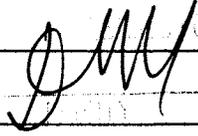


FILED  
COURT OF APPEALS

CASE NO. 40362-5-II

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STATE OF WASHINGTON

BY:  JMY

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

**WILLIAM R. ROSE**

**Appellant**

v.

**MAHER, INGELS, SHAKOTKO, CHRISTENSEN, LLP**

**Respondent**

---

Appeal from the Superior Court of Pierce County  
The Honorable Kathrine M. Stolz  
Pierce County Superior Court Cause No. 08-2-05446-8

---

**BRIEF OF APPELLANT**

William R. Rose  
11424 44<sup>th</sup> Ave East  
Tacoma, Washington 98446  
(253) 365 9333

*Appellant / Pro Se*

**TABLE OF CONTENTS**

**Table of Authorities.....3,4**

**Assignment of Error .....5**

**Statement of the case..... 6,7,8**

**1. Facts**

**2. Judgment/Appeal**

**Summary of Argument.....9**

**Argument.....10,11,12,13,14,15**

**1. Standard Review**

**2. Did a Contract Exist**

**3. Failing to Issue Finding of Fact and Conclusion of Law to**  
        **Support its Order.**

**Conclusion.....16**

**Appendices.....17,18**

## TABLE OF AUTHORITIES

### **Cases**

<u>Lynch vs. Higley</u> , 8 Wa. App. 903, 910-11, 510 .2d 663 (1973).....	9,12,13
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317, 323(1986).....	10
<u>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</u> , 475 U. S. 574,586 (1986).....	10
<u>Anderson v. Liberty Lobby, Inc.</u> , 447, U.S. 242, 253 (1986).....	10
<u>T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n</u> , 809 F. 2d 626,630 (9 <sup>th</sup> Cir 1987)....	10
<u>Babcock v. State</u> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	11
<u>Grundy v. Thurston County</u> , 155 Wn.2d 1, 6, 117 P.3d 1089 (2005).....	11
<u>Lilly v. Lynch</u> , 88 Wn. App. 306, 312, 945 P.2d 727 (1997).....	11
<u>Selberg vs. United Pac. Ins. Company</u> , 45 Wa.App 469, 474, 726,P.2d 468, Rev. Denied, 107 Wn2d 1017 (1986).....	11
<u>Roger Crane &amp; Assocs. v. Felice</u> , 74 Wn. App. 769, 875 P.2d 705 (1994).....	11
<u>Brouillet v.Cowles Publishing Co.</u> , 114 Wn.2d 788,791 P.2d 526 (1990).....	11
<u>Redding v. Virginia Mason Medical Center</u> , 75 Wn. App. 424, 878 P.2d 483 (1994).....	11
<u>Yakima county (West Valley) FireProt. Dist. No. 12 vs. City of Yakima</u> , 122Wn2d 371,388,858 P.2d 245 (1993) .....	12
<u>Sea-Van Invs. Assocs. Vs. Hamilton</u> , 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).....	12
<u>Ruff vs. King County</u> 125 Wn.2d 697, 704, 887 P.2d 886 (1995).....	12
<u>State v. Agee</u> , 89 Wn.2d 416, 573 P.2d 355 (1977).....	14
<u>State v. Nelson</u> , 89 Wn.App. 179,948 P.2d 13 14 (1997).....	14
<u>State v. Ford</u> , 110 Wn.2d 827, 755 P.2d 806 (1988).....	14
<u>State v. Hill</u> , 123 Wn.2d 641,644, 870 P.2d 3 13 (1 994) .....	14

## **Rules and Regulations**

CR 56(c).....	10
CR 56(e).....	10
CR 56 .....	9
FRCP 34, PCLR3 ( b) (2).....	7

**A. ISSUES PERTAINING THERETO:**

1. Did the trial court err when it granted the plaintiff's motion for summary judgment where the plaintiff failed to meet his burden to show that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law?.....
2. Did the trial court err when it granted the motion for summary judgment, concluding that no issue of material fact existed concerning whether William R. Rose entered into a contract to personally guarantee the contract between Maher, Ingels, Shakotko, Christensen LLP, and Architectural Business Concepts & Development LLC?.....
3. Did the trial court err when it granted summary judgment without a finding of fact and conclusion of law to support its order?.....

