NO. 95974-9

SUPREME COURT OF THE STATE OF WASHINGTON

ACCESS THE USA., LLC, a Washington Limited Liability Company; 520 BRIDGE REPLACEMENT FUND II, LP, a Washington Limited Partnership; and PREMIER 520 BRIDGE REPLACEMENT FUND II, LP, a Washington Limited Partnership,

Appellants,

v.

THE STATE OF WASHINGTON, a government entity; THE OFFICE OF THE TREASURER, a government entity and agency of the State of Washington; and CITIGROUP GLOBAL MARKETS, a New York corporation,

Respondents.

STATE DEFENDANTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Access the USA, LLC (Access) asks this Court to accept review based on its disagreement with longstanding case law about overlapping privilege, an argument the Court of Appeals expressly did not reach. Access then fails to address the alternative basis for dismissal of its tortious interference claim, the basis the Court of Appeals actually relied upon. Having failed to establish any error or basis for review, this Court should deny Access's Petition.

At summary judgment the State Defendants argued two alternative bases for dismissal of Access's tortious interference claim: first, Access failed to establish the elements of that claim; and, second, even if Access proved the elements, the State Defendants' comments were privileged. Without specifying which of those bases was more persuasive, the trial court granted summary judgment to the State Defendants.

The Court of Appeals affirmed the trial court's dismissal of the tortious interference claim, and explained the basis for its holding: Access failed to establish two elements of its tortious interference claim. Slip Op. at 26. The Court of Appeals correctly held that basis is dispositive and therefore expressly *did not* address the applicability of privilege to the State Defendants. "[W]e need not reach the State's alternative argument regarding privilege in this setting." Slip Op. at 25.

As to the State Defendants, it is *only* the privilege issue—the issue the Court of Appeals did not address—to which Access assigns error in its Petition. Petition, 1. Access does not appeal the actual basis for the Court of Appeal's affirmance—Access's failure to establish the elements of its tortious interference claim. Access has failed to show the Court of Appeals erred, and it has not met any of the other requirements for review in RAP 13.4(b). This Court should deny the Petition.

II. COUNTERSTATEMENT OF THE ISSUES

The Petition should be denied. However, if review were granted, the issue would be whether the Court of Appeals correctly affirmed the trial court's dismissal of a tortious interference claim against the State Defendants because Access did not present sufficient evidence to overcome summary judgment on at least two elements of that claim.

III. COUNTERSTATEMENT OF THE CASE

At issue are Access's attempts to purchase state bonds relating to the SR 520 bridge project. When selling state bonds such as those at issue here, the State Defendants follow established, proven procedures. CP 1029. The State sells its bonds to competitively selected underwriters, and the underwriters, not the State, decide to which investors they will sell the bonds. CP 1030, 1114. The underwriters here, including the lead

underwriter (Co-Respondent Citigroup), all had a long history of working with Washington State bond offerings. CP 1117-18, 1122-23, 1160.

Access intended to purchase state bonds as an allegedly qualifying investment that could eventually lead to resident visas for foreign nationals through the federal EB-5 visa program. CP 1585. To advance that plan, Access successfully purchased a first round of SR 520 bonds in October 2011, when J.P. Morgan was the lead underwriter. CP 1198, 1310-14. Prior to that bond offering, state employees learned of Access's interest in the bonds and briefly communicated with representatives of J.P. Morgan about the standard vetting process for Access. CP 1108-13. Ellen Evans, the Deputy Treasurer for Debt Management at the Office of the State Treasurer, initiated that communication. *Id.*

In that conversation, Ms. Evans mentioned she did not understand how the State's bonds would fit within the EB-5 program because there was little risk in buying Washington general obligation bonds, which are highly rated, and an investor's purchase of these bonds was not creating jobs (risk and job creation are two qualifying factors in the EB-5 program). CP 1112-13. Accordingly, Ms. Evans encouraged J.P. Morgan to perform due diligence on Access and its investors. CP 1030, 1132-33.

