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CLERK OF COURTS
SUPERIOR COURT
STATE OF WASHINGTON
By _____

No. 358453

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

FRANK PRIMIANI

Appellant

v.

THE ESTATE OF MARIE PRIMIANI

Respondent

APPEALED FROM SPOKANE COUNTY
SUPERIOR COURT CAUSE NO. 15-4-00097-9
THE HONORABLE ANNETTE PLESE

APPELLANT'S REPLY BRIEF

JP. DIENER, WSBA #36630
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TABLE OF CONTENTS

	Page
A. Respondents' Reference to Documents Outside of the Clerk's Papers is Inappropriate.....	1
B. Standard of Care.....	1
C. The <i>Mumby</i> Standard Does Not Create a Rebuttable Presumption.....	2
D. <i>Chapman</i> and <i>Kessler</i> Do Not Set an Applicable Standard Of Good Faith.....	3
E. <i>Mumby</i> Provides the Correct, and Only, Standard to Determine Good Faith and Probable Cause.....	5
1. Frank Acted in Good Faith.....	6
2. Frank's Law Degree Has No Bearing on Good faith.....	8
F. Conclusion.....	9

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>In re Chapman</i> , 133 Wash. 18,.....	2,3
<i>Estate of Kessler</i> , 85 Wn. App. 359 (1999).....	3,4
<i>In Re Estate of Mumby</i> , 97 Wn. App. 395 (1999).....	2,5,6,7,8,9,10

A. Respondents' References to Documents Outside of the Clerk's Papers is Inappropriate

Respondent falsely states that in her September 21, 2018 order, Commissioner Wasson reserved ruling on Respondent's motion to include certain documents in the Clerk's Papers. A plain reading of that order shows that the Respondent's motion was denied. "The Estate nevertheless argues that it needs the transferred documents to argue judicial estoppel. Because it is not apparent what that argument will entail, the Court denies the motion to transfer at this time." The Order goes on to state that the Court will consider a renewed motion if the Respondent's brief makes a clear argument for judicial estoppel.

The Respondent's brief does not, in fact, address the legal doctrine of judicial estoppel, and the Respondent has made no renewed motion to transfer the documents into the Clerk's Papers. In spite of this reality, the Respondent's brief cites the documents multiple times. These citations and references are inappropriate and should be disregarded by this Court, as the documents are not a part of the Clerk's Papers and were not before the trial court at any point in time.

B. Standard of Review

Respondent argues that the correct standard of review in this case is de novo in regard to the trial court's conclusions of law, but that when it

comes to the findings of fact, they must meet a “substantial evidence” standard; that is, the findings of fact must be supported by substantial evidence in the record.

For the purposes of this appeal, the result of a de novo review and a substantial evidence review of the trial court’s findings of fact would lead to the same result: reversal of the trial court’s decisions. The findings of fact made by the trial court in this case are not supported by substantial evidence, which is essentially the very same question that this Court would have to ask on a de novo review of those facts.

C. The *Mumby* Standard Does Not Create a Rebuttable Presumption

The Respondent claims that *Mumby*’s standard of relying on counsel after a full disclosure of all material facts only creates an initial presumption of good faith, implying that there is then an opportunity for the opposing party to rebut that presumption. But the court in *Mumby* does not state that it gives rise to a rebuttable presumption.

“If a contestant initiates an action on the advice of counsel, after fully and fairly disclosing all material facts, she will be deemed to have acted in good faith and for probable cause as a matter of law.” *In re Estate of Mumby*, 97 Wash. App. 385, 393, 982 P.2d 1219 (Div. 2 1999). There is nothing in that sentence which indicates only a rebuttable presumption is

created. The only thing that the Court says in regard to a presumption is that because the contestant in that case did not fully and fairly disclose all material facts to her counsel, she was not entitled to the presumption of good faith and probable cause.

Respondent's attempt to characterize *Mumby* as creating only a rebuttable presumption is at best a misreading of the opinion. Instead, the case clearly and cogently sets out what actions will amount to good faith and probable cause.

D. *Chapman and Kessler Do Not Set an Applicable Standard of Good Faith*

The cases of *Chapman* and *Kessler* are cited by the Respondent to lend some credence to the trial court's determination that to avoid a finding of bad faith Frank needed to prove the elements of undue influence with admissible and relevant evidence. *In re Chapman*, 133 Wash. 318, 233 P. 657 (1925); *Estate of Kessler*, 95 Wn. App. 358, 977 P.2d 591 (Div. 1 1999).

