NO. 92197-1

SUPREME COURT OF THE STATE OF WASHINGTON

WILFRED A. LARSON,

Respondent,

v.

CITY OF BELLEVUE,

Petitioner,

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The Court of Appeals ignored a basic rule of workers' compensation law that the appealing party has the burden of proof at superior court. RCW 51.52.115. As recently as two months ago, this Court in *Gorre v. City of Tacoma* confirmed that in a firefighter-presumption case under RCW 51.32.185, the appealing party has the burden of proof under RCW 51.52.115. The principle that the burden of proof is on the appealing party is not new to workers' compensation case law; there are decades of such decisions. The Court of Appeals decision conflicts with this precedent by placing the burden of proof on the non-appealing party, here the City of Bellevue, to prove that the Board correctly decided that the presumption that melanoma was an occupational disease was rebutted.

By instructing the jury to apply the standard of proof applicable at the Board, rather than the standard of proof applicable for superior court review, the Court of Appeals decision also conflicts with this Court's decision in *La Vera v. Department of Labor & Industries*. That case held that the jury should not be instructed about the burden of proof at the Board. Finally, Division One's decision here conflicts with Division Two's decision in *Harrison Memorial Hospital v. Gagnon* that the appealing party has the burden of persuasion in a workers' compensation appeal at superior court. Contrary to Division Two's decision, Division

One placed the burden of persuasion on the non-appealing party. Review should be granted to resolve these fundamental conflicts with well-enshrined legal principles in workers' compensation cases. RAP 13.4(b)(1), (2).

The Court of Appeals' unwillingness to reconcile RCW 51.52.115 with RCW 51.32.185 will cause confusion in litigating firefighter-presumption cases in superior court. The uncertain landscape in firefighter-presumption cases presents an issue of substantial public interest. RAP 13.4(b)(4).[1]

II. STATEMENT OF THE ISSUES

1. Does a special burden of proof apply in firefighter-presumption cases under RCW 51.32.185 at the superior court, or does RCW 51.52.115's application to "all" court proceedings control to place the burden of proof on the appealing party?

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[1] On January 5, 2016, this Court will also consider whether it accepts and hears a firefighter's request for discretionary review where the trial court judge correctly applied RCW 51.52.115 and held that the jury should not be instructed about the presumption in RCW 51.32.185. *Spivey v. City of Bellevue*, No. 91680-2. Spivey, represented by the same counsel as Larson, asks for this Court's review, stating that "the Department, the Board, and Washington Superior and Appellate Courts need guidance on the application of the presumptive disease statute, RCW 51.32.185. An authoritative determination by this Court is needed to give guidance as to whether it is the jury or the Court's role to determine if the presumption of occupational disease is rebutted by a preponderance of the evidence." Statement for Grounds for Direct Review 4 (June 2, 2015). He further states that "[t]he administration and construction by the Department, Board and lower courts of the Industrial Insurance Act's presumption . . . affects thousands of Washington firefighter's and the public they serve." *Id.* at 9. Finally he notes that the case needs review because it involves "uncertainty by the Department, Board and lower Courts in the application and interpretation of RCW 51.32.185." *Id.* at 15. If review is granted in these two cases, they should be consolidated.

2. Did the trial court err in instructing the jury about the burden of proof at the Board when *La Vera v. Department of Labor & Industries* specifically prohibits instructing the jury about the burden at the Board?

3. Is the burden of persuasion on the non-appealing party at superior court when *Harrison Memorial Hospital v. Gagnon* places it on the appealing party?

III. STATEMENT OF THE CASE

A. Larson's Melanoma Was Presumed To Be an Occupational Disease, and the City Was Required To Rebut This Presumption

Wilfred Larson, who works as both a firefighter and an EMT for the City of Bellevue (the City), filed a workers' compensation claim alleging that a malignant melanoma on his back was an occupational disease. The Department of Labor and Industries (Department) ordered Larson's claim allowed based on the statutory presumption applicable to firefighters and contained in RCW 51.32.185, which states "there shall exist a prima facie presumption that . . . cancer [is an] occupational disease." CP 37. The City appealed the Department order to the Board of Industrial Insurance Appeals (Board). CP 40.

