

No. 67277-1-I and No. 67195-2-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

No. 67277-1-I

RHODA CASSELL, Plaintiff/Appellant

v.

DOUGLAS A. PORTELANCE, M.D. and EASTSIDE INTERNAL
MEDICINE, PLLC
Defendants/Respondents

No. 67195-2-I

In re the Estate of:

DAVID DANIEL FINCH

Deceased.

APPELLANT'S REPLY BRIEF

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR 30 PM 3:35

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	ii
I. Introduction.....	1
II. Allowing Dr. Portelance to Challenge Ms. Cassell’s Appointment as Personal Representative Was Clearly Erroneous Under Established Washington Probate Law.....	2
III. The Fact That Respondent Cries “Fraud” Does Not Invest the Trial Court with Subject Matter Jurisdiction to Hear this Impermissible Will Contest.....	4
IV. Respondent Makes No Argument In Opposition To Appellant’s Assignment Of Error To Judge Eadie’s Order Permitting Dr. Portelance’s Motion For Intervention.....	6
V. CR 60(b) Provides No Authority For Dr. Portelance’s Motion Herein.....	7
VI. Rhoda Cassell did Not Commit A Fraud On Any Person Nor On the Court.....	18
VII. The Court Does Not Need Dr. Portelance To Uphold Its “Honor”.....	23
VIII. Conclusion.....	25

TABLE OF AUTHORITIES

WASHINGTON CASES

Atchison v. Great W. Malting Co., 161 Wash.2d 372,
166 P.3d 662 (2007).....18, 19

Batey v. Batey, 35 Wash.2d 791, 215 P.2d 694 (1950).....16, 17

Cedell v. Farmers Ins. Co. of Washington
157 Wash.App. 267, 277, 237 P.3d 309 (2010).....21

DeHeer v. Seattle Post-Intelligencer, 60 Wash.2d 122,
126, 372 P.2d 193 (1962).....7

Estate of Lint, 135 Wash.2d 518, 957 P.2d 755 (1988).....5

In re Adoption of Hernandez, 25 Wash.App. 447,
455, 607 P.2d 879 (1980).....20

In re Estate of Kordon, 157 Wash.2d 206,
137 P.3d 16 (2006).....4

In re Hoscheid's Estate, 78 Wash. 209, 139 P. 61 (1914).....6

In re J.M.R., 160 Wash.App. 929, 937, N 2,
9 P.3d 3 (2011).....22

In re Perry, 31 Wash.App. 268, 272,
641 P.2d 178 (1982).....20

In re Estate of Peterson, 102 Wash. App. 456,
9 P.3d 845 (2000).....5, 6

In re Estate of Toth, 138 Wash.2d 650,
981 P.2d 439 (1999).....4

In re Upton's Estate, 199 Wash. 447,
92 P.2d 210 (1939).....2, 3, 13

<i>Lindgren v. Lindgren</i> , 58 Wash.App. 588, 596, 794 P.2d 526 (1990).....	22
<i>Peyton v. Peyton</i> , 28 Wash. 278, 68 P.2d 757 (1902).....	15
<i>State Ex Rel. Wood v. Superior Court</i> , 76 Wash. 27, 135 P. 494 (1913).....	6
<i>Thomas v. Bremer</i> , 88 Wash App. 728, 946 P.2d 800 (1997).....	8
<i>Swanson v. Solomon</i> , 50 Wash.2d 825, 314 P.2d 655 (1957).....	20, 21, 22

FOREIGN AUTHORITIES

<i>Campbell v. Kildew</i> , 115 P.3d 731 (Idaho 2005).....	10, 11, 12, 13
<i>Eyak Native Village v. Exxon Corp.</i> , 325 F.2d 773, 777 (9th Cir. 1994).....	10
<i>Kem Mfg. Corp. v. Wilder</i> , 817 F.2d 1517 (11th Cir. 1987)...	12, 13
<i>Lawrence v. Wink</i> , 293 F.3d 615, 627 n.11 (2nd Cir. 2002)...	13, 20
<i>Selway v. Burns</i> , 150 Mont. 1, 429 P.2d 640 (1967).....	14, 22, 23
<i>Sutherland v. Irons</i> , 628 F.2d 978 (6th Cir. 1980).....	13
<i>Universal Oil Prods. Co. v. Root Refining Co.</i> , 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946).....	8, 9, 11

