IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Supreme Court No. 89301-2

Court of Appeals No. 68434-5-I

JOYCE LEAH BURTON

Respondent

v.

JANICE BECKER and AFFILIATED MENTAL HEALTH PROGRAMS, INC.

Petitioners

RESPONSE TO PETITION FOR REVIEW

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RESTATEMENT OF THE CASE

Background – Cross-Appellant Joyce Leah Burton, aka ("Burton"), was an employee of Appellant Affiliated Mental Health Programs, Inc., ("AMHP"). AMHP is a mental health counseling agency.

Relief Sought in Original Action – This is a breach of contract case. Burton argued to the Court of Appeals' three-judge panel that she should have been awarded :

1. the value of her salary and benefits improperly withheld by AMHP from July 31, 2009 until September 11, 2009

   and

2. double damages for those wages improperly withheld by AMHP during the period of July 14, 2009 to September 11, 2009.

The Court of Appeals panel denied Burton's appeal for double damages, but, upheld, and increased, the trial court's award of damages by reversing a trial court offset for unemployment benefits received by Burton.

Basis for Burton's Claims - Burton was AMHP's Director from January 1, 2007 until July 13, 2009. CP 132 and 135, Exhs 2 and 45. Prior to that Burton had served as AMHP's Clinical

Director from June 21, 2004 until December 31, 2006. CP 134, Exh 36.

Burton was terminated from her Director position on, or around, July 13, 2009, by co-Appellant Janice Becker who owns AMHP. CP 132, Exh 1.

An employment agreement was in effect between Burton and AMHP which required "due cause" and 60 days notice prior to termination. CP 132, Exh 2. After Burton's termination, there were crossing breach claims by Burton and AMHP. CP 1-32.

The trial court concluded there was "due cause" for termination, but Burton was entitled to salary and benefits for the 60 day notice period because she had "carried her burden of proving that AMHP breached the contract by failing to pay 'compensation to the Director [Burton] for services rendered to the date of termination.'" CP 129, COL 6 and CP 130, COL's 7 and 10.[1]

The trial court held that any breach of "loyalty" alleged by AMHP was justified or excused by Burton's duty to her clients. See Trial Court FOF's 11 and 12[2] at CP 128.

[1] COL refers to the Trial Court's Conclusions of Law in the above-captioned matter

[2] FOF refers to the Trial Court's Findings of Fact in the above-captioned matter.

RCW 18.225.100 and Patient Choice - Burton testified that she was familiar with RCW 18.225.100 and that mental health clients, by statute, have decision-making authority in determining their individual treatment provider and the method and mode of treatment. CP 333 and RP 64:23 – 65:7.

Length and Focus of Treatment of P.B.'s, D.E.'s, and M.S.'s Families - Burton had been the individual therapist for three families who rejected AMHP's services after Burton was terminated by AMHP on July 13, 2009. CP 341-42 and VRP of M.S., 6:20 - 7:6.

The focus of treatment for two of the families concerned a child with self-harm issues. CP 341-43. The third involved a child who, according to her mother, had been "psychotic" for two years. See V.R.P. of M.S.

Events of July 13, 2009 – Becker went into Burton's office on July 13, 2009 and delivered a letter stating Burton's employment with AMHP was being terminated as of September 11, 2009, but was expected to stop working immediately and leave the office. (CP 132, Exh 2).

The letter stated Burton would be paid "as provided in the Agreement through your termination date." (CP 132, Exh 2).

Summary of Events After July 13, 2009 - Burton's salary was paid through July 13, 2009. CP 135, Exh 37. Burton's insurance benefits were terminated on either July 31, 2009 or August 1, 2009. CP 137, Exh 124.

No Solicitation by Burton - The trial court found that "the evidence established ... that the three clients Ms. Burton 'took' from AMHP had sought her out[,] ... were not interested in disrupting the therapeutic relationship ... established with Ms. Burton[,] and would not have considered staying with AMHP after Ms. Burton left the agency." CP 128, FOF 11.[3]

Choice Belongs to Patient - The trial court found that both parties testified, and the law provides, that the choice of a therapist belongs solely to the client. CP 128, FOF 12.[4] "[So] AMHP could not have required [the] clients to stay with the agency in any event." Id.

