73037-1

73037-1

No. 73037-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Estate of LOLA ELIZABETH MOONEY, Deceased

JAMES CHARLES HOWARD, Appellant,
v
ELIZABETH ANN COVEY, Respondent

BRIEF OF RESPONDENT

Joshua B. Locker
Attorney for Elizabeth Ann Covey,
Respondent

WSBA #38719
2442 NW Market Street, #236
Seattle, Washington 98107
Phone: (206) 377-9168
Fax: (206) 282-6957
E-mail: josh@lockerlawoffice.net

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUN 22 AM 9: 33

TABLE OF CONTENTS

Introduction..... 1
Responses to assignments of error..... 2
Statement of the Case..... 3
Argument..... 11
Conclusion..... 27

CASES

Black v. Dept. of Labor & Industries, 131 Wn.2d 547 (1997)..... 19, 20, 21, 22
Continental Sports Corp. v. Dept. of Labor & Industries, 128 Wn.2d 594 (1996)..... 19, 20
Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801 (1992)..... 11
Cox v. Helenius, 103 Wn.2d 383 (1985)..... 13
Crisp v. Groll, 126 Wn.App. 18 (2005)..... 18, 19
Erection Co. v. Dept. of L&I, 121 Wn.2d 513 (1993)..... 12
Ha v. Signal Electric, Inc., 182 Wn.App. 436 26
Kilian v. Atkinson, 147 Wn.2d 16 (2002)
King County v. Taxpayers of King County, 104 Wn.2d 1 (1985)..... 13
Miller v. City of Tacoma, 138 Wn.2d 318 (1999)..... 11
Overhulse Neighborhood Assn. v. Thurston County, 94 Wn.App. 593 (1999)..... 13, 17
In re Palucci, 61 Wn.App. 412 (1991)..... 19, 22, 23
Robinson v. Safeway Stores, Inc., 113 Wn.2d 154 (1998)..... 11, 23
Rozner v. City of Bellevue, 116 Wn.2d 342 (1991)..... 11
State v. Clark, 129 Wn.2d 805 (1996)..... 12
Thayer v. Edmonds, 8 Wn.App. 36 (1972)..... 23
Union Bay Preservation Coalition v. Cosmos Devel. & Admin., 127 Wn.2d 614 (1995)..... 15, 16, 17, 18
In re Estate of Van Dyke, 54 Wn.App. 225 (1989)
Vasquez v. Dept. of Labor & Industries, 44 Wn.App. 379 (1986)..... 19, 22
Witt v. Port of Olympia, 126 Wn.App. 752 (2005)..... 24

STATUTES AND COURT RULES

RCW 11.02.005..... 12
RCW 11.24.010..... 1, 2, 3, 5, 6, 9, 11, 12, 13, 14, 16, 17, 18, 18, 21, 22, 23, 25, 26, 27
RCW 11.96A.090..... 5, 6
RCW 22.44.010..... 3, 25, 26
RCW 34.05.010..... 15
RCW 34.05.542..... 15
RCW 36.70C.040..... 17
RCW 51.52.110..... 19, 21, 22
RCW 64.04.005 (former)..... 18
CR 2A..... 3, 25, 26

1. Introduction

RCW 11.24.010 mandates that will contestants "shall personally serve the personal representative within ninety days after the date of filing the petition." On October 8, 2013, Appellant James Howard delivered a summons and will contest petition to Respondent Elizabeth Ann Covey's probate attorney. Mr. Howard did not personally serve Ms. Covey as prescribed by the statute. The King County Superior Court subsequently dismissed Mr. Howard's petition on grounds of insufficiency of process.

Mr. Howard argues that the Superior Court erred in not applying the doctrine of substantial compliance to RCW 11.24.010. Mr. Howard's thirty three-page brief neglects to cite or acknowledge RCW 11.24.010's remaining language. The statute continues: "If, following filing, service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations." RCW 11.24.010 contains an express legislative mandate that precludes the application of the doctrine of substantial compliance. The Superior Court properly dismissed Mr. Howard's action.

Mr. Howard also argues maintains that his counsel entered into an oral substitute service agreement with Ms. Covey's former counsel. Additionally, Mr. Howard argues that Ms. Covey waived

her affirmative defense of insufficiency of process. The Superior Court find insufficient evidence of a substitute service agreement. There was also no evidence that Ms. Covey engaged in conduct constituting waiver. The Superior Court's factual findings were supported by the substantial evidence. Ms. Covey respectfully asks this Court to affirm the Superior Court's order of dismissal.