**B. ASSIGNMENT OF ERROR**

**The trial court erred when it granted the motion for summary judgment, concluding that no issue of material fact existed concerning whether William Rose entered into a contract to personally guarantee a contract between DARB Organic Energy Conversion Company, a Nevada Limited Liability Company, a company that was a wholly owned subsidiary of Architectural Business Concepts & Development LLC, a Native American owned, Washington Limited Liability Company and Maher, Ingels, Shakotko, Christensen LLP.**

### **C. STATEMENT OF THE CASE**

**Facts:**

William R. Rose , hereinafter " Rose ", was a member of DARB Organic Energy Conversion Company, a Nevada Limited Liability Company, a company that was a wholly owned subsidiary of Architectural Business Concepts & Development LLC, a Native American owned, Washington Limited Liability Company. ( uncontested)

In December of 2005, Architectural Business Concepts & Development LLC, ( hereafter referred to as ABCD) was introduced to Casey Ingels, a partner in the law firm of Maher, Ingels, Shakotko, Christensen LLP, ( hereafter referred to as MISC) by Randoff Hedgebeth, Architect, and member of ABCD. ABCD was looking for legal advise on a project that it was pursuing and Mr. Hedgebeth thought that MISC would be the right firm to represent ABCD, as indicated by the letter from MISC shown as in (*CP* Exhibit "A" of the Supplemental Declaration of Veronica E. Shakotko, 25th day of April, 2008.) Plaintiff has indicated that Rose had filled out the new Client information sheet on June 13, 2006,( *CP* Defendants Exhibit "C" declaration of Rose filed December, 2009 ) That sheet contained, Personal information, Employer Information and Legal Information. In the legal information section it shows "nature of this matter", answer, "Business"

Plaintiff neglected to mention the Retainer Agreement that was titled as “FIRM INTRODUCTION AND FLAT FEE REATINER AGREEMENT”, which was mentioned in the letter: “Enclosures” item 2. That document would have been delivered on January 24, 2006 as part of the items enclosed.( *CP* Plaintiff Exhibit “A” supplemental declaration of Veronica E. Shakotko dated 25 April, 2008) The salutation was: “Dear Mr. Rose” and that agreement was never signed or witnessed. It was not until March of 2008, when Rose learned that MISC filed a breach of contract suit against Rose, and Jane Doe Rose personally. Rose had never been personally represented by MISC in any legal matter. Prior to this litigation Rose had never received any accounting or invoice on any legal matters from MISC claiming his personal liability as shown by (*CP* Rose’s Declarations filed with the trial court on Dec. 28, 2009 defendants Exhibit “A”). On March 26, 2009 by certified mail Rose requested, pursuant to FRCP 34, PCLR3 (b) (2) the production of “Documentary Evidence or Tangible Things”, all files for ABCD, DARB, DARB II, and any other documents that may indicate his personal involvement. Rose was denied this discovery by a letter from MISC dated April 30, 2008. Rose insisted that he never personally signed for any legal fess with MISC, even though MISC had produced an ambiguous generic fee agreement which appeared to be signed, witnessed and dated June 1, 2006.(*CP* supplemental Declaration of Rose filed 4/24/2008, paragraph lines 22, 23)

Rose received a CD from MISC via US mail in May of 2009, titled “ DARB: Client Files”. (*CP* defendants Exhibit “5” in support of opposition to Plaintiffs Motion for summary judgment filed 1 December, 2009.) throughout all stages of proceedings Plaintiff makes much ado about the fact the Rose signed a Retainer Agreement and it was memorialized on June 1, 2006, when in fact Rose had found that the document used as evidence in the original filing as plaintiffs Exhibit “ A” could not have been signed and witness on June 1, 2006 as indicated by sworn testimony of Veronica Shakotko and Chris Christensen, as the same document appeared on the CD provided by MISC, undated, un witnessed as late as Wednesday October 24, 2007 at 1:27:48 PM, some 17 months after the alleged signing. Until this time Rose was led to believe that he signed a Retainer agreement on June 1, 2006 and that the documents was witness on that date. This is shown in (*CP*, Defendants Exhibits, 4 & 5 in support of opposition to Plaintiffs Motion for summary judgment filed 1 December, 2009.) MISC had filed a Motion for Summary Judgment, Rose had answered the Motion with Response of Opposition to Plaintiff’s Motion for Summary Judgment, and his Motion to strike evidence and impose sanctions, as the evidence discovered at minimum supported a issue of genuine material fact.

