

No. 49161-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JOHN O'CONNELL,

Appellant(s),

v.

MACNEIL WASH SYSTEMS LIMITED, a Canadian designing and manufacturing company doing business in Thurston County, Washington; AUTO WASH SYSTEMS LLC, a Washington limited liability company; CHARTER INDUSTRIAL SUPPLY, LLC, a Washington limited liability company; PATRICK HARRON & ASSOCIATES, LLC, a Washington limited liability company; ANDERSONBOONE ARCHITECTS, PS, a Washington professional service company; KAREN BOWMAN and "JOHN DOE" BOWMAN, and their marital community; and DOE CORPORATIONS 1 through 3; Jointly and Severally,

Respondent(s).

RESPONDENT'S AMENDED BRIEF

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I. INTRODUCTION

During business hours on October 8, 2011 Mr. O'Connell was directing vehicles via hand motions into the Go Green Car Wash (Go Green) owned and operated by him at the time. The car wash equipment had been manufactured by MacNeil Wash Systems (MacNeil). MacNeil sold the equipment to Mr. O'Connell through independent contractor Auto Wash Systems (Auto Wash). Auto Wash installed the equipment at Go Green.

On October 8, 2011 Ms. Bowman, a physically disabled woman with a left foot pedal installed in her vehicle, took her vehicle to Go Green and was directed by Mr. O'Connell onto the conveyor belt that would push her car through the car wash. Her vehicle never engaged in the conveyor and instead drove over the top of the conveyor striking and injuring Mr. O'Connell.

Mr. O'Connell has filed a product liability claim against MacNeil under RCW 7.72, claiming that MacNeil's equipment was not reasonably safe as designed and that MacNeil owed Mr. O'Connell a duty to install safety bollards at the entrance of Go Green. He does not point to a specific defective relevant product as the cause of his injuries, instead he points to an area at the entrance of the car wash where the vehicle operator relinquishes control to the conveyor.

The Trial Court properly recognized that the evidence created no genuine issue of material fact to suggest there was a defect in any equipment manufactured by MacNeil, that MacNeil had a duty to recommend or install bollards, or that MacNeil owed a duty to warn that their properly functioning equipment might not prevent this accident from occurring. The Trial Court resolved these issues as a matter of law in favor of MacNeil. The Appellate Court should affirm dismissal of this meritless claim.

II. STATEMENT OF ISSUES

The issues before this Court to consider are simple:

FIRST: The Washington Product Liability Act (WPLA) provides an exclusive remedy for product related injuries and defines the at fault party as the product seller or manufacturer who makes the relevant product or component part which give rise to the product liability claim. RCW 7.72.010(2). A defect or design of the product must be a proximate cause of the injuries. The injury must result from the functioning of the relevant product itself and not the actions of third parties. Was the trial court correct in finding that MacNeil's products were not defective and did not cause Plaintiff's injuries?

SECOND: MacNeil did not, as a car wash equipment manufacturer, design or manufacture safety bollards and did not recommend the installation of safety bollards. Was the trial court

correct in deciding that it was not industry custom and standard for car wash equipment manufacturers to make such recommendations regarding installation of bollards or installing bollards?

THIRD: Was the trial court incorrect in determining that MacNeil did not owe a duty to warn Mr. O'Connell that their properly functioning equipment might not prevent vehicles from driving over the conveyer and causing injury?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

MacNeil manufactures car wash equipment. That equipment is sold to car wash owners through independent contractor Auto Wash and subsequently installed by Auto Wash. MacNeil does not manufacturer bollards. MacNeil is not an architect or builder. CP 7. Mr. O'Connell hired architect Anderson Boone to design his car wash. CP 46. Mr. O'Connell hired Bailey Construction to build his car wash. CP 48. After hiring Anderson and Bailey, Mr. O'Connell purchased MacNeil car wash equipment from Auto Wash. CP 120-122. Components of that equipment were subsequently installed by Auto Wash and also relocated by Mr. O'Connell within Go Green after installation. CP 88-89; 91-110.