2. Responses to Assignments of Error

No. 1. RCW 11.24.010 provides that a will contestant "shall personally serve the personal representative within ninety days after filing the petition." The statute goes on to prescribe: "If, following filing, if service is not so made, the action is deemed not to have been commenced for purposes of tolling the statute of limitations." RCW 11.24.010 sets forth an unequivocal legislative directive. The doctrine of substantial compliance cannot displace its express personal service requirements.

No. 2. Because RCW 11.24.010 mandates strict compliance, it is unnecessary to reach the question of whether Mr. Howard substantially complied with the statute by serving his will contest petition upon Ms. Covey's probate attorney.

No. 3. The substantial evidence supports Judge Rietschel's finding that Ms. Covey's probate attorney did not orally agree to

accept service of original process on her behalf. The unrebutted evidence also shows Ms. Covey did not authorize her attorney to accept service. Further, CR 2A and RCW 22.44.010 both require courts to disregard contested oral agreements between parties or attorneys.

No. 4. The substantial evidence supports Judge Rietschel's finding that Ms. Covey did not waive her defense of insufficiency of process. Ms. Covey raised the affirmative defense in her initial responsive pleading. She engaged in no dilatory or inconsistent conduct that would warrant a finding of waiver.

3. Statement of the Case

On May 28, 2013, Respondent and Personal Representative Elizabeth Covey commenced the probate of Lola Mooney's estate. (Superior Court Docket No. 32, Exh. A; Docket No. 31.)[1] Ms. Covey was represented by attorney Angel Vasilev. (CP 22.)

On July 19, 2013, Mr. Howard's attorney, Candace Wilkerson, sent Mr. Vasilev an email notifying him that Mr. Howard intended to bring a will contest. (CP 29.) Mr. Vasilev responded on

---

1. Ms. Covey has submitted supplemental Designations of Clerks' Papers at the time of this filing. Ms. Covey references the King County Superior Court docket number in this response brief. She will submit an amended brief replacing citations to the Superior Court docket with Clerk's Papers page numbers upon issuance of an Index to Clerk's Papers.

July 22, 2013:

> I received your email in the above-captioned matter [the probate]. Please forward any further documents to the address below.

(CP 30.) Ms. Wilkerson did not ask Mr. Vasilev if he would accept service of original process on Ms. Covey's behalf. Mr. Vasilev also did not make such an offer. Mr. Wilkerson responded later that day: "Thanks for letting me know. I will do so." (Id.)

On August 6, 2013, Ms. Wilkerson forwarded Mr. Vasilev filings from two earlier proceedings involving Mrs. Mooney and Mr. Howard.[2] (CP 35, 36.) Ms. Wilkerson did not send Mr. Vasilev any pleadings pertaining to a prospective will contest. (Id.) She also did not raise the subject of service. (Id.)

On October 8, 2013, a process server delivered a summons and will contest petition (the "Will Contest Petition") to Mr. Vasilev's office. (CP 24.) Mr. Vasilev had not agreed to accept service of original process for Ms. Covey. (Docket No. 33.) Ms. Covey also had never authorized Mr. Vasilev to accept service on her behalf. (Docket No. 31.) Mr. Howard did not personally serve his

---

2. The first proceeding, King County Superior Court Case No. 11-2-10011-1 SWA was a lawsuit by Mrs. Mooney against Mr. Howard for conversion and breach of fiduciary duty. (CP 35-36.) The case settled after entry of partial summary judgment against Mr. Howard and mediation. (Id.) The second proceeding, King County Case No. 12-4-02852-1 SEA, was a guardianship action that was open at the time of Mrs. Mooney's death. (Id.)

petition on Ms. Covey. (Docket No. 33.)

Mr. Howard filed his Will Contest Petition on October 13, 2013. TEDRA requires that will contests be commenced as separate actions.[3] Mr. Howard did not initiate a new action. (CP 87.) Instead, he improperly filed his Petition Contesting Will within the existing probate. (Id.)

Mr. Vasilev never represented Ms. Covey in the will contest. (14:20-25.) On November 6, 2013, a different lawyer, Sheila Ridgeway, appeared in the probate as Ms. Covey's litigation counsel. (Docket No. 32, Exh. A.) Both Mr. Vasilev and Ms. Ridgeway withdrew on December 3, 2013. (Id.) On January 21, 2014, Ms. Covey filed her response to the Will Contest Petition. (CP .) Ms. Covey expressly pled as affirmative defenses RCW 11.24.010 and insufficient service of process. (CP 199.)

On September 9, 2014, Mr. Howard filed a new TEDRA petition seeking to remove Ms. Covey as personal representative of Mrs. Mooney's estate (the "Removal Petition").

On September 24, 2014, Ms. Covey filed a motion to dismiss Mr. Howard's will contest pursuant to RCW 11.24.010 and RCW

---

3. RCW 11.96A.090 was amended in January 2013 to provide that all TEDRA suits "must be commenced as a new action. Once commenced, the action may be consolidated with an existing proceeding upon the motion of a party for good cause shown."

