No. 89924-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NINA L. MARTIN individually and as Personal Representative of the ESTATE OF DONALD R. MARTIN, et al.

Petitioners,

vs.

DEMATIC dba/fka RAPISTAN, INC., MANNESMANN DEMATIC, and SIEMEN DEMATIC; GENERAL CONSTRUCTION COMPANY; WRIGHT SCHUCHART HARBOR COMPANY; FLETCHER GENERAL, INC. and FLETCHER CONSTRUCTION COMPANY NORTH AMERICA,

Respondents.

RESPONDENTS FLETCHER GENERAL, INC. AND FLETCHER CONSTRUCTION COMPANY OF NORTH AMERICA'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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CIVIL RULES

I. IDENTITY OF RESPONDENTS

Fletcher General, Inc. and Fletcher Construction Company North America (collectively "FCCNA") are the sole Respondents with respect to this Petition. They were Respondents in the Court of Appeals and Defendants in the trial court.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

The Supreme Court should deny discretionary review because the issues that Petitioner Martin[1] presents for review do not satisfy RAP 13.4(b)(2). FCCNA restates the issues as follows:

1. Discretionary review should be denied because the Court of Appeals correctly: (a) followed In re Estates of Hibbard, 118 Wn.2d 737, 826 P.2d 690 (1992); (b) distinguished Orear v. Inter'l Paint Co., 59 Wn. App. 249, 796 P.2d 759 (1990); and held that the discovery rule did not toll the statute of limitations since FCCNA's corporate identity was a matter of public record at the time Martin filed the initial complaint.

2. Discretionary review should be denied because the Court of Appeals correctly interpreted and applied Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.2d 781 (1991), including its dictum, and held that RCW 4.16.170 did not toll the statute of limitations against FCCNA since:

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[1] For ease of reference, the Petitioners are collectively referenced in this Answer as "Martin."

(a) FCCNA was an *unnamed* defendant; and (b) FCCNA was never identified—much less with "reasonable particularity" before the statute of limitations expired.

3. Division II's decision in Powers v. W.B. Mobile Services, Inc., 177 Wn. App. 208, 311 P.2d 58 (Oct. 15, 2013) does not change the outcome of the Martin decision (Oct. 14, 2013) because Division II held that plaintiff Powers' initial complaint identified "John Doe Construction Company" with reasonably particularity as "the builder of the handicap access ramp." Here, Martin never identified FCCNA as an alias "John Doe," much less with "reasonable particularity."

4. Discretionary review should be denied because the Court of Appeals correctly interpreted and applied the requirements of CR 15(c) and held that Martin's amended complaint naming FCCNA was untimely and did not relate back to the date of the original complaint, due to, among other reasons, inexcusable neglect. Martin could have discovered FCCNA's identity because it was a matter of public record.

III. RESTATEMENT OF THE CASE

On August 13, 2004, Mr. Donald Martin was fatally injured while working for his employer, Kimberly-Clark, at its paper products plant in Everett, Washington. (CP 618-24) Specifically, he was leaning over a guardrail while a co-worker lowered the dipping conveyor on Tissue

Machine #5 ("TM #5"). Because Mr. Martin was leaning over and his body was not fully behind the guardrail, he was killed. (CP 618; CP 748; CP 2018; CP 2086; CP 2437)

On June 29, 2007—nearly three years after Mr. Martin's accident—the Martin family filed a products liability lawsuit naming seven corporate entities,[2] including "General Construction Company dba/fka Wright Schuchart Company." (CP 3576-85) Notably, the complaint named no "John Doe" or "ABC Corporation." Martin alleged that "General Construction Company dba/fka Wright Schuchart Company" was a commercial product manufacturer that "designed, manufactured, supplied, marketed, installed and/or sold under its corporate brand name and/or logo the dipping conveyor, chute and/or component parts of these products which caused Donald Martin's fatal injuries." (CP 3583)

On October 16, 2007, "General Construction Company dba/fka Wright Schuchart Company" filed its Answer and asserted a Third-Party Complaint against Fletcher General, Inc.[3] as a potentially liable party for breach of contract and indemnity. (CP 3543-51) It alleged that GC Investment Co. entered into a stock agreement to purchase the stock of

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[2] Some of these entities settled with Martin.

