Appellants,

v.

JOHN LEE, PERSONAL REPRESENTATIVE TO THE ESTATE AND
TRUSTEE OF THE LYDE L. HERRLE TRUST,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Third Amendment to the Trust of Lyde L. Herrle provides that the Trust shall retain an interest in the \$150,000 to be distributed to the Appellants, Connie and Thomas Marich. The distribution was to be used for the purpose of purchasing a home for Ms. Marich (Mr. Herrle's niece) to reside in during her lifetime. The Estate accordingly paid \$150,000 to the Mariches. The Mariches did in fact purchase a home (the "Property"). But then the Mariches refused to recognize that the Estate has an interest in that \$150,000 distribution.

Respondent John Lee, Personal Representative to the Estate and Trustee of the Lyde L. Herrle Trust (the "Personal Representative"), accordingly brought a petition under the Trust and Estate Dispute Resolution Act to quiet title and sought an order granting the Trust an interest in that Property proportionate to the \$150,000 (*i.e.*, \$150,000 divided by the purchase price). The trial court agreed, granting an order on summary judgment (the "Order") awarding a 42.7% interest in the Property to the Trust. CP 518-20 (May 17, 2012 Order) & CP 663-65 (May 16, 2012 letter decision from Judge Richard T. Okrent). The Mariches appealed.

The Personal Representative believed that the Mariches put the \$150,000 toward the purchase of the Property. As discussed in

Respondent's Motion to Dismiss Appeal and Remand to Vacate Order Below (filed October 24, 2012 in this appeal), however, the Personal Representative's counsel discovered during this appeal that the relief obtained below was based upon the Mariches' failure to disclose a critical fact to the trial court. Instead of following the Trust's directive, the Mariches wrongfully retained the \$150,000 and purchased the Property by taking out a loan for \$362,686 and fully encumbered the property. That is, they did *not* use the \$150,000 toward the purchase of the Property. Moreover, the Mariches then refinanced the Property *during* the trial court's proceedings on the Personal Representative's petition to quiet title without disclosing that fact to the trial court. The Mariches' failure to disclose these key facts to the trial court has caused the Estate to seek needlessly (albeit successfully) the Order granting it an interest in the Property. The Personal Representative has accordingly moved to dismiss the appeal and have the case remanded to the trial court to vacate the Order.

By letter decision dated November 29, 2012, Commissioner Mary Neel ruled that the Personal Representative's Motion to Dismiss the Appeal and Remand to Vacate Order Below would be best considered by the judicial panel. That Motion to Dismiss is fully briefed and submitted.

Commissioner Neel also directed the Personal Representative to submit this Respondent's Brief to address the merits of the appeal. In sum, summary judgment was appropriate in favor of the Estate. The Third Amendment to the Trust of Lyde L. Herrle is clear that Mr. Herrle intended for \$150,000 to be distributed to Connie Marich for the purchase of a home to live in during her lifetime. There is no material question of fact that this was the testator's intent. There is no ambiguity in the Will and Trust. The Mariches' declarations claiming they had an option to purchase Mr. Herrle's house are expressly contradicted by the Trust. Nor is there any evidence to support the Mariches' theory that the \$150,000 was paid to them in "settlement" of claims.

The Personal Representative had hoped to avoid the expense of briefing this appeal via its Motion to Dismiss. In light of Commissioner Neel's ruling, however, the Personal Representative seeks relief to which the Estate is entitled: an interest in the \$150,000 distributed to Connie Marich. The Personal Representative asks the Court to affirm the grant of summary judgment as to liability, but to remand for further proceedings to pursue the \$150,000 which was apparently not put into the Property.

II. STATEMENT OF THE ISSUES

1. Was summary judgment for the Personal Representative appropriate where the testator's intent was clear and unambiguous that the trust should retain an interest in the Property?

2. Was denial of the Mariches' motion for summary judgment appropriate where the testator's intent was clear that the trust is to retain an interest in the \$150,000, and where they failed to raise a material question of fact to support their theory that the \$150,000 was paid as part of a settlement of claims?

III. STATEMENT OF THE CASE

A. Decedent Expressly Intended for the Trust to Retain a Proportionate Interest in the Distribution to the Mariches

Lyde L. Herrle passed away on February 23, 2010. CP 73. Prior to his passing, on August 6, 2008, he executed a new Will and amendment to his Trust. CP 12, CP 20.