At the Board, the City presented evidence proving that Larson's melanoma was not caused by firefighting through three expert witnesses.

Andy Chien, MD, a board-certified dermatologist specializing in melanoma, testified that melanoma is caused by a variety of complex

genetic predisposing factors and by exposure to ultraviolet light, both from the sun and from tanning beds. RP 573-77, 589-603, 608-09. Larson was exposed to ultraviolet light through outdoor recreation and in tanning beds. RP 284-92. Dr. Chien also testified that melanoma is not a systemic disease and does not arise from inhalation of chemicals or exposure to chemicals. RP 604, 644-45. Dr. Chien concluded that Larson's melanoma was caused by his occasional exposures to ultraviolet radiation and genetic risk factors. RP 608. Thus, Larson's working conditions did not play a role in the development of his melanoma. RP 608-09.

Sarah Dick, MD, Larson's treating dermatologist, testified that Larson had a number of risk factors that were not occupationally related and that predisposed him to develop melanoma, including exposure to ultraviolet light, genetic risk factors, a decreased immune system, being fair-skinned, and use of tanning beds. RP 714, 718, 722, 724, 726-31. Dr. Dick testified that there is no exposure unique to working as a firefighter that constitutes a risk factor in the development of melanoma and that Larson probably would have had melanoma regardless of what work he did. RP 732.

Noel Weiss, MD, an epidemiologist specializing in cancer, testified that the medical literature did not show an increased incidence of malignant melanoma in the firefighting population. RP 656, 662, 664-65.

Dr. Weiss further testified that there was no scientific proof that firefighters were at an increased risk of any form of cancer. RP 664.

B. The Board Decided That the City Had Rebutted the Presumption

Based on the City's evidence, the Board decided that the City introduced "credible medical evidence demonstrating that Captain Larson's melanoma was proximately caused by specific factors unrelated to his work as a firefighter." CP 33. The Board ruled that the City had met its burden of rebutting the presumption in RCW 51.32.185 by a preponderance of evidence and Larson was thus required to produce contrary evidence. CP 32-33.

Larson presented the testimony of one medical doctor, Kenneth Coleman, M.D. Dr. Coleman is a family practice and emergency medicine doctor who obtained a law degree in 1993 and, since 1989, has worked as a medical legal consultant. RP 408-09. Dr. Coleman testified about 12 articles that he believed indicated that firefighting is an occupation that results in increased melanoma. RP 412-30, 498-506. Based on those articles, he testified that Larson's occupation is probably one cause of his melanoma. RP 508.[2]

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[2] Drs. Chien and Weiss both reviewed the same 12 articles and testified that they only spoke to the incidence of disease, and not to causation, and that the studies were otherwise unreliable with respect to both incidence of melanoma and causation. RP 651-52, 662-87.

The Board, after concluding that the City rebutted the presumption, weighed the evidence presented by both parties and found the City's evidence to be more persuasive. BR 27. The Board reversed the Department order, directing that Larson's claim be rejected.

C. The Superior Court Did Not Rule on Whether the City Rebutted the Firefighter Presumption, but Instead Gave This Question to the Jury

Larson appealed the Board's decision to superior court. CP 1-2. The Department filed a notice of appearance in superior court. The City, at the conclusion of the testimony in superior court, asked the trial court to rule that the City had rebutted the firefighter presumption under RCW 51.32.185 as a matter of law and that the only issue before the jury was whether Larson had sustained his burden of proving that the Board decision that his melanoma was not an occupational disease was wrong. RP 753-54. The trial court denied the City's motion. RP 754. The trial court turned to a discussion of the jury instructions and verdict form. RP 758.

