

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.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

This case involves a probate estate's rejection of a Creditor's Claim based on a written Promissory Note executed by the Decedent. When the creditor brought suit to enforce the Promissory Note, the estate counterclaimed to enforce a "lifetime compensation agreement" allegedly entered into by the creditor and the decedent. However, the undisputed facts clearly show that neither the creditor, nor the decedent ever signed or entered into such an agreement.

The creditor moved for summary judgment. The Trial Court granted summary judgment, entered judgment for the outstanding interest on the Promissory Note and dismissed the estate's counterclaim. The Court of Appeals should affirm the Trial Court's decision.

However, the Trial Court declined to enter a judgment for the entire principal balance on the Promissory Note (i.e. accelerate the outstanding principal balance) or award the creditor attorneys' fees, citing a lack of jurisdiction to take either step. These Trial Court's decisions were incorrect and should be reversed; the Court of Appeals should order the Trial Court to enter a judgment that includes the outstanding principal on the Promissory Note and award the Cross-Appellant its attorneys' fees.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

Assignment of Error 1.

The Trial Court erred by not including the outstanding principal balance on the Promissory Note in the judgment against the Estate, and thus, not accelerating the outstanding principal balance on the Promissory Note pursuant to RCW 11.76.180.

Assignment of Error 2.

The Trial Court erred by denying Plaintiff's motion for attorneys' fees when RCW 11.96A.150(2) allows for an award of attorneys' fees in cases arising under Title 11 RCW, the statute pursuant to which this case arose.

III. COUNTERSTATEMENT OF ISSUES ON REVIEW

1. Did the Trial Court properly grant summary judgment against the Estate on the unpaid interest on the Promissory Note when there is no dispute that the Promissory Note exists and is enforceable, MCT actually loaned \$108,000 to Decedent pursuant to that Promissory Note and the Decedent made payments on the Promissory Note?

2. Did the Trial Court properly dismiss the Estate's counterclaim on the alleged "lifetime compensation agreement" when there was no evidence of an agreement, and the three year statute of limitations on the counterclaim had already run?

3. Did the Trial Court properly allow testimony from MCT's owner, David Suzuki, regarding the absence of the "lifetime compensation agreement," when such testimony was offered to rebut the Estate's counterclaim that such an agreement existed?

4. Did the Trial Court err by not recognizing its authority to enter a judgment for the outstanding principal balance on the Promissory Note?

5. Did the Trial Court err by denying Plaintiff attorneys' fees when RCW 11.96A.150(2) allows for an award of attorneys' fees in all proceedings under Title 11 RCW, including proceedings involving Creditor's Claims?

IV. COUNTERSTATEMENT OF THE CASE

A. THE PROMISSORY NOTE CLEARLY EXISTS AND IS ENFORCEABLE.

Microcurrent Technology, Inc. (hereinafter "MCT") is a family owned and operated company, founded by the decedent, James Y. Suzuki (hereinafter "Decedent"). [CP 82]. Decedent's two sons, David Suzuki (hereinafter "David") and Jimmy Suzuki (hereinafter "Jimmy"), had been running the day-to-day operations of MCT since the late 1990's. [CP 82-83]. In 2003, Decedent left MCT and transferred his ownership of the company to David and Jimmy. [CP 82-83] Thus, David and Jimmy became the sole owners of MCT. [CP 82-83].

Previously, the Personal Representative of the Estate, Christine

Suzuki (hereinafter “Christine”), was involved with the operations of MCT and worked for the company. [CP 65-66]. Christine dissociated herself from MCT in 1996, citing concerns about Decedent incurring financial obligations for MCT, which MCT struggled to pay. [CP 65]. Christine admitted in her deposition that she has had no involvement with MCT after she left MCT in 1996. [CP 66].

In 2006, Decedent sought financial help from MCT. [CP 83]. At the time, MCT was the beneficiary and owner of a life insurance policy taken out on Decedent. [CP 83]. To help Decedent, MCT cashed out the policy and loaned him the proceeds. [CP 83]. The proceeds amounted to One Hundred and Eight Thousand Dollars (\$108,000.00). [CP 83, 87]. MCT was not willing to loan the money to Decedent without documentation; the parties executed a Promissory Note. [CP 87]. Per the terms of the Promissory Note, MCT actually loaned Decedent \$108,000.00. [CP 196].

In the Promissory Note, Decedent agreed to make semi-monthly interest payments at the rate of 5% per annum. [CP 87]. Decedent made payments on the Promissory Note from April of 2010 to May of 2011. [CP 83-84, 93]. However, Decedent did not pay off the Promissory Note completely. [CP 84]. Since Decedent was the MCT owners’ father, they were patient with him and did not pursue harsh collection methods. [CP 83-84]. The principal balance due and owing as of May 5, 2011, the last

time Decedent made a payment, was \$84,600.00. [CP 84, 94].

Decedent passed away on September 13, 2014. [CP 83]. Thereafter, Christine probated Decedent's 2014 will (hereinafter "Will"). [CP 83]. MCT gave notice of its Creditor's Claim for amounts due under the Note. [CP 83]. Christine rejected the Creditor's Claim, claiming that she did so "on the ground of lack of consideration, payment, accord and satisfaction, release, and insufficient proof." [CP 96-97] As a result, MCT had to file this lawsuit on or about March 20, 2015 to contest the rejection. [CP 1-5].

During the course of the litigation, Christine, in her capacity as the PR, was deposed. Despite the rejection of the Creditor's Claim, Christine admitted the debt was owed. [CP 69]. At her deposition, she testified:

Q: To the best of your knowledge, did your father ever pay back the money that was given to him by the company from the life insurance policy?

A: Yes.

Q: And how did he pay it back?

A: Through payroll deductions.

Q: Did he pay the whole thing back?

A: No.

Q: So there is still some money owed on that obligation?

A: Correct.

[CP 70].

Christine also testified at her deposition that she was unaware of MCT's operations prior to Decedent's death and had not been involved with the company for many years:

Q: I know we've had documents back and forth regarding the company and your father that could have involved the company, but other than this litigation, you haven't reviewed any documentation from the company; right, between 1996 and, say, 2013?

A: Are you talking about just recently or for the –

Q: Any time – let's – there is a time period. From 1996 when you left the company –

A: Uh-huh. (Witness answers affirmatively.)

Q: -- to 2013, did you look at any corporate documentation whatsoever?

A: Not that I recall.

Q: Okay. So it's fair to say you really had no involvement in the operations of the company, other than your interior design work with respect to the building?

A: Correct.

[CP 66-67].

Furthermore, Christine admitted she was not involved with Decedent's life for a lengthy period of time. [CP 65]. Specifically, she testified:

Q: Would it be fair to say that you were estranged from your father for a period of time?

A: Can you define "estranged"?

Q: Not speaking with him.

A: Yes.

Q: And from what period – roughly how long was that period of time, and from what point to what point did that exist?

A: 1996 to approximately 2000.

Q: Not longer, not like maybe through 2010/2011?

A: (Witness gesturing.) I guess it depends on what you – how estranged – I talked to him.

Q: You talked to him. So there was a four-year period you didn't talk to him at all, give or take. I understand it was several years ago.

A: Uh-huh. (Witness answers affirmatively.)