Access was interested in purchasing a second round of SR 520 bonds, which were set for offering in May 2012, in which Citigroup would

be the lead underwriter. CP 640, 1030. To be qualified as a potential purchaser allowing it to place an order for the SR 520 bonds from Citigroup, Access first had to open an account with Citigroup, which meant going through Citigroup's established months-long on-boarding process that is intended to assure compliance with federal money-laundering and other regulations. CP 1156-61, 1165-68, 1181-85, 1189.

In her role as Deputy Treasurer for Debt Management at the Office of the State Treasurer, Ms. Evans communicated with employees of Citigroup ahead of the May 2012 bond sale, just as she had in the October 2011 bond offering. CP 1118-21. Ms. Evans still did not understand the appropriateness of state bonds for the EB-5 program because of the low risk and because an investor's purchase was not creating jobs. CP 1114-17. Ms. Evans was also wary of the potential impact that an EB-5 investment could have on the bond offering and, in particular, whether EB-5 investors owning state bonds could increase volatility in the state bond market. CP 1112-13. Ms. Evans expressed her concerns in large-group meetings at which Citigroup representatives were present. CP 1030, 1116-17. Furthermore, Ms. Evans had been interviewed by FBI agents about the SR 520 financing in spring 2012, which added to her own concerns. CP 1118-19, 1030.

Access failed to complete the on-boarding process, its bond order was not placed, and Access did not purchase bonds in May 2012. CP 1263-64, 1295-96, 1324, 1327-28, 1497-98, 1510, 1512-14. After it failed to purchase these bonds, Access filed suit, claiming that the State Defendants had violated a variety of statutes. CP 2. Ultimately, the federal district court (after removal) and state superior court (to which the remaining State law claims were remanded) dismissed all of Access's claims. CP 30, 476-77, 2140-41. In the Court of Appeals, Access appealed only two claims against the State Defendants: tortious interference and negligent misrepresentation. In this Court, Access seeks review only of its tortious interference claim. Petition at 1.

The Court of Appeals concluded that Access failed to meet two elements of its tortious interference claim. Slip Op. at 26. Instead of challenging that conclusion, Access argues that this Court should accept review to overturn long-standing legal precedent regarding privilege. Petition at 9-12. Because Access failed to meet the elements of its claim, the Court of Appeals found it unnecessary to address the State's alternative privilege argument. Slip Op. at 25. The Court of Appeals' decision does not rest on privilege, and the issue raised in the Petition—"Does the privilege relied upon by the Court of Appeals conflicts [*sic*]

with Supreme Court precedence?"—does not accurately reflect the Court of Appeals decision.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Access argues that the Court of Appeals' decision conflicts with this Court's precedent and involves a matter of substantial public interest supporting review under RAP 13.4(b)(1) and 13.4(b)(4). As explained below, the decision does neither. Moreover, while Access focuses exclusively on the issue of privilege, privilege was an independent and secondary basis upon which the trial court *could have* granted summary judgment. The Court of Appeals, however, neither analyzed nor used the issue of privilege to affirm dismissal. Regardless, nothing in the trial court's order of dismissal nor the unpublished Court of Appeals opinion conflicts with this Court's decisions, and this Court should deny review.

A. Even if This Court Were to Reach the Privilege Issue Raised in the Petition, the Tortious Interference Claims Are Properly Dismissed on That Basis Alone

Even had Access been able to establish the elements of a tortious interference claim, that claim could not have survived summary judgment because the State Defendants' actions were privileged as a matter of law. This Court has long recognized the availability of a privilege defense in tortious interference claims. *See, e.g.*, *Calbom v. Knudtzon*, 65 Wn.2d 157, 162, 396 P.2d 148 (1964). Moreover, statements that are privileged under

the law of defamation are equally privileged under the law of interference with prospective economic advantage. *Lawson v. Boeing Co.*, 58 Wn. App. 261, 269, 792 P.2d 545 (1990).

1. State Defendants' comments were absolutely privileged

High ranking state officials are privileged to make statements related to their official duties. This privilege has been applied many times to claims that government officials harmed plaintiffs through their comments. A claim of tortious interference with prospective advantage and a claim of defamation are both subject to this defense. *Stidham v. State, Dep't of Licensing*, 30 Wn. App. 611, 615-16, 637 P.2d 970 (1981). "Courts allow privilege to invade a plaintiff's interest in furtherance of a social interest of greater public import." *Id.* at 616.

