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Supreme Court No. 1015186- Estate of Doris E. Mathews
Court of Appeals No. 553147-II

SUPREME COURT
OF THE STATE OF WASHINGTON

TED SPICE, an individual, PAVEL PASYUK, an individual, and PLEXUS INVESTMENTS, LLC, a Washington limited liability company

Petitioner

v.

ESTATE OF DORIS MATHEWS, a Washington Estate; DONNA DUBOIS, as Personal Representative of the Estate; MARK DUBOIS, a purported agent of the Estate; DORIS ELAINE MATHEWS LIVING TRUST, a Washington Trust,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

This case essentially began on December 8, 2009, when the Decedent, Doris E. Mathews, died. Thereafter, appellant Ted Spice commenced a lawsuit against the Estate and in September 2012, a jury awarded him a partial ownership interest with the Estate in various real property. Mr. Spice appealed the verdict, which was affirmed. Since the jury verdict, Mr. Spice engaged in years of protracted and constant litigation against the Estate and various Respondents in State, Federal and Bankruptcy courts, including four appeals to the Court of Appeals. *CP 3735.*

B. STATEMENT OF THE CASE

The following is largely taken from the appellate decisions and the Findings of Fact and Conclusions of Law (CP 5038-5057) entered by the trial court.

After Ms. Doris E. Mathew died on December 8, 2009, probate commenced on January 8, 2010, and Donna E. DuBois, the decedents daughter and sole beneficiary, was appointed

personal representative of the Estate. *CP 3280, 3733.* On April 26, 2010, Mr. Spice filed his first creditor's claim against the Estate for $8,000,000.00, which claim was rejected by the Estate and on August 2, 2010, Mr. Spice filed his first lawsuit against the Estate. *Id.; CP 3731-3763.*

1. <u>First Trial and Appeal:</u> On September 17, 2012, a jury apportioned split interests in various properties between Mr. Spice and the Estate. *CP 3280.* The first trial court found that Mr. Spice had “little or no prior experience in being a project manager/developer of a commercial warehouse facility and/or cancer treatment center”. *CP 4701.* Following an appeal by Mr. Spice, the Court of Appeals affirmed the decision. *Spice v. DuBois, 192 Wn. App. 1054, 4, 6-7 (2016) (unpublished).* Thereafter, Mr. Spice filed additional claims and lawsuits against the Estate and various respondents.

2. <u>Summary Judgment and Second Appeal:</u> The additional lawsuits included claims for alleged wages, claims of other individuals who had assigned their alleged claims to Mr.

Spice, alleged oral contracts with Ms. Mathews, among other claims. *CP 3281-3282; see also various complaints and amended complaints: CP 1, 409, 482, 500, 516, 537, 792.*

On October 30, 2015, the trial court entered an Order Granting Summary Judgment which dismissed all claims by Mr. Spice. *CP 3283.* Following an appeal, the Court of Appeals affirmed dismissal of most of the claims, including claims of an oral contract, reimbursement of property taxes, contribution to the LLC, and breach of fiduciary duty regarding misappropriation of funds. *CP 3289-3290.* However, the Court remanded a limited issue to the trial court. *CP 3292.*

3. Second Summary Judgment and Third Appeal: While the second appeal was pending, Mr. Spice filed another lawsuit against the Estate. *CP 3739.* After amending the complaint, Mr. Spice alleged "fraudulent misrepresentation, fraudulent transfer act violations, agents acting without proper authority, agent acting without bond, failure to provide funds for litigation and development costs, waste, and a violation of

the Consumer Protection Act. *CP 3739.* The trial court dismissed the claims on summary judgment and Mr. Spice filed his third appeal.

On appeal, the Court of Appeals found material facts exist on claims for waste and fraudulent transfer, but affirmed the dismissal of claims involving agents acting beyond their authority and fraudulent misrepresentations. *CP 3753.*

4. <u>Trial.</u> Following remand of the limited issues from the second and third appeals, trial was held before the Honorable Judge Bryan E. Chushcoff on October 1, 5, 6, and 7, 2020. *CP 5038.*

The trial court found that at the time of the jury trial at the end of 2012, "the jointly owned properties consisted of very old buildings. Mr. Spice lived on the 11003 Property at that time, before moving onto the property across from the 11003 Property. Mr. Spice testified there were issues with a sinking foundation on one structure, at least one roof leak, a hot water leak in one unit, mold, and other general disrepair of jointly

owned properties." *CP 5041; RP 233-235;239.* Mr. Spice acknowledged that the "properties were old and dilapidated and probably had the water damage for quite some time – even Mr. Spice said that – because of the black mold problems." *RP 431.*

