NO. 945683

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 74638-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MITCHELL KANE,

Appellant,

v.

BETHANY COMMUNITY CHURCH,

Respondent.

APPELLANT'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS' DECISION

Mitchell Kane, plaintiff in the trial court and appellant in the Court of Appeals, petitions for review of the March 27, 2017 unpublished decision in Mitchell Kane v. Bethany Community Church and Jonathon Hilton. [Appendix A] The Court of Appeals denied a Motion for Reconsideration on April 19, 2017. [Appendix B]

The claim against the City of Seattle has been dismissed. Jonathon Hilton remains a defendant and the case was stayed pending appellate review

B. ISSUES PRESENTED FOR REVIEW

1. What evidence of the degree of a driver's intoxication is necessary to establish on summary judgment that visual obstruction of a stop sign could not have been found to be a contributing cause of the driver's failure to stop for the stop sign?

2. Does the holding in Atherton Condominium Apartment Owners Association v. Blume Development Company, 115 Wn.2d 506 (1990), that "we do not consider the nuisance claim apart from the negligence claim" deny a party the right to allege in its

Complaint that unlawful obstruction of a stop sign is (1) negligence and also (2) a violation of the nuisance statute? (RCW 7.48.010)

C. STATEMENT OF THE CASE

The Summary Judgment Issue

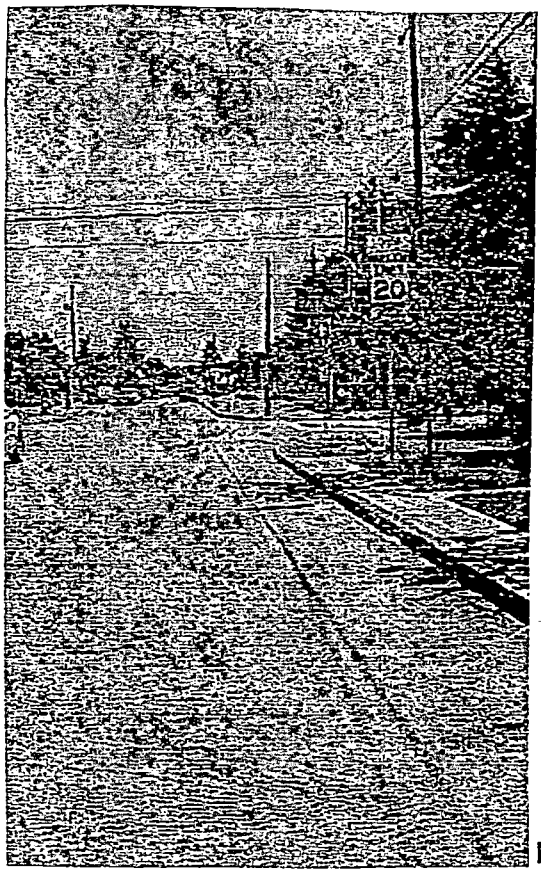
The subject traffic accident happened around 11:30 on a July 2014 night, in the Green Lake neighborhood of Seattle. (CP 136) Defendant driver Jonathan Hilton failed to obey a visually obstructed stop sign and seriously injured appellant Mitchell Kane who was riding home from work on his moped. (CP 136) Kane was protected from cross traffic by a stop sign facing Hilton at the intersection of Stone Avenue North and North 80th Street. (CP 136)

Driver Hilton was unfamiliar with the neighborhood. (CP 295, 296, 297) His driving was further complicated by two unlawful acts. First, he was impaired to an uncertain degree with a blood alcohol reading of .11. (CP 492-498) Second, the stop sign he ran was visually obstructed by the untrimmed branches of a street tree owned by respondent Bethany Community Church. (CP 493)

1. Evidence of the Stop Sign Obstruction

Evidence established that the stop sign was obstructed by tree branches that violated both the Seattle Municipal Code (SMC

10.52.030 and 15.43.040) and WSDOT minimum standards. (CP 494, 495)



HIDDEN STOP SIGN (CP 464)

Declarations from competing experts each acknowledged the hazard caused by the branches obstructing the stop sign. Plaintiff's expert said the sign was not visible from the distance at which Hilton would have needed to brake to avoid the collision. (CP 494, 495) An opposing expert admitted measurements showed

that an emergency stop was necessary to stop within the available sight distance from the sign. (Decision p. 5, l. 1)

Hilton testified that he slammed on his brakes as soon as he saw the sign, but too late to avoid the accident. (CP 294-295, 297)

There was no evidence or argument that Hilton would not have stopped for the stop sign had it been visible for the distance required by law.

