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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

Court of Appeals Cause No. ~~45729-6-II~~  
DEPUTY

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**IN THE COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON**

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IN RE THE MATTER OF THE ESTATE OF CHARLES CRESS EICKHOFF

Deceased.

BRIAN CHARLES EICKHOFF and CATHY NEGELSPACH, Petitioners;  
and DAVID BUSTAMANTE,

Appellants,

vs.

DIANE EICKHOFF, as Executrix and Personal Representative of the Estate;  
and DIANE EICKHOFF, individually,

Respondent.

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**BRIEF OF RESPONDENT**

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## COUNTER STATEMENT OF THE CASE

On February 25, 1988, Charles Cress Eickhoff, hereinafter referred to as "Charles" executed a Will at the office of his attorney, J. W. Darr, in Hillsboro, Oregon. The Will was executed pursuant to Oregon law. Charles' wife, Diane Eickhoff, "Diane", the Respondent herein, was named Personal Representative and sole heir to Charles' estate. A copy of this Will is found at CP 1-4.

Years later, after Charles and Diane moved to Grayland, Washington, they retained Aberdeen attorney Frank Franciscovich for several matters connected to their commercial fishing business. Mr. Franciscovich had known Charles and Diane for many years prior to drafting a Community Property Agreement for them, which they signed on November 9, 2010. Mr. Franciscovich submitted a declaration to the court which refers to the Community Property Agreement and in which he states that Charles was clearly competent when he executed the Community Property Agreement.

Mr. Franciscovich's declaration is found at CP 183-184. The Community Property Agreement is found at CP 282-293.

Again, in the Community Property Agreement, Charles made Diane his sole heir. The Community Property Agreement is consistent with the Oregon Will which remained in effect.

When Charles died on July 8, 2011 (Not July 12<sup>th</sup>, as referred to in Appellant's brief), upon the advice of Mr. Franciscovich, Diane filed the original Will on August 5, 2011, with the Pacific County Clerk pursuant to RCW 11.20.010. At that time the Will became available to the public for inspection, including the Appellants and their attorney.

Based upon a declaration executed by Appellant's attorney on October 25, 2011, CP 21-22, it appears that this attorney examined the original Will at the Pacific County Clerk's office. In his declaration, the attorney cites "several irregularities which called into question its [the 1988 Will] authenticity" [Quoting from the declaration of this attorney dated October 25, 2011]:

- "1) Although the Will has every appearance of a document that was professionally drafted the names of the witnesses are not printed, nor are their addresses provided;
- "2) The witness names are partially illegible;
- "3) Although no affidavit is required, the purported notary signature is also illegible and is not printed;
- "4) The affidavit does not contain the notary seal as required by Oregon state law as of 1988. See former ORS 194.031 (1987 version) attached herewith as Appendix C;

- “5) It is difficult to imagine that a true document drafted and executed according to standard legal practices, with an attached self-proving affidavit, would have omitted the notary seal, the requirement for which would have been common knowledge among legal practitioners during this time period.
- “6) The provisions of the purported Will stand in direct contradiction to the various specific bequests described by the decedent while he was still alive and of sound mind.”

This attorney then described his efforts to determine the authenticity of the 1988 Will. He left several telephone messages for Diane; he attempted through the Oregon Secretary of State to identify the notary; and finally, he inquired of “several local lawyers regarding a lost Will”. Most notably, he did not attempt to communicate with the lawyer who drafted the Will. However, his client, Appellant Cathy Negelspach, knew who had drafted the Will and made efforts to contact this attorney. In her declaration dated July 19, 2012, she admits that she “telephoned the law offices of Jimmie Darr in Oregon” and asked about the Will. She admits that she was given this name by Diane as the name of the attorney who drafted the 1988 Will. CP 432-439. Neither the attorney, nor Ms. Negelspach, made any effort to contact Mr. Darr directly. A simple Internet inquiry would have placed the attorney in contact with Mr. Darr, who would have confirmed that indeed he drafted the Will, that it was executed pursuant to Oregon law, and that in 1988 Charles was definitely competent.

The Declaration of James W. Darr, CP 98-104, makes it clear that in 1988 Charles was competent when he executed the Will and that the Will was executed pursuant to Oregon law. A raised seal was indeed applied by the notary, a lady who was employed by Mr. Darr. Anyone inspecting the original Will on file at the Pacific County Clerk's office would have immediately learned that a raised seal was applied.

