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No. 73037-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

Estate of LOLA ELIZABETH MOONEY:
JAMES CHARLES HOWARD, Appellant,

v.

ELIZABETH ANN COVEY,
Respondent.

REPLY BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 JUN 27 AM 9:33

ORIGINAL

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I. ARGUMENT

A. Washington case law supports Appellant's contention that strict compliance is not required by the RCW 11.24.010 personal service provision.

According to the Brief filed by Respondent, Elizabeth Ann Covey (hereafter, "Ms. Covey"), RCW 11.24.010 "contains an express legislative mandate that precludes the application of the doctrine of substantial compliance." ((Respondent's Brief, p. 1.) This contention is discussed extensively throughout Ms. Covey's Brief, but it does not stand up to scrutiny of Washington case law.

In a 2006 case the Washington Supreme Court reviewed RCW 11.24.010's previous requirement that "a party contesting a will must file a petition in the court with jurisdiction over the will" and "the party contesting the will must then request and serve a citation on all executors, administrators, and legatees of the will." *In re Estate of Kordon*, Wn.2d 206, 209, 137 P.3d 16, 157 (2006). The Court observed that the will contestant requested and served a citation, equivalent to a summons, on the personal representative *more than two years* after timely filing a petition contesting the Decedent's will. "Such belated service is obviously inadequate." However, the Court continued, "[s]ubstantial compliance with the RCW 11.24.020 citation requirement within the RCW 11.24.010 statute of limitations may be sufficient." *Kordon*, Wn.2d at 213-14,

emphasis added, citing *In re Estate of Palucci*, 61 Wn. App. 412, 810 P.2d 970 (1991).

Although some of the language of RCW 11.24.010 has been revised since the entry of the *Kordon* decision, the case remains good law, as does *Estate of Palucci*, which states: “[p]ersonal service statutes [contrary to] statutes authorizing service by means other than personal service, *on the other hand, require only substantial compliance.*” *Palucci*, 61 Wn. App. at 415-16 (emphasis added) (citations omitted). In this instruction, the *Palucci* Court was quoting the Washington Court of Appeals in *Thayer v. Edmonds*, 8 Wn. App. 36, 503 P.2d 1110 (1972), which also remains good law.

Ms. Covey dismisses the dictate of *Palucci* as “inapposite” because *Palucci* was not a case involving “service statutes that mandate personal service on a specific individual or prescribe a penalty for noncompliance” (Respondent’s Brief, p. 19). But in actuality, the *Palucci* Court’s observation that “personal services statutes require only substantial compliance” was a critical part of the reasoning leading to the holding in the case, as was the statement “we observe that the law favors the resolution of legitimate disputes brought before the court rather than leaving parties without a remedy.” *Id.* at 415, 416. .

The *Palucci* court also noted: “the heirs do not claim they did not have actual notice of the November 2 show cause hearing.” *Id.*, 61 Wn. App. at 416-17 (citations omitted). In the present case, Ms. Covey never claimed she did not receive actual notice of Appellant’s (“Mr. Howard’s”) will contest petition. She was unharmed by the service of the will contest petition upon her probate attorney, Mr. Vasilev.

Union Bay Preservation Coalition v. Cosmos Devel. & Admin. 27 Wn. 2d 614, 902 P.2d 1247 (1995) discusses a personal service statute that the Washington Supreme Court excepted from the general rule allowing substantial compliance with personal service requirement. However, the factors in *Union Bay* that caused the Supreme Court to require strict compliance with the personal service rule *do not* apply in the present case.

As discussed in detail in Appellant’s Brief (pp. 18-22), the statute at issue in *Union Bay* was part of the Administrative Procedure Act and contained very specific language (and deletions of language) not present in this case. The *Union Bay* Court itself cautioned that “the refusal to permit service of petitions for judicial review on attorneys “has no bearing on other statutes and other requirements of service. We decide only that Union Bay's service of its petition did not satisfy the APA's requirements.” *Union Bay*, 127 Wn. 2d at 620.

Ms. Covey has attempted to shoehorn the legislative changes to RCW 11.24.010 into a situation analogous to that of the statute in *Union Bay*. However, as stated in Appellant's Brief, the two statutes are very different.