As pointed out in the Appellant's initial brief, and as the Respondent admits, these cases are about the imposition of attorney fees on a party who has their will contest dismissed. They do not discuss the standard required to impose the consequences of a no contest clause. In regard to the imposition of attorney fees, the courts in *Chapman* and *Kessler* reference the need for a showing of good faith and a prima facie showing of the

elements of the underlying claim. What the courts in those cases do not say is that the contestant needs to prove the elements of the underlying claims with relevant and admissible evidence (the standard imposed by the trial court in this case). They also do not elaborate on what constitutes good faith, which is the very question that must be answered in this matter. Therefore, *Chapman* and *Kessler* are of little to no value in deciding this case.

The Respondent urges this Court to apply the same standard to the enforcement of no contest clauses as courts have used to impose attorney fees. This ignores the fact that the enforcement of a no contest clause is often of much more serious consequence than paying the other side's attorney fees. Losing one's share of an Estate worth millions is substantially more costly than having to pay another party's attorney fees. Therefore, it makes sense that the standards would differ between the two.

But, even if one could use the standard set forth in *Chapman* and its lineage, it is clear that the trial court did not properly apply it. Those cases require the contestant to have made a prima facie showing of probable cause for contesting the will and to have acted in good faith. While those cases give little direction about what constitutes a prima facie showing of probable cause, or what passes for good faith, the trial court in this case made the burden much heavier than the courts in those disputes. The trial

court expected Frank to prove undue influence with admissible evidence, without conducting discovery, and his failure to do so was the primary basis for the finding of bad faith. Those cases do not require the contestant to prove their entire claim, only to show that they acted in good faith and had probable cause.

E. *Mumby* Provides the Correct, and Only, Standard to Determine Good Faith and Probable Cause

Mumby is uniquely useful because of all the cases, whether regarding attorney fees or no contest clauses, it is the only opinion which sets forth how the court can determine whether a contestant acted in good faith and with probable cause. If the claimant relied on advice of counsel after fully and fairly disclosing the facts, they will be deemed to have acted in good faith and with probable cause. *In re Estate of Mumby*, 97 Wash. App. 385, 393, 982 P.2d 1219 (Div. 2 1999). And this standard makes logical sense. It is just, and it is fair.

Where someone not versed in the complex laws of wills, trusts and estates, seeks out an attorney who presumably is versed in that law, lays out all the facts as he/she believes or understands them to be, and that attorney advises them to take legal action, it would be unjust to bar them from their inheritance if that claim falls legally or (as in this case) procedurally short. Otherwise, that person would be forced to choose between correcting

unlawful behavior that may adversely affect all beneficiaries of an estate, and ignoring those unlawful acts for fear of losing their share of the estate.

1. Frank Acted in Good Faith

The trial court determined that Frank did not act in good faith because he did not have sufficient admissible evidence to prove his claim at the time he filed his petition. This standard is inferior to that set forth by the Court in *Mumby*. The reality is that often, at the time a complaint or petition is filed, all the petitioner has to go on is evidence that may ultimately may be deemed inadmissible, because it is hearsay, because of the dead man's statute, or for a variety of other evidentiary reasons. But the purpose of the discovery period is to allow the petitioner to seek admissible evidence that corroborates or supports whatever his/her understanding of the situation was at the time the petition was filed.

The Respondent goes on at length about how Frank relied in large part on inadmissible statements and information when he filed the petition, and the Respondent takes the view (as did the trial court) that this constitutes bad faith. It does not. Frank was not given the opportunity to seek evidence that would support his beliefs about his sister's fitness to be personal representative and what she had done to their mother's estate prior to their mother's passing. Had Frank had the opportunity to conduct discovery, he may have found admissible evidence to support his claim. Or, perhaps he

would not have found such evidence and as such would have ended up voluntarily dismissing his claim. As things stand, because of the procedural mistakes of Frank's former attorney, we will never know what discovery would have revealed.

This case illustrates perfectly why the *Mumby* standard is fair and just. Under circumstances like this, it is unfair and impossible for the trial court to expect a petitioner to prove their case with admissible evidence, before any discovery could occur. *Mumby* asks whether the petition itself was filed in good faith, and does that by looking at the circumstances surrounding the filing. Did the petitioner go to an attorney and lay out all of the information at the petitioner's disposal? And did the attorney, based on that information, advise the petitioner to proceed with litigation? It is logical to say that if those things happened, the petitioner was acting in good faith.