The Appellants continued to argue in court that the 1988 Will was somehow improperly executed. In 1988, and years prior, an embossed notary seal was sufficient. The change of Oregon law took place in 1990, as indicated by the Declaration of Darla Biggar of the Rose City Stamp, Inc. CP 490-493. That a notarial seal could be used in 1988 is also proved by the documents received by the Oregon State Archives Office. CP 467-489.

The Appellants' first move was to ask that Michael Sullivan, the Pacific County Superior Court Judge, disqualify himself. They then asked that Diane's attorney, Frank Franciscovich, disqualify himself as well. Diane then engaged the services of Brown Lewis Janhunen & Spencer, which firm was represented by Curtis M. Janhunen. An effort then was made by the Appellants to disqualify Janhunen. This effort was unsuccessful at the trial court level, and the Appellants moved for discretionary review. After almost a year elapsed, the motion was denied,

first by the Court of Appeals Commissioner and then, when that effort failed they sought a review by the State Supreme Court. The Supreme Court finally ended this effort and filed a Certificate of Finality certifying that the decision the Court of Appeals filed on September 20, 2012, became final on April 3, 2013. A copy of the Certificate of Finality is found at CP 202-209. A copy of the Court Commissioner's opinion may be found at C/A No. 43534-9-II. The efforts to disqualify attorney Janhunen occupy a large portion of the record before the Court. The motion was denied by the Superior Court on several occasions.

After approximately a year had elapsed, the case was once again before the Pacific County Superior Court. The personal representative, Diane, filed a Motion for Summary Judgment. She also filed a motion to have the Appellants and their attorney found in violation of Civil Rule 11 by willfully failing to make even a basic investigation into the validity of the February 25, 1988 Will executed by the decedent; and further that the efforts to disqualify attorney Janhunen were made in bad faith and without legal basis in that there was no substantial relationship between the 2003 custody matter and the validity of the 1988 Will.

The Motion for Summary Judgment which, after delays which resulted in terms being awarded against the Appellants, was heard on July 29, 2013. On December 9, 2013, Findings of Fact, Conclusions of Law and an Order Denying Petitioners' Amended Petition for Relief and

requiring Petitioners to pay Respondent's reasonable attorney fees and costs. A judgment were entered by the court. The court specifically entered a finding of fact. That same day, the court granted Respondent's Order for Summary Judgment and awarded costs and attorney fees pursuant to RCW 11.96A.150, the court finding that the actions of the Appellants were without probable cause, without good faith, and that considering all factors there was no benefit to the Estate by their actions.

### **ARGUMENT**

The Appellants failed to follow RAP 10.3(g). This rule, in pertinent part, states as follows:

“A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.”

The trial court specifically entered Findings of Fact and, as stated in the case of Scheib vs. Crosby, 160 Wn.App. 345, 249 P.3d 184 (2011), the failure to assign error to the trial court's Findings of Fact makes them verities on appeal. 160 Wn.App. at 349. See also, Detention of Kistenmacher, 134 Wn.App. 72, 138 P.3d 648 (2006), at page 75:

“ . . .

“Finally, we do not need to review findings of fact to which error has not been assigned; they are verities on appeal. State vs. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). “

There is certainly evidence to support the trial court's findings.

The effort repeated many times by Appellants to disqualify attorney Janhunen remains without a basis.

### **ASSIGNMENTS OF ERROR NOS. 1 & 2**

RPC 1.9(a) prohibits attorneys from representing a client in an action adverse to a prior client if the matter is substantially related to the first client's matter:

“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”

The Comment to RPC 1.9, states that, “Matters are ‘substantially related’ if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.”

The court is to engage in a three prong analysis. First, the court is to reconstruct the scope of the facts of the former representation; then, 2), it is to assume the lawyer obtained confidential information from the client about all of the facts; and 3) it is then to determine whether any former factual matter is sufficiently similar to a current one that the lawyer could use the confidential information to the client's detriment. The decision turns on whether the lawyer was so involved in the former representation

that he can be said to have switched sides. Sanders vs. Woods, 121 Wn.App. 593, 598, 89 P.3d 312 (2004).

Here, the Appellants cannot demonstrate that the trial court erred. The Appellant's case in which Janhunen was involved occurred in 2003-2004 and dealt with a paternity dispute, ultimately resulting in a parenting plan, visitation and child support. The current case involves challenges to specific documents and the decedent's mental state when he signed them. Even the attorney for the Appellants admitted that although Janhunen never moved to withdraw, he had nothing to do with the case since 2004 and that other attorneys in the meantime had worked for the Appellant in that same paternity case.