With respect to Instruction No. 9, the burden of proof instruction, the trial court inserted language regarding the rebuttable firefighter presumption into the pattern instruction. RP 769-70; CP 1768. The first, second, and fourth paragraphs of Instruction No. 9 recite verbatim WPI 6th 155.03. The third paragraph (italicized here for ease of reference) was

added by the trial court at Larson's request. RP 765-67, 769-70. The instruction read:

> The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence.
>
> The burden of proof is on the firefighter to establish by a preponderance of the evidence that the decision is incorrect.
>
> *At the hearing before the Board of Industrial Insurance Appeals the burden of proof is on the employer to rebut the presumption that 1) claimant's malignant melanoma arose naturally out of his conditions of employment as a firefighter and, 2) his employment is a proximate cause of his malignant melanoma.*
>
> When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

CP 1768 (emphasis added). The City took exception to this instruction. RP 835. The City argued that the instruction was confusing and that it misstated RCW 51.32.185. The City stated that the trial judge was confusing a burden of production with a burden of proof. RP 777, 785-92. It is clear from the context that by "burden of proof" the City meant the burden of persuasion. RP 777, 785-92. The City further argued that the City had met the burden of production and proof at the Board, that on

appeal at superior court it no longer bore a burden of production, and that the burden of proof was on Larson at superior court. RP 777, 785-92.

The parties offered different verdict forms. CP 1589-79, 1703, 1748-50. The trial judge adopted Larson's verdict form. RP 824. It read:

> Question 1: Was the Board of Industrial Insurance Appeals correct in deciding that the employer rebutted by a preponderance of the evidence the presumption that plaintiff's malignant melanoma was an occupational disease?
>
> Yes or No?
>
> If you answered "No" to question one, do not answer any further questions.
>
> Question 2: Was the Board of Industrial Insurance Appeals correct in deciding that the plaintiff did not prove by a preponderance of the evidence that his malignant melanoma was an occupational disease?
>
> Yes or No?

CP 1775-76. The jury answered "no" to Question One. CP 1775, 1900.

After taking exceptions to individual instructions, and before the jury was instructed, the City further took exception to how the trial judge "approached" the whole issue of the RCW 51.32.185 prima facie firefighter presumption. It stated that the instructions created a presumption that occupational disease had been proved and placed the burden on the City at superior court to disprove that Larson's melanoma was an occupational disease. RP 835. The trial court did not revise its

rulings regarding the instructions or verdict form in response to the City's exceptions.

The parties then gave closing arguments to the jury. During Larson's closing, he stated that the City still bore the burden of rebutting the statutory presumption. He asked the jury: "Did [the City] even rebut the statutory presumption that there's a link between melanoma and firefighting?" RP 911. Larson pointed to Instruction No. 9 and said:

> At the hearing before the board, the burden of proof is on the employer, right? That's what it says, to rebut the presumption that my client's melanoma was occupational. Right? So that's their burden. They have that burden to rebut that.

RP 912.

The jury found for Larson. CP 1775-76. The trial court entered judgment for Larson. CP 1900-01.

D. The Court of Appeals Affirmed the Trial Court by Placing the Burden of Proof on the City

The City appealed and the Court of Appeals affirmed. *Larson v. City of Bellevue*, 188 Wn. App. 857, 355 P.3d 331 (2015). The Court of Appeals placed the burden of proof on the City at superior court:

> The text of RCW 51.32.185(1) supports the conclusion that this statute shifts both the burden of persuasion and production.

Id. at 871.

> In summary, once a firefighter proves that he suffers from a qualifying disease described in RCW 51.32.185(1), this statute's presumption shifts the burdens of production and persuasion to the entity contesting an award of industrial insurance benefits. The trial court did not err in allowing the jury to decide if the City had rebutted this presumption.

Id. at 875. The Court of Appeals did not discuss or cite to RCW 51.52.115 regarding the non-appealing party's burden of proof at superior court. The City moved for reconsideration, arguing that the decision conflicts with RCW 51.52.115. The Court of Appeals denied the motion. The City petitions for review.

