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No. 75148-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

OPENING BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

This appeal arises from an unsecured promissory note and claim for compensation between a family-owned business and its founder, James Y. Suzuki, who died September 13, 2014. The trial court erroneously granted summary judgment enforcing the promissory note and dismissing the counterclaim for compensation.

James Y. Suzuki (the "Decedent") started the company Micro Current Technology ("MCT") in the 1990s, and in 2003 he transferred the company to his two sons, David Suzuki and James I. Suzuki (David and Jimmy). After Mr. Suzuki's death from cancer, MCT sued his estate through its personal representative (the "Estate") to collect on an alleged promissory note dated August 11, 2006 (the "Note") that provided for interest-only payments until September 30, 2021. MCT claimed the Estate owed unpaid principal of $84,600.00 even though the Note did not mature until September 30, 2021 and did not contain an acceleration clause. MCT claimed the Estate owed an additional $21,385.99 in interest, even though MCT never charged interest before the Decedent died. The Estate counterclaimed for $418,070.56, alleging MCT had breached its agreement to compensate the Decedent for consulting services and his ownership interests in MCT.

The evidence viewed in the light most favorable to the Estate

showed that the Note was not a genuine debt owed by the Decedent; that the $108,000 paid to him in 2006 was a life insurance pay-out from a policy he purchased, not a loan; that MCT waived any right to collect interest on the Note by its course of performance over the eight (8) years prior to the Decedent's death; and that MCT breached its agreement to pay the Decedent a lifetime salary when it discontinued regular payroll payments to him in June 2011, making only sporadic payments through June 2013.

The trial court incorrectly granted summary judgment to MCT for $21,091.00 in unpaid interest accruing after the Decedent's death [1] a result that cannot be squared with either the language of the Note or the course of performance. The trial court also erred in summarily dismissing the counterclaim for compensation, when the factual record established mutual assent, consideration, performance followed by breach, and damages. Dismissal of the counterclaim was also error because the trial court admitted testimony from David, an interested party, in violation of the Dead Man Statute, RCW 5.60.030, erroneously holding that the Estate had waived the statute merely by asserting its counterclaim. The Estate respectfully requests that this Court reverse and remand.

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[1] The trial court also declined to accelerate the debt, which is the subject of MCT's cross appeal.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1.

The trial court erred in granting summary judgment of $21,091.00 against the Estate for unpaid interest on the Note accruing after the Decedent's death, together with costs and attorney fees. CP 290-91, 297.

Assignment of Error 2.

The trial court erred in granting summary judgment dismissing the Estate's counterclaim for unpaid compensation. CP 290-291; RP 35.

Assignment of Error 3.

The trial court erred in ruling that the Estate had waived the Dead Man Statute, RCW 5.60.030, by asserting a counterclaim for breach of the compensation agreement between MCT and the Decedent. CP 295.

Assignment of Error 4.

The trial court erred in admitting testimony from interested party David Suzuki that "there was no agreement for compensation for the deceased." CP 295.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1.

An enforceable contract requires mutual assent. Did the trial court err in ruling as a matter of law that the Note was a genuine debt owed by the Decedent? Assignment of Error 1.

Issue 2.

An enforceable contract requires adequate consideration. Did the trial court err in ruling as a matter of law that the Decedent received adequate consideration for his promise to pay MCT $108,000.00, when the $108,000.00 paid to him in 2006 was from the life insurance policy he had purchased and transferred to MCT in 2003? Assignment of Error 1.

Issue 3.

Terms of a written contract can be waived by the parties' course of performance. Did the trial court err in ruling as a matter of law that MCT had not waived its right to collect interest when it did not charge, demand or collect interest on the Note prior to the Decedent's death on September 13, 2014? Assignment of Error 1.

Issue 4.

Enforcement of a promissory note can be barred by laches. Did the trial court err in ruling as a matter of law that laches did not bar recovery of accrued interest on the Note when MCT failed to demand payment until after the issuer died and documentary evidence was lost? Assignment of Error 1.

Issue 5.

Contracts can be implied in fact when the conduct of the parties shows mutual assent and the exchange of consideration. Did the trial

court err in ruling as a matter of law that no lifetime compensation agreement existed when the evidence showed that the Decedent transferred his interest in MCT and its assets to David and Jimmy; proposed a lifetime agreement in 2003, which MCT alleged was never signed; thereafter received regular compensation as MCT's "advisory director," even though this did not involve any real work according to MCT; remained on the MCT payroll receiving a regular salary after becoming very ill from cancer; continued to provide some consulting and product development services to MCT; and received a regular salary until June 2011, at which time David proposed terminating the Decedent's salary to gain leverage in the Decedent's divorce negotiations? Assignment of Error 2.

Issue 6.

The Dead Man Statute, RCW 5.60.030, prohibits parties with a pecuniary interest in the outcome of civil litigation from testifying about statements and transactions with the deceased, including testimony that a transaction did not occur. Did the trial court err in ruling that the Estate waived its right to assert objections under the Dead Man Statute by filing a counterclaim for compensation against MCT, and in admitting testimony from David Suzuki that his business did not have a compensation agreement with the Decedent? Assignments of Error 3, 4.

