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DIVISION II

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STATE OF WASHINGTON

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No. 53833-4-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF
LAWRENCE D. GOLDBERG,
Deceased.

Consolidated With:
RACHAEL LAUREN GOLDBERG,
Respondent,
v.
JENNIFER ALLEN,
Appellant.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

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I. Introduction.

The trial court held that the will under consideration in this case was invalid because the witnesses to the will did not sign it in the testator's presence and at his request; that it was brought to them by someone else and signed by the witnesses after the testator had already signed, outside of their presence.

One of the two persons whose signatures appears as a witness on the will died two months before trial. The surviving witness testified both at trial and at a deposition that he and the other witness signed in the decedent's presence and at his request. The court's suspect as to who had actually brought the will to the witnesses for signature, pre-signed by the testator, was the appellant, Jennifer Allen, the sole legatee under the will. Ms. Allen

testified at the trial that she did not bring the will to the witnesses for signature and was not present when it was signed.

No witness at trial testified to the version adopted by the trial court: that the testator had already signed his will before it was brought to the attesting witnesses by Ms. Allen.

The surviving witness had made out-of-court statements, which he corrected within minutes after making them as referring to an entirely different document, that the will was brought to him by Ms. Allen and not by the testator. The claim of error in this case is that the court relied upon this non-party witness's unsworn, out-of-court statements as substantive evidence, and not merely impeachment evidence, in making its finding that the will had not been signed by the witnesses in the testator's presence – and consequently was invalid.

All parties at trial and the trial court were agreed that clear, cogent, and convincing evidence had to be shown to the trial court before it could find that there existed a manner-of-execution deficit invalidating the will. However, *no one* testified at trial to the circumstances of execution of the will as found by the trial court.

This appeal also challenges awards of attorney's fees imposed upon Ms. Allen by the trial court. Ms. Allen further

requests reasonable attorney's fees and costs against the respondents.

II. Assignments of Error.

Prefatory note: The prevailing party proposed a plethora of findings, many of which are distant and distracting from what actually affects the outcome of the case. Counsel has complied with the specification of RAP 10.3(a) that assignments of error be set forth in the brief before the Statement of the Case, but the court might find understanding the case considerably easier if that later section of the brief (beginning at page 21) were read before the formal, inevitably somewhat mechanical, assignments of error.

As to findings of fact: In compliance with RAP 10.3(g), appellant asserts that the court entered in making the following findings of fact in the Findings of Fact, Conclusions of Law and Order Invalidating the Last Will and Testament of Lawrence David Goldberg. (CP 309.) All specification of "Issues" concerning findings of fact in this section are stated succinctly in an attempt to conserve space but are more fully addressed in Sections III, "Statement of the Case," and V, "Argument", below. Identification of the portion(s) of the record supporting the claims as to the issues

alleged is likewise set forth in those specified later portions of this brief:

1. The following portions of Finding 3.8: “[Mr.] Visser . . . set up his computer on the hood of his car. . . . [T]he computer contained a scanned version of the [w]ill; . . .”

Issues: As a likely minor matter, the computer was set on the trunk rather than the hood of the car.

Much more importantly, the computer contained not only the will but also, confusingly, the scanned signature page only of a declaration of supporting witnesses executed by the same attesting witnesses approximately four years later. The interviewer toggled back and forth between the two documents. The witness testified he became confused between the two documents in answering questions about them to the investigator, Mr. Visser.

2. The following portions of Finding 3.10: “[Ms.] Allen made repeated attempt to interrupt the interview, stating . . . admission of the [w]ill to probate . . . had already be[en] resolved . . . [Mr.] Visser asked [Ms.] Allen . . . several times to move away . . .”

Issues: The evidence is undisputed that the “interruption” began when Ms. Allen was beckoned to the interview scene by the

person being interviewed. She voiced questions and concerns to the interviewer but after a brief conversation with him walked away. She claimed aspects of the probate proceeding had been in court but did not claim admission of the will to probate had been conclusively resolved. Diplomatic and tactful requests by the interviewer for one-on-one access to the individual being interviewed were two and not "repeated."

3. Finding 3.11:

[Mr.] Visser showed [Mr.] Potter a copy of the [w]ill[,] which [Mr.] Visser had downloaded on his laptop. In response to a direct question as to who brought the [w]ill to [Mr.] Potter to sign, [Mr.] Potter indicated that [Ms.] Allen brought the [w]ill to him and his mother. [Mr.] Potter also indicated that [Dr.] Goldberg was not present when [Mr.] Potter signed the [w]ill as purported witness.

Issues: The only testimony of any witness at trial or at the one deposition taken in the case (that of Mr. Potter) was that Dr. Goldberg brought the will to Mr. and Ms. Potter, who then signed the will at Dr. Goldberg's request and in his presence. The above finding is un-sworn impeachment evidence of a non-party (Mr. Potter) but was erroneously considered and adopted by the court as substantive evidence. The finding also does not reflect that the impeaching statements of this non-party witness were immediately pointed out by him to the interviewer as inadvertent mistakes based

on confusion of his between two different documents shown to him on the interviewer's lap top computer outside, in the open, on a windy mid-winter day at sunset.

3. Finding 3.13:

The [c]ourt finds that [Mr.] Potter was shown a copy of the [w]ill, not the [d]eclaration, and that [Mr.] Potter's responses to [Mr.] Visser's questions were in response to the [w]ill. [Mr.] Potter was not confused. . . . [Mr.] Potter told [Mr.] Visser that [Ms.] Allen brought the [w]ill to his home; and that both he and his mother signed the [w]ill outside the presence of [Dr.] Goldberg and not at Dr. Goldberg's direction.

Issues: The above is a recitation of some but not all of what Mr. Potter *said* , not under oath, when interviewed by Mr. Visser, after which Mr. Potter immediately corrected his misstatements. Mr. Potter's deposition and trial testimony were that he and his mother signed Dr. Goldberg's will at his request and in his presence. The court erred in basing a substantive finding on out-of-court impeaching statements by a non-party when the totality of the trial testimony of *all* witnesses who had knowledge of the event testified opposite the court's finding.

4. The following italicized finding in Finding 3.14: "[T]he [c]ourt does not find that [Mr.] Potter was . . . impaired to such a

degree that [his impairment] would have affected his *testimony*.”

(Italics added.)

Issues: There was no claim whatsoever that Mr. Potter was impaired by alcohol at the time he gave either his deposition or trial testimony. Consequently, the above finding as to his “testimony” relates to what he said, as a non-party, while not under oath, when interviewed by the investigator. This finding that what Mr. Potter told the investigator in front of the former’s house was “testimony” both reveals clear error by the trial court (erroneously finding unsworn, out-of court statements of any person to be “testimony”) and, fatally, that the out-of court, unsworn statements of this non-party could be and were relied upon by the court as substantive evidence and not merely for impeachment.