### **Judgment /Notice of Appeal**

The trial court entered motion for Summary Judgment on the 8<sup>th</sup> day of January 2010 and judgment was entered January 29<sup>th</sup> 2010, defendant filed a timely notice of appeal on February 22, 2010.

**D. SUMMARY OF ARUGMENT**

Rose contends that the trial court erred when it granted summary judgment under CR 56, concluding that there was no issue of material fact concerning whether Rose signed as a personal guarantee of ABCD a limited liability company, or if there was a completed agreement as alleged by MISC at all.

In addition to the above Rose contends that at a minimum the presence of the signature and the absence of any, date or witness in the agreement creates an ambiguity that should be clarified by parol evidence. If, in fact, that is the case Rose's testimony that he did not affix his signature to the agreement as a personal guarantee because he never intended to be the personal guarantor of the debt of ABCD, or any of its subsidiaries, would be admissible and this creates an issue of material fact that necessitates trial by jury. See, *Lynch vs. Higley*, 8 Wa. App. 903, 910-11, 510 .2d 663 (1973). where the court stated: "Even as to a fully integrated agreement, the parol evidence rule does not forbid the introduction of evidence to clear up an ambiguity contained therein."

In this matter contradictory proof in the form of evidence and declaration entitled Rose to a trial on the merits and most certainly did not warrant summary judgment as a matter of law.

## E. ARGUMENT

### 1. Standard of Review

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law . Fed. R. Civ. P. 56 ( c ). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof . Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986). There is no genuine issue of fact for trial where the record taken as a whole, could not lead rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp. , 475 U. S. 574,586 (1986) ( nonmoving party must present specific, significant probative evidence, not simply “ some metaphysical doubt”). See also Fed. R. Civ. P. 56 ( e ). Conversely, a genuine dispute over a material facts exist if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. Anderson v. Liberty Lobby, Inc., 447, U.S. 242, 253 (1986); T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F. 2d 626,630 (9<sup>th</sup> Cir. 1987). (*emphasis mine*)

A Summary judgment is not a substitute for trial. Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991). The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. Grundy v. Thurston County, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion Lilly v. Lynch, 88 Wn. App. 306, 312, 945 P.2d 727 (1997). Based on these standards, summary judgment was not appropriate.

Summary judgment is inappropriate “if the records show any reasonable hypothesis which entitles the non-moving party to relief. Selberg vs. United Pac. Ins. Company, 45 Wa.App 469, 474, 726,P.2d 468, Rev. Denied, 107 Wn2d 1017 (1986).

On appeal, the appellate court decides the case on a *de novo* basis, engaging in the same analysis as the trial court. See, e.g., Roger Crane & Assocs. v. Felice, 74 Wn. App. 769, 875 P.2d 705 (1994). Both the law and the facts will be reconsidered by the appellate court. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788,791 P.2d 526 (1990). Any findings of fact entered by the trial court will be considered superfluous and will be disregarded by the appellate court. Redding v. Virginia Mason Medical Center, 75 Wn. App. 424, 878 P.2d 483 (1994).

## **2. Did a Contract Exist?**

An enforceable contract requires mutual assent, which generally takes the form of offer and acceptance. *Yakima county (West Valley) FireProt. Dist. No. 12 vs. City of Yakima*, 122Wn2d 371,388,858 P.2d 245 (1993)

Normally the existence of mutual assent or a meeting of the minds is normally a question of fact. *Sea-Van Invs. Assocs. Vs. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994) a question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Ruff vs. King County* 125 Wn.2d 697, 704, 887 P.2d 886 (1995)

In this case, Rose contends the issue of whether or not the contract for a personal guarantee was mutual assented, if the alleged contract was admissible then should all discovery been presented to the jury and not have been decided as a matter of law. Furthermore Rose contends that varying reasonable inferences can be drawn from the presence of Roses signature on the Generic Retainer Agreement. A jury could easily conclude Rose entered into this agreement binding ABCD, and that he did not intend to enter a personal guarantee. This is clearly not a situation where reasonable minds could reach but one conclusion. In addition to the above the Rose contends that at a minimum the presence of the signature and the absence of any, date or witness in the agreement creates an ambiguity that should be clarified by parol evidence.