IV. STATEMENT OF THE CASE

A. The Decedent Founded MCT In The 1990s And Transferred The Company To David And Jimmy In 2003.

MCT is a family owned and operated company, founded by the deceased, James Y. Suzuki. CP 44, 46, 82. The Decedent started MCT in the 1990s and originally co-owned it with his daughter, Christine Suzuki, who is personal representative of the Estate. CP 65, 66. Christine gave up her ownership interests in MCT in 1996. CP 66. The Decedent transferred his ownership of MCT to David Suzuki and Jimmy Suzuki in 2003 or 2004. CP 47, 66, 83. The company became profitable after 2004. CP 178. The Suzuki family's pattern and practice was to enter into agreements with each other and conduct business on an informal basis, without written agreements. CP 72, 75. MCT's management committee is comprised of David, Jimmy, and David's wife, Dena Suzuki. CP 181.

B. The Decedent Received A Regular Salary As "Advisory Director" Until June 2011.

After transferring ownership of MCT to David and Jimmy in 2003, the Decedent continued on as advisory director through May 2011. David testified that the Decedent was compensated "for being an advisory director," but stated that this position primarily involved talking about "politics and football" and "there really were no services provided." CP 83, 177. According to David, 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. MCT's comptroller testified that the Decedent "was the creative one developing new products and whatnot." CP 205. Although Christine Suzuki had limited knowledge of MCT operations after her ownership ended in 1996, she was aware that MCT continued to consult with the Decedent about product development after that date. CP 67. The Decedent received a regular salary from MCT through May 2011, although David could not recall how much the Decedent was paid. CP 93, 153, 177, 178, 205. The Decedent remained on the Company payroll at least through May 2011. CP 84, 93, 153.

C. The Decedent And MCT Discussed A Lifetime Compensation Agreement, But No Signed Agreement Could Be Located.

An 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, but no signed agreement was located or produced by David and Jimmy, who took possession of the Decedent's MCT records after he died. CP 123. MCT offered deposition testimony from the Personal Representative stating that she believed the unsigned 2003 compensation agreement was commissioned and paid for by MCT, and that it reflected the terms of the compensation agreement between

MCT and the Decedent. CP 72-73. The unsigned agreement provided for an annual salary to the Decedent for the remainder of his life. CP 76, 77.

One of the trial court's evidentiary rulings was to limit the testimony that the Estate offered about the unsigned lifetime compensation agreement. CP 293. However, MCT itself offered the document as evidence, as well as testimony by the Personal Representative about the document based on her review of the Decedent's salary statements and W-2 forms. CP 72, 76-81. On the face of the document, it appears to be a draft with proposed additions appearing underlined. *See* CP 77, 78, 79.

David admitted that the lifetime compensation agreement was proposed and discussed in 2003, but asserts that the "agreement was rejected by MCT[.]" CP 84. Nevertheless, after the discussion of the lifetime compensation agreement, the Decedent provided consulting services as MCT's "advisory director," and was on MCT's payroll for approximately eight (8) years. CP 93, 153, 177, 178, 254. The Decedent continued in this position after he became very ill with cancer in 2009. *Id.*; CP 65. According to David, the Decedent was paid regular compensation, even though he did not perform any actual work for the business. CP 83, 177, 254.

D. In August 2006, MCT Cashed In An Insurance Policy Originally Purchased By The Decedent And Wrote Two Checks To Him Totaling $108,000.

MCT owned a life insurance policy on the Decedent. CP 47, 203. This life insurance policy was the source of the alleged loan to the Decedent. CP 47, 83. Three years after the Decedent transferred the business to David and Jimmy, MCT cashed in the life insurance policy, "gave Jim the cash," CP 203, and created the promissory note. *Id.*

Management committee member Dena Suzuki described the life insurance policy payout as follows in an email to Christine Suzuki dated November 2, 2011:

> Attached are two check copies that represent the payout to your dad on his life policy, totaling $108,000.00.
>
> We do not have the full docs on the policy (he may have them at the house somewhere), however **it was originally held by him as owner**, then ownership was transferred to the company in approximately 2003. We took the money out on his behalf and received a check to the company, then in turn wrote the attached two checks to him.

CP 194 (emphasis added). The subject line of Dena Suzuki's 11/2/2011 email read: "JYS Life Policy Payout." CP 194. The email does not refer to the $108,000 as a loan or mention repayment. Dena Suzuki's summary is consistent with Christine Suzuki's testimony (offered by MCT in support of summary judgment) that the source of the $108,000 payment to the Decedent was a life insurance policy for $500,000, which he had

purchased and then transferred to Jimmy and David in the early 2000s. CP 68, 70. Terrance J. Luke, MCT's comptroller, could not rule out the possibility that the policy was originally titled to the Decedent. CP 204.

Dena Suzuki's 11/2/2011 email attached copies of the checks that totaled $108,000. CP 194. Terrance J. Luke, MCT's comptroller, prepared the two checks that were attached to Dena Suzuki's 11/2/2011 email. CP 203. Barely legible, the copies show one check for $6,000 was written August 7, 2006 and negotiated August 9, 2006, and one check for $102,000 was written August 9, 2006 and negotiated August 10, 2006. CP 196. Mr. Luke could not recall why he wrote two checks. CP 203. Nothing on the face of the checks indicated they were loans. CP 196.

According to MCT's comptroller Mr. Luke, the premiums paid on the life insurance policy exceeded the $108,000 that MCT gave to the Decedent in 2006, but he could not remember the name of the insurance company. CP 203, 204. David and Jimmy removed all MCT records from the Decedent's home after he died. CP 123. MCT no longer possesses any records relating to the life insurance policy or any corporate records predating 2009. CP 194, 203.