5. Finding 3.17: “[Mr.] Visser interpreted Tracy Potter’s statement of “I f - - ked up” as an admission that [Mr.] Potter did not say what [Ms.] Allen wanted him to say.”

Issues: This is a substantive finding as to a party’s intent based upon out-of-court, unsworn statements of a non-party and then, further, upon another witness’ impression as to the meaning of those statements. The out-of-court statements of this non-party were available to impeach him but not form the basis of substantive

evidence. Here, the court further compounded error by utilizing the statement of the non-party witness as substantive evidence of the intentions of a party.

6. Finding 3.18:

The [c]ourt . . . finds [Mr.] Potter's responses to [Mr.] Visser's questions credible for the following reasons: i.) [Mr.] Visser clearly defined what the purpose of his visit and interview questions were; ii.) he obtained [Mr.] Potter's express permission to record the interview; iii) [Mr.] Potter did not have advance warning of [Mr.] Visser's visit; iv.) [Mr.] Potter recognized [Mr.] Visser as a former Clark County Deputy Sheriff; and v.) there is no evidence [Mr.] Potter felt intimidated or otherwise felt compelled to give specific answer to [Mr.] Visser's questions.

Issues: The foregoing finding is essentially that the substance of what Mr. Potter, a non-party, told the investigator before he within minutes corrected his error was adopted by the court as what actually happened. *This was a clear violation of the evidence rule that unsworn, out-of-court statements of a non-party cannot be the basis for any finding of fact.* Mr. Potter's trial and deposition testimony were that he and his mother were asked by Dr. Goldberg to sign as witness his will and did so for him on the spot. Ms. Allen testified that she did not bring the will to the Potters and was not there when it was signed by the Potters in Dr.

Goldberg's presence. *No witness testified at trial in contradiction to this description of events.*

Less critically, the court's finding that "there is no evidence [Mr.] Potter felt intimidated" when interviewed by Mr. Visser is patently incorrect, as Mr. Potter testified when asked at trial whether he felt intimidated, "Oh yeah. . . . Yeah." Asked "What were you intimidated about?" he responded "Just him. He's big . . ." (Mr. Potter testified he is a 59-year-old retired horse race jockey. (Ex. 3, p. 43)). A finding of "no evidence" when there was such evidence is not confidence building as to the court's consideration and understanding of the evidence it was presented.

7. Finding 3.19:

During trial, counsel asked [Mr.] Potter if he had spoken to [Ms.] Allen on January 19, 2019 immediately after [Mr.] Visser left [Mr.] Potter's property, but before [Mr.] Potter called [Mr.] Visser to change his interview responses. After initially denying such contact, [Mr.] Potter admitted he talked to [Ms.] Allen before placing the call to [Mr.] Visser in which [Mr.] Potter changed his testimony.

Issues: First, in the telephone call Mr. Potter placed to Mr. Visser to correct his earlier misstatement to Mr. Visser, he was not "chang[ing] his testimony." Mr. Potter did not "testify" to anything to Mr. Visser; they were both outside court and not under oath. Mr. Potter told Mr. Visser, referring to the will and to the declaration,

that he had “got[ten] them mixed up” in describing the circumstances of his execution of each of the two documents.

Second, Mr. Potter’s initial response to a question from one of respondents’ attorneys was that Mr. Potter was unable to recall having been encouraged by Ms. Allen to telephone Mr. Visser after the interview to “say something to Mr. Visser.” Mr. Potter later clarified that he first raised with Ms. Allen that he had confused the will with the supporting declaration in speaking with Mr. Visser. He testified Ms. Allen had not instructed him to call Mr. Visser but only that she told him in response to his expressed consternation that placing the call “might be a good idea” to straighten out the mistake.

8. Finding 3.20:

The [c]ourt finds that [Mr.] Potter attempted to change the truthful testimony he provided to [Mr.] Visser only after he was persuaded by [Ms.] Allen to give a different version of events; and the [c]ourt finds [Mr.] Potter was susceptible to [Ms.] Allen’s influence. The [c]ourt finds that after [Mr.] Visser left the premises, [Mr.] Potter went to the barn area of the property where [Ms.] Allen and her husband claimed that a horse was loose. It is clear to the [c]ourt that [Mr.] Potter had a conversation about the . . . Visser interview with [Ms.] Allen and her husband; and, as a result of that conversation, [Mr.] Potter called [Mr.] Visser to change his responses.

Issues: The finding again reveals that the court treated the out-of-court, unsworn statements of Mr. Potter, a non-party, to have

the significance of “testimony.” This was plain error and the basis upon which Ms. Allen asserts the judgment below must be reversed. In this finding the court has mistakenly elevated impeachment evidence of out-of-court, unsworn utterances of a non-party to the stature of substantive evidence, upon the basis of which the court impermissibly made this finding.

9. Finding 3.21:

Counsel for [p]etitioner Cole Goldberg deposed [Mr.] Potter on April 24, 2019. The [c]ourt notes [Ms.] Allen transported [Mr.] Potter to the deposition; and that [Mr.] Potter said [Ms.] Allen instructed him not to get “turned around” during the deposition.

Issues: The exact testimony was that Ms. Allen voiced to Mr. Potter that she felt an attempt would be made to “twist [him] around” at the deposition and that Mr. Potter agreed with that assessment. Further, no witness testified to contradict Mr. Potter’s deposition testimony that Ms. Allen told him before the deposition to “tell the truth.”

10. Finding 3.22:

During the course of the deposition, counsel asked who brought the [d]eclaration to [Mr.] Potter and his mother to sign. [Mr.] Potter respond[ed] that [Dr.] Goldberg did. The date of the [d]eclaration is October 22, 2018, months after [Dr.] Goldberg’s death. When asked to confirm his response, he still identified [Dr.] Goldberg.

Issues: First, a quibble: The date of the declaration is exactly one month after the date of Dr. Goldberg's death; not "months." This discrepancy is further revelation of the possibility the trial court may not have fully absorbed or understood the evidence.

Finally, the above finding is rendered confusing surplusage by the unchallenged Finding 3.4, which reads in material part as follows:

[Ms.] Allen brought the [d]eclaration to the home of [Mr.] Potter and [his mother,] Betty Jo Potter . . . , on October 22, 2018. [Mr.] Potter and [his mother] signed the [d]eclaration on that date.

This unchallenged finding is definitive as to the date the declaration was executed, who signed it, where it was signed, and who brought the declaration to the declarants for their signatures.

