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No. 51920-8-II

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

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JEFFREY RANDALL MCKEE,

Appellant,

vs.

PARATRANSIT SERVICES,

Respondent.

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**PARATRANSIT SERVICES'S RESPONSE BRIEF**

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## I. INTRODUCTION

This appeal arises out of a Public Records Act (“PRA”) lawsuit filed by *pro se* plaintiff Jeffrey McKee. The respondent, Paratransit Services (“Paratransit”), is a private, non-for-profit corporation that dispatches and facilitates transportation services to qualified Medicaid patients for medical appointments.

In 2016, Mr. McKee served a PRA request on Paratransit. As a courtesy, Paratransit provided him with documents but advised that it was not a public agency under the PRA. Mr. McKee subsequently sued. Paratransit moved for summary judgment. At the first summary judgment hearing on January 26, 2018, Mr. McKee orally requested more time to conduct discovery, which the trial court allowed.

After Mr. McKee conducted discovery, Paratransit refiled its summary judgment motion, heard on April 27, 2018. The trial court carefully weighed each of the four *Telford*<sup>1</sup> factors on the record and granted Paratransit’s motion, ruling that it was not a public agency under the PRA.

On appeal, Mr. McKee rehashes the same baseless arguments he raised before the trial court. First, he erroneously claims that Paratransit contractually agreed to be subject to the PRA. Paratransit agreed only to comply with the same ethical duties that apply to state officials. Mr.

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<sup>1</sup> *Telford v. Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999).

McKee contends—without citing to any evidence or legal authority—that Paratransit’s agreement transformed two of its executives into state officers, and transmitted Paratransit itself into a public agency. This unfounded argument was rejected by the trial court, and should be rejected again here.

Next, Mr. McKee misconstrues three of the four *Telford* factors (he concedes that the fourth *Telford* factor does not support his appeal). Relying on an obsolete version of a federal regulation, Mr. McKee mistakenly argues under the first *Telford* factor (government function) that Paratransit is involved in the administration and supervision of the Medicaid program. But he does not cite to any evidence supporting this position. Under the second *Telford* factor (government funding), Mr. McKee misconstrues the nature of Paratransit’s funding and misapplies precedent. Lastly, under the third *Telford* factor (government control), he contends that the government has “day-to-day” control over Paratransit. Mr. McKee presented no evidence to support this allegation before the trial court, and he fails to point to any such evidence on appeal.

Finally, Mr. McKee seeks attorney fees and expenses on appeal under RAP 18.1, but does not include a section of his brief supporting his request. In any event, attorney fees and expenses are not warranted because his appeal is meritless.

**II. COUNTER STATEMENT OF THE ISSUES**

1. Did the trial court correctly rule that Paratransit is not the functional equivalent of an agency under RCW 42.56.070(1)?
2. Is Mr. McKee entitled to attorney fees or expenses under RAP 18.1?

**III. COUNTER STATEMENT OF THE CASE**

Paratransit is a private, not-for-profit corporation organized in the State of Washington. (CP at 364) Paratransit was founded 30 years ago and operates under the direction of a private board of directors. (*Id.*) Paratransit's executive team manages its day-to-day operations. (*Id.*)

Paratransit has transit and brokerage operations in three states (Washington, Oregon, and California) and operates in multiple counties throughout Washington. (CP at 364) In Washington, Paratransit provides brokerage services under contracts with the State of Washington Health Care Authority ("HCA"). (CP at 365) Paratransit's operations are funded by these contracts (as opposed to appropriations or grants), which are awarded on a competitive bid basis. (CP at 365-66) Paratransit competes for these contracts with companies such as FirstGroup, a multi-billion-dollar corporation based in the United Kingdom that owns multiple subsidiaries, including the Greyhound bus company. (CP at 365) These contracts are bid on regularly. (CP at 307)

