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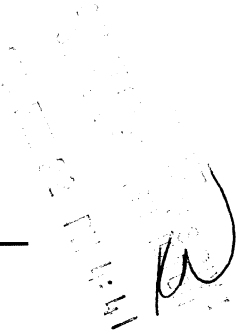
NO. 72512-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I



THOMAS MCLAREN et al.

Appellant

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

Respondent

APPELLANT'S REPLY BRIEF

Appeal from the Superior Court of King County

Cause No. 14-2-15217-5 SEA

The Honorable Barbara Lind, Presiding Judge

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TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Cases

page

Cases

Statutes

Rules and Regulations

Other Authorities

A. INTRODUCTION

This reply (1) identifies differences between the appellants initial brief and the respondent's response brief, and (2) seeks to analyze the differences. This reply seeks to avoid repetition of earlier material except to extent necessary to achieve the above objectives.

B. REPLY ISSUES TO RESPONSE

1. Because respondent's brief failed to respond to an issue raised by appellants, respondent has waived and abandoned the issue.

2. The administrative order was not a final order eligible for review because it failed to specify damages which is an integral part of the merits of a case under the Final Judgment Rule test for "finality".

    a. The order fails the Final Judgment Rule because does not specify damages which is integral to the merits.

    b. The order does not fall within an exception to the Final Judgment Rule to render it reviewable.

    c. Requiring the order to satisfy the Final Judgment Rule would promote judicial economy and justice.

    d. Jurisdiction may be raised for the first time on appeal.

3. If the administrative order was final and eligible for review, the superior court erred by dismissing review because appellants substantially complied with procedural requirements to vest review

C. REPLY STATEMENT OF THE CASE

The Department of Natural Resources (DNR) seized vessels belonging to Thomas and Alexander McLaren for trespass on state waters (not for physical condition) under the Derelict Vessel Act.

The vessels were impeccably maintained former Navy ships nearly finished with their conversion to long-range expedition yachts. (DNR

submitted evidence at the time of hearing that valued each ship at $5 million. The McLarens valued them higher.)

The McLarens' counsel (unbeknownst to them) agreed to DNR's request to bifurcate the administrative case so the hearing on liability would be followed later by a second hearing on damages. Orders and pleadings in the case reflect the bifurcation arrangement. Midway through trial, the McLarens discharged their attorney and retained new counsel.

The administrative court order said it was "final" for purposes of appeal to superior court within 30 days. CP 3.

Believing the order to actually be final, the McLarens initiated appeal by mailing copies of their petition for review via U.S. Mail to all parties in sufficient to be received by the 30-day deadline.

DNR subsequently moved the superior court to dismiss review for lack of jurisdiction for failing to serve the administrative court with a copy. DNR also moved for additional relief of dismissing Alexander McLaren as an appellant. CP 45-108.

The superior court entered an order dismissing review of the case for lack of jurisdiction, and granted the additional relief requested. CP 152-5. McLarens' new counsel attempted to seek a continuance but the attempt was denied. CP 109-135.

The McLarens moved for reconsideration and submitted evidence they mailed copies of their petition for review through the U.S. Mail to the superior court, the administrative court, and opposing party. CP 156-164.

The court denied their motion for reconsideration. CP 165.

This appeal followed.

During the course of this appeal the McLarens mailed copies of their Designation of Clerk's Papers via U.S. Mail to the superior court three times. The first two copies were apparently not received and not acted on by the superior court. The first copy was mailed regular first class; it was not received. The second copy was mailed registered with return receipt requested; it was not received. The third copy was mailed registered with return receipt requested; it was received and acted on by the superior court. During the course of this appeal appellants periodically filed Status Reports with exhibits showing proof of mailing via U.S. Mail to the superior court on each occasion.

D. REPLY ARGUMENT TO RESPONSE

1. Because respondent's brief failed to respond to an issue raised by appellants, respondent has waived and abandoned the issue.

Respondent's brief fails to present any counter-argument to Issue 4 of Appellants' Brief. Issue 4 concerned whether the superior court, after dismissing review of a matter for lack of jurisdiction, could then grant additional relief. The Washington Supreme Court has stated "the rule is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal.