[3] Fletcher General, Inc., among other entities, merged into Respondent FCCNA.

General Construction Company from Fletcher General. (CP 3548) It also alleged that "at the time of the Stock Purchase Agreement, Wright Schuchart Harbor Company was owned by, related to and/or a predecessor entity to Fletcher General." (CP 3459) General Construction alleged that under the Stock Purchase Agreement, Fletcher General had a duty to defend and indemnify General Construction Company. (CP 3550)

Despite knowing as early as October 16, 2007 that a Fletcher entity was named as a *potentially* liable party,[4] Martin did nothing for three years.

On January 22, 2010, Martin filed an amended complaint adding FCCNA as a defendant, and alleging that General Construction Company, Wright Schuchart Harbor Company, and FCCNA collectively installed, maintained, designed and/or manufactured the component parts on Tissue Machine #5 that allegedly caused Mr. Donald Martin's death. (CP 2402-08) FCCNA's Answer raised an affirmative defense that the statute of limitations had expired with respect to Martin's claims. (CP 2246)

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[4] The Fletcher entities have not waived the defense that they are absolutely the wrong parties in this litigation. Accordingly, if the Supreme Court accepts review and ultimately reverses and remands to the trial court, then FCCNA will move for dismissal based on evidence that (1) none of Fletcher entities installed TM #5, or purchased assets or assumed liabilities *of any entity* that did install TM #5; (2) the statute of repose bars Martin's claims; and (3) FCCNA is not a product seller or manufacturer.

When Martin filed the initial complaint on June 29, 2007, the following *public records* were readily available and on file and/or archived with the Washington Secretary of State:

1. Articles of Incorporation of Wright Schuchart Inc., May 27, 1976; (CP 722-27)

2. Articles of Amendment Changing name of Wright Schuchart Inc. to Fletcher General Inc., dated March 1, 1993; (CP 729) and

3. Articles of Merger of Fletcher General Inc. to Fletcher Construction Company North America, filed March 29, 2001. (CP 731)

(CP 719-20; CP 731)

Additional public records were available, including a 1993 *Seattle Times* newspaper article that explained in detail the corporate history of the various Wright Schuchart Harbor entities and Fletcher entities. (CP 733-34) For many years (at least through 2010) the on-line home page of co-defendant "General Construction Company dba/fka Wright Schuchart Harbor Company," contained the corporate history of Wright Schuchart. (CP 736-37)

On December 11, 2009, co-defendant General Construction Company moved for summary judgment dismissal on the grounds that it was not a successor entity to "Wright Schuchart Harbor Company," and was therefore an improper party in this action. (CP 2436-40) The trial court granted dismissal, Martin appealed, and the Court of Appeals

affirmed the dismissal. Martin does not seek discretionary review of this decision.

On November 23, 2010, FCCNA moved to dismiss Martin's lawsuit because it was filed after the three-year statute of limitations expired. On January 13, 2011, the trial court granted dismissal, ruling that the discovery rule did not apply, and even if it did apply, the Martin family did not exercise due diligence in identifying the correct parties—even after General Construction Company *specifically identified* Fletcher General, Inc. in its Answer and Third-Party Complaint in October 2007—*three years before Martin amended the complaint to add FCCNA.* (VRP 73:23-25 to 75:2; CP 3543-51)

The trial court found that the record was completely void of any evidence that Martin attempted to investigate, identify, and sue the correct entities. "As I pointed out during argument, there is in fact no information about what plaintiffs actually did in order to ascertain the appropriate entities to sue." (VRP 74:24 to 75:2) Rather, the only thing before the trial court "is information that the defense has provided about what would be available in an internet search and from records from the Secretary of State's office." (VRP 75:5-8)