OTHER AUTHORITIES

<i>Freeman on Judgments</i>	15, 17
RCW 4.16.170.....	19
RCW 98.72.....	24

RCW 11.24.010.....	3, 6
RCW 11.36.010.....	19
RCW 98.72.010(1).....	21
CR 24.....	7
CR 60.....	7, 8, 10, 11, 12, 13, 14, 16, 22
FRCP 60.....	11, 12, 13, 14, 16

I. Introduction

Counsel for respondent appears to believe that merely by reciting the word fraud or one of its permutations enough times,¹ these utterances will somehow magically provide authority, which is otherwise sorely lacking, in support of respondent's position. But "fraud" is not a shibboleth or incantation; it is a legal construct with elements that simply are not met under the circumstances of this case. Ms. Cassell did not defraud anyone, either a party or the Court. She had no intent to defraud, caused no one harm, and neither wanted to nor did obtain anything to which she was not lawfully entitled. No Court has ever found Ms. Cassell guilty of any wrongdoing, let alone fraud, nor has anyone ever argued that she was not the correct person to administer her late husband's estate. This fact is conclusively shown by the Order of Judge Eadie immediately re-appointing her after her erroneous removal as personal representative.

There is a very good reason why respondent's brief is long on accusations and short on authority.² Whether based on her husband's will

¹ Counsel for appellant counts 32 such mentions of "fraud", "fraudulent" and the like.

² As will be shown below, those cases cited by respondent that are not absolutely irrelevant uniformly support appellant's position. It is unknown whether respondent's counsel actually read the entire text of the cases cited, but the method of citation, cherry-picking a Court's statements which are believed to support respondent's position while ignoring analysis and holdings clearly in appellant's favor, is less than helpful to this Court, to say the least.

or not, Ms. Cassel has always been the proper personal representative of her late husband's estate.

II. Allowing Dr. Portelance to Challenge Ms. Cassell's Appointment as Personal Representative Was Clearly Erroneous Under Established Washington Probate Law.

Appellant's opening brief sets out in detail undisputed Washington authority for the propositions both that the time has long since run for *anyone* to contest Mr. Finch's will, and that Dr. Portelance was not a person who was *ever* entitled to bring such a will contest. Respondent appears to concede both the standing and timeliness issues. He neither attempts to distinguish, nor, in most instances, even mention the numerous cases cited by appellant which plainly establish that Dr. Portelance has no right to appear for any reason in the probate matter, much less to contest the execution of Mr. Finch's will.

Especially noteworthy in this regard is respondent's absolute failure to comment on *In re Upton's Estate*, 199 Wash. 447, 92 P.2d 210 (1939), which is directly on point in support of appellant's position. The Court held that the defendant in a wrongful death claim brought by the estate has no legally recognizable interest in whom the Court appoints as personal representative. *Id.* at 452-3. Since Dr. Portelance had no recognizable interest in the estate matter, he simply should not have been heard to challenge anything about Mr. Finch's will or the Court's orders.

As the Supreme Court said in *Upton*, “judgments or orders are not set aside to vindicate abstract law.” *Id.* at 453.

In order to avoid the clear and consistent probate law, respondent pretends that his challenge is something other than a will contest. However, when he brought his “motion” before the Court to intervene and set aside the recognition of the will, his allegations were that Mr. Finch lacked the capacity to make a will on the day of his will, and that he, in fact, had not signed the will and that it was not properly witnessed. These are matters that are explicitly listed in RCW 11.24.010, and are precisely the kind of matters that are routinely considered in will contests.

There is thus nothing unusual about Dr. Portelance’s claim here. In every case in which a will is submitted to probate, the petitioner has to attest that the will was freely and voluntarily made and that it was executed properly. Any will contestant challenging the acceptance of a will, of necessity will be asserting that those facts attested to are false. There was simply nothing about Dr. Portelance’s “motion” that distinguishes it from any other will contest (save for the fact, perhaps, that it was filed years too late and that he had no standing to bring it).

Dr. Portelance had no business being heard in probate Court in any matter concerning Mr. Finch's estate. Permitting him to even be heard on the motion was plain error.

III. The Fact That Respondent Cries "Fraud" Does Not Invest the Trial Court With Subject Matter Jurisdiction to Hear This Impermissible Will Contest.