Paratransit dispatches and facilitates transportation to qualified Medicaid clients for medical appointments through subcontracted transportation providers or through fuel reimbursements, bus fares, and mileage reimbursements directly to patients. (CP at 365) As an example, a Medicaid patient who qualifies for publicly-funded medical transportation services may call Paratransit to arrange transportation to a verified medical appointment. (*Id.*) Paratransit screens for the most appropriate, lowest-cost method of transportation (*i.e.*, bus fare, fuel reimbursement, or transportation through a subcontractor). If a subcontractor (such as a taxi) is the appropriate means, then Paratransit will contact the subcontractor, who is under an annual contract with Paratransit. (*Id.*) The subcontractor provides transportation for the trip and submits a bill to Paratransit. (*Id.*) Paratransit submits a consolidated invoice to the HCA and distributes the reimbursements to subcontractors (*Id.*)

Paratransit also receives a maximum monthly limit of administrative costs, which are defined as “costs of operations not including expenses or payment to Transportation Providers or Subcontractors for direct services,” such as the costs associated with Paratransit’s operation of a “pool of volunteer drivers” or “expenses such as mailing, delivery of bus passes, tickets, and/or gas cards.” (CP at 99, 153)

The HCA considers Paratransit a medical services provider, not a public agency. (CP at 307) The HCA has no control over the day-to-day operations of Paratransit. (*Id.*) The contract between HCA and Paratransit includes an independent contractor provision. (CP at 41).

In July 2016, Mr. McKee submitted a PRA request to Paratransit. (CP at 3) Paratransit notified Mr. McKee that it did not consider itself a public agency and, therefore, was not subject to the PRA's disclosure requirements. (CP at 198) As a courtesy, Paratransit provided Mr. McKee with records related to his utilization of Paratransit's services. (*Id.*)

Mr. McKee sued Paratransit under the PRA. (CP at 1-7) Paratransit moved for summary judgment, arguing that it was not a public agency. (CP at 190-95) The motion was heard on January 26, 2018. At the hearing, Mr. McKee asked for more time to conduct discovery. (VRP 4/27/18 at 10:22-14:10) Although he did not file a motion under CR 56(f), the trial court granted his oral request. (VRP 1/26/18 at 16:20-20:1)

Mr. McKee subsequently served narrow discovery requests. (CP at 359-60). He asked for copies of contracts between the HCA and Paratransit, which were disclosed. He also asked for income statements, statements of activities, and balance sheets. (CP at 359). Paratransit moved for a protective order, asking the court to modify the requests. Paratransit argued that, under the case law for determining whether a private entity is a public agency, the actual documents sought by Mr. McKee were not

relevant. (CP at 316-21) Instead, courts consider the percentage of funds attributable to public sources and the nature of the public funding scheme (e.g., fee-for-service). (CP at 320)

The trial court granted the motion in part and denied it in part, ordering Paratransit to produce a written declaration regarding Paratransit's funding, which Paratransit provided. (CP at 80, 393-95) Mr. McKee has not appealed this discovery order.

After Mr. McKee completed his discovery, Paratransit refiled its summary judgment motion, which was heard and granted on April 27, 2018. (CP at 82-83).

#### **IV. ARGUMENT**

##### **A. Summary of Argument**

This Court should affirm the trial court's summary judgment ruling. The trial court correctly held that Paratransit is not an "agency" under RCW 42.56.010(1) and properly dismissed Mr. McKee's action. On appeal, Mr. McKee essentially repeats the same erroneous arguments he raised below. His brief also does not identify what admissible evidence was presented to the trial court or how that evidence created a genuine issue of material fact. Mr. McKee also requests attorney fees and expenses on appeal, but does not "devote a section of its opening brief to the request." RAP 18.1(b). In any event, Mr. McKee is not entitled to attorney fees and expenses, as his appeal is without merit.