Q: There was a period of time that you didn't talk to him at all; right?

A: Correct.

Q: Well, let me ask you this: In that sense, when did

you become closer with him and began interacting regularly with him? When would that have happened?

A: When he became very ill.

Q: And do you have an approximate time frame of that?

A: Approximately 2009.

[CP 65].

Thus, Christine's deposition testimony revealed that she had little, to no personal knowledge of Decedent's dealings (including the Promissory Note in 2006) prior to 2009. [CP 65]. Again, at Christine's deposition, she conceded that the Estate owes MCT the amount on the Creditor's Claim. [CP 69-70].

B. THERE WAS NO COMPENSATION AGREEMENT.

When MCT filed a lawsuit to contest the rejection of its Creditor's Claim, Christine, as personal representative of the Estate, filed a counterclaim against MCT. [CP 28]. The Estate claimed that MCT owed the Estate money from an alleged "lifetime" compensation agreement it had with Decedent. [CP 28]. The Estate did not mention this alleged agreement as a basis for its rejection of MCT's Creditor's Claim. [CP 96-97]. MCT denies that any such agreement ever existed. [CP 31]. The Estate has not been able to provide evidence that the agreement was actually consummated; the Estate only provided an unsigned draft agreement, which both parties agree was ultimately not signed. [CP 77-81].

David and Jimmy continued to help Decedent with payments from MCT after Decedent left MCT. [CP 83-84]. The payments tended to fluctuate based on what MCT could afford. [CP 83] The stated reason for the payments was for consulting or mentoring services, but there actually were no services provided. [CP 83]. In reality, the sons were merely helping out their elderly father. [CP 83]. There was certainly no documentary or other evidence that a “lifetime compensation agreement” ever existed between MCT and Decedent. [CP 84]. The last payment to Decedent from MCT’s payroll stopped in May of 2011. [CP 73].

During Christine’s deposition, she was unable to provide or state any evidence of a compensation agreement between Decedent and MCT. [CP 72]. She testified that the basis of the Estate’s compensation claim stemmed from an unsigned document with a printed date of 2003. [CP 72, 77-81]. However, she admitted that the proposed compensation agreement was never signed and that she never discussed the compensation agreement with anybody involved with the purported transaction:

Q: And so I don’t want anything informal. I want to know on what you base the specific obligation.

A: There was an employment agreement.

Q: Okay. Was there a signed employment agreement?

A: There may have been. I don’t have one.

Q: You don’t know of one; correct? So you don’t know whether the company ever signed one; right?

A: Correct.

Q: Do you know whether or not one way or another

whether the company refused to sign an employment agreement?

A: I do not know...

Q: You've been handed what has been marked as Exhibit No. 8 for purposes of identification at this deposition. Is this the agreement we are talking about?

A: Correct.

Q: And you've never seen a signed version of this document; correct?

A: Correct.

Q: And do you have any idea of how this agreement was – the genesis or origins of this document.

A: Yes.

Q: What do you know about that?

A: I know that there was a fax from Roger Lageschulte to my brother David and my father regarding Jimmy and David buying shares of MCT.

Q: Does that have anything to do with this document? (Counsel indicating).

A: Yes.

Q: Does that fax specifically refer to this document? (Counsel indicating.)

A: It specifically refers to many of the opportunities to compensate my father for the purchase of shares of MCT.

Q: Did you ever discuss the matter with Roger Lageschulte?

A: No.

Q: Did you ever discuss this matter – and by this matter, I mean this agreement in Exhibit No. 8 with anyone at MCT?

A: No.

Q: Did you ever discuss this document with your father?

A: No.

[CP 72, 77-81].

Contrary to Christine's conjecture and assumption-based testimony, the agreement was actually drafted at Decedent's request at the insistence of his then wife, Roberta Tucker. [CP 84]. Ms. Tucker wanted to ensure that

she would be supported if anything happened to Decedent. [CP 84]. The agreement was rejected by MCT and, as a result, was never executed by the parties. [CP 84]. There was no compensation agreement. [CP 84].

C. THE TRIAL COURT GRANTED SUMMARY JUDGMENT IN FAVOR OF MCT, DISMISSED THE ESTATE'S COUNTERCLAIM, BUT DID NOT ACCELERATE THE DEBT OR AWARD ATTORNEYS' FEES.

MCT ultimately filed a Motion for Summary Judgment. [CP 44]. On March 4, 2016, the Trial Court held a hearing on the Motion for Summary Judgment. [RP 1]. The Trial Court entered an oral ruling that day, recognizing “there really are no inferences that the note did not exist. It existed.” [RP 35:14 – 35:15]. Further, the Trial Court ruled that “with respect to the lifetime compensation agreement, once again, I [i.e. the Judge] don’t see evidence of that in this record. I don’t think there’s any disputed fact as to that.” [RP 35:18 – 35:20].

On April 8, 2016, the Trial Court entered a formal written order. [CP 284-287]. The Trial Court granted MCT’s motion for summary judgment and entered judgment for the unpaid interest on the Promissory Note. [CP 285-286]. Also, the Trial Court dismissed the Estate’s counterclaim on the alleged lifetime compensation agreement. [CP 285].

However, the Trial Court declined to accelerate the principal on the Promissory Note, which would be due in 2021, on the basis that “[a]ny motion to mature the note must be brought pursuant to the probate of the

Suzuki estate under Title 11.” [CP 87]. The Trial Court also did not award MCT attorneys’ fees, ruling that “although RCW 11.9[6]A.150 (2) provides for a discretionary award of attorney fees governed by Title 11 this is a civil action for enforcement of a contract not a probate action.” [CP 285].

V. ARGUMENT

A. STANDARD OF REVIEW ON APPEAL

The Court of Appeals reviews orders granting motions for summary judgment *de novo*. See Kelley v. Centennial Contractors Enters., Inc., 169 Wn.2d 381, 386, 236 P.3d 197 (2010). The Court of Appeals may affirm a Trial Court ruling based on “...any correct ground, even though that ground was not considered by the trial court.” Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

The Court of Appeals applies a “...two-part review to awards or denials of attorney fees: (1) [the Court of Appeals] review[s] *de novo* whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) [the Court of Appeals] review[s] a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.” Gander v. Yeager, 167 Wn. App. 638, 646–47, 282 P.3d 1100, 1104 (2012).

In the present case, the Trial Court's decision to deny MCT attorneys' fees was based on a legal determination that the Trial Court did not have the jurisdiction to award attorneys' fees. [CP 285]. The Trial Court never ruled that MCT did not substantively merit attorneys' fees. [CP 285]. Hence, the first part of the two-part analysis from Gander is more pertinent here. Gander, 167 Wn. App. at 646-47.

B. THE TRIAL COURT SHOULD BE AFFIRMED; THE PROMISSORY NOTE IS ENFORCEABLE AND THE ESTATE'S COUNTERCLAIM WAS PROPERLY DISMISSED.

1. The Trial Court Properly Granted Summary Judgment on The Promissory Note.

a. The Promissory Note exists and is enforceable.

The parties do not dispute that the Promissory Note exists. [CP 87]. The terms of this Promissory Note were reduced to a written document dated August 11, 2006. [CP 87]. Both David Suzuki and James Y. Suzuki signed this Promissory Note. [CP 87]. Even Christine Suzuki, the Personal Representative of the Estate, admits that the Estate owes money on the Promissory Note. [CP 69]. Thus, there is no genuine issue of material fact that the Promissory Note exists.