From January 7, 2013, until March 31, 2014, the properties were managed by a professional management company to manage the jointly owned properties on behalf of the Estate and Mr. Spice. *CP. 5041-5042.* During that time, "Mr. Spice monitored the properties" and "either lived on the 11003 Property, or across from it, during the time periods relevant to this case. Prior to the 2012 trial, and since then, Mr. Spice was aware of who the tenants were, what units were rented, and the condition of the jointly owned properties." *CP 5041; RP 249-253.* "Due to the long-standing deteriorating conditions of various rental units" the management company "determined that repairs would be necessary to make certain units habitable. Some units had broken windows, mold, significant garbage left after a tent was evicted, were subject to

vandalism, two units had no heat source, among other issues." *CP 4042; RP 249-253.* However, rents "were not sufficient to rehabilitate the units." One small water leak was identified in October 2013, but the source was unknown and would require an invasive inspection to locate. *CP 5042.* "There were not sufficient funds to pay for this investigation or repairs that might be determined." *Id.*

The professional management company "terminated its management services on March 31, 2014, due to not being able to make units tenantable as a result of insufficient funds, and due to Mr. Spice's ongoing interference with management making it impossible to fully manage the units and tenants." *CP. 5042.*

Sometime between "approximately February 2014 and April 3, 2014, a water pipe burst in one of the 11003 Property triplex units causing significant damage to the unit." *CP. 5042.* At the time, the professional management company was managing the properties. *Id.* The trial court found the "burst

water pipe is not the fault of any party. A water pipe bursting, especially in an old building, is an unfortunate risk of property ownership." *CP. 5043.*

The jointly owned properties remained substantially in the same condition during Ms. DuBois' management "as existed prior to her management, and as existed for years after her management ended." *CP 5043.* Even after a new professional management company was selected by Mr. Spice and approved by the trial court, "No significant rehabilitation of rental has occurred" and "Rental funds have been largely insufficient to make unrented units habitable." *CP 5043-5044.*

The trial court found that Mr. Spice "failed to submit any credible testimony or relevant evidence to support his waste claims, breach of quasi-fiduciary duties, alleged damages or requested remedies." *CP 5046.* "Mr. Spice's testimony was often confusing and unclear. He suggested general damage amounts and remedies, but when asked to clarify his damages to certain properties or rental units, he was unable to do so, and

would attempt to talk about other issues he perceived existed. When asked to identify documents to support his claims and damages, Mr. Spice stated that he needed more time to prepare documents, asserted that documents were allegedly stolen by a party in a different lawsuit Mr. Spice was involved with, or that he gave documents to an accountant that he had difficulty identifying and who was not offered as a witness at trial by Mr. Spice." *CP 5046; RP 217-220.*

During the litigation process, the 11003 Property was sold in bankruptcy proceedings and Mr. Spice received "over $70,000 from the proceeds of that sale, which represented his share of the net proceeds after payment of appropriate encumbrances against the property." *CP 5050; RP 316.* "The bankruptcy proceedings appear to have been fair and appropriately handled and this Court will not engage in a review of those proceedings despite Mr. Spice's position otherwise. Mr. Spice offered no testimony or evidence that he

received less than fair market value for his interest in the 11003 Property." *Id.*

"Mr. Spice's requests for damages and remedies were based upon speculation, irrelevant evidence, irrational understanding of the law and facts, frivolous arguments not well grounded in fact or law, and evidence and testimony that was not credible." *CP 5050.*

Among other findings, the trial court found that Mr. Spice had "grandiose ideas" about the value of his alleged lost development rights of "$78 million, which was just preposterous. Just preposterous." *RP 430.* Mr. Spice was ultimately unsuccessful at trial not because an opposing party did not give testimony to somehow 'make his case,' but due to his case being without merit, which was found throughout the trial court's decision. "Mr. Spice was not credible or persuasive as a witness, and his testimony was largely unbelievable." *CP 5046.*

Credibility issues were found with other witnesses called by Mr. Spice. For example, Mr. Peet was called to try an identify alleged legal violations by the Estate. The trial court found, “Mr. Peet’s testimony was based upon fundamental and incorrect understandings of the law and facts… [it] was not credible, helpful, or reliable.” *CP 5048.*