The 1988 Will, obviously executed before Janhunen represented the Appellant, involves no facts that are related to the Appellant's paternity case, nor is the issue related to the alleged "lost" Will which Appellants contend was signed between 1999 and 2000, again well before Brian's paternity case. RP June 21, 2012, at page 3.

With respect to the Community Property Agreement drafted by Mr. Franciscovich and executed in 2010, obviously Janhunen had no participation of the drafting of the document, and the trial court correctly determined that his representation in 2003-2004 was not substantially related to the current Will contest.

The finding by the trial court again was not challenged and is a verity on appeal. Scheib vs. Crosby, *supra*.

The Motion for Summary Judgment which was granted by the trial court also contains findings. Specifically, the court found that the actions of the Appellants were taken without probable cause, without good faith, and that there was no benefit to the Estate. The court awarded attorney fees.

The court rule regarding summary judgment is found at Civil Rule 56. That rule has been the subject of many court cases and it is possible to state in general terms what the law is regarding summary judgment.

“Summary judgment shall be rendered if there is no genuine issue as to any material fact. CR 56(e). A material fact is one upon which the outcome of the litigation depends, in whole or in part. [Citation omitted.] Unsupported conclusory allegations are not sufficient to defeat summary judgment. [Citation omitted.] Unsupported argumentative assertions are not sufficient to defeat summary judgment. [Citation omitted.]

“Affidavits submitted in support of, or in response to, a motion for summary judgment must set forth such facts as would be admissible in evidence. CR 56(e). An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e., information as to ‘what took place, an act, an incident, a reality as distinguished from supposition or opinion.’ [Citation omitted.] Ultimate facts, conclusions of facts or conclusory statements of facts are insufficient to raise a question of fact. [Citation omitted.]

“Inadmissible evidence is surplusage which cannot support or defeat a motion for summary judgment. [Citation omitted.]”

Vacova Company vs. Farrell, 62 Wn.App. 386, 814 P.2d 255 (1991), at 395.

The most recent case of Woodward vs. Lopez, 174 Wn.App 460, 300 P.3d 417 (2013), makes it clear that the burden shifts after the moving party demonstrates by its affidavits that there is no genuine issue of material fact.

“After the moving party submits adequate affidavits, the nonmoving party must set forth facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue of a genuine issue as to material fact. [Citation omitted.] If the nonmoving party fails to do so, then summary judgment is proper. [Citation omitted.]”

The court goes on to state that

“a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. [Citation omitted.]”

Woodward vs. Lopez, at page 6.

Applying the law to the facts, it is clear that summary judgment is appropriate in this case.

There is no evidence that the 1988 Will was not properly drafted by J. W. Darr and properly executed by the testator, Charles Cress Eickhoff. RCW 11.12.020 provides:

That a last will and testament executed in the mode prescribed by the law of the place where executed or of the testator’s domicile, either at the time of the will’s execution or at the time of the testator’s death, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.”

Oregon law, found at OR § 112.235, sets forth the requirements for the execution of an Oregon Will:

“a will shall be in writing and shall be executed with the following formalities:

- “(1) The testator, in the presence of each of the witnesses, shall:
- (a) Sign the will; or
  - (b) Direct one of the witnesses or some other person to sign thereon the name of the testator; or
  - (c) Acknowledge the signature previously made on the will by the testator or at the testator’s direction.
- “(2) Any person who signs the name of the testator as provided in subsection (1)(b) of this section shall sign the signers own name on the will and write in the will that the signer signed the name of the testator at the direction of the testator.
- “(3) At least two witnesses shall each:
- (a) See the testator sign the will; or
  - (b) Hear the testator acknowledge the signature on the will; and
  - (c) Attest the will by signing the witness name to it.
- “(4) A will executed in compliance with the Uniform International Wills Act shall be deemed to have complied with the formalities of this section. [1969 c.591 §37; 1973 c.506 §7; 1981 c. 481 §4]

As is evident, under both Oregon law and Washington law the Will was properly executed.

Further, the Community Property Agreement drafted by Mr. Franciscovich and executed by Charles and Diane is consistent with the Oregon Will and can exist side by side with it. It is obvious that the reason why Charles did not execute another Will after he and Diane moved to Washington is because he already had a valid Will. The Community Property Agreement served only to cover any difference between Oregon and Washington law. Again, as stated above, Charles made Diane his sole heir.