11. Finding 3.25:

The [c]ourt finds [Ms.] Allen sought to influence and coach [Mr.] Potter's testimony to comport with her version of the events. The [c]ourt finds that [Mr.] Potter changed his testimony after she asserted herself (both at the time of the . . . Visser interview on January 19, 2019 and during the deposition on April 24, 2019).

Issues: The trial court record shows without contradiction that on the one determinative issue in this case – whether the Potters witnessed and signed Dr. Goldberg's will in his presence

and at his request – Mr. Potter’s testimony was the same at both his deposition and at trial. Mr. Potter never changed his testimony.

Again, the court’s identification of Mr. Potter’s unsworn statements to the investigator as “testimony” shows, first, that the court erroneously considered Mr. Potter’s unsworn, out-of-court statements to have been testimony, and, second, that the court erroneously accorded those out-of-court statements substantive effect rather than merely potentially impeachment effect.

12. Finding 3.26: “The [c]ourt does not find credible [Ms.] Allen’s testimony in her [d]eclaration and at trial that she did not have anything to do with executing the [w]ill.”

Issues: Ms. Allen testified she did not draft Dr. Goldberg’s will, and no witness at trial testified to the contrary of her testimony on that point. The finding, though, is as to her having something to do with “executing” – drafting, forging? -- the will. The determinative question in the case is whether the Potters signed as witnesses to the will in Dr. Goldberg’s presence and at his request. No witness at trial testified to the contrary of the testimony of Mr. Potter at both his deposition and at trial that he and his mother signed as witnesses to the will at Dr. Goldberg’s presence and at his request. If, purely hypothetically, Ms. Allen, per the finding,

“ha[d] [some]thing to do with executing the [w]ill,” it would still not defeat the validity of the will if it was nevertheless witnessed by the Potters in Dr. Goldberg’s presence and at his request -- as was the only testimony of any witness at trial.

13. Finding 3.27: “The . . . Potter testimony the [c]ourt finds persuasive and compelling is limited to [Mr.] Potter’s responses to [Mr.] Visser’s interview questions.”

Issues: The only Potter *testimony* on the single issue in the case was his trial and deposition testimony that he and his mother signed as witnesses to Dr. Goldberg’s will upon his request and while he was personally present. Mr. Potter’s out-of-court statement – which he immediately corrected – that the will was brought to him by Ms. Allen rather than Dr. Goldberg was never “testimony.” This finding is thus impermissible use of non-party impeachment evidence as substantive evidence and is the error which mandates reversal in this case.

14. Finding 3.28:

[Ms.] Allen attempted to argue [Dr.] Goldberg had [Mr.] Potter and [Ms.] Potter sign his will because they had horses in common. The testimony, on the other hand, supports a very limited relationship between [Dr.] Goldberg and [Mr.] Potter and [Ms.] Potter. There is no evidence of a social relationship. Rather, [Dr.] Goldberg simply knew [Mr.] Potter and [Ms.] Potter because he, or [Ms.] Allen boarded a

horse on the Potter property; and but for [Ms.] Allen, [Dr.] Goldberg would not have met the Potters.

Issues: This finding is next to entirely immaterial on the determinative issue of whether Dr. Goldberg brought his will to the Potters, asked them to witness it for him, after which they then signed as witnesses in his presence.

The un-contradicted trial testimony was that Dr. Goldberg stated he wanted witnesses who “weren’t . . . family or anything like that.”

The entirely immaterial findings of a “very limited relationship” and “no evidence of a social relationship” are belied by the un-contradicted trial evidence that Mr. Potter had known Dr. Goldberg possibly as long as four years when he asked his mother and him to witness his will; that he lived as a near neighbor to Dr. Goldberg; that he had been coming to the Potter property “a couple of times a week” to ride and care for a horse by that time; that he, Dr. Goldberg, and others at least once went to comedy club in Portland together on a purely social basis; that, according to Mr. Potter, he knew Dr. Goldberg as “a friend.”

The quoted finding, although an irrelevancy on the only issue in the case, stands as either confirmation that the trial court may

not have understood or absorbed the evidence or based its judgment on factors which had nothing to do with how the case should have been determined, or both.

15. Finding 3.29:

The [c]ourt has an abiding belief that [Ms.] Allen coached and influenced [Mr.] Potter to provide different testimony to the [c]ourt; and that [Ms.] Allen submitted different testimony in her [d]eclarations and at trial.

Issues: First, no “declarations” of Ms. Allen were offered or admitted into evidence at trial and thus cannot form any basis for the court’s findings and judgment in this matter.

Second, the only “testimony” of Mr. Potter was consistent between his deposition and trial testimony on the one and only determinative issue in this case.

Third, the evidence at the deposition was that Mr. Potter was told by Ms. Allen that respondents might again attempt to confuse him between the occurrences respecting the will and the declaration he and his mother signed years apart from one another, but that Mr. Potter should “tell the truth.”

Fourth, no evidence admitted at trial derogated from the version testified to by Mr. Potter at his deposition and trial that he first told Ms. Allen his out-of-court statement to the investigator had

confused the occurrences at the will event with the declaration event, and that Ms. Allen then told him it "might be a good idea" if he were to let the investigator promptly be made aware of that.

16. Conclusion of Law 4.8 – Mistakenly identified as a conclusion of law but actually a finding of fact:

The [c]ourt has an abiding belief in the Findings of Fact contained in Article III of this Order. The [c]ourt holds by clear, cogent, and convincing evidence, that [p]etitioners presented evidence which gives this [c]ourt and abiding belief that [Ms.] Allen brought the [w]ill to [Mr.] Potter and [Ms.] Potter and not [Dr.] Goldberg. Therefore, the [w]ill does not comport with the requirements of Wash. Rev. Code Sec. 11.12.020(1).

Issues: First, the findings challenged by appellant have already been covered individually hereinbefore.

Second, the quoted statement does not identify the evidence upon which the court's belief was developed. No testimony of any witness who testified at trial supports a finding that anyone besides Dr. Goldberg took his will to the Potters and they thereupon signed it as witnesses in his presence and at his request. The court had impeachment evidence from a non-party that he briefly identified Ms. Allen as the person who brought them the will to sign, but he then immediately recanted his statement and said he had

inadvertently given information about the circumstances of execution of the supporting declaration and not about the will.

Operating in the background of this struggle was a need for demonstration by clear, cogent, and convincing evidence that the will was not signed by the witnesses in Dr. Goldberg's presence and at his request, but every witness who testified at trial who spoke to the matter said that that was exactly how it happened. The court committed no error in receiving into evidence both what Mr. Potter said when interviewed and also the transcript of what he said, but it was error to elevate the out-of-court statements of this non-party witness from impeachment evidence to substantive evidence.