E. Requiring No Repayment Of Principal Until 2021, The Note First Surfaced During Discussions Of The Decedent's Divorce Settlement In 2011.

The Decedent and David signed a promissory note dated August 11, 2006 (the "Note"), which was prepared by MCT's comptroller Mr. Luke. CP 7, 203. It did not state that the Decedent had received any value in exchange for the indebtedness or require any principal payments until September 30, 2021. CP 7. It reads as follows in its entirety:

> *Promissory Note*
>
> Borrower: James Y. Suzuki
>
> Lender: Microcurrent Technology, Inc.
>
> Principal Amount: $108,000.00
>
> James Y. Suzuki promises to pay Micro Current Technology, Inc. the principal sum of one hundred eight thousand and 00/100 dollars ($108,000.00) USD, with interest payable on the unpaid principal balance at a rate of 5.00 percent per annum. Interest will paid [sic] semi-monthly and the principal balance of $108,000.00 will be due in-full on September 30, 2021.
>
> *s/James Y. Suzuki* — *8/11/06*
> James Y. Suzuki (Borrower) — Date
>
> *s/David Suzuki* — *8/11/06*
> Micro Current Technology, Inc. (Lender) — Date

CP 7.

Other than the Note, no paperwork on the alleged loan exists. The first documentary reference to the alleged debt appeared in emails sent by

David in 2011, five years after the Note was allegedly made. CP 200. During the divorce negotiations, David directed the Decedent's attorney to use the $108,000 "debt" to reduce the Decedent's wife's property settlement. CP 200. In deposition testimony offered by MCT in support of summary judgment, the Personal Representative disputed the genuineness of the debt:

> Q: Okay. So why do you dispute that the money is owed under the promissory note?
>
> A: Because he never – I never – first of all, I never saw this promissory note. I had been doing his [the Decedent's] books for about three or four years. He never mentioned that he owed anybody anything. We talked about his financial situation constantly. I never saw this [the Promissory Note] and did not know it existed.

CP 69. *See also* CP 122-3.

F. MCT Did Not Charge Any Interest On The Note Or Make Any Demand For Payment Prior To The Decedent's Death.

The Estate's denial of the debt is consistent with the course of performance predating the Decedent's death. The Note provided for interest-only payments for 15 years until September 30, 2021. CP 7. But MCT did not charge any interest on the alleged debt prior to the Decedent's death. CP 205. MCT's comptroller Mr. Luke testified to a course of performance that differed from the terms of the Note as follows:

> Q: Do you know why interest wasn't charged?
>
> A: Well, I mean, this was between David and his dad, and so – I mean, I wasn't instructed to book any interest.

CP 205.

The only payments on the alleged debt were applied to principal, and came in the form of payroll deductions taken from the Decedent's salary between April 20, 2010 and May 2011. CP 93, 123, 205. MCT applied the payroll deductions to principal, not interest. *Id.* No payments or payroll deductions occurred prior to April 20, 2010 or after May 2011. *Id.*, CP 83-4. There is nothing in the Decedent's records to indicate that he approved or was aware of the payroll deductions. CP 123. During the timeframe that the payroll deductions started in 2010, the Decedent was hospitalized, CP 166-7, 169, unable to care for himself, 170-1, and, according to David, having "a hard time with speech, and basic logic some times." CP 172. The record is devoid of any evidence that MCT ever made a demand for payment on the Note prior to the Decedent's death.

G. MCT Stopped Paying The Decedent A Regular Salary During The Divorce Proceedings In May 2011, After Which The Personal Representative Requested That Payments Resume.

MCT discontinued regular salary payments to the Decedent in June 2011. CP 73. Sporadic payments continued into June 2013. CP 160. At the time MCT stopped paying the Decedent a regular salary, he was

receiving approximately $140,000 per year from the company. CP 76. Payroll deductions applied to the principal of the Note stopped at the same time, in May 2011. CP 83-4, 93.

The pay stoppage coincided with divorce negotiations. CP 122, 123. David retained counsel to protect his interest in MCT from a potential community property claim by the Decedent's wife, Roberta Tucker. CP 153, 157-8. In May 2011, David's lawyer recommended that David "get the corporation's records 'bullet proof,'" that David "take control of his [the Decedent's] affairs[,]" and that they "use the threat of terminating Father's income" to negotiate the divorce settlement. CP 153. During this timeframe, the Decedent was cancer-stricken, unable to live independently, and repeatedly hospitalized. CP 121, 123.

In 2013, Christine Suzuki, who assisted her father with bill paying, CP 65, 69, 83, 121-2, wrote to MCT requesting that the salary resume. CP 73. MCT did not respond. *Id.* This lawsuit was filed on the compensation claim after the Decedent's death.

H. Jimmy and David Took Possession of the Decedent's Company Records After He Died.

The Decedent died September 13, 2014. CP 83. After his death, Jimmy and David came to the Decedent's home and removed a large volume of the records that the Decedent had kept regarding MCT. The Estate did not retain a copy. CP 123

I. Procedural Facts.

On or about December 23, 2014, MCT filed a creditor's claim asserting that the Decedent owed $100,827.47 under the terms of the promissory note. CP 9. On March 12, 2015, the Estate rejected the creditor's claim, asserting that lack of consideration, payment, accord and satisfaction, release, and insufficient proof. CP 22.

