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COURT OF APPEALS
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**Case No. 358453-III
Superior Court Case No. 15-4-0097-9**

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

In the Matter of the Estate of

MARIA PRIMIANI,

Deceased.

FRANK PRIMIANI,

Petitioner,

v.

**THE ESTATE OF MARIA PRIMIANI, Deceased, ANNA ILIAKIS as
Personal Representative, and ANNA and MICHAEL ILIAKIS**

Respondents.

**THE ESTATE OF MARIA PRIMIANI'S RESPONSE BRIEF TO
PETITIONER'S APPELLATE BRIEF**

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I. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1, attorney fees on appeal authorized by statute, and 18.9, attorney fees as a sanction for frivolous appeal, Respondent request attorney fees.

II. STANDARD OF REVIEW

The appellate courts review a trial court's conclusions of law de novo. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880 (2003). Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176 (2000). If this standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873,879-80 (2003). Questions of law and conclusions of law are reviewed de novo. *Id.* A mixed question of law and fact refers not to review of the facts themselves, nor the law governing the situation, but to the law as applied to those facts. *Franklin Cty. Sheriff's Office v. Sellars*, 97 Wn.2d 317, 329 (1982). Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts. *Id.* at 329-330. The standard of review for mixed questions

of law and fact is also de novo. *Id. citing Daily Herald Co. v. Dept. of Employment Security*, 91 Wn.2d 559, 561 (1979).

III. STATEMENT OF THE CASE

Maria Primiani died testate on December 24, 2014. (CP 399) She passed away at the age of 104. (CP 315) She began living on and off the family farm in the 1950's, when her family immigrated here from Italy. (CP 22) In 1996 she began living with her daughter Anna Iliakis, and her husband, Michael Iliakis, on the family farm. (CP 206) The family farm is located at 6500 N. Havanna Street. (CP 206) The family farm consists of 60 acres of farm land and timber on a hillside, visible on the North side of East Francis in Spokane, WA, as it turns into Bigelow Gulch Road. Maria executed her last will and testament on July 11, 2008. (CP 3) In her will, Maria left approximately 60 acres in real property to her two children, Anna Iliakis and Frank Primiani (appellant), to divide equally. (CP 2)

Maria named her daughter Anna Iliakis as Personal Representative of her Estate, and Frank as alternate PR. (CP 1) Maria's will contained a no contest clause as follows:

In the event that any person shall contest this Will or attempt to establish that he or she is entitled to any portion of my estate or any right as an heir, other than as herein provided, I hereby give and bequeath unto any such person the sum of one dollar.

(CP 2)

Frank filed a TEDRA petition on August 19, 2015. (CP 5) In his petition, Frank claimed undue influence as an issue for determination by the court in the execution of the will, but did not include the claim as part of his relief sought. (CP 7-8) Frank did ask that Anna be removed as the PR in his relief.¹ (CP 8) It wasn't until a hearing in December 21, 2015, that Frank's attorney Steve Schneider, acknowledged his TEDRA Petition was a will contest, putting into play procedural requirements for filing and serving the will contest and the harsh consequences of the will contest clause. (RP 22-23, from the first appeal in this matter, moved to this case by order of the court on June 28, 2018.)

On March 10, 2016, the trial court found Frank and his then attorney, Steve Schneider, had obtained medical records of Maria in bad faith. (CP 135) The trial court found that Frank and Mr. Schneider had failed to properly serve the will contest, and dismissed this claim. (CP 135) The trial court enforced the no contest clause of Maria's will. (CP 135) The trial court did not award attorney fees to the Estate for defending the will contest. (CP 135)

Frank and Mr. Schneider, as co-counsel, filed a motion for discretionary review, appealing both the dismissal of his will challenge,

¹ Both Anna and her husband Michael have since passed away. Anna's son, Aristidis Iliakis, was appointed by the court as successor PR on April 20, 2017. (CP 413)

and the application of the no contest clause. (CP 403) Frank and Mr. Schneider appeared on at least three pleadings as co-counsel. (CP 393) Frank argued in his Motion for Discretionary Review that the rest of his claims were useless due to the application of the will contest clause in Maria's will, limiting his inheritance to \$1.² In Appellant's brief, Frank argued that the trial court did not make findings of bad faith and probable cause to enforce the will contest. (CP waiting assignment, Appellant's Brief filed August 26, 2016, pg. 10) Frank did not argue that *Mumby* was the controlling standard for determining good faith and probable cause in the context of will contest clauses. (CP waiting assignment, Appellant's Brief filed August 26, 2016, pgs. 9-19) Frank seemed to argue that the standard of good faith and probable cause in the context of applying it to will contest clauses, and attorney fees under 11.24.050 are the same standard. (CP waiting assignment, Appellant's Brief filed August 26, 2016, pg. 12) The Estate argued in its Response Brief, that the court did make findings of bad faith, and if it did not, that the case be remanded back to the trial court to make those findings. (CP waiting assignment, Respondent's Response Brief filed December 2, 2016). The court of