If, in fact, that is the case Rose's testimony that he did not affix his signature to the agreement as a personal guarantee because he never intended to be the personal guarantor of the debt of ABCD, or any of its subsidiaries, would be admissible and this creates an issue of material fact that necessitates trial by jury. *See, Lynch vs. Higley*, 8 Wa. App. 903, 910-11, 510 .2d 663 (1973). where the court stated: "Even as to a fully integrated agreement, the parol evidence rule does not forbid the introduction of evidence to clear up an ambiguity contained therein." In dealing with parol evidence rule in *Lynch vs. Higley, Supra*, the court stated at p. 909, as one imminent authority has stated:

" the use of such a name for this rule has had unfortunate consequences, principally by the distracting the attention from the real issues that are involved. These issues may be one or more of the following: 1.) have the parties made a contract? 2.) Is the contract void or void able because of illegality, fraud, mistake or any other reason? 3.) did the parties assent to a particular writing as a complete and accurate integration of the contract?"

" In deciding these issues, or any one of them, there is no parol evidence rule to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them however long and detailed it may be, however formal and however many may be the seals and signatures and assertions. No one of theses issues can be determined by mere inspection of the written document."

### **3. Failed to Issue a Finding of Fact and Conclusion of Law, in Support of its Order**

The trial court erred when it granted summary judgment without a finding of fact and conclusion of law which were supported by evidence to support its order for the award of attorney fees, and or breach of contract, assuming that the trial court ruled under CR 56 it made no findings whatsoever to indicate the basis for its award, oral or written. The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179,948 P.2d 13 14 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988).

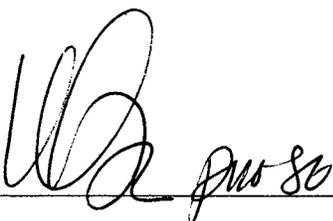
In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. Findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641,644, 870 P.2d 3 13 (1 994).

**F. CONCLUSION**

For the foregoing reasons, the Defendant/Appellant respectfully asks this court to reverse the trial courts order granting summary judgment and further asks this court to direct the superior court to remand this case for trial.

REPECTFULLY SUBMITTED this 20<sup>th</sup> day of August 2010

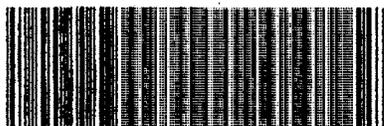
William R. Rose  
11424 44<sup>th</sup> Ave East  
Tacoma, Washington 98446  
(253) 365 9333  
*Appellant / Pro Se*

By: 

William R. Rose, *Appellant/Pro Se*

# Appendix 1

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

**MAHER INGELS SHAKOTKO  
CHRISENSEN LLP,**

**Plaintiff,**

**vs.**

**WILLIAM R. ROSE AND JANE DOE  
ROSE, husband and wife, and their marital  
community,**

**Defendants.**

**NO. 08-2-05446-8**

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

This matter, having come on for hearing in open court upon Plaintiff's Motion for Summary Judgment, and the court having considered:

1. Plaintiffs' Motion for Summary Judgment;
2. Declaration of Counsel in Support of Summary Judgment;
3. Response in Opposition of Defendant to Plaintiff's Motion for Summary Judgment and Motion to Strike Evidence and for Imposition of Sanctions;
4. Declaration of William Rose in Support of Response to Summary Judgment;
5. Reply to Response to Motion for Summary Judgment;
6. Declaration of Counsel in Reply to Response;

