

FILED
Court of Appeals
Division III
State of Washington
2/6/2018 4:11 PM

No. 35596-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

VICTOR JOHNSON and MARILYN JOHNSON,

Appellants

v.

BILL SPENCER, BENTON COUNTY ASSESSOR,

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 17-2-00304-0

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Reid W. Hay,
Deputy Prosecuting Attorney
BAR NO. 34584
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. STATEMENT OF FACTS	1
III. ARGUMENT.....	3
A. The superior court did not acquire subject matter jurisdiction over the Johnsons’ appeal because they failed to timely serve their petition for judicial review on the agency from which the appeal was taken as required under the Administrative Procedures Act.....	3
B. Substantial Compliance (1) is not sufficient to invoke the subject matter jurisdiction of the superior court under the APA and (2) cannot be applied where there is a failure to comply with a statutory time limit.....	5
C. The “Spirit of the Law” is not an exception to statutory time limits.	9
D. Neither prejudice nor the lack of prejudice can cure the absence of subject matter jurisdiction.....	12
E. Because the Attorney General has not appeared in this action, the Johnsons’ service on the Attorney General does not cure their failure to timely serve the BTA.....	13
F. Neither waiver nor equitable estoppel can create subject matter jurisdiction.....	15
IV. CONCLUSION.....	17

TABLE OF AUTHORITIES

WASHINGTON CASES

Cheek v. Emp't Sec. Dep't of State of Washington, 107 Wn. App. 79, 25 P.3d 481 (2001).....3, 4, 5, 10, 12, 14, 15, 16
City of Seattle v. PERC, 116 Wn.2d 923, 809 P.2d 1377 (1991)6, 8, 9
Hall v. Seattle Sch. Dist. No. 1, 66 Wn. App. 308, 831 P.2d 1128 (1992).....7, 8
Jones v. Dep't of Corr., 46 Wn. App. 275, 730 P.2d 112 (1986)16, 17
Krawiec v. Red Dot Corp., 189 Wn. App. 234, 354 P.3d 854 (2015)5, 6
Matter of Botany Unlimited Design and Supply, LLC, 198 Wn. App. 90, 391 P.3d 605 (2017).....10, 11, 15
Matter of Saltis, 94 Wn.2d 889, 621 P.2d 716 (1980).....7, 8
Medina v. Pub. Util. Dist. No. 1 of Benton Cty., 147 Wn.2d 303, 53 P.3d 993 (2002).....6
San Juan Fidalgo Holding Co. v. Skagit Cty., 87 Wn. App. 703, 943 P.2d 341 (1997).....6, 8, 13
Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cty., 135 Wn.2d 542, 958 P.2d 962 (1998).....3, 4, 5, 6, 10, 12, 16, 17
Skinner v. Civil Serv. Comm'n of City of Medina, 168 Wn.2d 845, 232 P.3d 558 (2010).....6
Sprint Spectrum, LP v. State Dep't of Revenue, 156 Wn. App. 949, 235 P.3d 849 (2010).....4, 9, 10, 11, 12
Vasquez v. Dep't of Labor & Indus., 44 Wn. App. 379, 722 P.2d 854 (1986).....7, 8
Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 254 P.3d 818 (2011).....16, 17

WASHINGTON STATUTES

Ch. 41.12 RCW.....7
RCW 34.05.5146
RCW 34.05.542(2).....3, 4, 5, 8, 10, 12, 16, 17
RCW 34.05.542(6).....13, 14

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (6th ed. 1990).....14

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The superior court did not err in following Washington case law holding that substantial compliance cannot cure a failure to comply with the service requirements under the APA, and further that a failure to meet a statutory time limit cannot constitute substantial compliance.
- B. The superior court did not err in following Washington case law holding that assertions of waiver or estoppel cannot cure the absence of subject matter jurisdiction.
- C. The superior court did not err in following Washington law that where the court lacks subject matter jurisdiction, the question of prejudice is not relevant.