IV. ARGUMENT

Firefighters benefit from a special presumption of occupational disease at the Board under RCW 51.32.185. Under this statute, there is a prima facie presumption that certain conditions are occupational diseases unless the employer or Department rebuts the presumption. RCW 51.32.185. Here, Larson's melanoma was presumed to be an occupational disease at the Board hearings, but the City presented evidence that the Board determined rebutted that presumption. As the presumption had been rebutted and disappeared, the Board next had to determine if Larson proved that he had an occupational disease. *See Raum v. City of Bellevue*, 171 Wn. App. 124, 141, 286 P.3d 695 (2012) ("If RCW 51.32.185's

rebuttable evidentiary presumption applies, that burden shifts to the employer unless and until the employer rebuts the presumption.").

When Larson lost at the Board, the landscape regarding the applicable presumption changed at superior court. If the firefighter loses at the Board, the burden of proof is no longer shifted to his or her employer under RCW 51.32.185. Instead, RCW 51.52.115 places the burden on the firefighter to prove that the Board's order is incorrect. That the appealing party has the burden of proof is well accepted in workers' compensation law, and the Court of Appeals decision not only conflicts with this body of law, but will cause confusion and disarray in future cases. Review should be granted because the decision of the Court of Appeals conflicts with this Court's decisions and decisions of Division Two. Review should also be granted because the confusion caused by the Court of Appeals decision is antithetical to the "sure and certain relief" guaranteed by the Industrial Insurance Act, and as such presents an issue of substantial public interest. RCW 51.04.010.

A. The Court of Appeals Decision Conflicts With Long-Standing Precedent That Places the Burden of Proof on the Party Appealing the Board Decision

1. Many Cases Establish That the Appealing Party Has the Burden of Proof in a Superior Court Appeal

The firefighter presumption construed by the Court of Appeals needs to be placed in proper context. Larson lost at the Board and then he had the burden at superior court to prove that the Board was wrong. RCW 51.52.115. Under the Industrial Insurance Act, "[i]n *all* court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." RCW 51.52.115 (emphasis added); *Gorre v. City of Tacoma*, __ Wn.2d __, 357 P.3d 625, 628 (2015) ("The Board's decision and order is presumed correct, and the party challenging that decision carries the burden on appeal to the superior court."); *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) ("The Board's decision is prima facie correct under RCW 51.52.115, and a party attacking the decision must support its challenge by a preponderance of the evidence.").[3] Larson had the burden at superior court to show that the

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[3] *See also Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987) (under RCW 51.52.115, the burden of proof is on party attacking the Board's decision); *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 843, 440 P.2d 818 (1968) (burden is on party attacking findings and decision of Board to establish incorrectness by preponderance of the evidence); *Chalmers v. Dep't of Labor & Indus.*, 72 Wn.2d 595, 603, 434 P.2d 720 (1967) (findings and decision of Board are correct until trier of fact finds from fair preponderance of evidence that such findings and decision are incorrect); *La Vera v. Dep't of Labor & Indus.*, 45 Wn.2d 413, 415, 275 P.2d 426 (1954); *Goehring v. Dep't of Labor & Indus.*, 40 Wn.2d 701, 707, 246 P.2d 462 (1952); *Ferguson v. Dep't of Labor & Indus.*, 197 Wash. 524, 531, 85 P.2d 1072 (1938); *Eklund v. Dep't of Labor & Indus.*, 187 Wash. 65, 67, 59 P.2d 1109 (1936); *Grub v. Dep't of Labor & Indus.*, 175 Wash. 70, 72, 26 P.2d 1039 (1933); *McArthur v. Dep't of Labor & Indus.*, 173 Wash. 701, 702, 23 P.2d 417 (1933); *Knipple v. Dep't of Labor & Indus.*, 149 Wash. 594, 600, 271 P. 880 (1928).