As to orders/judgments: The court erred in entering the following and the findings, conclusions, orders, and judgments set forth therein:

1. Findings of Fact, Conclusions of Law and Order Invalidating the Last Will and Testament of Lawrence David Goldberg. (CP 309.)
2. Judgment for Attorney's Fees and Costs. (CP 306.)
3. Order Denying Respondent's Motion for Reconsideration. (CP 339.)

4. Judgment. (CP 341.)

As to other matters: The court erred in adopting as substantive evidence and not merely impeachment evidence statements of a non-party not uttered by him under oath either at trial or during the course of his deposition.

III. Statement of the Case

Sometimes legal scenarios occur which are most readily introduced through a timeline setting forth the principal occurrences in the case:

Date:	Event:	Record:
12/18/14	Execution date appearing on decedent's will.	Ex. 1
9/22/18	3 yrs., 9 mos. later: Decedent dies.	RP 45
10/22/18	1 mo. after that: Execution date appearing on will supporting declaration	Ex. 2
1/19/19	3 mos. after that: Investigator interviews 1 of 2 witnesses to will. (Other witness too ill to be interviewed.)	RP 56
2/27/19	1 mo. after that: Physically infirm witness to will dies.	Ex. 3, p. 7
4/24/19	2 mos. after that: Surviving witness to will dep-	

osed.

RP 14

4/26/19

2 days after that:
Trial.

RP 5

(Throughout this brief, “RP” refers to the verbatim report of the proceedings conducted at the trial of this case on April 26, 2019.)

Since this case involves the question whether the trial court was entitled to conclude that clear, cogent, and convincing evidence was admitted at trial to show that the will in question was not signed by the witnesses thereto in the decedent’s presence, the following description will hew closely to only the evidence admitted at trial, even though all sorts of “enhancements” to and embellishments of the evidence were alluded to by counsel during the trial court proceedings which are unsupported by the evidence. Some of these embellishments advance the claims of the appellant and some those of the respondents, but none of them has any proper role in this appeal, which involves, on the merits, nothing more nor less than whether the evidence received could possibly have justified the trial court’s finding that the will was signed by the witnesses out of the presence of the decedent.

The decedent, Lawrence Goldberg, M.D., Jennifer Allen, her husband, James Gregory Boynton, and the two persons whose

signatures appear as witnesses on the will in question were all known to one another through horse ownership, care, and riding at an equestrian farm in LaCenter, Washington, owned by the two people whose signatures appear as witnesses to the will. (RP 22, 23.) Ms. Allen and her husband lived about three-quarters of a mile from the witnesses' farm and were friendly with Dr. Goldberg, and he at times resided with them. (RP 89.) The two persons who signed as witnesses were related to one another as mother and son, and they resided in a house at the farm some distance from the horse barn and attended to their responsibilities as owners and managers of the equestrian operation. (RP 23, 26, 28, 47.) Dr. Goldberg had known the persons who became witnesses, Betty Jo and Tracy Potter, for a period of time between approximately one to four years by the time Dr. Goldberg executed his will. (RP 23.) Dr. Goldberg and Ms. Allen and her husband rode together at times at the Potters' equestrian property. (RP 22, 28.) Dr. Goldberg's time at the property was mostly involved with the horses, at the barn, rather than at the Potters' house, although he occasionally went to the house. (RP 28.) Mr. Potter directly testified at trial that Dr. Goldberg executed his will at Dr. Goldberg's request, and in the presence of Mr. Potter's mother and himself, in the Potters' living

room at the farm on December 18, 2014. (RP 26, 27, 29, 81.) No witness at trial testified otherwise but, as stated, Mr. Potter's testimony was impeached at trial by prior statements which he related were accidental, due to confusing one document for another when he was asked about them.

The evidence memorialized in the 83 pages of the record covering receipt of the trial evidence showed the following two theories as to what happened respecting Dr. Goldberg's execution of his will: The heirs at law claimed that irrespective of when and under what circumstances Dr. Goldberg signed his will, the persons who signed as witnesses did so at some later time than when Dr. Goldberg signed. The heirs contended that the most plausible theory as to what happened was that Dr. Goldberg first signed his will, and then when Ms. Allen discovered it signed by Dr. Goldberg but not by the witnesses, she took it to them and had them sign, very possibly at some point in time after Dr. Goldberg died. (RP 107.) Ms. Allen's assertion was that Dr. Goldberg signed in the presence of Mr. Potter and his mother in the living room of their home on December 18, 2014, and the Potters then and there both signed as witnesses at Dr. Goldberg's request. (RP 26.) As previously stated, the testator and one of the two witnesses were

dead by the time of trial, leaving only Tracy Potter alive as a witness as to what he said had occurred. (RP 23, 34. Ex. 3, p. 8.) No other person remaining alive was witness to either Dr. Goldberg's execution of his will or the witness' alleged signing forthwith after Dr. Goldberg signed. (RP 23, 34 102. Ex. 3, p. 8.)

Four separate incidents/occurrences made up what the court considered relevant to arriving at its findings:

a. Incident No. 1 – Execution and Witnessing of the Will.

Only one person – Tracy Potter -- testified at trial as a sight witness to a claimed incident on December 18, 2014, in which Dr. Goldberg executed his will, Exhibit 1, in the presence of two witnesses and immediately after had his execution attested by the placement of the signatures of those two witnesses on the will. (RP 26.) Ms. Allen testified that she was not present when this occurred. (RP 102.) According to the testimony of Mr. Potter, the only persons present at the transaction were Mr. Potter, his mother, Betty Jo Potter, and the testator, Dr. Goldberg. (RP 26.) Dr. Goldberg died of cancer just under four years later, which was seven months before trial on September 22, 2018. (RP 45.) Betty Jo Potter died two months before trial. (RP 56.)

By the time of trial, it had been 4-1/2 years since Dr. Goldberg allegedly executed his will in the presence of the Potters. (RP 82.) Mr. Potter nevertheless remembered a somewhat through inventory of details of the event and testified to those at trial. He remembered that execution of the will took place in his and his mother's living room. (RP 27.) That on the day in question, Dr. Goldberg knocked on the door of the Potters' home and was allowed in. (RP 27.) That it was unusual for persons, including Dr. Goldberg, visiting their equestrian property to come to their home rather than to the barn. (RP 28.) That Dr. Goldberg stated he needed witnesses for his will and wanted persons who weren't family or "anything like that." (RP 27.) That Dr. Goldberg's demeanor was "fine – not down." (RP 27.) That he and his mother looked through the will "a little bit" but didn't go through the entire document word for word. (RP 29.) That Dr. Goldberg was with the Potters roughly 30 minutes regarding the will and that the only topic of conversation at that time was the will. (RP 28, 29.) That only Dr. Goldberg and the Potters were present when the three of them placed their signatures on the will. (RP 26.) That he observed Dr. Goldberg sign the will. (RP 81.)