The *Stidham* Court explained this social interest by quoting *Barr v. Matteo*, 360 U.S. 564, 571, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959):

> The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Stidham, 30 Wn. App. at 616. In keeping with this policy, Washington courts have adopted an absolute privilege for executive and administrative officers, including agency heads, and their assistants. *See Gold Seal*

Chinchillas, Inc. v. State, 69 Wn.2d 828, 420 P.2d 698 (1996); *Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572, 578, 811 P.2d 231 (1991); *Stidham*, 30 Wn. App. at 612. As here, the privilege applies if the acts are within the scope of the official's duties and have more than a tenuous relation to that person's official capacity. *Stidham*, 30 Wn. App. at 614.

It is undisputed that Ellen Evans, as Deputy Treasurer, is a high-ranking State official. *See* CP 1072, 1073 (Mattox testifying that Ms. Evans "is a person of high authority" and agreeing that she is "a state executive with statewide responsibilities"). CP 1028. And RCW 43.08.120 defines the Deputy Treasurer as a high-ranking executive in State government with broad authority: "The state treasurer may appoint an assistant state treasurer, who shall have the power to perform any act or duty which may be performed by the state treasurer . . . ." Whatever comments Ms. Evans may have made to the underwriters were made in her official position as a "high authority." It is entirely consistent with precedent to hold the Deputy Treasurer's expressions of concern in this case to be absolutely privileged.

2. If not absolutely privileged, State Defendants' comments were qualifiedly privileged

If not absolutely privileged, State Defendants' statements were qualifiedly privileged because even low-ranking public officials enjoy a

qualified privilege to speak freely in performing their duties. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 569, 27 P.3d 1208 (2001); *Restatement (Second) of Torts* §598A (1977). Unlike the absolute privilege described above, a qualified privilege can be overcome if a plaintiff can show actual malice—i.e., the speaker's knowledge that the statement was false or the speaker's reckless disregard as to its truth or falsity. *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 703, 24 P.3d 390 (2001), *rev'd on other grounds*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

A plaintiff must prove actual malice by clear and convincing evidence. *Duc Tan v. Le*, 177 Wn.2d 649, 668, 300 P.3d 356 (2013). Whether evidence is sufficient to show actual malice is a question of law. *Id.* at 668-69. In this case, there has never been any evidence of actual malice, much less convincingly clear evidence. Access has complained only that Ms. Evans did not confer with Access as it would have hoped. *See* CP 1074-77. Failure to confer does not constitute actual malice. *See Herron v. KING Broad. Co.*, 112 Wn.2d 762, 777, 776 P.2d 98 (1989). Because there is no evidence of knowing falsity or reckless disregard for the truth, Ms. Evans' statements were privileged. The tortious interference claim cannot stand and dismissal on that ground would be consistent with precedent had the Court of Appeals addressed it.

3. The law of privilege in Washington is well-supported by precedent

Access takes issue with the *Stidham* case and argues that it wrongly relies on *Moloney v. Tribune Publ'g Co.*, 26 Wn. App. 357, 613 P.2d 1179 (1980), to reach its holding regarding privilege because *Moloney* has been "overruled." *See* Petition at 9-12. Access misstates the legal principle for which this Court disapproved of *Moloney.*

The Court of Appeals in *Moloney* found it necessary to address only two issues:

> *first*, whether Pierce County and its employees are immune from liability for mistakes made in the course of criminal investigations and the disclosure of investigation information; and *second*, whether the Tribune is protected from liability for publishing a substantially accurate summary of the county's investigation report concerning an event of immediate public interest.

Moloney, 26 Wn. App. at 358 (emphasis added). That Court found police officers were entitled to discretionary immunity (first issue) and the Tribune's publication was privileged (second issue).