² Respondent filed a motion to include Frank's appeal documents in this record, which was reserved by Commissioner Wasson, by her order, on September 21, 2018. The cited information is in Appellant's Motion for Discretionary Review, filed in Court of Appeals case #342000, March 31, 2017, pages 7,21,23; Reply to Response, filed May 2, 2016, page 2)

appeals upheld the trial court's decision to dismiss the will challenge for defective service, but found the trial court failed to make specific findings of bad faith, and remanded this issue back to the trial court to make specific findings regarding good faith and probable cause. *In the Matter of the Estate of Maria G. Primiani (hereinafter referred to as Primiani I)*, 198 Wn.App. 1067, at pgs 9, 17 of Opinion. The court of appeals opinion said that an evidentiary hearing was likely needed, and analyzed the current state of the law regarding bad faith in the context of will contests. *Primiani I*, 198 Wn.App. 1067, at pgs 11-17 of Opinion.

On June 22, 2017, Judge Plese explained that she never had a chance to make specific findings of probable cause and good faith because Frank had appealed her Opinion immediately. (RP 5, hearing from June 22, 2017) Judge Please also opted not to have an evidentiary hearing on the issue of bad faith in bringing the will contest, but gave Frank an opportunity to make an offer of proof as to the facts supporting his will challenge and his claim of undue influence. (RP 6, hearing from June 22, 2017) On July 6, 2017, Mr. Primiani submitted approximately 174 pages of declarations supporting his will contest and claim of undue influence. (CP 205, 211, 217, 223, 237, 258) In his brief on Evidence, Frank again argued good faith and probable cause, but again did not argue *Mumby* as the legal standard in determining good faith and probable cause in the

context of will contests. (CP 237-253) On October 2, 2017, Judge Plese made 15 Findings of Fact and 13 Conclusions of Law supporting her initial finding of bad faith, enforced the no contest clause, and awarded the Estate attorney fees related to defending against the will contest brought in bad faith and without probable cause. (CP 304-316)

Frank then filed a Motion for Reconsideration on November 3, 2017, arguing that the trial court did not apply the *Mumby* standard when it made its findings of bad faith and no probable cause. (CP 371-372) The Estate filed a response a response on November 15, 2017, arguing that the trial court was not bound by the *Mumby* rule. (CP 381-386) Frank filed a reply on November 21, 2017, again arguing the *Mumby* standard. (CP 387-390) The trial court denied the motion on December 28, 2017, and explained that the court did consider *Mumby*, but found it inapplicable because Frank is an attorney and appeared as co-counsel in the case, and he did not rely upon the advice of counsel. (CP 391-395) Frank filed this appeal, arguing that the trial court failed to apply the correct legal standard in analyzing good faith and probable cause when it applied Maria's no contest clause leaving him an inheritance of one dollar.

IV. ARGUMENT

A. The Trial Court Did Not Apply the Wrong Standard to Determine the Application of the No Contest Clause.

The court of appeals reviews trial court decisions regarding issues of law on a de novo standard of review. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880 (2003).

1. Washington Law Strictly Enforces No Contest Provisions.

This court discussed three cases when it remanded it back to the trial court to make a finding of good faith and probable cause: *In re Chappell's Estate*, 127 Wn. 638 (1923); *In re Estate of Kubick*, 9 Wn. App. 413 (1973); *In re Estate of Mumby*, 97 Wn. App. 395 (1999).

As this court said in *Primiani I*, The *Chappell* court approvingly noted decisions that enforced no contest clauses, as long as the will contest was not based on public policy. *Primiani I*, 198 Wn.App. 1067 at pg 12 of Opinion.

The Washington Supreme Court, in *Boettcher v. Busse*, 45 Wn.2d 579 (Wash. 1954), said in referring to no contest clauses that “This court has recognized the validity of such provisions. *In re Chappell's Estate*, 127 Wash. 638, 221 P. 336; see 'Provisions in a will forfeiting the share of a contesting beneficiary.' 3 Wash.Law Review 45 (1928).” *Id.* at 585.

Even the *Mumby* case noted that generally, no contest clauses in wills are enforceable in Washington. *In re estate of Mumby*, 97 Wn. App. 385,393,982 P.2d 1219 (1999).