2. Evidence of the Effect of the Alcohol

As noted in the Court of Appeals' decision, evidence of the effect of alcohol on Hilton's driving ability included that he had driven carefully and obeyed all traffic signs while driving more than 15 miles through a combination of residential and commercial streets and on the freeway. (CP 348-349) He had last properly stopped for a stop sign no more than two blocks before the accident. (CP 349-350) The results of field sobriety tests were mixed. "Walk and Turn" and "One Leg Stand" tests were within normal limits and Hilton's balance was excellent." (CP 66) Verbal responses were affected by his stuttering speech impediment. (CP 65)

3. Evidence Relied Upon to Grant Summary Judgment

To eliminate the tree branches as a contributing cause of Hilton's failure to stop, the Court of Appeals' decision relied entirely on variations of Hilton's statement that "I didn't see the stop sign until I got to it; I remember trees being there but currently have no recollection of whether the trees obscured my vision." (Decision p. 3, l. 6-8)

The Court of Appeals pointed out that Hilton's "lack of recollection" of the branches was the deciding factor in the trial courts ruling. The decision explained:

> **The trial court granted the motion based on Hilton's testimony that "he didn't know if the trees obstructed his vision and he had no clear memory that they did, in fact obstruct his vision."**
>
> (Decision, p. 4, l. 7-9)

The Court of Appeals adopted the same grounds for summary judgment dismissal. The decision relied on Hilton's "lack of recollection" as the only evidence cited in support of summary judgment. This is both remarkable and unmistakable when reading the two full pages of the decision that are devoted entirely to repeating and analyzing evidence showing Hilton lacked

recollection of whether or not the trees obstructed his vision of the stop sign. (Decision p. 3, l. 4 through p. 4, l. 2 and p. 5, l. 7 through p. 6, l. 5) On that basis alone the Court of Appeals concluded, "we do not know that the diminished visibility of the stop sign was a contributory cause of Hilton's failure to stop." (Decision, p. 7, l. 17-19) The "lack of recollection" of defendant Hilton is not affirmative proof that overwhelms contrary evidence of the degree of obstruction.

The Right to Plead Violation of the Nuisance Statute

A month before the summary judgment motion was heard, and eight months before the trial date, the trial court denied Kane's motion to amend his complaint to add an allegation that the obstructing branches also constituted a statutory public nuisance. (CP 198-200) The Order Denying Motion to Amend failed to state the trial court's reasoning (as required by Watson v. Emard, 165 Wn. App. 694,702 (2011)). However, it was Bethany's argument that the case of Atherton Condominium Apartment Owners Association v. Blume Development Company, 115 Wn.2d 506 (1990), ruled out pleading a statutory nuisance claim in addition to a negligence claim because of the Atherton holding that "In

Washington, 'a negligence claim presented in the garb of nuisance' need not be considered apart from the negligence claim." (Brief of Respondent, p. 24).[1] The Court of Appeals did not address this issue because the subsequent dismissal of the complaint made the nuisance claim futile. (Decision, p. 8, l. 10)

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' Decision is Contrary to Supreme Court Decisions on Burden of Proof for Summary Judgment

The Court of Appeals' decision fails to apply the burden of proof required of a moving party to establish a right to judgment as a matter of law.