Deshenes v. King County, 83 Wn.2d 714; 521 P.2d 1181 (1974); 21 C.J.S. *Courts* 118 (1940). Respondent failed to counter-argue this point.

Courts generally have held that where a respondent fails to argue (or even sufficiently argue) an issue raised by appellant, respondent is deemed to have waived or abandoned it. *Norton v Sam's Club*, 145 F.3d 114 (2d Cir. 1998) (appellee deemed to have waived issued because appellee's brief mentioned issue only in passing); *Thaddeus-X v Blatter*, 175 F.3d 378, (6th Cir. 1999) (appellees waived by not presenting issue in their brief); *Cf. Blackwell v Cole Taylor Bank*, 152 F.3d 666, (7th Cir. 1998) (appellee's failure to brief constitutes waiver of appellant's factual assertions).

Because respondent failed to address Issue 4 in its response brief, this court should deem respondent to have waived or abandoned this issue, estop respondent from orally arguing this issue, and decide that appellants have prevailed on this issue.

2. <u>The administrative order was not a final order eligible for review because it failed to specify damages which is an integral part of the merits of a case under the Final Judgment Rule test for "finality".</u>

Appellant's brief argues that the superior court lacked jurisdiction to review the administrative order because it wasn't final in that it covered only the liability portion of a bifurcated case and damages still remained to be litigated.

The respondent's brief argues that the order was final because it was labeled "final" and because the process leading to the order involved

discovery, motions, and a five day long hearing (on liability only). The respondent's brief then asserts that appellants can't raise the issue of lack of jurisdiction for the first time on appeal.

Both parties agree that review of administrative orders is limited to *final* orders. The right to administrative review is limited to final action. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 27-33, 785 P.2d 447 (1990); *R/L Assocs. v. City of Seattle*, 61 Wn. App. 670, 674-78, 811 P.2d 971 (1991); *State Dept of Ecology v. City of Kirkland*, 84 Wn.2d 25, 29-30, 523 P.2d 1181 (1974); *Wells v. Olsten Corp.*, 104 Wn. App. 135, 145, 15 P.3d 652 (2001).

But the parties disagree on the test used for determining "finality". Respondent asserts its own self-made, self-serving construct as the test. Appellants reply that the proper test to use is the Final Judgment Rule, a ubiquitous standard used across the country to determine "finality".

When tested against the Final Judgment Rule, the order fails.

a. <u>The order fails the Final Judgment Rule because does not specify damages which is integral to the merits.</u>

Respondent correctly cites Washington case law which states an order is final for judicial review if it "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as the consummation of the administrative process". *State Dep't of Ecology v. City of Kirkland, Wells v. Olsten Corp.*

But respondent then introduces at a self-made test that misconstrues the meaning of "consummation of the administrative process".

Respondent's brief says:

> The Board's Order was the 'the consummation of the administrative process". The Order followed a lengthy administrative proceeding, which included discovery, motions, and ultimately five days of hearing before an administrative law judge. CP 5, n.1. The Board specifically designated its Order as a final order and advised Mr. McLaren of the need to appeal the Order to superior court within 30 days. CP 3. Based on these facts, the Board's Order was indisputably final.

Respondent argues (without a good rationale for why it should be so) that the length in days of the hearing and the allowance of discovery and motions somehow results is a consummated process.

That respondent has misconstrued the meaning can be seen easily by a couple hypothetical examples: If we assume that respondent's meaning of "consummation of the process" is correct, that would mean the board's order might have been ***not*** *final* if the administrative process had been *less* lengthy; or if *no* discovery or *no* motions had occurred; or if the hearing had lasted only *four instead of five* days. (Not to mention that if an admin order were always correct in all respects (the order's erroneous label of "final"), there would be no need for superior court review, right?)