Post-2006 additions to RCW 11.24.010, such as the instruction that: "If, following filing, service is not so made, the action is deemed not to have been commenced for the purposes of tolling the statute of limitations," do not necessarily mandate strict compliance with the personal service requirement. The statement simply indicates that the statute of limitations for initiating a will contest petition *will not be tolled unless* service is made upon the personal representative. The plain language of the statute does not prohibit substantial compliance with such service of process.

In *Ashley v. Pierce County Superior Court*, the Washington Supreme Court, sitting *en banc*, discussed the due process requirements of notice. *Ashley v. Pierce County Superior Court*, 83 Wn.2d 630, 521 P.2d 711 (1974).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties* of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But

if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Ashley, 83 Wn.2d at 635.

The Supreme Court continued by cautioning that “process which is a mere gesture is not due process,” and stated that the means used to provide notice “must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” The reasonableness of a chosen method of notice should be “in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice [. . .] not substantially less likely to bring home notice than other of the feasible and customary substitutes.” *Id.*

In this case, the means used to provide notice of the will contest petition to the personal representative was service of the personal representative’s probate attorney with the summons, petition, and exhibits, all presented by courier to the attorney’s office. Although not strictly “personal service” upon the personal representative, this notice was reasonably designed to inform the personal representative of the will contest petition.

B. Appellant’s attorney understood that an oral agreement existed between Respondent’s probate attorney and herself, allowing Appellant to make original service of Appellant’s will contest petition on Respondent’s attorney, rather than Respondent herself.

1. *Appellant's attorney had informed Respondent's probate attorney that a will contest petition was being filed, approximately two months before the petition was filed.*

Mr. Howard's attorney, Ms. Wilkerson first contacted Mr. Vasilev, Ms. Covey's probate attorney, by email on July 19, 2013. (CP 23, 29, 49.) This was the first time Ms. Wilkerson informed Mr. Vasilev that she planned to file a will contest petition on behalf of her client. (CP 23, 29, 49.) The attorneys' email correspondence also is discussed in Appellant's Brief, p. 5. Although Ms. Covey asserted that "Ms. Wilkerson did not send Mr. Vasilev any pleadings pertaining to a prospective will contest" (Respondent's Brief, p. 4), this is incorrect.

On August 5, 2015, Ms. Wilkerson emailed Mr. Vasilev copies of documents from the underlying cases involving Decedent Lola Mooney (a civil case against Mr. Howard filed in Mrs. Mooney's name, and a guardianship case involving Mrs. Mooney). (CP 35-36.) Before sending these documents, Ms. Wilkerson emailed Mr. Vasilev on August 2, 2013, in response to his email of the same day requesting "to know the grounds for contesting the will[.]" (CP 31.) Ms. Wilkerson's August 2nd email stated:

There are a number of bases for contesting the will, mostly the fact that Lola Mooney was not competent to draft a will at the time the one you probated was created. Are you familiar with the two King County court cases involving Lola Mooney (one guardianship, one

civil)? There is a great deal of documentation (even beyond the DSHS case, substantiating finding of exploitation and abuse) that Lola Mooney was incompetent and under the undue influence of Ann Covey. I am happy to give you those case numbers, and will be filing the will contest petition next week.

(CP 33-34.)

In answer, Mr. Vasilev wrote on August 5, 2013:

I am aware of one case against Ms. Covey that recently got dismissed. Further, it is my understanding that your client was found to have stolen assets from Ms. Mooney and a court order was issued where he was ordered to return all assets. It is my understanding that your client was never adopted and therefore **has no standing** in this matter.

Ms. Mooney drafted two wills in 2011 intentionally leaving your client out of any inheritance. Both wills were notarized and witnessed. I am prepared to get in contact with the attorney who drafted the latest Will and provide a written declaration attesting Ms. Mooney's competence . . . I will appreciate the two case numbers you mentioned and will also forward the case number and possibly the court order against your client.

(CP 34.) (Emphasis in original.)