Dr. Portelance appears to recognize that a person actually interested in the estate, like an heir or devisee, would have been barred from bringing a will contest alleging the exact same grounds as did Dr. Portelance and at exactly the same time. However, he claims to have greater authority than would a legitimate heir, precisely because he is a person who has no interest in the estate, but rather is only a disinterested third party trying to vindicate the honor of a defrauded Court. This not only makes no sense whatsoever, but it is not the law.

As set out in detail in appellant's opening brief, at pages 28 to 31, the subject-matter jurisdiction of the probate Court is entirely circumscribed by the probate statutes. *See, e.g., In re Estate of Kordon*, 157 Wash.2d 206, 137 P.3d 16 (2006); *In re Estate of Toth*, 138 Wash.2d 650, 981 P.2d 439 (1999). Dr. Portelance appears to be saying that these statutory rules do not apply to him precisely because he is not "interested" in the will, but is only a well-meaning stranger attempting to disclose a

"fraud on the Court". Not surprisingly, there is no Washington authority that even vaguely suggests such a principle.

In re Estate of Peterson, 102 Wash. App. 456, 9 P.3d 845 (2000), states the controlling law, which is decidedly contrary to respondent's position. There, heirs of the deceased filed a will contest outside the four-month limitation period, urging the Court to apply the "discovery rule" to extend the limitation period. The Court of Appeals flatly rejected such a suggestion, plainly stating that the violation of the four-month time limitation divested the Court of subject matter jurisdiction over the will contest. *Id.* at 462 and Fn. 7.

The claimants there urged that the form of limitation period might be extended in matters involving "fraud of the grossest kind." The Court of Appeals noted that, although the Supreme Court in *Estate of Lint*, 135 Wash.2d 518, 957 P.2d 755 (1988) allowed claimants to go outside the statutory framework to declare the marriage of a testator invalid, it did not, "however, circumvent the Legislature's time limit for filing will contests, in spite of allegations of fraud." *Id.* at 465. It should be noted that the claimants in *Peterson* alleged that the marriage of the testator to his third wife and primary heir under his will was a sham in that the purported wife, part of a notorious gypsy family, procured the will by means of fraud, undue influence and other misconduct as part of a scheme essentially to

steal her late husband's money.³ The Court steadfastly adhered to previous Supreme Court holdings to the effect that will contests are statutory proceedings and the jurisdiction of the Court extends only so far as permitted by statute. The Court quoted from *In re Hoscheid's Estate*, 78 Wash. 209, 139 P. 61 (1914), which in turn quoted from *State Ex Rel. Wood v. Superior Court*, 76 Wash. 27, 135 P. 494 (1913), to the effect that, "All contests *based upon any cause* affecting the validity of the will must be commenced within ... [the time limited], and if not so commenced the probate becomes a final adjudication as to the validity of the will, binding upon the whole world, ...". Quoted in *Peterson, supra* at 467. RCW 11.24.010 plainly states, "[i]f no person shall appear within the time under this section, the probate or objection of such shall be binding and final." The Court in *Peterson* is clear that binding and final means what it says; it applies to all comers, including Dr. Portelance. The trial Court was without jurisdiction to determine Dr. Portelance's "motion".

IV. Respondent Makes No Argument In Opposition To Appellant's Assignment Of Error To Judge Eadie's Order Permitting Dr. Portelance's Motion For Intervention.

As stated in detail in appellant's opening brief, the question of the ability of Dr. Portelance to appear in the estate case is jurisdictional. In

³ The conduct alleged is worse in every way than the "fraud" Dr. Portelance urges against Ms. Cassell.

the trial Court, Dr. Portelance argued that CR 24 provided the necessary authority for intervention. That justification has apparently been abandoned by respondent in this Court. One explanation of this perhaps can be seen in CR 24(a)(2) itself, which requires that the applicant for intervention “claims an interest relating to the property or transaction which is the subject of the action”. As Dr. Portelance has repeatedly insisted, he has no such interest in the estate, and CR 24 would be of no assistance in justifying Judge Eadie’s order permitting intervention.

In its brief to this Court, Dr. Portelance cites no authority opposing appellant’s argument that Judge Eadie was in error in granting respondent’s motion to intervene. “Where no authorities are cited in support of a proposition, the Court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wash.2d 122, 126, 372 P.2d 193 (1962).

V. **CR 60(b) Provides No Authority For Dr. Portelance’s Motion Herein.**

Respondent apparently relies solely on CR 60(b) as authority for the proposition that there was no error in allowing Dr. Portelance to intervene in the case of an estate in which he had no interest past the time permitted by the applicable statutes. This reliance is entirely misplaced.