Go Green opened for business in February of 2010. Eighteen months later, on October 8, 2011, Ms. Bowman took her vehicle to the car wash for service. CP 382. Ms. Bowman was physically disabled and had a left foot pedal installed in her vehicle that allowed her to operate both the gas/accelerator pedal and brake pedal with her left foot because her right foot was not operational. CP 124-128. While directed by Mr. O'Connell, Ms. Bowman attempted to position her vehicle on the conveyor that would push her vehicle through the car wash. CP 126-128. Her vehicle never engaged with the conveyor. CP 127-128. Instead, she drove over the top of the conveyor and struck Mr. O'Connell. According to Mr. O'Connell the conveyor was working properly on October 8, 2011. CP 83. After Mr. O'Connell's accident, he hired Bailey Construction to build and install bollards at the entrance. CP 12.

B. STATEMENT OF THE CASE

MacNeil filed a motion for summary judgment that was heard on September 27, 2013. CP 6-22. In that motion, MacNeil argued that Mr. O'Connell could not prove his WPLA claims against MacNeil because he could not prove that a relevant product manufactured by MacNeil caused his injuries. CP 14. MacNeil also

argued that it was not liable for failure to warn of hazards that could not have been reasonably anticipated at the time of manufacture and that MacNeil had complied with industry custom and standards for car wash equipment manufacturers. CP 18, 20-21.

In opposition to that motion, Mr. O'Connell filed a declaration from human factors expert Gary Sloan. CP 173-181. Dr. Sloan opined in that declaration that there was an unsafe "physical interface" at the entrance of the car wash where the operator of a vehicle has control over that vehicle and where the operator gives that control up to the car wash. CP 177-178. At that "physical interface," Dr. Sloan opined MacNeil should have recommended or installed bollards. CP 179-181. Dr. Sloan also opined that "bollards have been used in car washes." CP 181.

After oral argument was concluded on that motion, the Trial Court asked the parties to provide information to the Court on industry custom and standard related to installation and use of bollards at the entrance of tunnel car washes. VR 1¹ 18-20.

Mr. O'Connell filed an Amended Complaint for Damages on November 5, 2013 naming Anderson Boone Architects, Auto Wash System, LLC, Charter Industrial Supply, LLC, and Patrick Harron &

Associates, LLC as defendants. CP 332-339. He again stated in that amended complaint that bollards are an industry safety standard. CP 332-339. Bollards are not industry custom and standard in the car wash industry as alleged by Mr. O'Connell in his amended complaint. CR 20-21.

MacNeil's renewed motion for summary judgment was heard on April 18, 2014. CP 265-275. In support of that motion, and as requested by the Trial Court, MacNeil submitted a declaration from car wash expert Harvey Miller opining that bollards are not an industry custom or standard. CP 276-279. In opposition to that motion, Mr. O'Connell submitted another declaration of human factors expert Gary Sloan. CP 434-447. Dr. Sloan opined in that declaration that neither the correlator nor conveyor was defective in design or function. CP 444. He did not identify a relevant product for WPLA purposes, instead referring again to the area of the car wash that he named the "physical interface." CP 439. Dr. Sloan is not a car wash equipment manufacturer and has not done any investigation regarding the installation of bollards in car washes. CP 541. Instead of providing the Trial Court with the information requested, i.e. bollards and industry custom and standard, Mr.

¹ The two Verbatim Reports of Proceedings are designated VR 1 for September

O'Connell submitted an unauthenticated article from 2011 entitled "bollards equal safety." CP 506. He also submitted unauthenticated articles regarding sudden acceleration of Jeep Cherokees from 2006 in support of his opposition. CP 502-504, 512-517.

