Supreme Court No. 100468-1

SUPREME COURT
FOR THE STATE OF WASHINGTON

JINUR BIAN, a married man,

Petitioner,

v.

OLGA SMIRNOVA, a married woman,

Respondent.

OLGA SMIRNOVA'S ANSWER TO JINRU BIAN'S PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Jinru Bian's Petition for Review ("Petition") of the Division 1 Court of Appeals' decision affirming[1] the grant of Respondent Olga Smirnova's summary judgment motion is replete with fatal flaws. Simply stated, there is no legitimate basis for further review, and the Court of Appeals properly sent this case back to the trial court for entry of an amended order granting Respondent an award of attorneys' fees and costs for defending against Petitioner's meritless claims. As a result, this Court should deny this Petition for Review.

Indeed, the sole question at this stage is whether Petitioner satisfies the substantive requirements for this Court to accept review. Because Petitioner does not satisfy any appropriate standard that warrants review, the simple answer is no.

This Petition concerns an approximately four (4) to six (6) inch strip of land between two lots in a residential subdivision in Bellingham, Whatcom County. In 2012, Jinru Bian ("Bian") purchased the property at 906 38th Street (the "Bian Property"), which lies directly north of the property owned by Olga Smirnova ("Smirnova") at 910 38th Street (the "Smirnova Property"). Those two lots have historically been separated by a series of fences, the location of which forms the factual dispute between the parties. At the time of Bian's purchase of the Bian Property, the properties were separated by a fence that was installed slightly within the Smirnova Property approximately parallel to the property line—but not exactly so.

[1] *Bian v. Smirnova*, 2021 WL 4840816 (Div. 1 2021) (the "Opinion").

Bian mistakenly believes this fence was installed in that location dating back to at least 1992—leading him to the erroneous conclusion that his predecessors in interest acquired title to the land between that fence and the property line by 2002 through adverse possession. As such, even though Smirnova had informed Bian on multiple occasions where the property line actually was, when Smirnova built a new fence between the properties in 2017, in accordance with a survey she obtained, Bian believed that the new fence was installed on property he owned. Despite telling Smirnova he was "not a property line guy," Bian then sued Smirnova based on claims for adverse possession, trespass, unjust enrichment, and injunctive relief.

Bian, as he did in the trial court and on appeal to the Court of Appeal, predicates his claims on a stubborn refusal to recognize the history of the fencing installed between the affected properties. Bian provided to the trial court no facts to dispute that the original fence (referred to as "Fence I" by the Court of Appeals)—in place the entire time his predecessor in interest, Margaret Erhardt and her husband (the "Erhardts"), owned the Bian Property—was installed directly on the property line between the Smirnova Property and the Bian Property. As such, it is undisputed that the Erhardts adversely possessed nothing. Bian instead claims that the original fence was installed within the Smirnova Property line, thus leading to the "perfection" of an adverse possession claim to that strip of land in 2002 by the Erhardts. This simply does not conform to the undisputed material facts.

Bian appealed the order of the trial court denying his motion for summary judgment and granting Smirnova's cross motion for summary

judgment. The Court of Appeals affirmed the trial court's grant of summary judgment in favor of Smirnova "[b]ecause Bian failed to rebut Smirnova's evidence defeating his adverse possession claim."[2] Notably, the Court of Appeals did not address the applicability of the doctrine of merger of title because Bian failed to establish his claim for adverse possession.[3]

Bian also appealed the trial court's subsequent order awarding Smirnova her attorneys' fees and costs under RCW 7.28.083(3). In reversing the trial courts award, the Court of Appeals held that "the record fails to establish that the trial court determined the award was equitable and just."[4] The Court of Appeals remanded "to the trial court to independently determine if the amount Smirnova requested was equitable and just."[5] Notably, the Court of Appeals did not rule that Smirnova was not entitled to an award.