MCT filed this lawsuit on March 23, 2015, alleging the Estate owed it $105,985.99 for breach of contract, of which $84,600.00 was unpaid principal. CP 2, 9. The Estate filed an answer, asserting payment, laches, estoppel, release, failure of consideration, offset, lack of consideration, and fraud, and counterclaimed that David and Jimmy had breached their agreement to compensate the Decedent for his interests in the business and services he rendered to MCT in the amount of $418,070.56. CP 40-43.

MCT moved for summary judgment supported by declarations from David Suzuki and Lindsey Truscott. CP 44, 61, 82. Excerpts from Christine Suzuki's deposition were attached to the Truscott Declaration. CP 64-76. The Estate countered with competing declarations from Christine Suzuki, CP 121, and Jaclyn Bray, which attached excerpts from Mr. Luke's deposition and David Suzuki's deposition, which in turn attached copies of Dena Suzuki's 11/2/2011 email and the checks. CP

173-207. The Estate also objected under the Dead Man Statute, RCW 5.60.050. CP 119.

On March 4, 2016, the trial court orally granted the motion for summary judgment to enforce the promissory note and dismiss the counterclaim for compensation. RP 35. On March 31, 2016, the trial court entered judgment for "past interest due on the note[.]" CP 284-5. On April 25, 2016, the trial court approved the judgment amount of $21,091.25 for past due interest, $200.00 for statutory attorney fees under RCW 4.84.808, and costs of $1,383.45. CP 286. This appeal followed.

V. STANDARD OF REVIEW

An order of summary judgment is reviewed *de novo*, with the appellate court engaging in the same inquiry as the trial court. Scrivener v. Clark College, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). Summary judgment is appropriate if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). The evidence and all reasonable inferences from the evidence are considered in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). The purpose of summary judgment is to avoid a "useless trial." Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979) (quoting Balise v. Underwood, 62 Wn.2d 195,

199, 381 P.2d 966 (1962).

This appeal concerns summary judgment granting MCT's loan claim and dismissing the Estate's compensation claim. Both claims arise from contract. Contract interpretation is normally a question of fact for the fact-finder. *See, e.g.,* Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (distinguishing contract interpretation, a question of fact, from contract construction, a question of law); Hansen v. Transworld Wireless TV-Spokane, Inc., 111 Wn. App. 361, 376, 44 P.3d 929 (2002) ("Whether there was mutual assent normally is a question of fact for the jury."); In re Estate of Richardson, 11 Wn. App. 758, 761, 525 P.2d 816 (1974) ("The existence of a contractual intention is ordinarily a fact question to be resolved by the trier of the facts."). Summary judgment on an issue of contract interpretation is proper only where "the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning." Hall v. Custom Craft Fixtures, Inc., 87 Wn. App. 1, 9, 937 P.2d 1143 (1997).

The interpretation of an implied or oral contract is generally not appropriate for summary judgment because its existence and terms usually depend on the credibility of witnesses testifying to specific fact-based dealings that, if believed, would establish a contract and the contract's terms. *See, e.g.,* Duckworth v. Langland, 95 Wn. App. 1, 6-8, 988 P.2d

967 (1998); Crown Plaza Corp. v. Synapse Software Sys., Inc., 87 Wn. App. 495, 501, 962 P.2d 824 (1997).

VI. ARGUMENT

A. The Trial Court Erroneously Granted Summary Judgment Enforcing The Interest Provisions Of The Promissory Note.

The trial court ordered enforcement of a contract that did not exist. The promissory note was not a genuine debt. The promissory note did not recite any consideration for the debt, because none was given. The $108,000 paid to the Decedent in 2006 came from a life insurance policy he purchased and paid for before transferring his interests to David and Jimmy in 2003. Even if consideration could be found, the only enforceable term of the contract – the interest payment provision – was not enforced for eight (8) years before the Decedent died. It was error to find that the parties had a binding contract and that enforcement was not barred by waiver and laches.

1. No Contract Was Formed.

The trial court erroneously concluded that the existence of the written promissory note was dispositive, commenting:

> There – as Mr. Hecker put it in his reply, there really are no inferences that the note did not exist. It existed, and whether there was flexibility in the payment of the note I don't think really, really makes a difference that the note did exist.

RP 35. Simply because a document titled "Promissory Note" exists does not mean it is an enforceable contract. The Note in this case is a negotiable instrument under the Uniform Commercial Code. *See* RCW 62A.3-104. Negotiable instruments are subject to the same defenses as any other contract. *See* RCW 62A.3-305(a)(2). "The debt must be real, the payment actual, the consideration adequate." Fed. Land Bank v. Egan, 195 Wash. 330, 335-6, 80 P.2d 813, 816 (1938) (holding the evidence was insufficient to establish a real and genuine debt.) Washington cases hold that the intent of the parties to a particular agreement

> may be discovered not only from the actual language of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties."

Scott Galvanizing, Inc. v. NW EnviroServices, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993) (quoting Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)).

The formation of a contract requires mutual assent, which is normally a question of fact that is reviewed under a substantial evidence standard. Hogland v. Meeks, 139 Wn. App. 854, 870, 170 P.3d 37 (2007); Citibank S.D., NA v. Ryan, 160 Wn. App. 286, 247 P.3d 778 (2011). In

Citibank, summary judgment was reversed and the case was remanded for trial due to factual disputes relating to mutual assent. *Id.*

The Estate disputed that MCT loaned the Decedent $108,000.00, and asserted the Note was signed at David's suggestion to better the Decedent's position in the divorce settlement, and that there was never the intent for the Decedent to repay the $108,000 to MCT. The evidence did not establish a loan from MCT to the Decedent.

