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No. 73037-1-I

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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

v.

ELIZABETH ANN COVEY,  
Respondent.

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BRIEF OF APPELLANT

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Appellant

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## I. INTRODUCTION

This case involves a will contestant whose will contest petition was filed a little more than two months after a statutory revision went into effect. The statutory revision, to RCW 11.96A.090(2), altered what had been an **option** to file a dispute under the Trust and Estate Dispute Resolution Act (RCW 11.96A) in a new case, into a **requirement** that the dispute be filed in a new case.

The revision to RCW 11.96A.090(2) is not an issue in this appeal, except insofar as it led to a corresponding procedural service issue that serves as the focus of this appeal. Appellant's attorney erroneously believed that the personal representative's probate attorney was necessarily the personal representative's attorney of record for the disputed matter.

As a result, Appellant's attorney asked the personal representative's probate attorney whether he would accept original service of process of the will contest petition, or whether the personal representative herself should be served with the petition.

Appellant's attorney understood, from her communications and her assistant's communications, with the probate attorney that the probate attorney would accept original service of the will contest petition, rather than requiring Appellant to serve the personal representative.

As a result of this understanding, Appellant's attorney had the probate attorney served in the manner prescribed by the probate attorney. Neither Appellant nor his attorney believed there was a problem with service because it was not mentioned again until more than 90 days later, when a belated Answer (“hereafter, “Verified Response”) was filed in the matter by the personal representative’s new counsel.

The Verified Response raised the issue of insufficient personal service for the first time. Ironically, the Verified Response was filed shortly *after* the expiration of the statutory period in which Appellant could have properly re-served the personal representative.

Eventually, more than one year later, the personal representative, the Respondent in this appeal, managed to have the Appellant’s will contest petition dismissed because of the alleged insufficient service. Although the personal representative obviously received the will contest petition since she was able to file her Verified Response, and was not damaged by the alleged insufficient service of process, the Appellant was damaged irreparably by the dismissal of his case because he cannot re-file his will contest petition.

Appellant appeals from the dismissal of his petition.

#### **I. ASSIGNMENT OF ERROR**

The trial court erred in entering the order of January 23, 2015,

granting Respondent's motion to dismiss the petition contesting the will pursuant to RCW 11.24.010 because of insufficient service of process of the petition upon Respondent.

Issues Pertaining to Assignment of Error

**No. 1:** RCW 11.24.010 states that a will contest petitioner "shall personally serve the personal representative within ninety days after the date of filing the petition." Is substantial compliance with the personal service requirement sufficient to commence the action?

**No. 2:** If substantial compliance with the personal service requirement of RCW 11.24.010 suffices to commence a will contest action, did Appellant's attorney substantially comply with the statute, where Respondent's probate attorney at the time, Angel Vasilev, agreed that Appellant's attorney could complete original service of the will contest petition on him?

**No. 3:** And if so, was such an agreement made between Ms. Wilkerson, the attorney for Appellant and Mr. Vasilev, the original probate attorney for Respondent/personal representative that Mr. Vasilev would accept original service of the will contest petition on behalf of Respondent?

**No. 4** If the Court finds the RCW 11.24.010 personal service requirement was not satisfied by Appellant's service of original process of

his petition upon Respondent's attorney, did Respondent waive the CR 12(b)(5) defense of insufficiency of process by her inconsistent conduct or her failure to raise the defense until more than 90 days after Appellant had filed his will contest petition?

### **III. STATEMENT OF THE CASE**

Appellant James Howard (hereafter, "Mr. Howard") filed his Petition Contesting Will (hereafter, "Petition") on October 3, 2013 in the original probate case, King County Superior Court Case No. 13-4-08610-4 SEA, rather than in a new case. (CP 22, 56-86.)

Mr. Howard filed his Petition within the four-month period after Respondent Elizabeth Covey (hereafter, "Ms. Covey") was appointed personal representative of the Estate of Lola Mooney by the Order Admitting Will and Letters Testamentary on June 24, 2013. (CP 22, 195.)

Ms. Covey had two previous attorneys in King County Superior Court Case No. 13-4-08610-4 SEA before Joshua Locker and Marlin Vortman, who now represent her in that case (which was subsequently consolidated into Case No. 14-4-05178-3 SEA), and who also represent her in Case No. 14-4-05178-3 SEA. Ms. Covey's first attorney was Angel Vasilev, who represented her when probate began in June 2013 (CP 22); and her second attorney was Sheila Ridgway, who filed her Notice of

Appearance and Association of Counsel on November 6, 2013 and her Notice of Intent to Withdraw on December 3, 2013. (CP 22, 27-28.)

Mr. Howard's counsel, Ms. Wilkerson, filed and served the Petition and Summons upon Ms. Covey's attorney of record at that time, Angel Vasilev, understanding this to be Mr. Vasilev's instruction. (CP 23.)