At the hearing on MacNeil's renewed motion for summary judgment, the Trial Court concluded:

1. That the equipment manufactured by MacNeil was not defective and that O'Connell was not injured by MacNeil equipment CP 551;

2. That bollards are not industry custom or standard in car washes CP 551;

3. That the cases cited by Mr. O'Connell were all failure to warn cases and MacNeil had no duty to warn about properly functioning equipment that did not injure him. VR 2 15-16.

For the above reasons, summary judgment was granted in favor of MacNeil. Having resolved claims against the other parties named in this lawsuit, this appeal now follows.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

The trial court recognized that no triable issue of material fact exists regarding MacNeil in this case. Mr. O'Connell was not injured by equipment manufactured by MacNeil. MacNeil should not have recommended or installed bollards since they are not industry custom and standard in tunnel car washes. And MacNeil did not owe Mr. O'Connell a duty to warn about properly functioning equipment.

On these undisputed facts, the trial court entered judgment for MacNeil as a matter of law.

B. STANDARD OF REVIEW

This Court reviews a motion for summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to respondents, the nonmoving parties. See *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

This Court can affirm the dismissal by the trial court on any ground found in the record. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

The purpose of summary judgment is to avoid a useless trial. *Seven Gables Corp. v MGM, UA Entertainment Company*, 106 Wn. 2d 1, 13 721 P. 2d 1 (1986). A motion for summary judgment

should be granted when there are no genuine issues as to material facts and the moving party is entitled to summary judgment as a matter of law. CR 56 (c).

Summary judgment is a legitimate procedure for testing a party's evidence. *Cofer v. Pierce County*, 8 Wn. App. 258, 162-263, 505 P. 2d 476 (1973). A defendant may move for summary judgment by simply pointing out to the court that there is an absence of evidence to support the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P. 2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct 2548 91 L. Ed. 2d 265 (1986)). Summary judgment in favor of defendant is appropriate if the plaintiff fails to establish a prima facie case concerning an essential element of his claim. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P. 3d 1068 (2001).

The party moving for summary judgment must meet the burden of showing there is no dispute as to any issue of material fact. But once that burden is met, the burden is shifted to the non-moving party to establish the existence of material facts regarding elements essential to its case. *Hiatt v. Walker Chevrolet Company*, 120 Wn. 2d 57, 66, 837 P. 2d 618 (1992).

This showing, if believed, must be beyond mere unsupported allegations and raise a genuine issue as to a material fact. *Brane v. St. Regis Co.*, 97 Wn. 2d 748, 649 P. 2d 836 (1982). Absent that showing, the court should grant the Defendant's motion. *Young*,

112 Wn. 2d at 225, 770 P. 2d 182 (quoting *Celotex*, 477 U.S. at 322-323).

C. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT MACNEIL DID NOT VIOLATE THE WPLA.

1. MacNeil did not manufacture defective equipment.

Mr. O'Connell's claims against MacNeil were brought under the WPLA because MacNeil is a product manufacturer. The WPLA provides an exclusive remedy for product related injuries and preempts all common law theories related to the product. *WNP v. Graybar Electric*, 112 Wn.2d 847, 856, 774 P. 2d 1199 (1989). Under the WPLA the at-fault party is a product seller or manufacturer who makes the relevant product or component part which gives rise to the product liability claim. RCW 7.72.010 (2). The defect or design of the product must be a proximate cause of plaintiff's injuries. *Bich v. General Electric Co.*, 27 Wn. App. 25, 28, 614 P. 2d 1323 (1980). The injury must result from the functioning of the relevant product itself and not the actions of third parties. *May v. Defoe*, 25 Wn. App. 575 578, 611 P. 2d 1275 (1980).

The Court in *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wash. App. 12, 84 P.3d 895 (2004) examined liability where a person was injured when a load fell from a hook that had

been modified by his employer, forged by one company and supplied by another. The court considered the entire assembly, which included the component hook as a unit and found that the hook itself was not defective; thus, the defendants who forged and supplied the hook not liable. The plaintiff in that case, as in the instant case, unsuccessfully argued that the danger was in the finished assembly.