The trial court acknowledged that Martin certainly had the ability to ascertain the correct parties since they had established that General

Construction Company had a corporate history "because they alleged that Wright Schuchart Harbor was doing business and was formerly known as General Construction, which would tend to suggest both past and present." (VRP 75:8-14)

Martin moved for reconsideration, explaining that General Construction Company's *unauthenticated* July 24, 2007 tender of defense and indemnity letter was evidence that FCCNA had "notice" of their wrongful death claim, and accordingly FCCNA "knew that but for a mistake concerning the identity of the proper party" the original complaint would have named FCCNA as a defendant.[5] (CP 53-54)

On March 9, 2011, the trial court, in a written order, denied Martin's motion for reconsideration. The trial court ruled that Martin did not meet the CR 15(c) requirements for relation back of amendments and "the record in no way supports such a finding" that FCCNA could have known "before the statute of limitations ran that but for a mistake concerning identity it would have been named in the Original Complaint." (CP 47)

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[5] Denials of Motions for Reconsideration are reviewed for abuse of discretion. Brinnon Group v. Jefferson County, 159 Wn. App. 446, 485, 245 P.3d 789 (2011). Martin submitted this unauthenticated document with its motion for reconsideration, which the trial court denied and the Court of Appeals affirmed.

The trial court acknowledged that FCCNA "claims that *it believes the work in question was not performed by a company that merged into FCCNA, but by a wholly separate entity, Wright Schuchart Harbor Joint Venture,* ***whose assets and liabilities were never merged into any Fletcher entity.***" (CP 48 (emphasis added)) Thus, FCCNA would have no reason to know or believe that it could have been named or could be liable for any damages to Martin.

FCCNA's corporate records custodian explained in answers to interrogatories that "it appears that the TM #5 project was likely completed by the Wright Schuchart Harbor *Joint Venture.*" (CP 425) FCCNA was never connected with the Joint Venture. FCCNA's record custodian confirmed that "the entities which previously comprised Wright Schuchart Harbor Joint Venture had changed their names as necessary and were transferred to Sprague Resources Corporation as dividends by June 30, 1987 prior to the sale of Wright Schuchart, *Inc.* to Fletcher. Thus, these entities were not included in the sale of Wright Schuchart, *Inc.* to Fletcher in October 1987." (CP 426) Stated differently, "Wright Schuchart Harbor *Joint Venture*" has always been a separate and distinct corporate legal entity from Wright Schuchart Inc. or Wright Schuchart Company, and the Joint Venture was never acquired by any Fletcher entity.

To the extent the *Joint Venture* is liable and any assets or insurance exist to cover Martin's claims, then Sprague Resources Corporation—who acquired the Joint Venture (which installed TM #5)—is the correct entity.

Finally, the trial court ruled that even if all of the requirements of CR 15(c) were met, "the Plaintiffs must demonstrate they exercised due diligence in investigating and identifying the proper defendants to the action in order to have the Amended Complaints naming new defendants relate back." (CP 48) The trial court concluded that the plaintiffs "have presented some evidence of why they might have been confused despite information in the public record from which the correct parties could be determined as demonstrated by the Fletcher Defendants, but have not presented any evidence of what investigation they actually performed, what information was revealed by that investigation, or why they did not name the Fletcher Defendants." (CP 49) The Court of Appeals agreed.

Martin appealed the trial court's dismissal of their claims against General Construction Company and FCCNA. The Court of Appeals affirmed the trial court's dismissal of both parties. *See* Martin v. Dematic, ___ Wn. App. ___, 315 P.3d 1126 (2013).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals correctly applied the three-year statute of limitations to preclude Martin's claims.

Actions for personal injury in Washington are subject to a three-year statute of limitations. RCW 4.16.080(2). Here, Donald Martin died on August 13, 2004. Accordingly, his family's wrongful death claims expired on August 13, 2007. However, Martin did not obtain leave from the trial court to add FCCNA as a defendant until January 15, 2010, nor did the order contain language allowing the amended complaint to relate back to its original filing. (CP 2409-10) The Court of Appeals correctly held that "the statute of limitations bars the Martins' claims against FCCNA." Martin v. Dematic, 315 P.3d at 1138.