II. STATEMENT OF FACTS

This matter arose from the Johnsons' appeal from the Assessor's determination concerning the taxes, interest, and penalties associated with removal of one of the Johnsons' properties from "current use" property tax classification at the time the property was sold. Assisted by counsel, the Johnsons challenged the determination before the Benton County Board of Equalization, which sustained the Assessor's decision. CP 7-8. Then, the Johnsons brought an appeal to the Washington State Board of Tax Appeals ("BTA"). CP 1-2. The BTA obtained briefing from the parties

and held a full evidentiary hearing with witness testimony on February 8, 2016. *See* CP 6-15, 25-96. On September 9, 2016, the BTA issued a written initial decision upholding the determination of the Benton County Board of Equalization. CP 6-15. The Johnsons next petitioned for review of the initial decision to the full Board, which, on January 9, 2017, issued an order adopting the initial decision upholding the Benton County Board of Equalization as the BTA's Final Decision. CP 17. That final order was served on the Johnsons on January 9, 2017. CP 107.

On February 8, 2017—30 days later—the Johnsons filed a petition for judicial review of the BTA's final order with the Benton County Superior Court. CP 216-18. However, the petition for review was not provided to the BTA until May 25, 2017. CP 108, 209-10. That date was 136 days after service of the BTA's January 9, 2017, final order.

The Assessor moved for an order dismissing the petition because the Johnsons' failure to timely satisfy the judicial review provisions of the Administrative Procedures Act ("APA") deprived the superior court of jurisdiction. CP 97-106. Following a hearing on the issue, the superior court agreed and granted the order to dismiss on September 8, 2017. CP 214-15. The Johnsons filed an appeal from that order, now bringing the matter before the Court of Appeals. CP 216-20.

III. ARGUMENT

- A. The superior court did not acquire subject matter jurisdiction over the Johnsons' appeal because they failed to timely serve their petition for judicial review on the agency from which the appeal was taken as required under the Administrative Procedures Act.**

When an appeal from an administrative tribunal is brought to superior court, the petitioners are seeking to invoke “the appellate, rather than the general, jurisdiction of the superior court.” *Skagit Surveyors and Eng’rs, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). Because it is “[a]cting in its appellate capacity, the superior court is of limited statutory jurisdiction, and all statutory procedural requirements must be met before jurisdiction is properly invoked.” *Id.*

Under the APA, a party wishing to contest an agency order must file a petition for judicial review and serve it “on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.” RCW 34.05.542(2). Failure to do so deprives the superior court of subject matter jurisdiction. *Cheek v. Emp’t Sec. Dep’t of State of Washington*, 107 Wn. App. 79, 83, 25 P.3d 481 (2001). The absence of subject matter jurisdiction “renders the superior court powerless to pass on the merits of the controversy brought before it.” *Skagit Surveyors and Eng’rs*, 135 Wn.2d at 556; accord *Cheek*, 107 Wn. App. at 85. Any party, even one that was itself properly served, “may raise

the issue of lack of subject matter jurisdiction at any time.” *Skagit Surveyors and Eng’rs*, 135 Wn.2d at 556. Unlike personal jurisdiction, *subject matter* jurisdiction cannot be waived. *Id.*

The requirements of RCW 34.05.542(2) are unambiguous. *Sprint Spectrum, LP v. State Dep’t of Revenue*, 156 Wn. App. 949, 963, 235 P.3d 849 (2010). The statute identifies three categories of entities, each of which the petitioners must serve with their petition within 30 days of service of the agency’s final order: (1) the agency that issued the final order being challenged; (2) the office of the attorney general; and (3) all parties of record. *Sprint Spectrum*, 156 Wn. App. at 954-55; *Cheek*, 107 Wn. App. at 83 (“The statute is straightforward. Ms. Cheek was required to serve her petition for review on the Department *and* the attorney general *and* all parties of record.” (emphasis in the original)); RCW 34.05.542(2). When the petition seeks review of an order issued by the BTA, the BTA is “the agency” that must be timely served in order to comply with RCW 34.05.542(2). *Sprint Spectrum*, 156 Wn. App. at 955.

Here, the Johnsons did not serve the BTA with a copy of the petition for review until 136 days after the issuance of the BTA’s final order. CP 107-08. This was not within the 30-day window provided under RCW 34.05.542(2), and as a result the superior court did not acquire subject matter jurisdiction under the APA to entertain the Johnsons’

appeal. *See Skagit Surveyors and Eng'rs*, 156 Wn.2d at 556; *Cheek*, 107 Wn. App. at 83.

B. Substantial Compliance (1) is not sufficient to invoke the subject matter jurisdiction of the superior court under the APA and (2) cannot be applied where there is a failure to comply with a statutory time limit.