Another witness, Mr. Riley, who the court found was not timely disclosed as a witness, was allowed to testify about “alleged damages due what Mr. Spice perceived as lost development rights… and a wage claim.” *CP 5050.* The trial court found that “Mr. Riley’s testimony was no credible, helpful, or reliable.” *CP 5051.*

Mr. Spice called another witness, Ms. Drury, who the trial court allowed to testify despite not being timely disclosed as a witness, to try and establish damages. During her testimony, it was discovered that the documents she was relying on were not included with the trial exhibits. Mr. Spice’s attorney stated that the documents were intentionally

removed by Mr. Spice, "We tried to truncate what is apparently a thousand-page report to what – to what we thought was relevant at the time." *RP. 185.* Upon further questioning by the trial court, it was discovered that Mr. Spice apparently added documents that were not part of the final report. *RP 189-190.* Mr. Spice's attorney stated, "It was simply our attempt to try and reduce a 1,200-page document which has far more information that is either not relevant or has been dismissed, and it was our attempt --- once again, it was difficult for us to anticipate at every moment in this litigation where we would end up in trial today, and so we did our best to assemble what we had hoped would be relevant to remove a thousand pages of stuff that the court didn't need to filter through." *RP 192-193.* The trial court found that "Ms. Drury did not offer any testimony that was relevant, helpful or reliable." *CP 5052.*

5. <u>Court of Appeals Decision</u> The Court of Appeals issued an unpublished opinion on August 2, 2022, amended

October 18, 2022, to correct a scrivener's error, affirming the decision of the trial court. *Appendix A, Petition for Review (cited hereinafter as "Op.___").* Mr. Spice's Motion for Reconsideration was also denied.

C. ANSWER TO ISSUES PRESENTED FOR REVIEW AND REASONS THE COURT SHOULD NOT ACCEPT REVIEW

1. The trial court and Court of Appeals correctly interpreted CR 43(f)(1).

CR 43(f)(1) provides that a party may compel the managing agent of the opposing party to attend the trial "solely by notice (in lieu of a subpoena) given in the manner prescribed in rule 30(b)(1) to opposing counsel of record." "CR 43(f)(1) does not expand the subpoena power of a Washington court." *Campbell v. A.H. Robins Co., Inc,* 645 P.2s 1138, 32 Wn. App 98, 100 (1982). "The <u>notice shall state the time and place for taking the deposition</u> and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the deponent or the particular class or group to which the deponent belongs." *CR 30(b)(1), underlining added.* The use of the word "shall" is an imperative command, indicating that the action is mandatory and not permissive. *See State v. Martin,* 137 Wn.2d 149, 155

(1998)*, "us of 'may' and 'shall' in the statute indicates that the Legislature intended the two words to have different meanings: 'may' being directory, while 'shall' being mandatory."*

The "'compulsory' power of a CR 43(f) notice to appear depends rather on the power of the court over the parties to the action, and the expectation that a party faced with sanctions will exercise its own power over its managing agents." *Campbell at 107.* The power to sanction cannot be exercised if no notice to attend was ever given. The compulsory power is significant, a court may strike the answer and enter judgment against the defendant, and face proceedings as in other cases of contempt. *CR 43(f)(3).*

The first time Mr. Spice attempted to call Ms. DuBois to testify was after trial already commenced. *RP 286-289; 364.* Because of the potential drastic sanctions if Ms. DuBois did not testify if compelled, efforts were made to make Ms. DuBois available one afternoon of trial. As the Court of Appeals found, "The Estate responded [to an email request of Mr. Spice's attorney stating he planned to call Ms. DuBois to testify on the next trial date] that DuBois was not available on October 5 due to a medical appointment and that Spice had failed to provide notice as required by CR 43 and CR 30(b)(1). The Estate, however, conveyed that DuBois would 'likely be available after lunch' and that 'we can have her testify after lunch assuming

she is done with the appointment and physically able. Even so, Spice did not call DuBois on that date." *CP at 5580; Op. at 10.* Thereafter, Ms. DuBois was not available and she was not present during almost all of the trial due to medical issues, and efforts to reach her were unsuccessful. *RP (Oct. 6, 2020) at 164; Op. at 10.*

After allowing Mr. Spice to argue whether the trial court had authority to compel Ms. DuBois to testify, the court found "I can't compel her to attend trial… She didn't receive the notice to attend trial nor was she subpoenaed." *RP (Oct. 6, 2020) at 196, 286.*

Mr. Spice admission at trial that he failed to serve either a subpoena or notice to attend trial is dispositive of his Petition for Review. It was his decision not to provide the requisite notice to compel a witness to testify. There is nothing novel or unique about issuing a subpoena/notice to compel witnesses to testify. Mr. Spice is not entitled to a new trial due to his failure to issue the requisite notice.