In his original Trust dated August 6, 2008, Mr. Herrle provided for a potential sale of his house and farm to Thomas and Connie Marich for \$100,000. CP 12. But on January 2, 2010, Mr. Herrle executed a Second Amendment to the Trust, providing for repayment of the \$10,000 he received from Thomas Marich "on a verbal agreement that has not been reduced to writing and that he is unable to satisfy as was intended when it was discussed." CP 59. The Second Amendment to the Trust then

describes Mr. Herrle's "primary intent that the farm, including the farmland, outbuildings & my home, be sold to Robert Jungquist at the price we have agreed upon." CP 59. Specifically, Mr. Herrle included the language:

No other agreement, verbal, written or otherwise shall supersede my agreement with Mr. Robert Jungquist. All offers prior to any agreement with Mr. Jungquist, if any, have been verbal and have not been reduced to writing of any kind.

It is my understanding and my intent that any verbal agreement with regard to real estate must be reduced to writing within one year if it is to be valid legally. I have not reduced any agreement to writing and do not intend to do so with anyone other than Robert Jungquist. Therefore, I declare that I have no prior agreements with any person for the purchase and sale of my farm at the time of execution of this amendment to my trust.

CP 60.

He then executed a Third Amendment to his Trust ("Third Amendment"), which amended the Will and Trust executed on August 6, 2008. CP 65; see generally CP 6 (Declaration of Marie Kunferman and Exhibits A-F thereto). The Third Amendment restates the primary beneficiary provision to name (1) the Immaculate Conception (Regional) School Endowment or Foundation and (2) scholarship program for

Immaculate Conception (Regional) School tuition as the primary beneficiaries. See CP 65. The Third Amendment also amends some of the special bequests, increasing or decreasing what Mr. Herrle wanted to leave to certain individuals.

In the Third Amendment Mr. Herrle reiterated his intent to reimburse Thomas Marich for the \$10,000 payment “on a verbal agreement that has not been reduced to writing and that he is unable to satisfy as was intended when it was discussed.” CP 68 at ¶ 1. The Third Amendment provides instead for a distribution of \$150,000 to be made available to purchase a house in Skagit County for the benefit of Ms. Marich:

One Hundred Fifty Thousand Dollars (\$150,000.00) shall be made available to purchase a house for the benefit of Connie Marich. The house shall be one that is located in Skagit County and is within an hour’s drive of my sister, Marie A. Kunferman. Connie may choose any house she wishes, however, it is not my intent to buy a house outright for Connie. It is my intent to see that she is provided for, for her lifetime, therefore if this bequest is used to purchase a house for Connie then the title of this house shall maintain a legal life estate for Connie. This bequest is contingent upon Connie Marich living in the house and being available to help my sister, Marie A. Kunferman, for as long as Marie is alive. In the event Connie Marich has predeceased distribution of her entire share, then in that

event, if my sister Marie is still living such share shall be re-allocated up to any amount of the undistributed fifty thousand dollars to Marie, outright or as soon as practicable. However, if my sister, Marie A. Kunferman is not living then such share shall lapse.

The above provision to provide funds for a house for Connie Marich for her life replaces any previously mentioned special bequest of twenty five thousand dollars (\$25,000.00) going outright, or as soon as is practicable to Connie Marich.

Further, as to any of the proceeds of my trust going to the purchase of a house for Connie Marich, that portion of the house purchased by the proceeds of this trust shall be used to determine a percentage of ownership in the house purchased by Connie Marich. The percentage of the house purchased by Connie Marich shall remain the percentage owned by the trust throughout the time that Connie lives on the property. In the event that Connie chooses to sell the property or to move off of the property, the same percentage of the property as determined by the amount from the trust used in the original purchase shall be amount that goes to Immaculate Conception School Foundation upon the sale of the property or the death of Connie Marich. That is, if the house purchased is purchased for \$200,000.00 and \$150,000.00 comes from the trust, then 3/4 of the house is what the trust owns and 1/4 of the house is what Connie Marich owns. Therefore, if the house increases in value to \$400,000.00 and Connie sells the house, then Connie shall receive \$100,000.00 of the sale proceeds and Immaculate Conception Regional School

Endowment shall receive the remaining 3/4 of the sale proceeds. This is my intent.