In the first instance, Washington law is directly to the contrary. In *Thomas v. Bremer*, 88 Wash App. 728, 946 P.2d 800 (1997), a purported owner of land sued a second purported owner to quiet title. One of the plaintiff's arguments was that the judgment in an earlier proceeding not involving him, and which quieted title in the defendant should have been vacated by the trial Court pursuant to CR 60 (b). Construing the language of the rule itself the Court rejected that argument:

[Plaintiffs] cannot make use of CR 60(b) because it only authorizes the Court to relieve a party or its legal representative from a final judgment on motion. A stranger to the proceeding cannot ask the Court to vacate its final judgment. ... As the Thomases [like Dr. Portelance] emphasize, they were not a party to [the earlier action].

Id. at 734 (citation omitted.)

Nor does any of the foreign cases cited by respondent stand for the proposition that a non-party, with absolutely no interest in an estate, can move pursuant to CR 60 (b) to set aside an order or judgment of a probate Court. In the first instance, these cases are distinguishable as not being concerned with wholly statutory proceedings as will contests are in Washington. Equally important, a review of the analysis and holdings of these cases clearly shows that they support Ms. Cassell's position.

Respondent's citation of the first such case, *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946), for the proposition that "Anyone should be welcome to [bring

evidence of fraud to the attention of the Court] merely as amicus curiae” (Resp. Br. at 23) is so far from the mark as to practically be intentionally deceptive. The case certainly doesn’t imply that anyone can come in off the street and act as a kindly volunteer amicus curiae.

This was a case for patent infringement which was decided for the Plaintiff in the trial Court. The judgment was affirmed in the Appellate Court, and the same plaintiff brought other suits against other defendants on the same grounds. A criminal investigation of one of the appellate judges determined that he had been bribed to obtain, among other things, a favorable ruling in this patent infringement case. The Circuit Court itself appointed an amicus curiae to investigate the situation and appointed a master to determine the facts. The master found that there had been fraud in procuring the appellate decision in this matter.

It was in this context that the Supreme Court discussed a Court’s inherent power to investigate fraud. The decision to permit participation by the defendants in the other lawsuits, was based on the fact that the Federal Court may bring before it “by appropriate means all those who may be affected by the outcome of its investigation”. *Id.* at 580. That the other defendants were “affected” by the investigation was clear. They were being sued on precisely the same ground as was Root Refining, and Universal Oil was using the purchased appellate decision as authority

against them. This is a far cry from somebody wandering in off the streets to take part in a lawsuit that does not concern him in any way.

Each other example cited by defendants likewise permits intervention only by those directly affected by the ruling in question. For example, in *Eyak Native Village v. Exxon Corp.*, 325 F.2d 773, 777 (9th Cir. 1994), one of the cases arising out of the Exxon Valdez disaster, members of some of the classes who were claimed to be barred from proceeding on the basis of a consent decree entered into between the Federal government, the state of Alaska, and Exxon, alleged that the state participated in the consent decree because of a conflict of interest. Since enforcement of the consent decree would completely bar their independent litigation of the matter, their interest in the original consent decree is obvious.

To the same effect is the Idaho case cited, *Campbell v. Kildew*, 115 P.3d 731 (Idaho 2005). That case concerned the judicial confirmation of a sham arbitration in order to produce a Court order which would give developers a “Court order” exception to the requirements of the county code which had to be met prior to subdividing and developing land. The intervening parties, bringing a Rule 60(b) motion to set aside the confirmation of the arbitration were adjoining landowners who had

standing according to the Idaho Court as “non-parties *directly affected* by the Court’s confirmation of a sham arbitration award.” *Id.* at 646.

As the Court went on, “Several Federal Circuits have held that a non-party has standing to bring a Rule 60(b) motion so long as the non-party was directly affected by the judgment sought to be set aside. *Id.* at 646, listing several of the cases cited by respondents here.⁴ Nonetheless, despite the adjoining landowners’ clear interest in the matter, the Idaho Court ruled that they likely did not have standing pursuant to Idaho Rule 60(b)(3) (identical to CR 60(b)(4)) as that rule was intended to relieve only a “party or his legal representative” from a final judgment. Rather, the Court found that the adjacent landowners had standing pursuant to Rule 60(b)(6), a section identical to a section of FRCP 60(b)(6) stating that “This rule does not limit the power of the Court to entertain an independent action or relieve a party from a judgment, order or proceeding, ... or to set aside a judgment for fraud upon the Court.” The Washington Civil Rule has no counterpart to this last phrase. Rather, CR 60(c), the analogous section in Washington states merely, “This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order or proceeding.” The Idaho rule, like

⁴ Indeed, it appears that the cases cited by respondents were discovered by “Shepardizing” *Universal Oil*, and simply discarding those parts of the various opinions that clearly go against them.

the Federal Rule, and unlike Washington's CR 60, explicitly recognizes the independent right of the Court to set aside a judgment for what is termed a "fraud on the Court".

