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No. 342026

COURT OF APPEALS
OF THE STATE OF WASHINGTON

BOTANY UNLIMITED DESIGN AND SUPPLY, Appellant,

v.

STATE OF WASHINGTON, LIQUOR & CANNABIS BOARD, Appellee.

Franklin County Superior Court # 15-2-50860-4

REPLY BRIEF

Jeffry K. Finer
Attorney for Appellant

West 35 Main • Suite 300
Spokane, WA 99201
509 464-7611
WSBA No. 14610

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BOTANY'S REPLY TO LCB'S RE-STATEMENT OF THE CASE

The LCB's summary of the proceedings below is accurate but incomplete. A full recitation of the uncontested facts below is set forth in Botany's Opening Brief at pages 6-10. The LCB version of the facts fails to admit that AAG Lee was the attorney for the LCB throughout the administrative proceedings. Those citations are not material to Botany's first issue on appeal (whether Botany's Emergency Motion constituted a petition for review under RCW 34.05.546), but the citations are material to Botany's second issue (whether service of the motion on AAG Lee met the provision found at RCW 34.05.542(6)).

ARGUMENT

I. Summary of Objections to LCB's Response Brief.

It is helpful to revisit the issues Botany has actually raised. The effect of Botany's failed pleading entitled "Request for Judicial Review" (CP 48) is not in issue and the LCB's many pages of argument regarding that pleading are unhelpful. Botany set forth its issues in its Opening Brief, at page 5, as follows:

> As to Assignment (a): Whether Botany's Emergency Motion [to] Stay along with its exhibits, being timely filed and properly served, fully and substantially satisfied RCW 34.05.546(1) through (8).

and

> As to Assignment (b) … whether service of the Emergency Motion [to] Stay … met the requirements of RCW 34.05.542(6)….

LCB's Response Brief first addresses the standard of review (which the parties agree is *de novo*), and the iron-clad rule that jurisdiction for the Superior Court in its appellate capacity is strictly construed. Botany agrees and, again, acknowledges that its timely filed Request for Judicial Review was not properly served. *See* Opening Brief at 10-11.

Unfortunately, the LCB's authorities on pages 7-10 regarding strict compliance are freighted with additional argument that are factually inapposite to the relevant issue of Botany's service of its Emergency Motion. *Compare* Response Br. at 7-10 *with* Opening Br. n. 3 at 11. Because Botany has conceded that its Request for Judicial Review was not served, the LCB case citations on pages 7-10 are not helpful to the determination of proper service.[1] The Request for Judicial Review at CP 48 is not the basis for Botany's appeal; Botany's arguments are based on its Emergency Motion at CP 103. The majority of LCB's cases at pages 7-10 of its brief pre-date the amendment liberalizing service options; while the cases are good authority for the proposition of strict compliance with service rules, the cases

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[1] To be sure, service is addressed in Botany's Issue (b) addressed below in Part III, where the argument rests on the application of RCW 34.05.542(6). The LCB Response Brief entirely omits any mention of this sub-clause. It does, however, liberally rely on sub-sections -.542(2), (4), (5) and the abrogated holding of *Union Bay Pres. Coal. V. Cosmos Dev. & Admin Corp.*, 127 Wn.2d 614 (1995) as it existed *before* the passage of sub-section -542(6). *See* Response Br. at iii, 7-10.

are not helpful in interpreting RCW 34.05.542(6). *See Netversant Wireless Systems v. Washington Dept. Labor & Indus.*, 133 Wn.App 813, 821 n. 10 (2006) (noting that the LCB's primary authority, *Union Bay,* has been superseded by statute). *See also* RCW 34.05.542(6).

Botany's first issue — whether the Emergency Motion is the equivalent of a Request for Review — is set forth in Part II, next, and alleged service defects are not material to that argument.

Botany's service issue is material to Part III, found at page 9 below. The LCB's Response does address the service issue, but it neglects to even mention the controlling statutory provision of RCW 34.05.542(6).

II. By statute a party may appeal a final order from an agency to a superior court acting in its appellate capacity by fully and substantially meeting all eight elements found in RCW 34.05.546; Botany's Emergency Motion met these elements.

In its response brief the LCB does not take issue with Botany's assertion that its Emergency Motion to Stay was timely served on September 23, 2015, or that the method of service (via United States mail) was proper.[2] CP 1-3, Response Brief at 1-7. The LCB asserts, however, that Botany's Emergency Motion cannot take the

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[2] The second issue, whether service of the Emergency Motion on AAG Lee in lieu of service on the LCB satisfied the statute, is addressed in Part III. Part II addresses the dispute over legal significance of Botany's Motion (CP 38) and supporting documents (CP 4) and whether together the pleadings satisfied the requirements for a petition for review.

functional place of a petition for review and even if it could, its service on the AAG who was the attorney of record during the administrative phase did not satisfy the service rules' requirement for service on the Board.