In light of the Courts of Appeals holding that Bian failed to establish his claim of adverse possession, Bian now petitions this Court for review. Bian fails to meet the correct standards for review in RAP 13.4(b). This significant failure mandates this Court deny the Petition.

Should the Court grant Bian's Petition, Smirnova seeks review of the Court of Appeals reversal of the trial court's award of attorneys' fees and costs because the Court of Appeals erred in requiring that the trial court make a specific determination that the award is "equitable and just."

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[2] *See* Opinion at 1.
[3] *Id*. at 13, n. 6.
[4] *Id*. at 17.
[5] *Id*.

II. RESTATEMENT OF THE ISSUES

1. Under RAP 13.4(b), review of an appellate court's decision may only occur if the decision conflicts with a Court of Appeals or Supreme Court Decision, is a significant question of constitutional law, or is an issue of substantial public interest. The Court of Appeals issued an Opinion correctly applying the standard under Washington Civil Rule 56 to the facts as presented to the trial court and finding that Bian failed to rebut Smirnova's evidence defeating his adverse possession claim. Bian fails to satisfy these criteria for review. Given Defendants failure to meet the RAP 13.4(b) requirements, should the Court deny review?

2. The Court of Appeals' Opinion held that under the specific facts in the record, Bian failed to rebut Smirnova's evidence defeating his adverse possession claim. In doing so, the Court of Appeals affirmed the grant of summary judgment without reaching Bian's arguments on the inapplicability of the doctrine of merger. Given this lack of relevance, should the Court deny review or be otherwise sure to reach all pertinent issues presented by both parties?

If this Court grants Bian's Petition for Review, the following issue should be presented for review:

3. Under RCW 7.28.083(3), the prevailing party in an adverse possession case may request the trial court award costs and reasonable attorneys' fees if, after considering all the facts, the court determines such an award is equitable and just. The Court of Appeals found that the trial court failed to create an adequate record for the review of the award of attorneys' fees and costs and that it could not determine if the award was

equitable and just from the trial court's order. Did the Court of Appeals err in reversing and remanding to the trial court on this basis?

III. STATEMENT OF THE CASE

The Opinion sets out the facts in a fair and detailed fashion, and Smirnova generally concurs with that rendition of the facts. Op. at 1-6. However, Smirnova would be amiss if she did not point out the following specifics.

As an initial matter, Bian's Petition, as did his brief to the Court of Appeal and his Motion for Reconsideration, contains facts, evidence, and argument that were not presented to the trial court. As noted by the Court of Appeals, such new evidence and argument should not be considered.[6]

Here Bian's Petition is entirely predicated on the unsupported assertion by Bian that "[T]here is no **material** evidence supporting Fence I existed, except Smirnova's declaration."[7] This of course entirely misses the point. First, Smirnova provided material evidence in support of Fence I in the form of not only her own declarations, but also text messages between Bian and Smirnova (CP 131), and various other pieces of evidence provided in support of her Motion for Summary Judgment as well as in opposition to Bian's Motion for Summary Judgment. Indeed, the record is replete with evidence submitted by Smirnova supporting the history of the fencing between the properties, of which she has personal knowledge.[8]

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[6] Opinion at 9, n. 4.
[7] Pet. at 4.
[8] *See* Opinion at 8-9.

More importantly, despite numerous opportunities to do so, Bian was unable to produce any evidence to challenge Smirnova's material facts, leaving them undisputed at the trial court level. Instead, Bian simply accuses Smirnova of making it all up, which he continues to do here before this Court. Crucially, here and at the Court of Appeals, Bian has continually attempted to either introduce new evidence or invite the appellate courts to allow further discovery on issues that have already been resolved at the trial court level and are not within this Court's jurisdiction. However, as noted by the Court of Appeals, "[a]lthough we review facts and inferences in the light most favorable to the nonmoving party, '[o]nce there has been an initial showing of the absence of any genuine issue of material fact, the party opposing summary judgment must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues.'"[9]

This case was filed in 2018 and Bian had ample opportunity before he filed for summary judgment to conduct discovery and attempt to support his argument that Fence II never existed (which of course it did). He chose instead, while aided by counsel, to file his motion for summary judgment, resulting in Smirnova's assertion of her cross-motion. Bian never even took a deposition in advance of filing his motion. He cannot introduce new facts on appeal and request further discovery to cure his utter failure to do so at the trial court level. And in any event, this does not reveal grounds for review under RAP 13.4(b).