Board's decision was incorrect, including whether the Board correctly decided that the firefighter presumption was rebutted. Larson may argue that the presumption in RCW 51.32.185 controls over the presumption in RCW 51.52.115, but this is not correct because RCW 51.52.115 addresses "*all* court proceedings" involving an appeal from a Board decision. The specific statute in RCW 51.52.115 controls. *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (specific statute controls over general statute). RCW 51.32.185 is the more general statute because it does not specify how to approach appeals to superior court; in contrast, RCW 51.52.115 explicitly addresses "*all* court proceedings."

The Court of Appeals expressly placed the burden of proof on the City and created a conflict with the express terms of RCW 51.52.115 and the legion of Supreme Court cases, including *Gorre*, itself a firefighter case, that place the burden on the appealing party. *Larson*, 188 Wn. App. at 872-75; *Gorre*, 357 P.3d at 628.

2. The Court of Appeals Decision Conflicts with this Court's decision in *La Vera*

The Court of Appeals decision conflicts with *La Vera v. Department of Labor & Industries*, 45 Wn.2d 413, 415, 275 P.2d 426 (1954). "It is our opinion that, in an appeal to the superior court from an order of the board, the question of burden of proof at the board level is

immaterial." *Id.* at 414 (citing RCW 51.52.115). In *La Vera*, the worker wanted the jury to be instructed that at hearings before the Board, the Department had the burden of proof. The court rejected that argument as unsupported by RCW 51.52.115 because the sole question at superior court is whether the evidence supports the Board's decision:

> Neither in this statutory provision nor elsewhere in the act has the legislature specified that the judge or jury should test the board's decision with reference to the burden of proof at the board level. The sole fact-finding function in a court review of a board order is to examine the evidence and determine whether or not it clearly preponderates against the board's findings. If not, the appellant has failed to sustain his statutory burden of proof, and the prima facie correctness of the board's order has been confirmed.

Id. at 415. The Court emphasized that instructing the jury about the burden of proof at the Board would add "complexity and confusion" to an already difficult task of deciding who should prevail:

> Were we to consider ourselves free to add to the statutory provisions regarding burden of proof, we would reach the same result. Appellant argues that, where the evidence presents a close question of fact, the correctness of the board's order necessarily depends on who had the burden of proof before the board. As a proposition in logic, this may have merit. But the statutory appeal procedure is designed for practical application. In our judgment, the superimposing of this procedural ramification would serve only to add complexity and confusion to a fact-finding task which is already most difficult.

La Vera, 45 Wn.2d at 415. The Court of Appeals decision here, which approves of instructing the jury that the City had the burden of proof at the

Board, directly conflicts with *La Vera. Larson*, 188 Wn. App. at 872-75. It causes confusion, which is why the City correctly argued that the legal conclusion of whether the presumption had been rebutted was one for the judge to decide.

3. The Court of Appeals Decision Conflicts with *Harrison Memorial Hospital* by Placing the Burden of Persuasion on the City

In *Harrison Memorial Hospital v. Gagnon*, 110 Wn. App. 475, 484-85, 40 P.3d 1221 (2002), Division Two held that the party appealing the Board's decision carries the burden of persuasion. *See also Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008) (appealing party has burden of persuasion at superior court). The Court of Appeals decision held that the City, the non-appealing party, had the burden of persuasion which conflicts with Division Two's decision. *Larson*, 188 Wn. App. at 871. *Harrison Memorial Hospital* rested on well-developed case law and RCW 51.52.115 that the appealing party had the burden of proof. 110 Wn. App. at 484-85.