I know that I am not long for this world. My family knows that I am not long for this world. At one time I believed that Connie and her husband, Tom Marich, would come to live on my property and help me to care for it as well as to help care for me in my old age. I have seen with my own eyes that what I had thought would happen is not what happened. During the time that Connie and Tom Marich have lived on my place, Tom Marich has put up cameras to watch people who come and go, and he has acted as if he already owned my property. I know that I invited him to live on my property, but what I believed we agreed to ended up being something all together different that what I was thinking, for this reason I do not believe I have any binding agreements with Thomas Marich.

CP 66-67.

As is plain from the text, the \$150,000 distribution is not an outright cash distribution. Instead, the terms of the Third Amendment require that Ms. Marich fulfill certain conditions. The Trust specifically states Mr. Herrle's intent that the Trust continue to own a percentage of the house proportionate to the \$150,000 distribution. CP 66. This ownership interest is to continue until the house is sold, Ms. Marich moves off the premises, or upon Ms. Marich's death. CP 66-67. Further, in the

event of a sale, the appropriate percentage of the proceeds are to be given to the Immaculate Conception School Foundation. CP 67.

B. The Estate Distributed the \$150,000 to the Mariches and the Mariches Bought Property, but the Mariches Refused to Acknowledge the Trust's Ongoing Interest in the Funds

On April 5, 2010, Letters Testamentary were issued to Marie Kunferman naming her Personal Representative to execute Lyde Herrle's Will. CP 90. (John Lee has since been appointed to replace Ms. Kunferman and serves as the current Personal Representative. CP 661.) On or about April 15, 2010, the Estate distributed the \$150,000 to Ms. Marich. CP 543-44, CP 570, CP 572. Ms. Marich signed a Receipt of Heir on April 15, 2010. CP 572. The payments to the Mariches were made on the Estate's checks signed by Marie Kunferman. CP 224-27.

At no time did the Personal Representative, Ms. Kunferman, authorize the Estate's attorney, Rosemary Kamb, to take any action contrary to the terms of the Trust and the Third Amendment. CP 667. Ms. Kamb had drafted the amendments to the Trust. CP 6-7.

Soon thereafter, on or about June 10, 2010, the Mariches purchased for \$351,100 a residence located at 1483 Barrell Springs Road, Bellingham, Whatcom County, Washington 98229 ("the Property"). CP 240, 279.

Believing the Mariches used the \$150,000 to purchase the Property pursuant to the terms of the Trust, the Estate requested in April 2011 that the Mariches execute a Quit Claim Deed transferring the percentage of the Property owned by the Trust. CP 242. The Estate calculated that it was entitled to 42.7% of the Property (*i.e.*, \$150,000 divided by \$351,100). The Mariches refused to execute a Quit Claim Deed recognizing that the Estate had a proportionate interest in the Property. See CP 198.

C. The Court Ordered the Enforcement of the Trust

The Personal Representative initially filed a TEDRA petition in the trial court on July 6, 2011, for an order to quiet title in the Property. CP 591. After negotiation between the parties regarding the appropriate venue, the Personal Representative re-filed the TEDRA petition with the trial court on February 9, 2012. CP 1. The Mariches answered the petition on February 28, 2012. See CP 197. Shortly thereafter, the Personal Representative filed a motion for summary judgment on March 26, 2012. CP 228. The Mariches responded on April 18, 2012. CP 506. On May 22, 2012, the trial court granted the Personal Representative's motion for summary judgment, denied the Mariches' motion for summary judgment, ordered the Property's fee title quieted, and established and confirmed in the Trust a proportionate interest of 42.7%. CP 518-20 & CP 663-65. Among other things, the trial court

found that the Mariches purchased the Property “using, in part, the \$150,000 distribution.” CP 664.