**B. Standard of Review**

“The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

Although courts view the facts and reasonable inferences to be drawn from them in favor of the nonmoving party, *Travis v. Bohannon*, 128 Wn. App. 231, 237, 115 P.3d 342 (2005), a nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact. *Baldwin v. Silver*, 165 Wn. App. 463, 471, 269 P.3d 284 (2011). More than speculation or mere possibility is required to successfully oppose summary judgment. *Chamberlain v. Dep’t of Transp.*, 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995).

**C. Paratransit is Not An “Agency” Under the PRA**

The PRA requires “[e]ach agency, in accordance with published rules, [to] make available for public inspection and copying all public records.” RCW 42.56.070(1). “Agency” is defined as:

all state agencies and all local agencies. “State agency” includes every state office, department, division, bureau, board, commission, or other state agency. “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010(1).

In *Fortgang v. Woodland Park Zoo*, the Supreme Court adopted a four-part test (referred to as the *Telford* test or factors, after *Telford v. Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999)) to decide whether a “private entity is treated as the functional equivalent of an agency.” *Fortgang*, 187 Wn.2d 509, 517-18, 387 P.3d 690 (2017).

The four factors are “(1) whether the entity performs a government function, (2) the extent to which the government funds the entity’s activities, (3) the extent of government involvement in the entity’s activities, and (4) whether the entity was created by the government.” *Fortgang*, 187 Wn.2d at 518 (citing *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008)). “A balancing of these factors rather than a satisfaction of all four determines if the entity is the functional equivalent of a state or local agency.” *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 719, 354 P.3d 249 (2015).

In this case, the trial court correctly analyzed and weighed each of the *Telford* factors, and properly ruled that Paratransit is not a functional

equivalent of an agency. That ruling should not be disturbed.

**1. Paratransit did not subject itself to the PRA by contracting with the HCA**

Before reaching the *Telford* factors, Mr. McKee argues that Paratransit is “contractually bound to be subject to the Public Records Act.” (App. Br. at p. 25). Mr. McKee repeats this argument from his summary judgment motion, which was correctly rejected by the trial court. Paratransit’s agreement to comply with the Ethics in Public Services Act (the “EPSA”) does not subject it to the PRA.

Paratransit’s contract states, in relevant part, “The Contractor certifies that the Contractor is now, and shall remain, in compliance with Chapter 42.52 RCW, Ethics in Public Service, throughout the term of this Contract.” (CP at 43). Mr. McKee points to RCW 42.52.050(4), which provides, “No state officer or state employee may intentionally conceal a record if the officer or employee knew the record was required to be released under chapter 42.56 RCW, was under a personal obligation to release the record, and failed to do so.” But RCW 42.52.050(4) imposes an ethical duty on state officers and employees to not withhold a record only *if* the record is “required to be released under chapter 42.56.” In other words, the record must first be subject to disclosure under the PRA.

Mr. McKee misinterprets the relationship between the EPSA and the PRA. Without any authority or argument, he assumes that, because Paratransit agreed to “compl[y]” with the ethical duties of the EPSA, (CP

at 43), Paratransit’s General Manager and President/CEO are somehow “state officers” under RCW 42.52.010(19). (*See* App. Br. at p. 21-22). “State officers,” however, are explicitly defined as “every person holding a position of public trust in or under an executive, legislative, or judicial office of the state” and “any person exercising or undertaking to exercise the powers or functions of a state officer.”

Mr. McKee does not provide any legal reasoning or precedent demonstrating that Paratransit’s agreement to observe the ethical duties of “state officers” somehow transforms Paratransit’s employees into “state officers.” *In re Chubb*, 112 Wn.2d 719, 726, 773 P.2d 851 (1989) (“Lack of a clear legal argument with cited authority is grounds for dismissing an argument on appeal.”); *Burke v. Hill*, 190 Wn. App. 897, 916, 361 P.3d 195, 204 (2015) (“Where no authorities are cited, the court may assume that counsel, after diligent search, has found none.”)