The efforts by Appellants to raise genuine issues of material fact must fail. They attempt to summarize conversations and meetings they had with the decedent to support their allegation that there was a Will that has never been discovered or that Charles was incompetent at the time he executed the Community Property Agreement. Of course, the competency of Charles in 1988 cannot be challenged and that Will continues to be valid.

The efforts by Appellants to create a genuine issue of material fact by describing conversations with the decedent which they claim took place violate RCW 5.60.030, the so-called Dead Man's Statute. The Appellants are obviously attempting to benefit themselves by describing the alleged conversations. Their efforts must fail.

The actions of the Appellants have certainly not benefitted the Estate. On the contrary, they have been without merit and caused the Estate to expend thousands of dollars in attorney fees and costs. They should be required pursuant to RCW 11.96A.150 to pay to the Estate such amounts as this Court deems equitable.

#### **ASSIGNMENTS OF ERROR NOS. 3 & 4**

At all hearings, the trial court sat as the finder of fact. A part of the court's obligation was to rule on the credibility of the witnesses, even though they may have been testifying by affidavit. The behavior of the parties at the hearings could not be ignored. A judge is not required to remain blind and deaf when misbehavior occurs before him. The judge ruled on the evidence that came to him as exhibits and declarations. While he may have observed one of the Appellants misbehaving, that observation was not taken into account when the court considered the evidence.

The Appellants asked the court to disqualify Janhunen because he remained as the "attorney of record" for Brian Eickhoff, one of the Appellants, due to Janhunen's failure to withdraw from the custody case in 2004. VRP 6-21-12, page 1, line 11. Appellants' counsel conceded Janhunen had nothing to do with the case since 2004. VRP 6-21-12, page 8, line 20. Other attorneys had represented the Appellant in the

same case over the ensuing years. CP 6-21-12, page 7. Appellants injected the earlier case into these proceedings and thereby invited the court to review the file, which he did. The trial court concluded there was no substantial relationship between the paternity case and the Will contest. There was no error committed by the trial court. The Appellants now argue that they did not want the judge to “look behind the curtain”, but rather wanted to use the curtain as a shield.

There was no error committed by the trial court.

#### **ASSIGNMENT OF ERROR NO. 5**

In this Assignment of Error, the Appellants argue that the Respondent waived the Dead Man’s Statute. They spent a great deal of time arguing that Charles executed a second Will which would have, in effect, revoked the 1988 Will. The only evidence offered by the Appellants was their own testimony. Their testimony must be stricken as in violation of RCW 5.60.030, the so-called Dead Man’s Statute. That statute reads as follows:

**“Not excluded on grounds of interest—Exception—  
Transaction with person since deceased.** No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or of any minor under the age of

fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.”

A discussion of this statute is found at page 312 of the *Courtroom Handbook on Washington Evidence*. The case is discussed later in Diel v. Beekman, 7 Wn.App. 139, 499 P.2d 37 (1972) (overruled on other grounds by, Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984)). In that case, the defendant wife was sued by parties seeking to prove an alleged agreement with the deceased by offering testimony regarding the agreement. The court held that the statute barred the testimony. The wife was able to use the statute as a bar because, even though she was a party in interest as to her share of the community property, her interest and the interest of the estate were not severable. Therefore, she could, if necessary, testify concerning an interest which would have been the other separate property. The discussion of the Dead Man’s Statute found in the Diel v. Beekman case is very thorough.

Both of the Appellants are therefore barred from repeating any conversations they allege occurred between themselves and the decedent. “Death having closed the lips of one party, the law closes the lips of the other.” The test is whether the decedent could have

contradicted the testimony of the Appellants if he were alive and indeed he could.

Even if the testimony of the Appellants regarding their alleged conversations with the decedent was admissible, and Respondent believes they are not and should be barred. The case cited by the Appellants, Estate of Black, 116 Wn.App. 476, 66 P.3d 670 (2003), sets forth the burden they must bear in proving the existence of a so-called lost Will. The contents of this phantom Will must be proved to the satisfaction of the Court by clear, cogent and convincing evidence. RCW 11.20.070(2).

As set forth in Black, the proponents of the phantom Will must prove that the Will was in existence at the time of the testator's death, that it was properly executed, and that their evidence must show the contents or the authenticity of a copy of the Will. The Will's contents must be proved clearly and distinctly by testimony of at least two people.