The Court in *Simonetta v. Viad Corp.*, 165 Wash. 2d 341 (2008) in evaluating *Sepulveda* stated “[w]e interpret *Sepulveda* to align the WPLA with the common law limitations in that component sellers are not generally liable when the component itself is not defective.” *Simonetta*, 165 Wash. 2d at 353.

Mr. O’Connell argues that the relevant product here is the area at the entrance to the car wash, not a specific product or component part manufactured by MacNeil. He relies on *Parkins v. Van Doren Sales, Inc.* 45 Wn. App. 19, 25, 724 P. 2d 389 (1986), *Thongchoom v. Graco Children’s Products, Inc.*, 117 Wn. App. 299, 71 P. 3d 214, (2003) and *Soprani v. Polygon Apartment Partners*, 137 Wn. 2d 319, 971 P. 2d 500(1999) to support the theory that a system can be a relevant product under the WPLA. In all three of those cases the plaintiff was injured by a relevant product,

manufactured by the named defendant. Mr. O'Connell admits here that the conveyor was working properly and does not claim that the conveyor itself caused his injuries. With this testimony, and lack of a defect part or component part it is irrelevant whether the product was part of a system or not.

In the instant matter, Mr. O'Connell according to his expert Dr. Sloan, was not injured by a relevant product, a component part or a system manufactured by MacNeil but instead due to an unsafe area at the car wash built and designed not by MacNeil and due to the actions of a third person, namely Ms. Bowman.

Mr. O'Connell has not submitted any authority or evidence that would support liability against a manufacturer for injuries not caused by a relevant product. He has not submitted authority or evidence that would support liability against a manufacturer for injuries caused by a third person, here Ms. Bowman. Mr. O'Connell's WPLA claims against MacNeil therefore fail.

2. The mere inclusion of an expert opinion does not in and of itself create a triable issue of fact.

Mr. O'Connell claims that expert testimony, when viewed in the light most favorable to him as the non moving party, establishes a foundation for this Court to set aside the Trial Courts order

granting summary judgment. He cites no authority for that proposition.

MacNeil argued in its reply to Mr. O'Connell's opposition to MacNeil's renewed summary judgment that Dr. Sloan's declaration should be stricken because when an expert witness cannot properly express an opinion on the facts, it would be error to allow the testimony citing *Crowe v. Prinzing*, 77 Wn. 2d 895, 898, 468 P. 2d 450 (1970). Courts often exclude the testimony of "human factors" experts as speculative and conjecture. *Watters v. Aberdeen Recreation, Inc.*, 75 Wn. App. 710, 713, 879 P. 2d 337 (1994); see also *Walker v. State*, 67 Wn.App. 611, 620, 837 P. 2d 1023 (1992) (exclusion of "human factors expert holding testimony to based on conjecture and therefore inadmissible.") MacNeil argued that the overwhelming majority of Dr. Sloan's testimony was irrelevant to the only issues raised by MacNeil's motion, namely, (1) that a relevant product manufactured by MacNeil did not cause Plaintiff's injuries, (2) that bollards are not industry custom and standard for car wash equipment manufactures in tunnel car washes, and (3) that MacNeil had no duty to warn of properly functioning products. All other testimony, i.e. the ability of the car wash to control the speed of Ms. Bowman's vehicle,

recommendations of hard hats, safety glasses, and shoes during machinery installation, the cost and configuration of bollards, sudden acceleration of Jeep Cherokees, etc. is irrelevant and ought to be wholly disregarded. The Trial Court properly found Dr. Sloan's declaration in opposition to summary judgment unconvincing and granted summary judgment.

D. BOLLARDS ARE NOT INDUSTRY CUSTOM AND STANDARD IN THE CAR WASH INDUSTRY.

Mr. O'Connell makes the unsupported claim in his amended complaint that MacNeil should have recommended or installed safety bollards at the entrance of Go Green. Interestingly, Mr. O'Connell did not ask MacNeil to install these after his injuries but instead asked his builder to do so.