D. The Mariches Failed to Disclose Key Facts to the Trial Court and This Court

The Mariches have since appealed the trial court’s grant of summary judgment in favor of the Estate. CP 521. After the appeal was filed, the Personal Representative’s counsel discovered recordings at the Skagit County Auditor showing that in order to buy the Property valued at \$351,100, the Mariches took out a loan for \$362,686 in 2010, secured by a deed of trust granting to a third-party lender an interest in the Property. Declaration of Theresa Wang, filed under this appellate cause number and dated October 24, 2012. The Mariches then refinanced the Property with another loan in the amount of \$360,523, granting a third-party lender a secured interest in the entire Property. Id. The recorded deed of trust evidencing the refinancing of the lender’s interest in the Property is dated April 9, 2012, indicating that the Mariches refinanced and fully encumbered the Property *during* the briefing period for the Personal Representative’s motion for summary judgment. Id. Presumably in preparation for abandoning the Property should they lose the appeal, the Mariches also recorded a Declaration of Homestead on April 27, 2012. Id.

Based upon these facts, it is clear the Mariches never used the \$150,000 distribution from the Estate to purchase the Property.

IV. ARGUMENT

The Mariches assign error to the trial court's finding on summary judgment that the Estate (actually, the Lyde L. Herrle Trust, see CP 518) has an interest in the Mariches' home. As discussed above, the Personal Representative (who is also the trustee of the Lyle L. Herrle Trust) contends in light of recent discoveries that the Trust has an interest in the \$150,000, wherever it was placed. Given that the funds were not put into the home, the Argument will focus on showing that the trial court was correct in finding that the Third Amendment gives the Trust an ongoing interest in the funds. Similarly, the trial court was correct in denying the Mariches' motion for summary judgment, which asserted that the funds were given to Connie Marich in "settlement" of claims against the Estate.

A. Standard of Review

The Court reviews summary judgment orders *de novo*. Ensley v. Mollman, 155 Wn. App. 744, 750-51, 230 P.3d 599, review denied, 170 Wn.2d 1002 (2010).

The purpose of summary judgment is to determine whether there is a genuine issue of material fact requiring a formal trial. Landberg v. Carlson, 108 Wn. App. 749, 33 P.3d 406 (2001), review denied, 146

Wn.2d 1008 (2002). A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10 (2007). The moving party bears the initial burden of showing that there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets his or her burden, then the non-moving party “must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial” in order to withstand summary judgment. Galen v. County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007). Here, the Mariches are unable to “set forth specific facts showing that there is a genuine issue for trial.” CR 56(e); Young v. Key Pharm., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (holding that because the plaintiff did not present competent evidence to rebut the defendants’ initial showing of the absence of a material issue of fact, the defendants are entitled to summary judgment). The Mariches are also unable to present sufficient evidence to support their claims.

When a party moving for summary judgment presents affidavits which make out a prima facie case, the opposing party may not rely on

mere allegations contained in his pleadings but must make an evidentiary showing of a factual issue which is material to the contentions before the court. Winterroth v. Meats, Inc., 10 Wn. App. 7, 516 P.2d 522 (1973); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). “Conclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment.” Turngren v. King County, 33 Wn. App. 78, 84, 649 P.2d 153 (1982) (concluding that the trial court did not err in granting summary judgment), remanded, 100 Wn.2d 1007 (1983).

B. The Third Amendment to the Trust is Clear, and Supersedes the Mariches’ Alleged Option to Purchase Mr. Herrle’s Farm

A court’s “paramount duty” is to give effect to the testator’s intent when he executed his will. RCW 11.12.230. The testator’s intent is to be found within the four corners of an unambiguous will. In re Estate of Burks, 124 Wn. App. 327, 331, 100 P.3d 328 (2004). Specific provisions must be construed in the context of the entire will. In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972). In this case, Mr. Herrle’s intent to sell his house and farm to Mr. Jungquist, not to the Mariches, is clear.

In his original Trust dated August 6, 2008, Mr. Herrle provided for a potential sale of his house and farm to Thomas and Connie Marich for \$100,000. CP 12, 20. But the Second Amendment to the Trust describes Mr. Herrle's "primary intent that the farm, including the farmland, outbuildings & my home, be sold to Robert Jungquist at the price we have agreed upon." CP 59. Mr. Herrle then reiterated in the Third Amendment his intent to reimburse Thomas Marich for the \$10,000 payment "on a verbal agreement that has not been reduced to writing and that he is unable to satisfy as was intended when it was discussed." CP 68; see also CP 66-67, 667 (Mr. Herrle's sister and former Personal Representative to the Estate and Trustee to the Trust, Marie Kunferman, observed that Mr. Herrle's relationship with the Mariches had changed over the years and understood that he no longer wished to sell his house and farm to them).