2. There cannot be substantial compliance when there is noncompliance.

Mr. Spice argues that the trial court had authority to compel testimony because he "substantially complied with Rule 43 and 30(b)(1)" by sending an email after trial already commenced and listing Ms. DuBois on a witness list. *RP (Oct. 7, 2020) at 364.* Mr. Spice's attempt to rely on a Pierce County Superior Court local rule for witness disclosure is not a substitute for a subpoena under the Civil Rules. The local rule provides:

> PCLR 26 Discovery: Disclosure of possible lay and expert witnesses. … (b) Disclosure of Primary Witnesses. Each party shall, not later than the date for disclosure designated in the Order Setting Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.

A witness list is not a "notice" but rather a "disclosure" identifying "possible" witnesses a party "reserves the option to call". That disclosure does not compel attendance. Who a

party "reserves the option to call" and who they "actually" call are two entirely different decisions and subject to different rules. A witness list does not satisfy the notice requirement under CR 43.

The Court of Appeals appropriately found that, "Substantial compliance 'has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute." *Williamson, Inc. v. Calibre Homes, Inc.* 147 Wn.2d 394, 406, 54 P.3d 1186 (2002)) (quoting *In re Habeas Corpus of Santore,* 28 WN. App. 319, 327, 623 P.2d 702 (1981)). In cases of substantial compliance, there was actual compliance, albeit procedurally faulty. *Williamson, Inc.* 147 Wn.2d at 406. But the "failure to comply (through inaction, inadvertence, or in a manner which does not fulfill the objective of the statute), or belated compliance, cannot constitute substantial compliance." *Clymer v. Emp. Sec. Dep't,* 82 Wn. App. 25, 29, 917 P.2d (1996). "Noncompliance with a statutory mandate is not substantial compliance." *Id. (*quoting

Petta v. Dep't of Lab. & Indus., 68 Wn. App. 406, 407, 409-10, 842 P.2d 1006 (1992))." Mr. Spice "never even attempted to notify DuBois under CR 43." *Op. at 17.*

An email after trial commences and a witness list do not constitute "substantial compliance", nor does CR 43 allow for substantial compliance. As the Court of Appeals found, "a witness list merely serves to notify the other party who you may call to testify." *Op. at 17.* Mr. Spice's failure to give notice was willful. A "party's failure to comply with a court order will be deemed willful if it occurs without reasonable justification." *Jones v. Seattle,* 179 Wash.2d 322, 314 P.3d 380, 391 (2014). Mr. Spice offers no justification for his failure to comply with the Civil Rules. Even if there was error by the trial court, it was harmless as Mr. Spice was given an opportunity to present evidence to support his various claims of alleged wrongdoing by Ms. DuBois.

The failure to provide notice would have led to significant prejudice to Ms. DuBois had she been compelled to

testify. First, she physically may not have been able to testify due to health and scheduling issues. Further, notice under CR 43(f)(1) commences critical time limitations in which a protective order can be sought, including an order that might limit the scope or subject matter of examination under CR 30. That right is important given the significant litigation and appellate history by Mr. Spice against the Respondents. To compel testimony under threat of significant penalties, without notice, is contrary to the explicit rights given to the party whose testimony is sought.

The notice also assists a party in trial preparation, including testimony preparation (reviewing dates, exhibits, and other matters) by giving at least ten days' notice of their expected testimony. Because Mr. Spice did not serve the CR 43 notice or a subpoena, critical trial preparation did not occur because it was understood Ms. DuBois was not being called to testify by him and the Respondents relied on the lack of notice as part of its trial preparation efforts.

The failure of providing the date and time at which Ms. DuBois was expected to testify is also crucial. Ms. DuBois was out of state during trial and experiencing health issues such that she was unable to attend most of the trial even though it was broadcast via Zoom. Further, had notice been given, a decision could have been made to have Ms. DuBois testify in person rather than over a Zoom link. Because of the Zoom link, the notice was also necessary for arranging distribution of trial exhibits to witnesses testifying remotely.