1 and being fully advised in the premises, it is now

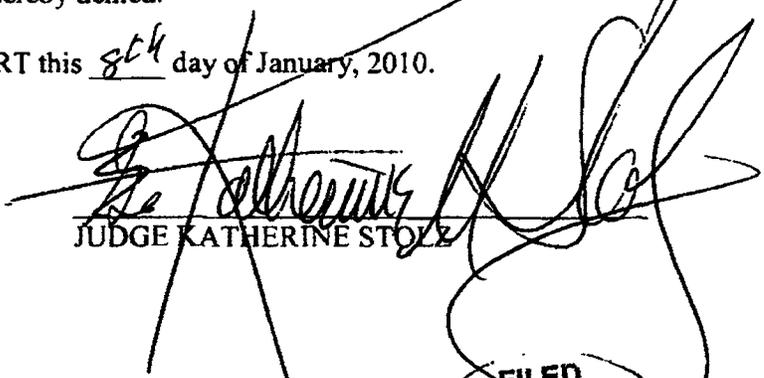
2 **ORDERED, ADJUDGED and DECREED** that Plaintiffs' Motion for Summary  
3 Judgment is granted; and it is further

4 **ORDERED, ADJUDGED and DECREED** that Defendant William R. Rose is  
5 liable to Plaintiffs for unpaid attorney's fees and costs in the amount of \$68,763.10 plus  
6 prejudgment interest; and it is further

7 **ORDERED, ADJUDGED and DECREED** that Plaintiff is entitled to attorney's  
8 fees and costs incurred in pursuit of this matter; and it is further

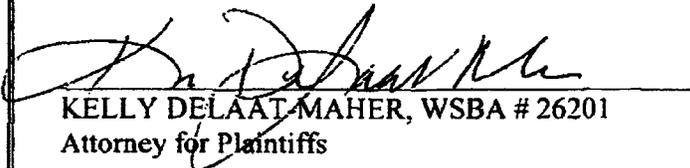
9 **ORDERED, ADJUDGED and DECREED** that Defendant's Motion to Strike and  
10 for Imposition of Sanctions is hereby denied.

11 DONE IN OPEN COURT this 8th day of January, 2010.

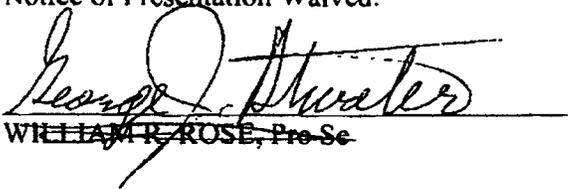
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16 JUDGE KATHERINE STOLZ

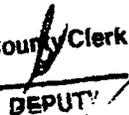
17 Presented By:

18 MAHER AHRENS FOSTER SHILLITO PLLC

19   
20 KELLY DELAAT MAHER, WSBA # 26201  
21 Attorney for Plaintiffs

22 Approved as to Form;  
23 Notice of Presentation Waived:

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25 WILLIAM R. ROSE, Pro Se  
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FILED  
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IN OPEN COURT  
JAN 8 - 2010  
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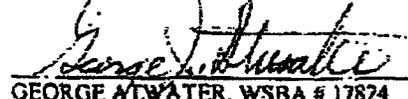
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Presented By:

MAHER AHRENS FOSTER SHILLITO PLLC

  
KELLY DELAAT MAHER, WSBA # 26201  
Attorney for Plaintiffs

Approved as to Form:  
Notice of Presentation Waived:

  
GEORGE ABRATER, WSBA # 17824

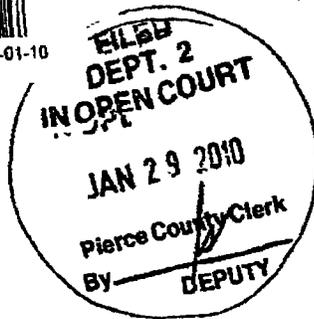
## Appendix 2

# **JUDGMENT**



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

**MAHER INGELS SHAKOTKO  
CHRISENSEN LLP,**

**Plaintiff,**

**vs.**

**WILLIAM R. ROSE AND JANE DOE  
ROSE, husband and wife, and their marital  
community,**

**Defendants.**

**NO. 08-2-05446-8**

**JUDGMENT**

**I. JUDGMENT SUMMARY**

Judgment Creditor:	MAHER INGELS SHAKOTKO CHRISTENSEN LLP
Judgment Debtor:	WILLIAM R. ROSE
Principal Judgment Amount:	\$68,763.10
Late Charges:	None
Interest to Date of Judgment:	\$27,224.58
Interest Rate after Judgment:	12%
Attorney's Fees:	\$9,053.50
Costs:	\$240.00
Other Recovery Amounts:	None
<b>Total Judgment Amount:</b>	<b>\$105,198.45</b>
Attorney for Judgment Creditor:	Kelii DeLaat-Maher, of Maher Ahrens Foster Shillito P.L.L.C.
Attorney for Judgment Debtor:	George Atwater

**II. HEARING**

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2.1 **Date.** The court heard Plaintiff's Motion for Summary Judgment on January 8, 2010.

2.2 **Appearances.** Plaintiff appeared by and through its counsel, Kelly DeLaat-Maher, of MAHER AHRENS FOSTER SHILLITO PLLC. Defendant appeared by and through his attorney George Atwater.

2.3 **Purpose.** To rule on Plaintiff's Motion for Summary Judgment.

**III. ADJUDICATION**

**ON THE BASIS OF THE FOREGOING, IT IS ORDERED, ADJUDGED, AND DECREED**

3.1 Plaintiff is awarded Judgment against Defendant in the principal amount of \$68,763.10; with interest at 12% from the date the last services were rendered on October 4, 2006 to the date of Judgment in the amount of \$27,224.58, and an interest rate after Judgment of 12%, with a reasonable attorney's fees award of \$9,053.50, as of the date of judgment, with the right to collect reasonable attorney's fees and legal costs through enforcement of the judgment, and until satisfaction thereof, including post judgment action, collection, appeal and/or bankruptcy; with costs of \$240.00; for a total judgment of \$105,198.45.

DONE IN OPEN COURT this 29<sup>th</sup> day of January, 2010.

FILED  
DEPT. 2  
IN OPEN COURT  
JAN 29 2010  
Pierce County Clerk  
By [Signature]  
DEPUTY

[Signature]  
JUDGE KATHERINE STOLZ

[Signature]  
MAHER AHRENS  
FOSTER SHILLITO  
1145 BRADWAY, STE 610

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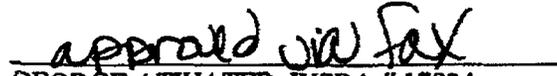
MAHER AHRENS FOSTER SHILLITO PLLC



KELLY DELAAT-MAHER, WSBA # 26201

Attorney for Plaintiffs

Approved as to Form;  
Notice of Presentation Waived:

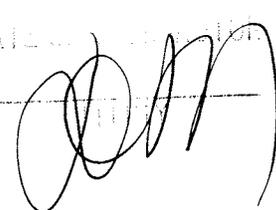


GEORGE ATWATER, WSBA # 17824

FILED  
COURT OF APPEALS

10 AUG 20 PM 12:38

STATE OF WASHINGTON

BY: 

**CERTIFICATE OF SERVICE**

Under penalty of the laws of perjury of the State of Washington, I, William R. Rose, certify that, on this 20<sup>th</sup> day of August, 2010 I sent a true and correct copy of Appellants Opening Brief to be served by First Class US Mail on the persons whose names and addresses appear below:

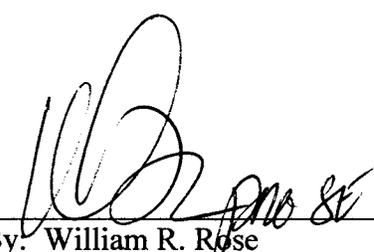
Ms Kelly DeLaat-Maher  
Attorney at Law  
Maher Ahrens Foster & Shillito, PLLC  
1145 Broadway, suite 610  
Tacoma, Washington 98402

Telephone: (253) 722-1700  
FAX: (253) 722-1701  
e-mail: [khmaher@mafslaw.com](mailto:khmaher@mafslaw.com)

Attorney for Plaintiff

***U.S. Mail, postage prepaid***

DATED this 20<sup>th</sup> day of August, 2010 .

  
By: William R. Rose  
Defendant/Appellant, *Pro Se*