In this case, Frank did seek legal counsel, and he did disclose all he knew about the facts of the case to that legal counsel, and that legal counsel advised that Frank file the petition. This meets the standard provided by *Mumby*. The trial court did not have evidence of these facts before it, except on reconsideration. And even once these facts were provided, the trial court still found bad faith. Under the *Mumby* standard, the trial court erred.

2. Frank's Law Degree Has No Bearing on Good Faith

The Respondent argues repeatedly that because Frank is himself a lawyer, the element of *Mumby* that one must rely on the advice of counsel does not apply. But as discussed at length in the initial appellate brief, such a conclusion is short sighted and unrealistic. Because one is a lawyer does not mean that one is an expert in every area of the law. In fact, being a lawyer does not even guarantee one a basic understanding of every single area of the law.

There is nothing in the record that would support the idea that Frank has any significant knowledge of estate or probate law, or that he has any experience with TEDRA. In fact, there is no evidence in the record that Frank has any litigation experience whatsoever. Given this lack of evidence, it is manifestly unreasonable to suggest that Frank could not be expected to rely on the advice of another lawyer. Of course, he could, and he did. It would be better evidence of bad faith if Frank, having no experience with probate law or TEDRA litigation, filed this case on his own, without securing the assistance of other counsel. But he did not do that. He did exactly what the Court in *Mumby* tells us that someone in Frank's position should do.

F. Conclusion

The Estate's brief is 32 pages of meandering and repetitive argument that manages to champion the trial court's orders without explaining in any detail why they are correct, while failing to directly address Frank's arguments on appeal. There is no serious discussion of what constitutes good faith and probable cause, and the Respondent offers no concrete alternative to the *Mumby* standard. Instead, the Estate focuses on Frank's reliance on inadmissible evidence, the fact that Frank has a law degree, and the cases regarding attorney fees that require a prima facie showing of probable cause. None of these things answers or directly contests Frank's arguments.

There is no support for the idea that Frank should have had to prove undue influence with admissible evidence in order to prove good faith and probable cause. There is no argument, other than the fact that Frank is a lawyer, to say that Frank would not have met the *Mumby* standard. The Estate offers no argument that the standard imposed on Frank was fundamentally fair and just.

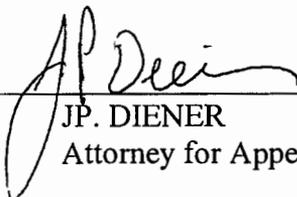
The Estate's failure to mount a defense to Frank's arguments is completely understandable. There is no good defense. It is known and agreed that to enforce the no contest clause in the will, it must be proven that Frank acted in bad faith and without probable cause. While there are

multiple cases that tell us that the petitioner must have acted in good faith and with probable cause, there is only one case that provides an explanation of what constitutes good faith and probable cause: *Mumby*. It is abundantly clear from the record that the trial court did not apply the *Mumby* standard, and when the trial court purported to do so on reconsideration, it ruled without regard to the evidence in the record and made up out of thin air an exception to *Mumby* in all cases where the petitioner has a law degree. The trial court was wrong in how it determined Frank acted in bad faith and without probable cause, and there is no defense to that.

The petitioner, Frank Primiani, respectfully requests that this court reverse the decision of the trial court on the enforcement of the no contest clause, and remand for entry of an Order that reflects Frank acted in good faith and with probable cause under the *Mumby* standard.

DATED this 16 day of November, 2018.

FELTMAN EWING, P.S.

By:  _____
JP. DIENER
Attorney for Appellant

FILED

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DECLARATION OF SERVICE

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I, JAN PERREY, am a citizen of the United States and a resident of the State of Washington; I am over the age of eighteen (18) years; I am competent to be a witness in a court of law; and I am not a party to the within-entitled action.

On the 16th day of November, 2018, I sent via the method indicated below, to the party listed the following pleadings:

- **Appellant's Reply Brief**
- **Declaration of Service**

Mr. Brant L. Stevens Attorney at Law 222 W. Mission, Suite 25 Spokane, WA 99201	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile
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DATED this 16th day of November, 2018.



JAN PERREY