Next, Mr. McKee infers—again without authority or argument—that the designation of “state officers” makes Paratransit an “agency” under RCW 42.56.010(1) of the PRA. His reasoning is flawed. The paragraph cited by Mr. McKee is titled “Contractor Certification Regarding Ethics.” (CP at 43). Paratransit agreed to follow the same ethical duties as state officers and employees, but it does not transmute them into state officers or employees.

As he did in the trial court, Mr. McKee puts the cart before the

horse. The EPSA imposes an ethical duty to disclose records only when “required” by the PRA. RCW 42.52.050(4). Accordingly, Mr. McKee must first show Paratransit is subject to the PRA before the duty of RCW 42.52.050(4) becomes relevant. But he cannot use Paratransit’s agreement to comply with the ethical duties of the EPSA to make that showing. Paratransit’s commitment to obey the same ethical duties of state officers and employees does not convert Paratransit employees into state officers and employees. Mr. McKee did not provide any legal authority to support that argument before the trial court, and he again fails to do so on appeal.

**2. Paratransit does not perform a core government function under the first *Telford* factor**

Under the first *Telford* factor, Mr. McKee asserts that the “sole function” of Paratransit is to “administer[] a federal program.” (App. Br. at p. 30). From this, Mr. McKee concludes that Paratransit “performs a government function.” (*Id.*). He is mistaken. The only statute or regulation that Mr. McKee relies on, 42 C.F.R. §431.10, vests the HCA with exclusive authority to make high-level administrative and supervisory decisions about the administration of Medicaid.

As an initial matter, Mr. McKee appears to cite to a superseded version of 42 C.F.R. §431.10. This regulation was originally enacted in 1979, and amended in 2012 and again in 2013. The emphasized portions of Mr. McKee’s quote are from the pre-2012 version:

(e) *Authority of the single State agency.* In order for an agency to qualify as the Medicaid agency--

(1) The agency must not delegate, to other than its own officials, authority to—

(i) Exercise administrative discretion in the administration or supervision of the plan, or

(ii) Issue policies, rules, and regulations on program matters.

(2) The authority of the agency must not be impaired if any of its rules, regulations, or decisions are subject to review, clearance, or similar action by other offices or agencies of the State.

(3) If other State or local agencies or offices perform services for the Medicaid agency, they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency.

The purpose of former §431.10(e) was to “provide a single state actor that would be accountable to the federal government for systemwide performance” and “to promote systemwide efficiency.” *San Lazaro Ass’n v. Connell*, 286 F.3d 1088, 1100-01 (9th Cir. 2002). As such, former §431.10(e) prohibited the HCA from delegating discretionary decisions about the administration and supervision Medicaid or its policy-, rule-, and regulation-making authority. These tasks are the “core government functions” that cannot be delegated to the private sector and, critically for purposes of this appeal, were not delegated to Paratransit. *Clarke*, 144 Wn. App. at 194.

Moreover, former §431.10(e) does not even mention the brokering of transportation to Medicaid patients, much less make it a task that cannot be delegated to the private sector. Indeed, such brokerage service is delegated to multiple private-sector entities such as Paratransit and its competitors, including FirstGroup, a multi-billion-dollar corporation based in the United Kingdom. (CP at 365). While Paratransit (and its competitors) contract with the HCA for the brokering service, the Supreme Court has rejected the rule that an entity “performs a government function any time it “contracts with the government pursuant to enabling legislation.” *Fortgang*, 187 Wn.2d at 525.

Further, section (e) of the version of 42 C.F.R. §431.10 in effect during the relevant period in this case (*i.e.*, 2016-17) states, “The Medicaid agency may not delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters.” The non-delegable tasks, as contained in the version of §431.10 applicable to this case, are supervision of the Medicaid program in Washington and the promulgation of policies, rules, and regulations about Medicaid. The record does not contain any evidence that Paratransit performs either task, and Mr. McKee did not carry his burden of opposing summary judgment to show otherwise.