Ms. Wilkerson first contacted Mr. Vasilev by email on July 19, 2013, about her representation of Mr. Howard and intent to file a will contest petition in the probate. (CP 23, 29.)

In response, Mr. Vasilev sent Ms. Wilkerson an email dated July 22, 2013 informing her that Ms. Wilkerson should serve him with "any further documents" at the physical address listed in his email (CP 30.).

This email correspondence was continued in August 2013; Mr. Vasilev requested to know the grounds upon which Mr. Howard contested the will on August 2nd, and Ms. Wilkerson responded on the same date. (CP 31-34.)

Emails were exchanged again on August 5, 2013, when Ms. Wilkerson forwarded Mr. Vasilev a number of pleadings related to the proposed will contest. (CP 35-36.)

Ms. Wilkerson asked Mr. Vasilev whether she should have the will contest petition served upon him or upon his client, Ms. Covey, during a

phone conversation with Mr. Vasilev before the actual date of filing. (CP 23.)

At Ms. Wilkerson's instruction, Ms. Wilkerson's legal assistant, Timothy Alex Folkerth, also contacted Mr. Vasilev on October 8, 2013 to ask if he should serve Mr. Vasilev with the will contest petition. (CP 24, 43.)

In response, Mr. Vasilev told Mr. Folkerth to serve him with the will contest petition and accompanying documents by legal courier service, which service was accomplished on the same date. (CP 38, 43-45.)

The service upon Mr. Vasilev was made within five days after the Petition was filed, which was well within the 90-day period for service mandated by RCW 11.24.010. (CP 24.)

Mr. Howard filed and served an Amended Petition Contesting Will (hereafter, "Amended Petition") on November 4, 2014, to correct the lettering of several exhibits. No other changes were made to the Petition. (CP 24, 87-193.)

Neither Mr. Vasilev nor Ms. Ridgway filed a response or objection to the Petition or to the Amended Petition. (CP 25.) Mr. Vasilev and Ms. Wilkerson spoke with each other after Mr. Vasilev filed his Notice of Intent to Withdraw in December 2013. (CP 25.)

During that conversation, Mr. Vasilev did not tell Ms. Wilkerson that he objected to the Petition, nor did he allege that the Petition had been improperly served. (CP 25.)

No response or objection was filed, either to the Petition or to the Amended Petition, until January 2014, after Ms. Covey retained Mr. Vortman and Mr. Locker to represent her. (CP 25.)

On January 21, 2014, Ms. Covey filed a Personal Representative's Verified Response to Petition of James Charles Howard with Affirmative Defenses and Counter Claim for Attorney's Fees ("Verified Response"). (CP 25, 194-209.)

By the time Ms. Covey filed her Verified Response and raised the defense of insufficient service of process for the first time, the 90-day period for service of the Petition had expired. (CP 25.) The four-month statute of limitations period for filing a will contest petition had expired as well, thus leaving Mr. Howard with no opportunity to re-file or re-serve Ms. Covey with the Petition. (CP 25.)

Ms. Covey filed three separate motions to dismiss the Petition pursuant to CR 12(b)(5) and/or CR 12(b)(6). (CP 25.) The first hearing on any motion to dismiss was on October 9, 2013, more than one year after the original Petition was filed. (CP 25.)

On April 9, 2014, Ms. Covey filed her first Motion to Dismiss Petition Contesting Will (hereafter, “First Motion”) in King County Superior Court Case No. 13-4-08610-4 SEA. (CP 210-212.) Ms. Covey’s First Motion claimed that Mr. Howard’s Petition Contesting Will and Amended Petition Contesting Will should be dismissed pursuant to CR 12(b)(6), failure to state a claim upon which relief can be granted, because Mr. Howard had failed to file his Petition for Will Contest and Amended Petition in a new case pursuant to RCW 11.96A.090. (CP 210-212.) The First Motion *did not* request dismissal of Mr. Howard’s will contest pursuant to CR 12(b)(5). (CP 210-212.)

Mr. Howard filed Petitioner’s Response/Opposition to Respondent’s Motion to Dismiss Petition Contesting Will on April 16, 2014. (CP 238-245.)

No hearing was held on the First Motion, because it was stricken several days before by Ms. Covey’s counsel. (CP 262.)

On September 25, 2014, Ms. Covey filed her Respondent and Personal Representative Elizabeth Ann Covey’s Motion to Dismiss Petition Contesting Will (“hereafter, “Second Motion”) in King County Superior Court Case No. 13-4-08610-4 SEA. (CP 25, 246-250.) The Second Motion requested dismissal of the Petition pursuant to both CR 12(b)(6) and CR 12(b)(5). (CR 246-250.)

On October 23, 2014, King County Superior Court Commissioner Carlos Velategui entered an Order Granting Respondent Elizabeth Ann Covey's Motion to Dismiss Petition Contesting Will (hereafter, "Order Granting Motion to Dismiss") in King County Superior Court Case No. 13-4-08610-4 SEA. (CP 313-314.)