B. The Court of Appeals correctly determined that the "discovery rule" does not apply; the decision is factually inapposite to Orear.

Martin contends that the Martin decision conflicts with Orear v. Inter'l Paint Co., 59 Wn. App. 249, 796 P.2d 759 (1990), *rev. denied*, 116 Wn.2d 1024 (1991). However, Orear is factually inapposite.

Orear was premised on a products liability claim "where the connection between the plaintiff's latent injury and the allegedly defective product was 'difficult to trace.'" Martin, 325 P.2d at 1134 (quoting Orear, 59 Wn. App. at 256). Unlike Orear, Mr. Martin did not sustain a latent

injury, and the connection between his fatal injury and the allegedly defective product was clear.

Orear diligently tried to identify the product manufacturer by asking for the information through interrogatories to the party that actually possessed the products in a parallel administrative law proceeding. However, that case and all discovery was essentially stayed for two years. Orear, 59 Wn. App. 250-51. Here, FCCNA's identity as a successor was a matter of public record when Martin filed the lawsuit on June 29, 2007. Defendant General Construction asserted a Third-Party Complaint against FCCNA on October 16, 2007. Rather than investigate further, Martin waited until 2010 to add FCCNA.

In Martin, the Court of Appeals correctly relied on the Supreme Court's holding in In re Estates of Hibbard, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992). The Supreme Court clarified that the discovery rule applies only to claims "in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of the information by the defendant" and to "claims in which plaintiffs could not immediately know of the cause of their injuries." Martin, 315 P.3d at 1134. The Court of Appeals observed that when Washington courts have applied the

discovery rule, "the plaintiff lacked the means or ability to ascertain that a legal cause of action accrued." Martin, 315 P.3d at 1134.

In the trial and appellate court, and now here, Martin contends that "a series of complex and non-public mergers and acquisitions obscured the identity of FCCNA as the successor to the company that manufactured and sold" the TM #5 or its component parts. (*See* Petition at 9)

This contention is belied by documents in the record which identified FCCNA as a successor through public records. The record contains articles of incorporation of Wright Schuchart, Inc., dated May 27, 1976 (CP 722-27); articles of amendment changing the name from Wright Schuchart, Inc. to Fletcher General, Inc., dated March 1, 1993 (CP 729); and the articles of merger of Fletcher General, Inc. into FCCNA, dated March 29, 2001 (CP 731).

As late as November 23, 2010, General Construction's website explained Wright Schuchart's corporate history. (CP 736-37; November 23, 2010 is the date the Declaration was signed and to which the printout was attached as an exhibit.) A detailed article was published in *The Seattle Times* in 1993 that explained the connection between the various Wright Schuchart and Fletcher entities. (CP 733-34) The Court of Appeals correctly declined to apply the discovery rule because Martin was

on inquiry notice that FCCNA was a successor.[6] This decision does not conflict with Orear, and is factually closer to In re Estates of Hibbard. Discretionary review should be denied.

C. The Court of Appeals' decision does not conflict with *Powers v. W.B. Mobile* because the defendant, unlike here, was identified with "reasonable particularity," which tolled the statute of limitations.

Martin asserts that the Martin decision, decided on October 14, 2013 by Division I conflicts with Powers v. W.B. Mobile Services, 177 Wn. App. 208, 311 P.3d 58, decided on October 15, 2013 by Division II. (*See* Petition at 10-12) Martin and Powers are easily reconcilable. In Powers, the plaintiffs named a "John Doe Construction Company," and alleged that it built the ramp on which the injury occurred. The Court of Appeals held that this was sufficiently "particular" to toll the statute of limitations while plaintiffs discerned the real identify of John Doe Construction Company. Here, Martin never identified, named, or described FCCNA—with "reasonable particularity"—or otherwise in the

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[6] Martin opines that the Court of Appeals "is simply wrong" and that FCCNA's identify was not a matter of public record.(*See* Petition at 8 n.4) To the extent that Martin is literally referring to a purported absence of the initials "WSH" Martin is incorrect. General Construction's website (as of November 23, 2010) explicitly states that Wright Schuchart Harbor, Co. (WSH) was the industrial division of WSI (Wright Schuchart, Inc.); in 1987, Fletcher Challenge acquired the Wright Schuchart companies; and General and WSH were combined into one company under the name Fletcher General. (CP 736-37)

initial complaint. There is no conflict; discretionary review should be denied.

