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MAY 30 2017

**WASHINGTON STATE
SUPREME COURT**

NO. 94344-3

SUPREME COURT OF THE STATE OF WASHINGTON

BOTANY UNLIMITED DESIGN AND SUPPLY, LLC,

Petitioner,

v.

STATE OF WASHINGTON, LIQUOR AND CANNABIS BOARD,

Respondent.

STATE'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUE2

III. COUNTERSTATEMENT OF THE CASE2

 A. Administrative Proceedings3

 B. Judicial Review in Superior Court.....4

IV. REASONS WHY THE COURT SHOULD DENY REVIEW6

V. CONCLUSION10

TABLE OF AUTHORITIES

Cases

<i>Matter of Botany Unlimited Design & Supply, LLC</i> , 198 Wn. App. 90, 391 P.3d 605 (2017).....	6, 7, 8
<i>Prosser Hill Coal. v. Spokane County</i> , 176 Wn. App. 280, 309 P.3d 1202 (2013).....	8, 9
<i>Quality Rock Products, Inc. v. Thurston County</i> , 126 Wn. App. 250, 108 P.3d 805 (2005).....	8, 9
<i>Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.</i> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	8

Statutes

RCW 34.05	1
RCW 34.05.542	4
RCW 34.05.542(2).....	1, 2, 7
RCW 34.05.550(2).....	7, 8

Rules

RAP 13.4(b).....	6, 7
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I. INTRODUCTION

Botany Unlimited Design and Supply, LLC (Botany) asks this Court to rescue it from failing to follow a clear and simple rule regarding service of a required pleading. The service error arose when Botany sought judicial review of an adjudicative order by an agency, the Liquor and Cannabis Board (Board), an action governed by the Administrative Procedure Act (APA), RCW 34.05. The APA requires that a petition for review seeking a superior court's appellate jurisdiction shall be filed with the court and served on the agency whose decision is to be reviewed. RCW 34.05.542(2). Botany concedes that it failed to properly serve its petition for review on the Board. In a strained attempt to excuse its service error after the fact, Botany contends that a properly served, motion for stay it filed should be treated as a functional equivalent of a petition for review, arguing that the motion contained the required elements for a petition for review.

The Court of Appeals rejected Botany's argument for excusing its failure to serve the Board. Review of that is not warranted. The Court of Appeals addressed a straightforward issue of statutory interpretation: whether service of a motion to stay substitutes for original service of a petition for review. In deciding this issue, the Court of Appeals properly concluded that compliance with the rules of service is mandatory since

service is necessary to invoke a superior court's appellate jurisdiction to review the final order of an adjudicative proceeding. The Court of Appeals based its conclusion on the uncontroversial finding that RCW 34.05.542(2) expressly states that a petition for review shall be served on the agency and does not provide for any excuse based on service of a substitute document. Further, the Court of Appeals correctly held that labeling service of the wrong document as substantial compliance would render the service statute advisory rather than mandatory, defeating the clear legislative intent. This Court should deny Botany's petition for review because this decision presents no conflict among the courts, nor does it involve a significant issue where this Court's final review is needed.

II. COUNTERSTATEMENT OF THE ISSUE

Did the Court of Appeals properly hold that because Botany did not serve the petition for review on the Board, the trial court lacked appellate jurisdiction over Botany's appeal?

III. COUNTERSTATEMENT OF THE CASE

On December 2014, Botany applied for renewal of a license for "Marijuana Producer Tier 2/Processor" with the Licensing and Regulation Division of the Liquor and Cannabis Board (Licensing). As part of the renewal process, Botany's principal, Mark Gomez (Gomez), submitted his

finger prints. The Board's Licensing staff ran a federal criminal background check using those prints. Gomez received a score of twelve for a federal felony conviction in 2007, which exceeded the eight point cutoff to qualify for a marijuana license. On July 17, 2015, based on Gomez's accumulation of twelve points in criminal history, the Board's Licensing staff denied renewal of Botany's marijuana license.

Botany asked for an administrative appeal and claimed that the Board had mitigated Mark Gomez's felony conviction during the initial application, but changed its position during the renewal process. The administrative record showed, however, that at the time of the initial application, the Board had not yet received an originating agency identifier to run federal background checks. The federal felony conviction could not be verified, and the Board's Licensing staff did not consider the conviction when determining whether to grant the original license in August, 2014.