- The short Note was not accompanied by any other writings or loan documents, and does not recite the consideration given for the promise to pay, as discussed more fully below.
- Extrinsic evidence showed that MCT wrote two checks to the Decedent in 2006, for $102,000 and $6000. But the checks do not include any notation on their face stating that they are a loan.
- There are no other contemporaneous writings documenting that the two checks were a loan.
- The source of the funds is not consistent with the checks being a loan. The funds for these checks came from a life insurance policy that the Decedent purchased in the early 2000s before transferring the company to Jimmy and David. The premiums paid for the policy exceeded the pay-out to the Decedent, making it likely that he paid some or all of the premiums before he transferred the policy to MCT

in 2003. There is no evidence showing that MCT ever compensated the Decedent for the transfer of his interest in the insurance policy.

- The first documentary reference to the life insurance payment as a loan came in an email that David sent the Decedent's divorce lawyer in 2011. This attribution was part of David's negotiation strategy in the dissolution.
- The Personal Representative who assisted the Decedent with bill paying was unaware of the purported loan.
- There is no evidence of any payment of interest, as provided for under the Note, at any time prior to the Decedent's death.
- Notwithstanding eight (8) years of nonpayment, there is no evidence of any demand for payment before the Decedent died.
- No payment of principal was required under the Note until September 30, 2021.

Drawing all reasonable inferences in favor of the Estate and "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties[,]" Berg v. Hudesman, 115 Wn.2d at 667, the trial court erred in ruling as a matter of law that the Note was a genuine debt for $108,000 owed by the Decedent.

2. No Consideration Was Given.

"Every contract must be supported by consideration to be enforceable." King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). A promissory note is a contract to pay money, and the issuer has a defense if the promised payment is made without consideration. RCW 62A.3-303(b) ("The drawer or maker of an instrument has a defense if the instrument is issued without consideration."); Burton v. Dunn, 55 Wn.2d 368, 372, 347 P.2d 1065 (1960) (failure of consideration is defense to an action on a promissory note).

Whether MCT provided adequate consideration for the Decedent's promise to pay $108,000 is disputed. Consideration consists of "any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. Before an act or promise can constitute consideration, it must be bargained for and given in exchange for the promise." King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). An agreement to do that which one is already obliged to do is not sufficient consideration to support a contract. Johnson v. Tanner, 59 Wn.2d 606, 369 P.2d 307 (1962); Anderson v. County Properties, 14 Wn. App. 502, 505, 543 P.2d 653 (1975).

The absence or failure of consideration for a negotiable instrument may be shown by parol evidence. Eder v. Nelson, 41 Wn.2d 58, 63, 247

P.2d 230 (1952); Spokane State Bank v. Tilton, 132 Wash. 641, 233 Pac. 15 (1925). The Note in this case does not state or refer to any consideration given for the promise to pay $108,000, not even a general allusion to "value received," and there are no other related agreements. CP 7. Therefore, the trial court here was required to examine parol evidence to determine what consideration, if any, supported the Note. Malacky v. Schepper, 69 Wn.2d 422, 425, 419 P .2d 147 (1966). Even if the Note had referred to "value received," such recitals are "not conclusive" and would still require the trial court to "inquire into the consideration and show, by parol evidence, the real or true consideration." *Id.*

The record demonstrates that the Note was not issued for consideration and is otherwise unenforceable against the Estate, or at least that genuine issues of material fact exist on these issues. The evidence showed that the $108,000 received by the Decedent came from an insurance policy that he had purchased before transferring MCT to David and Jimmy, and that MCT cashed in the policy on his behalf, not as a loan. The email from Dena Suzuki established that the life insurance policy that was cashed in for the $108,000 payment to the Decedent was "originally held by him as owner, then ownership was transferred to the company in approximately 2003." CP 194. No testimony or other evidence was offered to rebut this description. CP 180. There is no evidence the

Decedent received any value in exchange for the policy. The trial court looked no further than the existence of the Note, and erroneously granted summary judgment when material issues of fact call into question whether any actual consideration was given.

3. MCT Waived Its Right To Collect Interest And Nothing Else Is Due.

The Note is not overdue, and MCT waived interest. Therefore, summary judgment *dismissing* MCT's claim was appropriate, not granting it. The UCC provides:

> Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal.

RCW 62A.3-304(c). The due date for payment of principal is September 30, 2021. The Note does not include an acceleration clause, and the record does not reflect that the due date of the principal has been accelerated. Because there was no default in payment of principal, the instrument was not overdue. Therefore, the only enforceable claim was for accrued interest, which was waived by MCT.

In the present case, 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. The UCC provides that "a course of performance is relevant to show a waiver or modification of any term inconsistent with

the course of performance." RCW 62A.1-303(f). "Course of performance" is defined as a "sequence of conduct between the parties to a particular transaction that exists if: (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection." RCW 62A.1-303(a). In addition to the UCC waiver provision, "An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it." Kessinger v. Anderson, 31 Wn.2d 157, 168, 196 P.2d 289 (1948) (reversing judgment for plaintiff; finding waiver of damages claim based on inaction).

In this case, the inconsistent course of performance included (1) nonpayment between the date the Note was allegedly signed in 2006 and April 2010, (2) payroll deductions applied to principal between April 2010 and May 2011, (3) MCT's election to not charge interest, (4) nonpayment between May 2011 and the date of death (September 13, 2014), and (5) no demand for payment during the eight (8) years between the alleged signing and death. MCT's comptroller testified that David instructed him not to book any interest on the Note. CP 205. This lengthy course of

performance raised material issues of fact that should have precluded summary judgment for unpaid interest.