Mr. McKee attempts to analogize this case to *Telford*, where the Washington State Association of Counties (the “WSAC”) and the Washington State Association of County Officials (the “WACO”) were held to be public agencies because, in part, “they largely determine[d] the manner in which county programs are administered.” *Id.*, 95 Wn. App. at 163. WSAC and WACO performed tasks such as participating in and appointing individuals to various state boards and commissions. *Id.* at 163-64. As with the authority contained in §431.10, decisions about the management and regulation of programs in *Telford* “could not be delegated to the private sector.” *Id.* Mr. McKee cites no evidence that Paratransit plays a similar role in the administration of Medicaid that the WSAC and WACO had with administering county programs. Instead, he simply asserts that it does. But speculation and unsupported assertions cannot defeat summary judgment. *Chamberlain*, 79 Wn. App. at 215-16.

In sum, Mr. McKee provides no authority or evidence that the third *Telford* factor supports his position.

**3. Paratransit’s funding does not support a functional agency ruling under the second *Telford* factor**

Under the second *Telford* factor, Mr. McKee argues that Paratransit is a public agency because it is “entirely funded by [its] contracts with the State of Washington.” (App. Br. at p. 34). He distorts the analysis under this factor, and also ignores the nature of Paratransit’s public funding. Paratransit does not receive “fixed allocation” such as

“designated levy funds.” *Fortgang*, 187 Wn.2d at 528. Instead, Paratransit’s public funding is variable based on the costs associated with administering its brokerage service.

In *Fortgang*, the Supreme Court analyzed both the percentage of funds attributable to public sources and the type of funding. *Id.* at 529-30. Paratransit’s operations are funded through HCA contracts awarded on a competitive bid basis to both non-profits such as Paratransit.<sup>2</sup> (CP at 364-65). While Paratransit receives monthly administrative costs, Paratransit also invoices the HCA on a fee-for-service basis. Paratransit’s subcontractors bill it for each trip provided, and Paratransit submits a consolidated invoice to the WHCA for those trips. (CP at 365).

Mr. McKee criticizes the trial court for considering Paratransit’s fee-for-service funding in its analysis (*see* App. Br. at p. 33), while himself acknowledging that Paratransit “receives services costs through [its] contracts with the State.” (App. Br. at p. 31). Even the monthly administrative costs are not a “fixed allocation,” as the contract specifies a “maximum” monthly limit, rather than a set amount each month. *Fortgang*, 187 Wn.2d at 529; (CP at 153).

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<sup>2</sup> Mr. McKee complains that Paratransit “aggressively s[ought] to keep its revenue numbers confidential.” (App. Br. at 32). Paratransit sought a protective order in response to Mr. McKee’s requests for income statements and balance sheets under *Fortgang*, which held that the “percentage of funding attributable to public sources, rather than the total amount of government funding allocated” was relevant to the second *Telford* factor. *Fortgang*, 187 Wn.2d at 528. The trial court granted Paratransit’s motion but required it to provide a “written declaration regarding the percentage of funds attributable to public sources.” (CP at 80).

Mr. McKee states, without citing to the record, that administrative costs are “determined at the time the contracts are signed.” (App. Br. at p. 32). He is only partially correct: The maximum monthly amount is specified in the contract, not the actual amount of monthly administrative costs to be paid to Paratransit. (CP at 153). Administrative costs are defined as “costs of operations not including expenses or payment to Transportation Providers or Subcontractors for direct services,” such as the costs associated with Paratransit’s operation of a “pool of volunteer drivers” or “expenses such as mailing, delivery of bus passes, tickets, and/or gas cards.” (CP at 99).