Access cites *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 669 P.2d 451 (1983), for the proposition that *Moloney* has been "overruled" in a way that is relevant here. *See* Petition at 9-12. Access, however, takes the Court's holding in *Chambers-Castanes* too far. Factually, *Chambers-Castanes* involved King County Sheriff's Office's alleged "failure to respond in a proper and timely manner to appellants'

call for assistance." *Chambers-Castanes*, 100 Wn.2d at 277. The defendants in that case asserted, among other things, the defense of discretionary immunity. *Id.* at 282-83.

In reaching its decision related to the discretionary immunity doctrine, the *Chambers-Castanes* court examined two then-recent Court of Appeals decisions, including *Moloney*, that "purport[ed] to extend the doctrine of limited governmental immunity to *all* discretionary acts." *Id.* at 283. The Court disapproved of the *Moloney* Court's decision only on the discretionary immunity issue:

> In both *Clipse* and *Moloney*, the Court of Appeals categorized the police conduct at issue as discretionary and failed to determine whether the challenged conduct involved a basic policy decision by an executive level officer, as required under *Evangelical*, *King*, and *Mason*. We now expressly disapprove of the two decisions to the extent they conflict with our prior case law and with the decision we announce today.

Chambers-Castanes, 100 Wn.2d at 283. This Court disapproved of *Moloney* only to the extent it allowed discretionary immunity to police officers in their regular police work.

Importantly, State Defendants here have not asserted discretionary immunity as a basis for dismissal.[1] Rather State Defendants have always

[1] The public duty doctrine does not apply to intentional torts such as tortious interference in any event. *Vergeson v. Kitsap Cty.*, 145 Wn. App. 526, 543-44, 186 P.3d 1140 (2008); *see also Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

asserted their comments were privileged—an entirely different legal defense. And, contrary to Access's arguments, this Court has not disapproved of *Moloney* on the issue that *Stidham* cited it for: defamation and tortious interference "are subject to the defense of privilege." *Stidham*, 30 Wn. App. at 616.

This Court's decision in *Bender v. City of Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983), also provides support for the principle that *Moloney* is still good law regarding privileges in defamation cases. In *Bender*, this Court further identified the extent to which it disapproved of *Moloney*.

> Although police investigations and the disclosure of investigation information to the press are of a discretionary nature, we do not view those actions as the type of high level, policy-making decisions of a governmental entity that fall within the rule of discretionary governmental immunity. Instead, such conduct is more closely analogous to the type of discretion exercised at an everyday operational level, such as whether or not to engage in a high speed chase. . . . Thus, to the extent the Court of Appeals decisions in *Clipse* and *Moloney* purport to extend the limited doctrine of discretionary governmental immunity, we now expressly disapprove of those cases.

Bender, 99 Wn.2d at 589-90. This Court in *Bender* then discussed and approved privileges that apply in defamation cases. *See id.* at 599-602.

In sum, this Court has never disapproved of privileges that apply in defamation cases. *See id.* at 601 (defamation plaintiff must establish abuse

of any qualified privilege by proving defendant acted with knowledge or reckless disregard as to the falsity of a statement); *accord Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 658, 717 P.2d 1371 (1986). Because, as explained above, privileges that apply in defamation cases also apply in tortious interference cases, the privilege issue is entirely supported by this Court's precedent. The Court of Appeals below could have affirmed the dismissal of Access's tortious interference claim on this basis even though it did not. This Court should deny Access's Petition.

B. Access Did Not Assign Error to the Dispositive Issue: Its Failure to Raise Material Issues of Fact Regarding Its Tortious Interference Claim Against the State Defendants

The Court of Appeals below found it unnecessary to address the privilege issue because Access failed to present evidence of two elements of tortious interference. Access has waived and abandoned the right to review of that dispositive issue by choosing to not raise it in its Petition. *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967).