The Idaho Court in *Campbell* cites *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517 (11th Cir. 1987) as distinguishing between standing under FRCP 60(b)(3) (identical to CR 60(b)(4) and FRCP 60(b)(6) (the "fraud on the Court" clause Washington's rule does not contain). The Court notes that rules like CR 60(b)(4) in terms are intended to relieve a "party or his legal representative from a final judgment." A legal representative consists of individuals "in a position tantamount to that of a party or whose legal rights were otherwise so intimately bound up with the parties that their rights were directly affected by the final judgment, citing *Campbell* at 647, citing *Wilder* at 1520. It is beyond obvious that Dr. Portelance does not fit into this category.

Likewise, even as to standing under FRCP 60(b)(6), the Idaho Court quotes *Wilder* as follows:

"There are cases that allow standing to non-parties ... but none of them even suggest that a District Court must provide standing to every *non-party* who makes a Rule 60(b) motion that asserts that there has been a fraud on the Court. In no case presented to us has the Court provided standing to a non-party unless that non-party's rights were directly compromised by the final judgment. *Thus, barring extraordinary circumstances (and we find none here), a non-party only has standing to raise a challenge of fraud on the*

Court if the non-party's interests are directly affected by the final judgment.

Id. at 520-21 (citation omitted) (emphasis added). *Campbell, supra*, at 738.

No right of Dr. Portelance's was in anyway affected by the order appointing Ms. Cassell personal representative of her late husband's estate. As our Supreme Court stated in *Upton, supra*, Dr. Portelance had no interest whatsoever in who was appointed the personal representative of the estate that sued him. Other cases cited by respondent are to the same effect. Thus, in *Lawrence v. Wink*, 293 F.3d 615, 627 n.11 (2nd Cir. 2002), the precise footnote cited by respondents, the Court notes that a non-party can bring a Rule 60(b) motion when its interests are "strongly affected" or "directly affected". Dr. Portelance, of course, does not fit in that category.

The final cases from foreign jurisdictions cited by respondent are of no more help to respondent's cause. In *Sutherland v. Irons*, 628 F.2d 978 (6th Cir. 1980), the lawyer in a civil rights case told the Court that he would repay the Medicaid lien out of his portion of the settlement funds. Based on this assertion, the Court entered an order of allocation of the settlement proceeds. The lawyer never paid back Medicaid, and Medicaid moved to set aside the allocation order based on

the lawyer's fraud. Again, the order in question directly affected the interests of the non-party.

In *Selway v. Burns*, 150 Mont. 1, 429 P.2d 640 (1967) (the only estate case cited by respondent) a settlement was made in a civil case against an estate by the estate's personal representative and the plaintiff and was approved by the Court. The executor told the Court that the beneficiary of the estate was in agreement with the settlement. In fact, the plaintiff and the executor hid the existence of the lawsuit from the beneficiary, resulting in a judgment against the estate which directly diminished her recovery from the estate. The Montana Court affirmed the granting of the beneficiary's motion to set aside the verdict. Its holding was again explicitly based on that section of Rule 60(b) not present in the Washington rule which expressly reserves the power of the Court to set aside a judgment for "fraud upon the Court". *Id.* at 8. Even under this rule, however, the Montana Court held that it is not every allegation of fraud that can be attacked in this way. "The fraud that moves a Court of equity to exercise its inherent power to vacate judgments has been described as that which prevents the unsuccessful party from having a trial or presenting its case fully." *Id.* at 8 (citation omitted).