11.96A.090. (Docket No. 32, Exh. B.) Commissioner Carlos Velategui granted Ms. Covey's motion on October 23, 2014, and dismissed the will contest under RCW 11.96A.090. (CP 313.) Commissioner Velategui did not reach the question of dismissal under RCW 11.24.010. (Id.)

On November 21, 2014, Judge Jean Rietschel revised and vacated the dismissal order. (CP 422.) Judge Rietschel also consolidated the will contest with the removal action. (Id.) On December 19, 2014, Commissioner Velategui summarily dismissed Mr. Howard's removal action. (Docket No. 36A.)

On December 11, 2014, Ms. Covey filed a new motion to dismiss the will contest under RCW 11.24.010. (CP 1.) Ms. Covey submitted a declaration stating that she never authorized Mr. Vasilev to accept original service on her behalf. (Docket No. 31.) Mr. Vasilev submitted a declaration stating that he could not recall giving Ms. Wilkerson or her assistant his agreement to accept original service and that he had no reason to believe any such conversation ever took place. (Docket No. 32.)

Mr. Howard filed his opposition papers on December 29, 2014. Mr. Howard asserted in his opposition brief:

> Mr. Vasilev sent Ms. Wilkerson an email dated July 22, 2013, informing her that Ms. Wilkerson should serve him with "any further documents" at the physical address listed in his email.

(CP .) As noted above, Mr. Vasilev's email did not state this. (CP 11:8.) Rather, Mr. Vasilev merely told Ms. Wilkerson to "forward" him "any further documents" pertaining to the anticipated will contest. (CP 30.)

Mr. Howard's opposition brief went on to assert:

> Ms. Wilkerson also asked [Mr. Vasilev] whether she should have it served upon him or upon his client, Ms. Covey. The question was asked during a phone conversation with Ms. Vasilev before the actual date of filing.

(CP 11:20.) Mr. Howard's brief cited to Ms. Wilkerson's supporting declaration, which set forth the same averments. (CP 23.) Neither the brief nor Ms. Wilkerson's declaration actually asserted that Mr. Vasilev agreed to accept service in a phone call with Ms. Wilkerson. (Id.)

Mr. Howard also submitted a declaration signed by Mr. Wilkerson's legal assistant, Timothy Folkerth . (CP 42-45.) Mr. Folkerth stated that on October 8, 2013, Mr. Vasilev gave his telephonic authorization to accept service of original process on Ms. Covey's behalf. (Id.)

Mr. Howard's opposition brief set forth three legal arguments. (CP 9-20.) First, he argued that the doctrine of substantial compliance should apply to RCW 11.24.010 and that he met this standard. (Id.) Second, Mr. Howard contended that Mr. Vasilev had

entered into an enforceable substitute service agreement. (Id.) Third, Mr. Howard asserted that Ms. Covey waived her right to challenge the sufficiency of his service. (Id.)

Judge Rietschel ordered an evidentiary hearing on Ms. Covey's dismissal motion. Hearing took place on January 23, 2015. Mr. Folkerth did not appear to testify. (RP, 3:16-20) He also did not make himself available to give telephonic testimony. (Id.)

Mr. Vasilev testified by phone. (RP 6:15-16:14.) Mr. Vasilev was clear that contrary to Mr. Howard's representations, his July 22, 2013 email to Ms. Wilkerson did not constitute an agreement to accept service of original process:

> Question: Did you consider that email to be your agreement to accept original service of process on behalf of...?
>
> Answer: No. Because at that point, it was just a conversation between me and Ms. Wilkerson regarding the status of the case. Nothing was filed.

(RP, 7:22-8:1.)

Mr. Vasilev repeatedly stated he had no recollection of giving Ms. Wilkerson his telephonic authorization to serve him original process. (RP, 7:1-11:3.) Mr. Vasilev also repeatedly stated that he would only have given such authorization in writing and pursuant to Ms. Covey's instruction. (Id.) Ms. Wilkerson then asked:

> But, Mr. Vasilev, are you saying, then that you and I never had a conversation by phone in which you told--

> in which I asked you if I could serve you personally with the will contest on behalf of Ms. Covey? You're saying we never had that conversation?

Mr. Vasilev responded:

> Like I said previously, Ms. Wilkerson, I don't recollect a conversation like this. It happened seven [sic] months ago. Our practice and our policies in the law firm was to confirm this in writing. So if I did have a conversation, I would have followed up in writing that said we accepted--- will accept service on behalf of our client. If there is such an agreement, you should have access to it.

(RP, 11:14-21.)

