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APR 28 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
Division III**

CASE #33897-5-III

NORTHWEST BUSINESS FINANCE, LLC, a Washington Limited
Liability Company,

Appellant,

v.

ABLE CONTRACTOR, INC., also known as ABLE CONTRACTORS,
INC., a Washington corporation; LINDA K. HOBSON, individually and
the marital community of LINDA K. HOBSON and JIM HOBSON, wife
and husband; and WESTERN CONSTRUCTION SERVICES, INC., a
Washington corporation,

Respondents

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 1. Northwest may prosecute this appeal from denial of a summary judgment motion following a trial. 2

 2. Able’s fraudulent representations to Northwest did not excuse Western’s obligation to pay Able’s debt to Northwest. 3

 3. Northwest submitted all of the undisputed material facts necessary to support its Motion for summary judgment. . . 6

 4. The disputed issues of fact found by the trial judge were immaterial to the legal issue of Western’s obligation to pay Northwest, and should have been disregarded. 6

 5. The Notice of Assignment of Proceeds that Northwest delivered to Western was sufficient to obligate Western to pay Northwest the accounts owed to Able. 11

 6. Northwest raised all theories of its case in the summary judgment proceedings. 14

 7. Northwest asserted all factual and legal grounds supporting its summary judgment motion. 15

 8. Northwest’s appeal is meritorious. 16

III. CONCLUSION 18

TABLE OF AUTHORITIES

CASES

<i>Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd.</i> , 170 Wash. 2d 577, 580, 245 P.3d 764, 766 (2010) . . .	16, 17
<i>Carlile v. Harbour Homes, Inc.</i> , 147 Wash. App. 193, 208, 194 P.3d 280, 287 (2008)	4, 12
<i>Johnson v. Rothstein</i> , 52 Wash. App. 303, 759 P.2d 471 (1988)	2
<i>Kaplan v. NW. Mut. Life Ins. Co.</i> , 115 Wash. App. 791, 65 P.3d 16 (2003)	2, 3, 10, 15, 16
<i>Moore v. Mayfair Tavern, Inc.</i> , 75 Wash. 2d 401, 407, 451 P.2d 669, 673 (1969)	14
<i>State v. Ward</i> , 182 Wash. App. 574, 586, 330 P.3d 203, 209	14

STATUTES

RCW 62A.9A-406(a)	11
RCW 62A.9A-406(c)	9

RULES

RAP 2.5(a)	14
RAP 9.12	14-16

I. INTRODUCTION

The matters discussed in Respondent Western Construction Services, Inc.'s responsive Brief may be distilled into eight issues:

1. May Appellant Northwest Business LLC (“Northwest”) prosecute an appeal from denial of a summary judgment motion following a trial?
2. Was Western Construction Services, Inc. (“Western”) obligated to pay Northwest on debt incurred as a result of Able’s fraudulent representations to Northwest?
3. Did Northwest submit sufficient undisputed material facts to support its summary judgment motion?
4. Were the disputed issues of fact found by the trial judge immaterial facts that should have been disregarded for the purpose of granting Northwest’s Motion for summary judgment?
5. Was the Notice of Assignment of Proceeds that Northwest delivered to Western sufficient to obligate Western to pay to Northwest money owed to Able?
6. Did Northwest raise all theories of its case in the summary judgment proceedings?
7. Did Northwest assert all factual and legal grounds supporting its summary judgment motion?
8. Is Northwest’s appeal meritorious?

The reply to each of these issues is, “Yes.”

II. ARGUMENT

1. Northwest may prosecute this appeal from denial of a summary judgment motion following a trial.

Western relies upon the case of *Johnson v. Rothstein*, 52 Wash. App. 303, 759 P.2d 471 (1988) to support its argument that, once a trial has been concluded, an appeal from denial of summary judgment is inappropriate. Fifteen years after making its decision in the *Johnson* case, Division 1 revisited this issue in *Kaplan v. NW. Mut. Life Ins. Co.*, 115 Wash. App. 791, 65 P.3d 16 (2003), cited in Northwest's opening brief.