The *proper test* of whether an administrative order is "final" and is the "consummation of the process" is whether the order constitutes the "end of litigation on the merits between the parties and leaves nothing for the court to do but execute on the judgment" – a ubiquitous standard known as the Final Judgment Rule. *Ray Haluch Gravel Co. v Central*

Pension fund of Int'l Union of Operating Eng'rs, __ U.S. __, 134 S. Ct. 773, 187 L. Ed. 669 (2014)("final" decision is one that ends litigation on the merits and leaves nothing left but to execute on judgment); *Catlin v United States*, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945) (decision ending litigation on the merits leaving court only to execute on judgment is final); *Leftbridge v Connecticut State Trooper Officer #1283*, 640 F.3d 62 (2d Cir. 2011) (quoting *Catlin*); *Giles v Campbell*, 698 F.3d 153, (3d Cir. 2012) ("final" decision ends litigation and leaves nothing for court to do but execute on judgment); *Dickens v Aetna Life Ins. Co.*, 677 F.3d 228 (4 th Cir. 2012) (quoting *Catlin*); *United States v Branham*, 690 F.3d 633 (5 th cir. 2012) (order is only final when it ends litigation on the merits and leave nothing to do but execute on judgment); *Armistad v State Farm Mutual Auto. Ins. Co.*, 675 F.3d 989 (6 th Cir 2012) (no final decision until litigation on merits has ended leaving nothing for court to do but execute on judgment); *Palka v City of Chi.*, 662 F.3d 428 (7 th Cir. 2012) (for order to be final, it must end litigation on merits and leave nothing for court to do but execute on judgment); *Gannon Int'l Ltd. V Blocker*, 684 F.3d 785 (8 th Cir. 2012) (for order to be final, it must end litigation on merits and leave nothing for court to do but execute on judgment); *United States v Guerrero*, 693 F.3d 990 (9 th cir. 2012) (appellate jurisdiction depends on decision ending litigation on the merits leaving nothing to do but execute on judgment); *United States v F & M Schaefer Brewing Co.*, 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 721 (1958); *Calderon v GEICO*

Gen. Ins. Co., 754 F.3d 201 (4th Cir. 2014) (judgment not final because court had not found all facts necessary to compute damages); *Accord Zinc v United States*, 929 F.2d 1015 (5th Cir. 1991)(judgment that did not specify damages amount held not final); *Minnesota Dep't of Revenue v United States*, 184 F.3d 725 (8 th Cir. 1999)(amount of money essential element of judgment, but sufficient if judgment specifies means to determine amount due); *Franklin v District of Columbia*, 163 F.3d 625 (D.C. Cir. 1998)(in damages and injunction action, final judgment must declare not only liability but also specify consequences of liability).

Under the Final Judgment Rule, the order fails because it covers only the liability portion of a case while leaving damages undetermined. The order failed to include an award of damages because damages have not yet been litigated because the case was bifurcated. Thus, the order is not the end of litigation on the merits between the parties so as to leave nothing to do but execute on the judgment. A court cannot execute on damages that are not yet determined.

b. The order does not fall within an exception to the Final Judgment Rule to render it reviewable.

A limited exception to the Final Judgment Rule exists where a question that is collateral to the merits remains to be decided, such as attorney fees. *Budinich v Becton Dickinson & Co.*, 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1998) (decision leaving award of attorney fees undecided is appealable); *Barrow v Falck*, 977 F.2d 1100 (7 th Cir. 1992) (lingering dispute about attorney fees did not affect finality of

judgment on merits); *United States ex rel. Shutt v Community Home & Health Care Servs. Inc.*, 550 F.3d 764 (9 th Cir. 2008)(judgment on merits is final and appealable even if lower court retains collateral issue of awarding attorney fees).

The order in this case indicates that the respondent will be entitled to attorney fees and damages. However, it fails to specify the amount of attorney.

If the order solely omitted the amount of attorney fees, the order would fall within the collateral question exception to the Final Judgment Rule because the award of attorney fees is collateral, not integral, to the merits of the case.

The order also omits the amount of damages. Under the Final Judgment Rule an award of damages is integral to the merits of a case. The collateral question exception (available for attorney fees) is not available for damages. Because the order failed to include any actual award of damages which is an integral part of the merits of the case, the order does not satisfy the Final Judgment Rule.

Another limited exception exists for damages under certain conditions. Although damages are integral to the merits of a case under the Final Judgment Rule, an exception exists where the damages are readily determinable in a straightforward ministerial manner by direct resort to an external standard. This exception is applied in welfare and

social security cases where commonly-available financial tables are used to calculate recipients' benefits.