The Estate has no evidence to refute the Promissory Note's existence and enforceability, though it challenges whether the Promissory Note is a "genuine debt." [App. Br. p. 21]. The Estate claims that "there was never the intent for the Decedent to repay the \$108,000 to MCT."

[App. Br. p. 20]. As a preliminary matter, the “evidence” that the Estate proffered in support of that claim consisted of nothing more than unsupported bald-faced assertions. [App Br. p. 20]. Indeed, none of the “evidence” mentioned in pages 20-21 of Appellant’s Brief had a reference to the Clerk’s Papers, which would have shown the source of such “evidence.” [App Br. p. 20-21]. Also, Decedent made payments on the Promissory Note during his lifetime, which directly refutes the Estate’s speculation that Decedent did not intend to pay the debt. [CP 83-84, 93].

Regardless, the Estate’s assertions do not raise the genuine issues of material fact necessary to invalidate the Promissory Note. The Estate’s assertion that the Promissory Note was not accompanied by other contemporaneous writings is irrelevant because the Promissory Note contains all the terms of the parties’ agreement and was signed by both parties. [CP 87]. That is, the Promissory Note did not reference an extrinsic document that is needed to understand the Promissory Note. [CP 87].

Further, that the loan evidenced by the Promissory Note was made in two payments in 2006 supports, not refutes, the Promissory Note’s validity. [CP 196]. The payments clearly establish that MCT actually loaned James Y. Suzuki the money as promised in the Promissory Note. [CR 196]. The Promissory Note was not a mere sham.

The Estate's assertion that James Y. Suzuki originally purchased the life insurance policy from which the loaned funds were drawn is also of no consequence, as it is undisputed that MCT (a corporate entity) actually owned the policy at the time of the loan. [CP 83, 203]. Moreover, it is of no consequence that the Promissory Note was used in divorce negotiations or that the Personal Representative, Christine, was unaware of the Promissory Note. See Overton v. Consol. Ins. Co., 145 Wn.2d 417, 430–31, 38 P.3d 322, 328 (2002) (stating that lack of recall is insufficient to defeat summary judgment). Indeed, if anything, the fact that the debt was assigned to the Decedent as part of the divorce settlement further establishes its validity.

The Estate's assertions that MCT did not require payment on the Promissory Note also do not invalidate the obligation. Even if those assertions were true, they do not negate that the Promissory Note exists and was validly created. [CP 87]. Thus, none of the extrinsic "evidence" that Estate proffered refutes the validity of the Promissory Note or supports the Estate's speculation that Decedent never intended to pay the Promissory Note.

- b. The Estate may not use extrinsic evidence to defeat or contradict a written agreement.

Even if the Estate had evidence of James Y. Suzuki's unilateral intent, such evidence would not defeat the existence or enforceability of

the Promissory Note. The Estate relies heavily on a 1990 Washington Supreme Court case for the proposition that Estate can use extrinsic evidence to defeat or contradict a written agreement. Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d. 222, 228 (1990). Estate's reliance on Berg is misplaced because the Washington Supreme Court has subsequently clarified that opinion in 2005. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501-504, 115 P.3d 262, 266-267 (2005). As will be explained below, Berg, as clarified in Hearst, actually defeats the Estate's argument.

The Court in Hearst expressed concern that "...Berg was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation." Id. at 503 (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 693, 974 P.2d 836 (1999)). After expressing this concern, the Court in Hearst clarified a couple matters. Hearst, 154 Wn.2d at 503.

First, the Court clarified the use of extrinsic evidence, as follows:

Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used **"to determine the meaning of *specific words and terms used*" and not to "show an intention independent of the instrument" or to "vary, contradict or modify the written word."**

Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005) (emphasis added).

The Court ruled that the use of extrinsic evidence was appropriate in Berg because the term “gross rentals” was undefined in the lease in that case, and extrinsic evidence was needed to interpret that term. Id. at 501. The Court concluded that “...extrinsic evidence may be used only to determine the meaning of specific words in the agreement.” Id. at 509.

Moreover, the Court reiterated that Washington State follows the “objective manifestation theory of contracts,” which means that Washington courts “...do not interpret what was intended to be written but what was written.” Id. at 503-504. Thus, “...the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” Id. at 504. Furthermore, extrinsic evidence about the parties’ intent and desire is irrelevant, and is therefore inadmissible. Id. at 503 (“admissible extrinsic evidence does not include evidence of a party’s unilateral or subjective intent as to contract’s meaning”); ER 402 (“Evidence which is not relevant is not admissible.”).

Applying the holding of Hearst to this case, it is clear that the Trial Court properly granted summary judgment on the Promissory Note in favor of MCT. Again, extrinsic evidence is only admissible for the purpose of interpreting ambiguous words in an agreement. Hearst, 154 Wn.2d at 509. Here, the Estate did not claim that any word in the Promissory Note was ambiguous. [CP 96-97].

Rather, Estate wanted to use extrinsic evidence to show “...that there was never the intent for the Decedent to repay the \$108,000 to MCT.” [App. Br. p. 20]. The Court in Hearst specifically prohibited parties from using extrinsic evidence to establish the parties’ intent in contradiction of a written agreement. Hearst, 154 Wn.2d at 503. Hence, the Trial Court properly rejected Estate’s use of extrinsic evidence to show intent contrary to the written contents of the Promissory Note.

The Estate also sought to use extrinsic evidence to show that the Promissory Note lacked consideration and to show waiver or laches. [App. Br. p. 23, 25]. Again, the Hearst case greatly limits the use of extrinsic evidence, such that extrinsic evidence may only be used to interpret ambiguous words in an agreement. Hearst, 154 Wn.2d at 509. Thus, Hearst calls into question whether the Estate may use extrinsic evidence to support the Estate’s defenses.

c. The Promissory Note is supported by consideration.

In addition to arguing Decedent’s subjective intent, the Estate also asserted defenses based on lack of consideration, RCW 62A.3-304, waiver, and laches. The Trial Court properly rejected those defenses.

The Estate’s argument that the promissory note was not supported by consideration fails to overcome a direct legal presumption:

A person whose signature appears upon a promissory note is presumed to have become a party to the note for

value. Such person has the burden of establishing lack of consideration, even if he signed the note after its execution and delivery.

Dittmar v. Frye, 200 Wash. 451, 457, 93 P.2d 709, 711 (1939) (emphasis added).

Here, James Y. Suzuki's signature was on the Promissory Note. [CP 87]. James Y. Suzuki is therefore presumed by law to have become a party to the note for value. [CP 87]. The burden of proof is on Estate to establish lack of consideration. Dittmar, 200 Wash. at 457.

The Estate cannot meet that burden of proof because the Promissory Note is, in fact, supported by consideration. Contractual consideration is "...any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). Here, the Promissory Note itself states the consideration: \$108,000. [CP 87]. James Y. Suzuki actually received \$108,000 in 2006, the year when the Promissory Note was signed. [CP 196]. Thus, the Promissory Note is supported by consideration.