The *Johnson* Court ruled, *sua sponte*, that a denial of summary judgment cannot be appealed after a determination of disputed material facts were made at a trial. *Johnson*, 115 Wash. App. at 472. The *Kaplan* Court cited this part of its *Johnson* ruling:

A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder.

Kaplan, 115 Wash. App. at 799. *Kaplan*, however, deals with the corollary to the ruling in the *Johnson* case, holding that an appeal from an adverse summary judgment ruling after trial is appropriate where there is no dispute about the material facts.

We are not precluded from review by the fact that the trial court sent the issue of Kaplan's compliance with the "licensed physician" clauses to the jury in the erroneous belief that there was a material factual issue for the jury to decide.

Although it is generally true that a denial of summary judgment based on a determination that material facts are in dispute cannot be appealed following a trial on the merits, this is not the case where the disputed issues of fact were not material - that is, where the decision on summary judgment turned solely on a substantive issue of law. (Internal citation omitted.)

Kaplan, 115 Wash. App. at 803-04. *Johnson* is distinguishable from instant case because no disputed material facts were at issue in the summary judgment proceedings.¹ Northwest's appeal may be heard because its summary judgment motion was based upon a purely legal issue determinable by undisputed material facts.

2. Able's fraudulent representations to Northwest did not excuse Western's obligation to pay Able's debt to Northwest.

Western's defense is that, because Able factored false invoices with Northwest, it had no obligation to pay Able anything on the false invoices, and therefore had no obligation to pay Northwest because nothing was due to Able on those false invoices. This defense, however, is limited only to

¹As will be discussed below, none of the facts material to the issues before the court in the summary judgment proceedings were disputed at trial.

Western's obligation to pay under the Factoring Agreement between Northwest and Able.

Although this defense may be successful if Western had notice of only the Factoring Agreement, it is not operative here because, in addition to the Factoring Agreement, Northwest and Able had entered into a Security Agreement covering, among other things, any and all accounts. CP 33 at ¶ 29. The Security Agreement defined "Account" to mean, "[A] right to payment for goods sold, or leased, or services rendered which is not evidenced by an instrument of chattel paper." CP 32 at ¶ 2. Northwest included a copy of a Notice of Assignment of Proceeds of Able's accounts with the copy of each factored invoice it sent to Western. CP 148 at ¶ 6.

Western and Northwest agree that "An assignee steps into the shoes of the assignor, and has all of the rights of the assignor." *Carlile v. Harbour Homes, Inc.*, 147 Wash. App. 193, 208, 194 P.3d 280, 287 (2008). Western argues that, because it did not have an obligation to pay on illegitimate invoices, it was excused from paying Western on *any* account owed to Able.

This argument ignores the fact that Western and Able had a contract whereby Western agreed to make periodic payments to Able for services performed. (The "Tumwater Fred Meyer Project") CP 277-278; 284-302. Able did perform services for Western on the Tumwater Fred Meyer Project,

and Able earned rights to payment from Western for the work it did perform on the Tumwater Fred Meyer Project. CP 278-280. Western did pay Able directly payments totaling \$81,000.00 for work Able performed on the Tumwater Fred Meyer Project. CP 149 at ¶ 13. The invoices Western did not honor were for work it claimed Able did not perform on the Tumwater Fred Meyer Project. CP 280-281.

Western's "illegitimate invoice" argument fails, for among other reasons, because the accounts Western paid to Able were for services Able performed for Western under the contract for the Tumwater Fred Meyer Project. Merely because four of the factored invoices may not have been legitimate does not excuse Western's obligations to remit to Northwest the accounts it owed to Able for legitimate services it performed.² Western has no unilateral right to pick and choose which accounts it decides to remit to Northwest.

²Permitting an account debtor to excuse payment because the assignor breached a warranty could open a wide range of defenses for an account debtor who failed to remit to an assignee. For example, Able warranted the accuracy of its books and records shown to Northwest. CP 33 at ¶ 18. The consequence of allowing the breach of warranty defense would be that an account debtor would be excused from payment if the assignor gave a false financial statement to the assignee. Such a result would be contrary to the law governing assignments.