Mr. Herrle's intent to revoke any informal, verbal commitment to sell his property to the Mariches was clearly and unequivocally stated. The language of Mr. Herrle's Trust documents are clear as to his intent.

C. The Trust is Entitled by Law to an Interest in the Mariches' Property in Accordance with the Terms of the Third Amendment

The Mariches argue that the trial court improperly created a "joint tenancy" without their consent. Appellant's Brief at 15-16. They argue that the trial court created a "contract" which the parties did not make for

themselves. Of course, there is no such contract created by the trial court's order, which granted the Trust an interest in the distributed funds consistent with the conditions which came with that distribution.

The Mariches also argue that a "joint tenancy" was created by the trial court without a written instrument. Yet the interest in the Property was expressly contemplated by the Third Amendment, which explained in detail how the \$150,000 would be used to calculate the Trust's ongoing interest in the Property as well as how the proceeds of the eventual sale of the Property would be divided between Connie Marich (or her estate) and the Lyde L. Herrle Trust. See, supra, at 6-8 (discussing CP 66-67). The Trust has a valid subsisting interest in the Property, and a right to its proportionate interest thereof. Pursuant to RCW 7.28.010, the Trust should have title to the Property for its proportionate interest in accordance with the terms of the Amendment. RCW 7.28.010 provides:

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; an action to quiet title may be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs against the unknown heirs of such deceased person or

against such person presumed to be
deceased and his or her unknown heirs, . . .

Here, the Petitioner had a valid interest in the Mariches' Property
as contemplated by RCW 7.28.010. Further, the plain language of the
Amendment states:

Further, as to any of the proceeds of my trust
going to the purchase of a house for Connie
Marich, that portion of the house purchased
by the proceeds of this trust shall be used to
determine a percentage of ownership in the
house purchased by Connie Marich. ***The
percentage of the house purchased by
Connie Marich shall remain the
percentage owned by the trust*** throughout
the time that Connie lives on the property.

CP 67 (emphasis added). Thus, the Trust's investment of \$150,000 in the
Property amounts to a 42.7% interest in the Property purchased at
\$351,100 (i.e., \$150,000 divided by \$351,100). As stated in RCW
7.28.120 "the superior title, whether legal or equitable shall prevail."

Of course, Appellants' assignment of error on this point is moot if
the Court grants the Personal Representative's request (via the Motion to
Dismiss) to vacate the Trust's interest in the Property and to rule that the
Trust has an interest in the \$150,000 and the right to pursue that interest
on remand.

D. The Alleged Option to Purchase Mr. Herrle's Property is Unenforceable Under the Statute of Frauds

In Washington, contracts for the sale or conveyance of real estate *must* include a description of the real property. Pardee v. Jolly, 163 Wn.2d 558, 567, 192 P.3d 967 (2008) (citing Key Design Inc. v. Moser, 138 Wn.2d 875, 881, 983 P.2d 653, 993 P.2d 900 (1999)). Pursuant to this rule, options to purchase real estate are subject to the statute of frauds. Id. (citing 4 Caroline N. Brown, CORBIN ON CONTRACTS § 17.19 at 490 (rev. ed. 1997)). Washington courts have noted the state follows the strictest standard in the nation with regard to the requirement of a full legal description in real estate contracts. See Home Realty Lynnwood, Inc. v. Walsh, 146 Wn. App. 231, 240, 189 P.3d 253 (2008) (holding a purchase and sale agreement void in violation of the statute of frauds even though parties agreed there was no confusion with regard to the property at issue).

The Mariches' claim and defense to this action is based on their assertion that Mr. Herrle informally, verbally agreed to sell them his property sometime before 2008. This agreement is referenced in his initial Trust documents, but only in cursory fashion — there is no written agreement binding either party, much less a documented option to purchase real estate, with a legal description as required by Washington

law. Therefore, *even if* Mr. Herrle's subsequent Trust documents *did not directly contradict* the Mariches' claims, the option to purchase would be void for violation of the statute of frauds, and, thus, unenforceable.

