No. 86936-7

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

Case No. 29411-1-III

P.E. SYSTEMS, LLC, a Delaware limited liability company,

Plaintiff/Respondent,

v.

CPI Corp., a Missouri corporation,

Defendant/Petitioner.

FILED
FEB 21 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
12 FEB 21 AM 8:35
BY RONALD R. CARPENTER
CLERK

P.E. SYSTEMS, LLC'S ANSWER TO CPI'S PETITION FOR REVIEW

NICHOLAS D. KOVARIK
KEVIN W. ROBERTS
DUNN & BLACK, P.S.
111 North Post, Suite 300
Spokane, WA 99201
(509) 455-8711
Attorneys for P.E. Systems, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. IDENTITY OF RESPONDENT 2

III. COURT OF APPEALS' DECISION 2

IV. STATEMENT OF THE CASE AND DECISION BELOW 2

- A. Factual Background. 2
- B. Procedural Background. 5

V. REASONS FOR DENYING REVIEW 6

- A. There Is No Conflict With A Decision Of The Supreme Court Or A Decision Of Another Court Of Appeals. 7
  - 1. Dicta In The Court of Appeals' decision Is Not In Conflict With Berg. 8
  - 2. Dicta Regarding Striking Immaterial Information From Declarations Is Not In Conflict With Other Decisions 11
  - 3. The Court of Appeals Did Not *Sua Sponte* Sever Addendum A. 12
  - 4. The Court Of Appeals' Holding Is Not In Conflict With Keystone Or 16th St. Investors, LLC. 14
- B. This Case Does Not Raise An Issue Of Substantial Public Interest. 17

VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS 20

VII. CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

16th St. Investors, LLC v. Morrison, 153 Wn. App. 44 (2009) 8, 14, 15, 16, 17

Adler v. Fred Lind Manor, 153 Wn.2d 331 (2004) 8, 13

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) 8, 9, 10, 19

Bloom v. Christensen, 18 Wn.2d 137 (1943) 16

Bort v. Parker, 110 Wn. App. 561 (2002) 8

Hanson Indus. Inc. v. Kutschkau, 158 Wn. App. 287 (2010) 8

Hollis v. Garwall, Inc., 137 Wn.2d 683 (1999) 8

Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171 (2004) 8, 14, 15, 16, 17

McKee v. AT&T Corp., 164 Wn. 2d 372 (2008) 8, 13

Morris v. Maks, 69 Wn. App. 865 (1993) 16

N. Coast Enters., Inc. v. Factoria P'ship, 94 Wn. App. 855 (1999) 8

P.E. Sys., LLC v. CPI Corp., 164 Wn. App. 358, 264 P.3d 279 (2011) 2, 9, 11, 12, 14, 15, 16, 18

Parrilla v. King County, 138 Wn. App. 427 (2007) 8

Peoples State Bank v. Hickey, 55 Wn. App. 367 (1989) 7

Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn. App.261 (2006) 8

Spectrum Glass Co., Inc. v. Pub. Utility Distr. No. 1 of Snohomish County, 129 Wn. App. 303 (2005) 8

Rules

CR 10 ..... 17, 18

CR 12 ..... 1, 6, 9, 10

CR 12(b) 1

CR 12(c) 1, 5, 8, 9, 10, 11

CR 56 9

CR 7 ..... 17, 18

RAP 13.4 7
RAP 13.4(b)(1) 7
RAP 13.4(b)(2) 7
RAP 13.4(b)(3) 7
RAP 18.1 20

Other Authorities

Restatement (Second) of Contracts § 29 (1981) 15

I. INTRODUCTION

The Court of Appeals, Division III followed Washington law and reversed the errors committed by the Trial Court. The Court of Appeals correctly held that the Trial Court failed to apply the standard required by CR 12(b) and (c) and that the July 10, 2009 Agreement for Services ("Agreement") between the parties was a valid, enforceable contract and not merely an agreement to agree. Additionally, it held that the Trial Court erred in not considering the evidence presented by P.E. Systems, LLC ("PES") once the proper CR 12 standard was applied.