As Able's assignee, Northwest steps into the shoes of Able, and is entitled to be paid *any* account owed by Western to Able, including accounts owed for *any* work Able performed on the contract for the Tumwater Fred Meyer Project. As a matter of law, Western was required to pay the \$81,000 Able earned on the Tumwater Fred Meyer Project to Northwest instead of to Able.

3. Northwest submitted all of the undisputed material facts necessary to support its Motion for summary judgment.

As discussed in Northwest's opening brief, only three material facts are necessary to establish an account debtor's legal obligation to pay to the assignee an account owed to the assignor: 1) The account debtor has notice of an assignment of proceeds, 2) The account debtor owes an account to the assignor, and 3) The account debtor paid the assignee instead of the assignor. Here, it is undisputed that Western did receive the Notice of Assignment of Proceeds, that Western did owe accounts to Able, and that Western did pay Able after it received the Notice of Assignment of Proceeds. CP 148, 277-280. Western did not dispute any of these material facts. CP 67-70; 277-282.

4. The disputed issues of fact found by the trial judge were immaterial to the legal issue of Western's obligation to pay Northwest, and should have been disregarded.

The trial court identified four disputed issues in making his ruling on the summary judgment motions:

In reviewing everything that has been submitted so far, the Court finds that there are genuine issues of material fact that relate to both motions. One disputed issue is whether the assignment covered all of the invoices or just specific invoices. The agreement may be read in a couple of ways because in that security agreement it references bona fide accounts. If there are illegitimate invoices, that would be an exception to the agreement. A second disputed issue is what type of notice did Western receive. It appears that Western received notice that all of the accounts or invoices had been assigned, however, it also appears there are some exceptions listed in the agreement as to what has been assigned. A third disputed issue is whether Western had a duty to remit payment even if some of the invoices were illegitimate. Yet another disputed issue is whether Western received notice of each assigned invoice or a singular notice of all of the invoices.

Appeal Doc. 6, p. 21, l. 20 - p. 22, l. 10. None of the disputed facts found by the trial court are material to the application of the law requiring account debtors to remit payment to an assignee.

Disputed Issue #1: One disputed issue is whether the assignment covered all of the invoices or just specific invoices. The agreement may be read in a couple of ways because in that security agreement it references bona fide accounts. If there are illegitimate invoices, that would be an exception to the agreement.

As discussed above, Northwest's Security Agreement with Able covered any and all accounts. CP 33 at ¶ 29. Northwest filed a Financing Statement with

the State of Washington covering, among other things, all accounts. CP 147 at ¶ 4, 235. Western has never disputed, and cannot dispute, that the provisions of the Security Agreement did not encompass all accounts.

Although the Security Agreement does reference bona fide accounts (CP 33 at ¶ 16), that reference is to only one of many warranties Able made to Northwest.³ CP 32-33. Those warranties are separate and apart from the scope of the security interest Able granted to Northwest. CP 33 at ¶ 29. That Able breached its warranty when it factored false invoices with Northwest does not excuse Able's obligation to repay the debt. As a matter of law, Northwest had a valid security interest in all of Able's accounts. Western was required to remit all of Able's accounts to Northwest.

Under the facts of this case, whether Able ever granted a security interest to Northwest is irrelevant. This is because Western's obligation to remit Able's accounts to Northwest was triggered by the Notice of Assignment of Proceeds Northwest delivered to Western,⁴ not the existence

³As Western points out, there was never a contract between Northwest and Western, and that Western had never seen a copy of the Security Agreement until after this litigation was commenced. Western's Brief of Respondent, p. 2. Western, correctly, does not argue that the agreement between Northwest and Able is not binding upon Western.

⁴RCW 62A.9A-406(a).

of an actual assignment or security agreement. Western is only excused from remitting the account if it had requested proof of the assignment from Northwest and Northwest had failed to seasonably comply.⁵ Western did not make such a request to Northwest prior to paying the accounts directly to Able.

Disputed Issue #2: A second disputed issue is what type of notice did Western receive. It appears that Western received notice that all of the accounts or invoices had been assigned, however, it also appears there are some exceptions listed in the agreement as to what has been assigned.