The LCB supports its argument in opposition to Botany's first issue by arguing 2 points:

1. Under rule from *Skagit Surveyors & Eng'rs, LLC v Friends of Skagit County*, 135 Wn.2d 542 at 556-57 (1998) Botany's "Request for Judicial Review" was not served. Response Brief at 10-11. Botany agrees. Opening Br. at 8, 12. Nothing further need be said on that.
2. That Botany's Emergency Motion "was different in both form and substance from the Petition as it served a different purpose..." Response Br. at 12. Respondent LCB correctly noted that the relief sought by Botany's Motion was not the same as set forth in its Request for Judicial Review. The LCB then injects several *ipse dixit* propositions that a motion cannot serve as a petition for review. Response Br. 12. at Ultimately, the LCB's argument turns to re-writing appellant's issue:

> The issue is not whether the contents of Botany's Petition [sic; probably: Botany's *Emergency Motion*] comported with the requirements of RCW 34.05.546, but rather, whether Botany failed to properly serve its Petition on the Board as required by RCW 34.05.542(2).

Response Br. at 13. The error in logic arises partly from the LCB's indiscriminate mixing of definite and indefinite articles.[3] Botany filed *a* petition for review. It is plainly a nullity for obtaining jurisdiction, having never been served. Botany also filed another pleading, labelled "Emergency Motion to Stay Agency Action in Case No. 07-2015-LCB-00078." The contents of the two pleadings were not identical, but that is not the test for the sufficiency of the second pleading. The test is whether the contents of the Emergency Motion to Stay (and the served and filed attachments) met the standards of RCW 34.05.546(1) through (8). The LCB fails to offer an analysis of the elements in the statute; it makes no comparison between the statute prescribing the contents of a petition for judicial review and the contents of Botany's motion (CP 38 plus the referenced exhibits from CP 4), standing on its own.

The LCB's only reference to the *contents* of Botany's motion observed that the relief Botany requested in its Motion did not "match" the relief of Botany's failed "Request for Judicial Review." This is a false distinction. Botany's argument is not

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[3] For example: "The statute's requirement that *the* Petition must be served on the agency is unequivocal." Response Br. at 13 (emphasis added). Botany has agreed that the pleading denominated "Request" was not served properly. Botany argues that the pleading denominated "Motion" was properly served, that *its* contents meet the eight requirements of RCW 34.05.546, and that Botany's full or substantial compliance in meeting the requirements of 34.05.546 is sufficient for that statute's purposes.

that its Motion was in complete harmony with its "Request for Judicial Review" but, rather, that its Motion, standing alone, satisfies the requirements under RCW 34.05.546 and that this is clearly so when one reads the statue's eight elements that are required for a petition.

What is more, contrary to the LCB's assertions that the relief was not a "match", the Emergency Motion was plain as to its request for relief and that relief included judicial review:

> **Relief Sought.** Botany Unlimited respectfully asks this Court to enter an order staying the agency's order to cease business as of September 30 and to permit operations pending this judicial review.

CP 39:6-8. The LCB does not argue that this relief is improper or non-conforming to the statute governing the contents of a petition for review. It asserts in conclusory fashion that the Emergency Motion "is not the same document, legally or otherwise, as a Petition for Judicial Review," and that "[i]t would be legally incorrect to allow an appellate to file one document with the court while mailing a different document to the agency." Response Br. at 12.

Botany responds that no rule requires identity between an *unserved* pleading and the one that was served. What matters is that Botany's served Emergency Motion was the same as the one it filed. Both service and filing were timely. The Motion, moreover, satisfied the eight statutory elements for a petition for review. Further,

the cases allow for substantial compliance with RCW 34.05.546 and the LCB has acknowledged this rule. *See* Opening Br. at 11 and 15 *and* Response Br. at 14 ("strict compliance" as to the contents of a Petition for Judicial Review is not required."). At most, the only flaw with the Emergency Motion is its title. That non-conformity does not defeat any of the requirements of RCW 34.05.546 and Botany's compliance with the statute was substantial if not perfect.

III. RCW 34.05.542(6) permits service on an agency by serving its counsel of record; counsel of record for the LCB was AAG Lee.