The Order Granting Motion to Dismiss dismissed Mr. Howard's Petition and Amended Petition pursuant to CR 12(b)(6) and RCW 11.96A.090 "for failure to file will contest petition as new case." (CP 314.)

On November 21, 2014, King County Superior Court Judge Jean Rietschel revised the Order Granting Motion to Dismiss with the Order Granting Petitioner James Charles Howard's Second Amended Motion for Revision of Commissioner's Order. (CP 422-424.). The Court also transferred the Petition and Amended Petition into King County Superior Court Case No. 14-4-05178-3 (CP 422-424.).

On December 11, 2014, Ms. Covey filed her Respondent and Personal Representative Elizabeth Ann Covey's Motion to Dismiss Petition Contesting Will pursuant to RCW 11.24.010 (hereafter, "Third Motion") in King County Superior Court Case No. 14-4-05178-3. (CP 1-8.) The Third Motion requested dismissal of the Petition pursuant to CR 12(b)(5) for insufficient service of process. (CP 2.)

An evidentiary hearing was held on the Third Motion on January 23, 2015, before Superior Court Judge Jean Rietschel. (RP 1-34.) Ms. Wilkerson appeared on behalf of Mr. Howard, and Mr. Locker appeared for Ms. Covey. (RP 1.)

At hearing, Judge Rietschel stated:

[I]t's not absolutely clear from the pleadings whether there was an agreement that service could be made on the prior attorney. So I was setting this for either or both parties to provide testimony to persuade the court that there was or was not an agreement for service to be made upon the attorney.

(RP 2.)

Ms. Wilkerson's assistant, Mr. Folkerth, had provided his Amended Declaration of Timothy Alex Folkerth (CP 42-45) in support of Mr. Howard's Response (CP 9-20). He was not available for the hearing, so he did not provide testimony. (RP 3.) Ms. Wilkerson expressed concern about acting as her own witness and testifying, but said that Mr. Howard had agreed to such testimony if the Court wished to hear her, and that she was willing to testify if needed. (RP 3.)

However, the only witness called at hearing was Angel Vasilev, Ms. Covey's previous probate attorney, who appeared telephonically. (RP 2-16.)

After the hearing, Judge Rietschel entered the Order Granting Respondent Elizabeth Ann Covey's Motion to Dismiss Petition Contesting

Will for insufficient service upon the personal representative pursuant to RCW 11.24.010. (CP 47.)

Subsequently, Mr. Howard was time-barred by the RCW 11.24.010 statute of limitations from re-serving the personal representative. (CP 13, 25.)

Mr. Howard filed a Notice of Appeal to Court of Appeals on February 4, 2015. (Notice of Appeal to Court of Appeals.)

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

Questions of statutory construction are reviewed de novo. *Buecking v. Buecking*, 179 Wn. 2d 438, 444, 316 P. 3d 999 (2013). Washington courts first look to the plain language of a statute when engaging in statutory interpretation. *Id.*

In construing a statute, the court's fundamental objective is to ascertain and carry out the intent of the legislature. *State v. Morales*, 173 Wn. 2d 560, 567, 269 P.3d 263 (2012).

According to the Washington Court of Appeals in *Estate of Palucci*:

A will contest is a purely statutory proceeding, and the court must be governed by the provisions of the applicable statute. The jurisdiction of the trial court is derived exclusively from the statute, and may be exercised only in the mode and under the limitations therein prescribed.

*In re Estate of Palucci*, 61 Wn. App. 412, 415, 810 P.2d 970 (1991) (citation omitted).

And in *Miller v. Badgly* the Court of Appeals stated:

When, as here, the trial court has weighed the evidence, our review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings, in turn, support the conclusions of law and judgment. Even where the evidence is conflicting, we need determine only whether the evidence most favorable to the respondent supports the challenged findings.

*Miller v. Badgly*, 51 Wn. App. 285, 290, 753 P.2d 530 (1988), *Hammer v. Thompson*, 35 Kan.App.2d 165, 129 P.3d 609, 621 (2006) (citations omitted).

Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.”

*Holland v. Boeing Co.*, 90 Wn.2d 384, 391 (1978), 583 P.2d 621(1978).

Under the common law doctrine of waiver, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. *Lybbert v. Grant County*, 141 Wash.2d 29, 38-39, P.3d 1124 (2000).

B. Oral findings may be used to interpret the court’s decision if consistent with the judgment.

No written findings were made by the Court in the Order Granting Respondent Elizabeth Ann Covey’s Motion to Dismiss Petition Contesting Will Pursuant to RCW 11.24.010. (CP 46-48.) Pursuant to CR 52(a)(5)(B), findings of fact and conclusion of law are not necessary on

decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2). *Id.*

However, the Washington Supreme Court held that “[. . .] if the court's oral decision is consistent with the findings and judgment, it may be used to interpret them.” *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963).