RCW 7.72.050(1) expressly allows for the introduction of evidence relating to industry custom, state-of-the-art and technology feasibility. It states:

Relevance of industry custom, technological feasibility and nongovernmental, legislative or administrative regulatory standards.

1. Evidence of custom in the product seller's industry, technological feasibility or that the product was or was not, in compliance with nongovernmental standards or with legislative regulatory standards or administrative regulatory standards, whether relating to design, construction or performance of the product

or to warnings or instructions as to its use may be considered by the trier of fact.

Thus, a Defendant's compliance with industry custom and the observance of state-of-the-art safety measures is relevant consideration in determining whether a product was "not reasonably safe." In *Falk v. Keene Corp.*, 113 Wn 2d 645, 654-655; 653 P. 2d 974 (1989) the Court held that RCW 7.72.050(1) applies to design defect claims, whether based on the manufacturer's burden to design a safer product (RCW 7.72.030(a)(1)) or on the expectations of an ordinary consumer (RCW 7.72.030(3)).

In regards to compliance with industry customs in this case, the industry that should be examined is the car wash equipment manufacturer, since that is MacNeil's industry and who Mr. O'Connell has sued in this case. MacNeil is not aware of any evidence that bollards are industry standard for car wash equipment manufacturers to recommend or supply. Mr. O'Connell has not provided any evidence to the contrary. MacNeil does not design and build car wash structures, only manufactures car wash equipment.

MacNeil has never seen safety bollards at the entrance of a tunnel car wash. CP 359. Safety bollards at the entrance of tunnel car washes are not and have never been an industry standard or industry custom in car washes. CP 278-279. Car wash equipment manufacturers, including MacNeil, do not recommend, design or install safety bollards, and bollards are not included with available equipment from car wash equipment manufactures. CP 278-279

Mr. O'Connell cannot show that bollards are regularly included with auto wash equipment. He has not provided any specific industry standard, regulation, or trade custom that shows that bollards are recommended to be included with auto wash equipment. Mr. O'Connell's claims that MacNeil's failure to recommend or provide safety bollards pursuant to the WPLA likewise fails.

E. MACNEIL DID NOT OWE PLAINTIFF A DUTY TO WARN

A product manufacturer is subject to liability if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe because adequate warnings or instructions were not provided. RCW 7.72.030(1) (b). In determining whether a product was not reasonable safe under the WPLA, the trier of fact shall consider

whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer. See RCW 7.72.030 (3). The manufacturer has no duty to warn of obvious dangers that an ordinary consumer would recognize without a warning. “[A] failure to warn amounts to negligence only when the supplier of a dangerous good has no reason to believe that those for whom the good is supplied will realize the dangerous condition.” *Baughn v. Honda Motor Co., Ltd.*, 107 Wn 2d 127, 140-141, 727 P. 2d 655 (1986).

On the day of Mr. O’Connell’s accident and for the 18 months that Go Green Car Wash was operational prior to his accident, vehicles were directed onto the conveyor by Mr. O’Connell and his employees through hand motions. Mr. O’Connell stood and watched vehicles coming towards him on numerous occasions; none of which failed to stop and none of which collided with him. The risk of injury in working in front of moving vehicles and directing moving vehicles is obvious. Mr. O’Connell chose to build his car wash per architectural plans prepared by Anderson, with a closed-in area to the left of the conveyor where he chose to stand. MacNeil did not design this area, and did not tell Mr. O’Connell how to run his car wash. MacNeil simply provided

component equipment for Mr. O'Connell's use. The accident at issue in this lawsuit had nothing to do with MacNeil or with the equipment manufactured by MacNeil.

MacNeil could not, and is not expected under the law, to anticipate every action of Mr. O'Connell in the operation of his car wash. That level of responsibility is greater than what the WPLA imposes on a manufacturer. *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 84 P.3d 895 (2004).