The Trial Court properly rejected the Estate's argument that the Promissory Note lacked consideration because the policy originally belonged to Decedent. It is undisputed that MCT owned the life insurance policy at the time of the Promissory Note in 2006. [CP 83, 194, 203]. While it is true that a pre-existing obligation cannot serve as consideration,

MCT had no obligation to loan any money derived from the policy to Decedent. Johnson v. Tanner, 59 Wn.2d 606, 609, 369 P.2d 307, 309 (1962). [CP 83, 194, 203]. Thus, the loan to Decedent properly served as consideration.

In conclusion, the Promissory Note was supported by consideration, as there is a presumption that a signed Note is supported by consideration. Decedent actually received consideration. The Estate's argument that the life insurance policy originally belonged to Decedent is irrelevant, as the policy belonged to MCT at the time of the loan. [CP 83, 194, 203]. MCT had owned the policy for many years. [CP 203]. MCT had no obligation to loan funds derived from the policy to Decedent. Thus, MCT's loan of \$108,000 to Decedent was consideration for Decedent's repayment of said loan. Hence, the Trial Court properly granted summary judgment on the Promissory Note.

d. MCT did not waive its rights under the Promissory Note and even if waiver occurred, MCT has reinstated its rights.

As a preliminary matter, the Court of Appeals should reject the Estate's convoluted argument that this case is not ripe because the principal is not yet due and the interest had been waived. [App. Br. p. 24]. The Estate based that argument on RCW 62A.3-304, which relates to the "holder in due course doctrine" and is wholly inapplicable here. RCW 62A.3-304; RCW 62A.3-302(a)(2)(iii).

The Estate's argument that this case is not ripe fails because the Estate's rejection of MCT's Creditor's Claim actually precipitated this case. [CP 1]. Indeed, MCT has only thirty days from the Estate's rejection of its claim to file this case, or MCT would be forever barred from bringing this case. RCW 11.40.100.

Moreover, the Trial Court properly rejected the Estate's argument that MCT waived its rights to enforce the Promissory Note. The case that the Estate cited in support of its waiver argument involved a fact pattern where a person purchased real estate despite having knowledge of an encumbrance on the purchased property. See Kessinger v. Anderson, 31 Wn.2d 157, 168, 196 P.2d 289 (1948). The court ruled that the purchaser waived the right to complain about the encumbrance. Id. at 171-172. In Kessinger, waiver occurred around the time of the contract's inception, with the person's subsequent ownership of the property confirming that waiver had occurred. Id.

Here, there is absolutely no proof that MCT entered into the Promissory Note with Decedent with knowledge that Decedent would not pay. [CP 83] ("It was understood that it was a loan and not a gift."). As such, Kessinger is distinguishable and inapplicable.

Indeed, the Estate failed to cite a 2011 case from Division One of the Washington Court of Appeals, involving waiver as it relates to promissory notes that is directly on point. See Cornerstone Equip.

Leasing, Inc. v. MacLeod, 159 Wn. App. 899, 909, 247 P.3d 790, 796

(2011). The Court in Cornerstone Equip. Leasing, Inc. ruled,

A waiver is generally defined as the voluntary relinquishment of a known right. A waiver can be unilateral and without consideration. When a waiver is given without consideration, the waiving party may reinstate the rights that have been waived upon reasonable notice that gives a reasonable opportunity to comply.

Cornerstone Equip. Leasing, Inc., 159 Wn. App. at 909 (internal citations omitted).

Here, the Estate did not provide any evidence that MCT voluntarily relinquished its rights. [App. Br. p. 25-26]. For example, there is nothing in writing where MCT told Decedent that he will never have to pay the debt. The Estate only claimed that MCT implicitly waived its right to collect on the Promissory Note by not strictly demanding payment from Decedent. [CP 114; App. Br. p. 25-26].

The mere fact that a creditor did not strictly demand payment from the debtor does not establish waiver. Seattle-First Nat. Bank v. Westwood Lumber, Inc., 65 Wn. App. 811, 826, 829 P.2d 1152, 1160 (1992) (cited in Cornerstone Equip. Leasing, Inc., 159 Wn. App. at 909). Here, MCT has a reason other than voluntary relinquishment for which MCT did not strictly enforce the debt against Decedent; Decedent was the elderly father of MCT's owners and MCT's owners simply did not want to be harsh with him. [CP 83].

Even if, assuming *arguendo*, there was a waiver, there is no dispute that any such waiver would be without consideration. [CP 114]. That is, the Estate did not claim that Decedent gave anything of value to MCT in exchange for the alleged waiver. See Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 833, 100 P.3d 791, 793 (2004) (“To constitute consideration, a performance or a return promise must be bargained for.”). As there was no consideration for the waiver, the Cornerstone case is clear that the allegedly waived debt can be reinstated if MCT (the alleged waiving party) provides the Estate with reasonable notice that gives a reasonable opportunity to comply. See Cornerstone Equip. Leasing, Inc., 159 Wn. App. at 909.

In Cornerstone, the creditor had previously told the debtor that they were “even” on their promissory note. Id. at 904. Even so, the Trial Court allowed the creditor to reinstate the promissory note by later demanding the debtor pay the debt. Id. Here, regardless of whether MCT previously waived the Promissory Note, MCT made a clear demand, in the form of a Creditor’s Claim, that the Estate pay the Promissory Note. [CP 89-91]. Washington statute gave the Estate thirty days to comply, indicating that the Washington Legislature recognized that time period as a reasonable opportunity to comply. See RCW 11.40.030. Therefore, even if *arguendo* the Promissory Note had somehow been “waived,” the

Creditor's Claim was enough to reinstate the Promissory Note. See Cornerstone Equip. Leasing, Inc., 159 Wn. App. at 909.

e. MCT's right to enforce the Promissory Note is not barred by laches.

The Estate's defense of laches also fails. Laches only applies if the following three elements exist:

(1) Knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay.

Citizens for Responsible Gov't v. Kitsap Cty., 52 Wn. App. 236, 240, 758 P.2d 1009, 1011 (1988)

Here, MCT arguably had a reasonable opportunity to discover that Decedent was not making payments on the Promissory Note as he should. [CP 83-84].

Regardless, MCT did not unreasonably delay in commencing a cause of action to collect on the debt. Generally, "...the doctrine of laches should not be employed to bar an action short of the applicable statute of limitations." Brost v. L.A.N.D., Inc., 37 Wn. App. 372, 375, 680 P.2d 453, 455-456 (1984). Indeed, "[a] court is generally precluded, absent highly unusual circumstances, from imposing a shorter period under the doctrine of laches than that of the relevant statute of limitations." Id.

Thus, unreasonable delay occurs when a party waits beyond the statute of limitations period to bring suit. Id.

There is a six-year statute of limitations for a promissory note, which starts running "...within six years after the due date...stated in the note." RCW 62A.3-118(a). Here, MCT's Promissory Note's due date is September 30, 2021. [CP 87]. As such, the statute of limitations does not run until six years after that date, or September 30, 2027. RCW 62A.3-118. MCT filed the present lawsuit on or around March 20, 2015, long before the statute of limitations has even started running. [CP 5]. Since MCT's claim is not barred by the statute of limitations, it is also not barred by the doctrine of laches either. Brost, 37 Wn. App. at 375.