E. There is No Material Issue of Fact to Support the Mariches' Contention of Some "Settlement" With the Mariches on Behalf of the Estate

The Mariches argue that the \$150,000 was paid to Connie Marich under the Personal Representative's right to settle claims against the Estate. There is no evidence of this. Moreover, everything Kamb and Kunferman did is consistent with the Third Amendment of the Trust.

The distribution of \$150,000 to the Mariches is within the contemplation of the Trust. It is the exact amount specified in the Third Amendment. See CP 224-227 (checks). The only documentation in the record is consistent with the fact that these funds were a distribution according to the terms of the Third Amendment, not a settlement. There is no documentation or writing referencing or in any way indicating the existence of a supposed settlement. There is no language, either on the checks to the Mariches, or on the Receipt of Heir that suggests the Receipt of Heir or the money distributed was for a release of claims or for settlement. To the contrary, all documentation supports the fact that the Mariches received what they were entitled to under the Amendment. The Receipt of Heir is clear, and Ms. Marich acknowledged:

I, Connie Marich, am one of the heirs and/or beneficiaries of the above entitled Trust/or Estate, and as such I do hereby acknowledge & confirm the receipt of one hundred ten thousand dollars (with the full amount to be \$150,000) ***as my full and complete share of the above mentioned Trust and/or Estate as provided to me under the Testamentary document*** and/or the laws of the State of Washington.

CP 572 (emphasis added). As the trial court observed, “There is no indication on [the Receipt of Heir], however, that the personnel [sic] representative settled all claims or that the Amended Trust language was modified in any way.” CP 664. Moreover, Ms. Marich noted on the Receipt of Heir comments which indicate she is acknowledging that \$150,000 is what is owed to her under the Will (“the full amount stated in the will, \$150,000”). *Id.* She acknowledges that she has been distributed \$110,000 and is still owed \$40,000. *Id.* Ms. Marich was not confused — her interlineated, handwritten comments show that she was acting consistently with the Third Amendment. Similarly, the Receipt to Heir signed by Thomas Marich, CP 540, is a \$20,000 distribution consistent with the Third Amendment, see CP 68. The trial court concluded, “Neither the check to the Respondents nor the Receipt of Heir was for a release of claims or settlement.” CP 665. These writings do not show that they are in “settlement” of any claims, nor do they relieve the Mariches of complying with the terms of the Third Amendment.

Even without the hearsay issues replete in Ms. Marich's testimony as to what Ms. Kamb said or did not say (discussed below), Ms. Kamb was not authorized to enter into any kind of "settlement" with the Mariches on behalf of the Estate. Ms. Kamb had no apparent authority to act as personal representative or trustee. On April 5, 2010, Letters Testamentary were issued to Marie Kunferman naming her Personal Representative to execute Lyde Herrle's Will. CP 90. At this time, Rosemary Kamb was suspended to practice law, which was effective on March 9, 2010. CP 76. Thus, she could not have actual authority by virtue of being an attorney. When the Estate distributed the \$150,000 to the Mariches it was while Ms. Kunferman was the Personal Representative, and the checks issued to Ms. Marich were checks written from the Estate of Lyde Herrle after Ms. Kamb's suspension. CP 224-227. Ms. Marich signed the Receipt of Heir on April 15, 2010. CP 572. The Mariches' assertion about conversations with Ms. Kamb, even if true, does not magically confer any authority on Ms. Kamb.

The declarations submitted by the Mariches are also vague. In seeking to submit hearsay regarding alleged statements by Ms. Kamb and Ms. Kunferman, the declarations do not explain what precisely the Mariches contend was said to them. CP 537, CP 541, CP 603, CP 604. They do not state that Marie Kunferman gave Rosemary Kamb authority

to settle claims. Again, Ms. Marich does not use the word “settlement,” but rather “the full amount stated in the will,” CP 572, meaning the original Will which was superseded by the Second and Third Amendment.

Even if there were any doubt about the documents at issue and the (admissible) testimony, the former Personal Representative, Ms. Kunferman, submitted a declaration refuting these allegations and making the issues of agency clear in this case. CP 666-67. In this declaration, she reaffirms the validity of the Third Amendment, and she expressly denies discussing the Second Amendment with Ms. Marich, directly refuting Ms. Marich’s claim to the contrary. Compare CP 543 & 604 with CP 667 at ¶¶ 7-8. She states, “I did not, at any time, authorize Rosemary Kamb to enter into any agreement with Thomas and Connie Marich with regard to any transaction on behalf of the Estate.” 667 at ¶ 8. This accords with the complete lack of documentary evidence suggesting that any settlement of claims occurred. Marie Kunferman was the only person with the authority to settle claims for the Estate.