The Johnsons contend that even though RCW 34.05.542(2) requires a petition for review of an agency order be served within 30 days of the agency's final order, untimely service after that statute's 30-day window has closed constitutes "substantial compliance." Substantial compliance is "actual compliance with the substance essential to every reasonable objective of a statute." *Krawiec v. Red Dot Corp.*, 189 Wn. App. 234, 241, 354 P.3d 854 (2015). The Johnsons' contention is without merit first because substantial compliance is inadequate to provide subject matter jurisdiction under the APA, and second because in any action, whether under the APA or under other law, the doctrine of substantial compliance cannot cure a failure to comply with a statutory time limit.

The Washington Supreme Court has held that "[s]ubstantial compliance with the service requirements of the APA is not sufficient to invoke the appellate, or subject matter, jurisdiction of the superior court." *Skagit Surveyors and Eng'rs*, 135 Wn.2d at 556; *accord Cheek*, 107 Wn. App. at 85. Because this appeal arises from a petition for review of an

agency order brought under RCW 34.05.514 (*see, e.g.*, CP 2), substantial compliance with APA service requirements as claimed by the Johnsons would nevertheless fail to provide the superior court with subject matter jurisdiction over this action. *Skagit Surveyors and Eng'rs*, 135 Wn.2d at 556.

In addition, and regardless of whether an appeal is brought under the APA or under other law, the established rule is that there cannot be substantial compliance if service of the petition failed to comply with a statutory *time limit*. *Medina v. Pub. Util. Dist. No. 1 of Benton Cty.*, 147 Wn.2d 303, 317-18, 53 P.3d 993 (2002); *City of Seattle v. PERC*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991); *Krawiec*, 189 Wn. App. at 241-42; *San Juan Fidalgo Holding Co. v. Skagit Cty.*, 87 Wn. App. 703, 711-13, 943 P.2d 341 (1997). In their brief to this Court, the Johnsons discuss four cases in which a party's imperfect service of a petition for review was held to constitute substantial compliance. Br. of Appellants at 6-9. Those cases, the Johnsons argue, are analogous to actions brought under the APA. *Id.* at 7. However, even if those cases were relevant to the APA they are inapplicable to the case at bar because none of them involved—as here—a failure to comply with a statutory time limit.

The Johnsons cite first to *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 855-56, 232 P.3d 558 (2010), in which the court

determined that in the circumstance of a small city where delivery to the Civil Service Commission was specified under Chapter 41.12 RCW, but the Commission had no staff or physical office at its listed city hall address, leaving a copy of the petition with the City Clerk constituted substantial compliance.

Next, the Johnsons cite to *Matter of Saltis*, 94 Wn.2d 889, 895-96, 621 P.2d 716 (1980), an industrial insurance appeal under Title 51 where the Court found substantial compliance where the petition was served on the Department of Labor and Industries, rather than being directed specifically to the “Director” of that Department. In a similar vein, the Johnsons cite next to *Vasquez v. Dep’t of Labor & Indus.*, 44 Wn. App. 379, 722 P.2d 854 (1986), in which service to the other party’s lawyer was deemed to substantially comply with the requirement under Title 51 to serve the other party. *Id.* at 384. Finally, the Johnsons cite to *Hall v. Seattle Sch. Dist. No. 1*, 66 Wn. App. 308, 831 P.2d 1128 (1992), where service was deemed to substantially comply where it was delivered to the secretary of the chair of the school board, rather than handed directly to the chair. *Id.* at 312-14.

In contrast, Washington courts hold that the doctrine of substantial compliance cannot be applied if service of the petition was *untimely*, and our courts have specifically and carefully distinguished cases such as those

cited by the Johnsons that relate to defects such as with the method of service from those that instead pertain to defects in timeliness. *See San Juan Fidalgo Holding Co.*, 87 Wn. App. at 711-13 (distinguishing several such cases, including *Saltis* and *Hall*).

In *PERC*, 116 Wn.2d at 928, the Washington Supreme Court discussed and specifically distinguished *Saltis* and *Vasquez*, two cases now relied upon by the Johnsons, because in those cases there had been “actual compliance” with the service statute, “albeit procedurally faulty.” In contrast, in *PERC* although the petition for review was served on some of the parties within the applicable 30-day statutory deadline, others were served three days too late. *Id.* at 927. Because the defect in *PERC* was untimely service, there was no possibility of finding substantial compliance. *Id.* at 928-29. The Supreme Court held:

It is impossible to substantially comply with a statutory time limit in the same way. It is either complied with or it is not. Service after the time limit cannot be considered to have been actual service within the time limit. *We therefore hold that failure to comply with a statutorily set time limit cannot be considered substantial compliance with that statute.*

Id. (emphasis added).