Employment Agreement Required AMHP to Pay Wages and Benefits for an Additional 60 Days - The trial court found Burton lost income and had additional damages from uninsured medical expenses and costs which were incurred prior to the

[3] FOF refers to the Trial Court's Findings of Fact in the above-captioned matter.
[4] Id.

expiration of the 60 days following notice of her termination. CP 128, FOF 14 and CP 129, FOF 17.

The trial court concluded that Defendants had an obligation to provide Burton with an additional 60 days of pay and benefits past July 13, 2009. See CP 130, COL 7[5] and CP 132, Exh 2. Burton was directed to submit a form of judgment in favor of Burton. CP 130, COL 10.

Judgment Amounts - The final trial court judgment awarded a principal amount of $6,779.25 and a cost judgment of $230.00 to Burton on February 23, 2012. CP 219-220.

Absence of Conclusion on Whether Upholding Patient Choice Excuses Breach - The trial court found that both Burton and Becker testified, and the law provides, that the choice of therapist belongs solely to the client, (CP 128, Finding of Fact 12). In spite of the above findings, however, the Trial Court entered no explicit conclusion of law concerning whether any breach by Burton was otherwise excused by a public policy supporting a privately-funded mental health client's right to choose his/her provider. (CP 129-130). Nevertheless, as stated in the preceding paragraphs, the trial court directed Burton to prepare a judgment against AMHP for withholding wages and benefits from Burton.

AMHP's References to a Requirement for Clients to Provide 30 Days Notice Before Terminating Services - AMHP argued in its Opening Appeal Brief and Petition for Review that Burton knew that AMHP's clients were required to give 30 days notice before terminating services with AMHP and that Burton was aware of this provision in AMHP's agreements. (AMHP's Opening Brief at page 8).

Uncontested Findings About Patient Choice - In its Findings of Fact and Conclusions of Law, the trial court found that both parties testified, and the law provides, that the choice of a therapist belongs solely to the client. (CP 128, FOF No. 12). In their opening appeal brief, AMHP and Becker state: "the trial court noted ... the clients had a right to choose their therapist [and] [t]his is true ..." (AMHP's Opening Brief, p 19). Further, the trial court found: "Representatives of the clients testified that they were not interested in disrupting the therapeutic relationship they had established with ... Burton and would not have considered staying with AMHP after ... Burton left the agency." (CP 128, FOF 11). Finally, "[t]he evidence established ... that the three clients ... Burton 'took' with her from AMHP had sought her out. (CP 128, FOF 11).

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[5] COL refers to the Trial Court's Conclusions of Law in the above-

These finding have not been argued, factually or via cited legal authorities, by AMHP or Becker on appeal. Undisputed findings are verities on appeal. In re the Contested Electin of Schoessler, 140 Wn2d 368, 385, 998 P2d 818 (2000).

Burton's Previous Argument That There Was No Bona Fide Dispute as to Whether She Was Entitled to 60 Days of Post Notice Salary and Benefits - In her trial and previous appellate briefing, Burton argued that the law does not recognize AMHP's trial assertions or defenses as constituting a bona fide dispute. Burton, in support, cited the record, Ebling v Gove's Cove, 34 WnApp 495, 500-503, 663 P2d 132 (1983), RCW 49.52.050(2), RCW 49.52.070, Schilling v Radio Holdings, Inc., 136 Wn2d 152, 157-9, esp 159, 961 P2d 371 (1998), and Department of Labor & Industries v Overnite Tranportation, 67 Wn App 24, 834 P2d 638 (1992), *review denied*, 120 Wn2d 1030, 847 P2d 481(1993).[6] The Court of Appeals panel disagreed and found that there was a bona fide dispute as to whether Burton was owed wages. (AMHP's Appx pp 15-16).

Burton's Argument That Any Breach by Her Was Excused on Public Policy Grounds - It was also argued by

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captioned matter.