It is thus apparent that respondent relies on a number of cases from foreign jurisdictions, none of which supports the position that a complete

stranger to the estate, having no interest therein, can intervene to set aside the appointment of a personal representative. The Washington cases cited by respondent are of no greater help. *Peyton v. Peyton*, 28 Wash. 278, 68 P.2d 757 (1902) is a case in which a man's first wife seeks to have a divorce he obtained *ex parte* invalidated. The holding of the case is that the wife could not be heard in a proceeding to set aside the divorce, both because she sought relief too late, and because her independently filed lawsuit was a prohibited collateral attack on the judgment. (The facts of the case are extremely complex, and the turn of the century syntax makes the Court decision less than crystal clear.) In setting out this holding, the Court states in passing the distinction between a collateral attack on a judgment by a party and one by a non-party that respondent seeks to use as authority for his position. The Court quotes from *Freeman on Judgments* as follows:

“Whenever a judgment or decree is procured through the fraud of either of the parties or by the collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained.”

Quoted in *Peyton*, at 299 (emphasis added). This, of course, has nothing to do with this case, as not even respondent has alleged that Ms. Cassell had any purpose to defraud anyone. Nor, as will be shown in greater detail below, did she commit any kind of fraud.

Batey v. Batey, 35 Wash.2d 791, 215 P.2d 694 (1950) is of no more help to respondent, and would only be cited by one who had either not read it, or hoped that this Court would not. In the first instance, the case was not concerned with a direct attack as would be, for example, a Rule 60(b) motion to set aside a judgment filed in a lawsuit itself. Rather, it involved a separate action brought by a formerly incompetent mentally ill man against his wife and the guardian appointed upon his wife's petition. The former incompetent alleged that the guardian had paid out of the guardianship estate unjustified payments of his wife's separate obligations, including money to enable the wife to pay expenses connected with the birth of an illegitimate child. He also alleged that the guardian had negligently failed to maintain certain personal property, resulting in its loss. As stated by the Court, the questions raised in the *Batey* case were:

(1) Does this action constitute a collateral attack on the order of the probate Court approving the guardian's final account, and (2) if so does the complaint allege facts sufficient to entitle appellant to collaterally attack this order.

Id. at 795. The Court found that it was a collateral attack, and that such a collateral attack could not be maintained. Rather, the Court indicated the attack on the order approving the disbursements should have been made on a motion to set aside or vacate the order under the statutory correlate of the present CR 60(b). The plaintiff argued that the prohibition against a

collateral attack had an exception for fraud. It was only in this context that the Court considered and used the term “fraud on the Court” in the snippet quoted by respondent. However, the remainder of the cited section shows that the Court was, in fact, distinguishing between various types of allegations of fraud.

“The rule is generally stated that a final judgment of the Court of competent jurisdiction is not subject to attack in another judicial proceeding except for fraud. This statement of the rule should be made more explicit by specifying the character of fraud which will justify a collateral attack on a final judgment. It is only where the fraud practiced by the successful party goes to the very jurisdiction of the Court which rendered the judgment that the judgment is subject to attack.”

Id. at 798. The Court makes clear that the reference in *Freeman* to “fraud upon the Court” is used to describe that situation involving “fraud of a character going to the very jurisdiction of the Court preventing it from obtaining the requisite power to entertain or decide the issues in controversy.” Quoted in *Batey* at 799. The Court goes on to quote further from *Freeman* distinguishing the type of fraud that vitiates the Court’s jurisdiction from “fraud inhering in the proceeding itself, holding that this latter fraud is not available as a grounds for collateral attack.

Dealing as it does with a collateral attack on a judgment, *Batey v. Batey* is, for all practical purposes, merely irrelevant. However, to the degree it has relevance it is only in that however respondent wants to

characterize Ms. Cassell's actions, it is clear that she did not commit a "fraud on the Court" as that is defined by Washington Courts.

VI. Rhoda Cassell did Not Commit A Fraud On Any Person Nor On the Court

The lynchpin of respondent's argument is that, "If Ms. Cassell was not 'the properly appointed' personal representative, she lacked the capacity to file the wrongful death complaint against Dr. Portelance in December 2008. Resp. Br. at 19. (Internal quotes added) The term "properly appointed" is one used in the trial Court by defense counsel and ultimately adopted by Judge Middaugh. Respondent's appellate counsel continues to use this phrase. However, neither in the trial Court nor in this Court does anyone explain what "properly appointed" means, nor is any authority given to support the proposition that the use of this phrase is meaningful or correct. Certainly, *Atchison v. Great W. Malting Co.*, 161 Wash.2d 372, 166 P.3d 662 (2007) provides no such authority. That case turned on the language of the statute of the limitation tolling statute, relating to the incapacity of a person "entitled to bring an action". The personal representative of the estate in question was the daughter of the deceased. At the time of his death, the undisputed date of accrual of the cause of action, the daughter was a minor. She argued that the statute of limitations should not begin to run against her because of her incapacity as

a minor, but rather should start to run at her 18th birthday. However, the Supreme Court noted that the tolling statute applies only to “the person entitled to bring an action. At the time of the decedent’s death, the daughter, being a minor, could not have been appointed personal representative because of her minority. RCW 11.36.010. Therefore, the Court ruled that the daughter was not a person “entitled to bring an action, since only the personal representative can bring a wrongful death action.