In contrast, unreasonable delay was found when a party waited 62 years to bring an action. Davidson v. State, 116 Wn.2d 13, 26, 802 P.2d 1374, 1382 (1991) (case relied upon by Estate). Obviously, the statute of limitations would have long passed after 62 years. MCT's delay was nowhere near 62 years; the last time Decedent made payment on the Promissory Note was May 2011, less than four years before MCT brought the present action. [CP 83-84]. Thus, Davidson is distinguishable in terms of the sheer number of years that passed from the time a claim accrued to when the action was brought.

Further, there was absolutely no prejudice or harm to Decedent or the Estate from MCT's decision not to pursue harsh collection methods

against him. It is well-established that it is only appropriate to apply laches when "...the other party has in good faith become so changed that he cannot be restored to his former state." Brost, 37 Wn. App. at 375-376. For example, laches was found in a case where developers had already begun construction in reliance on the challenged zoning ordinance. See Citizens for Responsible Gov't v. Kitsap Cty., 52 Wn. App. 236, 240-41, 758 P.2d 1009, 1012 (1988) (case cited by the Estate).

There is no evidence that Decedent significantly changed his position in reliance on MCT's decision not to pursue collection against him. Certainly, the Estate cannot and did not argue that it lacks funds to pay MCT's Promissory Note. Since the Estate cannot show that Decedent suffered prejudice from MCT's decision not to pursue collection, the Estate cannot establish laches.

The Court of Appeals should reject the Estate's assertion that there was prejudice in the form of loss of evidence. [App. Br. p. 27]. In support of this argument, the Estate cited to Davidson, the aforementioned case where a party waited 62 years to bring a lawsuit. Davidson, 116 Wn.2d at 26. In Davidson, the Court found,

All those who surveyed, drew, and established the harbor area are now deceased. Expert witnesses for both sides were unable to discover any firsthand documents setting forth the basis for the placement of the lines.

Davidson v. State, 116 Wn.2d 13, 26-27, 802 P.2d 1374, 1382 (1991)

In the present case, there is a crucial firsthand document setting forth the debt, namely the Promissory Note itself. [CP 87]. Also, almost all witnesses having knowledge of the Promissory Note are still alive. David Suzuki and Jimmy Suzuki are still alive. [CP 82-83]. Christine, who was not involved in Decedent's life at the time of the Promissory Note but who now has some of his financial records, is still alive. [CP 66-67]. Terry Luke, who has knowledge of MCT's loan to Decedent pursuant to the Promissory Note, is also still alive. [CP 203].

It is true that Decedent James Y. Suzuki is now deceased. [CP 83]. However, even if he were alive, he could not alter or defeat the terms of the Promissory Note with statements of his subjective intent. Hearst Commc'ns, Inc., 154 Wn.2d at 503. Again, the court would "...not interpret what was intended to be written but what was written." Id. at 504. Hence, the loss of Decedent's testimony is of no consequence. The Promissory Note fully sets forth the terms of the parties' agreement, and Decedent would not have been able to alter the terms or defeat the agreement with his oral testimony anyway. [CP 87]. Since Decedent's arguments based on lack of intent to pay, lack of consideration, RCW 62A.3-304, waiver, and laches all fail, the Trial Court properly granted summary judgment in MCT's favor on the Promissory Note.

2. The Trial Court Properly Dismissed the Estate’s Counterclaim.

a. The alleged lifetime compensation agreement never existed.

The Trial Court properly dismissed the Estate’s counterclaim, as the counterclaim was unsupported by any facts and was based on a non-existent “lifetime compensation agreement.” [RP 35:18 – 35: 20]. The Trial Court correctly noted that there is no evidence of the alleged compensation agreement’s existence. [RP 35:18 – 35: 20]. Obviously, there can be no breach of contract, if there was no contract.

It is well-established that a contract, whether oral or written, only exists if there is a “meeting of the minds” as to all the essential elements of the parties’ agreement. Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 125, 881 P.2d 1035, 1038 (1994). The offer must match the acceptance exactly, as to all essential elements, in order for there to be a meeting of the minds. Id. at 126. Essential terms include “...the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.” DePhillips v. Zolt Const. Co., Inc., 136 Wn.2d 26, 31, 959 P.2d 1104, 1107 (1998). Even when there is meeting of the minds as to one essential term, no contract exists if there is no meeting of the minds as to all the other essential terms. Sea-Van Investments Associates, 125 Wn.2d at 129.

Here, there was no meeting of the minds as to any essential term concerning the alleged “lifetime compensation agreement.” The Estate’s

primary “evidence” of the existence of the compensation agreement is an unsigned employment agreement. [CP 77-81]. However, the unsigned employment agreement was prepared by Decedent and was outright rejected by MCT. [CP 84]. Even the Estate conceded in its Appellate Brief that the document “appears to be a draft with proposed additions appearing underlined.” [App. Br. p. 8.] At most, the document was an offer. There was no proof that it was accepted; no contract was formed. See Sea-Van Investments Associates, 125 Wn.2d at 126.

Although courts sometimes recognize oral contracts, even oral contracts require a meeting of the minds. Hadaller v. Port of Chehalis, 97 Wn. App. 750, 755, 986 P.2d 836, 839 (1999). Whether there is mutual assent depends on objective manifestations, such as the parties’ statements and conduct. Id.

The Estate claimed that MCT gave some money to Decedent through May 2011 and that this alleged fact constitutes an oral agreement. [App. Br. p. 34-35]. However, Personal Representative Christine conceded in her deposition that MCT’s owners (i.e. Decedent’s sons) made those payments to support their elderly father, not out of any obligation. [CP 75]. Specifically, she stated as follows:

A: I believe there was an agreement, whether it was formal or informal, or both, for compensation for gifts that he gave to my brothers.

Q: And why do you believe that?

A: Because it stated in many different places and

because they compensated him on an ongoing basis long –
Q: He was their father; right?
A: Pardon me?
Q: He was their father. They were taking care of him,
weren't they?...
A: Yes.

[CP 75].

In sum, the Estate has no evidence that the lifetime compensation agreement existed. Further, as there was no meeting of the minds between Decedent and MCT on the purported “lifetime compensation agreement,” the alleged agreement is not a legally enforceable contract. Hence, the Trial Court properly dismissed the Estate’s counterclaim.

b. The Statute of Limitations bars the Estate’s counterclaim.

Regardless, even if a compensation agreement had existed between MCT and the Decedent, the Estate’s breach of contract claim is barred by the statute of limitations. It is undisputed that there is no written compensation agreement. [CP 72, 84]. A three-year statute of limitations applies to actions arising from an unwritten agreement. Hudson v. Condon, 101 Wn. App. 866, 874, 6 P.3d 615 (2000) (citing RCW 4.16.080(3)). “The general rule is that a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a Trial Court for relief.” Id. (citation omitted). A party may apply to the Trial Court for relief when each element of the action can be established. Id. (citation omitted).

In Personal Representative Christine's deposition, she admitted that the last payment Decedent received from MCT was in "May of 2011." [CP 73]. Later, in her declaration, she claimed that the last payment Decedent received from MCT was in October of 2013. [CP 109]. Christine based this on a "Table of Compensation" that she herself constructed. [CP 109, 123, 127].