Mr. Vasilev testified at the hearing that he also had no recollection of telling Ms. Wilkerson's legal assistant he would accept original service. (RP, 12:3-13:3.) Mr. Vasilev again stated: "If I did say I accept service on behalf of my client, I will have it in writing and I will have authorization from my client in the client file." (RP, 13:5-8.)

After the conclusion of Mr. Vasilev's testimony, Judge Rietschel gave Ms. Wilkerson an opportunity to call witnesses. (RP 16:18.) Ms. Wilkerson declined. (RP 16:19.) Judge Rietschel then granted Ms. Covey's motion and dismissed the will contest pursuant to RCW 11.24.010. Judge Rietschel explained her decision as follows:

> In the Court's mind, this comes down to whether there is a sufficient factual basis to find that there is, in fact, a waiver. And I look at this in terms of the affidavits

that were filed and in terms of the testimony.

The first issue is whether there was an agreement by the emails. The emails show that there was an agreement to forward documents. In the Court's mind, that does not amount to an agreement to accept service. To say that you are willing to have documents forwarded is not the same as an agreement to accept service. There may have been a misunderstanding as to that.

I don't believe counsel on either side has acted in bad faith. But merely saying that you wish further documents to be forwarded is not the same as an agreement to accept service. So I don't believe the emails from the prior attorney amount to an agreement to accept service.

We have the affidavit of the legal assistant. "I spoke personally. He instructed me to serve him at his office by legal courier with the petition contesting will." Interestingly, we do not have him as a witness today. The Court has no further information about that other than that he had that conversation. There's nothing further about that information.

We have testimony of the prior attorney in which he doesn't remember a great deal other than it is the practice and was the practice of the firm that if there was such an agreement, it would have been in writing. He doesn't recall that agreement. He doesn't recollect passing on the information to the client.

In looking at this, I think the burden is on the party establishing or trying to establish that there was, in fact, a waiver. And this Court is not persuaded by the evidence before it that there was, in fact, an agreement by the prior attorney to accept service of process, that there is sufficient facts to find that there was that agreement, that there was, therefore, a waiver of the requirement to service of process upon the actual individual. And I don't find that there was. So I would grant [Ms. Covey's] motion on that basis.

(RP 31:13-33:1.)

4. Argument

A. Standard of Review.

Courts review questions of statutory interpretation *de novo.* *Rozner v. City of Bellevue,* 116 Wn.2d 342, 347, 804 P.2d 24 (1991). Courts review factual findings by the substantial evidence standard. *Miller v. City of Tacoma,* 138 Wn.2d 318, 323, 979 P.2d 429 (1999). *See also, Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 819, 828 P.2d 549 (1992) ("Findings of fact supported by substantial evidence are verities on appeal"). The substantial evidence standard is met where there is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Robinson v. Safeway Stores, Inc.,* 113 Wn.2d 154, 157, 776 P.2d 676 (1998).

B. RCW 11.24.010's Plain Language Mandated Dismissal of Mr. Howard's Will Contest for Failure to Personally Serve Ms. Covey.

RCW 11.24.010 sets forth the service requirements for will contests. That statute states in its entirety:

> If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he or she shall file a petition containing his or her objections and exceptions to said will, or to the rejection thereof. Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of the last will and testament

> under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or part of it, shall be tried and determined by the court.
>
> For purposes of tolling the four-month limitations period, a contest is deemed commenced when the petition is filed with the court and not when served upon the personal representative. The Petitioner shall ***personally serve the personal representative*** within ninety days after the date of filing the petition. ***If service is not so made, the action is deemed not to have commenced for purposes of tolling the statute of limitations.***
>
> If no person files and serves a petition within the time under this section, the probate or rejection of such will shall be binding and final.

(RCW 11.24.010 (emphasis added).)

Title 11's definition of "personal representative" does not include the personal representative's attorneys within its ambit. RCW 11.02.005 provides: "'Personal representative' includes executor, administrator, special administrator, and guardian or limited guardian and special representative."[4]

It is a canon of statutory interpretation that "the court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute." *Erection Co. v. Dept. of L&I,* 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

---

4. The Supreme Court has elsewhere noted: "Personal service usually denotes personal service on a party. Service on a party's attorney suggests substitute service rather than personal service." *State v. Clark,* 129 Wn.2d 805, fn. 1 (1996).

> In the judicial interpretation of statutes, the first rule is the court should assume that the legislature means exactly what it says. Plain words do not require construction. This Court will not construe unambiguous language.