In this case, it seems that this court remanded it back to the trial court to make findings of good faith and probable cause, not necessarily because it's the law in Washington, but because that's what the Estate requested in its briefing from *Primiani I*. RAP 2.5(c)(2) allows the appellate court to look at its previous rulings and decide cases on appeal based on the appellate court's opinion of the law at a later date. Regardless, if this court adopts the probable cause doctrine, the trial court made sufficient findings to support its finding of bad faith and no probable cause. Which legal standard to apply to the case at hand should be reviewed on a de novo basis.

2. Some States Have a Applied the Probable Cause Doctrine.

The *Chappell* case, cited a United States Supreme Court case on page 643 of its decision, *Smithsonian Institution v. Meech*, 169 U.S. 398, 18 S.Ct. 396, 42 L.Ed. 793 (1898). In the *Smithsonian* case, the Smithsonian Institution sought to quiet title in real property and enforce the no contest clause of the decedents will. The Supreme Court found that no contest clauses are enforceable.

When legacies are given to persons upon conditions not to dispute the validity of or the dispositions in wills or testaments, the conditions are not, in general, obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi*, the nonobservance of the conditions will not be forfeitures. *Powell v. Morgan*, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 404; *Loyd v. Spillet*, 3 P.Wms. 344. The reason seems to be this: a court of equity does not

consider that the testator meant such a clause to determine his bounty if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it, but merely to guard against vexatious litigation. But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to determine upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorem*, but assumes the character of a conditional limitation. The bequest is only *quousque* the legatee shall refrain from disturbing the will and if he controvert it, his interest will cease and pass to the other legatee.

Id. at 413

The *Smithsonian* case went on to add:

The propositions thus laid down fully commend themselves to our approval. They are good law and good morals. Experience has shown that often, after the death of a testator, unexpected difficulties arise; technical rules of law are found to have been trespassed upon; contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the [18 S.Ct. 403] voice of the testator cannot be heard either in explanation or denial; and, as a result, the manifest intention of the testator is thwarted. It is not strange in view of this that testators have desired to secure compliance with their dispositions of property, and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty or be put in a position to use it in the effort to thwart his expressed purposes.

Id. at 415.

The *Smithsonian* case is from 1898, and according to Casemaker

has been cited 98 times, and is still good law. It creates a distinction between *in terrorem* clauses, and conditional limitation clauses. The no contest clause used by Maria seems to be the latter. The *Smithsonian* case also lays out the doctrine of probable cause, *probabilis causa litigandi*, which has been adopted by some states, but not Washington.

The *Chappell* case also cited a California case law on page 643 of its decision, *Re Miller's Estate*, 156 Cal. 119, 103 P. 842, 23 L. R. A. (N. S.) 868. The *Chappell* court went on to say, when discussing the *Miller* case:

The doctrine of probable cause was expressly rejected in the decision, the court saying respecting the same that the identical question was presented in the provisions of the will in *Re Hite's Estate*, but there dismissed without discussion. 'No such exception is stated in the contest provision contained in the will, and we know of no principle that authorizes us to declare it. To do so would be to substitute our own views for a clearly expressed intent of the testator to the contrary. We are aware that some text-writers have expressed views tending to support appellant's contention in this behalf, and that it is the rule adopted in Pennsylvania (citing *Estate of Friend*, 209 Pa. 442, 58 A. 853, 68 L. R. A. 447); but we cannot perceive any proper basis upon which to rest such a conclusion. Like the doctrine accepted in many decisions to the effect that no forfeiture of the legacy results under such a provision when there is no gift over of the legacy in the event of a contest, although a forfeiture of land devised will result under such circumstances without a specific devise over, a doctrine repudiated by us in *Estate of Hite supra*, it is a mere attempt at an artificial distinction to avoid the force of a plain and unambiguous condition against contests. See *Hoit v. Hoit*, 42 N. J. Eq. 388, 7 A. 856, 59 Am. Rep. 43. See, also, *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419.'

Chappell at 643.

Chappell also cited the *Miller* case for the proposition that:

“A testator has the lawful right to dispose of his property upon whatever condition he desires, as long as the condition is not prohibited by some law or opposed to public policy, such as conditions in restraint of marriage or of lawful trade, and when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts rightly hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it ” *Id.* at 642 (internal quotation marks omitted) (quoting *In re estate of Miller*, 156 Cal. 119, 121-22, 103 P. 842 (1909)).

Chappell also cited a Supreme Court of Pennsylvania case at page 641 of its decision, *Re Friend*, 209 Pa.442, 58 A. 853, 68 L. R. A. 447.