Judge Rietschel stated at hearing on the 3<sup>rd</sup> Motion:

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 serve service of process upon the actual individual. And I don't find that there was. So I would grant your motion on that basis.

(RP 32-33.)

Judge Rietschel then signed the Order dismissing Appellant's Petition Contesting Will and Amended Petition Contesting Will (CP 47); therefore, her oral decision was consistent with the judgment entered shortly thereafter.

It is reasonable to believe, from her statements in the record, that Judge Rietschel was not persuaded, by testimony, affidavits, or argument, of the following: that there was an agreement by the prior attorney (Mr. Vasilev) to accept service of Mr. Howard's will contest petition; or that

sufficient facts existed to convince her of such agreement. She did not reach the issue of whether substantial compliance with the RCW 11.24.010 personal service requirement would suffice to satisfy the statute.

C. In this case, RCW 11.24.010 required only substantial compliance with the personal service provision, rather than strict compliance, and Appellant substantially complied with the personal service provision by serving the personal representative's previous attorney, Mr. Vasilev, instead of the personal representative.

1. *Appellant's substantial compliance with RCW 11.24.010 was adequate, because Appellant followed the substance of the statute so as to carry out its intent.*

Where a defendant challenges jurisdiction based on insufficient service of process, the plaintiff has the burden of proof of establishing a prima facie case of proper service. *Harvey v. Obermeit*, 163 Wn. App. 311, 327, 261 P.3d 671 (2011).

According to the Washington Court of Appeals: "substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute." *Application of Richard J. Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981) (citation omitted). In other words, the court should determine whether the statute has been followed sufficiently to fulfill the statutory intent. *Id.* (citation omitted). "What constitutes substantial compliance

with a statute is a matter depending on the facts of each particular case.”

*Id.* (citation omitted).

“Statutes authorizing service by means other than personal service, that is, constructive and substituted service, require strict compliance and must be strictly construed as in derogation of the common law. *Personal service statutes, on the other hand, require only substantial compliance.*”

*Estate of Palucci*, 61 Wn. App. 412, 415-16, 810 P.2d 970 (1991)

(emphasis added) (citations omitted).

*Estate of Palucci*, a will contest case, involved a question of substantial compliance with the statute at issue in this case, RCW 11.24.010. However, *Palucci* involved an earlier version of the statute which, according to the Court, required a will contest petitioner to “cause citations to be issued to the executor and all legatees residing in this state, requiring them to appear before the court to show cause why the petition should not be granted.” *Id.* at 415. The Court found the mail service used by the will contestant to be substantial compliance, noting: “the heirs do not claim they did not have actual notice of the November 2 show cause hearing. *Case v. Bellingham*, relied on by the heirs, is distinguishable in this regard. There, the plaintiff never received any notice personally or by mail.” *Palucci*, 61 Wn. App. at 416-17 (citations omitted).

The *Palucci* Court stated, “we observe that the law favors the resolution of legitimate disputes brought before the court rather than leaving parties without a remedy.” *Id.* at 416 (citations omitted).

There are a number of cases in which the service of process required by a statute was considered substantially complied with, even though such service was procedurally faulty. According to the Washington Court of Appeals, in *Chrisp v. Goll*:

For example, our courts have found substantial compliance where . . . a party delivers a petition or notice of appeal to the wrong person, but the party who was statutorily required to receive the document was certain to do so[.] See, e.g., *Black v. Dep't of Labor & Indus.*, (claimant's service of notice of appeal on assistant attorney general assigned to represent Department in his case substantially complied with requirement that service be made on Department through its director); *Matter of Saltis*, 94 Wash.2d 889, 895-96, 621 P.2d 716 (1980) (petition delivered to Department of Labor and Industries rather than to the "director" of the Department as required by statute); *Vasquez v. Dep't of Labor & Indus.*, 44 Wash. App. 379, 384, 722 P.2d 854 (1986) (petition served upon an attorney instead of the "party").

*Id.*, 126 Wn. App. 18, 24, 104 P.3d 25 (2005) (emphasis added) (citation omitted).

In *Black v. Dep't of Labor & Indus.*, the Washington Supreme Court, sitting en banc, discussed why it held that service of an appellant's notice of appeal upon the defendant employer's attorney, instead of the employer, in *Vasquez v. Department of Labor & Indus.* and *Fay v. Northwest Airlines, Inc.* substantially complied with RCW 51.52.110. *Black v. Dep't of Labor & Indus.*, 131 Wn. 2d 547, 933 P.2d 1025 (1997).