Here, the defect with the Johnsons’ service to the BTA was that it was untimely. Under RCW 34.05.542(2), the Johnsons were required to serve their petition for review on the BTA within 30 days of service of the

agency's final order. The final order was served on January 9, 2017 (CP 107), but the Johnsons did not serve the BTA with their petition for review from that final order until May 25, 2017. CP 108, 209-10. That date was 136 days after service of the final order, and 106 days after the statutory deadline.

As in PERC, where the appeal was dismissed because substantial compliance cannot apply to a missed statutory deadline, *PERC*, 116 Wn.2d at 928-29, here substantial compliance is not available to cure the Johnsons' untimely service of the petition for review. A statutory time limit "is either complied with or it is not. Service after the time limit cannot be considered to have been actual service within the time limit." *Id.* Accordingly, substantial compliance does not and cannot be applied to this case.

C. The "Spirit of the Law" is not an exception to statutory time limits.

The Johnsons next assert that untimely service of their petition nonetheless satisfied the "Spirit of the Law." Br. of Appellants at 10. They cite to no cases applying the "Spirit of the Law" as a separate doctrine, and instead their argument appears to be that because the BTA was eventually, albeit untimely, served, that should be enough. *See* Br. of Appellants at 10. The Johnsons thereby attempt to distinguish *Sprint*

Spectrum, 156 Wn. App. at 952, in which service to the BTA never occurred. Br. of Appellants at 10.

In *Sprint Spectrum*, however, the court's determination to uphold the dismissal of Sprint's appeal did not hinge on whether the petition had never been served, but was based simply on service having been untimely. *See* 156 Wn. App. at 955 ("*Timely* service of a copy of the petition for review on the Board, the agency whose order is the subject of the petition, is required. . . . The failure to *timely* serve a copy of the petition on the Board was a failure to comply with the express terms of the statute." (emphasis added)). Eventual but untimely service does not cure the jurisdictional error created by failing to satisfy a statutory time deadline. *See Cheek*, 107 Wn. App. at 84-85 (upholding pursuant to RCW 34.05.542(2) the dismissal of petition for judicial review because—as here—it was untimely served on the agency from whose order the appeal was taken).

In an appeal from the APA such as this, a court has only limited statutory jurisdiction, and the statutory procedural requirements set forth by the legislature must be met in order for subject matter jurisdiction to exist. *Skagit Surveyors and Eng'rs*, 135 Wn.2d at 555-56. "The statutory service requirements are jurisdictional and quite strict." *Matter of Botany*

Unlimited Design and Supply, LLC, 198 Wn. App. 90, 94, 391 P.3d 605 (2017).

The obligation to adhere to the requirements set forth by the legislature is curiously underscored by a feature in the Johnsons' brief to this Court. They write:

Admittedly, there are other ways to ensure that the record of an administrative agency is submitted to the court for review. For instance, the parties may agree to make their own arrangements, as in the instant case. The Johnsons made arrangements and provided said record to the court and to the County.

Br. of Appellants at 10.

The first sentence of the passage from the Johnsons' brief quoted above is remarkably similar to a sentence in the Court of Appeals' decision in *Sprint Spectrum*, 156 Wn. App. at 957, differing only in the omission of the word "promptly." But following that sentence borrowed by the Johnsons, the Court of Appeals in *Sprint Spectrum* went in the exact opposite direction from what the Johnsons now argue. In *Sprint Spectrum*, the Court wrote:

Admittedly, there are other ways to ensure that the record of an administrative agency is promptly submitted to a court for review. But the legislature has specified that service on the agency whose order is the subject of a petition is required to accomplish that objective under these circumstances. We will not substitute our judgment for that of the legislature on the proper method of ensuring timely

transmittal of the administrative record to a court for judicial review.

Id. at 957.

As discussed in *Sprint Spectrum*, courts do not substitute their judgment for that of the legislature or otherwise cast aside the statutory requirements for bringing a matter up for judicial review. *See id.* Jurisdictional requirements, especially statutory time deadlines such as in RCW 34.05.542(2), are satisfied by timely compliance and are not satisfied by non-compliance. *See Sprint Spectrum*, 156 Wn. App. at 957-63; *Cheek*, 107 Wn. App. at 84-85.