The Department will not repeat the City of Bellevue's well-reasoned explanation about why the Thayer theory of presumption applies instead of the Morgan theory except to point out that the Morgan theory does not apply at superior court in workers' compensation cases because the burden of persuasion at superior court is on Larson instead of the

City.[4] Pet. at 11-15. The Court of Appeals analysis proposing the Morgan theory rested on its incorrect placement of the burden of persuasion on the non-appealing party at superior court, the City. *Larson*, 188 Wn. App. at 871. But this is contradictory to *Harrison Memorial Hospital*, which places the burden of persuasion on the appealing party. 110 Wn. App. at 484-85.[5]

B. Resolution of the Uncertainty Caused by the Court of Appeals Decision Presents an Issue of Substantial Public Interest

The Court of Appeals ignored RCW 51.52.115, *La Vera*, and the legion of Supreme Court cases that place the burden of proof on the

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[4] Under the Thayer theory, a presumption places the burden of producing evidence on the party against whom it operates but disappears if that party produces contrary evidence. *In re Estate of Langeland*, 177 Wn. App. 315, 321 n.7, 312 P.3d 657 (2013), *review denied*, 180 Wn.2d 1009 (2014). Under the Morgan theory, a presumption does not disappear upon the production of contrary evidence but continues throughout the trial, and the court instructs the jury that the party against whom the presumption operates has the burden of proving that the presumed fact is not true or does not exist. *Id.* at 321 n.8.

[5] To the extent that parties would apply the Court of Appeals ruling about the burden of persuasion at the Board, this would conflict with *Olympia Brewing Co. v. Department of Labor & Industries*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Department of Labor & Industries*, 52 Wn.2d 33, 323 P.2d 241 (1958), which places the burden of persuasion on the claimant. It should be noted that this case has been partially abrogated by statute. In *Olympia Brewing*, the court held that claimants had the burden to show "strict proof of their right to receive benefits" even if it was an employer appeal. *Id.* RCW 51.52.050 makes it clear that the "appellant," which could include an employer, now has the burden to establish a prima facie case. *See In re Kathleen Stevenson*, No. 11 13592, 2012 WL 5838717, *2 (Wash. Bd. Indus. Ins. Appeals Aug. 3, 2012). Under Board practice once the employer makes a prima facie case, the claimant must prove his or her case by the preponderance of the evidence based on *Olympia Brewing*. *Id.* This would similarly apply to firefighter cases, initially the claimant is relieved of the burden of production under RCW 51.32.185, so the burden of production is on the employer to rebut the prima facie case that there is an occupational disease, once this is done, the burden of persuasion would persuasion shift to the claimant under *Olympia Brewing*.

appealing party, but superior courts cannot ignore such authority that governs their proceedings. The Court of Appeals decision creates confusion as to which statute controls in firefighter cases at the superior court, RCW 51.52.115 or RCW 51.32.185. In the context of a workers' compensation appeal, it does not make sense to have the jury decide a countervailing question of whether the firefighter presumption was rebutted at the Board. But more significantly, this Court should resolve the confusion over competing presumptions. To resolve the conflict, the superior court presumption should control because it is the more specific presumption at superior court. *See Black*, 153 Wn.2d at 164. The Industrial Insurance Act promises "sure and certain relief" to workers and employers. Having a confusing landscape regarding the application of RCW 51.32.185 and RCW 51.52.115 does not advance this goal and presents a reason meriting Supreme Court review.

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V. CONCLUSION

This Court should take review because the Court of Appeals decision is at odds with numerous Supreme Court and Court of Appeals decisions. It creates uncertainty and confusion as to how basic workers' compensation principles apply, affecting firefighters, employers, and the Department.

RESPECTFULLY SUBMITTED this 4th day of November, 2015.

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NO. 92197-1

SUPREME COURT OF THE STATE OF WASHINGTON

WILFRED LARSON, Respondent, v. CITY OF BELLEVUE, Petitioner, DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

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DATED this 4th day of November, 2015.

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OFFICE RECEPTIONIST, CLERK

To: Pacarro-Muller, Shana (ATG)
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RE: **Wilfred A. Larson v. City of Bellevue and DLI**
Case No.: 92197-1

Dear Mr. Carpenter:

Attached for filing is the Department's Answer to Petition for Review and Certificate of Service in the above referenced matter.
Thank you,

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