But this exception is not available in this case because damages are not readily determinable in a ministerial manner from an external standard. In this case damages are unique, complicated and disputable. Damages in this case involve the cost of demolishing two ships. There are no tables for calculating the costs involved in ship-breaking. Although vessel moorage is commonplace and typically priced by the liner foot, ship-breaking is uncommon. There are no commonly available tables for ship-breaking that a court can casually consult to calculate damages in a ministerial manner.

Damages in this case will be complicated and disputed. The vessels have steel hulls, aluminum superstructures, and operational engines, gears, and equipment. The cost of labor to break the ships will be off-set by revenue from sales of the high-priced commodity metals aboard and sales of the functioning engines, gears, and equipment. As a result, the amount of damages is not readily determinable from an external standard (if such tables existed), but are unique and complex and will be decided by the administrative court only after litigation.

c. Requiring the order to satisfy the Final Judgment Rule would promote judicial economy and justice.

The purpose of the final judgment rule is to promote justice and judicial efficiency by avoiding piecemeal litigation.

Respondent argues that appellants' contention that an order is not final unless it includes a determination of damages is "antithetical to any meaningful judicial review of agency action" because it would "preclude judicial review of an agency's decision to take custody of a vessel. . . until the vessel has been destroyed or disposed of and all costs for which the owner may be liable [damages] . . . are known". "If that were the case, no owner could ever get judicial review . . . until it was too late to do the owner any good".

Respondent's rationale is flawed in both a practical and legal sense. It is not necessary to destroy or dispose of a vessel to determine the costs of its destruction and disposal. Such costs can best be determined through investigation, competitive bidding, and the adversary process. They can and should be litigated at a sufficiently early time to provide a meaningful opportunity to dispute them.

Contrary to the respondent's assertion, it is antithetical to meaningful justice to do otherwise. In this case appellants' counsel (unbeknownst to them) agreed to respondent's request to bifurcate the case so the hearing on liability would be followed by a "second, later hearing" on damages. As of this date the damages hearing has not occurred. Although there has not been a hearing, the respondent recently destroyed the vessels and billed appellants $1.4 million for the costs. Enclosed as Exhibit A is a letter from respondent claiming the costs. Because the ships were destroyed without notice, appellants were denied a meaningful opportunity

to discover evidence of the reasonableness and accuracy of the costs. There was no opportunity for appellants to arrange surveyors, experts, or competitive bidders to investigate the matter. Nearly two years have elapsed since the administrative court rendered its decision on April 24, 2014, and the hearing on damages has not yet occurred. If and when there is a hearing, appellants will have no evidence to contest the matter. Appellants have been effectively denied the ability to contest. As a result, appellants have been denied due process of law.

Enforcement of the Final Judgment Rule in this case will prevent the order from being reviewed until it becomes "final" by the inclusion of damages. That, in turn, will set a precedent in this type case. It will remove the incentive for the respondent to bifurcate future cases of this type which, in turn, resulting in the loss of opportunity to gain evidence needed to contest damages. It will ensure due process and serve the interests of justice and the public interest in this type case.

d. <u>Jurisdiction may be raised for the first time on appeal.</u>

Appellants' brief raised the issue of jurisdiction for the first time on appeal.

Respondent's brief argues that RAP 2.5(a) precludes raising an issue for the first time on appeal. Respondent's brief also argues that the appellants offer no grounds for which this court should depart from that rule.

Appellants disagree. RAP 2.5 states:

CIRCUMSTANCES WHICH AFFECT SCOPE OF REVIEW

> (a) Errors Raised for First Time on Review. The appellate court ***may*** **refuse to review any claim** of error which was not raised in the trial court. However, a **party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court *jurisdiction*,** (2) failure to establish facts upon relief can be granted, and (3) manifest error affecting a constitutional right.

In summary, the above rule states that an appellate court "may" refuse to hear a newly raised issue but does not mandate refusal. The rule also allows a party to raise lack of jurisdiction for the first time on appeal.