The *Chappell* court noted:

In Pennsylvania, it is well settled that where there is probable cause for contest, a legatee may disregard such condition without losing the property devised to him. See *Re Friend*, 209 Pa. 442, 58 A. 853, 68 L. R. A. 447. The editorial notes in L. R. A., *supra*, assert that---'The wisdom of this section as to probable cause has commended it to the courts of this country, wherein it has found unhesitating support.'

Id. at 641.

The *Chappell* court was faced with the public policy issue of restraint on alienation, with an estate, that could have been subject to California laws. The court's holding only went so far as to say that if a contestant challenges a will on public policy grounds, the Supreme Court

of Washington will read a probable cause and good faith standard into a no contest clause. However, *Chappell* did not waiver on the principles in *Smithsonian*, that no contest clauses are generally enforceable.

The *Kubick* case was both a public policy case, and a no contest clause that contained a safe harbor provision. The public policy at issue in *Kubick*, is that the removal of the PR is authorized by statute. When a no contest clause provides for disinheritance upon application to remove a PR, because a statute strictly authorizes the maneuver, courts have given challengers a safe harbor provision in the law, making will challenges based on statute or public policy, subject to disinheritance, only if they are brought in bad faith and without probable cause. This encourages contestants to exercise their statutory rights without the harsh effects of a will contest clause automatically taking their inheritance. In essence, the courts have written a safe harbor provision into the law for will contestants based on public policy.

The *Kubick* case also cited a West Virginia case at page 420 of its decision, *Dutterer v. Logan*, 103 W.Va. 216, 137 S.E. 1, 52 A.L.R. 83 (1927). The *Dutterer* case seems to be the genesis for the test for probable cause and good faith in *Kubick* and *Mumby*, i.e., acted under advice of counsel compels the conclusion that the petition was made in good faith and for probable cause. *Kubick* at 420.

In *Dutterer*, the Supreme Court of West Virginia refused to apply the harsh consequences of a no contest clause, if it was brought in good faith. *Dutterer* concluded that a majority of jurisdictions have applied a *probabilis causa litigandi* standard to will contests, i.e., the will contests brought in good faith and with probable cause are not subject to the harsh effects of the will contest clause. The *Dutterer* case relied heavily on the Pennsylvania case cited above, *Re Friend*. *Id.* at 220. *Dutterer* then cited a number of cases supporting *probabilis causa litigandi*. *Id.* at 220-221.

The California Supreme Court strictly enforced no contest clauses. See *Burch v. George* (1994) 7 Cal.4th 246 [27 Cal.Rptr.2d 165]. However, California Probate Code (2010) 21310-21315, directly contradicted long standing precedent and found that will contests brought in good faith will not face disinheritance. §21311.

The Uniform Probate Code, adopted in 16 states (Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah) provides: A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if

probable cause exists for instituting proceedings.” UPC §§ 2-517 and 3-905.

Massachusetts allows for penalty clauses in wills: “A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is enforceable.” See M.G.L. Ch. 190B, Art. II, Sec. 2-517.

New York has rejected the "probable cause" defense to enforcement of such clauses. Such clauses are given full effect upon challenge. Some exceptions apply, e.g. election against the will by a minor, contest on ground of forgery or revocation by later Will. N.Y. EPTL § 3-3.5

Oregon enforces no-contest clauses against losing parties even when there was probable cause to contest the will. Oregon Revised Statutes, Section 112.272(4).

Mumby found that when there was full and fair disclosure by a claimant to their counsel of all material facts, there was a presumption of good faith. *Id.* at 394 This is different from *Kubick* in that the *Kubick* court found that full and fair disclosure of material facts, meant that the contest acted with good faith and probable cause as a matter of law. *Id.* at 420. *Mumby* did not go this far. *Mumby* then looked at good faith and

probable cause without the presumption of good faith. *Id.* at 394. The Appellant is claiming “The Court held that a will contest is brought in good faith and probable cause where the challenger acted on advice of counsel after fully and fairly disclosing all material facts to said counsel.” *Appellant’s Brief*, page 13. Appellant is saying that full disclosure equals good faith and probable cause, but *Mumby* said it creates only the presumption thereof.

The *Mumby* case simply applied the probable cause doctrine, even though Washington case law has never adopted this doctrine, and seems to be contrary to *Chappell* and *Boetcher*. However, our Supreme Court has never expressly rejected the probable cause doctrine either.

3. The Law Applied to this Case.

The trial courts findings of facts should be reviewed under the substantial evidence standard. The Appellant argues for a de novo review of the findings of facts, and cites *Brinkerhoff v. Campbell*, 99 Wn.App. 692 (2000). However, the *Brinkerhoff* case applied the summary judgment standard of review to the enforcement of a settlement agreement. This court held in *Rose v. FMS, Inc.*, 32284-0, III, an unpublished opinion, that “....”we adhere to a bedrock principle of appellate review. We will not reverse any finding of fact entered by the trial court when the finding is

supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Which law to apply to the findings, should be reviewed de novo.