On the same date, August 5, 2013, Ms. Wilkerson emailed the following to Mr. Vasilev:

[. . .] There were no findings that my client had stolen assets; the civil case in which he was accused of stealing was dismissed by the attorney who filed it (Keith McClelland) after mediation. Yes, my client was ordered to return the assets as part of a summary judgment motion in which we counter-petitioned for appointment of a Guardian ad Litem in the case (12/11). The order states only that

Mr. Howard did not have the "legal authority" to transfer assets to himself. (See attached.)

Our opposition/counter-petition for GAL filed as a response to McClelland's summary judgment motion claims that Ann was exercising undue influence over Lola, and that APS already had begun an investigation of Ann. Heidi Wilson testified at the hearing on 12/30/11 that she believed Lola was cognitively impaired and that APS was very concerned about the alienation of Lola and isolation of Lola from her family members by Ann.

Thorder *[sic]* on partial summary judgment was entered in December 2011, just after Lola signed the will you probated. As part of the GAL's (Katherine Hanson) duties, she obtained an evaluation of Lola's competence in February 2012. The evaluation (by Dr. Janice Edwards) found that Lola was suffering from "moderate to advanced" dementia, and that Lola didn't even know who Ann Covey was. Lola thought Ann was a woman named Suzie/Susan. (See Medical/Psychological Report filed in the first case mentioned below in late February 2012. It was filed under seal, so let me know if you can't retrieve it.) I am also including a copy of the Declaration of Heidi Wilson (the APS caseworker) filed in the guardianship case, stating that Lola demonstrated "significant signs of cognitive impairment" when Heidi interviewed Lola on September 26, 2011 (before your will was probated).

My client, as the sole beneficiary of Lola's last will drafted before the 2011 wills, has standing to file the petition. I have attached a faxed copy of this will, which was drafted by Keith McClelland in March 2010.

I'm happy to talk with you about this. I'm sorry my messages in response to your calls didn't reach you, and I agree that I'm difficult to reach me by phone; however, if you propose a date/time for a phone conference I'm happy to schedule something.

The two cases:

1) KC Superior Court Case No. 11-2-10011-1 SEA, Lola E. Mooney v. James Charles Howard, was filed on March 17, 2011 and dismissed on May 10, 2013. This case, involving claims of breach of fiduciary duty against James Howard, was filed in the name of Lola Mooney by her former attorney Keith McClelland, and was dismissed after settlement and the filing of a guardianship for Lola Mooney.

1) [*sic*] The guardianship case, Case No. 12-4-02852-1 SEA, In re the Guardianship of Lola Mooney, was filed on April 30, 2012 by Assistant Attorney General Diane L. Dorsey on behalf of DSHS, Adult Protective Services, requesting appointment of a guardian of the person and estate of Lola Mooney.

(CP 35-36.)

Five documents from the two cases listed above were attached to Ms. Wilkerson's August 5, 2013 email to Mr. Vasilev. (CP 36.) These attachments were those referred to in Appellant's Brief on p. 5 ("Ms. Wilkerson forwarded Mr. Vasilev a number of pleadings related to the proposed will contest").

It is clear from the emails between July 19, 2013 and August 5, 2013 that Ms. Wilkerson not only informed Mr. Vasilev of her intention to file a will contest petition, but that the attorneys discussed the previous cases and background of the prospective will contest over several days. (CP 29-36.)

The will contest petition was not filed until almost two months after the last email communication between Ms. Wilkerson and Mr. Vasilev on

August 5th. However, Ms. Wilkerson did speak with Mr. Vasilev at least once more by telephone before filing, and at that time she asked if she should serve him with the will contest petition, or whether she should serve it upon Ms. Covey. (CP 23.) Ms. Wilkerson thought Mr. Vasilev was Ms. Covey's attorney of record for the will contest since she mistakenly believed that the will contest petition should be filed in the probate case. (Appellant Brief, p. 1.)

Ms. Wilkerson believed the verbal discussion between attorneys to be an agreement between the two attorneys and permission to make original service of process of the will contest petition upon Mr. Vasilev. As she stated at hearing on January 23, 2015, "[w]e trusted Mr. Vasilev in saying, go ahead and serve me by courier." (CP 24, RP 25.) Ms. Wilkerson then instructed her legal assistant, Timothy Alex Folkerth, to contact Mr. Vasilev to confirm that Mr. Folkerth should serve Mr. Vasilev with the will contest petition filings, which Mr. Folkerth did on October 4th, 2013. (CP 24, 43.)