Notwithstanding the lack of citation in the Respondent's brief, there exists a rule that provides for service on the "attorney of record" as opposed to the agency itself. RCW 34.05.542(6). The LCB never addresses or cites the text of this sub-section. It does, however, implicitly acknowledge that service on an attorney of record can be made in lieu of service on the board that issued the final ruling under appeal. Response Br. at 18.

The LCB argues that AAG Lee was not its attorney of record — at least not at the superior court level — at the time of Botany's filing its Emergency Motion. Instead, Lee was the attorney for the licensing "division" of the LCB. The LCB does not argue that a division is an agency separate from the LCB itself, and thus appears to concede that Lee was the LCB attorney at least at the administrative

level.

The LCB next argues that AAG Lee was not the attorney for the "tribunal" hearing the administrative appeal, namely the Office of Hearings and Appeals. Response Br. at 17 (incorrect to argue that AAG who "represented a party before a tribunal is the attorney of record for that tribunal for the purposes of judicial review"). The LCB asserts that the notice at the close of the final administrative ruling identified legal counsel (not AAG Lee) and instructed appellants to provide that AAG "with a copy." Response Br. at 17; *see also* CP 149. Nothing at CP 149 suggests that the instructions for judicial review alters the plain unambiguous language of the statute's requirements.

The LCB's citation to *Banner Realty Inc., v. Department of Revenue*, 48 Wn. App. 274, 278 (Div. 2, 1987) is unavailing. In *Banner*, a taxpayer sought judicial relief and failed to strictly comply with the service rules. The taxpayer argued substantial compliance under a specific statute allowing for review of an excise tax assessment. *Id.* at 278, (citing former RCW 34.04.130(2), recodified and amended under RCW 34.05.542(2)). Banner admitted that he failed to serve the Board of Tax Appeals. That board issued the final decision against Banner and his appeal to the superior court was dismissed due to his failure to serve that Board, the one that issued the final decision. *Id.* Banner argued that the provision in question was

unconstitutional and that substantial compliance should result in jurisdiction. The court held that the provision was constitutional and did not reach the second issue as Banner's compliance was not substantial. *Id.; see also Sprint Spectrum LP v. Dep't of Revenue,* 156 Wn. App. 949 (2010) (dismissal required when appellant served its petition for review on the Department of Revenue and the Attorney General, but not on the Board of Tax Appeals). The case never discussed the operation of RCW 34.05.542(6), which appears to be unambiguous:

> For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record."

RCW 34.05.542(6). Thus, the question can be focused narrowly: *what agency issued the final order and who was its attorney of record?*

The LCB suggests that the AAG referenced in the Board's judicial review notice at CP 148 (Mary Tennyson) "may have been the Attorney of Record for the Board below, it is clear that AAG Lee was not." Response Br. at 18.

In essence, the "Board below" here is interpreted by the LCB to be a separate agency, an office of hearings and appeals apart from the LCB itself. In truth, the only Board referenced anywhere in the Clerks Papers is the Liquor and Cannabis Board. Botany read the final order and sought review of it; the case number was the

original LCB case number; the order from which Botany sought relief was the one issued on September 15, 2015. CP 48-49. A review of the final order shows that the LCB was the agency ruling against Botany and that the LCB was the agency from which Botany sought appeal.

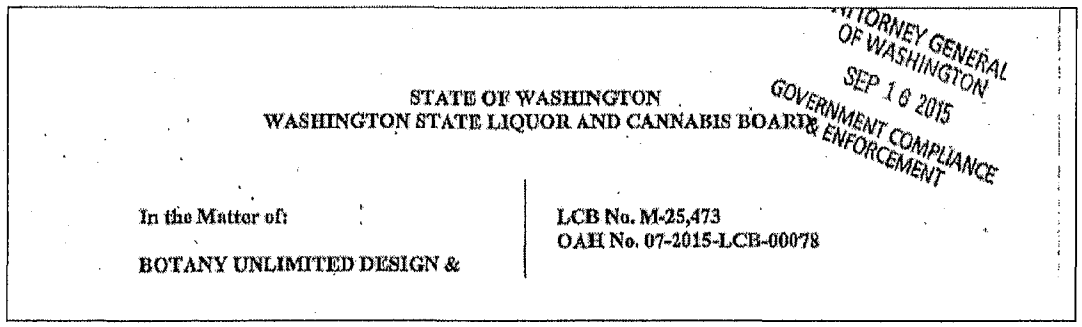
That final order reads as follows:

> 1.1 Review. This matter comes **before the Members of the Liquor and Cannabis Board** to review the Findings of Fact, Conclusions of Law and Initial Order of Brief Adjudicative Proceedings entered by Administrative Law Judge, Terry A. Schuh on August 7, 2015.