By law, a person cannot create a genuine issue of material fact "...with an affidavit that merely contradicts, without explanation, previously given clear testimony." Berry v. Crown Cork & Seal Co., Inc., 103 Wn. App. 312, 321, 14 P.3d 789, 793 (2000). That is, where there is a contradiction between a person's deposition testimony and the person's later affidavit, the deposition testimony controls. Id. Thus, the "Table of Compensation" does not create a genuine issue of material fact. Christine is bound by her previous deposition testimony that the last payment from MCT to Decedent was in "May of 2011." Berry, 103 Wn. App. at 321. [CP 73].

When the payments stopped in May of 2011, Decedent could have established the elements of his claim in Trial Court. [CP 83]. However, the Estate did not file its counterclaim on the alleged lifetime compensation agreement until April 13, 2015. [CP 29]. April 13, 2015 is more than three years after May of 2011. Accordingly, the Estate's counterclaim is barred by the three-year statute of limitations. RCW

4.16.080(3)

c. The Deadman Statute does not bar David Suzuki's testimony.

The Trial Court properly admitted David Suzuki's testimony, which explained that there was no alleged lifetime compensation agreement between MCT and Decedent and that MCT simply provided funds to Decedent to help him financially, not to compensate him. [CP 83]. By law, the Deadman Statute (i.e. RCW 5.60.030) does not apply to "...statements made in cases where the party having the adverse interest is not a natural person." Thor v. McDearmid, 63 Wn. App. 193, 200, 817 P.2d 1380, 1385 (1991).

Here, the party having the adverse interest (i.e. denying the existence of the lifetime compensation agreement) was MCT, a corporation. [CP 1]. David Suzuki was testifying on behalf of MCT, not himself as an individual. [CP 82]. The Deadman Statute therefore did not preclude David Suzuki's statements on behalf of MCT. Thor, 63 Wn. App. at 200.

To the extent the Deadman Statute applies, the Estate waived the protection of that statute when the Estate described alleged transactions between the Decedent and MCT. [See, e.g., CP 28, 71]. Division One of the Washington Court of Appeals explained waiver of the Deadman statute as follows:

The protection of the statute may be waived, however, when the protected party introduced evidence concerning a transaction with the deceased. Once the protected party has opened the door, the interested party is entitled to rebuttal.

Bentzen v. Demmons, 68 Wn. App. 339, 345, 842 P.2d 1015, 1019 (1993) (citations omitted) (citing, among other cases, Johnston v. Medina Imp. Club, 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941)).

The facts in Bentzen are analogous to the facts in the present case. In Bentzen, the Estate claimed that an agreement did not exist. Bentzen, 68 Wn. App. at 345-346. The Trial Court ruled that this claim constituted a waiver of the Deadman Statute and allowed the opposing party to testify in rebuttal that the agreement existed. Bentzen, 68 Wn. App. at 345-346.

Here, the situation is like Bentzen, but in the reverse, as the Estate is the one claiming the existence of an agreement between the Decedent and MCT. [CP 28]. In support of this claim, Christine testified regarding the alleged agreement in her deposition and her declaration. [CP 71]. Since the Estate raised the issue of the alleged transaction with Decedent, MCT was properly allowed to rebut the Estate's claim with evidence that there was in fact no such agreement. Bentzen, 68 Wn. App. at 345-346.

Regardless, error regarding the Deadman Statute, if any, was harmless where there was already strong evidence supporting the Trial Court's ruling. In re Rakestraw's Estate, 28 Wn. App. 585, 587, 624 P.2d 1175, 1176 (1981). Here, the Trial Court dismissed the counterclaim on the alleged lifetime compensation agreement because there was no

evidence of the agreement in the record. [RP 35:18-20]. The Estate only provided an unsigned draft agreement, which MCT denied ever signing. [CP 77-81, 84]. The Personal Representative Christine admitted that she never saw a signed version of that agreement. [CP 72]. She also conceded that MCT's owners made payments to Decedent to support their father, and not necessarily because of any obligation. [CP 75].

Thus, there was already strong evidence showing that the lifetime compensation agreement was never agreed to by MCT and Decedent. David Suzuki's testimony only further explained that evidence. [CP 83-84]. Since strong evidence independently supports the Trial Court's decision, error regarding the Deadman Statute, if any (and MCT does not believe there was any), was harmless. In re Rakestraw's Estate, 28 Wn. App. at 587. The Court of Appeals should affirm the Trial Court's dismissal of the Estate's counterclaim.

C. THE TRIAL COURT ERRED BY NOT ENTERING A JUDGMENT FOR THE ENTIRE PRINCIPAL OF THE PROMISSORY NOTE AND FOR DENYING MCT'S REQUEST FOR ATTORNEYS' FEES.

1. The Trial Court Erred By Not Accelerating the Debt and Entering a Judgment for the Outstanding Principal Amount.

In actions involving a rejected creditor's claim, the superior court first determines how much money the creditor is actually owed. See RCW 11.40.100; RCW 11.40.120. Once the superior court has determined the total amount owed by the Estate (i.e. the judgment amount), the superior

court then determines how that judgment should be paid. See Sloans v. Berry, 189 Wn. App. 368, 375, 358 P.3d 426, 429 (2015).

While the Trial Court properly acknowledged the enforceability of the Promissory Note, the amount of the judgment was in error. It is undisputed that the debt on the Promissory Note has two components: unpaid interest (which is already past-due) and outstanding principal (which is due in 2021). [CP 87]. Both components are in a sum certain: \$21,091.25 for the unpaid interest and \$84,600.00 for the outstanding principal. [CP 265, 286]. Thus, the Trial Court should have entered a judgment in the amount of \$105,691.25, a combination of both components. However, the Trial Court only entered a judgment for the unpaid interest in the amount of \$21,091.25. [CP 286]. The Court of Appeals should therefore reverse the judgment amount and remand to the Trial Court to instead enter a judgment for the full amount of \$105,691.25.

Per the recent Court of Appeals decision in Sloans, "...after a judgment in a civil action establishes the amount of an allowed claim[,] the claim becomes subject to rules of estate administration." Sloans, 189 Wn. App. at 375. One particularly applicable rule of estate administration is found in RCW 11.76.180, which states:

If there be any claim not due the court may in its discretion, after hearing upon such notice as may be determined by it, mature such claim and direct that the same be paid in the due course of the administration.

RCW 11.76.180.

Although maturation (i.e. acceleration) of a debt is discretionary in RCW 11.76.180, the Trial Court did not recognize that it had this discretion. [CP 285]. Instead, the Trial Court erroneously concluded that it lacked discretion to accelerate the debt. [CP 285]. Specifically, the Trial Court ruled on procedural grounds that “Any motion to mature the note must be brought pursuant to the probate of the Suzuki estate under Title 11.” [CP 285]. Since the Trial Court declined to apply discretion that it actually held, the Court of Appeals should reverse the Trial Court’s declination and remand with instructions to the Trial Court to accelerate the debt.

In essence, the Trial Court’s ruling is centered on its belief that the superior court sitting in a civil action cannot grant relief under Title 11 RCW. This belief is incorrect because there is no legal distinction between the superior court sitting in a civil action versus a probate action. Rather, “[a] superior court acting in probate is the same court when it hears an ordinary civil action.” See Sloans, 189 Wn. App. at 377. That is, “...probate matters are administered by the superior court as a court of general jurisdiction, both legal and equitable.” In re Pugh's Estate, 22 Wn.2d 514, 523, 156 P.2d 676, 680 (1945).