If a will contest is just simply a will contest with no public policy concerns, courts are split in applying the harsh consequences of disinheritance.

In this case, the will contest clause is specifically designed to prevent litigation intended to increase an heir's share of the estate. The no contest seems to be of the nature of a conditional limitation, rather than an *in terrorem* provision as distinguished in the *Smithsonian* case:

In the event that any person shall contest this Will or attempt to establish that he or she is entitled to any portion of my estate or any right as an heir, other than as herein provided, I hereby give and bequeath unto any such person the sum of one dollar.

There is no ambiguity in the clause. If you challenge Maria Primiani's will, and the will is upheld, you get disinherited. Reading the *Chappell* and *Smithsonian* cases, the no contest clause should be enforced without having to make a finding of good faith and probable cause. There is no safe harbor provision, and courts have routinely enforced such provisions.

If you challenge the PR of the will, as in *Kubick*, then RCW 11.28.020 provides a statutory basis for the challenge, and courts have

found that when there is a challenge based on public policy, the safe harbor provisions of good faith and probable cause should apply. That is not the case here. Frank challenged the will on the grounds of undue influence, his will challenge was dismissed for procedural grounds, and therefore, the testor's wishes have been enforced, and Frank was disinherited.

The trial court cited *Estate of Kessler*, 85 Wn. App. 359 (1999), in its conclusions of law on good faith and probable cause. *Kessler* was an attorney fee case, not a no contest clause case, and so not necessarily relevant to the issue of good faith and probable cause in the context of will challenges. Arguably, they are the same standard as Mr. Schneider alluded to in his Brief from *Primiani I.* (CP waiting assignment, Appellant's Brief filed August 26, 2016, pg. 12)

Frank argues that the trial court applied the wrong standard regarding good faith and probable cause when it enforced the no contest clause in Maria's will. He argues that the standard comes from the *Mumby* case. Frank argues there is a two part analysis in determining whether he acted with good faith and probable cause: 1) Did he act on advice of counsel, and 2) Did he fully and fairly disclose all material facts to said counsel. (*Appellant's Brief*, page 13) However, that is not the end

of the discussion as *Mumby* said it only creates a presumption of good faith and probable cause.

The trial court said “good faith means the challenger had sincerity of intention when moving forward with their claim.” “Probable cause is a reasonable belief there are some facts supporting the Petitioner’s case that would deem it sufficient to move forward with a full challenge.” (CP 369)

Mumby defined bad faith as 'actual or constructive fraud' or a 'neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.' " *Bentzen v. Demmons*, 68 Wash.App. 339, 349 n. 8, 842 P.2d 1015 (1993) (quoting *State v. Sizemore*, 48 Wash.App. 835, 837, 741 P.2d 572 (1987)) (alteration in original).

As for the Washington Supreme Court, *In re the Estate of Chapman*, a 1925 case, the Supreme Court said “where a person in good faith brings an action to contest a will and makes a prima facie case, attorney’s fees should not be awarded against him in the event his action fails.” *Chapman*, 133 Wash. 318, 322, 233 P. 657 (1925). This seems to be more attuned to the standard used by the trial court, rather than the *Mumby* court. The trial court relied on *Kessler* which cited *Chapman*.

The question then is does good faith and probable cause have a different meaning or analysis in the context of a will challenge, for these two issues: Disinheritance and Attorney Fees. Respondent would argue that the analysis should be the same, and urges this court to follow a long line of Supreme Court Cases defining good faith and probable cause in the context of attorney fees, see *Chapman* cited above, *In re Estate of Mitchell*, 41 Wash.2d 326, 249 P.2d 385(1952), and *In re the Estate of Riley* cited above, etc.

The court of appeals remanded this case back to the trial court to make specific findings regarding good faith and probable cause. The trial court made 15 findings of fact in support of its decision to disinherit Frank. (CP 367-368) Clearly, the court found substantial evidence to disinherit the appellant. So even if *Mumby* is the correct standard and Frank carried the presumption of good faith and probable cause, the court found bad faith and no probable cause when considering the evidence.