[9] *See* Opinion at 6 (quoting *Boyd v. Sunflower Props., LLC*, 197 Wn. App. 137, 142-43, 389 P.3d 626 (2016)).

Bian's Petition mostly regurgitates his denied Motion for Reconsideration and fails to meet the applicable standards for review by this Court. *See Generally* Pet. at Appendix E. Bian's arguments essentially invite the Court to declare Smirnova a liar and allow further discovery, but crucially, do not identify any error by the Court of Appeals in the application of any opinion of this Court or the Court of Appeals. As such, the Petition fails to meet the criteria of RAP 13.4(b).

IV. ARGUMENT

Defendants' Petition must meet one of four requirements to obtain Supreme Court review of a decision terminating review. *See* RAP 13.4(b). The Petition fails to meet these criteria. These failures irreparably conflict with Defendants' obligations under both RAP 13.4(b) and RAP 13.4(c)(7) to (1) articulate the reasons for review; and (2) provide "[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in [that section], with argument." *See* RAP 13.4(b) and RAP 13.4(c)(7).

The Opinion does not merit review by the Court for three reasons. First, the Petition fails to adequately discuss the relevant standards. Second, the Petition does not satisfy the relevant standards. Third, the Petition is, in part, based on alleged issues that were not addressed by the Court of Appeals. If, on the other hand, the Court grants the Petition, Smirnova requests that the Court review the Court of Appeals' reversal of the trial court's award of attorneys' fees and costs under RAP 13.4(b).

A. This Court should not grant the Petition because Bian fails to satisfy any one of the four requirements for review under RAP 13.4(b).

Bian cannot satisfy any of the requirements set out by RAP 13.4(b) in order to warrant review. This Court accepts petitions for review under RAP 13.4(b) only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or[10]
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Put simply, petitioners like Bian here "must demonstrate that the Court of Appeals decision conflicts with a decision of this court or another Court of Appeals decision, or that [they are] raising a significant constitutional question or an issue of substantial public interest." *In re Matter of Dove*, 188 Wn. 2d 1008, 398 P.3d 1070 (2017). Smirnova addresses each of these criteria in turn.

1. The Court of Appeals' Opinion is in harmony with existing Supreme Court and Court of Appeals decisions.

The Opinion of the Court of Appeals does not conflict with any decision by this Court or the appellate courts of this State, as the Court of Appeals properly applied the well-worn jurisprudence developed when

[10] Bian does not appear to argue that a significant question of Constitutional law is at stake.

applying Civil Rule 56. In reviewing the Petition, Bian makes it clear that he does not find fault with the Court of Appeals' application of the substantive law applicable to adverse possession claims. Instead, Bian asserts that the Court of Appeals erred by not recognizing Bian's unsupported disputes of "fact" (which are simply allegations that Smirnova made up the existence of Fence II). But this is not the standard, as it does not reveal a conflict with applicable opinions, but rather a conflict between the decision reached by the Court of Appeals and the decision that Bian wanted. *See In re Coats*, 173 Wn. 2d 123, 132-33, 267 P.3d 324 (2011) (recognizing "petitioner must persuade us that **either** the decision below conflicts with a decision of this court or another division of the Court of Appeals; that it presents a significant question of constitutional interest; or that it presents an issue of substantial public interest that should be decided by this court.") (emphasis added); *see also Matter of Dove*, 188 Wn. 2d 1008, 398 1070 (2017) ("To obtain review in this court, Mr. Dove **must** demonstrate that the Court of Appeals decision conflicts with a decision of this court or another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest.") (emphasis added).