The statute relied upon by the Mariches, RCW 11.68.090, discusses what a personal representative acting under nonintervention powers may do. Appellant’s Brief at 10-11. However, there is no dispute that Rosemary Kamb was not the personal representative, rather it was Marie Kunferman. Thus, RCW 11.68.090 is not applicable. Similarly, the

case authority relied upon by the Mariches is not applicable. In Estate of Freitag ex rel. Blackburn v. Frontier Bank, 118 Wn. App. 22, 75 P.3d 596 (2003), the facts involved a known personal representative placing estate funds in a personal bank account. The issue in Freitag was whether a bank could rely on the authority of the personal representative for purposes of an analysis of whether the bank had breached its duty under RCW 62A.4A-202. These facts are not at all similar to the present matter.

Because the language of Decedent's trust documents are clear as to their intent, even if Ms. Kamb purportedly released any claims the Estate might have against the Mariches, such an action would constitute a breach of her fiduciary duties to the Estate to act in the best interest of its beneficiaries. See generally Tucker v. Brown, 20 Wn.2d 740, 768-770, 150 P.2d 604 (1944) (discussing the trustee's duties to act in the best interest of the trust). Waiving the Estate's clear and legitimate right to a proportionate share of the Mariches' home would be contrary to these duties. As the drafter of the Will and various trusts, Ms. Kamb would have been well aware of the fact that the Mariches held no claim worth settling. Instead, it is clear that Ms. Kamb did not make such an agreement because the "Full and Final Distribution and Receipt of Heir" that Ms. Kamb prepared for signature does not, as Ms. Marich claims, relieve the Mariches of their duty to comply with the terms of the

distribution. Moreover, if Ms. Kamb had wanted to settle claims against the Estate, she would have put some release language into the documentation for these supposed “settlements.” But there is none.

The Mariches failed to raise a material issue of fact that the \$150,000 was a distribution, and the Court should so hold.

F. Evidence Submitted by the Mariches is not Admissible

CR 56(e) requires that supporting affidavits shall be made on personal knowledge and “shall set forth such facts as would be admissible in evidence” This rule has been reiterated in case law to include this same requirement for declarations. Davies v. Holy Family Hosp., 144 Wn. App. 483, 493, 183 P.3d 283 (2008); Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 259-60, 11 P.3d 883 (2000). The Personal Representative made timely objections to inadmissible evidence below, CP 499-504, and summarizes those objections as follows.

1. The Mariches’ Submittals Are Barred By The Statute of Frauds

The Statute of Frauds was discussed above as a legal bar to granting relief for the Mariches. It also renders their evidence regarding their alleged option to purchase Mr. Herrle’s farm inadmissible.

2. The Mariches’ Statements Regarding Mr. Herrle’s Intent Are Barred by the Deadman’s Statute

Under the Deadman's Statute, a "party in interest" may not testify on his or her own behalf regarding any transaction or statement with the decedent. RCW 5.60.030. A person is a "party of interest" if he or she stands to gain or lose from the judgment. O'Steen v. Estate of Wineberg, 30 Wn. App. 923, 935, 640 P.2d 28 (1982).

Here the Mariches are parties in interest with regard to the outcome of this petition. Thus, the statutory bar prevents the Mariches from submitting evidence about statements made to them, or in their presence, by Lyde Herrle. It also bars testimony about "transactions" that they had with Mr. Herrle. The Deadman's Statute "renders the interested litigant or witness incompetent to testify" about transactions with the deceased. Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). The test is whether Mr. Herrle could contradict the witnesses from his own knowledge were he still living. Bentzen v. Demmons, 68 Wn. App. 339, 344, 842 P.2d 1015 (1993); In re Estate of Lennon, 108 Wn. App. 167, 174, 29 P.3d 1258 (2001). As such, the self-serving testimony of Connie and Thomas Marich regarding Mr. Herrle's intent regarding the alleged option to purchase the house and farm are inadmissible. See CP 501-02 (enumerating objectionable testimony about what Lyde Herrle allegedly said).