Burton that any breach by her was excused because there can be no dispute as to whether public policy directs that provider choice belongs to mental health clients in Washington State because:

(1) Becker and AMHP admitted that it does, (AMHP's Opening Brief, p 19)

and

(2) Washington law states likewise. See RCW 18.225.100.[7]

Finally, Burton argued there should be no dispute as to whether the courts can enforce a mental health client's statutory rights, through a third party like Burton, under RCW 18.225.100, because a third party is entitled to utilize the courts' equity power to enforce the rights of another where public policy issues are present and no explicit method of enforcement is listed in the statute. See Sullivan v Little Hunting Park, Inc., 396 U.S. 229, 235, 238-39, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

BURTON's ARGUMENT IN RESPONSE TO AMHP's PETITION FOR REVIEW

1. Summary of Burton's Response

[6] Possibly superceded, on other grounds, by statute, according to Oliver v Dunn Company, 2009 U.S. Dist. LEXIS 40434 (C.D. Ill. 2009)

[7] RCW 18.225.100: A person licensed under this chapter must provide clients ... with accurate disclosure information ... including the right of clients to refuse treatment [and] the responsibility of clients to choose their provider and treatment modality which best suits their needs ...

Burton disagrees with the Court of Appeals' three-judge panel's analysis of RCW 18.225.100's intent, but agrees with the panel's other cited reasons for upholding the trial court decision to award damages to Burton. Burton disagrees with AMHP's argument that three-judge panel's decision is unsound and requires additional review.

2. The Court of Appeals' Panel Did Not Conflate a Duty of Loyalty with a Non-Solicitation Claim; Nor Did It Disregard, or Fail to Consider, the Standard of Review for a Trial Court's Refusal to Allow Full Forfeiture of Salary and Benefits as a Remedy.

Specifically, the three-judge panel ruled that:

(1) The "forfeiture rule" does not make every type of employment during a termination period a violation of the duty of loyalty or the duty not to compete; (AMHP Appx 10),

(2) Burton's activities did not violate the contractual noncompetition clause and did not cause AMHP to lose clients because Burton did not approach or solicit former AMHP clients and it was unrebutted that the former clients "would not have stayed with AMHP after Burton left;" (AMHP's Appx 6 and 10),

(3) Forfeiting all salary is not a mandatory remedy for a violation of a duty of loyalty;[8] (AMHP's Appx 6-9),

(4) AMHP presented no other applicable theories of recovery or "authority that would allow [AMHP] to offset wages Burton earned during the 60 day [period]" of post-notice employment; (AMHP's Appx 10), and

(5) Whether and how much salary Burton could be compelled to forfeit rested within the discretion of the trial court; (AMHP's Appx 16),

As a result, the three-judge panel did not fail, as AMHP alleges, to consider the breadth of an employee's duty of loyalty. The panel also did not, as AMHP alleges, fail to understand or apply Washington law concerning if, or when, full forfeiture of salary and benefits is required from a breaching party. Instead, the Court of Appeals panel looked at the breadth of the duty of loyalty, concluded that Burton had violated some duties therein, but the remedy chosen by the trial court should not to be disturbed because it was permissible for the trial court to consider, in

[8] The three-judge panel ruled, without citation to any particular case, that Burton had, as part of her duty of loyalty, the specific duties instructing AMHP's former clients to formally terminate their relationship with AMHP before switching to Burton and to pay their post-switch money to AMHP, instead of Burton. (AMHP's Appx 6-9).

exercising discretion, that, among other things, AMHP failed to offer any evidence that Burton solicited former AMHP clients.

***Obert* is Supportive of Burton's Position, Not AMHP's** - The trial court's ruling and the panel's affirmation of that ruling are not contrary to any positions reached in AMHP's cited case, Obert. See Obert v ERADCO, 112 Wn2d 323, 771 P2d 340 (1989). In fact, the inappropriateness of citing Obert for a hard and fast rule in support of forfeiture is plainly stated within Obert, itself:

> This court has held that a denial of specific performance, in an instance of a fiduciary's breach, is in the sound discretion of the court. Obert at 338.

***Obert* Was Specific to Its Own Facts** - The fact that the Obert Court decided, on its particular facts, to compel nearly full forfeiture by the Obert defendant, (i.e., ERADCO), has nothing to with what remedy should be imposed in the above-captioned case because the facts of each are wildly different.