Paratransit’s revenue generated from both service and administrative costs is similar to the funds received as “consideration for providing certain services to victims of family violence as set forth in grants and contracts,” *Domestic Violence Servs. v. Freedom of Info. Comm’n*, 704 A.2d 827, 833, 47 Conn. App. 466 (Conn. App. Ct. 1998), and funds received as “consideration for the services [an organization] provided pursuant to a contract for the administration of the emissions inspection program.” *Envirotest Sys. Corp. v. Freedom of Info. Comm’n*, 757 A.2d 1202, 1206, 59 Conn. App. 753 (Conn. App. Ct. 2000). The Supreme Court in *Fortgang* cited both *Domestic Violence Services of Greater New Haven, Inc.* and *Envirotest Systems Corporation* as examples of funding models that “weigh *against* functional equivalency even when

an entity receives all or most of its funding from public sources.”

*Fortgang*, 187 Wn.2d at 528 n.11. This case is comparable to both.

The trial court correctly analyzed the second *Telford* factor, which weighs against a finding of functional equivalency.

**4. The third *Telford* factor—government control—also weighs against a functional equivalency finding**

Under the third *Telford* factor, Mr. McKee argues that “[t]he government has day-to-day control over Paratransit.” (App. Br. at p. 39). This assertion is not supported by any facts, was rejected by the trial court, and should be rejected on appeal.

*Fortgang* distinguished between “day-to-day control (supporting functional equivalency) and mere regulation (supporting private entity status).” *Id.*, 187 Wn.2d at 530. Ignoring this distinction, Mr. McKee’s argument relies entirely on federal regulations (including the obsolete version of 42 C.F.R. §431.10) and contractual provisions that govern Paratransit’s activities. But “[t]here is no good reason to value government transparency more in a heavily regulated area than in a less regulated area.” *Id.*

The trial court correctly ruled that it was “undisputed” that the government does not “control the day-to-day operations” of Paratransit. (VRP 4/27/18 at 24:11-16). Mr. McKee does not explain how this ruling was erroneous or cite to any part of the record showing actual day-to-day control. Mr. McKee did not raise a genuine issue of material fact before

the trial court, who correctly found this factor weighed against functional equivalency.

Additionally, Paratransit's contract includes an independent contractor provision. (CP at 41) ("The parties intend that an independent contractor relationship will be created by this Contract. The Contractor and his or her employees or agents performing under this Contract are not employees or agents of the Department.") This further supports the trial court's holding. *Research & Def. Fund v. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 609, 137 P.3d 120 (2006) ("Further, when the City contracts with the Association, it typically includes an independent contractor clause, stating the Association is an independent contractor and 'not the agent or employee of the City.'").

**5. Mr. McKee does not contest the fourth *Telford* factor**

The trial court correctly found that Paratransit was not created by the government, (VRP 4/27/18 at 10:2-8), Mr. McKee concedes this point. (App. Br. at p. 39). Accordingly, this factor supports the trial court's ruling.

**D. Mr. McKee Is Not Entitled to Attorney Fees or Expenses**

Mr. McKee asks for attorney fees and expenses on appeal. (App. Br. at p. 39). But he does not "devote a section of its opening brief to the request for the fees or expenses." RAP 18.1(b); *Edwards v. Edwards*, 83 Wn. App. 715, 725 n.5, 924 P.2d 44 (1996) ("We likewise reject John's assertion that the court award him fees for this appeal. Contrary to the

requirements of RAP 18.1, he failed to cite RAP 18.1, devote a section of his brief to a request for fees, or make any supporting argument.”)

In any event, Mr. McKee is not entitled to attorney fees or expenses because his appeal should be denied.

**V. CONCLUSION**

Paratransit respectfully requests this Court affirm the trial court’s ruling and deny Mr. McKee’s request for attorney fees and expenses.

Dated this 17th day of May, 2019.

Respectfully submitted,

/s/ John A. Safarli

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## CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 17th day of May, 2019, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

Jeffrey Randall McKee  
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**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51920-8  
**Appellate Court Case Title:** Jeffery R. McKee, Appellant v. Paratransit Services, Respondent  
**Superior Court Case Number:** 17-2-01798-3

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