More importantly, Bian completely ignores the Court of Appeals admonition that:

> Summary judgment is subject to a burden shifting scheme. 'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a

> genuine issue as to a material fact.' " *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601-02, 200 P.3d 695 (2009) (quoting *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)).
>
> Although we review facts and inferences in the light most favorable to the nonmoving party, "[o]nce there has been an initial showing of the absence of any genuine issue of material fact, the party opposing summary judgment must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues." *Boyd v. Sunflower Props., LLC*, 197 Wn. App. 137, 142-43, 389 P.3d 626 (2016).[11]

Reviewing the record before the trial court *de novo*, the Court of Appeals concluded that "Smirnova established that because Fence II was not Fence I, Bian cannot prove Erhardt adversely possessed the strip of land based on the location of Fence II."[12] At that point, Bian "was required to respond with more than conclusory allegations and speculative statements that Smirnova's explanation about the fences was 'fabricated' and a 'fake' story."[13] The Court of Appeals further explained that:

> Bian fails to understand that Smirnova presents evidence based on personal knowledge because she lived on the Smirnova Property during the time in question. The evidence she presented in her declaration cannot be disregarded as simply conclusory statements because Bian chooses not to believe them. *Cf. Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 463, 909 P.2d 291 (1996) (citing CR 56(e) and recognizing that trial courts should reject evidence when the court is presented with an affidavit not based on personal knowledge).

[11] Opinion at 6.
[12] *Id*. at 8.
[13] *Id*. at 8-9.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.[14]

The Court of Appeals went on to explain in detail how Bian's arguments did not comply with the requirements of Rule 56(e), which mandate the presentation of specific facts creating a genuine issue of material fact.[15]

The Court concluded that "[a]lthough we review facts and inferences in the light most favorable to the nonmoving party, Bian failed to produce specific facts to rebut Smirnova's evidence that the fence that encroached on Smirnova's property was erected in 2009 and removed in 2017."[16] This is not a case of the Court of Appeals "weighing the evidence" and tipping the scales in Smirnova's favor, as suggested by Bian. There was no weighing to be made as Bian failed to provide any material evidence to counter Smirnova's evidence based on personal knowledge. As such, the Court of Appeals correctly concluded that the trial court properly granted summary judgment in favor of Smirnova. The Court of Appeals decision does not conflict with any opinion of this Court or the Court of Appeals and is in fact in harmony with those decisions. It is Bian's contentions that conflict with existing law in that he continues to refuse to recognize that the requirements of Rule 56(e) preclude the relief he seeks.

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[14] Opinion at 9.
[15] *Id*. at 9-13.
[16] *Id*. at 13.

An additional point bears mentioning is that Bian repeatedly asserts throughout his briefing both here and below that "genuine issues of fact" exist precluding summary judgment, that he was subjected to "trial by summary judgment," and that he is the victim of "judicial overreach."[17] Apart from being hyperbolic, these assertions are astounding considering that it was Bian who initially moved for summary judgment in the first place. He argued in his motion that there were no genuine issues of fact and that he was entitled to a judgment as a matter of law. His motion was denied and Smirnova's was granted, so now he has dragged the parties through a years' long exercise resulting in tens of thousands of dollars in attorneys' fees based on his claim that Smirnova "faked" Fence II and that he has somehow been wronged. This turns the facts on their heads as it is Smirnova who has been forced to defend an action over four (4) inches of property and had her fees on appeal for doing so denied by the Court of Appeal.

