

No. 94344-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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BOTANY UNLIMITED DESIGN & SUPPLY, LLC,

Petitioner,

v.

STATE OF WASHINGTON, LIQUOR AND  
CANNABIS BOARD,

Respondent.

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**PETITIONER'S REPLY TO STATE'S ANSWER**

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## I. INTRODUCTION

This case involves citizens, a state agency, and a legal technicality impacting the administration of justice.

To begin, it is helpful to restate the issue presented by Botany as opposed to the respondent's version. Botany asks the question:

Does substantial compliance for the contents of a petition for review extend to the title of the document where in all other respects the document met the content required under RCW 34.05.542 and the document was otherwise timely served and filed?

A variant of this question was used by the Court of Appeals below:

May service of a motion to stay substitute for service of a petition for review when the contents of the motion to stay meet all the requirements of a petition for review?

The respondent LCB's Counterstatement of the Issue, however, found at page 2 of its opposition to review, is wrong and assumes the truth of the matter to be decided. Further, in its

Answer to Petition for Review, LCB asserts another procedural objection to Botany's Petition to this Court: *whether a petition may be reviewed by this Court under RAP 13.4(b) when that rule is not explicitly cited*. This Reply addresses that issue and the LCB's other arguments against review.

## II. ARGUMENT

The rule governing this Court's acceptance of petitions for discretionary review is Rule of Appellate Procedure 13.4 (2016). Specifically, section (b) of RAP 13.4 outlines the four circumstances where review will be accepted. RAP 13.4(b)(1)-(4). Applicable here are subsections (1), (2), and (4). Subsections (1) and (2) relate to the core of the LCB's most recent objection, and subsection (4) relates to the objection *and* the heart of original cause of action. Importantly, the text of RAP 13.4 does not require a petitioner to invoke the rule by name or number in order to properly petition this Supreme Court for review. *See* RAP 13.4.

**a. The Court of Appeals' published decision is in conflict with the decision of this Court in both *Skinner v. Civil Serv. Comm'n of City of Medina*.**

More to the point, Botany's Petition actually identifies a clear conflict between the holding from the decision below and existing case authorities.

This Court has previously held that substantial compliance with service requirements is sufficient to confer appellate jurisdiction whenever the service is reasonably calculated to provide actual notice. *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 857 (2010). It is uncontested at this point that there was sufficient and proper service of the Emergency Motion upon LCB's counsel of record. The only issue here is whether the Emergency Motion itself may stand in for a Petition for Review.

The lower court's published decision below, in a ruling contrary to previous case holdings by this Court, held that the caption determines whether the document meets substantial

compliance with the rules. For the lower court, a Petition for Review must be named: Petition for Review.

Here, the situation is most closely analogous to that in *Skinner*. Botany filed a timely Petition as well as an Emergency Motion in superior court to address the LCB order stating that its license denial was final and that the agency could not issue a stay of proceedings. One pleading was titled “Petition for Review” and one titled “Emergency Motion for Stay.” Botany emailed both documents to counsel for LCB — which does not meet the service rule’s requirement for strict compliance. Botany, however, properly and timely serve via mail its Emergency Motion for Stay on the LCB’s attorney of record. There is no dispute that the attorney of record, Assistant Attorney General Lee, was served the motion in lieu of service upon the LCB itself, as provided for by statute. Two days after Botany emailed the documents to opposing counsel, opposing counsel Lee filed his notice of appearance on behalf of LCB.

There was no delay, and more significantly no showing of prejudice against the LCB.

In its opinion on this issue, the Court of Appeals states that applying the accepted rule of substantial compliance to the *title* of the Emergency Motion for Stay “would render the service statute advisory rather than mandatory.” *In re License Application of Botany Unlimited Design & Supply, LLC*, 198 Wn. App. 90, 99 (2017) (reprinted as Appendix A in Botany’s petition to this Court).

The Court of Appeals holding that substantial compliance of the service requirements — in particular a caption error — is *not* sufficient to secure the appellate jurisdiction of the superior court is in direct conflict with this Court’s opinion in *Skinner*. *Compare Skinner*, 168 Wn.2d at 857, *with Botany*, 198 Wn. App. at 99.