Mr. Potter testified that his recollection that Dr. Goldberg came to his and his mother's house to execute his will was "crystal clear." (RP 47.) That he was "confident" Dr. Goldberg brought the will to them for the three of them to execute it. (RP 27.)

To the contrary of the theory of the respondents, Mr. Potter specifically testified that Jennifer Allen *did not* bring Dr. Goldberg's will to his mother and him to be signed by them. (RP 47.) Ms. Allen testified she had nothing to do with the drafting of the will. (RP 102, 105.) That she did not take Dr. Goldberg's will to the Potters for them to sign it. (RP 102.) That she first became aware of Dr. Goldberg's will only about six weeks before he died and first saw it about two weeks later when he was in the hospital and she believed he would probably not be returning to his home. (RP 102 – 104.) That Dr. Goldberg mentioned to her that he had sons but never mentioned a daughter to her. (RP 104.)

No witness at the trial testified that anyone besides the Potters observed Dr. Goldberg execute his will. No witness testified that the three of them – Dr. Goldberg and the Potters -- did not place their signatures on the will in the presence of one another in the single transaction described by Mr. Potter. No witness testified that any of the three signatures on the will was affixed at

any time other than when each of the three wrote their signatures on the will in the Potters' living room in December of 2014.

b. Incident No. 2 – Execution of Declaration of Attesting Witnesses.

Just under four years later, Tracy and Betty Jo Potter executed the Declaration of Attesting Witnesses, Exhibit 2, in the living room of their home on October 22, 2018 – one month after Dr. Goldberg's death. (RP 45, 49.)

A succinct finding of the court as to that occurrence, *not challenged by any of the parties*, is as follows:

[Ms.] Allen brought the Declaration [of Attesting Witnesses] to the home of [the] Potter[s] in LaCenter, WA on October 22, 2018. [The] Potter[s] signed the Declaration on that date.

(CP 311; Finding 3.4.)

Mr. Potter testified Ms. Allen did not provide him any other document or documents to inspect or review when he and his mother signed the attesting witness declaration. (RP 32.) That the extent of Mr. Potter's review of the declaration was that he "looked through it." (RP 51.) Skipped through it. (RP 51.)

The declaration was executed one month after Dr. Goldberg died. (CP 311.)

c. Incident No. 3 – The Visser Interview.

An investigator hired by respondent Cole Goldberg's attorney, Charles Isely, came unannounced to Mr. Potter's residence at about sunset one Saturday afternoon in midwinter and recorded Mr. Potter's identifying an image of the will on his lap top computer as the document brought to his and his mother's home on October 22, 2018, by Ms. Allen and then and there signed by his mother and him. (RP 70.) The investigator, John Visser, showed Mr. Potter two documents, and, in fact -- and for whatever reason -- only showed him one page of the second document, the Declaration of Attesting Witnesses. (RP 55, 56.) (Recall that the court's unchallenged finding is that on that day, October 22, 2018, Mr. Potter and his mother signed the Declaration of Attesting Witnesses, which had been brought to them by Ms. Allen. (CP 311; Finding 3.4.)) Within minutes of what Mr. Potter later testified was a mix up on his part between the two documents, he was on his telephone explaining to Mr. Visser that he had mistakenly identified the will as having been brought to his mother and him by Ms. Allen when he had intended to identify the Declaration of Attesting Witnesses. (RP 65.)

It will be remembered that both the will and the Declaration of Attesting Witnesses were executed in the Potters' living room, at widely separated points in time, and that Mr. Potter described in his trial testimony that the will was brought to his mother and him by Dr. Goldberg but that, following Dr. Goldberg's death, the Declaration of Attesting Witnesses was brought to them by Ms. Allen. (RP 27, 32, 33.) Each document bears the signatures of Mr. Potter and his late mother. (Ex. 1, 2.)

The Visser interview took place in front of the Potters' home not long before sunset on a breezy Saturday in January. (RP 59.) Mr. Visser first made contact with Mr. Potter at about 4:00 p.m., and the interview itself concluded a few minutes before 4:48 p.m., by which time Mr. Visser had already driven about one to 1-1/2 miles from the Potters' property in his car. (RP 56, 65.) When he originally arrived at the Potters' property, Mr. Visser asked to be permitted to speak with Mr. Potter inside the Potters' home, but Mr. Potter explained that would not be possible because his mother was inside the home asleep, convalescing. (RP 58.) Ms. Potter was then and there in the care of a hospice nurse. (RP 91.) Mr. Visser counter-proposed that they conduct the discussion with his lap top computer open on the trunk of his car as a makeshift desk.

(RP 59.) Mr. Visser testified that he had wanted to open up some files at a table or something of that nature inside the house. (RP 58.) At trial, Mr. Visser volunteered that the trunk of his car was “kind of not a real great place for me, . . .” (RP 59.) Mr. Visser showed Mr. Potter computer images of the will and one page of the declaration of attesting witnesses and but not “hard” copies of either document. (RP 67, 70.) There was no evidence at trial as to the size, resolution, or clarity of the monitor on Mr. Visser’s lap top computer or even any specific evidence as to Mr. Potter’s distance from the monitor. There was no evidence at trial as to the length of time Mr. Potter was shown and/or looked at the computer image of each document. Perhaps somewhat importantly, Mr. Visser testified he showed Mr. Potter all of the pages of the will but -- for whatever reason -- only the signature page of the declaration of attesting witnesses. (RP 55, 56.)

It is to be remembered that this unannounced interview occurred on a Saturday just before dinner time and that Mr. Visser first made contact with Mr. Potter upon locating Mr. Potter inside his home. (RP 57.) Three witnesses testified, contradictorily, as to the state of Mr. Potter’s sobriety when he was interviewed by Mr. Visser: Mr. Visser, Mr. Potter, and Ms. Allen’s husband, who

coincidentally arrived on scene with Ms. Allen after Mr. Visser began questioning Mr. Potter. (RP 72, 80, 91.) Mr. Visser testified he witnessed no evidence of alcohol influence or impairment on Mr. Potter. (RP 72.) Mr. Visser conceded, however, that he was unable "in any way shape or form" to judge whether Mr. Potter's affect at the time of the interview differed from his usual affect, as this was his first contact with Mr. Potter. (RP 72.) Mr. Potter testified at trial that before Mr. Visser arrived at his door he had been drinking some sort of alcoholic beverage in a can as well as a regular beer. (RP 80.) Ms. Allen's husband, James Gregory Boynton, testified at trial that it was clear to him that Mr. Potter was intoxicated. (RP 91, 95.) For his own part, Mr. Potter stated in response to a question at trial about the extent of his impairment only that he "wasn't completely s - - t faced." (RP 80.)