The first appeal was primarily on whether the Will Contest was served properly, which this court and the court of appeals agreed, it was not. In the first appeal, the Appellant's brief cited *Mumby*, *Chapman*, and *In re the Estate of Riley*, 78 Wn.2d 623 (1970). (CP waiting assignment, Appellant's brief, pages 9-19) The *Riley* case, another case from the Washington Supreme Court, uses the standard out of *Chapman*, "Since

respondents (contestants) appear to have acted in good faith and have made a Prima facie showing of probable cause for contesting the will, costs in the superior court will not be assessed against them.” *Id.* at 666. The Supreme court allowed the Appellant’s (noncontestants) attorney fees and costs from the Estate, both from the trial court, and on appeal. *Id.*

The *Mumby* case looks at what was disclosed between Frank and Mr. Schneider as to whether there was full and fair disclosure. This seems like a strange result and likely to put the client and attorney in an adversarial position, and presents issues with the attorney/client privilege. Mr. Schneider may be liable for sanctions under CR 11, for advising Frank to move forward when he clearly had no factual basis to do so.

As the trial court pointed out, Frank is an active attorney in the state of Washington. So even if this court adopts the *Mumby* standard for determining good faith and probable cause, this case is distinguishable because Frank is an active attorney. As the trial court pointed out, Frank is listed as co-counsel with Mr. Schneider on at least three court filings. (CP 393) This fact underlies the rationale behind *Mumby*, in that a will challenger should not be punished for full disclosure and relying on the advice of counsel. However, in this case, Frank is an active attorney, and should assume responsibility in choosing to move forward with the will

contest. So even if the *Mumby* standard is the correct standard, this case is distinguishable because Frank is an attorney.

The legal standard of good faith and probable cause in the context of will contests, has been an elusive target in this case, in the first appeal, on remand, and in the briefing of this second appeal. The first time the appellant argued affirmatively for the *Mumby* standard was in his motion for reconsideration, after the trial court had already made its findings of fact and conclusions of law, and after Frank had changed attorneys from Mr. Schneider to Mr. Deiner. In the first appeal, the appellant's Motion for Discretionary Review (page 21) and his Appellate Brief (pages 9-19), Frank argues for a prima facie standard, and appellant does not suggest that *Mumby* is the controlling legal standard. On remand the Appellant's Memorandum of Authorities in Support of Findings and Conclusions, filed June 21, 2017 (CP139-204), Brief on Evidence-Petitioner, filed July 6, 2017 (CP 237-253), Response to Motion to Strike and Reply RE Evidence on Remand-Petitioners, filed August 14, 2017 (CP 290-303), all argue a different standard than *Mumby*. In the Petitioner's Response to Motion to Strike and Reply RE Evidence on Remand filed August 14, 2017, page 8, the appellant argued, "Rather, the standard is whether there is a prima facie showing that would allow the contestant to go forward to trial where such evidentiary objections can be

made.” (CP 297) That standard is satisfied.” The appellant’s position that *Mumby* is controlling, did not appear in the briefing until their Motion for Reconsideration, after the appellant switched counsel from Mr. Schneider, to Mr. Deiner, knowing full well that the trial court did not inquire into the disclosures between the appellant and his counsel. Yet another example of the high wire act by appellant and counsel. However, even if *Mumby* is controlling, the court made findings of bad faith and no probable cause to disinherit Frank.

Under RCW 11.24.050, the trial court may also award attorney fees to the Estate. RCW 11.24.050 provides:

If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.

To conclude, once the trial court made findings of bad faith and no probable cause, it had then made sufficient findings to award attorney fees, which it did. Once the court made findings of bad faith and no probable cause, regardless of which legal standard you apply, it was appropriate to enforce the no contest clause and award attorney fees.

B. The Trial Court’s Analysis of Good Faith and Probable

Cause is Not Fundamentally Unfair and Prevented Appellant from Gathering and Presenting Evidence Pursuant to *Mumby*.

Frank argues there is no precedent for the trial court's determination of good faith and probable cause. *Appellant's brief*, page 14. However, the court relied on *Kessler*, which cited the Supreme Court Case, *Chapman*. The trial court analyzed *Mumby* on Frank's Motion for Reconsideration. In light of this, the court denied Frank's Motion for Reconsideration finding he did not rely on advice of counsel in proceeding with his will contest.

Also, Frank fails to cite any law on his doctrine of fundamental unfairness.