D. Neither prejudice nor the lack of prejudice can cure the absence of subject matter jurisdiction.

The Johnsons assert that the Assessor has not been prejudiced by the untimely service of the petition for review, and so dismissal of the petition would be improper. Br. of Appellants at 11-12. The Johnsons do not cite to any supporting authority.

Absent timely service of the petition for review, there is no subject matter jurisdiction, *Cheek*, 107 Wn. App. at 83, and a “[l]ack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it,” *Skagit Surveyors and Eng’rs*, 135 Wn.2d at 556. When there is no jurisdiction, whether there is prejudice is irrelevant.

In *San Juan Fidalgo Holding Co.*, 87 Wn. App. at 713, a statutory time deadline for service of a petition for review was missed by 36 minutes. There, the court considered and rejected the argument that prejudice, or the lack of it, has any relevance to a failure to comply with timeliness requirements. *Id.* The court wrote:

We recognize that the practical difference between a petition (timely) served slightly before 4:30 p.m. and a petition (untimely) served at 5:06 p.m. is negligible, inasmuch as both result in the County's obtaining the petition within the same hour, and that the prejudice to [the petitioner] caused by the dismissal of its appeal is considerable.

Id. The court went on to hold, however, that permitting a prejudice exception to timeliness "would be to create an exception that would render the rule a nullity." *Id.*

Prejudice or the lack of it cannot cure the absence of subject matter jurisdiction. Further, as described by the court in *San Juan Fidalgo Holding Co.*, given the nature of time requirements, creating an exception for prejudice would render timeliness rules a nullity. *Id.* Accordingly, prejudice is not relevant here.

E. Because the Attorney General has not appeared in this action, the Johnsons' service on the Attorney General does not cure their failure to timely serve the BTA.

The Johnsons argue that because RCW 34.05.542(6) provides that "service upon the attorney of record of any agency or party of record

constitutes service upon the agency or party of record,” then its service on the Attorney General should constitute service on the BTA. Br. of Appellants at 12-13.

The fatal difficulty with the Johnsons’ argument is that the provision at issue would apply here only if the Attorney General were an “attorney of record” appearing for the BTA in this action. *See* RCW 34.05.542(6). However, the Office of the Attorney General has not appeared in this case in any way, and the Johnsons have not suggested otherwise.

The argument now being advanced by the Johnsons has twice been considered—and twice disposed of—by Washington courts. In *Cheek*, examining RCW 34.05.542(6), the court noted that the term “attorney of record” was not defined in the APA and so looked to Black’s Law Dictionary for the following definition:

Attorney whose name must appear somewhere in permanent records or files of case, or on the pleadings or some instrument filed in the case, or on appearance docket. Person whom the client has named as his agent upon whom service or papers may be made.

An attorney who has filed a notice of appearance . . . and who hence is formally mentioned in court records as the official attorney of the party.

Cheek, 107 Wn. App. at 84 (quoting BLACK’S LAW DICTIONARY, at 129 (6th ed. 1990)). In *Cheek*, the attorney general did actually appear in that

action on behalf of the agency, *but had not yet done so* as of the date of the petitioner’s 30-day deadline. *Id.* Consequently, the petitioner’s service on the Attorney General was held to be insufficient to invoke the subject matter jurisdiction of the superior court under the APA. *Id.*

In *Botany Unlimited Design and Supply*, the Court held “that an attorney who has consistently appeared during the underlying administrative proceedings may be served as the attorney of record on behalf of the agency.” 198 Wn. App. at 94.

Here, the Office of the Attorney General has not appeared in any capacity in this action, not even after the close of the statutory deadline as in *Cheek*, and certainly not “consistently appear[ing] during the underlying administrative proceedings” as in *Botany Unlimited Design and Supply*, 198 Wn. App. at 94. Accordingly, service on the Attorney General—although also required by statute—did nothing to satisfy the Johnsons’ separate obligation to timely serve their petition on the BTA. *See Cheek*, 107 Wn. App. at 82-85.

F. Neither waiver nor equitable estoppel can create subject matter jurisdiction.

Finally, the Johnsons contend that the Assessor waived or should be estopped from pointing out the absence of subject matter jurisdiction. *See Br. of Appellants* at 13-14. The Johnsons are incorrect.