Further, RCW 11.76.180, the statute addressing acceleration of debts in probate, refers to “the court” in general and does not specify that only certain courts may accelerate an allowed debt. Thus, there is no legal

authority stating that RCW 11.76.180 may only be applied by “probate courts.” To be sure, there are no special courts in King County that only rule on probate matters.

Rather, whether the court has authority to accelerate the debt under RCW 11.76.180 depends on whether the court had already “...establishe[d] the amount of [the] allowed claim.” Sloans, 189 Wn. App. at 375. Here, the Trial Court had already allowed the entire amount on the Promissory Note as a just debt, though the Trial Court’s judgment is erroneously inconsistent with the Trial Court’s ruling in not including the principal amount as well. [RP 35:14-35:15; CP 285-286]. Thus, the Trial Court certainly had authority under RCW 11.76.180 to accelerate the debt. RCW 11.76.180; Sloans, 189 Wn. App. at 375.

The Trial Court should have accelerated the debt and required that the entire amount of the allowed claim be paid in probate. Washington law has an overarching policy promoting the efficient administration of estates. This policy is evident in the fact that a personal representative has a duty to “...settle an estate as quickly as possible but without sacrifice to the estate,” meaning that while doubtful claims may be rejected, the rights of creditors should be protected. Wilson's Estate v. Livingston, 8 Wn. App. 519, 528, 507 P.2d 902, 909 (1973) (citing National Bank of Commerce v. Peterson, 179 Wash. 638, 644, 38 P.2d 361 (1934)). The purpose of this duty is to avoid “...loss to another.” Wilson’s Estate, 8

Wn. App. at 528.

Here, MCT's claim on the Promissory Note is not a doubtful claim but rather a just debt, as determined by the Trial Court. [RP 35:14-35:15; CP 285]. Hence, the debt must be paid, and accelerating the debt would promote the efficient administration of the probate of the Estate, which had already been ongoing for two years. [CP 2, 83]. There is no claim by the Estate that the Estate is insolvent or otherwise lacks funds. Thus, there is no legal, equitable, or factual reason why the Estate should not be required to pay the entire debt now so that the probate can finally close.

Furthermore, acceleration of the unpaid principal balance will avoid loss to MCT. The Promissory Note requires the Estate to make semi-monthly interest payments "on the unpaid principal balance at a rate of 5.00 percent per annum." [CP 87]. Hence, so long as there is an unpaid principal balance, interest will continue to be due regularly. [CP 87].

The Estate persists in not making any interest payments on the Promissory Note, despite the Trial Court order recognizing the Promissory Note as a valid debt. [CP 285]. Thus, if the unpaid principal balance is not accelerated, interest will continue to accrue. [CP 87]. The Estate's continued failure to make interest payments would require MCT to bring lawsuits regularly to collect those payments. Such collection lawsuits would obviously harm both MCT and the Estate by necessitating both parties to incur additional attorneys' fees.

In contrast, acceleration would have the Estate pay off the debt in full now. Once the debt is paid in full, there will not be an unpaid principal balance anymore, and thus, there will also not be any more interest payments due. No further lawsuits will be necessary to enforce the Promissory Note. Hence, acceleration of the unpaid principal balance should be granted to avoid harm to MCT and the Estate.

Also, until MCT's Promissory Note is paid, the Estate beneficiaries' respective interests in the Estate will remain subject to MCT's creditor's claim. See Griffin v. Warburton, 23 Wash. 231, 237, 62 P. 765, 767 (1900). If any distributions are made to the beneficiaries in disregard of MCT's creditor's claim, then MCT may claw back the distributed assets and file a lawsuit against the Personal Representative. RCW 11.76.170.

As such, without acceleration of the Promissory Note, the Estate's assets may not be distributed to the beneficiaries free and clear of MCT's creditor's claim and the possibility of claw back until September of 2021, when the principal on the Promissory Note finally comes due. The probate Estate would need to remain open in the meantime. See RCW 11.68.110(1)(d) (not allowing a non-intervention probate to be closed until all justly due creditor's claims have been paid); RCW 11.76.050 (not allowing distribution of assets to beneficiaries until "...all debts have been paid"). [CP 87]. The beneficiaries would incur opportunity cost from not

being able to use and enjoy assets they would otherwise have had, if MCT's just debt been paid. The beneficiaries would also have to bear the risk of adverse events occurring to Estate property from now until September of 2021.

Hence, the result of not accelerating the debt is more uncertainty for beneficiaries and more litigation if the Personal Representative's actions result in harm to MCT (as a creditor) or the beneficiaries of the Estate. It is therefore clear that refusing to accelerate MCT's entire claim on the Promissory Note is completely antithetical to the policy for efficient administration of probate estates.

In sum, the Trial Court had the authority and jurisdiction to accelerate the principal on the Promissory Note. The Trial Court's conclusion that it lacked authority and jurisdiction was erroneous. Accelerating the principal on the Promissory Note promotes the efficient administration of the Estate and benefits both MCT and the beneficiaries of the Estate. Not accelerating the principal would effectively paralyze the Estate for five years, until September 2021, and would require MCT to bring lawsuits regularly and incur additional attorneys' fees in obtaining interest payments from the Estate. Hence, the Court of Appeals should remand with instructions to the Trial Court to accelerate the principal on the Promissory Note, so that the probate action can finally conclude.

2. The Trial Court Erred By Not Awarding MCT Attorneys' Fees.

The Trial Court also erred by not awarding MCT attorneys' fees for having to bring a legal action to obtain a judgment on the Promissory Note against the Estate. [CP 285]. The Trial Court's stated basis for denying MCT attorneys' fees is that: "...although RCW 11.9[6]A.150 (2) provides for a discretionary award of attorney fees governed by Title 11 this is a civil action for enforcement of a contract not a probate action." [CP 285].

This stated basis is contrary to law, as the Trial Court erroneously ruled that it did not have jurisdiction to enter an award of attorneys' fees when, in fact, it did. RCW 11.96A.150. Also, the Trial Court erroneously ruled that this action does not fall within RCW 11.96A.150, as the scope of RCW 11.96A.150 is rather broad and encompasses the present case. Hence, the Trial Court's ruling to deny attorneys' fees should be reversed and attorneys' fees should be awarded to MCT.

RCW 11.96A.150 does not distinguish between judges sitting on the probate calendar and judges sitting on the civil calendar. Rather, the court that is empowered by the statute to enter an award of attorneys' fees is "the superior court." RCW 11.96A.150(1). Thus, the King County Superior Court judge had the jurisdiction and authority to award MCT attorneys' fees. Indeed, in 2012, Division One of the Washington Court of Appeals upheld an award of attorneys' fees by the superior court in an

action based on a creditor's claim, confirming that the Trial Court has jurisdiction and authority to enter such an award. In re Estate of Fitzgerald, 172 Wn. App. 437, 453–54, 294 P.3d 720, 728–29 (2012).