King County v. Taxpayers of King County, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985) (internal citations omitted). *See also, Kilian v. Atkinson,* 147 Wn.2d 16, 21 (2002) ("If a statute is clear on its face, its meaning is to be derived from the language of the statute alone"). Further, "the court is required to give effect to 'every word, clause and sentence of a statute... No part should be deemed inoperative or superfluous unless the result of obvious mistake or error.'" *Overhulse Neighborhood Assn. v. Thurston County,* 94 Wn.App. 593, 599, 972 P.2d 470 (1999) (quoting *Cox v. Helenius,* 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

RCW 11.24.010 is unambiguous. The statute imposes an express legislative mandate that will contestants "shall personally serve the personal representative within ninety days." The statute also prescribes the consequence of its violation: "If service is not so made, the action is deemed not to have been commenced for purposes of tolling the statute of limitations." Mr. Howard did not personally serve Ms. Covey. Therefore, his will contest was deemed not to have been commenced. The inquiry should begin and end with RCW 11.24.010's plain language. Judge Rietschel properly dismissed the

action.

C. RCW 11.24.010's Plain Meaning is Confirmed by its Legislative History.

RCW 11.24.010 is clear on its face. Its meaning must therefore be derived from the statutory language alone. The legislative history is nonetheless instructive.

Prior to 2006, the will contest statute act did not contain a requirement of personal service on the personal representative. Rather, former RCW 11.24.020 merely provided that "a citation shall be *issued* upon the executors." (CP 7, 8, emphasis added.) The legislature deleted this language in 2006 and simultaneously amended RCW 11.24.010 to require personal service upon the personal representative. (Id.) To dispel any question about the import of these deletions and additions, the Legislature mandated that "if service is not so made, the action is deemed not to have commenced for purposes of tolling the statute of limitations." RCW 11.24.010's legislative history confirms that the Legislature intended to strictly mandate personal service on the personal representative.

D. The Doctrine of Substantial Compliance Cannot Apply to RCW 11.24.010.

Mr. Howard acknowledges he did not personally serve Ms. Covey as required by RCW 11.24.010. However, he asks the Court to hold that he substantially complied with the statute when he

delivered his Will Contest Petition to Ms. Covey's attorney. The doctrine of substantial compliance cannot apply to statutes that unequivocally require strict compliance. Mr. Howard cannot invoke the doctrine to trump the Legislature's clear intent as expressed through RCW 11.24.010's well-defined statutory scheme.

The Supreme Court articulated this principle in *Union Bay Preservation Coalition v. Cosmos Devel. & Admin.,* 127 Wn.2d 614, 902 P.2d 1247 (1995). In that case, a preservation coalition filed a petition for review of a hearing board's decision and served all attorneys of record. The coalition did not separately serve the parties. RCW 34.05.542(2) requires that such petitions be "filed and served on... all parties of record within thirty days after service of the final order." RCW 34.05.542(4) provides that service may be by mail. The trial court granted the developer's motion to dismiss on grounds of insufficient service of process.

The coalition argued on direct review that the phrase "parties of record" should be construed to subsume their attorneys. The Supreme Court rejected this argument, noting (a) RCW 34.05.010(11)'s definition of "party"[5] did not include attorneys, and

---

5. RCW 34.05.010(11) provides that "'party', in a context so indicating, means "a person to whom the agency action is specifically directed; or (b) a person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding."

(b) the Legislature previously removed language authorizing service on attorneys from a different service provision within the APA. *Id.* at 618.

The coalition next argued that it substantially complied with the APA's service requirements. The Court held:

> We cannot apply the doctrine [of substantial compliance] to this case. The unequivocal definition of "party" in the APA combined with the deletion of "attorneys of record" from the APA prevents such an application. Because the language and history of the APA exclude service on attorneys, we cannot permit such service by relying on substantial compliance.

Id. at 629. The Court concluded: "When the Legislature directs service on a party of record under the APA, it means service on the party, not the party's attorney." *Id.* at 619. The Court affirmed the trial court's order of dismissal. *Id.*

Union Bay confirms that the doctrine of substantial compliance cannot apply to statutes the Legislature intended to be subject to strict compliance. *Union Bay's* reasoning applies with even greater force to RCW 11.24.010. It was necessary for the Court in *Union Bay* to analyze the APA's legislative history to determine if RCW 34.05.542 permitted service on parties' attorneys. RCW 11.24.010 is plain on its face. Whereas the APA authorizes service by mail, RCW 11.24.010 mandates "personal service" on the "personal representative". The APA does not define the

consequences for failure to properly serve parties. In contrast, RCW 11.24.010 requires that the action be dismissed if the personal representative is not personally served.

As noted earlier, RCW 11.24.010's legislative history compels this same result. The will contest statute previously required contestants to "issue" a citation. The Legislature deleted this language and replaced it with an unequivocal mandate of personal service on the personal representative.