4. The Trial Court Erroneously Dismissed The Estate's Laches Defense.

Laches is an equitable defense based upon estoppel. A defendant asserting the doctrine of laches must affirmatively establish: "(1) knowledge by the plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by the plaintiff in commencing an action; and (3) damage to [the] defendant resulting from the delay." Davidson v. State, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). The main consideration in applying laches is the prejudice and damage likely to result from the belated action. Citizens for Responsible Government v. Kitsap County, 52 Wn. App. 236, 240, 758 P.2d 1009 (1988) (laches barred organization's challenge to land use ordinance because organization failed to challenge the ordinance within a reasonable time and challenge would result in major harm to the developer).

According to the Note, interest payments were due beginning in 2006. The evidence showed that no payments were made prior to April 2010, and then the payroll deductions that MCT credited to the loan balance were unilaterally applied to principal not interest. No legal action was commenced, or threatened, until after the Decedent died. In addition

to the loss of the Decedent's testimony, documents relating to the insurance policy that generated the $108,000 for the alleged loan were lost prior to the lawsuit. Although Mr. Luke drafted the promissory note, he could not recall why interest was not charged, CP 205, whether the insurance police was originally in Mr. Suzuki's name or the company's name, CP 204, the name of the insurance company, CP 203, or why two checks were written to the Decedent. CP 203. The trial court erred in dismissing the defense of laches as a matter of law.

The present case is analogous to Davidson v. State, 116 Wn.2d at 26, which held: "The doctrine of laches commonly recognizes the unavoidable loss of defense evidence as establishing material prejudice." In Davidson, the "loss of defense evidence" was identified as the death of potential witnesses (the persons who conducted the surveys in question) and the loss of "any first-hand documents setting forth the basis for the placement of the lines." *Id.* The same categories of loss exist in the present case, where the only person with testimonial knowledge other than David and Jimmy was the Decedent, and where the insurance policy which yielded the funds that were the subject of the alleged debt was lost, according to David. The prejudice is compounded because according to MCT's comptroller Mr. Luke, MCT records predating 2009 are not available.

The existence of a written Note does not preclude application of the laches doctrine. In Daniels v. Spear, 65 Wash. 121, 117 Pac. 737 (1911), the court affirmed the trial court's dismissal of a creditor's claim to enforce promissory notes based on the defense of laches. The court noted that 12 years had elapsed since the cause of action accrued on the notes and that the creditor's delay in seeking enforcement of their rights defeated their efforts to recover from the estate. In Stewart v. Yesler Estate, Inc., 46 Wash. 256, 265, 89 Pac. 705 (1907), the court denied a specific performance claim based on the defense of laches, due to the party's long and unexplained delay at a time when the property increased in value tenfold.

> Unreasonable delay of a party in performance, or in enforcing his rights when disputed, may shorten the period fixed by the statute of limitations and constitute such laches as will amount to an **abandonment of the contract** on his part and deprive him of the remedy of specific performance.

Stewart, 46 Wash. at 265 (emphasis added). The Stewart Court also observed:

> There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defense to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard

> must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed.

Id. (citations omitted). Considered in the light most favorable to the Estate, the record creates unresolved issues of fact regarding whether MCT unreasonably delayed the lawsuit resulting in material prejudice to the Estate. Therefore, summary judgment was improper.

B. The Counterclaim For Compensation Was Improperly Dismissed.

The trial court erred in summarily dismissing the Estate's counterclaim, which alleged MCT

> failed to continue compensation payments owed to Decedent, James Suzuki, thereby breaching its agreement with Decedent to compensate him for transfer of his ownership of Microcurrent, Inc., to the current shareholders, for transfer of patents and other assets, for continued employment during his life, and for past services to Plaintiff for which he was not adequately compensated in the amount of $418,070.56.

CP 42-3. The evidence showed that after the Decedent transferred his interest in the company to Jimmy and David, he continued to provide consulting services and was the advisory director, although David alleged MCT compensated the Decedent for essentially coming to the office and talking about sports. *See supra* at 6, 13. After the written compensation agreement was prepared and discussed in 2003, which MCT asserts it

rejected, the Decedent continued to receive a regular salary from MCT until June 2011, and sporadic payments through June 2013. All payments then stopped. Emails indicate that the stoppage was orchestrated by David for leverage in the Decedent's dissolution, which David had a pecuniary interest in due to his concerns that the Decedent's then wife would assert a community property interest in MCT.

1. Enforceable contracts can be implied by the factual circumstances without written agreements.

The trial court placed too much emphasis on the lack of a written agreement in denying the counterclaim. From the trial court's written order it is impossible to determine the trial court's reasons for dismissing the counterclaim because the order did not mention the counterclaim. The oral ruling may be looked at for clarification if it is not inconsistent with the written ruling. *See* Ferree v. Doric Co., 62 Wn.2d 561, 383 P.2d 900 (1963). The trial court indicated that the basis of her ruling was lack of any evidence of an agreement: "And with respect to the lifetime compensation agreement, once again, I don't see evidence of that in this record. I don't think there's any dispute of fact as to that." RP 35. The trial court's remarks reflect an overemphasis on the lack of a written instrument. Just as the trial court found that the mere existence of the Note was dispositive in proving MCT's claim, the lack of a signed written

instrument appears to have been dispositive for the trial court in dismissing the counterclaim. This was legal error.

In Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), the United States Supreme Court observed: "the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'" *Id.* at 601-2 (quoting 3 A. Corbin on Contracts §§ 561-572A (1960)). An implied contract or contract implied in fact

> is an agreement which depends for its existence on some act or conduct of the party sought to be charged, and arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention on the part of the parties to contract with each other.

Ross v. Raymer, 32 Wn.2d 128, 137, 201 P.2d 129 (1948). To determine whether an implied contract was created, Washington courts "look at the alleged understanding, the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case." Rowe v. Vaagen Bros. Lumber, Inc., 100 Wn. App. 268, 275, 996 P.2d 1103 (2000). Washington courts have adopted the following rule: "if the recipient of services should, as a reasonable man, have understood that the performer expected compensation, the actual belief of the recipient as to such matter is immaterial." Jacobs v. Brock, 66 Wn.2d 878, 884-85, 406 P.2d 17 (1965) (finding an implied

contract to pay for caregiver services even though no demand for payment was made during the decedent's lifetime). A contract implied in fact does not describe a legal relationship which differs from an express contract. Johnson v. Whitman, 1 Wn. App. 540, 545, 463 P.2d 207 (1969). Only the mode of proof is different. *Id.*

There are too many cases finding contracts implied in fact to recite them all. Instructive examples include: In Perry v. Sindermann, 408 U.S. 593, the United States Supreme Court recognized an implied agreement between a teacher and a university despite the absence of a written contract where the teacher had been employed for over 10 years, and held that the teacher was entitled to pursue a lawsuit for termination of his employment. In Thomson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984), the trial court's order awarding summary judgment to the employer in a wrongful discharge action was reversed and remanded for trial to decide fact questions relating to whether the statements and conduct of the employer created an implied contract preventing termination at will. In Johnson v. Whitman, 1 Wn. App. at 545, an implied contract arose from a letter referring to the "still undetermined balance," coupled with a payment of $150 on account. Ross v. Raymer, 32 Wn.2d 128, held no implied contract existed where the contractor tendered his advice and aid to the decedent as a friend with no expectation

of claiming compensation, and is easily distinguishable from the present case where the Decedent claimed and received compensation for his services. In Washington Association of Child Care Agencies v. Thompson, 34 Wn. App. 235, 238, 660 P.2d 1129 (1983), child care agencies that had expressly rejected the written compensation contract tendered by DSHS were nevertheless held to have agreed to the terms of the contract by accepting children for care: "Accordingly, acceptance of a child for care constituted a contract implied in fact, which in turn was an express contract." *Id.* In Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County, 164 Wn. App. 641, 661, 266 P.2d 229 (2011), the court held that the PUD's course of performance in paying four of the contractor's invoices showed its agreement to be bound by the rates and charges contained in those invoices, affirming summary judgment in favor of the contractor.

An instructive subject area where courts have found contractual obligations without written contracts is in the area of partnerships. For example, in deciding whether a partnership contract exists, no single factor is dispositive, and a written partnership agreement is not required. The intention of the parties is determined from the totality of the facts and circumstances.

> The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all

> of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. ... It is well settled that no one fact or circumstance will be taken as the conclusive test.

Minder v. Gurley, 37 Wn.2d 123, 129-30, 222 P.2d 185 (1950) (discussing whether a partnership contract was established and finding that a partnership had been formed) (emphasis added). Thus, it was error for the trial court to conclude that the lack of a signed written agreement was dispositive.

2. The evidence established an implied contract between the Decedent and MCT for ongoing compensation.

The record includes sufficient evidence to establish an implied contract between the Decedent and MCT for ongoing compensation payments, or at least factual disputes requiring a trial. Evidence in support of the Estate's contention that an agreement existed included:

- The Decedent's transfer of his interests in MCT to David and Jimmy;
- The lack of any other consideration for the Decedent's interests in MCT;
- The course of dealing within the Suzuki family that included inter-family business transactions without written agreements;
- The course of performance of this transaction that included regular payments from MCT to the Decedent through May 2011;

- The fact that the Decedent was on MCT payroll through May 2011 and received sporadic payments through June 2011 even after he became ill with cancer in 2009;
- David's testimony that the Decedent received compensation for serving as MCT's advisory director and that his role transitioned from employee to consultant sometime between 2010 and 2012;
- David's testimony that the Decedent's advisory role in the Company for which he was compensated did not involve much, if any, work;
- David's email suggesting that the Decedent's salary should be terminated for tactical reasons in the divorce proceedings;
- Testimony by MCT's comptroller about the services provided by the Decedent, who he characterized as "the creative one developing new products;"
- The insurance policy on the Decedent's life for which premiums paid exceeded $108,000, reflecting the Decedent's value to the Company;
- The unsigned lifetime compensation agreement prepared and discussed in 2003, after which the Decedent served as advisory director for at least eight years;
- Emails from Christine Suzuki in 2013 regarding the Decedent's salary.

Dismissal was error. The totality of the evidence viewed in the light most favorable to the Estate was sufficient to establish that the

Decedent and MCT reached an agreement after the written lifetime compensation agreement was prepared that provided for payment to the Decedent for the remainder of his life. "In the absence of circumstances indicating otherwise, it is inferred that a person who requests another to perform services of value for him thereby bargains and by implication agrees to pay for such services." Heasley v. Riblet Tramway Co., 68 Wn.2d 927, 935-36, 416 P.2d 331 (1966). The bargain struck in 2003 between the Decedent and his sons was that they would receive MCT in exchange for their promise to employ his services as an advisor and consultant for the remainder of his life. Their course of conduct, actions and statements reflect this agreement, which was enforceable as a contract implied in fact. At summary judgment, the trial court erred not only by misperceiving the law, but by failing to view the conflicting evidence in the light most favorable to the nonmoving party. This Court should reverse and remand for trial.