Mr. Potter testified he believed Mr. Visser to be "law enforcement" and that he was somewhat intimidated by Mr. Visser, whom he described as a big person. (RP 84, 85.) Mr. Potter's own physical size is not addressed in any of the evidence introduced at trial, but he testified he was a retired horse race jockey. (Ex. 2, p. 43.)

Mr. Visser was underway interviewing Mr. Potter on the trunk of Mr. Visser's car when Ms. Allen and her husband drove to the property to take care of the horse they boarded at the Potters, to clean the stall, bring the horse in, and feed the horse. (RP. 89, 90.) Seeing someone unknown to them interviewing Mr. Potter with an open lap top on the trunk of an auto also unfamiliar to them was part of what caused them to drive directly to that scene instead. (RP 89, 90.) Further, Mr. Potter beckoned to them with an arm gesture to come over to where he was speaking with Mr. Visser. (RP 90.)

From the beginning, there was tension between Mr. Visser, on the one hand, and Ms. Allen and her husband, on the other hand. (RP 90.) Mr. Boynton claimed to be aware prior to this incident that the attorney for respondent Rachael Goldberg, Steven Turner, had previously telephoned Mr. Potter about the circumstances of Dr. Goldberg's will. (RP 90.) Respondent Ms. Goldberg's lawsuit to invalidate Dr. Goldberg's will had been filed 2-1/2 months prior to the interview, and Ms. Allen's application to probate Dr. Goldberg's estate in accordance with the will had been filed about a month before that. (CP 396.) The objective of Mr. Visser's employer was thus diametrically opposite the objective of

Mr. Boynton's wife, and here the two of them found an agent of their litigation opponent engaged in unannounced, ex parte questioning of a longtime friend and neighbor of theirs about a matter of importance to them in the litigation. It may have been an understatement, as well as entirely understandable, that when Mr. Visser testified at trial he found Mr. Boynton and Ms. Allen "annoyed" that he was there interviewing Mr. Potter. (RP 63.)

Both Mr. Boynton and Ms. Allen spoke with Mr. Visser when they arrived on scene. (RP 94.) At some unspecified phase of the four-way interaction, Mr. Visser requested Mr. Boynton and Ms. Allen to "give them some privacy and leave so he could talk to [Mr. Potter] alone." (RP 90.) Mr. Boynton and Ms. Allen thereupon drove from the house to the barn in their car. (RP 90.)

Mr. Visser testified that he found Mr. Potter to have been "cooperative" and "nice" during the interview and that he did not consider Mr. Potter had been evasive with him. (RP 94.) His recording of his conversation with Mr. Potter is 13 minutes in length and was recorded on a cell phone which Mr. Visser described as being "no longer in service" and which he only used for making recordings. (RP 60, 61.)

Just before Mr. Visser packed up his equipment to conclude his interview with Mr. Potter, Mr. Boynton returned to the front of the Potters' home and told Mr. Potter a horse had gotten loose and asked him to assist in catching it. (RP 91.) Mr. Potter departed for the barn, which was at some distance from and behind the house. (RP 91.) However, the horse had been wrangled back into its stall by the time Messrs. Potter and Boynton made it to the barn. (RP 91.) Mr. Visser at some point called out that he was going to "take off," and that it appeared to him "everything is okay with the horse" (RP 64.) Mr. Potter called back to him that "We're good" respecting the loose horse. (RP 64.)

From a vantage point not at all clarified in the trial court record, Mr. Visser testified the Boynton/Allen vehicle was parked in front of the barn door and that the barn itself appeared to have a long central aisleway of 70 to 80 feet or more. (RP 64.) Mr. Visser drove off and away from the property. (RP 65.) The final few minutes Mr. Visser was on the property occurred shortly after sunset on that breezy midwinter day. (RP 56, 65.)

Mr. Visser was only about 1-1/2 to 2 miles from the property when a call came in to him from Mr. Potter at 4:48 p.m. (RP 65.) Mr. Potter described that he had mixed up the will for the attesting

witness declaration and vice versa when he described the circumstances of execution of those two documents by his mother and him. (RP 66, 92.) Mr. Potter was asked by Mr. Visser if he was alone as he was providing this updated information by telephone, and he responded that he was back at the house and alone. (RP 66.) That he was speaking "for himself." (RP 66.) That the will had been signed by Dr. Goldberg in his and his mother's presence and thereupon been signed by them immediately after. (RP 66.) That he was "firm about it" and would so testify at trial. (RP 66, 67.)

Mr. Boynton testified that Mr. Potter immediately raised with Ms. Allen and him at the barn that he had given accidentally mistaken information to Mr. Visser during the interview. (RP 92.) That he had confused the will with the declaration in relating the circumstances of each. (RP 92.) Mr. Potter testified at trial that he had mistakenly told Mr. Visser about who was present during the signing of each of the documents because he "got them mixed up." (RP 47.)

Mr. Potter testified that Ms. Allen at no time tried to coerce him as to what to say concerning Dr. Goldberg's will but that she

agreed with him that it “might be good” if he called Visser and straightened out his mistake. (RP 83.)

d. Incident No. 4 – Tracy Potter Deposition.

The deposition of Tracy Potter occurring on April 24, 2019, became a very heated affair, inasmuch as Ms. Allen directed profanity and expressed anger at the respondent’s attorneys. (RP 39 – 42.) Mr. Potter testified that the only thing Ms. Allen requested of him before the deposition was that he “tell the truth.” (RP 44.) She told him, though, that she expected that “they” were going to “try to twist you around . . .” at the deposition. (RP 44.) Mr. Potter shared Ms. Allen’s impression that respondents’ attorneys would attempt to “twist him around” at the deposition. (RP 44.)

By the time of the deposition, there had already been the aggravation to Ms. Allen that one of the respondents’ attorneys had telephoned Mr. Potter. (Ex. 4, p. 6.) Next, there had already been the unannounced, recorded interview of Mr. Potter in front of his home, in which the investigator asked Ms. Allen to leave. (Ex. 3, p. 32.) Twelve months prior to the deposition, respondent Rachael Goldberg had filed an action claiming that she “had discussed Decedent’s financial situation and estate planning with friends and family of the Decedent” and that she “d[id] not believe that

Decedent executed a last will and testament.” (CP 1.) With this untrue claim, Ms. Goldberg procured an *ex parte* order appointing her personal representative of her late father’s estate. (CP 7.)