Union Bay rested on an implied but unequivocal expression of legislative intent. *Overhulse Neighborhood Assoc. v. Thurston County,* 94 Wn.App. 593, 972 P.2d 470 (1999) dealt with explicit statutory language precluding the application of substantial compliance. In that case, a neighborhood association timely served a LUPA petition on the county prosecutor's office. RCW 36.70C.040(5) requires service on the county auditor. RCW 36.70C.040(2) provides: "A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the [county auditor and other persons identified in the statute]."

The trial court dismissed the action for insufficient service of process. On appeal, the neighborhood association argued that it substantially complied with LUPA's service requirements and should

be allowed to proceed with its action.

The Court of Appeals upheld the dismissal. The Court reasoned:

> Here, the legislative directive is ... unequivocal. A land use petition is barred, and the court may not grant review, if timely service is not completed in accordance with LUPA's procedures. RCW 36.70C.040(2). This explicit statutory language forecloses the possibility that the doctrine of substantial compliance applies.

Id. at 598. The Court concluded: "Because LUPA provides unequivocal directives, the doctrine of substantial compliance does not apply." *Id.* at 599. RCW 11.24.010's directive is similarly unequivocal. The doctrine of substantial compliance cannot relieve Mr. Howard of his statutory duty to personally serve Ms. Covey.

Crisp v. Groll, 126 Wn.App. 18, 104 P.3d 25 (2005) is also instructive. In that case, a real estate purchaser failed to initial boxes in an earnest money agreement as required by former RCW 64.04.005(1). Former 64.04.005(2) provided that if an earnest money agreement "does not satisfy the requirements of subsection (1)", the seller retains all remedies. The purchaser later sued and obtained a summary judgment determination that he had substantially complied with the earnest money forfeiture statute.

The Court of Appeals reversed and held as a matter of law that "the plain language of RCW 64.04.005 does not allow substantial

compliance..." *Id.* at 26. The Court reasoned:

> We do not see how a plain reading of this statute allows application of the substantial compliance doctrine. The statute itself clearly states the consequence of failure to comply; a seller retains all remedies. Excusing a party's failure to meet the requirements of subsection (1) would render meaningless the clear language of subsection (2).

Id. at 25.

The doctrine of substantial compliance similarly cannot apply to RCW 11.24.010. The statute unambiguously states the consequence of failure to comply: the will contest is deemed not to have commenced or purposes of the statute of limitations. The doctrine of substantial compliance would render this legislative mandate meaningless. Judge Rietschel's order of dismissal was proper. RCW 11.24.010 permitted no other outcome.

E. Mr. Howard's Authorities on the Substantial Compliance Question are Inapposite.

Mr. Howard's chief authorities are *Continental Sports Corp. v. Dept. of Labor & Industries,* 128 Wn.2d 594, 910 P.2d 1284 (1996), *Black v. Dept. of Labor & Industries,* 131 Wn.2d 547, 933 P.2d 1025 (1997), *Vasquez v. Dept. of Labor & Industries,* 44 Wn.App. 379, 722 P.2d 854 (1986) and *In re Palucci,* 61 Wn.App. 412, 810 P.2d 970 (1991). None of these cases involve service statutes that mandate personal service on a specific individual or prescribe a penalty for noncompliance. Mr. Howard's authorities are

inapposite.

Mr. Howard relies principally upon *Continental Sports Corp.,* which discussed *Union Bay* and declined to extend its reasoning to RCW 51.48.131. This statute requires appeals of employer assessments to be "sent to the director of labor and industries by mail or in person." *Continental Sports Corp.,* 128 Wn.2d at 597. The petitioner sent his appeal via Fed Ex. The Industrial Appeals judge dismissed the appeal. The trial court affirmed. The Court of Appeals reversed.

The Supreme Court held that the petitioner substantially complied with RCW 51.48.131's service requirements by mailing its appeal via Fed Ex. Significantly, the Court noted:

> ... we are not unmindful of our recent decision in *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp...* To hold in *Union Bay* that service on an attorney for a party amounted to substantial compliance with the requirement that service be made on a party of record would effectively have trumped the Legislature's clear expression of its intent that service be made only on parties of record. That situation is vastly different than that with which we are presented. Rather than flying in the face of a strict statutory requirement relating to service of a petition for judicial review, we determined that Continental substantially complied with a less specific requirement that notice of appeal be sent by 'mail', a term undefined by the Legislature.

Id. at 604.

Like the statutes involved in *Union Bay, Overhulse* and *Crisp,*

RCW 11.24.010 sets forth strict statutory requirements. To apply the doctrine of substantial compliance would be to trump the Legislature's clear intent as expressed in RCW 11.24.010's plain language.