> **Summary judgment is appropriate only if "there is no genuine issue as to any material fact: and "the moving party is entitled to a judgment as a matter of law" CR 56c. All facts must be considered in the light most favorable to the nonmoving party. *Vallandigham*, 154 Wn.2d at 26. Summary Judgment is granted only if given the evidence, reasonable persons could reach only one conclusion. ID. The moving party bears the burden of showing that there is no genuine issue of material fact. ID. If this burden is satisfied, the nonmoving party must present evidence demonstrating material fact. ID. Summary judgment is appropriate if the nonmoving party fails to do so.**
>
> Watson v. Boeing Co., 181 Wn.2d 391,395 (2014) [Emphasis Added]

[1] Given the date of the Order, the ruling could not have been based on grounds of prejudice or of futility.

Bethany' failed to meet this burden. Bethany's only proof of entitlement to summary judgment was that: (1) Hilton's driving was affected to an unknown degree by a blood alcohol level of .11 and (2) that Hilton could not recall whether the tree branches were the reason he failed to see the stop sign sooner. This does not even meet a moving party's initial burden on summary judgment.

As to the alcohol – Hilton's judgment and reaction time were undoubtedly affected to some degree and he is responsible for that negligence. However, individual reactions to alcohol vary to such a degree that blood alcohol tests alone do not, as matter of law, establish the *degree of impairment*.

> **"A person's sobriety must be judged by the way she appeared to those around her, not by what a blood alcohol test may subsequently reveal."**
>
> Wilson v. Steinbach, 98 Wn.2d 434 (1982).

It is uncontested that the only stop sign that Hilton did not obey in more than 15 miles of city driving was the one that was unlawfully obscured by Bethany's tree branches. This alone supports an inference that obstruction of this particular sign contributed to Hilton's failure to see the sign and stop as directed. There is good

reason to conclude that alcohol was not the sole cause of Hilton's failure to stop.

As to Hilton's personal lack of recollection of whether or not the branches obstructed his view, this is not proof one way or the other. At best, he simply did not recall. This "evidence" does not reach the level to absolve Bethany as a matter of law.

When the facts are "considered in the light most favorable to the non-moving party" Kane has shown he has a fundamental right to a jury trial on the issue of Bethany' liability.

2. The Court of Appeals' Decision Deprived Appellant of His Constitutional Right to a Jury Trial on a Material Issue of Fact

> **The object and function of the summary judgment procedure is to avoid a useless trial, however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.**
>
> Balise v. Underwood, 62 Wn.2d 195, 199 (1963).

The Court of Appeals' analysis skipped over the initial requirement that Bethany prove, as a matter of law, that no reasonable jury could find that obstruction of the stop sign was a contributing cause of Hilton's failure to stop.

Even if Bethany had made an initial showing sufficient to support summary judgment, the Court of Appeals decision provides a solid list of contrary evidence to defeat summary judgment. The decision finds:

> **As evidence that the obscuring branches caused the accident, Kane submits the following: Hilton said that he did not see the sign in time to stop; Hilton's passenger stated that the tree blocked the sign; an expert witness presented by Kane said that the sign was not visible from the distance at which Hilton would have needed to brake to avoid the collision; another expert's measurements showed that an emergency stop was necessary to stop within sight distance. There was evidence that Hilton, notwithstanding his intoxication, had just successfully driven over 15 miles through a mix of residential and commercial streets and on the freeway and had stopped at all stop signs, including one just 2 blocks before the accident intersection.**
>
> Decision p. 4, l. 20-24

Standing alone, this passage from the Court of Appeals' decision lists solid evidence that the effect of the visual obstruction of the stop sign is a material issue of fact. It is a factual issue that cannot be resolved by Bethany's evidence that (1) Hilton's driving was impaired to an uncertain degree and (2) that Hilton did not recall one way or the other whether the branches were a reason for his delayed observation of the sign.

In this case, a trial is "not useless, but is absolutely necessary." Kane has a constitutional right to have this issue decided by a jury.

Clarification is Needed on Whether a Complaint Can Contain Both a Negligence Claim and a Statutory Nuisance Claim

The trial court denied the Motion to Amend the Coplaint to add a nuisance claim. This was apparently based on Bethany's argument of the holding in Atherton Condominium Apartment Owners Association v. Blume Development Company, 115 Wn.2d 506, 527 (1990), that "In Washington a 'negligence claim presented in the garb of nuisance' need not be considered apart from the negligence claim".