***Obert*'s Facts Were Much More Egregious and Yet Even the *Obert* Defendant Was Not Compelled to Fully Forfeit Its Profits** - The Obert Court held that the underlying trial court order compelling defendant ERADCO to forfeit nearly all of its limited partnership profits, (it was allowed to keep its initial capital

contributions, *with interest*),[9] was within the Obert trial court's discretion because the trial court's findings indicated especially egregious breaches by ERADCO, as the general partner, in a limited partnership venture. Id. at 338-39.

The trial court in Obert, found that ERADCO, unlike Burton:

> (a) engaged in a number of fraud schemes which involved pledging the plaintiffs', not ERADCO's, limited partnership assets to obtain loans for ERADCO's own purposes,[10]
>
> (b) failed to provide audited financial statements as required by the Limited Partnership Agreement. (Some statements were eventually produced, but were untimely),
>
> (c) failed to pay real estate taxes, until late 1982, on the property for the years 1979, 1980, 1981 and 1982, contrary

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[9] Obert at 339.

[10] See Obert at 326-8. ERADCO borrowed monies from the limited partnership's bank, Westside Federal Savings and Loan, for its own purposes and pledged as collateral the separate limited partnership savings accounts of Campus Park. ERADCO also used the Limited Partnership accounts of other limited partnerships to secure their borrowings. Also as part of the collateral agreement with the bank, ERADCO agreed to restrict the use of those limited partner accounts for the duration of its loans. The monies were kept in a five and one-half percent (5 1/2) interest bearing account rather than being placed in an account earning interest at the current market rate of at least twelve percent (12%) or more. After that practice terminated in May 1982 at the request of the Campus Park limited partners, ERADCO continued to use other limited partnership savings accounts as collateral for its separate borrowings. The State Securities Division asked ERADCO and Easter to stop this practice but it continued the loans against the limited partnership savings accounts.

to the terms of the Deed of Trust, placing the limited partnership in default of its deed to its seller,

(d) failed to keep a reserve account as set forth in the Limited Partnership Agreement for the payment of taxes and assessments,

(e) failed to keep adequate land management time records for the "actual time" it alleges it spent in managing the limited partnership property, as was provided for in the Limited Partnership Agreement and represented in the Private Placement Memorandum and made some entries that were fictitious, leaving an overall lack of confidence in ERADCO's attention to this fiduciary duty, and

(f) In December 1983, commingled the separate monies of the Campus Park limited partnership with its own monies in its corporate account at First Interstate Bank, transferring One Hundred Fifty-five Thousand Dollars ($155,000) of limited partnership funds from the Campus Park savings account at Westside Federal Savings and Loan into an ERADCO corporate checking and savings account, which account had approximately One Hundred Fifty Dollars ($150) of other funds in it. Obert v. Environmental Research and Development Corp., 112 Wn2d 326-8 (1989).

The Obert Court additionally cited the fact that the $150,000.00 transfer of limited partnership funds into ERADCO's accounts was:

... with the clear purpose of inflating ERADCO's own financial statement for its own borrowings. This commingling was not disclosed to the limited partners at the time and was not reflected in any audited or unaudited financial statements of either ERADCO or Campus Park. It also subjected those funds to unlimited risk as ERADCO had not paid its withholding taxes to the IRS, which had

> begun action to collect the overdue taxes. Obert v. Environmental Research and Development Corp., 112 Wn.2d 323, 328, 771 P.2d 340 (1989).

As a result, the nature of ERADCO's breaches in Obert are not even comparable to Burton's breach in the above-captioned case and Obert's language did not include a rule imposing unilateral forfeiture in all cases of breach. Also, the Obert court did not, as AMHP attempts to imply, argue for a "strong public policy in favor of ensuring the undivided loyalty of agents and employees." (See AMHP's Petition for Review at page 20). Obert limited itself to its particular facts. Therefore, it should be viewed as support for trusting the "sound discretion" of the trial court it states it relies upon, not pursuing review of any trial court decision where full forfeiture is not ordered. This is also true of AMHP's other cited case, Cogan. See below.