CPI Corp. ("CPI") seeks leave to try to reinstate the erroneous Trial Court decision that allowed it to "win" a dismissal without ever addressing the merits of the lawsuit or having evidence bearing on the issues considered. CPI grasps at dicta in the Court of Appeals' decision in an effort to invent conflict of precedent or a substantial public interest where none exists. CPI's Petition focuses on the various examples used by the Court of Appeals or the reasoning employed to reach the ultimate holding without identifying any actual conflict. CPI fails to point to a holding in the decision that is in conflict with another division's decisions, this Court's decisions or impacts a **substantial**

public interest. Therefore, this Court should decline review of this private contract dispute.

II. IDENTITY OF RESPONDENT

Respondent PES asks this Court to deny review of the Court of Appeals Division III's decision designated in Part III of this Answer.

III. COURT OF APPEALS' DECISION

CPI requests review of Division III's decision in P.E. Sys., LLC v. CPI Corp., 164 Wn. App. 358, 264 P.3d 279 (2011). CPI's motion for reconsideration was denied on December 20, 2011.

IV. STATEMENT OF THE CASE AND DECISION BELOW

A. Factual Background.

PES is an independent, specialized consulting firm that analyzes debit and credit card processing costs for clients. CP 4, 48, 52. In order to be compensated for its services, PES enters into binding agreements with its clients. These agreements provide that PES will analyze the previous 12 months of merchant processing costs and determine if the amount the client is being charged can be reduced. CP 4, 48. The results of PES's analysis are provided to the client in a confidential report. CP 50-75. PES is paid by receiving a consulting

fee of 50% of any savings realized after providing the information/services. CP 48.

In order to determine a baseline to measure the amount of any savings, PES needs to determine the client's historic cost. CP 48. Due to the fact that the client's historic cost is unknown to PES at the time it enters into the agreement, the agreement itself sets forth a formula to calculate historic costs. CP 48. The historic cost formula, as set forth in the agreement, is the total Visa/MasterCard processing costs divided by the total Visa/MasterCard revenue. CP 48, 50-75.

The result of that historic cost calculation is then set forth and agreed upon in Addendum A simply as a procedure to allow the clients an opportunity to double-check the calculations. CP 48. Importantly, however, the historic cost formula is set forth in the agreement and is not susceptible to further negotiation. Therefore, once the agreement is accepted, there is no further agreement to be made in the future. Rather, the client has the opportunity to agree that the math was performed correctly and pursuant to the formula contained in the Consulting Agreement.[1] CP 48.

[1] Much like any contract where price is established by a formula. For example, sales commissions or prices per unit.

On or about July 10, 2009, CPI and PES entered into such an Agreement. CP 4, 48. CPI provided PES its historical merchant processing statements, and PES performed the analysis. CP 4. On August 12, 2009, PES delivered its proprietary Cost Savings Program to CPI demonstrating that it could save over $280,000 a year.[2] CP 4-5, 50-75.

Upon performing the analysis of CPI's processing environment, as the Agreement provides, PES took the total Visa/MasterCard processing costs and divided it by the total Visa/MasterCard revenue. CP 48, 58. The result of the calculation showed CPI's historic cost baseline was 1.655998%. CP 58. Pursuant to the terms of the Agreement, CPI was to pay PES 50% of the savings actually realized. CP 4-5, 48. The savings realized are determined by looking at the merchant processing statements and comparing those effective rates against the historic cost baseline of 1.655998%. CP 4-5, 48, 50-75.

However, CPI breached the Agreement by refusing to produce its post-Agreement merchant processing statements and refusing to pay PES its consulting fee earned despite the clear and unequivocal language in the Agreement to the contrary. CP 4-6, 48.

---

[2] An undisputed fact.

B. Procedural Background.

On June 8, 2010, PES filed its Complaint against CPI for breach of contract and breach of good faith and fair dealing. CP 3-7. On August 13, 2010, CPI filed its Answer to Complaint and Affirmative Defenses. CP 13-16. CPI also introduced evidence by attaching a copy of the July 10, 2009 Consulting Agreement to the Answer as Exhibit A. CP 18-21.

Shortly thereafter, on August 27, 2010, CPI moved the Trial Court for judgment on the pleadings under CR 12(c) claiming the July 10, 2009 contract was an unenforceable agreement to agree. CP 22-27. In response, PES submitted a declaration that provided a copy of the contract as Exhibit A and a copy of the August 12, 2009 presentation as Exhibit B to explain the intent of the parties. CP 35-75. CPI filed an untimely motion to strike Exhibit B to the Declaration of Nicholas D. Kovarik. CP 76-80.