The Court of Appeals found "We conclude Access does not establish any genuine issue of fact regarding the third and fourth elements of its tortious interference claim . . . ." Slip Op. at 26. That unchallenged holding ends Access's appeal as to its last and final claim against the State Defendants. "[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument

on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (emphasis in original). Therefore, even if Access's privilege argument had merit–which it does not–the Court of Appeals properly affirmed dismissal on the dispositive ground Appellants did not address, which is their obligation. *Id.*

Access failed to demonstrate issues of material fact to support a tortious interference claim. That deficiency is the sole basis for which the Court of Appeals affirmed. This Court should reject Access's invitation to render an advisory opinion on the privilege issue in a case that no longer presents a justiciable controversy regarding the tortious interference claim. *Bloome v. Haverly*, 154 Wn. App. 129, 140-41, 225 P.3d 330 (2010) (courts are generally prohibited from issuing advisory opinions on matters where there is no justiciable controversy). The Court should deny Access's Petition.

1. The Court of Appeals was correct that Access failed to prove the elements of its tortious interference action

The trial court and the Court of Appeals correctly ruled that Access failed to prove the elements of its tortious interference claim. Even if Access had raised this issue in its Petition, review of the sufficiency of the evidence issue is not warranted because under RAP 13.4 there is no split

of authority and there is no substantial interest in reviewing the Court of Appeals' fact-specific, and clearly correct holding.

Tortious interference has five elements: (1) a valid contractual relationship or business expectancy; (2) knowledge of that relationship by defendants; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) interference for an improper purpose or using improper means; and (5) damages. *Leingang*, 131 Wn.2d at 157; *Pleas v. City of Seattle*, 112 Wn.2d 794, 800, 803-04, 774 P.2d 1158 (1989). In order to survive summary judgment, a plaintiff must present factual evidence, not merely assertions or allegations, supporting each element of its claim. *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 779, 875 P.2d 705 (1994). Access did not meet this burden.

a. No intentional interference causing a breach

"Exercising one's legal interests in good faith is not improper interference." *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 132, 279 P.3d 487 (2012); *accord Leingang*, 131 Wn.2d at 157. If a defendant asserts his or her own legally protected interest that he or she believes may be impaired by a proposed transaction, there is no tortious interference. *Tacoma Auto Mall*, 169 Wn. App. at 132 (citing *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 10,

776 P.2d 721 (1989); and *Brown v. Safeway Stores Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980)).

"A privilege to interfere may be established if the interferor's conduct is deemed justifiable . . . ." *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 604-05, 564 P.2d 1137 (1977). " 'Interference is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right which was invaded.' " *Tacoma Auto Mall*, 169 Wn. App. at 133 (quoting *Plumbers & Steamfitters Union Local 598 v. Wash. Pub. Power Supply Sys.*, 44 Wn. App. 906, 920, 724 P.2d 1030 (1986)). That is the case here.

Access has presented no evidence of any "interference" other than concerns the State Defendants expressed about Access's investors in the presence of the underwriters and Co-Defendants who were working with the State. The record demonstrates State Defendants were appropriately wary for three principal reasons.

First, the State Defendants did not understand how a state bond could satisfy the requirements of the EB-5 program, because there is very little risk in purchasing highly rated (AA+) Washington State bonds and did not create any jobs. CP 1029, 1112-13. Evidence that investors have placed capital at risk and that the investment will create jobs are requisite qualifying features of EB-5 investments. 8 C.F.R. § 204.6.

Second, the State Defendants were appropriately concerned Access's EB-5 plan could produce market instability. If the federal government rejected the state bonds purchase as a qualifying investment under the EB-5 program, those bonds might be dumped into the market, to the detriment of the State's entire bond portfolio. CP 1029-30, 1112, 1115.

Third, the State Defendants were appropriately concerned by the FBI interview of Deputy Treasurer Ellen Evans about EB-5 investments following the October 2011 bond purchase by Access. CP 1030. To compound their additional concern about EB-5 investments brought on by the FBI interview, when the State Defendants called the FBI before the May 2012 offering and asked whether it had any concerns about a sale of state bonds to EB-5 investors, the State received no response. CP 1030.

Access's principal, Mr. Mattox, admitted he had no evidence the State Defendants harbored serious doubts as to the truth of what the State Defendants were saying (CP 1079) and no evidence anyone from the State uttered any deliberate falsehoods. CP 1078-79.