***Cogan* and *Kane* Do Not Help AMHP Either** - Cogan makes it very clear that, contrary to AMHP's position, trial courts have broad, not narrow, discretion in fashioning remedies for breach and neither Obert,nor Cogan, prescribes, or requires, full forfeiture, as a rule, for an employee's breach of his/her duty of loyalty. See Obert at 338-339, below, citing Cogan, Restatement (Second), and Williams:

> The Restatement (Second) of Agency § 469 (1958) provides: "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty". In Williams v. Queen Fisheries, Inc., 2 Wash.App. 691,[however,] **the Court of Appeals interpreted section 469 as flexible and held the denial of compensation "generally rests with the discretion of the court."** Williams, at 698 [469 P.2d 583].
>
> **We adopt this interpretation**. Cogan, 97 Wash.2d at 667.

Finally, as previously noted at page 11 of this brief, Obert, itself, is not a case where full forfeiture occurred. In Obert, as deceitful as the defendants were, they were allowed to keep the interest on their capital contributions, as well as reclaim the capital contributions themselves. Obert at 339.

Likewise, AMHP's citation to Kane is also minimally relevant because:

(1) Burton, unlike Kane's and Obert's defendants, was not a swindler,[11]

(2) Williams was decided 13 years after Kane,

(3) Williams issued a clear ruling that the purpose of the forfeiture rule is "not to impose a penalty,"[12] and

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[11] See Kane v Clos, 50 Wn2d 778 (1957).
[12] Williams v Queen Fisheries, 2 WnApp 691, 697-98 (1970).

(4) AMHP cites no post-Williams authority which overturns Williams clear ruling.

In addition, neither Obert, nor any other case cited by AMHP, gets AMHP past Williams or infringes upon the wide discretion traditionally given to the trial courts to fashion remedies for breach. Finally, AMHP provides no authority for reconsideration of the longstanding policy of substantial deference to a trial court's discretion in fashioning remedies. Therefore, there is no basis for a review of the initial decision of the Court of Appeals' panel in the above-captioned case

3. The Current Court of Appeals Decision is Consistent with the Public Policy Requirement that a Mental Health Patient's Choice of Provider is Superior to a Private Company's Profit Motive.

The decision of the Court of Appeals panel can, alternatively, be upheld on grounds previously urged by Burton, but discounted by the three-judge panel, i.e., that Burton's breach was excused because it was supportive of an established public policy, in Washington, under RCW 18.225.100, to uphold a privately funded mental health patient's right to be able to freely choose his or her provider and method of treatment.[13]

[13] (AMHP Appx 10-12).

Upholding the trial court's ruling to award damages on these public policy grounds would be appropriate because, otherwise, the courts will be sending the message that forfeiture of severance benefits is an allowable penalty for providing care to patients who want their longstanding counselor, not their counselor's former employer. Allowing such a penalty will mean very few counseling professionals will accomodate a patient's request for continuing treatment because the result is a knife pointed at the counseling professional's financial throat. As a result, the statutory guarantee in RCW 18.225.100 would become an empty promise if a breach in compliance with it is not excused.[14]

Enforcing RCW 18.225.100 by excusing a loyalty breach, however, is within a court's equity power to impose a remedy, on behalf of a third party, to implement a public policy goal, see Sullivan v Little Hunting Park, Inc., 396 U.S. 229, 235, 238-9, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), even if an explicit enforcement

[14] The panel justified its decision, based on Emerick v Cardiac Study Ctr, Inc., to discount the public policy concerns of maintaining access to treating professionals, however, Emerick cited no statute creating a right of patient choice of medical providers. Emerick, 170 WnApp 248, 286 P3rd 689, *review denied*, 175 Wn2d 1028, 291 P3d 254 (2012). Thus, the Emerick Court was missing a key ingredient for upholding patient choice in the medical context. That key ingredient, i.e., RCW 18.225.100, is present for mental health clients, so an explicit statutory public policy objective is present for mental health clients which the trial and appeals courts could have, and should have, used to uphold the trial court award of damages.

mechanism cannot be found in the legislation, itself. See Sullivan, *supra*.

See also Danny v Laidlaw Transit and Garder v Loomis Armored, Inc.[15] where it was determined contract breaches could be excused on public policy grounds even when there was no statute specifically supporting the public policy ground cited by the plaintiffs. In addition, see Department of Labor & Industries v Overnite Tranportation, 67 Wn App 24, 834 P2d 638 (1992), *review denied*, 120 Wn2d 1030, 847 P2d 481(1993).