Frank further argues that it is clear from the content of his Petition that he was not at the time alleging undue influence or making a will challenge. However, the order from December 21, 2015, specifically provides on Page 1, Line 19, paragraph #3, "Frank Primiani is contesting the validity of the admitted will." (CP 396) This provision in the order was based on the oral representation to the court on December 21, 2015, by Mr. Schneider that he was indeed challenging the validity of the will. (RP 22-23, from the first appeal in this matter, moved to this case by order of the court on June 28, 2018) Also, the Petition provides, on page 1, lines 21-22, "Petitioner, Frank Primiani, by his attorney Steven Schneider,

Attorney at Law, P.S., hereby Petitions the court for determination of the following matters.....Undue Influence, Misrepresentation, or concealment involving making or execution of the Will and or Quit Claim Deed, and in the wrongful appropriation of Decedents property and funds.” (CP 5-6)

The fact that Frank was dancing around the will contest issue was part of Judge Plese’s decision on Frank’s motion for reconsideration. She noted that Frank did not rush in and file will contest, but rather filed two creditor’s claims, and then started a fishing expedition for Maria’s medical records. (CP 393) Frank was really trying to be sneaky and bring up the issue of undue influence in the Petition, without running the risk of disinheritance, while gathering evidence to support his undue influence claim through his other claims. RCW 11.24.010 allows four months to challenge a will once it is filed for probate, and Frank was fishing for as much evidence as he could prior to officially announcing his will contest. This is only supported by the fact that once the will contest was dismissed, all discovery stopped, as this was the primary claim of Frank, guised in claims of misappropriation, violations of the Abuse of Vulnerable Adults Act Chapter RCW 74.34, and violations of the Inheritance Rights of Slayers and Abusers Act. Once his will contest was dismissed, he did not pursue his other claims.

Frank seems to think that he is allowed an indefinite time to file a will

contest. However, the statute clearly provides otherwise. So even if he was given an additional year to conduct discovery, and then moved to amend his Petition to request undue influence in the relief, the claim would have to fail. Frank got caught trying to use TEDRA to avoid the disinheritance clause in Maria's will, and ended up having his will contest dismissed because he didn't properly serve it, because he did not want to admit to a will contest, because he did not want to run the risk of being disinherited. Well, he got caught, had no evidence to support his undue influence claims, and was found to have acted in bad faith and without probable cause by the trial court.

The fact that Frank's will contest was dismissed without reaching its conclusion does not prevent the trial court from finding bad faith and no probable cause. The issue was expressly handled by the Supreme Court in *Chappell* when it said "a proceeding begun but not prosecuted to a conclusion to contest the will amounted to a contest which forfeited the legacy; the court saying that whenever the complaint uses the proper machinery of the law to the thwarting of testator's express wishes, whether he succeed or fail, his action is a contest." *In re Estate of Chappell* at 642.

Frank argues that he had good faith intentions based on reliable evidence from third parties. *Appellant's brief*, page 15. However, Frank

had no evidence that at the time of execution of the will in 2008, that Maria was under undue influence. The trial court, in its Findings of Fact and Conclusions of law, page 9-10, court specifically cited *Dean v. Jordan*, 194 Wash. 638 (1938) and found there was no evidence that Anna had actively participated in the procurement of the will, or received an unnatural portion of Maria's Estate, since it was split 50/50. (CP 367-368) This is the real problem with Frank's will challenge, he was attempting to use a pattern of abuse to claim undue influence, but had no evidence of undue influence at the time Maria executed her will. The standard to determine undue influence is whether the testator's free will was interfered with and prevented the testator from exercising their own judgment and choice **at the time the will is executed**. *Hilton v. Mumaw*, 522 F.2d 588, 599 (9th Cir., 1975) (emphasis added). Evidence must be produced that pressure was brought to bear *directly* upon the testamentary act. *Id.*

It is not good enough to prove a pattern of abuse and there must be something more than mere influence. "In order to vitiate a will, there must be something more than mere influence. There must have been undue influence at the time of the testamentary act, which interfered with the free will of the testator and prevented the exercise of judgment and choice." *In re Riley's Estate*, 78 Wn.2d. 623, 646 (1970)

The Court held in *Riley* that there was no direct evidence at trial, and that the circumstances, at best, gave rise to no more than a mere suspicion of undue influence. *Id.* at 662. Frank has yet to provide any evidence that on the date Maria executed her will, she showed signs of acting under influence. He wants to prove undue influence over the 18 years that Maria lived with Anna until she died at the age of 104, but this approach was rejected by our Supreme Court in *Riley*, cited above.

Frank argues that discovery was never completed, but he was forced by the trial court to prove undue influence. *Appellant's brief*, page 15. He was asked to make an offer of proof as to a prima facie case of undue influence. He submitted approximately 174 pages of declaration, and the trial court did not find any relevant or admissible evidence to support a prima facie case of undue influence. Frank is arguing that he is entitled to conduct a fishing expedition to support his will contest. The law requires a prima facie showing of evidence, that if through discovery is deemed to be true, would support your case. Frank has nothing from 2008 to support his will challenge, and that is why his claim was brought without probable cause and in bad faith.

Frank argues that the court's failure to apply the *Mumby* case is grounds for reversal. *Appellant's Brief*, page 16. However, this court sent this case down to the trial court with guidance on the existing case law.