In *Vasquez*, the Supreme Court found service on the employer's attorney was reasonably calculated to give notice to the employer and concluded that Vasquez substantially complied with RCW 51.52.110. *Black v. Dep't of Labor & Indus.*, 131 Wn. 2d at 554. Likewise, in *Fay v. Northwest Airlines, Inc.*, 115 Wn. 2d 194, 796 P.2d 412 (1990), the Court assumed serving a self-insurer's attorney was sufficient service under RCW 51.52.110. *Id.*

The *Black* Court found *Vasquez* and *Fay* on point: the fact that those cases involved service on the self-insurer under RCW 51.52.110 rather than on the Department made no meaningful difference. *Id.* at 555. The *Black* Court followed *Vasquez* and found that service on the assistant attorney general assigned to handle the case was reasonably calculated to give notice to the interested party in *Black*, the Department of Labor & Industries. *Id.*

This result is consistent with "the distinct preference of modern procedural rules [...] to allow appeals to proceed to a hearing on the merits in the absence of serious prejudice to other parties. We note there was no prejudice here.

*Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 554-555 (1997) (citation omitted).

The Court's comments in *Black v. Dep't of Labor & Indus* are on point with the present case as well, even though *Black* examined RCW

51.52.110, a different statute from the one at issue in this case. RCW 51.52.110 addresses appeals to the Superior Court from decisions of the Board of Industrial Insurance Appeals. RCW 51.52.110, like RCW 11.24.010, requires personal service, although it allows service by mail as well. It instructs, in relevant part:

Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, *a copy of the notice of appeal shall also be served by mail, or personally*, on such self-insurer.

RCW 51.52.110 (emphasis added).

2. *Appellate was not required to strictly comply with the personal service requirement of RCW 11.24.010, because of the language and legislative history of the statute combined with the facts of this case.*

The Washington Supreme Court discussed the need for strict compliance instead of substantial compliance in *Union Bay Preservation Coalition v. Cosmos Development & Admin. Corp.* “This court has used the doctrine of substantial compliance in cases involving service of original process and appellate process.” *Id.*, 127 Wn. 2d 614, 620, 902 P.2d 1247 (1995).

In *Union Bay*, however, the Court held that the doctrine of substantial compliance could not be applied to the service of process upon the defendant’s attorney, because service of process in that case was

governed by RCW 34.05.542(2). The Court reasoned that “Washington's administrative procedure act (APA) directs a party to serve its petition for judicial review on ‘all parties of record.’ RCW 34.05.542(2).” The Court explained as follows:

We cannot apply the doctrine to this case. The unequivocal definition of "party" in the APA combined with the deletion of "attorneys of record" from the act prevents such an application. Because the language and history of the APA exclude service on attorneys, we cannot permit such service by relying on substantial compliance.

*Id.* at 620.

The Court’s ruling “arises directly from the words of the APA and, for this reason, decisions applying the doctrine of substantial compliance to other statutes are not persuasive.” *Id.* at 620. However, the Court instructed, 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, supra*, 127 Wn. 2d at 620.

The *Union Bay* decision was distinguished by the Washington Supreme Court in *Continental Sports Corporation v. Dept. of Labor and Industries*. The *Continental Sports Corporation* court, in deciding that Continental substantially complied with RCW 51.48.131, stated itself “not unmindful” of its recent decision in *Union Bay*. *Continental Sports*

*Corporation v. Dept. of Labor and Industries*, 128 Wn.2d 594, 604, 910 P.2d 1284 (1996) (citation omitted).

The Supreme Court explained that, in *Union Bay*, a party asserted it had substantially complied with RCW 34.05.542(2), a provision in the administrative procedure act that requires service of a petition for judicial review upon the “parties of record.” *Continental Sports Corporation v. Dept. of Labor and Industries*, at 604. However, the *Union Bay* Court held that service of the petition upon opposing counsel was not substantial compliance with the aforementioned statute because the term “party” was explicitly defined in RCW 34.05.010(11) and, furthermore, the provision allowing service on “attorneys of record” had been repealed by the Legislature, citing RCW 34.05.464(9).

The Supreme Court also distinguished its *Union Bay* decision in *Black v. Dep't of Labor & Indus.*: It clarified that its decision in *Black* did not conflict with its decision in *Union Bay*. *Black v. Dep't of Labor & Indus.*, 131 Wash.2d at 555-56. According to the Court, “by its own terms, *Union Bay* does not apply here.” *Id.*

According to the *Black* Court, *Union Bay* was determined by legislative history which clearly directed “party of record” be limited to actual named parties and explicitly excluded attorneys of record from the definition. *Id.*

“Central to the court's finding was history that the APA “at one time defined party of record to include attorneys of record but was later *amended explicitly to remove attorneys of record from the definition.*” *Id.* (emphasis added) (citation omitted).

The "unequivocal" legislative directive over the exclusion of attorneys of record from the definition of "party of record" foreclosed the possibility that substantial compliance could apply. *Id.* “In the present case there is no evidence that the Legislature explicitly meant to exclude service on the attorney general to the extent it did in *Union Bay*. *Union Bay* is therefore not applicable.” *Id.*

RCW 34.05.010(12) contains the “party” definition discussed in *Black* and *Continental Sports Corporation*.