The trial court's action in this case illustrates how the Atherton holding can be taken out of context and misapplied. Official comments to WPI 380.00 touch briefly on avoiding confusion from the Atherton language when instructing a jury, but gives no guidance on pleading both negligence and nuisance on the same facts.

The trial court's ruling failed to recognize that a negligence claim requires proof of an unreasonable act. However, a nuisance

claim can result in strict liability. Further, a nuisance claim also supports equitable relief. (RCW 7.48.250)

Peterson v. King County, 45 Wn.2d 860, 863 (1954) included the following observation 55 years ago:

> **The attempt frequently made to distinguish between nuisance and negligence, for example, is based on a mistaken emphasis upon what the defendant has done rather than the result which has followed, and overlooks the well established fact that negligence is merely one type of conduct which may give rise to a nuisance." Prosser, Torts, 553 (1941).**

The language in Atherton should be revisited and placed in context to avoid the literal application to pleading practice argued by Bethany in this case.

E. CONCLUSION

Appellant asks the Supreme Court to accept review of the Court of Appeals' decision, to reverse that opinion, to remand this case for trial after allowing amendment of the Complaint to allege both negligence and nuisance claims.

Respectfully submitted this 19th day of May 2017.

LAW OFFICE OF PETER J. NICHOLS

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APPENDIX - 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MITCHELL KANE, Appellant, v. CITY OF SEATTLE, a municipal corporation, JONATHON HILTON, Defendants, and BETHANY COMMUNITY CHURCH, Respondent.	No. 74638-3-I DIVISION ONE UNPUBLISHED OPINION FILED: March 27, 2017

BECKER, J. — Appellant Mitchell Kane was hit by a drunk driver at an intersection near Bethany Community Church. Kane sued Bethany for negligence, alleging that the stop sign at the intersection was obscured by branches on a tree belonging to the church. The trial court correctly dismissed the suit on summary judgment for lack of proof that the driver's failure to stop was caused by the obscuring branches.

Summary judgment orders are reviewed de novo. Farmer v. Davis, 161 Wn. App. 420, 433, 250 P.3d 138, review denied, 172 Wn.2d 1019 (2011). Appellate courts engage in the same inquiry as the trial court. Highline Sch. Dist. No. 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary

judgment is proper when, viewing all evidence and available inferences in favor of the nonmoving party, there are no genuine issues of material fact. CR 56(c); Highline, 87 Wn.2d at 15. If the plaintiff fails to establish an essential element of his case, the court should grant summary judgment; a complete failure of proof concerning an essential element renders all other facts immaterial. Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 779-80, 133 P.3d 944, review denied, 158 Wn.2d 1017 (2006).

Declarations and exhibits submitted to the trial court establish the underlying facts, which the parties do not dispute. Around 11:30 on a July night in 2014, Kane was driving his moped in the Green Lake neighborhood of Seattle. While crossing eastbound through the intersection of Stone Avenue North and North 80th Street where he had the right of way, Kane was struck by a car moving southbound. He suffered a broken leg and pelvis and injuries to his head and chest.

The southbound driver, Jonathan Hilton, told police that he failed to stop at a stop sign before proceeding into the intersection. Hilton had a Breathalyzer reading of .116. He later pled guilty to vehicular assault.

Bethany Community Church is located at the intersection where the accident occurred. Bethany owns a crabapple tree on Stone Avenue. Photographs show that at various points on Hilton's approach to the intersection, the tree's branches obscured the stop sign that faced him.

Kane sued Bethany along with Hilton and the city of Seattle. Kane alleged that Bethany breached a duty to maintain the tree so that the branches did not

interfere with the ability of drivers using the street to see the stop sign. Kane claimed that his damages were a direct and proximate result of Bethany's negligence.

During discovery, the city directed an interrogatory to Hilton asking him to describe "any facts or circumstances you believe contributed to cause the incident." Hilton responded, in part, "I didn't see the stop sign until I got to it; I remember trees being there but currently have no recollection of whether they obscured my vision."