The Washington State Supreme Court has held, as an exception to the general rule that issues may not be raised for the first time on appeal, that a new issue may be raised "when the question raised affects the right to maintain the action". *Bennet v. Hardy*, 113 Wn.2d 912, 784 P.2d 507 (1990); *Maynard Inv. Co. v. McCann*, 77Wn.2d 616, 621 465 P.2d 657 (1970); *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

Maynard involved irregularity in both proof and procedure in a case questioning the rights and duties of various parties to a financial matter. The *Maynard* Supreme Court said:

> In 5 Am.Jur.2d Appeal and Error $$548-551 (1962), it is said:
>
> The ordinary rule that errors not raised below will not be considered on appeal has been treated as subject to an **exception where the matter raised for the first time on appeal was of such a character as to render the judgment of the lower court void, as where the court had no jurisdiction of the subject matter**.
>
> **The principle that an objection not taken in the lower court is not available on appeal or review has been held inap-**

> **plicable where the record discloses a combination of gross irregularities**....
>
> * * *
>
> A reviewing court may consider questions arise for the first time on appeal if necessary **to serve the ends of substantial justice or prevent the denial of fundamental rights**.
>
> * * *
>
> ...courts have frequently recognized that error may be considered for the first time on appeal where the matter in question **affects the public interest.** * * *
>
> Courts should not be confined by the issues framed or theories advanced by the parties **if the parties ignore the mandate of a statute or an established precedent.**

In summary, an issue can be raised for the first time on appeal if there is a question as to jurisdiction, a gross irregularity in the lower court proceeding, to serve the ends of substantial justice, in furtherance of the public interest, or to comport with statutory law or established precedent.

Reasons exist for allowing an issue to be raised for the first time on appeal in this case. The issue now raised on appeal regards the subject matter jurisdiction of the superior court. A gross irregularity was shown when the superior court granted inappropriate relief after acknowledging it lacked jurisdiction. Also, both statute and caselaw preclude review of a decision unless it is final.

Most importantly, the issue now raised for the first time on appeal affects the public interest and would serve to promote justice and prevent the denial of fundamental rights as discussed above.

3. If the administrative order was final and eligible for review, the superior court erred by dismissing review because appellants substantially complied with procedural requirements to vest review

Appellants' brief asserts that their efforts substantially complied with the procedural requirements necessary to vest jurisdiction for review in the superior court.

Respondent's brief counter-argues: A copy of the petition for review must be *delivered* on the administrative court, and mailing doesn't qualify as a means of delivery. Proof of mailing doesn't establish a presumption it was delivered on the court (but it's alright for establishing a presumption of delivery on the opposing party). Appellants' proof of mailing was not a postmark, which is required. Finally, appellants' tender of their proof of mailing at the time of reconsideration was too late.

Appellant replies as follows:

The objective of RCW 34.05.542(2) is to have appeals served on the deciding agency within 30 days of the decision. In *Banner Realty, Inc. v. Dep't of Revenue*, 48 Wn. App. 274, 738 P.2d 279 (1987) (petitioner's appeal dismissed because service on the agency not attempted until three days after the deadline), the court said:

> **Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute.** It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted. What constitutes substantial compliance with a statute is a matter **depending on the facts of each particular case**.

The statute, and the case law construing it, seek to ensure a secure and reliable means is employed to accomplish timely receipt. Compliance

with that 30-day deadline should be available by any reasonable means to ensure timely receipt of the appeal, including appellant's personal delivery, courier delivery, or delivery via a U.S. Mail carrier, UPS, etc.

Respondent argues that service must be accomplished by only *personal delivery*, and mailing is insufficient. Here, both Thomas and Alexander McLaren are appellants, so does personal delivery mean that they each must deliver their own petition for review on the administrative court, or can one rely on the other to serve a joint petition? If one is relying on the other, the other is acting as an agent of the other. If personal service by agent is acceptable, could the McLaren brothers hire a legal messenger service courier to deliver a copy to the administrative court? Note that the McLarens would have to mail a copy of the petition to the legal messenger service. And since they would have to mail it to the legal messenger service, could they just mail it through the U.S. Postal Service which is the official delivery service of the nation and deemed to be reliable for official purposes.