Northwest included a Notice of Assignment of Proceeds with the invoices it delivered to Western. CP 148, §§ 9 & 10. Western did not dispute this fact in its response to Northwest's summary judgment motion. The trial court found this fact to be undisputed. As discussed above, a finding of perceived exceptions to the Security Agreement is a misapplication of the law of assignments.

Disputed Issue #3: A third disputed issue is whether Western had a duty to remit payment even if some of the invoices were illegitimate.

⁵RCW 62A.9A-406(c). This provision also protects the assignor and the account debtor against fraudulent conduct by a bogus assignee.

Whether Western had a duty to remit payment of Able's account to Northwest is a pure issue of law. The trial court erroneously construed this as an issue of fact.

Disputed Issue #4: Yet another disputed issue is whether Western received notice of each assigned invoice or a singular notice of all of the invoices.

A dispute of material fact would have existed if Western had denied that it had ever received a Notice of Assignment of Proceeds. Western never disputed that it received the Notice of Assignment of Proceeds in either of the declarations it filed in the summary judgment stage of this case. CP 67-85; CP 277-315. As discussed in Northwest's opening brief, only one Notice of Assignment of Proceeds would be sufficient to bind Western to remit payment to Northwest. The trial court did not apply the law in ruling that the quantity of Notices of Assignment of Proceeds had any bearing on Western's obligations to Northwest.

Western improperly devotes a substantial portion of its response brief to testimony and documents presented at trial. Trial evidence may not be considered on an appeal from a summary judgment motion where a legal issue may be determined by considering the relevant undisputed material facts. *Kaplan*, 115 Wash. App. at 803-04.

None of the material facts (notice of the assignment delivered to Western, debt owed to Able, and failure to pay Northwest) were disputed at trial. None of the other facts put into evidence were material to the legal requirement that Western must pay Able's accounts to Northwest. Any reference to trial evidence must be disregarded.

5. The Notice of Assignment of Proceeds that Northwest delivered to Western was sufficient to obligate Western to pay Northwest the accounts owed to Able.

Western parses RCW 62A.9A-406(a) too narrowly when it contends that "appropriate notification" requires that each application for payment of an account must be individually identified in a notice of assignment. The Notice of Assignment of Proceeds specifically stated that Able assigned its accounts to Northwest. This is consistent with the statute, which permits the notice to include "amounts to become due . . ." RCW 62A.9A-406(a). This statute imposes no limitation upon how the scope of assigned accounts must be described in a notice of assignment.

The statute does not require that a notice of assignment be made on a specified form. Northwest is accorded a great deal of flexibility in the design of its notice:

No particular words of art are required to create a valid and binding assignment. Any language showing the owner's

intent to transfer . . . property in the assignee is sufficient.
(Internal citations omitted.)

Carlile, 147 Wash. App. at 208. The Notice of Assignment of Proceeds described the property assigned (accounts due to Able), directed payment of the accounts to Northwest, and was authenticated by Able's president. The Notice of Assignment of Proceeds met the requirements of the statute to bind Western to remit Able's accounts to Northwest.

Western asserts that the Notice of Assignment of Proceeds "did not identify or specify on its face which rights Able had assigned to Northwest. It merely referred to unidentified 'accounts.'" A cursory review of the Notice of Assignment of Proceeds, however, discloses that Northwest did direct Western to "remit any and all future payments due to ABLE CONTRACTORS, INC. directly to NORTHWEST BUSINESS FINANCE, LLC . . ." Northwest's Notice of Assignment of Proceeds should not have raised any question about Western's obligation to pay Northwest.

Western's contention that an assignee be required to notify an account debtor of each individual assigned account would impose commercially unreasonable requirements upon assignees because, as here, an assignee would not be aware of each account earned by the assignor. The assignee would be burdened with making frequent inquiries of account debtors about

the status of accounts owed to the assignor - a burden that would be shared equally by the account debtor in responding to these inquiries. The structure of RCW 62A.9A-406 eliminates these burdens by requiring that only a notice of the assignment be given to the account debtor.