"Party to agency proceedings," or "party" in a context so indicating, *means*:

- (a) A person to whom the agency action is specifically directed; or
- (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

RCW 34.05.010(12) (emphasis added).

In the present case, the term “personal representative” is the focus of the service provision in RCW 11.24.010. RCW 11.02.005 defines the

terms used in RCW Title 11. RCW 11.02.005 states that “when used in this title, unless otherwise required from the context” . . . “[p]ersonal representative” *includes* executor, administrator, special administrator, and guardian or limited guardian and special representative.” RCW 11.02.005(11) (emphasis added). And unlike the legislative history of the APA discussed in *Black*, there was no repeal regarding service upon attorneys of record either from RCW Title 11 or RCW 11.24.010.

Additionally, there is a difference between the word “means” in RCW 34.05.010(12), and the term “includes” in RCW 11.02.005(11), regarding the respective terms defined. “Includes” implies that the term “personal representative” could include *other* definitions besides executor, administrator, special administrator, and guardian or limited guardian and special representative. “Means” indicates that *only* the individuals listed in RCW 34.05.010(12) fit the definition of “party” or “party to agency proceeding.”

D. The agreement between Appellant/Will Contestant’s attorney and Respondent’s previous probate attorney that Appellant’s attorney could serve the personal representative’s attorney with original service of the Petitioner’s will contest petition, and subsequent performance according to the agreement, substantially complied with the service provision of RCW 11.24.010.

1. *Cases finding substantial compliance with personal service upon a defendant’s attorney and agreement support Appellant’s argument that he substantially complied with RCW 11.24.010.*

As discussed above in *Black v. Dep't of Labor & Indus.*, both *Vasquez v. Department of Labor & Indus.* and *Fay v. Northwest Airlines, Inc.* involved personal service upon a defendant's attorney, rather than upon the defendant. In both cases, the courts allowed substantial compliance with the statute.

Washington courts have permitted substantial compliance where a defendant has clearly authorized service upon another, or where service was indirect. For example, in *Lee v. Barnes*, the Supreme Court recognized service on the person whom the defendant appointed to accept service, even though the statute, RCW 4.28.080, did not appear to allow service on that individual. *Lee v. Barnes*, 58 Wn. 2d 265, 267, 362 P.2d 237 (1961) And in *Thayer v. Edmonds*, service was found sufficient where the defendant indicated to the process server that the notice could be left at the door. *Thayer v. Edmonds*, 8 Wn. App. 36, 41-42, 503 P.2d 1110 (1972),*rev. denied*, 82 Wn.2d 1001 (1973)

In *Thayer v. Edmonds*, the Court of Appeals explained its decision allowing substantial compliance. According to the Court, the defendant's statement was equivalent to an authorization to leave process in the door. *Id.* at 41-42. "We can discern no reason of public policy why a defendant should not be able to authorize delivery in a manner not enumerated in the statute [ ]" *Id.*

2. *Respondent's probate attorney, Mr. Vasilev, led Appellant's attorney to believe that she should make original service of process of the will contest petition upon him.*

In the present case, Mr. Howard's attorney, Ms. Wilkerson, told the Superior Court that Mr. Vasilev had agreed to accept original service of the will contest petition. (CP 24, RP 25). Ms. Wilkerson said at the hearing: "[t]here's absolutely no reason I would have served him if I didn't think I could do so. We even did it by courier because that was his request." (RP 22.)

Both Ms. Wilkerson and her legal assistant, Timothy Alex Folkerth, swore under penalty of perjury that Mr. Vasilev had given them specific permission to serve him with original process of Mr. Howard's will contest petition. (CP 24, RP 25.) There was no confusion regarding whether Mr. Vasilev had only authorized Ms. Wilkerson's office to forward documents in general, as suggested by Ms. Covey's attorney. (RP 27.) The petition was served upon Mr. Vasilev by courier service on October 8, 2015, five days after the will contest petition was filed. (CP 22, 24, RP 13). It is clear that Mr. Howard and his counsel believed proper service had been accomplished, and there was no contrary indication from Mr. Vasilev or any of Ms. Covey's later counsel until *after* the expiration of the 90 day period. (CP 24-25, RP 23, 26.)

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 never expressly stated that he *did not agree* to accept service of the will contest petition, simply that his firm's practice was to do so in writing (qualifying at one point, "I think that's what our policy was" (RP 12)), and that he did not have access to the emails from his former employer. (RP 7, 12.)