With those valid concerns, the most Access was able to demonstrate was that a Deputy State Treasurer mentioned some honest, well-founded concerns to underwriters who would be selling state bonds and who would conduct their own due diligence processes. Access submitted no evidence to show the State Defendants instructed the

underwriters to not sell bonds to Access or any other investor. CP 1030, 1168 (as testified by a Citigroup employee: "In my entire career I've never had or seen an issuer say specifically 'I don't want that specific investor to receive bonds.' "). Access has supplied no case law supporting its argument that a senior government official's honest and legitimate expression of concerns constitutes tortious interference. Such a rule would violate public policy and would be contrary to this Court's precedent.

Moreover, Access supplied no evidence the State Defendants' expressions of concern caused the termination of Access's business expectancy. Asked whether the State Defendants caused Access's failure to satisfy Citigroup's know-your-customer process, Mr. Mattox said, "No." CP 533. Mr. Mattox also could not say the State Defendants caused Access's failure to establish accounts at Citigroup. CP 533. Access cannot establish this element of its claim.

b. No improper purpose or means

A plaintiff alleging tortious interference must show not only the defendant intentionally interfered with a business relationship, but also the defendant had a "duty of non-interference." *Pleas*, 112 Wn.2d at 804 (quoting *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979)). Tortious interference can be "established [only] when interference resulting in injury to another is wrongful by some measure beyond the fact

of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means . . . ." *Pleas*, 112 Wn.2d at 804.

> An examination of improper purpose focuses on the motive for the defendant's interference with the contract, such as greed, retaliation, or hostility . . . . When examining improper means, we look to the method by which a defendant interferes with the contractual relationship, such as taking arbitrary and capricious action or using the threat of a lawsuit to harass.

Wash. Trucking Ass'ns v. State, Emp't Sec. Dep't, 192 Wn. App. 621, 651, 369 P.3d 170 (2016) (internal citations omitted), *rev'd in part on other grounds*, 188 Wn.2d 198, 393 P.3d 761 (2017). Access has not shown any evidence of either an improper purpose or an improper means.

Access has supplied no evidence to support a claim the State Defendants had any purpose other than to protect the State and its credit rating. The State Defendants' desire to maintain the State's excellent credit rating was not improper from a legal or public policy standpoint. "[E]xercising in good faith one's legal interests is not improper interference." *Schmerer v. Darcy*, 80 Wn. App. 499, 506, 910 P.2d 498 (1996). Likewise, the method the State Defendants used—simply expressing their concerns and suggesting the underwriters complete their already-in-place due diligence and know-your-customer processes—was not improper. On the contrary, it was salutary and legally protected.

As recognized by the Court of Appeals below, establishing the elements of its claim is a threshold issue Access must prove *before* a court should even bother addressing privilege. *See also Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992) (citing *Pleas*, 112 Wn.2d at 804). But Access cannot cross that threshold here because it did not to assign error to the Court of Appeals' conclusion that Access failed to prove the elements of its claim nor did Access supply argument addressing that issue. This Court, therefore, need not explore the propriety of privilege or any other issue.

V. CONCLUSION

For the foregoing reasons, State Defendants respectfully request that this Court deny Access's Petition for Discretionary Review.

RESPECTFULLY SUBMITTED this 27th day of July, 2018.

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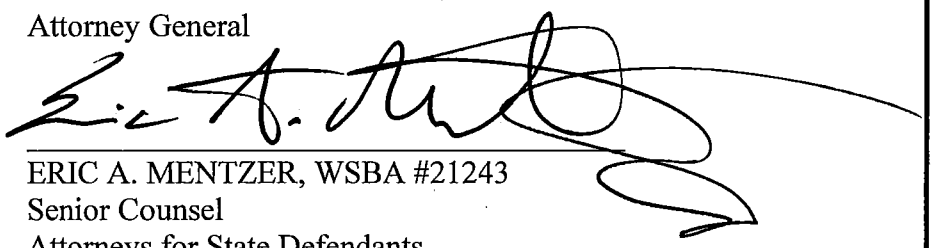

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I hereby certify that on July 27, 2018, I electronically filed the foregoing document with the Clerk of the Court using the E-Filing system which will send notification of such filing to the following:

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