Likewise, the Martin Court correctly interpreted and applied Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.2d 781 (1991), including its dictum, holding that RCW 4.16.170 did not toll the statute of limitations against FCCNA since: (a) FCCNA was an *unnamed* defendant; and (b) FCCNA was never identified—much less with "reasonable particularity" until six years after the injury.

The Martin Court reiterated that Sidis "did not concern unnamed defendants," but the dictum noted that "'in some cases, if identified with reasonable particularity, 'John Doe' defendants may be appropriately 'named' for purposes of RCW 4.16.170.'" Martin, 315 P.3d at 1134 (quoting Sidis, 117 Wn.2d at 331).

Relying on the corporate merger statute (RCW 23B.11.060), Martin advances the argument that naming a corporate defendant (General Construction, Inc. dba/fka Wright Schuchart Harbor) who has merged into another entity (FCCNA) should satisfy the requirement of identifying the successor corporation with reasonable particularity to toll the statute of limitations. (*See* Petition at 11).

However, the merger statute, RCW 23B.11.060(1)(d), allows a plaintiff to continue a lawsuit filed and served against a defunct entity that

was merged into a surviving corporation, *provided that the lawsuit was pending at the time of the merger*:

> (1) When merger takes effect:
>
> (d) A proceeding *pending* against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;
>
> RCW 23B.11.060(1)(d) (emphasis added).

The application of this statute does not revive Martin's action. The 2007 lawsuit was not "pending" when any merger took effect. The most recent entity merger took effect in 2001 when Fletcher General merged with FCCNA. (CP 731) Martin filed suit six years after the merger took effect. Consequently, their lawsuit was not *pending* at the time the merger took effect. The accident itself had not even occurred at the time of the last merger, therefore RCW 23B.11.060 does not apply.

The Court of Appeals similarly held that Martin cited "no authority demonstrating that identifying a defunct corporation well after the statute of limitations expired, and long after a merger took place, constitutes 'reasonable particularity.'" Martin, 315 P.3d at 1135.

D. The Court of Appeals correctly held that the relation back doctrine did not apply because the CR 15(c) requirements were not met.

CR 15(c) states that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Additionally, the burden of proof is on the party seeking to have an amendment relate back to the original action. Teller v. APM Terminals Pacific, Ltd., 134 Wn. App. 696, 705, 142 P.3d 179 (2006). However, "when an amended complaint adds or substitutes a new party, the amended complaint relates back to the date of the original complaint *if the party seeking to amend proves that it has satisfied three conditions.*" Martin, 315 P.3d at 1136 (emphasis added) (citing Segaline v. Dep't of Labor & Indus., 169 Wn.2d 467, 476-77, 238 P.3d 1107 (2010)).

The conditions are: (1) the new party received notice of the institution of the action so that he or she will not be prejudiced in making a defense on the merits; (2) the new party knew or should have known that but for a mistake concerning the proper party's identity, the plaintiff would have brought the action against it; and (3) the plaintiff's delay in adding the new party was not due to inexcusable neglect. Segaline, 169 Wn.2d at 477. The Supreme Court explained that "[a]dding a new party requires a showing that it was not due to 'inexcusable neglect' because

amendment of a complaint is not intended to serve as a mechanism to circumvent or extend the statute of limitations." Id. at 477 n.9.

"Inexcusable neglect exists when no reason for the initial failure to name the party appears in the record." Id. at 169 Wn.2d at 477. Inexcusable neglect also "includes delay due to a 'conscious decision, strategic or tactic.'" Id.