The trial court was never instructed that it had to apply the *Mumby* analysis. Even if this court finds that *Mumby* is the correct law, this case is distinguishable from *Mumby*, in that Frank is an attorney and participated in his case as co-counsel.

C. The Trial Court's Application of *Mumby* in its Opinion on Reconsideration is Supported by Evidence in the Record.

It is true that the trial did not take evidence on the disclosures between Frank and his attorney, Stephen Schneider. The trial court found that as an attorney, and given his active participation in the case, appellant did not rely on the advice of counsel. The trial court found that based on the evidence presented in this case, there was no credible evidence to proceed on a will contest. (CP 368-369) The Estate would argue that Frank and Mr. Schneider realized there was little evidence at the start of this case to support a will challenge, and so proceeded together in the way that they plead and served their TEDRA Petition. They tried to use TEDRA, specifically RCW 11.96A.100, to backdoor a will contest, without meeting the service requirements of RCW 11.24.020, to avoid disinheritance. So whether this was Frank or his attorney's idea, from the Estate's perspective, the Estate really has no dog in that fight. As it stands, Frank is paying the lion's share of Estate attorney fees incurred defending against his will contest brought in bad faith.

The trial court considered *Mumby*, and made findings from the record that Frank did not rely on counsel's advice, in that he acted as co-counsel on this case. The trial court also found a complete lack of evidence to support a will contest. Therefore, even if *Mumby* is applied, the court's findings of bad faith and no probable cause should not be disturbed on appeal.

D. The Evidence Supports a Finding of Bad Faith and No Probable Cause.

Frank's argument that the record supports good faith and probable cause is clearly erroneous. He relies on his own knowledge and understanding of the circumstances surrounding his case, and the allegations and assertions from Gina McLaughlin, Lucia Stewart, and Maria Tiberio. The trial court specifically found that Frank's declaration was full of hearsay, speculation, self-serving, irrelevant, portions inadmissible under the Dead Man Statute, and the majority of it inadmissible. (CP 369) Gina, Lucia and Maria's declarations were found to be inadmissible hearsay. (CP 369) It's hard to imagine how Frank can argue probable cause when he presented little if any evidence to support his will contest.

Appellant argues that common sense dictates that the question of good faith and probable cause have to be examined at the time the Petition

was filed. *Appellant's Brief*, page 20. However, he makes the exact opposite argument under *section B* of his brief, when he says “The second and perhaps the more concrete example of the unfairness of the trial court’s analysis is that discovery in the case was never complete.”

Appellant's brief, page 15.

Appellant also makes the argument that inadmissible evidence does not amount to bad faith. However, he does not provide any authority that a claim based almost exclusively on hearsay and speculation can be brought in good faith.

To conclude, the evidence provided by Frank supports a finding of bad faith and absence of probable cause to challenge his mother’s will.

V. CONCLUSION

Frank and his attorney tried to backdoor a will contest by using TEDRA, but failed to follow the service requirements of RCW 11.24, and ultimately were met with the harsh effects of Maria’s disinheritance clause. Frank argues that if he would have found evidence through discovery sufficient to support a will contest, he would have amended his TEDRA petition, and specifically requested this relief, since it was not initially requested in his petition. He recognizes that his evidence was insufficient to support a will contest at the time he filed his petition, but then encourages the court to apply the *Mumby* analysis, that looks at the

time of filing the petition to determine a presumption of good faith and probable cause. He knew that he didn't have evidence to support his will contest, but wanted to essentially preserve his will contest, without facing the harsh consequences of being disinherited.

Will contests do not work like this. You have four months to file and serve them, or you lose them. Frank thought his Petition would be enough to preserve his will contest, but it was not. When he was called to the table to provide a prima facia showing of his facts to support his will contest, he had almost nothing. Whether it was Frank, or his counsel, or both, that orchestrated this plan, it failed, and since Frank had little evidence to support his will contest, which he admits he had little evidence, he has been disinherited. This is exactly the kind of legal maneuvering that the no contest clause is designed to prevent. Frank had 120 days to conduct discovery for his will contest, and in fact was given a continuance to August 20, 2015, almost eight months since the petition for probate was filed. (CP 239) So whether this court defines good faith and probable cause under *Chapman* or *Mumby*, Frank's actions amount to bad faith, and exactly the right case to apply the harsh effects of a no contest clause, and disinherit Frank Primiani and award attorney fees.

Respondent Respectfully Submitted this 19th day of October,
2018.

By: 
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VI. CERTIFICATE OF SERVICE

I, Brant L. Stevens, hereby certify that on October 19, 2018, the foregoing Brief was hand delivered to the following:

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