Ms. Covey asserted both that Mr. Vasilev's July 22, 2013 email did not constitute an agreement to accept service of original process (Respondent's Brief, p. 8); and that "Mr. Howard *[sic]* opposition brief alleged the existence of three separate service agreements (Respondent's Brief, p. 24). Both are misstatements. Actually, Ms. Wilkerson stated that discussion of the prospective will contest petition between the two attorneys

continued after the July 22nd email; that Mr. Folkerth also spoke with Mr. Vasilev about service of the petition, and that by October 8, 2013 Ms. Wilkerson believed an agreement had been made to serve Mr. Vasilev with original service of the petition on Ms. Covey's behalf. (CP 11-12, 23-24.)

2. Written agreement allowing personal service of the will contest petition was not required between the two attorneys, either by RCW 2.44.010 or CR2A.

According to Ms. Covey, both CR 2A and RCW 2.44.010 (misstated as RCW 22.44.010) "require courts to disregard contested oral agreements between parties or attorneys" (Respondent's Brief, p. 3). Washington case law indicates that neither the court rule nor the statute applies to a verbal agreement between attorneys regarding service of process.

Both provisions regard settlement agreements, not agreements regarding service. According to the Court of Appeals, by its terms CR 2A applies "only to agreements that satisfy two elements. First, the agreement, hereafter called a settlement agreement, must be made by parties or attorneys 'in respect to the proceedings in a cause.' Second, 'the purport' of the agreement must be disputed." *In re Marriage of Ferree*, 71 Wn.App. 35, 856 P.2d 706, 708 (1993). When these elements are met, CR 2A supplements but does not supplant the common law of contracts. *Id.* at 709.

In Washington a trial court's authority to compel enforcement of a settlement agreement is governed by Civil Rule 2A and RCW 2.44.010. *Morris v. Maks*, 850 P.2d 1357, 69 Wn.App. 865, 868-869 (1993). According to the Court of Appeals in *Morris*, the underlying purpose of CR 2A and RCW 2.44.010 is to avoid disputes regarding the existence and terms of settlement agreements. *Id.* at 869.

3. *Substantial evidence did not support Judge Rietschel's finding that no agreement existed between the attorneys for service upon Mr. Vasilev.*

When explaining her decision to allow dismissal of the will contest petition, Judge Rietschel stated “[w]e have testimony of the prior attorney in which he doesn’t remember a great deal other than it is the practice and was the practice of the firm that if there was such an agreement, it would have been in writing.” (RP 32.)

However, Mr. Vasilev *never* clearly said he did not agree to accept service of process of the will contest petition. Instead, Mr. Vasilev told the Court at hearing that *if* he had agreed to accept service of Mr. Howard’s will contest petition, it was his former firm’s practice to do so in writing. (RP 7.) He then qualified that with “I think that’s what our policy was” (RP 12)), and said that he did not have access to the emails from his former employer. (RP 7, 12.) Mr. Vasilev was not even clear in

establishing whether his former firm had such a policy, and if so, whether he would have followed it.

Judge Rietschel also observed:

In looking at this, I think the burden is on the party establishing or trying to establish that there was, in fact, a waiver. And this Court is not persuaded by the evidence before it that there was, in fact, an agreement by the prior attorney to accept service of process, that there is sufficient facts to find that there was that agreement, that there was, therefore, a waiver of the requirement to service of process upon the actual individual. And I don't find that there was.

(RP 32.)

In making her decision, Judge Rietschel discounted the statements in Mr. Folkerth's declaration because he was unavailable for the hearing and further questioning. (RP 32.) However, in his Declaration Mr. Folkerth had stated unequivocally that on October 4, 2013 he telephoned Mr. Vasilev to confirm that Mr. Vasilev would accept service of the Petition Contesting Will; that on that date Mr. Folkerth spoke with Mr. Vasilev by phone, and that Mr. Vasilev instructed Mr. Folkerth to have the Petition Contesting Will served to him at his office by legal courier. (CP 43.)