Western claims that the Notice of Assignment of Proceeds is ambiguous, but does not describe the ambiguity within that document. The Notice of Assignment of Proceeds is not ambiguous. Western's claim of ambiguity also fails if it arises from construing the Notice of Assignment of Proceeds with the Factored Invoice Notice. No ambiguity can be found here because it should take little thought to understand that an account stated on a Factored Invoice Notice is merely an account included with those described in the Notice of Assignment of Proceeds.

Western never had any problems understanding its obligations under the assignment as evidenced by its compliance during the years prior to the Tumwater Fred Meyer Project. CP 148 at ¶¶ 5 & 8. Further, during the time Able was providing services under the Tumwater Fred Meyer Project, Western remitted to Northwest accounts arising from services performed by Able on other projects. CP 149 at ¶15.

Western did not raise the foregoing ambiguity defense in the summary judgment proceedings. This theory cannot be considered for the first time on

appeal. RAP 9.12, RAP 2.5(a). “[A]n appeal is not a device for trying out new theories or improving on the trial below.” *Moore v. Mayfair Tavern, Inc.*, 75 Wash. 2d 401, 407, 451 P.2d 669, 673 (1969). Western’s arguments based upon the theory of ambiguity should be stricken.

6. Northwest raised all theories of its case in the summary judgment proceedings.

Western contends that Northwest is advancing a new theory on this appeal that the \$81,000 Western paid to Able should have been paid to Northwest on accounts it did not factor. This contention must be supported by a showing that Northwest failed to “[I]nform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error.” (Internal citation omitted.) *State v. Ward*, 182 Wash. App. 574, 586, 330 P.3d 203, 209, review denied, 339 P.3d 634 (Wash. 2014).

Contrary to Western’s contention, Northwest did not advance a new theory in this appeal. It addressed the law applicable to assignments in both its opening brief and in its reply brief filed in the summary judgment proceedings. CP 240-241; CP 318-320. At oral argument, Northwest conceded that Able factored illegitimate invoices, and argued that the very reason a secured lender takes a broad security interest in all the borrower’s receivables is to protect against fraudulent conduct. Appeal Doc. 6, p. 12, l.

13-19. Other argument by Northwest supporting this theory can be found at Appeal Doc. 6, p. 11, l. 13-24; p. 12, l. 20 - p. 13, l. 4; p. 17, l. 2-13; p. 19, l. 20-24; & p. 21, l. 2-9. Western's "new theory" argument is not supported by the record.

7. Northwest asserted all factual and legal grounds supporting its summary judgment motion.

Western argues that Northwest should not be permitted to prosecute this appeal because it did not make motions under CR 50. Western cites no Washington authority supporting this theory. The appellant in *Kaplan* made no CR 50 motions. Northwest's appeal is properly before this Court.

Western devotes several parts of its brief to facts and testimony adduced at trial. Appellate consideration of trial testimony is prohibited by RAP 9.12:

SPECIAL RULE FOR ORDER ON SUMMARY JUDGMENT

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

See, also *Kaplan*, 115 Wash. App. at 799. Notwithstanding RAP 9.12, no relevant material facts were the subject of dispute by either party.

The cases Western cites for the proposition that there can be no appeal from denial of a summary judgment motion are those where issues of material fact were disputed. As was discussed above, those decisions do not apply to Northwest's appeal because the material facts at issue in the summary judgment proceedings were undisputed. The facts found as disputed by the trial court judge were not material, and should not have defeated Northwest's summary judgment motion.

8. Northwest's appeal is meritorious.

Sanctions for a frivolous appeal may be awarded only if the appeal has no merit whatsoever:

An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.

...

Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. (Internal citations omitted.)

Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd., 170 Wash. 2d 577, 580, 245 P.3d 764, 766 (2010).

In its appeal, Northwest has presented a record evidencing the following material facts: Western had notice of Able's assignment of proceeds to Northwest; Western owed accounts to Able; and Western paid Able instead of Northwest. Northwest cited Washington State case law establishing that it has the right to appeal from the denial of a summary judgment motion following a trial; that statutory and case law require an account debtor to remit to an assignee the accounts owed to an assignor; and that, as a matter of law under the undisputed material facts of this case, the trial court should have granted Northwest's summary judgment motion.