The consequences of failing to comply with a proper CR 43 notice are far too serious to allow a witness disclosure to suffice as "substantial compliance". Had Ms. DuBois been compelled to testify, the Respondents would have been substantially prejudiced.

3. The *Burnet* factors are not applicable.

The *Burnet* factors do not apply since the trial court was not excluding evidence or testimony for any reason, such as a discovery violation, some untimely response under CR 37, or

other failure to disclose evidence. *Burnet v. Spokane Ambulance,* 131 Wash.2d 484, 513, 933 P.2d 1036 (1997). Rather, the trial court appropriately refused to compel testimony by issuing penalties because it did not have authority to do so. The Court of Appeals appropriately found, "The trial court was not considering whether to exclude DuBois, but rather was considering whether it had the authority to compel DuBois to testify using the threat of judgment or finding her in contempt. *Burnet* simply does not apply here." *Op. at 18.*

It was not the trial court that stopped Mr. Spice from seeking testimony from Ms. DuBois; rather, it was Mr. Spice's failure to give notice that prevented the trial court from having authority to compel Ms. DuBois to testify. Under Mr. Spice's argument, if he failed to subpoena a witness and a trial court did not compel that witness to testify despite that failure; then, a court should find reversible error. There is no legal authority to support that drastic result.

Mr. Spice's argument that the exclusion is the same as in *Keck, Jones* and *ADA Motors* is without merit. In those cases, the witnesses were apparently prepared and willing to testify, and the issue was failure to comply with disclosure requirements, not failure to issue a proper notice or subpoena.

Even if *Burnett* applied, the willful or "other unconscionable" failure to give notice results in substantial prejudice to Respondents as discussed above. The trial court considered these factors in substantial discussion with counsel about what authority it had under CR 43, Mr. Spice's failure to give notice, additional delay to a trial after prior continuances were given, and the anticipated testimony Mr. Spice expected to obtain from Ms. DuBois. *RP 364-370.* As such, even if *Burnett* applied, the trial court considered the relevant factors before it elected not to compel testimony.

4. The Petition for Review does not meet the standards required by RAP 13.4(b).

Mr. Spice's Petition to this Court ignores an undisputed fact: he did not give any notice to compel attendance of a witness for trial, and now wants that to be the basis for a new trial. His intentional conduct does not meet the standards for review required by RAP 13.4(b), "(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Mr. Spice's Petition to this Court is entirely personal and raises no issues under RAP 13.4(b). Rather, the Petition is an effort to reverse a trial decision that resulted in dismissal of all his claims, a Court of Appeal decision affirming the trial court,

and denial of his request for reconsideration by the Court of Appeals, all so that he can obtain a new trial based upon his own decision not to compel attendance of a witness. Such a result would result in substantial prejudice to the Estate and Respondents which have been engaged in nearly constant litigation by Spice for nearly thirteen years.

5. This Court should award attorneys fees and costs to the Respondents.

Respondents requests an award of attorneys fees and costs as allowed by RAP Title 18.1. RCW 11.96A.150 provides in part, "any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party... The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate".

Respondents have successfully defended against the claims by Mr. Spice. This litigation has resulted in substantial fees and costs that would not have been incurred if Mr. Spice had not brought his unsuccessful claims. An award of attorneys fees in favor of the Respondents is appropriate.

E. CONCLUSION

Civil Rule 1 provides that the civil rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." "Litigation is not intended to be a life-long activity with litigants returning endlessly to our courts." *Burnet v. Spokane Ambulance, 131 Wash.2d 484, 513, 933 P.2d 1036 (1997), dissent.*

Mr. Spice has been endlessly litigating this matter since shortly after the death of Ms. Mathews on December 8, 2009, and he has been fully heard after summary judgments, two trials, and now four appeals. The Court should deny the Petition for Review and award attorneys fees and costs to the Respondents.

I certify this Answer is in 14 point Times New Roman font and contains 4,561 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Respectfully submitted this 3rd day of January, 2023.

HANIS IRVINE PROTHERO, PLLC

/s/ Patrick M. Hanis

____
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I sent a true copy of this document, as follows:

Washington State Supreme Court
PO BOX 40929
Olympia, WA 98504-0929

(VIA E-File)

Ian C. Cairns (VIA EMAIL: Ian@Washingtonappeals.com)

DATED this 3rd day of January, 2023, at Kent, Washington.

/s/ Patrick M. Hanis

____

Patrick M. Hanis, WSBA #31440

HANIS IRVINE PROTHERO, PLLC

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