In *Black,* the Supreme Court applied the doctrine of substantial compliance to RCW 51.52.110. That statute provides that appeals of workers compensation awards are perfected "by serving a copy thereof by mail, or personally, on the director [of the Department of Labor & Industries] and on the board." *Black,* 131 Wn.2d at 552. The petitioner in *Black* did not serve the director, but instead served the assistant attorney general assigned to represent the Department. The Board of Appeals denied the petition. The Superior Court affirmed. The Court of Appeals reversed, finding the service substantially complied with RCW 51.52.110.

The Supreme Court affirmed the Court of Appeals. *Black,* 131 Wn.2d at 557. The Court carefully distinguished *Union Bay:*

> We clarify that our decision today does not conflict with *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.,* 127 Wn.2d 614, 902 P.2d 1247 (1995). In *Union Bay* we held service of notice of appeal on the attorneys of record did not comply with the Administrative Procedure Act's (APA) requirements that notice of appeal be served on the "parties of record". *Id.* at 620-21, 902 P.2d 1247. By its own terms, *Union Bay* does not apply here. *Union Bay* was guided by legislative history which clearly directed "party of record" be limited to actual named parties and explicitly excluded attorneys of record

> from the definition. *Id.* at 620, 902 P.2d 1247...
>
> In the present case there is no evidence that the Legislature explicitly meant to exclude service on the attorney general to the extent it did in *Union Bay. Union Bay* is therefore not applicable.

Id. at 556, 557. *Black's* treatment of *Union Bay* applies with at least equal force to RCW 11.24.010. The Legislature explicitly mandated personal service on the personal representative and prescribed dismissal "if service is not so made". RCW 11.24.010 is not susceptible to substantial compliance.

Vasquez also dealt with RCW 51.52.110. There, a petitioner mailed his appeal to his insurer's attorney instead of to the insurer directly. The Court of Appeals held that the petitioner substantially complied with RCW 51.52.110's service requirements. *Vasquez,* 44 Wn.App. at 384. Because RCW 51.52.110 does not mandate strict compliance, *Vasquez* is irrelevant.

In *re Palucci* is also inapposite. That case involved the dismissal of a will contest for failure to file a proof of mailing prior to the initial hearing.[6] It also occurred under former RCW 11.24.010 and 11.24.020, which did not mandate personal service on the personal representative but instead provided for the "issuance" of

---

5. RCW 11.96A.110 (formerly RCW 11.96A.100) provides that "proof of service or mailing shall be made by affidavit at or before the hearing."

citations. The Court of Appeals reversed on substantial compliance grounds because "where notice by publication or mailing has in fact been given, the failure to file proof of notice amounts to a mere irregularity." *In re Palucci,* 61 Wn.App. at 412. *In re Palucci* addresses neither the facts nor the law at issue in Mr. Howard's appeal.

Mr. Howard places great emphasis on a terse and undeveloped observation in *In re Palucci* that "personal service statutes... require only substantial compliance." *Id.* at 416. *In re Palucci's* citations lead only to RCW 4.28.080, the general personal service statute. Id. (citing *Thayer v. Edmonds,* 8 Wn.App. 36, 38, 503 P.2d 1110 (1972). RCW 4.28.080 does not prescribe any consequences for its violation. Unlike RCW 11.24.010, it may therefore be subject to the doctrine of substantial compliance.

F. Substantial Evidence Supports Judge Rietschel's Finding that Mr. Vasilev did not Agree to Accept Service of Original Process on Ms. Covey's Behalf.

Mr. Howard assigns error to Judge Rietschel's finding that Mr. Vasilev did not enter into an email or oral substitute service agreement. As noted earlier, findings of fact are reviewed according to the "substantial evidence" standard. *Robinson,* 113 Wn.2d at157.

When a defendant moves to dismiss for insufficient service of process, "the plaintiff has the initial burden of making a *prima facie*

showing of proper service." *Witt v. Port of Olympia,* 126 Wn.App. 752, 757, 109 P.3d 489 (2005). Mr. Howard thus bore the burden of proving the existence of a substitute service agreement.

Substantial evidence supports Judge Rietschel's finding that Mr. Howard did not meet his burden. Mr. Howard opposition brief alleged the existence of three separate service agreements. First, he asserted Mr. Vasilev's July 22, 2013 email to Ms. Wilkerson informed her "that Ms. Wilkerson should serve him with 'any further documents'". This was a mischaracterization of Mr. Vasilev's email. Mr. Vasilev merely told Ms. Wilkerson to "forward any further documents" to him. Judge Rietschel correctly determined that this email did not constitute an agreement to accept original service of process.