3. The counterclaim was not time-barred.

Because this Court may affirm on any grounds, the Estate will address the statute of limitations defense, even though this was not the basis for the trial court's dismissal of the counterclaim. The Estate's counterclaim is premised on oral contract; therefore, the Estate was required to commence suit within three years from the date that it, or the

Decedent, learned of the breach. *See* RCW 4.16.080(3). "The statute of limitations on amounts due under a contract for continuous service does not begin to run until the contract is terminated." Richards v. Pac. Nat'l Bank, 10 Wn. App. 542, 549, 519 P.2d 272 (1974) (applying rule to an implied contract). *See also* Ah How v. Furth, 13 Wash. 550, 552, 43 P. 639 (1896) ("Where services are rendered under an agreement which does not fix any certain time for payment, nor when the services shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services are ended.").

In the present case, MCT continued to make regular payroll payments to the Decedent through May 2011, and sporadic payments thereafter, with the final payment occurring in June 2013. *See supra* at 13-4. The Decedent died from cancer on September 13, 2014, and the counterclaim was filed April 13, 2015. CP 24. This was less than three years from the final payment. Therefore, the counterclaim was not time-barred.

Under Washington's discovery rule, a cause of action does not accrue until the plaintiff knows or, through the exercise of due diligence should know, the essential elements of the cause of action. Green v. A.P.C., 136 Wn.2d 87, 95, 960 P.2d 912 (1998). As late as 2013, the evidence shows that both the Decedent and Christine Suzuki believed that

MCT would continue to pay the Decedent's salary. Notably, MCT issued no written notification of stop payment, and continued to make sporadic payments through June 2013. Therefore, the evidence does not support finding the counterclaim time-barred.

C. The Trial Court Erroneously Applied The Dead Man Statute To Admit Testimony By An Interested Party About Transactions With The Deceased.

On March 3, 2016, the trial court ruled:

> The adverse party, in this case the estate, waives the protection of the [dead man] statute by introducing evidence of the transaction or communication in question. *Johnston v. Medina Imp. Club*, 10 Wn.2d 44 (1941). By counterclaiming that plaintiff owed the estate for agreed upon lifetime compensation of the deceased, defendant has waived application of the Dead Man's statute as it applies to that issue.

CP 295. Based on this reasoning, the trial court overruled the Estate's evidentiary objections to ¶5 and ¶11 of the Declaration of David Suzuki and admitted the following testimony:

- Mr. Suzuki provided no services to the company.
- David was simply helping his father by supporting him financially.
- Mr. Suzuki and the company had no agreement for compensation.
- Mr. Suzuki never made any claim for compensation during his lifetime.

CP 83, 84.

The trial court's ruling on the Dead Man Statute was reversible error. The dead man statute, RCW 5.60.030, provides:

> In an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative

> of any deceased person, or as deriving right or title by, through or from any deceased person...then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent, or disabled person.

RCW 5.60.030. Unless waived, the Dead Man Statute prohibits parties with a pecuniary interest in the outcome of civil litigation from testifying about transactions or conversations with the deceased. *See, e.g.,* Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987) (reversing a grant of summary judgment because the dead man statute was violated); McFarland v. Dep't. of Labor & Indus., 188 Wash. 357, 362, 62 P.2d 714 (1936). The purpose of the Dead Man Statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased. In re the Estate of Miller, 134 Wn. App. 885, 890-891, 143 P.3d 315 (2006).

Although the Dead Man Statute may be waived when the protected party introduces evidence concerning a transaction with the deceased, it cannot be waived simply "by counterclaiming," as the trial court ruled, because pleadings – even those sworn under penalty of perjury -- are not evidence. *See* RCW 5.40.010 ("Pleadings sworn to by either party in any case shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party.")

Notably, the Johnston v. Medina case cited by the trial court specifically discussed the introduction of testimony and other evidence as the basis for finding waiver of the dead man statute, not the mere filing of a pleading.

The trial court's error in applying the Dead Man Statute resulted in the erroneous admission of evidence that should have been excluded. Testimony of an interested party that an event did not occur or a transaction did not occur is barred under RCW 5.60.030. A party "cannot testify indirectly to create an inference as to what did or did not transpire between the party and the deceased." In re the Estate of Miller, 134 Wn. App. at 890-891 (citing Lappin v. Lucurell, 13 Wn. App. 277, 289-91, 534 P.2d 1038 (1975). Here, MCT did not simply point out that there was an absence of evidence to support the claim for breach of the compensation agreement alleged by the Estate. MCT offered testimony from an interested party that no agreement existed, and this testimony was expressly cited by the trial court in its oral comments during the hearing. *See* RP 22:19-22. This error was prejudicial and requires reversal.

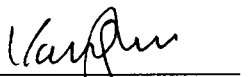
VII. CONCLUSION

"The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." Balise, 62 Wn.2d at 199. Because there are numerous disputed issues of material

fact regarding the Note and the compensation agreement, this Court should reverse the superior court's order granting summary judgment, and remand for further proceedings.

Respectfully submitted this 9th day of September, 2016.

THOMPSON HOWLE VAUGHN



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