On September 10, 2010, the Trial Court heard oral argument on CPI's Motion to Dismiss. RP 1, 3; CP 102. Despite PES's fee in the Agreement being based on an agreed formula, the Trial Court incorrectly granted CPI's motion to dismiss under CR 12(c). CP 117-18. Based on the ruling, PES moved to amend its Complaint to

assert causes of action for quantum meruit/unjust enrichment, Consumer Protection Act Violations and tort theories. RP 22. Despite the lack of prejudice to CPI, the Trial Court denied PES's motion. CP 119-20.

On September 28, 2010, Judgment was entered against PES. CP 124-26. On October 1, 2010, PES appealed to the Court of Appeals. CP 127-140. Division III reversed the Trial Court's decision, held that the Trial Court had not applied the correct legal standard required by CR 12, that the Agreement was valid and enforceable and that the Trial Court erroneously failed to consider evidence that was necessary to rule on the motion. In reaching its holding, the Court of Appeals, in dicta, gave many examples and reasons to support its holding. CPI's Petition quibbles with dicta and ignores whether the actual holding was correct. However, CPI's Petition for Review should be denied in total because the Court of Appeals' holding is not in conflict with any other decision and does not raise an issue of substantial public purpose.

V. REASONS FOR DENYING REVIEW

Despite CPI's protestation, Division III's reversal of the Trial Court's erroneous judgment on the pleadings and holding that the

Agreement for Services is a valid and enforceable agreement creates no conflict warranting review and raises no issue of substantial public interest[3]. Washington law prefers controversies be determined on their merits. See e.g., Peoples State Bank v. Hickey, 55 Wn. App. 367 (1989).

Here, Division III did not err in reversing the Trial Court's judgment on the pleadings and holding that the Agreement was valid and enforceable. An examination of the issues raised by CPI confirms review should be denied.

A. There Is No Conflict With A Decision Of The Supreme Court Or A Decision Of Another Court Of Appeals.

Discretionary review is only appropriate if there is a reason justifying review. RAP 13.4. RAP 13.4(b)(1) and (2) provide that review will be accepted only if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or another decision of a Court of Appeals. Here, no such conflict exists.

In an effort to manufacture justification for review, CPI claims the Court of Appeals' decision is in conflict with numerous other court decisions for various reasons. Those decisions and issues are: (1) Berg

[3] It is undisputed that there are no Constitutional questions in this case. Therefore, CPI cannot rely on RAP 13.4(b)(3) to justify review.

v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), the precedent[4] interpreting it and CR 12(c) (regarding extrinsic evidence in applying the context rule); (2) Hanson Indus. Inc. v. Kutschkau, 158 Wn. App. 287, 292 (2010), Parrilla v. King County, 138 Wn. App. 427, 432 n.2 (2007), and N. Coast Enters., Inc. v. Factoria P'ship, 94 Wn. App. 855, 859 (1999) (regarding striking immaterial information in declarations); (3) McKee v. AT&T Corp., 164 Wn. 2d 372, 403 (2008) and Adler v. Fred Lind Manor, 153 Wn.2d 331, 359 (2004) (regarding severability of contract provisions; and (4) Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 179 (2004) and 16th St. Investors, LLC v. Morrison, 153 Wn. App. 44, 55 (2009) (regarding agreements to agree). However, the fact that the Court of Appeals applied the undisputed facts of this specific case to the longstanding law and reached a conclusion based on the facts before it does not mean the Court of Appeals' decision conflicts with the decisions.

1. Dicta In The Court of Appeals' decision Is Not In Conflict With Berg.

CPI argues that this Court must review the Court of Appeals' decision because it wrongfully concluded that the Trial Court should

[4] Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn. App.261, 270 (2006); Spectrum Glass Co., Inc. v. Pub. Utility Distr. No. 1 of Snohomish County, 129 Wn. App. 303, 311 (2005); Bort v. Parker, 110 Wn. App. 561, 574 (2002); Hollis v. Garwall, Inc., 137 Wn.2d 683, 693 (1999).

have considered PES's proffered evidence. CPI states that the Court of Appeals wrongfully applied Berg and the cases that follow it because CR 12(c) gives the Trial Court discretion to exclude matters. However, this argument fails.