The purpose of the Deadman’s Statute “is to prevent parties from giving self-serving testimony about conversations or transactions with a dead or incompetent person.” Lasher v. Univ. of Wash., 91 Wn. App. 165, 169, 957 P.2d 229 (1998). “The statutory rule was formulated in recognition of the fact that, when the lips of the one who is said to have made the statement, or with whom the transaction is alleged to have been had, are sealed in death, it becomes difficult, and often impossible, to rebut such adverse testimony.” Thor v. McDearmid, 63 Wn. App. 193, 199, 817 P.2d 1380 (1991)(citation omitted).

3. The Rest of the Mariches’ Declarations Should be Stricken to the Extent They Cite Improper Evidence

While testimony by affidavit is allowed, the declarations of Thomas Marich and Connie Marich are inadmissible to the extent they cite hearsay or evidence outside the scope of the Mariches’ personal knowledge. See Davies v. Holy Family Hosp., 144 Wn. App. 483, 493, 183 P.3d 283 (2008); Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993) (“Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment”); Ebel v. Fairwood Park II Homeowners’ Ass’n, 136 Wn. App. 787, 792, 150 P.3d 1163 (2007) (noting out-of-court statements offered to prove the truth of the matter asserted were properly excluded as

hearsay) (citing ER 801(c)). Non-moving parties may counter a summary judgment motion only with specific facts set forth by affidavit — these facts must be based on personal knowledge and not merely conclusory allegations, speculative statements, or argumentative assertions.

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Here, the Mariches' declarations are rife with statements about what others, including Mr. Herrle, Ms. Kunferman, and Ms. Kamb, said or intended. See CP 502-03 (enumerating objectionable hearsay regarding what Ms. Kamb or Ms. Kunferman allegedly said to the Mariches).

Further, Ms. Marich's statements about the mental competency of her uncle are speculative, not based on personal knowledge, and inadmissible lay testimony on expert subjects. ER 602, 701; Carlos v. Cain, 4 Wn. App. 475, 477, 481 P.2d 945 (1971) (holding that a lay person without medical training is unable to testify regarding medical issues); see CP 503-04.

G. Promissory Estoppel is Not Appropriate

The Mariches arguments for Promissory Estoppel are meritless. See Appellant's Brief at 13-15. Just as they have no evidence of a "settlement" of claims, they have no evidence of any such "promise" upon which they relied. Their problem is not an inchoate contract, but rather

the lack of any promise — reduced to contract or not. There is also no evidence that they in fact relied on this alleged promise to their detriment. Nor will any injustice result if they do not prevail. Indeed, to the contrary, if they prevail, they will have profited by their failure to apprise the trial court and this Court of the fact that they did not use the \$150,000 distribution toward the purchase of the Property. Equity demands that this claim be rejected.

V. CONCLUSION

The Third Amendment explains how the Trust is to retain a proportionate interest in the Property so that upon its sale, the Trust has a right to the proceeds. Now, however, because the Mariches have fully financed the Property (and put the \$150,000 distribution to an unknown purpose), the Trust (and by extension the other beneficiaries, including the Immaculate Conception School Endowment and scholarship fund) is robbed of its right to the funds upon Connie Marich's death.

In light of the discovery that the Mariches did not use the \$150,000 from the Trust to purchase their home as contemplated by the Third Amendment, the Personal Representative moved to dismiss the appeal in hopes of avoiding the expense of briefing this appeal. Now, having been ordered to proceed with a hearing by the judicial panel, the Personal

Representative seeks relief to which it is entitled: either the return of the \$150,000 or, alternatively, an interest in the \$150,000.

The Personal Representative asks the Court to affirm the grant of summary judgment as to liability under the Third Amendment, but to remand for further proceedings to pursue the \$150,000 that was not put into the Property.

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CERTIFICATE OF SERVICE

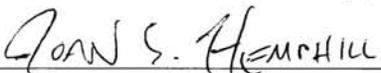
I hereby certify under penalty of perjury under the laws of the State of Washington that on the 21st day of December, 2012, I caused a true and correct copy of the foregoing Respondent's Motion to Dismiss Appeal and Remand to Vacate Order Below to be mailed first class, postage pre-paid to the following counsel of record:

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