2. This case does not involve an issue of substantial public interest.

Finally, the lawsuit does not involve an issue of substantial public interest. *See, e.g., State v. Watson*, 155 Wn. 2d 574, 577, 122 P.3d 903 (2005) (finding a decision concerning validity of a sentencing memorandum of substantial public interest when it had the immediate potential to affect all sentencing hearings in Pierce County); *see also In re Adoption of T.A.W.*, 184 Wn. 2d 1040, 387 P.3d 626 (2016) (finding an issue of substantial public importance in determining the scope of the ability to terminate parental rights pertaining to Native American tribes). This Court examined

[17] Pet. at 27-28.

what does and does not qualitfy as a substantial public interest in *In re Flippo*. *In re Flippo*, 185 Wn. 2d 1032, 380 P.3d 413 (2016). There, the Court found that the validity of imposing legal financial obligations more than a year after judgments on personal restraint petitions were final was an issue of a substantial public interest because of its potential to broadly impact personal restraint petitions. *Id.* The Court recognized it was a commonly occurring issue and affected a number of existing proceedings in lower courts at the time. *Id.* Conversely, this Court found no substantial public interest in examining a claim of whether a party's guardian ad litem was able to adequately communicate during trial. *See In re Dependency of P.H.V.S.*, 184 Wn. 2d 1017, 389 P.3d 460 (2015).

Here, the Opinion applies Rule 56 in a straightforward manner to the narrow set of facts on the record. Bian's Petition focuses on how the Opinion will impact him (i.e., violate Due Process, etc.) but does not discuss a broader public interest. As such, the Opinion is relevant to the particular dispute between Bian and Smirnova, and not some greater substantial public interest.

The Court should deny the Petition because it does not meet RAP 13.4(b)'s requirements for review.

B. The issues presented by Bian with respect to the doctrine of merger of title and whether title transfers divest title obtained by adverse possession have no relevance to the Court of Appeals' Opinion, which did not rest its decision on either of those bases.

Defendants' Petition asks this Court to review as issues "Whether [the] Merger Doctrine Can Be Applied to Divest the Title Vested by

Adverse Possession Is a First Impression in Washington and Should Be Determined by This Court" and "Whether Title Transfers Can Divest the Title Vested by Adverse Possession." Pet. at 2. But the Court of Appeals did not address either of these issues because it did not need to. "Because Bian cannot establish Erhardt adversely possessed the strip of land on Smirnova's property, we need not address Smirnova's argument that the doctrine of merger of title applied as an affirmative defense."[18]

The Court's holding—affirming the grant of summary judgment in light of Bian's argument—means that the issues raised are unavailing. This is not a new issue in this matter and this issue was briefed extensively in the lower courts. The only reason this issue was left undecided was because the Court of Appeals affirmed the grant of summary judgment on other grounds. Consequently, if the Court grants review it should be sure to reach all pertinent issues presented by both parties. Review is not warranted in the first place; but if the Court decides to grant review and take issue with the Opinion, it should also analyze the applicability of the doctrine of merger as an independent ground upon which to deny Bian's appeal.

C. If the Court grants the Petition, Smirnova requests that review be granted of the Court of Appeals reversal of the trial court's award of attorneys' fees and costs under RAP 13.4(b)

Initially, it is important to note that the Court of Appeals held that the trial court properly granted an award of attorneys' fees and cost under RCW 7.28.030(3).[19] As such, it is undisputed that Smirnova, as the prevailing party, was entitled to an award of fees. The Court of Appeals

[18] Opinion at 13, n. 6.
[19] *See* Opinion at 16.

took issue with the amount of the fees awarded, citing the inadequacy of the record for it to determine whether the trial court determined that the amount of fees awarded was "equitable and just" under the applicable statute.

The Court of Appeals noted that:

> trial courts must "independently decide" what constitutes reasonable attorney fees and not simply defer to the billing records of the prevailing party's attorney. *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). "Trial courts must also create an adequate record for review of fee award decisions. Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record." *Mayer*, 102 Wn. App. at 79 (internal citations omitted).