A. Administrative Proceedings

On August 7, 2015, after a Brief Adjudicative Proceeding, Administrative Law Judge Terry A. Schuh issued Findings of Fact, Conclusions of Law and Initial Order (Initial Order), affirming the staff decision to deny Botany's license renewal. CP 119-125. On August 18, 2015, the Board, *sua sponte*, issued an order to conduct an administrative review of the Initial Order. CP 126. On August 28, 2015, Botany filed its

Request for Administrative Review with the Board at the address specified in the Initial Order. CP 141, 147.

On September 15, 2015, the Board issued a Final Order. CP 147. The Board adopted the Initial Order as the Final Order and found that Botany's license renewal for Marijuana Producer Tier 2/Processor shall not be renewed. CP 147-148. The Final Order stated the following with respect to Botany's right of review, in pertinent part:

Judicial Review: Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

CP 148-149.

B. Judicial Review in Superior Court

On September 22, 2015, Assistant Attorney General Jong Lee (AAG Lee) of the Office of the Attorney General received, via email, a copy of Botany's Petition for Judicial Review (Petition). At the time it was thought to be a courtesy copy. CP 231, 301. On September 23, 2015, Botany filed its Petition in Franklin County Superior Court. CP 48. Also on September 23, 2015, Botany filed an Emergency Motion for Stay (Motion). CP 38-46. Botany served a copy of the Motion via mail to

AAG Lee but did not serve the Board. CP 231, 287. On September 25, 2015, AAG Lee filed his notice of appearance and the Board's opposition to the motion for stay. CP 214. On September 28, 2015, Judge Bruce A. Spanner denied the motion for stay. CP 217-218.

On November 13, 2015, AAG Lee contacted Kevin McCarroll, Adjudicative Proceedings Coordinator (Adjudicative Coordinator) regarding status of the certification of agency records to be used in the Judicial Review. AAG Lee learned that Botany had failed to properly serve the Washington State Liquor and Cannabis Board with its Petition. CP 230-234. The Board then moved to dismiss Botany's Petition. CP 220-225. The Board specifically argued that Botany's failure to timely serve the agency with the Petition required dismissal. *Id.*

Franklin County Superior Court granted the Board's motion to dismiss with prejudice. CP 301-302. Botany appealed to Division III of the Court of Appeals. CP 303-304.

The Court of Appeals affirmed the superior court's order of dismissal. It agreed that Botany did not serve the Petition on the Board, and that the trial court correctly identified that it did not have jurisdiction

to entertain Botany's appeal.¹ *Matter of Botany Unlimited Design & Supply, LLC*, 198 Wn. App. 90, 391 P.3d 605 (2017).

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

RAP 13.4(b) sets forth four limited circumstances where this Court may choose to accept review of a decision by the Court of Appeals. Botany's petition for review fails to address, much less show, that it meets any of those four circumstances. Its petition for review should be denied.

Instead of asserting any of the four circumstances in RAP 13.4(b), Botany claims that it raises a "substantial question" for the Court: whether "strict compliance" or "substantial compliance" applies to the caption and title of a petition for judicial review. That mischaracterizes the straightforward issue of statutory interpretation already addressed by both the trial court and the Court of Appeals. Both courts correctly resolved the question by hewing to the longstanding principle that compliance with the rules of service is mandatory since service is necessary to invoke the superior court's appellate jurisdiction.

Because Botany petition for review fails to satisfy any of the four circumstances in RAP 13.4(b), this Court should not exercise its jurisdiction to review this case. Botany's contention that its motion for a

¹ The Court of Appeals found in favor of Botany on the issue of which person constituted the agency's attorney.

stay serves as the functional equivalent of a petition for review is meritless. First, Botany knew that a petition for judicial review was required since it filed such a petition, but concedes it failed to properly serve its Petition on the Board. Appellant's Petition for Review at 6. That service error deprived the superior court of appellate jurisdiction to review the final agency order.

Having failed to properly serve its Petition, this case is only about Botany's post-hoc argument that that its motion for stay should serve as a substitute petition for judicial review because it contains some of the same elements. With regard to RAP 13.4(b) criteria, this is not a matter of broad public interest because it relates only to the narrow factual matter relating to Botany's failure to serve the Board. Furthermore, Botany's arguments for excusing its neglect are not supported by legal authority and should be rejected.