Mr. Vasilev's testimony, in contrast, was, at the least, vague and muddled and at worst less than credible, about events occurring more than one year before. When asked if he had received Ms. Covey's authorization to accept service of process on her behalf, Mr. Vasilev stated

twice that he did not recollect whether he did or did not. (RP 9.) He volunteered that he did not recollect what happened that long ago. (RP 14.)

Mr. Vasilev volunteered that after receiving the will contest petition “we engaged with another law firm to take over this matter because they work in this field in will contests.” (RP 15.) It is interesting that Mr. Vasilev’s clearest recollection was that of transferring the will contest petition file to another law firm after receiving it. However, he could not recall whether or not he waived his client’s rights by accepting service on her behalf. (CP 9.)

Contrary to Ms. Covey’s contention that “substantial evidence supported Judge Rietschel’s finding that Mr. Folkerth’s declaration failed to establish the existence of a substitute service agreement” (Respondent’s Brief, p. 25), Mr. Folkerth’s declaration, as well as Ms. Wilkerson’s declaration, was more persuasive than Mr. Vasilev’s testimony. Those declarations, combined with the evidence that Mr. Howard so relied upon Mr. Vasilev’s agreement to accept service on behalf of Ms. Covey that no efforts were made to serve her personally before the expiration of the ninety-day period after filing, provide “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.”

Robinson v. Safeway Stores, Inc., 113 Wn. 2d 154, 157, 776 P.2d 676 (1998).

Ms. Covey emphasizes in the Respondent's Brief that she never authorized Mr. Vasilev to accept original service of process of the will contest petition on her behalf. Respondent's Brief, p. 26. However, because Mr. Howard's attorney, Ms. Wilkerson, reasonably believed a verbal agreement existed between the attorneys, she would have had no reason to know that Mr. Vasilev's client did not authorize him to accept personal service of the will contest petition, if such was the case.

C. Although she had almost three months after receipt of the will contest petition to do so, Respondent failed to file an answer to the will contest petition until after the statute of limitations had run for Appellant to serve her personally; therefore, the doctrine of waiver should apply here.

In the Section F caption of her Respondent's Brief, Ms. Covey claims that "substantial evidence supports Judge Rietschel's finding that Ms. Covey did not waive her defense of service of process." (Respondent's Brief, p. 26.) However, Judge Rietschel never reached the issue of whether waiver of the defense of insufficient service had occurred because of Ms. Covey's dilatory and inconsistent behavior after receipt of the will contest petition.

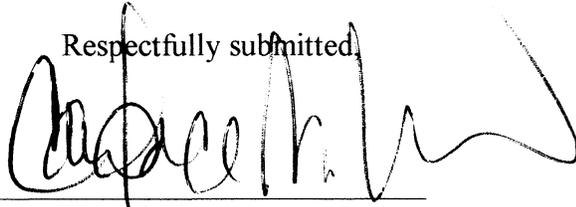
II. CONCLUSION

For all of the foregoing reasons detailed both in Appellant's Brief

and in this Reply Brief, this Court is requested to reverse the Superior Court order dismissing Appellant James Howard's Petition Contesting Will and Amended Petition Contesting Will; either because Appellant substantially complied with the personal service requirement of RCW 11.24.010, or alternatively, because Respondent waived her right to assert the defense of insufficient service of process against Appellant.

Dated: July 27, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Candace M. Wilkerson', written over a horizontal line.

Candace M. Wilkerson/WSBA No. 42211
Attorney for James Howard, Appellant

CERTIFICATE OF SERVICE
REPLY BRIEF OF APPELLANT

I certify that on the 27th day of July, 2015, I caused a true and correct copy of this *Reply Brief of Appellant* to be served on the following in the manner indicated below:

Counsel for Opposing Party, Respondent Elizabeth Ann Covey:

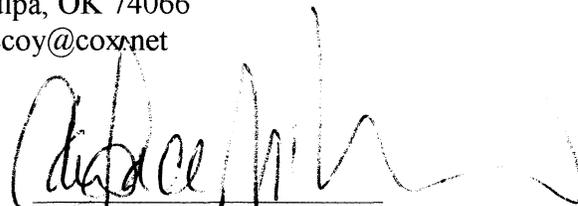
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