Mr. O'Connell claims that MacNeil's equipment was an overall system instead of individual parts. Yet he personally removed specific MacNeil parts and reinstalled those parts in other locations within his car wash. Clearly, the equipment parts provided by MacNeil were individual parts, and not part of an overall system as Mr. O'Connell alleges, otherwise he would not have been able to remove and reinstall given pieces.

F. MR. O'CONNELL IS PRECLUDED FROM RAISING NEW ISSUES AND ARGUMENTS.

Mr. O'Connell argues for the first time in this appeal that the Appellate Court should consider 1) Product Liability Public Policy and 2) Worker Safety Public Policy when deciding whether to accept discretionary review. Neither argument has been asserted

before at the Trial Court level in Mr. O'Connell's written oppositions to MacNeil's Summary Judgment Motion or Renewed Summary Judgment Motion, or during oral argument.

On review, of an order regarding a motion for summary judgment, the appellate court "will consider only evidence and issues called to the attention of the trial court." RAP 9.12. The appellate court engages in the same inquiry as the trial court, and will not consider an argument that was not made to the trial court. *Wash. Fed'n of State Employees*, 121 Wn. 2d 152, 849 P. 2d 1201 (1993). *1519-1525 Lakeview Blvd. Condo Ass'n v. Apartment Sales Corp*, 101 Wash. App. 923, 6 P.3d 74, review granted 143 Wash.2d 1001, 20 P. 3d 944, affirmed 144 Wash. 2d 570, 29 P. 3d 1249. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wash. App. 258, 268 P. 2d 958 (2011).

Based on the above, Mr. O'Connell's arguments should not be considered by the Appellate Court. Additionally, in his argument, Mr. O'Connell cites the Washington Industrial Safety and Health Act (WISHA) and how that applies to an employer's duty. MacNeil is not his employer. WISHA does not even apply to the facts here.

G. REQUESTS FOR COSTS.

RAP 18.1 allows this court to award attorney fees or expenses on review before this court where: (1) they are allowed by "applicable law," such as a statute, contract or recognized ground in equity that provides for such fees; and (2) the parties request the fees in a separate section of their opening briefs. RAP 18.1(a)-(b); *Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 176 Wn. 2d 662, 676, 295 P. 3d 231 (2013); *Dice v. City of Montesano*, 131 Wn. App. 675, 693, 128 P.3d 1253 review denied, 158 Wn. 2d 1017 (2006). RCW 4.85.010 allows the "prevailing party upon the judgment" to recover costs and statutory attorney fees. See also RAP 18.1; RAP 14.2. Here, if MacNeil is the prevailing party, MacNeil should be awarded expenses and attorney fees pursuant to RAP 18.1 and costs pursuant to RP 14.2.

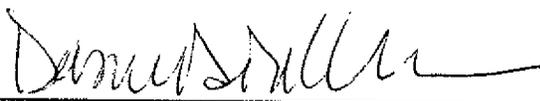
V. CONCLUSION

This lawsuit was ideal for summary adjudication. Mr. O'Connell was not injured by a relevant product or a component product manufactured by MacNeil. MacNeil had no duty to install or recommend bollards at the entrance of this tunnel car wash. MacNeil had no duty to warn Mr. O'Connell about properly functioning products.

No genuine issue of material facts exists here and MacNeil is therefore entitled to summary judgment. The trial court's judgment should be affirmed.

Respectfully submitted this 13th day of January, 2017.

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By 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day, the undersigned caused to be served in the matter indicated below of:

1. Respondent's Amended Brief.

to:

WA Court of Appeals, Division II

Via Electronic Filing;

and to counsel for Appellee:

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Via U.S. Mail.

DATED this 18th day of January, 2017, at Seattle, Washington.



Lisa Tardiff
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January 18, 2017 - 10:44 AM

Transmittal Letter

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Case Name: John O'Connell v. MacNeil Wash Systems Limited, et al

Court of Appeals Case Number: 49161-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Amended Respondent's

Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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