The Court of Appeals persuasively explained why it rejected Botany's argument that its emergency motion for stay filed pursuant to RCW 34.05.550(2) should be construed as a petition for judicial review. First, the court noted that RCW 34.05.542(2) expressly states that a petition for judicial review shall be served on the agency and does not provide for service of a substituted document. *Botany*, 198 Wn. App. at 99. Second, the Court of Appeals properly determined that the separate

provision of the APA addressing stays, RCW 34.05.550(2), expressly states that any such motion for relief be filed *after* the petition for review has been filed, and that the statute clearly contemplates that two separate documents will be filed in those instances when emergency relief is sought. *Botany*, 198 Wn. App. at 99.

The Court of Appeals also found that compliance with the rules of service is mandatory, since service is necessary to invoke judicial jurisdiction. *Botany*, 198 Wn. App. at 99, citing *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998). Finally, the Court of Appeals concluded that labeling service of the wrong document as substantial compliance would render the service statute advisory rather than mandatory. *Botany*, 198 Wn. App. at 99.

The case law cited by Botany in support of its position does not present a significant issue for this Court to address. In particular, Botany's reliance on *Prosser Hill Coal. v. Spokane County*, 176 Wn. App. 280, 288, 309 P.3d 1202 (2013) is misplaced. In *Prosser Hill Coal.*, the Court of Appeals cited *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 265-66, 108 P.3d 805 (2005) for the proposition that "...where service is otherwise proper under the civil rules, a party's failure to include the *name* of a necessary party in the caption does not divest the

superior court of jurisdiction absent demonstrated prejudice” (emphasis added). *Prosser Hill Coal.*, 176 Wn. App. at 287. In both *Prosser Hill* and *Quality Rock* the parties complied with the procedural requirements necessary to invoke the superior court’s appellate jurisdiction with the lone exception of omitting the names of parties in the petition’s caption. *Quality Rock*, 126 Wn. App. at 271-72. Specifically, the Court in *Prosser Hill* found the *Quality Rock* decision finding substantial compliance persuasive because two missing parties were identified in the LUPA petition and participated in the County proceedings, and the other party could not establish prejudice resulting from the caption amendment. *Prosser Hill Coal.*, 176 Wn. App. at 288.

In both *Prosser Hill* and *Quality Rock*, only minor errors were involved in the content of the petition for judicial review, errors which were later amended. Botany’s case is distinguishable. Unlike the situation in *Quality Rock*, where the Court of Appeals noted that “where service is otherwise proper under the civil rules...”, Botany failed to effect proper service. It did not serve the Board or its attorney with a petition for judicial review. And, this lack of service on the agency that issued the decision is a critical step because it informs the Board that its decision is not final and that a court will now review it. Failure to serve the

adjudicating agency, in contrast, means that the agency may be uninformed for weeks or months that its ruling is on appeal.

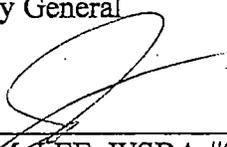
In sum, Botany's attempt to remedy its service error by re-casting its motion for stay as a de facto petition for review is meritless. A motion for stay is simply that; a petition for review is an entirely different pleading. The former cannot be transformed into the latter in an attempt to discount a service error – an error which irrefutably deprived the superior court of judicial jurisdiction to hear Botany's appeal. And given this lack of merit, there is no question presented by this case that warrants this Court's review.

V. CONCLUSION

For the above stated reasons, the Board respectfully requests that this Court deny Botany's petition for review.

RESPECTFULLY SUBMITTED this 30 day of May, 2017.

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DECLARATION OF
SERVICE

I, Rose Johnson, make the following declaration:

1. I am over the age of 18, a resident of Pierce County, and not a party to the above action.

2. On May 30, 2017, I deposited via U.S. mail, postage prepaid, a copy of the State's Answer to Petition for Review to:

JEFFRY K. FINER
LAW OFFICES OF JEFFRY K. FINER, P.S.
35 W MAIN AVE, SUITE 300
SPOKANE, WA 99201

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of May, 2017, at Olympia, Washington.


ROSE JOHNSON, Legal Assistant