Atchison clearly has no application here. Ms. Cassell was the personal representative of her husband’s estate at the time she filed the lawsuit, having been appointed by order of a Court having jurisdiction to enter it. The filing and service of the lawsuit tolls the running of the statute of limitations. RCW 4.16.170. Respondent provides no persuasive authority as to why Ms. Cassell’s later removal should undo the filing of the lawsuit, an act clearly done by the personal representative in her fiduciary capacity for the benefit of the estate.

Respondent’s argument continues that Ms. Cassell’s appointment was not “proper” because it was induced by fraud, and concludes that this fraud must have consequences and that the only “way the fraud Ms. Cassell committed will *have* real consequences is if this Court affirms the dismissal of the wrongful death complaint”. Resp. Br. 22. Neither of these positions is true. Although it is apparently easy for respondent’s

counsel to bandy about accusations of fraud, apparently it is more difficult to look up the actual elements of fraud. In the first instance, there is no evidence whatsoever that Ms. Cassell had an intent to defraud anyone. As stated in *Lawrence v. Wink, supra*, a case cited by respondent, in order to plead fraud with particularity, a party must allege facts which give rise to a strong inference of fraudulent intent. *Id.* at 626. As respondent explicitly acknowledges, there is no evidence of a fraudulent intent. Indeed, respondent expressly admits a complete ignorance as to Ms. Cassell's purpose in seeking probate of the will. Resp. Br. at 20, n. 7.

Washington law likewise requires an intent to defraud. The often cited case of *Swanson v. Solomon*, 50 Wash.2d 825, 314 P.2d 655 (1957) sets out nine elements necessary to the proof of fraud. Occasionally, as in adoptions cases it has been held that not all nine elements must be shown in order to prove fraud. See, e.g., *In re Adoption of Hernandez*, 25 Wash.App. 447, 455, 607 P.2d 879 (1980). However, as stated in *Hernandez, supra*, fraud does require an intent or calculation to deceive as well as a result that does damage to another or results in an undue and unconscientious advantage being taken of another. See also *In re Perry*, 31 Wash.App. 268, 272, 641 P.2d 178 (1982). Fraud must be shown by clear and convincing evidence. There is no evidence that Ms. Cassell intended to deceive or defraud anyone.

In order to be fraudulent, a misrepresentation must be of a material fact. *Cedell v. Farmers Ins. Co. of Washington* 157 Wash.App. 267, 277, 237 P.3d 309 (2010). A material fact is one that makes a difference or could make a difference in the outcome of a proceeding. See, e.g., RCW 98.72.010(1). Ms. Cassell's statement that the witnesses were present when Mr. Finch signed the will, while material to acceptance of the will to probate, is not in any way material with regard to the appointment of Ms. Cassell as personal representative. While in some cases it might be difficult to say whether a statement might have an effect on a proceeding, here we have conclusive proof. Judge Eadie in fact appointed Ms. Cassell as personal representative knowing that the witnesses did not witness the will, and knowing that the statement to the contrary made in the initial petition for probate was false.

A simple way of explaining the issue of materiality is this: If Ms. Cassell would have petitioned for acceptance of the will into probate with a declaration that stated in terms that it was improperly witnessed, and also stating that she was a surviving spouse and sole heir of the decedent, while it is likely that the will would not have been accepted to probate, it is certain that she would have been appointed personal representative. The issue of the manner of execution of the will has

absolutely no bearing whatsoever on Ms. Cassell's appointment as personal representative.