In fact, the McLarens resorted to using the U.S. mail for delivery because of the distance they would have had to drive to serve them. Thomas McLaren lives on the Oregon coast and a round trip drive to deliver them would have taken 2 days to accomplish. Alexander McLaren lives in Anacortes and a round trip drive would have taken 1 long day to accomplish. As a result, they sent the copies through the U.S. mail.

By mailing the petition through the U.S. Mail, the postal courier became their agent for the purpose of delivering their petition to the administrative court. Their payment for the service was the cost the postage paid to mail the petition.

If the mailed petition had been received by the administrative court by the deadline, no one would be complaining about the means of delivery via the U.S. Mail. If the federal mail service is deemed to be a reliable means of delivery, the McLarens should be deemed to have met the criteria for substantial compliance.

Therefore, the problem lies not with the particular courier used, but with the time it took to reach the recipient. The McLarens mailed copies of their appeal via U.S. Mail to the admin court, adverse party, and superior court at the same time on the same day. They mailed them 4 days early. They mailed them in sufficient time (allowing more than 3 days for delivery) for all addressees to receive them by the 30-day deadline. The agency decision occurred on April 24, 2014, and the 30th day fell on Saturday, May 24, pushing the deadline to Monday, May 26. The McLaren mailed copies to all addressees on May 22, 2014, allowing four days mailing time.

There is good proof appellants mailed the copies, and proof they mailed them 4 days early. Ironically, because Alexander McLaren was one stamp short, he went to the U.S. Post Office in Anacortes and bought a single stamp to complete the mailing to all parties. The record on appeal

contains the appellant's declaration and exhibits on the matter. Appellant's declaration, at CP 156-7, explains his actions in the mailing matter. Exhibits to his declaration, CP 158-9, show copies of all three addressed envelopes, two of which have stamps and one without a stamp. **Page CP 160 of the record shows a postal receipt dated May 22, 2015, for the purchase of one "Forever Swallow PSA" stamp because appellant had only two stamps and needed a third stamp to complete mailing of all three envelopes to all three addressees. The receipt shows he bought the stamp on May 22 from the U.S. Post Office in Anacortes which is where he then mailed all three envelopes.**

Respondent asserts that only a "postmark" is sufficient to establish a presumption of mailing. However, it is **unlawful** for a patron to request, or a postal worker to allow, return of **postmarked letter** to be photo-copied. Once a letter has been placed in the mail, it must remain there until delivered to the recipient.

The problem lies in the fact that the admin court did not receive its copy while the other recipients did receive their copies. The superior court is believed to have received its copy on time. Respondent claims to have received its copy one day late. Respondent asserts the administrative court never received its copy.

The court of appeal is invited to consider the prospect that the U.S. Postal Service might have failed to deliver the missing copy to the admin court. (*It happens!*) As stated in the revised Facts (above) in this Reply,

during the course of *this appeal* the McLarens mailed copies of their Designation of Clerk's Papers via U.S. Mail to the superior court three times. The first copy was mailed regular first class and was apparently not received by the superior court. **The second copy was *mailed registered with return receipt requested* and apparently not received. A Status Report was filed with this appellate court containing copies of the registered, return-receipt documents.** Because the superior court failed to receive that copy, another copy was again mailed registered with return receipt requested; it was received and acted on by the superior court. The Status Reports with attached exhibits filed in this appeals case show the efforts made to mail via U.S. Mail to the superior court on each occasion.

Finally, appellants' tender of their proof of mailing at the time of reconsideration was admittedly late, but its tardiness should not be considered to be fatal. Appellants had retained new counsel midway through the admin hearing. A review of the record will show he was appearing in the case. It was his duty to timely respond to respondent's motion to dismiss. He did not timely respond, unbeknownst to appellants. When they learned of the omission, they responded as quickly as possible.

F. CONCLUSION

For the foregoing reasons, the administrative court order lacking a specification of damages which is an integral part of the merits of the case fails to satisfy the finality test of the Final Judgment Rule and, as a result, is not a final judgment eligible for review by the superior court. The

superior court order on this matter should be reversed in its entirety and no prejudice should accrue to appellants/petitioners.

Respectfully Submitted and Dated this ____ day of February 2015.

Alexander McLaren Thomas McLaren

A copy of this brief was sent to opposing party/counsel this date.

Alexander McLaren Thomas McLaren