Mr. Vasilev's testimony at hearing was vague and confused. (RP 6-16.) Examples include: "that was several months ago and I don't recollect that." (RP 6-7.) "I don't have access to my emails to be able to create such a search[.]" (RP 7.) "[A]s far as accepting service, I don't recollect expressly saying yes, I do accept service on behalf of my client." (RP 7.) "[A]nd so it might have been that I asked for those proceedings . . . [b]ut I cannot go 100 percent sure." (RP 8.) "I don't recollect if I do or if I didn't" (when asked if he remembered receiving Ms. Covey's express authorization to accept original service of process of the will contest petition). (RP 9.) "[I]f you're asking me what my recollection is, I don't remember" (when asked if he remembered communicating with Ms. Wilkerson in August 2013). (RP 11.) "Whether that conversation happened, I just cannot recollect" (when asked if he had had a phone conversation with Ms. Wilkerson in which she asked if she could serve

Mr. Vasilev with the will contest petition on behalf of Ms. Covey). (RP 11.) “If I had those conversations, they will be memorialized in writing. *I think that’s what our policy was.*” (RP 12, emphasis added.) “I cannot—I don’t recollect what happened that long ago.” (RP 14.) “I have not responded or done—I don’t believe—I don’t remember responding to the will contest in writing or formally with the Court.” (RP 15.)

When Ms. Wilkerson asked Mr. Vasilev whether he had ever “worked on a will contest before,” Mr. Vasilev’s response was “I have not, and this is the reason why I seeked *[sic]* to have another law firm handle the will contest.” (RP 15.)

In her subsequent hearing argument, Ms. Wilkerson told the court:

Mr. Vasilev stated he was not an attorney who dealt with will contests. My belief is that Mr. Vasilev didn’t really know what he was doing, and he is trying to fall on his, you know, I don’t have any emails, I don’t have any documents, it’s our firm’s practice to—to cover the fact that he made a mistake.

(RP 22-23.)

Ms. Covey’s attorney, Mr. Locker, stated at hearing:

Now there’s also this long line of Washington decisional law that says that an attorney needs the client’s express authority to accept service of process . . . [a]nd Mr. Vasilev and Ms. Covey both state in their declarations that Ms. Covey never gave Mr. Vasilev authorization to accept original service, and that has not been repudiated.

(RP 18.)

Neither Ms. Wilkerson nor Mr. Folkerth had the ability to repudiate a statement regarding communications (or the lack of) between an attorney and his client. However, as Ms. Wilkerson observed:

We had no clue that Ms. Covey might not have agreed to such service. We trusted Mr. Vasilev in saying, go ahead and serve me by courier. My assistant specifically told Mr. Vasilev we are serving a will contest petition. How do you wish it served? And [Mr. Vasilev] said by courier. I would have asked [my assistant] to do that.

(RP 25.)

When Ms. Wilkerson asked Mr. Vasilev if he ever notified her in writing, after receiving the will contest petition, that he could not accept service and that Ms. Covey should be served personally, he replied “[i]f you don’t have it, I don’t have access to it.” (RP 14.) But he went on to state:

But this is what I recollect. I recollect that after I received the will contest from you, we engaged with another law firm to take over this matter because they work in this field in will contests. At that point, they took over the case.

(RP 14.)

Mr. Vasilev’s acknowledgment that, after his receipt of the will contest petition, he engaged a different firm to handle the will contest issue clarifies both that Ms. Covey received the will contest petition *and* that she suffered no damage from service of the will contest petition upon Mr. Vasilev.

The doctrine of substantial compliance should apply here, because Mr. Howard's attorney delivered the petition to Ms. Covey's attorney rather than to Ms. Covey, but Ms. Covey's attorney was certain to transmit the petition to Ms. Covey. “[O]ur courts have found substantial compliance where . . . a party delivers a petition or notice of appeal to the wrong person, but the party who was statutorily required to receive the document was certain to do so.” *Chrisp v. Goll*, 126 Wn. App. at 28-29.

E. If the Court finds the personal service requirement of RCW 11.24.010 was not satisfied by service of original process upon Respondent’s attorney, the Court should find that Respondent waived the defense of insufficiency of process by her inconsistent conduct and her failure to raise the defense until more than 90 days after Appellant filed the will contest petition.

1. *Waiver may be found when a defendant acts in a dilatory and inconsistent manner before asserting the defense.*

Washington Court Rules, Rule 12(b)(5), requires that:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . .

(5) insufficiency of service of process.

(*Id.*)

In *Lybbert v. Grant County*, the Supreme Court examined a case in which the Defendant only raised its defense of insufficient service of

process *after* the running of the statute of limitations for such service.

(*Id.*), 141 Wash.2d 29, 40, P.3d 1124 (2000).

The *Lybbert* Court observed that all three divisions of the Court of Appeals of Washington have recognized the common law doctrine of waiver. *Id.* at 38. Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. *Id.* at 38-39.

The *Lybbert* Court described the two ways in which waiver can occur: first, it can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. *Id.* at 39, citing *Romjue v. Fairchild*, 60 Wash.App. 278, 281, 803 P.2d 57 (1991).