Here, such evidence is lacking. In comparing the allegations of the Appellants with the evidence that was available in the Estate of Black it is very clear that the evidence offered, even if admissible, does not prove by clear, cogent and convincing evidence that this Will ever existed. For example, their testimony does not even indicate that the contents of the Will would not have mirrored the 1988 Will and the Community

Property Agreement and have the widow wife inheriting everything. Appellant Brian Eickhoff claims that he saw the paragraph revoking all prior Wills, but provides no other details. He didn't know the name of the attorney who drafted the Will, the names of the witnesses, and none of the contents.

The Appellants are obviously scrambling in their efforts to have the decedent die intestate. Fortunately, there exist two testamentary devices that were both properly executed.

The Appellants attempt to draw a difference between the Community Property Agreement and the 1988 Will. They are perfectly consistent. The death of Charles Cress Eickhoff results in Diane inheriting everything. That is the situation under both the 1988 Will and the Community Property Agreement drafted by their longtime attorney, Frank Franciscovich.

#### **REMAINING ASSIGNMENTS OF ERROR**

The Appellants were unable to disqualify Janhunen from representation of the Estate. Their efforts were rebuffed by the trial court and the Court of Appeals Commissioner. Those efforts were without any merit and violative of CR 11.

Not having succeeded in this effort, they attempted to have the 1988 Will declared invalid. Their efforts were so futile that they later conceded its validity. Having failed to convince the judge that the 1988 was invalid, they then tried to create another, later Will, through their testimony. The only portions of this phantom Will that they could recall was the paragraph revoking all prior Wills. How disingenuous.

But the Community Property Agreement stood in their way. To have the court recognize the phantom Will as controlling, they would have to convince the court that Charles was incompetent at the time he executed the Community Property Agreement. This effort, too, was rebuffed by the court after hearing the evidence from his personal physician.

Whether Charles was "institutionalized" or, as the court found, was simply placed in a nursing home to recover from surgery, it unimportant. The 1988 Will controls.

Diane was married to Charles for many years, even longer than he was married to the Appellants' mother. To accuse her of being greedy for inheriting Charles' estate is unseemly and requires no further response.

There is no evidence that the Appellants were required to pay attorney fees twice for the same work. Again, this is an unsupported allegation.

**CONCLUSION**

The Respondent asks that this Court dismiss the appeal and remand the case to the Pacific County Superior Court for enforcement of the judgments. The Appellants failed to assign error to the Findings of Fact entered by the trial court which then became verities on appeal. Substantial evidence support those Findings.

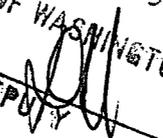
The Court should award the Respondent reasonable costs and attorney fees for this appeal. This request is made pursuant to RAP 18.1.

DATED: October 16, 2014

Respectfully submitted,

BROWN LEWIS JANHUNEN & SPENCER  
Attorneys for Respondent

By   
CURTIS M. JANHUNEN, WSBA #4168

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DEPUTY

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FOR THE STATE OF WASHINGTON

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In re the Matter of the Estate of )  
CHARLES CRESS EICKHOFF, )  
 )  
Deceased, )  
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BRIAN CHARLES EICKHOFF and )  
CATHY NEGELSPACH, )  
 )  
Petitioners, )  
 )  
and )  
 )  
DIANE EICKHOFF, as Executrix and )  
Personal Representative of the Estate; and )  
DIANE EICKHOFF, individually, )  
 )  
Respondent. )  
\_\_\_\_\_ )

CERTIFICATE OF MAILING

I, Carlene E. Kuhn, hereby certify that I am a citizen of the State of Washington, over the age of 18 years, and competent to be a witness herein. That I deposited the original and one true and correct copy of Brief of Respondent, in the United States mails, postage prepaid, on this 17<sup>th</sup> day of October, 2014, addressed as follows:

David C. Ponzoha, Court Clerk  
Court of Appeals, Division II  
950 Broadway, Ste 300, MS TB-06  
Tacoma WA 98402-4454

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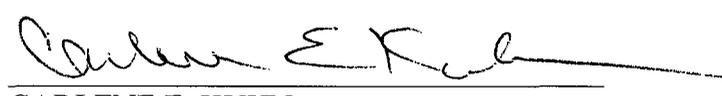
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I further deposed in the United States mails, postage prepaid, on this 17<sup>th</sup> day of October, 2014, a true and correct copy of the Brief of Respondent upon the attorney for Appellants:

David Bustamante  
Attorney for Appellants  
227 Bellevue Way NE #30  
Bellevue, WA 98004-5721

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

DATED this 17<sup>th</sup> day of October, 2014, at Montesano, Washington.



CARLENE E. KUHN  
Assistant to Curtis M. Janhunen  
Attorney for Respondent