Mr. Potter testified at trial that at times he was confused at the deposition about whether he was being questioned about the will or the declaration of supporting witnesses. (RP 35.) Indeed, Mr. Potter became “turned around” enough again about the two documents at the deposition that he testified that the supporting declaration, dated October 22, 2018, was brought to him by Dr. Goldberg, which was of course an entire impossibility, as Dr. Goldberg had died exactly a month earlier. (RP 38, 39.)

Ms. Allen erupted in what Mr. Potter described as a “not very nice” fashion. (RP 39.) Her basic accusation directed to respondent’s attorneys was that “You’re trying to trick him.” (RP 41.) She exploded that one of the respondent’s attorneys was a “liar” and a “snake.” (RP 40, 41.) That she intended to report him to the bar association. (RP 42.) She uttered both the “f” and “s” bombs before she was through venting her considerable displeasure about what she perceived to be an attempt to confuse and turn Mr. Potter around concerning the two documents in

question and, in the process, hold her out as a liar as well. (RP 41.)

IV. Summary of Argument

Out-of-court, unsworn statements by a witness not a party to a case may only be considered as impeachment evidence and not as substantive evidence of the contents of those statements. The findings of fact reveal that the court erroneously adopted the out-of-court statements of the non-party witness as substantive evidence in arriving at its judgment in this case.

V. Argument

a. Out-of-Court Unsworn Statements of a Witness Not a Party to a Case May be Admitted as Impeachment But Not as Substantive Evidence.

One of the better known evidence rules is that what a *party* says regarding a matter in litigation may be received in evidence when offered by a party-opponent either as an admission or as evidence potentially impeaching the credibility of the party, regardless whether the utterance was under oath or not, and regardless whether made during trial or before. ER 802(d)(2).

The general rule is that pretrial statements of a witness not a party to a case may be considered as affecting the credibility of the

witness but not as substantive evidence. K. Tegland, 5A Wash. Practice *Evidence Law and Practice* Sec. 613.3 (2007). There are a very few exceptions -- not as well known -- under which pretrial statements of a non-party witness may constitute substantive evidence; the only exception of relevance in this case is that a non-party witness' statements made under oath at a deposition may amount to both substantive evidence and impeachment evidence. ER 801(d)(1). In this case, Mr. Potter testified at both his deposition and at trial on the determinative issue in this case that the person who brought the will to Mr. Potter and his mother to be signed by them as witnesses was the testator, Dr. Goldberg. (RP 26. Ex. 3, p. 29.) No one testified at trial to the contrary. (RP 22 - 105.) Indeed, the only other witness addressing the issue at trial, Ms. Allen, testified it was not she who brought the will to the Potters to be witnessed and she was not present when that occurred. (RP 102.)

There was no error in admitting Mr. Potter's prior, out-of-court, unsworn statements and giving them impeachment effect. ER 613(a), 801. The error, requiring reversal in this case, is that the court's findings of substantive effect for those statements was against clear, well-established legal authority.

1. Rule Framework.

The rule structure within which this matter rests on appeal is as follows:

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial, . . . offered in evidence to prove the truth of the matter asserted.

ER 801.

HEARSAY RULE Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

ER 802.

(d) **Statements Which Are Not Hearsay.**
A statement is not hearsay if –

(1) *Prior Statement by Witness.* The declarant testifies at the trial . . . and is subject to cross examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a . . . deposition,

(2) *Admission by Party-Opponent.* The statement is offered against a party and is . . . the party's own statement

ER 801.

The credibility of a witness may be attacked by any party, including the party calling the witness.

ER 607.

Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

ER 613(a).

2. Treatise Description of Principle.

On the narrow issue involved in this appeal, Tegland summarizes that

Even though a prior inconsistent statement may be inadmissible as substantive evidence, it may be admissible for the limited purpose of attacking the credibility of the witness. When admitted for this limited purpose, the statement need not fall within some exception to the hearsay rule.

...

An inconsistent statement introduced under the instant rule [CR 613] [is] admissible only for the limited purpose of impeachment. Thus inconsistent statements submitted for impeachment purposes cannot support a verdict or finding.

(Italics added. Footnotes omitted.) K. Tegland, 5A Wash. Practice *Evidence Law and Practice* Sec. 613.3 (2007).

3. Case Law Authority.

The Supreme Court may have expounded on error in admitting inconsistent statements of non-party witnesses as

substantive rather than merely impeaching evidence as early as territorial days, but those pronouncements go back beginning at least 115 years ago. *State v. Nelson*, 39 Wash. 221, 81 Pac. 721, 723 (1905).

Further, the appellate courts have at times been relatively blunt that the rule is well established and ought to be well known. An especially terse statement of the rule is set forth in *State v. Fliehman*, 35 Wn.2d 243, 245, 212 P.2d 794 (1949):

It is elementary that impeaching evidence should affect only the credibility of the witness. *It is incompetent to prove the substantive facts encompassed in such evidence. State v. Sandros*, 186 Wash. 438, 58 P. (2d) 362 [(1936)]; *State v. Bogart*, 21 Wn.(2d) 765, 768, 153 P.(2d) 765, 768, 153 P.(2d) 407, 133 A.L.R. 1554 [(1944)]. When so used *it may be prejudicial*.

(*Italics added.*)

Another case in which the Supreme Court strongly implied the rule was “basic” and one which trial courts should know and apply without need of appellate guidance is *Puget Sound Nat. Bk. of Tacoma v. Moore*, 159 Wash. 5, 291 Pac. 1081, 1084 (1930). In that case, defendant’s father testified as a trial witness and gave testimony at variance with certain pretrial statements he, the father, had made. The judgment rendered against defendant was

reversed in part because the trial court allowed the prior inconsistent statements of the father to be treated as substantive evidence. The court said:

The father was not a party to the present action, a fact seemingly lost sight of in the trial . . . court His participation in the trial was as a witness only, The evidence could be admissible only as tending to impeach him as a witness, *[I]mpeaching evidence never tends to prove a fact. Its only purpose is to show the unreliability of the witness, . . .*

(Italics added.) *Puget Sound Nat. Bk. of Tacoma v. Moore, supra*, 291 Pac. 1081, 1084 (1930).

The court in *State v. Jefferson*, 6 Wn.App. 678, 683, 495 P.2d 696 (1972), stated that:

The purpose of impeachment is to attack the credibility of the witness and not to furnish substantive evidence The fact that the witness has stated the facts differently shows either a failure of memory, that he has forgotten what he once knew, or else it shows a want of integrity – either way it impairs the value of this testimony. *The contradictory statements are admissible solely to impeach the witness and not as direct and affirmative proof of the facts to which they relate. State v. Sandros*, 186 Wash. 438, 58 P.2d 362 (1936).