Second, Mr. Howard vaguely (both in his opposition brief and in Ms. Wilkerson's supporting declaration): "Ms. Wilkerson also asked [Mr. Vasilev] whether she should have it served upon him or upon his client, Ms. Covey. The question was asked during a phone conversation with Ms. Vasilev before the actual date of filing." Mr. Howard did not assert that Mr. Vasilev agreed to accept service. Judge Rietschel properly concluded that this alleged telephone conversation did not amount to a substitute service agreement.

Lastly, Mr. Howard submitted a declaration from Ms.

Wilkerson's legal assistant, Timothy Folkerth , alleging that in October 2013, he received Mr. Vasilev's telephonic authorization to serve him in lieu of Ms. Covey. Mr. Vasilev testified that he had no recollection or record of such a conversation. Mr. Folkerth was not available to testify. He also did not participate by phone. Substantial evidence supported Judge Rietschel's finding that Mr. Folkerth 's declaration failed to establish the existence of a substitute service agreement.

Mr. Howard's argument fails for three independent legal grounds as well. His account of events runs afoul of CR 2A, RCW 22.44.010 and Washington decisional law. CR 2A provides:

> No agreement or consent between parties or attorneys in respect to the proceeding in a cause, the purport of which is disputed, will be regarded by the court unless... the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

RCW 2.44.010 similarly provides:

> The court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action... unless such agreement or stipulation be... signed by the party against whom the same is alleged, or his or her attorney.

It is a matter of settled decisional law that:

> An attorney may not... surrender a substantial right of a client without special authority granted by the client. Therefore, an attorney needs the client's express authority to accept service of process.

Ha v. Signal Electric, Inc., 182 Wn.App. 436, 447, 332 P.3d 991

(internal citations omitted.) There was no CR 2A agreement. Ms. Covey never authorized Mr. Vasilev to accept service on her behalf. The substantial evidence establishes that Mr. Vasilev never agreed to receive original process. CR 2A, RCW 2.44.010 and *Ha* confirm that his position also fails as a matter of law.

F. Substantial Evidence Supports Judge Rietschel's Finding that Ms. Covey did not Waive her Defense of Insufficiency of Process.

Mr. Howard cites *Lybbert v. Grant County,* 141 Wn.2d 29 (200) for the rule that "waiver of insufficient service as an affirmative defense can occur when the defendant's previous behavior is inconsistent with the assertion of the defense or when counsel has been dilatory in asserting the defense." *Gross,* 139 Wn.App. at 61 (summarizing *Lybbert*). There was no inconsistency in Ms. Covey's past behavior, as Mr. Vasilev never agreed to accept original service on her behalf. There was also no dilatory action. Mr. Vasilev withdrew shortly after the will contest's commencement. Ms. Covey's second attorney was involved for a matter of weeks. Ms. Covey's current counsel filed her answer shortly after appearing in January 2014 and asserted the affirmative defense. The doctrine of waiver is inapplicable.[7]

---

7. It is also difficult to see how Mr. Vasilev *could* have waived Ms. Covey's insufficiency of process defense. Attorneys lack the authority to accept original service without their clients' express

5. Conclusion

> A will contest is a purely statutory proceeding, and the court must be governed by the provisions of the applicable statute. The jurisdiction of the trial court is derived exclusively from the statute, and may be exercised only in the mode and under the limitations therein prescribed.

In re Estate of Van Dyke, 54 Wn.App. 225, 230, 772 P.2d 1049 (1989) (internal citations omitted).

RCW 11.24.010 provides that will contestants must "personally serve the personal representative" within the prescribed time frame. The statute mandates dismissal "if service is not so made." By its plain language, RCW 11.24.010 doe not admit substantial compliance. Mr. Howard failed to prove the existence of an alternate service agreement or waiver. Judge Rietschel properly dismissed Mr. Howard's action on grounds of insufficient process. Her order should be affirmed.

---

consent to begin with. *Ha,* 332 P.3d at 996.

Dated June 19, 2015.

VORTMAN & FEINSTEIN

By: _____

s/ Marlin L. Vortman
WSBA #6051
500 Union Street, Suite 500
Seattle, Washington 98101
Phone: (206) 283-2124
Fax: (206) 282-6957
E-mail: marlin@vortman.com
Associated Co-Counsel for Respondent Elizabeth Ann Covey, as Personal Representative of Decedent's Estate

Dated June 19, 2015.

THE LAW OFFICE OF JOSHUA B. LOCKER, PLLC

p

By: _____

s/ Joshua B. Locker
WSBA #38719
2442 NW Market Street 236
Seattle, Washington 98107
Phone: (206) 377-9168
Fax: (206) 260-8933
E-mail: josh@lockerlawoffice.net
Associated Co-Counsel for Respondent Elizabeth Ann Covey, as Personal Representative of Decedent's Estate