Hilton's testimony at a deposition taken on July 28, 2015, was consistent with this response. He said, "So as you are coming up to the stop sign, I didn't see it as I got up to it." He explained that his passenger "pointed out that there is a stop sign. So that's when I looked over and saw it and went to go slam on my brakes and then that's when the accident happened." Hilton testified that his front tires were already past the stop sign when he looked up and saw it.

During another deposition on August 18, 2015, counsel for Kane asked Hilton to review a photograph of the accident scene. Hilton acknowledged that based on the photograph, it appeared that a tree branch would have blocked his view of the stop sign at a certain point. But later on in the deposition, he testified that the stop sign is visible "once you get closer to it." Counsel for Bethany asked Hilton, "is it fair to say as we sit here today, you don't know why you missed the stop sign on July 9, 2014?" He responded, "Yeah. I would say it's safe to say that I don't know why." When asked "you cannot testify with any degree of certainty . . . that there were branches or trees or foliage of any sort

obstructing the stop sign leading you to not stop, is that a correct statement?," he answered "Well, yeah, I would say it's a correct statement."

Bethany moved for summary judgment in September 2015, arguing in part that Kane lacked proof of causation. Bethany maintained that the sole proximate cause of the accident was Hilton's failure to abide by the rules of the road. Kane responded that the obscuring branches "eliminated the opportunity for Hilton to see and react to the sign in time to stop." The trial court granted the motion based on Hilton's testimony that "he didn't know if the trees obstructed his vision and he had no clear memory that they did, in fact, obstruct his vision." Kane appeals.

One element of a negligence claim is causation. Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 378, 972 P.2d 475 (1999); Little, 132 Wn. App. at 780. The plaintiff must establish that he would not have suffered harm but for the defendant's negligent conduct. Little, 132 Wn. App. at 780.

Whether the plaintiff has shown cause in fact is usually a question for the jury. Little, 132 Wn. App. at 780. "But factual causation may become a question of law for the court if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion." Little, 132 Wn. App. at 780, citing Daugert v. Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985).

As evidence that the obscuring branches caused the accident, Kane submits the following: Hilton said that he did not see the sign in time to stop; Hilton's passenger stated that the tree blocked the sign; an expert witness presented by Kane said that the sign was not visible from the distance at which

Hilton would have needed to brake to avoid the collision; another expert's measurements showed that an emergency stop was necessary to stop within sight distance. There was evidence that Hilton, notwithstanding his intoxication, had just successfully driven over 15 miles through a mix of residential and commercial streets and on the freeway and had stopped at all stop signs, including one just 2 blocks before the accident intersection.

This evidence is not proof that the reason Hilton failed to stop at the stop sign on 80th was that he could not see it. Hilton repeatedly testified that he does not know why he did not stop.

Kane contends that in the deposition on August 18, 2015, when Hilton was shown photos of the intersection taken the day after the accident, he "identified the tree branches as the reason he did not see the sign in time to stop." Actually, Hilton said that in the photo, the tree was obscuring the view of the stop sign "to where I wouldn't be able to see it."

> [HILTON:] Seen from right here, it definitely, you know, looks like it is obstructing the view. So yes.
> [PLAINTIFF'S COUNSEL:] Could you clarify what you mean by, "it's obstructing the view?"
> [HILTON:] Yeah. It is obstructing the view of the stop sign to where I wouldn't be able to see it.
> . . . .
> [PLAINTIFF'S COUNSEL:] When you say it's obscuring my view of the stop sign, what are you referring to?
> . . . .
> [HILTON:] I am referring to the tree.

Hilton's subjunctive observation ("I wouldn't be able to see it") does not establish causation. It is not evidence that the tree prevented him from seeing the sign in time to stop. To say that the tree would have obscured the stop sign

at the vantage point shown in a photograph is not inconsistent with, and does not overcome, Hilton's unequivocal testimony that he does not know why he failed to stop. Maybe he would have noticed the stop sign earlier if the branches had been properly trimmed, and maybe he would have stopped before he got to the intersection. But speculation does not create an issue of material fact. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 12, 721 P.2d 1 (1986). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. Little, 132 Wn. App. at 780; Marshall, 94 Wn. App. at 377.