(Italics added.)

Another illustrative case is *State v. Clinkenbeard*, 130 Wn.App. 552, 568, 123 P.3d 872 (2005). Prosecution for sexual

misconduct with a minor. The alleged victim testified and denied the claimed sexual contact but was examined concerning contrary statements she had made to others prior to trial. *Held*, no error in admitting the prior inconsistent statements to impeach the witness, but error in basing a finding of guilt on those impeaching statements; the conviction was reversed and the case remanded for dismissal with prejudice. The appellate court said, *State v. Clinkenbeard, supra*, 130 Wn.App. 552, 569 (2005): "Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence." Same: *State v. Johnson*, 40 Wn.App. 371, 377, 699 P.2d 221 (1985).

The rule was stated a long time ago in *National City Bk. v. Shelton Elec. Co.*, 96 Wash. 74, 164 Pac. 933, 934 (1917), to be that:

[I]mpeaching testimony does not establish, or in any way tend to establish, the truth of the matters contained in the contradictory statements. Such testimony must be strictly confined to the object of impeaching the witness. 5 Jones on Evidence, p. 254.

Finally, *State v. Stewart*, 2 Wn.App. 637, 639, 468 P.2d 1006 (1970), stands for the proposition that when impeaching evidence is erroneously allowed to stand as substantive evidence, and the

appellate court is unable to say whether the trial outcome was affected by the error, the trial court outcome must be reversed. *Stewart* concerned a prosecution for carnal knowledge of a minor. At trial, the mother of the alleged victim testified that she had not made various statements to the authorities tending to show the guilt of the defendant. Over objection, the prosecutor was permitted to claim to the jury that her pretrial contradictory statements tended both to impeach her credibility and also to show that the contrary statements supported the theory of the defendant's guilt. The appellate court held that reversible error was committed in allowing the prosecutor to argue to the jury that the non-party witness' statements could be considered as substantive proof of what was contained in those statements. The court first observed:

Impeaching evidence is not substantive evidence, *Gams v. Oberholtzer*, 50 Wn.2d 174, 310 P.2d 240 (1957); the state sought to use it as such in this case. The state's case had to stand or fall on the jury's belief or disbelief of the daughter's testimony. Here the state sought, erroneously, to corroborate her testimony by using hearsay, and possibly inflammatory, testimony of the mother's telephone conversation with a police woman.

State v. Stewart, supra, 2 Wn.App. 637, 639 (1970).

The appellate court held that reversal was required, as it was not possible for the appellate court to know whether the finding of

guilt would have been made without the hearsay evidence's having been allowed to be considered as substantive evidence:

[A]fter an examination of the entire record, this court is unable to say whether the defendant would or would not have been convicted but for the error committed. *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

State v. Stewart, supra, 2 Wn.App. 637, 639 (1970).

See also: *Saffer v. Saffer*, 42 Wn.2d 298, 304, 254 P.2d 746 (1953) (error to base finding on extrajudicial statement of non-party witness); *Elliott v. Puget Sound & Cent. Am. S.S. Co.*, 22 Wash. 220, 60 Pac.410, 412 (1900) (reversible error for trial court to instruct jury that writing authored by non-party bound party, despite non-party's testimony at trial).

b. The Attorney's Fees Judgments Against Ms. Allen Should be Reversed.

Awards of attorney's fees were entered against Ms. Allen under RCW 11.24.050 11.96A.150 on the basis that she had, without justification, and with knowledge that respondent's claims were meritorious, resisted respondent's claims that the will had not been validly executed. (CP 306, 317, 341.) It is submitted that the substantive evidence properly admissible at trial pointed instead to the conclusion of valid execution of the will, and it is consequently

the contention of Ms. Allen that the attorney's fees judgments entered against her should be vacated. (CP 306, 341.) Attorney's fees allowances in probate proceedings are a matter of discretion. RCW 11.96A.150. *See generally, In re Estate of Coffin*, 7 Wn.App. 256, 499 P.2d 223 (1972). This brief asserts Ms. Allen's claim, however, that the testimony properly admissible at trial pointed solely to the conclusion that the will had been witnessed correctly. The attorney's fees awards against her were therefore error as having been based on findings not supported by the evidence.

c. Ms. Allen Requests and Should be Awarded Reasonable Attorney's Fees and Expenses (RAP 18.1(a), (b)).

This is Ms. Allen's request for an award of reasonable attorney's fees and expenses payable by the respondents under RAP 18.1(a), (b). If this court determines the will should be sustained, authority to impose fees and costs against the parties claiming invalidity of the will is present in RCW 11.24.050. A more general grant of power to award costs and reasonable attorney's fees in probate proceedings payable by "any party to the proceedings . . . in such amount and in such amount as the court determines to be equitable" is present in RCW 11.96A.150.

VI. Conclusion

The parties were agreed that clear, cogent, and convincing evidence needed to be presented to sustain a claim that the will admitted to probate had been executed in an invalid fashion. However, no witness who testified at trial, or who testified before trial in a deposition, testified that the will had been witnessed other than validly, at the request of the decedent and in his presence. Pretrial, unsworn statements of a person not a party to this case, which he explained minutes after making them were incorrect, were allowed to be substantive evidence of the court's findings as to invalidity of the will. This was error as a matter of law.

The judgment declaring the will to be invalid should be vacated, as should the awards of attorney's fees against the appellant. Appellant should recover her reasonable fees and costs against the respondents.

Dated: June 12, 2020.

Respectfully submitted,



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FILED
COURT OF APPEALS
DIVISION II

2020 JUN 12 PM 4:40

STATE OF WASHINGTON

BY _____

Court of Appeals of Washington, Division II

IN THE MATTER OF THE ESTATE OF

LAWRENCE D. GOLDBERG,

Deceased.

Consolidated With:

RACHAEL LAUREEN GOLDBERG,

Respondent,

v.

JENNIFER ALLEN,

Appellant.

No. 53833-4-II

Proof of Service of Brief of Appellant

Proof of Service of Brief of Appellant

I certify that I mailed a copy of the Brief of Appellant and of this Proof of Service of Brief of Appellant, postage prepaid, to each of the below listed persons on June 12, 2020:

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Proof of Serv. of Supp. Not. of Appeal
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37 I declare under penalty of perjury under the laws of the State of Washington that the
38 foregoing is true and correct.
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40 Dated June 12, 2020, at Camas, Washington.
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