Unlike personal jurisdiction, subject matter jurisdiction cannot be waived. *Skagit Surveyors and Eng'rs*, 135 Wn.2d at 556. “Subject matter jurisdiction does not turn on agreement, stipulation, or estoppel. Either a court has subject matter jurisdiction or it does not.”¹ *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011) (citation omitted). “[E]stoppel cannot be the basis for conferring subject matter jurisdiction upon a court.” *Jones v. Dep’t of Corr.*, 46 Wn. App. 275, 279, 730 P.2d 112 (1986). “Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time.” *Skagit Surveyors and Eng'rs*, 135 Wn.2d at 556.

Absent timely service of the petition for review on the BTA, the superior court correctly determined it was without subject matter jurisdiction in this action. *See Cheek*, 107 Wn. App. at 83. Once the 30-day deadline following service of the BTA’s final order passed at the end of the day on February 8, 2017 (*see* CP 17, 107), without service to the

¹ The Johnsons’ petition for review was served on the Assessor and his counsel (although not on the BTA) on February 8, 2017—the last day of the 30-day window to appeal following service of the BTA’s final order. CP 1, 18-19; *see* CP 107; RCW 34.05.542(2). Counsel for the Johnsons point to communications with counsel for the Assessor as being the basis of an assertion of waiver or estoppel, but by counsel for the Johnsons’ own account those communications did not begin until April 2017. Br. of Appellants at 4-5; CP 200-01, 204-05. By that time, of course, the 30-day window for serving the BTA with service of the petition had long since closed. As a result, even if estoppel were applicable in this case, the Johnsons could not have relied to their detriment on statements by Assessor’s counsel because the statutory deadline for serving the BTA had already passed. Indeed, it passed on the same day counsel for the Assessor was served with the petition. CP 18-19.

BTA, the window for conferring subject matter jurisdiction on the superior court was closed. RCW 34.05.542(2); *Skagit Surveyors and Eng'rs*, 135 Wn.2d at 556. There is nothing that counsel for the Assessor could do or say from that point forward—not even if the parties had signed an express stipulation purporting to confer jurisdiction upon the court—that could create subject matter jurisdiction where it did not otherwise exist. *See Williams*, 171 Wn.2d at 730.

The Assessor could not be estopped from raising subject matter jurisdiction, *Jones*, 46 Wn. App. at 279; it cannot be waived, *Skagit Surveyors and Eng'rs*, 135 Wn.2d at 556; and because subject matter jurisdiction may be raised at any time, it cannot be lost by delay, *id.* The Johnsons' argument, in short, implies that subject matter jurisdiction can be created by an assertion of waiver or estoppel. It cannot. *Williams*, 171 Wn.2d at 730; *Jones*, 46 Wn. App. at 279.

IV. CONCLUSION

Absent timely service of the petition for review on the BTA pursuant to RCW 34.05.542(2), the superior court correctly determined that it lacked subject matter jurisdiction to entertain the controversy brought before it. Accordingly, the Assessor respectfully requests the Court affirm the decision below granting the Assessor's motion to dismiss.

RESPECTFULLY SUBMITTED on February 6, 2018.

ANDY MILLER
Prosecutor



Reid W. Hay, Deputy
Prosecuting Attorney
Bar No. 34584
OFC ID NO. 91004

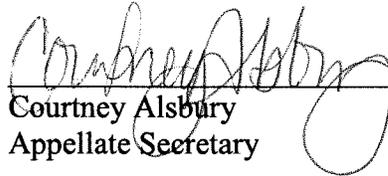
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Andrea J. Clare
Telquist McMillen Clare, PLLC
1321 Columbia Park Trail
Richland, WA 99352

Legal Messenger and e-mail to
andrea@tzmlaw.com

Signed at Kennewick, Washington on February 6, 2018.


Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

February 06, 2018 - 4:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35596-9
Appellate Court Case Title: Victor & Marilyn Johnson v. Bill Spencer, Benton County Assessor
Superior Court Case Number: 17-2-00304-0

The following documents have been uploaded:

- 355969_Briefs_20180206160953D3136105_2749.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 35596-9 Johnson v. Spencer Br. of Respondent.pdf

A copy of the uploaded files will be sent to:

- andrea@tzmlaw.com
- kristi@tzmlaw.com

Comments:

Sender Name: Courtney Alsbury - Email: courtney.alsbury@co.benton.wa.us

Filing on Behalf of: Reid Hay - Email: reid.hay@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20180206160953D3136105