First, Martin contends that FCCNA had "notice" of the 2007 lawsuit based on General Construction's tender of defense to Fletcher General. However, Martin only raised this argument in a motion for reconsideration wherein the tender letter was unauthenticated. (CP 59-63) Moreover, notice to FCCNA was never notice to the *Joint Venture*, since it never merged with FCCNA.

Second, Martin fails to present any evidence that FCCNA knew or should have known that but for a mistake, it would have been named in the initial complaint. Both the trial court and Court of Appeals were persuaded that Wright Schuchart Harbor Joint Venture, whose assets and liabilities never merged with any Fletcher entity, performed the work at issue. Martin, 315 P.3d at 1137. Moreover, FCCNA filed a certificate of dissolution in 2007 (CP 2861-62), so it had no reason to know that it should have been named in the initial complaint or that it might be liable to Martin.

Third, even if Martin met the first two conditions for relation back, Martin fails to demonstrate "excusable neglect." Martin argues that the Martin decision (finding inexcusable neglect) conflicts with Perrin v. Stensland, 158 Wn. App. 185, 240 P.3d 1189 (2010) (finding excusable neglect). (*See* Petition at 14-15) Both are Division One cases, however, Perrin is readily distinguishable.

In Perrin, the plaintiff named the deceased driver and wife in the complaint, rather than the driver's estate because he neglected to realize that the driver had died. Id. at 190-91. The court determined that service on the wife, who was on the same auto policy as her deceased husband, was sufficient notice and was not prejudicial to the estate. Id. at 194-94. Similarly, the estate knew that but for a mistake, the plaintiff would have asserted a claim against it. Id. Further, there was no evidence that Perrin made a strategic choice to avoid naming the estate. Id. at 202.

The element of "inexcusable neglect" is well established in Washington. Here, Martin "provided no evidence of actions that they took to determine the correct parties before the statute of limitations expired or what information any investigation revealed." Martin, 315 P.3d at 1137. The Supreme Court has consistently found inexcusable neglect when the party seeking to amend did not know the additional party's identity, but could have discovered it from public records. Haberman v. Wash. Pub.

Power Supply Sys., 109 Wn.2d 107, 174-75, 744 P.2d 1032, 750 P.2d 254 (1987) *appeal dismissed sub nom.* Am. Express Travel Related Servs. Co. v. Wash. Pub. Power Supply Sys., 488 U.S. 805(1988) (holding it was no excuse where omitted parties' identity was available from a variety of public sources); Tellinghuisen v. King County Council, 103 Wn.2d 221, 224, 691 P.2d 575 (1984) (holding it was no excuse where omitted parties' identity was a matter of public record); S. Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 77-78, 677 P.2d 114 (1984) (holding that "inexcusable neglect exists when no reason for initial failure to name the party appears in the record"); Teller v. APM Terminals Pac., 134 Wn. App. 696, 706-07, 142 P.3d 179 (2006) ("If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be inexcusable.")

Here, (1) FCCNA's identity was a matter of public record; the relationship among the entities was published in a newspaper; published on Defendant General Construction's website at least until November 2010; and available from the Secretary of State; and (2) General Construction identified FCCNA in its Answer and Third-Party Complaint in 2007. Martin never offered an explanation for a three-year delay in adding FCCNA as a party. The Martin Court correctly distinguished

Perrin and ruled that Martin's claims did not relate back to the initial complaint. Discretionary review should be denied.

V. CONCLUSION

For the foregoing reasons, FCCNA respectfully requests that the Supreme Court deny Martin's Petition for Discretionary Review.

Dated this 12th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 12th day of March, 2014, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

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Sent: Wednesday, March 12, 2014 11:11 AM
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Attached please find for filing, Respondents Fletcher General, Inc. and Fletcher Construction Company of North America's Answer to Petition for Discretionary Review in the following case:

- Martin v. Fletcher General, Inc. et al.
- 89924-0
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Thank you,

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