Finally, see Bennett v. Hardy, 113 Wn.2d 912, 919-21, 784 P.2d 1258 (1990), for its implementation of public policy directives without specific enforcement mechanisms and Bennett's citations to In re. WPPSS Sec. Litig., 823 F.2d 1349, 1353 (9th Cir.1987), McNeal v. Allen, 95 Wash.2d 265, 274, 277, 621 P.2d 1285 (1980) (Brachtenbach, J., dissenting), State v. Manuel, 94 Wash.2d 695, 699, 619 P.2d 977 (1980); Krystad v. Lau, 65 Wash.2d 827, 846, 400 P.2d 72 (1965), State ex rel. Phillips v. State Liquor Control Bd., 59 Wash.2d 565, 570, 369 P.2d 844 (1962),

AND

[15] Danny v Laidlaw Transit, 165 Wn2d 200, 193 P3d 128 (2008) and Garder v Loomis Armored, Inc., 128 Wn2d 931, 913 P2d 377 (1996).

see Bennett's citation to the Restatement (Second) of Torts, Cort, and WPPSS, *infra*, recognizing an implied right of action for legislative directives in the absence of an explicit legislative enforcement mechanism:

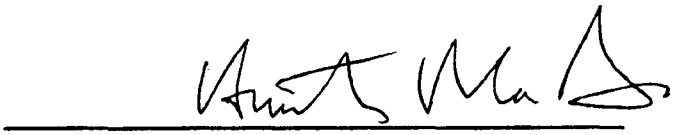
> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action. Restatement (Second) of Torts § 874A (1979), cited at Bennett v. Hardy, 113 Wn2d at 921.
>
> The federal courts ... recognize an implied cause of action under a statute which provides protection to a specified class of persons but creates no remedy. Bennett at 921, citing Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) and In re WPPSS Sec. Litig., 823 F.2d 1349 (9th Cir.1987).

CONCLUSION

Affirming the Court of Appeals three-judge panel decision, on public policy grounds, would be appropriate because AMHP provides mental health counseling. Its practices, therefore, are regulated by RCW 18.225.100. Under RCW 18.225.100's explicit language, Burton AMHP knew it could not interfere with a patient's choice of provider. Its decision to penalize Burton for attempting to accomodate patient choice, therefore, cannot be reconciled with the explicit directives of RCW 18.225.100.

There should be no further review of the decision of the three-judge panel of the Court of Appeals, filed on August 12, 2013, because that decision can, and should, be upheld on the grounds cited therein, as well as public policy grounds, and no new issues or theories of trial court discretion for the fashioning of remedies are presented in AMHP's briefing which merit of review of the Washington standards currently in effect.

RESPECTFULLY SUBMITTED this 10th day of OCTOBER, 2013.



F. Hunter MacDonald, WSBA #22857
Attorney for Cross-Appellant Burton

CERTIFICATE OF SERVICE

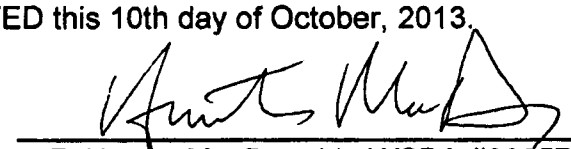
The undersigned declares, under penalty under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and to be a witness herein.

On this date I caused copies of Cross-Appellant's RESPONSE TO Appellant's Petition for Review to be served in the manner noted below on the following:

Jeffrey B. Youmans
Davis Wright Tremaine LLP
1201 Third Ave., Ste 2200
Seattle, WA 98101-3045

Via: U.S. Mail and Email.

DATED this 10th day of October, 2013.



F. Hunter MacDonald, WSBA #22857

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Cc: Youmans, Jeffrey
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From: Hunter MacDonald [mailto:macdonald.law@gmail.com]
Sent: Thursday, October 10, 2013 2:55 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Youmans, Jeffrey
Subject: Response to Petition for Review - Ct of Appeals No. 68434-5-I

Please see attachment. A copy of same has been forwarded to opposing counsel via email and U.S. Mail. A certificate of service is included in the attached document.

F. Hunter MacDonald, WSBA #22857
Attorney for Respondent Burton

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Democracy is created by culture. It is not a gift you give someone by bombing them.

- Marjane Satrapi