Having established that the Trial Court had the jurisdiction and authority to enter an award of attorneys' fees, the next issue is whether RCW 11.96A.150 allows for such an award in the present case. RCW 11.96A.150 not only applies to TEDRA actions, but also to all actions governed by Title 11 RCW (the probate and guardianship statute). RCW 11.96A.150(2). RCW 11.96A.150(2) states:

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

RCW 11.96A.150(2) (emphasis added).

By its own terms, RCW 11.96A.150 is not limited to TEDRA actions, nor does it exclude civil actions.¹ Rather, the linchpin for whether RCW

¹ Clearly, RCW 11.96A.150(2) applies to actions governed by Title 11 RCW, even though they may not be brought under TEDRA. For example, RCW 11.96A.150(2) allows attorneys' fees to be awarded for guardianship matters, the laws for which is codified in a different section altogether from the TEDRA statutes. See Chapter 11.96A RCW (TEDRA); Chapter 11.88 RCW (guardianship statute).

11.96A.150 applies to a particular case is whether that case is “...governed by this title,” i.e. Title 11 RCW. RCW 11.96A.150(2). If the case is governed by Title 11 RCW, then RCW 11.96A.150 applies, and the Trial Court may award attorneys’ fees under that section.

Title 11 RCW clearly governs the present legal action. The very title of the petition here was “Petition Re: Creditor’s Claim and Complaint.” [CP 1]. Chapter 11.40 RCW governs the creditor’s claim procedure. See RCW 11.40.010 (“A person having a claim against the decedent may not maintain an action on the claim unless a personal representative has been appointed and the claimant has presented the claim as set forth in this chapter.”). That this case arose from and is governed by Chapter 11.40 RCW is evident from that quoted excerpt of RCW 11.40.010, which states that the present action could not have been brought at all, except by following the creditor’s claim process. RCW 11.40.010. Even more specifically, the statute that authorized the present case was RCW 11.40.100(1), which states,

If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection or the claim is forever barred.

RCW 11.40.100(1).

There is therefore no doubt that this case is governed by Title 11 RCW as it was brought under RCW 11.40.100(1).

Further, RCW 11.96A.150 (the attorneys' fees statute) specifies that it applies to "...proceedings involving...decedent's estates and properties." RCW 11.96A.150(2). This case involves a creditor's claim against the Estate. [CP 1]. Hence, RCW 11.96A.150 applies to this case.

Case law confirms that creditor's claim actions are within RCW 11.96A.150. The trial court in Fitzgerald awarded attorneys' fees in a creditor's claim case under that statute. In re Estate of Fitzgerald, 172 Wn. App. at 453–54. In sum, the origins of this case, the plain text of RCW 11.96A.150, and case law all confirm that this case is a probate case and that RCW 11.96A.150 authorizes an award of attorneys' fees for this case. The Trial Court, however, erroneously ruled to the contrary, so the Trial Court's decision should be reversed. [CP 285].

Having established that the Trial Court had jurisdiction and authority to award attorneys' fees and that RCW 11.96A.150 applies, the only remaining question is whether MCT merits an award of attorneys' fees. One key consideration is whether the losing party's arguments had merit. In re Estate of Fitzgerald, 172 Wn. App. at 453–54. Here, the Estate's arguments lacked merit, as the Trial Court found,

[T]here 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 makes a difference that the note did exist. 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 disputed fact as to that.

[RP 35:14-20].

These findings confirm that the Estate's arguments lacked merit. The Estate's staunch opposition to the Promissory Note was unjustified because there were no inferences that the note did not exist. [RP 35:14-15]. The note was in writing, and its terms were clearly stated. [CP 87].

Also, the Estate's counterclaim for the "lifetime compensation agreement" was devoid of merit, as the Trial Court found not one iota of evidence for the agreement. [RP 35:18-20]. Since the Estate's arguments lacked merit, the Trial Court should have awarded MCT attorneys' fees in the amount requested. Hence, the Court of Appeals should reverse the Trial Court's decision and remand the issue of attorneys' fees to the Trial Court for entry of a judgment for the full amount of attorneys' fees.

D. MCT SHOULD BE AWARDED ATTORNEYS' FEES UNDER RAP 18.1.

RAP 18.1 allows the Court of Appeals to award a party attorneys' fees "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before...the Court of Appeals." RAP 18.1(a). A prevailing party is one that "...substantially prevails on its claims." Peterson v. Koester, 122 Wn. App. 351, 364, 92 P.3d 780, 786 (2004). Here, MCT should be the substantially prevailing party for

reasons stated previously in this brief. Hence, MCT should be awarded attorneys' fees under RAP 18.1.

Conversely, the Estate should not be awarded fees under RAP 18.1. RAP 18.1 is clear that a request for fees under that rule must be raised in its own separate section in the opening brief. RAP 18.1(b). The Estate did not ask for attorneys' fees under RAP 18.1 in its appellate brief. Thus, the Estate's failure to ask for attorneys' fees in its opening brief constitutes a waiver of such fees. See Gardner v. First Heritage Bank, 175 Wn. App. 650, 677, 303 P.3d 1065, 1079 (2013) (denying attorneys' fees where prevailing party failed to devote a section of its opening brief to attorneys' fees as required by RAP 18.1(b)). Further, the Estate is not the substantially prevailing party, for reasons stated above, and is not entitled to attorneys' fees.

VI. CONCLUSION

The Trial Court properly granted summary judgment allowing MCT's creditor's claim on its Promissory Note, as it is clear that the Promissory Note exists and is enforceable. Further, the Trial Court properly granted summary judgment dismissing the Estate's counterclaim. That counterclaim was based on an alleged lifetime compensation agreement, which there is no evidence of whatsoever. Moreover, the Trial Court did not err in allowing David Suzuki to rebut the Estate's assertion

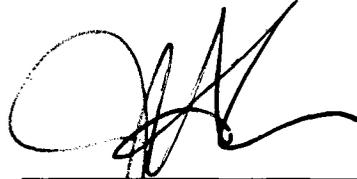
that the lifetime compensation agreement existed. The Court of Appeals should affirm those Trial Court rulings.

Nonetheless, the Trial Court erred by not entering judgment for the outstanding principal on the Promissory Note. The Trial Court should have accelerated the entire debt for payment sooner, rather than later, in the probate of the Estate. Acceleration of the Promissory Note would promote the efficient administration of the Estate and would be beneficial to both MCT and the Estate's beneficiaries. Hence, the Court of Appeals should reverse the Trial Court's judgment and remand with instructions to the Trial Court to accelerate the Promissory Note and enter judgment for the entire principal balance.

Also, the Trial Court erred by not awarding attorneys' fees under RCW 11.96A.150(2) when that statute allows an award of attorneys' fees in cases arising under Title 11 RCW. This case involves a rejected creditor's claim and arises under Title 11 RCW, including RCW 11.40.100(1). Since the Estate's arguments were found to be meritless and devoid of any genuine issues of material fact, the Trial Court should have awarded MCT attorneys' fees. The Trial Court's decision not to award attorneys' fees, based on a perceived lack of authority or jurisdiction, should be reversed and remanded with instructions to the Trial Court to also enter a judgment for MCT's attorneys' fees.

Finally, MCT should be awarded attorneys' fees under RAP 18.1.

RESPECTFULLY SUBMITTED this 10th day of October, 2016.

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by several loops and a long horizontal stroke extending to the right.

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