Finally, in order to be fraudulent, not only must a material misrepresentation be intended to wrongly harm another, it must actually cause damages. *Swanson v. Solomon, supra*, at 828. There is no "fraud in the air". A misrepresentation, whether intentional or reckless, cannot be fraudulent unless it actually harms someone or has some real negative effect. As stated by the Court in *Lindgren v. Lindgren*, 58 Wash.App. 588, 596, 794 P.2d 526 (1990) in order to apply CR 60(b) to vacate a judgment for fraud, "the fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense." Ms. Cassell's misrepresentation could not have such an effect, because there was no one opposing her appointment as personal representative and no one who was prevented by any action on her part from opposing her appointment. Her conduct simply did not cause the kind of damage necessary to vacate a Court order for fraud. See also *In re J.M.R.*, 160 Wash.App. 929, 937, n. 2, 249 P.3d 193 (2011). *Selway v. Burns, supra*, the Montana case cited by respondent is precisely to the same effect. The Court there states that the power to vacate judgments for fraud is limited to a fraud which prevents the unsuccessful party from having a trial or presenting its case

fully. Id. at 8. The Court explicitly stated that mere perjury in the course of a proceeding is not grounds for a collateral attack on a judgment. Id. at 11. Ms. Cassell did not intend to deceive or harm anyone. The misrepresentation concerning the execution of the will is both understandable and completely immaterial to her appointment as personal representative. She in fact harmed no one, and indeed did not receive anything to which she was not entitled, or which she would have received under any circumstances. This is simply not fraud.

VII. The Court Does Not Need Dr. Portelance To Uphold Its "Honor"

In a grand show of artificial sanctimony, Dr. Portelance argues that "The commission of a fraud on the Court surely cannot be overlooked or excused. It must have real consequences. Resp. Br. at 22. While this phrase may have a nice ring to it, it is equally true that there is no authority cited for this proposition. As shown above, there is no authority for the proposition that Dr. Portelance should be allowed to intrude into the estate matter to champion the Court's honor and effect retribution on Ms. Cassell. Equally pompous, equally specious, and equally without authority is Dr. Portelance's conclusion that the only way to make sure that Ms. Cassell suffers the consequences of her evil ways is to dismiss her lawfully filed medical malpractice claim. If indeed Dr. Portelance, rather

than simply trying to weasel out of a wrongful death claim was truly interested solely in upholding the dignity of the Court, he would have brought this matter to the attention of the prosecutor, rather in seeking a resolution which purely benefits himself. The legislature has created an entire chapter of statutes addressing perjury and interference with official proceedings. RCW Ch. 98.72. While Dr. Portelance might well have a difficult time convincing any prosecutor that Ms. Cassell was guilty of perjury, since it is unlikely anyone could prove that a false statement she made was materially false (RCW 98.72.020(1) and RCW 98.72.010(1)), simple false swearing, defined as “making a false statement, which he or she knows to be false, under an oath required or authorized by law”, is likewise illegal, though a gross misdemeanor as opposed to a felony. RCW 98.72.040. My guess is that Dr. Portelance has taken no such action, and that he would be laughed out of the prosecutor’s office if he did. It is the job of the prosecuting attorney to uphold the honor of the Court pursuant to RCW Ch. 98.72. It is hard to believe that anyone in that position would likely see Ms. Cassell’s “offense” as something that is worth any of the State’s time, effort or money. More likely, the prosecutor might consider this matter as did Judge Eadie who, rather than punishing Ms. Cassell, promptly reappointed her to her rightful position as personal representative of her husband’s estate.

VIII. Conclusion

Enough is enough. Respondent's trial counsel began this travesty alleging that Mr. Finch was incompetent and that Ms. Cassel must have forged his will. The facts came out differently and Judge Eadie made no such findings, turning this into an ordinary will contest, in which he wrongly found that Dr. Portelance had an interest, and could participate.

Stripped of his juicy allegations, Respondent nonetheless maintains his hysterical tone, crying "fraud" at everyone who will listen, despite having no proof of fraud or even mentioning the elements of fraud. While the rulings below unfortunately show that you can fool some of the people some of the time, it is time for this Court to end this charade.

Rhoda Cassell is and always has been the proper person to serve as the personal representative of her beloved husband's estate. She lawfully filed the action alleging that Dr. Portelance was a cause of his death. This Court should reverse the decisions below and remand this case to the Superior Court for the trial to which Ms. Cassell is entitled.

Dated this 29th day of March, 2012.

Respectfully submitted:



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Counsel for Appellant

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the State of Washington, that on this 30th day of March, 2012, I sent for delivery a true and correct copy of **Appellant's Reply Brief** via legal messenger and via electronic mail to:

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