In *Skinner*, this Court explicitly held that the caption itself did not divest the superior court of its appellate

jurisdiction. This holding explicitly applies to petitions for review submitted to trigger the appellate jurisdiction of a superior court over an agency action. *Id.*

Because of this conflict between an opinion of this Supreme Court — as well as an opinion of the Court of Appeals for Division III — it is appropriate for this Supreme Court to review this Petition under RAP 13.4(b)(1). Because the matter touches upon issues of considerable public interest, that being the means by which the State’s citizens can perfect judicial appeal of actions by the State’s agencies, review is again appropriate.

**b. The decision on appeal from the Court of Appeals is in conflict with the Court of Appeals decision in *Prosser Hill Coal. v. Spokane County.***

The Court of Appeals for Division III, in its opinion in *Prosser Hill Coal. v. Spokane County*, reiterated a Division II holding that states a flaw in a document’s caption does not divest a superior court of its jurisdiction when service is

otherwise proper and there is no demonstrable prejudice. 176  
Wn. App. 280, 287 (2013).

Here, the situation is akin to that in *Prosser Hill*. Botany timely and properly filed and served its document labelled “Emergency Motion for Stay.” That same document completely satisfied the statutory requirements for a petition for judicial review — a point that the LCB does not effectively address in its Answer in opposition to Botany’s petition to this Court. Additionally, the Emergency Motion fully satisfied the service requirements under the State’s APA. Further, counsel for LCB had actual notice of the served Petition as well as actual notice of the served and filed Emergency Motion, and knew their contents, so there was cause for undue delay, no burdensome hardship, and no demonstration of prejudice affecting LCB’s ability to litigate Botany’s appeal.

Nevertheless, the Court of Appeals held in effect that a superior court cannot have appellate jurisdiction to hear an

administrative appeal if the pleading is not titled as a “Petition for Review.” The rose, as it were, ceases to be a rose whence titled by any other name. In essence, the Court of Appeals opines that for purposes of obtaining a superior court’s appellate jurisdiction over agency actions, the petition’s *caption* is reviewed for strict compliance. Such an opinion conflicts with the opinion of that same Court in *Prosser Hill*.

Because of this conflict between the opinions of the Court of Appeals for Division III, it is appropriate for this Supreme Court to review this Petition under RAP 13.4(b)(2).

- c. The underlying appeal as well raises an issue of exceptional importance to the public and State’s legal cannabis industry as well as to the public in general.**

The underlying merits of Botany’s dismissed judicial appeal involves critical and substantial matters of great interest and importance to the public. Facially, the dispute is between a Washington corporation and the state agency regulating the conduct of that corporation’s newly legitimized industry: state-

legalized commercial cannabis production and processing. At issue is the degree of reliance a State licensee may rest upon the State's granting a discretionary license. While originating in the cannabis industry setting, the impact of the underlying dispute is significant to any industry that requires state licensing.

The procedural issue presented in Botany's Petition is the single hurdle preventing Botany from litigating the merits of its license renewal. Based on the above reasons, it is proper for this Court to grant review of Botany's Petition under RAP 13.4(b)(4).

### **III. CONCLUSION**

There being no claim of undue delay or actual prejudice—the record discloses that the Attorney General promptly entered his notice of appearance within days of receipt of the Emergency Motion—this case should be permitted to proceed to the merits regarding LCB's alleged wrongful and arbitrary refusal to renew Botany's cannabis license. Botany has been prevented from litigating the merits of its license renewal due to

the captioning in its Emergency Motion for Stay: *not* due to its contents or timing or means of service. Based on standing case authority by this Court and the lower courts in Washington, Botany's efforts meet the substantial compliance test for seeking judicial review.

Due to the reasons set forth above, Petitioner respectfully requests this Court to grant its Petition for Review.

Dated this 14<sup>th</sup> day of June, 2017.

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**Transmittal Information**

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