CPI confuses whether an issue is being resolved on the pleadings (CR 12) versus being decided as a question of law (summary judgment standard).[5] See P.E. Sys., LLC, 164 Wn. App. at 365. If a Trial Court is deciding an issue of law, it must give the non-moving party the opportunity to present all material made pertinent to such a motion by Rule 56. CR 12(c). The Court of Appeals' decision did not destroy the trial courts' discretion but, rather, found that this particular Trial Court erred when it decided a question of law without giving PES any opportunity to present its evidence and refusing to consider the evidence that was presented. P.E. Sys., LLC, 164 Wn. App. at 365-66.

The choices the Trial Court had were as follows: (1) exclude all matters outside the pleadings and determine if the pleadings alone show that there is no cause of action even considering all hypothetical scenarios; (2) consider the evidence outside the pleadings, such as the Agreement and convert the motion to one for summary judgment

[5] A flaw pointed out by the Court of Appeals. P.E. Sys., LLC, 164 Wn. App. at 365.

giving PES the opportunity to present evidence. Id. CPI's argument fails to realize that when the Trial Court considered the Agreement **and** decided a question of law, it was required to convert the motion to one for summary judgment and allow PES to present its evidence. Id. at 365. In doing so, the Trial Court would consider all the evidence present under the Berg context rule. Therefore, holding that the Trial Court erred in deciding a question of law but not considering PES's evidence is not in conflict with Berg and CR 12(c), but in accord with how the rules and Berg work together. CPI is simply grasping at any straw it can find to try to claim a conflict exists.

Further, the Court of Appeals' decision also makes practical sense. If CPI's argument were accepted, then a defendant could simply attach all the documentary evidence supporting its case, move for judgment on the pleadings and have only its attachments considered. That is not the intent of CR 12. Rather CR 12 judgment on the pleadings' purpose is to test the hypothetical facts to determine if the Plaintiff asserted viable causes of action. When anything other than the allegations in the Complaint and the hypothetical facts are considered, fundamental fairness dictates that each party should have the

opportunity to present evidence so that decisions are made on the merits. Therefore, review should be denied.

2. Dicta Regarding Striking Immaterial Information From Declarations Is Not In Conflict With Other Decisions.

CPI further strains to create conflict by claiming the Court of Appeals' decision should be reviewed because a Trial Court can disregard immaterial evidence from a declaration when deciding questions of law. This argument presupposes that the Cost Savings Program presented to CPI was immaterial.

Even assuming it was immaterial, which it was not, the Court of Appeals' decision is not in conflict with other decisions, because those decisions deal with a summary judgment standard deciding an issue of law. As demonstrated above and set forth in the Court of Appeals' decision, a decision on the pleadings (CR 12(c)) is different than one resolving a question of law (summary judgment standard). P.E. Sys., LLC, 164 Wn. App at 365. Here, CPI's argument fails because the Trial Court cannot decide a question of law "on the pleadings." As such, the Trial Court erred by not considering PES's proffered evidence and review is not justified.

3. The Court of Appeals Did Not *Sua Sponte* Sever Addendum A.

Next, CPI argues that the Court of Appeals' decision should be reviewed because it *sua sponte* severed Addendum A in conflict with other decisions of this Court and other Courts of Appeals. Additionally, CPI argues that the price term was never agreed upon, and thus, the Agreement lacks consideration. These arguments are fatally flawed, because the Court of Appeals did not sever Addendum A but, rather, used the notion of severing Addendum A as reasoning why the Agreement was valid and enforceable. P.E. Sys., LLC, 164 Wn. App. at 367-68. In other words, a valid and enforceable contract was formed with or without Addendum A. This is because the Agreement set forth the specific price term to which CPI agreed. Id. at 368.

At the root of this case was whether the July 10, 2009 Agreement is valid and enforceable. The Court of Appeals correctly found that the Agreement was not an agreement to agree, because the mathematical formula to calculate PES's fee term was clearly set forth in the body of the Agreement. Id. at 367. To support this conclusion, the Court of Appeals reasoned that the Agreement is valid without

Addendum A because Addendum A could be easily severed. Id. Thus, with or without Addendum A, there was a valid contract.