Second, the waiver can occur if the defendant's counsel “has been dilatory in asserting the defense,” *Id.*, citing *Raymond v. Fleming*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979).

The Court asserted its belief that the waiver doctrine is sensible and consistent with the “policy and spirit” behind modern procedural rules, which “exist to foster and promote the ‘just speedy, and inexpensive determination of every action.’” *Id.*

One court has acknowledged that [a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a

dismissal on that ground only after the statute of limitations has run,” thereby depriving the plaintiff of the opportunity to cure the service defect.

*Id.* at 40 (citation omitted).

“Allowing the County to assert the defense of insufficient service of process *after the statute of limitations has run* would be injurious to the Lybberts because they would be without a forum in which to pursue their claim against the County.” *Id.* at 36 (emphasis added).

The Washington Court of Appeals found *against* the appellant’s waiver argument in *Davidheiser v. Pierce County*, because the defense of insufficient service of process was raised *within* the statute of limitations. “Here, Pierce County raised the defense in its answer, filed on January 26, 1996, at least two months before the statute of limitations had run.” *Davidheiser v. Pierce County*, 92 Wn. App. 146, 155-56, 960 P.2d 998 (1998).

And finally, in *Romjue v. Fairchild*, the Court of Appeals remarked that a defendant’s engagement in discovery did not necessarily bar him from later asserting the defense of insufficient service. However, Defendant’s awareness that plaintiff’s service of process had been defective, yet still waiting for the statute of limitations to run before asserting a defense of insufficient service, *did* constitute waiver of the

defense. *Romjue v. Fairchild*, 60 Wash.App. 278, 281-82, 803 P.2d 57 (1991).

In the present case, Ms. Covey's previous counsel (Mr. Vasilev and/or Ms. Ridgway) collectively represented Ms. Covey for almost three months after Mr. Howard served Mr. Vasilev with Mr. Howard's will contest petition. (CP 25.) However, no Answer was filed in response to the petition during that period, nor did either counsel indicate in any manner that they would be asserting a defense of insufficient service. (CP 25.) Although the defense was asserted in the Verified Response filed by Ms. Covey's present counsel, (CP 25), the Verified Response was only filed on January 21, 2014, approximately *two weeks after the expiration* of the 90-day service period required by RCW 11.24.010. (CP 25.) By that time, it was too late for Mr. Howard to cure any service defects. (CP 25.)

Therefore, unless this Court remedies the matter, Ms. Covey, who suffered no damage from the service upon her previous attorney, who certainly received the will contest petition from Mr. Vasilev (and if not, from Ms. Ridgway) (RP 15, 16, 24), and who hired new counsel to administer probate and pursue the will contest after the withdrawal of Mr. Vasilev and Ms. Ridgway, namely, Mr. Vortman and Mr. Locker, (CP 25) will benefit from a windfall in this matter. If the dismissal of the will

contest petition is affirmed, Ms. Covey will not be required to litigate the merits of Mr. Howard's will contest petition.

Her patience in waiting for the expiration of the RCW 11.24.010 90-day service period before filing her Verified Response and raising the defense of insufficient service, thus ensuring the dismissal of the will contest petition without her opponent's ability to re-file it, will be rewarded. This is a "trial by ambush" style of advocacy, as described by the Washington Supreme Court in *Lybbert v. Grant County*, 141 Wash.2d at 40.

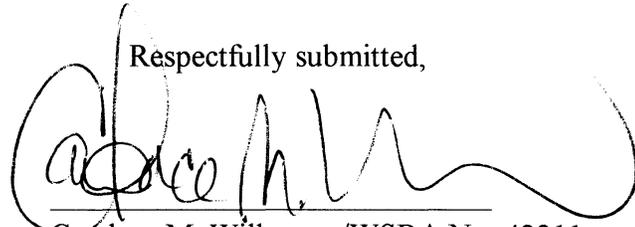
As the *Lybbert* Court stated: "[i]f litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised." *Id.*, at 39 (citation omitted). Ms. Covey's assertion of the defense of insufficient service of process should be barred by the doctrine of waiver.

## **V. CONCLUSION**

For all of the foregoing reasons, 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: May 21, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Candace M. Wilkerson". The signature is written in a cursive style with a large initial "C" and a long, sweeping underline.

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

CERTIFICATE OF SERVICE  
BRIEF OF APPELLANT

I certify that on the 21st day of May, 2015, I caused a true and correct copy of this *Brief of Appellant* to be served on the following in the manner indicated below:

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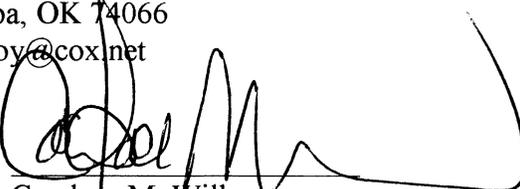
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