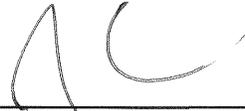
The debatable issue in *Advocates* was whether a non-lawyer individual could represent an environmental organization in court proceedings. The Supreme Court found that, because at least one court in a foreign jurisdiction had allowed a non-lawyer individual to represent an environmental organization in a court proceeding, the appeal had sufficient merit to deny sanctions against the appellant. Here, Northwest has raised multiple debatable issues in this appeal. Western has failed to demonstrate that there is no doubt that Northwest's appeal is frivolous. Western's request for sanctions should be denied.

III. CONCLUSION

The trial court judge did not find that any of the material facts necessary to grant Northwest's motion were disputed. As a pure matter of law, Northwest's summary judgment motion should have been granted. The denial of Northwest's summary judgment motion should be reversed. No sanctions on appeal should be awarded to Western.

RESPECTFULLY SUBMITTED this 27 day of April, 2016

PHILLABAUM, LEDLIN, MATTHEWS &
SHELDON, PLLC



Brian S. Sheldon, WSBA #32851
Ian Ledlin, WSBA #6695

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 28th day of April, 2016, a true and correct copy of APPELLANT'S REPLY BRIEF, to which this declaration is attached, was served by the method indicated below, and addressed to the following:

Linda Hobson, Registered Agent	<input checked="" type="checkbox"/>	U.S. Mail
for Able Contractors, Inc.	<input type="checkbox"/>	Hand Delivered
12604 NE 172 nd Avenue	<input type="checkbox"/>	Overnight Mail
Brush Prairie, Washington 98606	<input type="checkbox"/>	Fax:
	<input type="checkbox"/>	Email:
Linda Hobson, Registered Agent	<input checked="" type="checkbox"/>	U.S. Mail
for Able Contractors, Inc.	<input type="checkbox"/>	Hand Delivered
147 Lull Rd.	<input type="checkbox"/>	Overnight Mail
Toutle, WA 98649	<input type="checkbox"/>	Fax:
	<input type="checkbox"/>	Email:
Farron Curry	<input checked="" type="checkbox"/>	U.S. Mail
Darien S. Loisell	<input type="checkbox"/>	Hand Delivered
Schwabe, Williamson & Wyatt	<input type="checkbox"/>	Overnight Mail
1420 Fifth Avenue, Suite 3400	<input type="checkbox"/>	Fax:
Seattle, WA 98101-4010	<input checked="" type="checkbox"/>	Email: fcurry@schwabe.com

DATED: 4/28/16

Shannan Sheldon
Shannan Sheldon

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

NORTHWEST BUSINESS FINANCE, LLC.,
a Washington limited liability company,

Appellant,

NO. 338975

CERTIFICATE OF SERVICE

v.

ABLE CONTRACTOR, INC., also known as
ABLE CONTRACTORS, INC., a Washington
corporation; LINDA K. HOBSON,
individually and the marital community of
LINDA K. HOBSON and JIM HOBSON, wife
and husband; and WESTERN
CONSTRUCTION SERVICES, INC., a
Washington corporation,

Respondents.

I certify under penalty of perjury of the laws of the state of Washington that on the 29th day
of April, 2016, a true and correct copy of APPELLANT'S REPLY BRIEF was served by the method
indicated below, and addressed to the following:

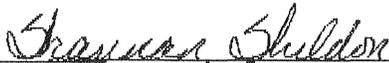
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FACSIMILE TRANSMITTAL SHEET

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DATE: April 29, 2016

TO: Court of Appeals Div. III
ATTN: JOYCE ROBERTS

FAX #: 456-4288

FROM: Shannan Sheldon

Total number of pages sent, including this transmittal letter: 3

REGARDING: Case #338975
Northwest Business Finance v. Western Construction

COMMENTS: Hi Joyce. Attached is my Certificate of Service regarding Darien Loisell. Can you fax me back a conformed copy? Thanks. Hard copy will not follow by mail.

If you do NOT receive all of the pages, please contact our office at 509/838-6055.
Telecopier Operator: Shannan