Just because the Court of Appeals discussed severability to illustrate why the Agreement was valid and enforceable does not conflict with McKee v. AT&T Corp., 164 Wn.2d 372, 403 (2008) or Adler v. Fred Lind Manor, 153 Wn.2d 331, 359 (2004). Even if the Court of Appeals did sever Addendum A, its decision is not in conflict with other precedent, because severing Addendum A would not disturb the primary intent of the Agreement.

CPI's argument that severing Addendum A would sever the signature page and the material price term ignores the facts of this case. The signatures appear on the same page as the body of the Agreement not on Addendum A. CP 48. On this same page, the "price term" is specifically set forth. Paragraph 4 states that CPI owes PES 50% of any savings realized during the term of the Agreement. CP 48. The savings realized is based upon the difference between the client's new merchant processing costs and the Historic Cost. CP 48. Paragraph 3 of the Agreement specifically sets forth how Historic Cost is determined. It states:

> *(3)* ***Client's Historic Cost will be determined, based upon the data provided by Client, by taking Client's***

> ***total Visa and MasterCard credit and debit card costs divided by Client's total Visa and MasterCard credit and debit card revenue which reflects Client's accurate Historic Cost.***
>
> ***
>
> *Should Client decide to go forward and implement any part of PES Cost Savings Program, either by itself, by a third party or by using PES services,* ***this Historic Cost becomes the baseline which the parties will use to measure "Program Cost Savings".*** *[PES receives 50% of all Program Cost Savings as a consulting fee].*

CP 48 (emphasis added).

Further, as the Agreement states, the Historic Cost becomes the baseline for measuring of savings. P.E. Sys., LLC, 164 Wn. App. at 368. Thus, when CPI implemented the recommendations, the Historic Cost became the baseline. Id. More importantly, this method for calculating PES's fee was set forth in the Agreement and sufficiently provided consideration for the Agreement. Therefore, CPI's argument regarding severability does not justify review.

4. The Court Of Appeals' Holding Is Not In Conflict With Keystone Or 16th St. Investors, LLC.

CPI's argument that the July 10, 2009 Consulting Agreement is an unenforceable "agreement to agree" is not persuasive and does not conflict with Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171 (2004) and 16th St. Investors, LLC v. Morrison, 153 Wn. App. 44

(2009). The Court of Appeals analyzed the Agreement in accordance with these cases and reached a conclusion that was unfavorable to CPI. P.E. Sys., LLC, 164 Wn. App. at 367-68. The fact that CPI's arguments were meritless does not mean that the decision is in conflict with Keystone or 16th St. Investors, LLC.

The Keystone court addressed the issue of whether an exchange of letters between a potential buyer and seller of real property which communicated offers, counter-offers, and acceptances could give rise to an enforceable agreement when both parties expressly agreed in the correspondence that they would have to negotiate, draft and sign a formal purchase and sale contract. Keystone, 152 Wn.2d at 174-175. The Keystone court correctly noted that this was an unenforceable "agreement to agree" requiring "*a further meeting of the minds of the parties and without which it would not be complete.*" Id. at 175.

On the other hand, where negotiations are to the point where the parties have definitely agreed to the terms but have not yet executed a final written instrument, an enforceable contract exists. See Restatement (Second) of Contracts § 29, comment a (1981). Where mutual manifestations of assent of the parties are present, a contract

will not be prevented from forming on the basis of intent to later formalize the agreement or supply a non-material term. Id.

Washington courts have held that an open term contract is enforceable as long as there is reasonable certainty of terms in order for the court to provide a basis for determining breach and the appropriate remedy, and there is a manifestation of assent. See 16th St. Investors, LLC v. Morrison, 153 Wn. App. 44, 55 (2009); see also Morris v. Maks, 69 Wn. App. 865 (1993) (a valid and enforceable contract exists so long as the subject matter is agreed upon, the terms are stated in informal writings, and the parties intended to have a binding agreement). The court may test the contract based on the surrounding circumstances to determine if it is complete and therefore valid. Bloom v. Christensen, 18 Wn.2d 137, 151 (1943).

Here, the Court of Appeals properly applied Keystone and its progeny to the Agreement before it. P.E. Sys., LLC, 164 Wn. App. at 367. It held that the July 10, 2009 Agreement was valid and enforceable, because there was a reasonable certainty of terms in order for the court to provide a basis for determining breach and the appropriate remedy. Id.