A comparable case is Kristjanson v. City of Seattle, 25 Wn. App. 324, 606 P.2d 283 (1980). The plaintiff sustained injuries in a car crash. Kristjanson, 25 Wn. App. at 324. The other driver, who was impaired, was rendered unconscious by the collision and had no recollection of it. The plaintiff sued the city for failing to provide adequate sight distance and adequate signage on the road where the accident occurred. Kristjanson, 25 Wn. App. at 324. A curve warning sign facing the impaired driver was partially obscured by foliage and an advisory speed sign was totally obscured by foliage. Kristjanson, 25 Wn. App. at 326. This court affirmed the order dismissing the suit on summary judgment for lack of proof of causation. "At most, Kristjanson's contentions are that, given additional sight distance, he *might* have reacted in a way which could have avoided the collision" and the other driver "*might* have heeded warning signs to drive carefully." Kristjanson, 25 Wn. App. at 326. Such contentions can only be characterized as "speculation and conjecture." Kristjanson, 25 Wn. App. at 326.

Recovery cannot be based on a claim of what *might* have happened. Kristjanson, 25 Wn. App. at 326.

Kane does not show how his case is materially different from Kristjanson. Another analogous case is Little, 132 Wn. App. 777. The plaintiff was injured on a job site. Little, 132 Wn. App. at 778. The circumstances suggested that he had fallen off a ladder, but he had no memory of what happened and no one witnessed the accident. Little, 132 Wn. App. at 778. He sued Countrywood, the company he had been working for. Little, 132 Wn. App. at 779. Summary judgment in favor of the company was affirmed for lack of proof that the accident was more probably than not caused by Countrywood's violations of safety standards. Although it was possible to "speculate that the ladder was not properly secured at the top or that the ground was unstable," no one, including Little, knew how he was injured. Little, 132 Wn. App. at 782.

Under Little and Kristjanson, the evidence that Kane relies on is inadequate to establish causation. Assuming that Bethany was negligent for failing to trim the tree, all we know is that an intoxicated driver failed to stop at an intersection where the tree branches made it difficult to see the stop sign. We do not know that the diminished visibility of the stop sign was a contributing cause of Hilton's failure to stop. Kane's negligence claim fails in the absence of proof that the alleged breach caused his damages.

When Bethany moved for summary judgment, Kane moved to amend his complaint to add a nuisance claim against Bethany. The court denied the motion, and Kane assigns error to this decision as well.

In deciding whether to permit an amendment, a court may consider the probable merit or futility of the requested amendments. Doyle v. Planned Parenthood of Seattle-King County, 31 Wn. App. 126, 131, 639 P.2d 240 (1982).

If an alleged nuisance results from allegedly negligent conduct, rules of negligence apply. Hostetler v. Ward, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985), review denied, 106 Wn.2d 1004 (1986). A court need not consider separately a "negligence claim presented in the garb of nuisance." Hostetler, 41 Wn. App. at 360; see also Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 527, 799 P.2d 250 (1990).

Kane asserts that Bethany's failure to trim its trees created a public nuisance. This is the same conduct offered to support the claim that Bethany was negligent. The court did not abuse its discretion in denying Kane's request to add the nuisance claim because it was futile.

Affirmed.

Becker, J.

WE CONCUR:

Spearman, J.

Schindler, J.

APPENDIX - 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MITCHELL KANE, Appellant, v. CITY OF SEATTLE, a municipal corporation, JONATHON HILTON, Defendants, and BETHANY COMMUNITY CHURCH, Respondent.	No. 74638-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Mitchell Kane, has filed a motion for reconsideration of the opinion filed on March 27, 2017. Respondent, Bethany Community Church, has not filed an answer to appellant's motion. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 19th day of April, 2017.

FOR THE COURT:

Becker, J.

Judge

CERTIFICATE OF SERVICE

Linda Voss, declare under penalty of perjury, that on date noted below, she caused to be delivered a copy of Appellant's Petition for Review via Email and Legal Messenger to

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Signed in Seattle, WA this 19th day of May 2017

Linda Voss
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