The Court of Appeals focused in on the language of the second sentence of RCW 7.28.030: "The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is *equitable and just*."[20]

The Court of Appeals cited the proper standard when reviewing an award of attorneys' fees and costs: " 'When attorney fees are authorized, we will uphold an attorney fee award unless we find the trial court manifestly abused its discretion.' *Workman v. Klinkenberg*, 6 Wn. App. 2d 291, 305, 430 P.3d 716 (2018). A trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Workman*, 6 Wn. App. 2d at 305. Having cited the proper standard, the Court of Appeals then ignores it and creates its own.

[20] Opinion at 14 (emphasis added).

The Court of Appeals quotes at length the trial court's decision at the February 26, 2020, hearing on Smirnova's motion for fees.[21] In that portion of the transcript cited, the trial court explicitly states that the request for attorneys' fees made by Smirnova's counsel was reasonable based on the facts presented to the trial court. The trial court referenced the declaration submitted by counsel wherein the efforts to reach an agreement on the amount of fees were extensive and the court also noted that the amount of fees were reasonable given the "course of the litigation."[22] It is clear that the trial court "consider[ed] all the facts" in awarding Smirnova her attorneys' fees and costs and decided that awarding Smirnova her fees was reasonable under the circumstances.

The Court of Appeals ruled that this was not enough, but did not rule that the trial court was "manifestly unreasonable" in making the award or that the award was "based on untenable grounds," as required by applicable law. *Workman*, 6 Wn. App. 2d at 305. Instead, the Court of Appeals ruled that the "record fails to establish that the trial court determined the award was equitable and just, as required by RCW 7.28.030(3) . . . ." This, however, is not required by the plain language of the statute. That the trial court made the award after "considering all the facts" presupposes that the trial court found it "equitable and just."

The failure of the Court of Appeals to specifically rule that the trial court manifestly abused its discretion conflicts with the established law of the Court and the Court of Appeals, and warrants review under RAP

[21] Opinion at 14-15.
[22] *Id*. at 15.

13.4(b). This error of the Court of Appeals was doubly detrimental to Smirnova, as the Court of Appeals determined that Bian was a partially prevailing party and denied Smirnova her attorneys' fees and costs on appeal—even though Smirnova was the prevailing party on the actual substantive adverse possession claim.

V. CONCLUSION

The Court of Appeals' Opinion is well-informed and correct with respect to Bian's adverse possession claim. Bian's Petition fails to satisfy the criteria for discretionary review under RAP 13.4(b). Since Bian fails to satisfy any of the requirements for review, the Court should deny his Petition.

If, despite all of this, the Court grants Bian's Petition, the Court should be sure to reach all of the relevant issues—particularly those raised by Smirnova—presented to the Court of Appeals, including issues surrounding the doctrine of merger as well as the Court of Appeals reversal of the trial court's award of attorneys' fees and costs under RCW 7.28.030(3)..

Respectfully submitted this 31st day of January, 2022.

CHMELIK SITKIN & DAVIS P.S.

By_____

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CERTIFICATE OF SERVICE

I, KIMIKO A. TORRES, certify, under penalty of perjury under the laws of the State of Washington, that on the 21st day of December 2021, I caused to be served a true and correct copy of the preceding document, *Answer to Petition for Review*, on the parties listed below at their e-mail addresses of record via E-mail:

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CHMELIK SITKIN & DAVIS P.S.

By_____
Kimiko A. Torres, Legal Assistant

AMENDED CERTIFICATE OF SERVICE

I, KIMIKO A. TORRES, certify, under penalty of perjury under the laws of the State of Washington, that on the 31st day of January 2022, I caused to be served a true and correct copy of the preceding document, *Answer to Petition for Review*, on the parties listed below at their e-mail addresses of record via E-mail:

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CHMELIK SITKIN & DAVIS P.S.

By_____
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CHMELIK SITKIN & DAVIS, P.S.

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