CPI and PES entered into a binding agreement and that included all material terms. Id. at 368. The Consulting Agreement is sufficiently definite such that, under the most basic contract interpretation principles, CPI's acceptance resulted in an enforceable contract and the ability of a court to fix exactly the legal liability of the parties. The "historic cost" that CPI argued required further agreement is, in fact, fully provided in a mathematic formula that was expressly agreed to by CPI in the Consulting Agreement. Id. Therefore, the Court of Appeals' decision is not in conflict with Keystone and 16th St. Investors, LLC.

B. This Case Does Not Raise An Issue Of Substantial Public Interest.

CPI argues that this Court must review the Court of Appeals' decision because it wrongfully concluded that the Agreement was "outside" of the pleadings for purposes of determining if the motion for judgment on the pleadings should have been converted to one for summary judgment. CPI asserts that the Agreement must be "inside" the pleadings as stated in CR 7 and CR 10, and not accepting review will substantially affect the public interest as litigants will be confused on how to apply the Civil Rules in light of the Court of Appeals' decision.

However, CPI overlooks the fact that the Court of Appeals only found the Agreement to be outside the pleadings as a result of the Trial Court deciding a question of law without applying the appropriate summary judgment standard. P.E. Sys., LLC, 164 Wn. App. at 364-66. The Court of Appeals' decision does not change the application of CR 7 or CR 10. See Id.

Further, the Court of Appeals' decision does not affect the substantial public interest, because this dispute is a private dispute between two businesses. The Agreement between them is unique to the facts of this case and has limited applicability to other disputes.

The Court of Appeals held that the Trial Court erred when it did not consider PES's proffered evidence but yet considered the Agreement when it decided a question of law (summary judgment), as the Trial Court cannot pick and choose what and whose evidence to consider. Id. at 364-65. As the Court of Appeals stated, the Agreement is not part of the pleadings with regard to the Trial Court's application of the proper standard. Id. at 365. The Court of Appeals further clarified this holding when it stated that CPI "*confuses the process of resolving a dispute as a question of law with the process of resolving a dispute on the pleadings.*" Id.

This holding is clear and does not leave litigants with conflicting messages regarding the application of the rules. If the Trial Court (or a litigant) desires to resolve an issue on the pleadings, it must find that the moving party shows that **the pleadings alone** show that there is no cause of action, even considering hypothetical scenarios. Id. at 365. However, if the Trial Court (or litigant) desires to resolve an issue as a question of law, which it did in this case, then a summary judgment standard applies. Id. at 365-66.

Because PES properly alleged in its Complaint, breach of contract and breach of good faith and fair dealing, the Trial Court could not have granted CPI's motion on the pleadings based on hypothetical facts. Id. at 366. Instead, the Trial Court analyzed the contract which was outside the pleadings and made a legal determination that the contract was unenforceable. Id. When it did so, it necessarily was deciding an issue of law, not of pleading and was required to consider all of the evidence presented bearing on the intent of the parties. This is precisely what the Berg context rule allows. Id. at 364-66. Therefore, the Court of Appeals' holding is not of substantial public interest, and review should be denied.

VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Respondent PES respectfully requests an award of the reasonable attorney fees and costs incurred based on RAP 18.1 and the valid and enforceable contract between PES and CPI. CP 48.

VII. CONCLUSION

CPI's Petition for Review lacks any legal or factual basis for the argument supporting review by this Court. Therefore, PES respectfully requests that CPI's Petition for Review be denied.

DATED this 17th day of February, 2012.

Respectfully Submitted,

DUNN & BLACK, P.S.

NICHOLAS D. KOVARIK, WSBA #35462
KEVIN W. ROBERTS, WSBA #29473
Attorneys for P.E. Systems, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of February, 2012, I caused to be served a true and correct copy of the foregoing document to the following:

☒ HAND DELIVERY ☐ U.S. MAIL ☐ OVERNIGHT MAIL ☐ FAX TRANSMISSION ☐ EMAIL	J. Michael Keyes Whitney J. Baran K&L Gates, LLP 618 W. Riverside Ave., Ste. 300 Spokane, WA 99201

NICHOLAS D. KOVARIK