CP 79 (Emphasis in bold added). So, the tribunal was in fact the LCB.

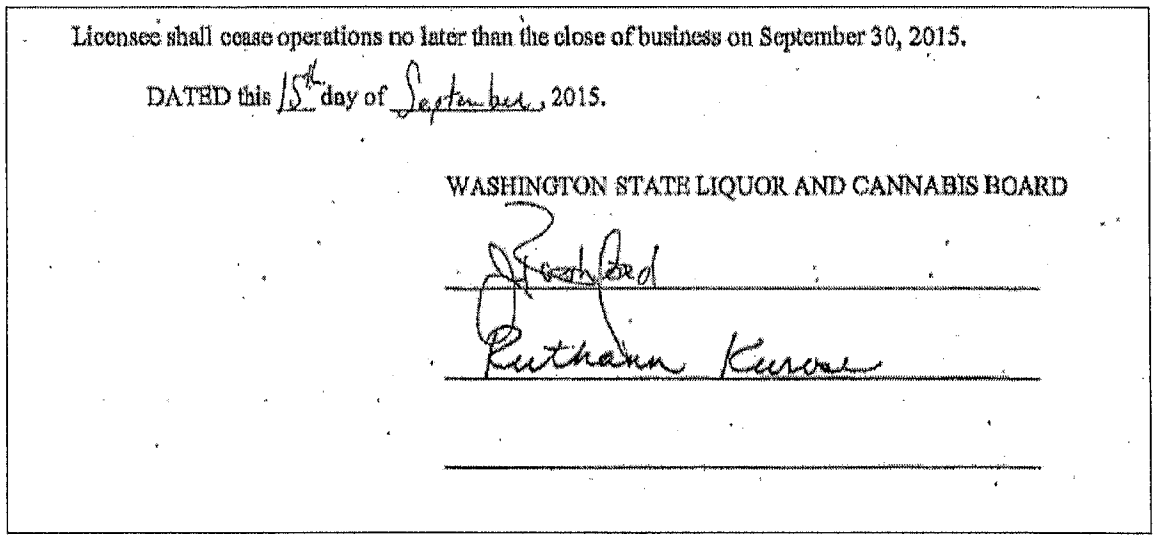
This is not a casual reference.

The heading of the final order states that the matter was set before the Washington State Liquor and Cannabis Board. A true and correct copy of that heading is reproduced here:



Plainly, the institution that issued the order under appeal is identified as the "WASHINGTON STATE LIQUOR AND CANNABIS BOARD". *See* CP 79. Again, the agency from which Botany sought judicial relief was the LCB.

Further, the signatories to the final order on review are identified as members of the Liquor and Cannabis Board itself. CP 80.



Licensee shall cease operations no later than the close of business on September 30, 2015.

DATED this 15th day of September, 2015.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD

The LCB's argument that it was not the agency from which the final order issued is contrary to the heading, signature block, and identification of the scope of review found within the text of the order under appeal. No other agency is mentioned.

Thus, the issue in dispute is whether AAG Lee was the "attorney of record" for the agency, i.e., for the LCB, at the point in time Botany filed its Request for Judicial Review in Franklin County. It is uncontested that AAG Jong was not

prohibited from being the attorney of record for the LCB at the superior court level: a few days after Botany filed its pleadings AAG Jong filed a notice of appearance. The issue is whether he was the "attorney of record" for the purposes of RCW 34.05.542(6) on or before September 23, 2015.

According to every document that references counsel for the LCB, the answer comes back that its attorney of record was Jong Lee, Assistant Attorney General. CP 107 ¶ 2, CP 230 ¶ 2, and *see* CP 222:14.

Conclusion

For the reasons set forth above, the Court should hold that Botany's timely Emergency Motion fully and substantially complied every standard required by RCW 34.05.546 for a petition seeking review of the final order issued by the Liquor and Cannabis Board on September 15, 2015, and further, that service upon the Liquor and Cannabis Board's "attorney of record" was in lieu of service on the Board itself, thus resulting in Botany's strict compliance with RCW 34.05.542(6).

DATED THIS 23rd day of September, 2016.

Jeffry K. Finer
Counsel for Appellant Botany Unlimited

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 23rd day of September, 2016, I caused a true and correct copy of the foregoing *REPLY BRIEF* to be served, via USPS postage prepaid on the following:

Jong Lee, AAG
1125 Washington St. SE
PO Box 40100
Olympia, WA 98504-0100

Dated this 23 day of September, 2016.

Danette Lanet