Supreme Court No. 92803-7
Court of Appeals No. 46465-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JZK, INC.

Respondent,

vs.

VIRGINIA COVERDALE, *et al.*

Appellant.

RESPONDENT JZK, INC.'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Despite Virginia Coverdale's insistence that this case involves something far grander, it remains a simple breach of contract action. Coverdale gave something: her written promise not to disseminate JZK, Inc.'s materials and information. And she got something in return: attendance at JZK's Ramtha's School of Enlightenment ("RSE"). Yet Coverdale knowingly posted JZK's materials on the internet and scoffed at requests for those materials to be taken down. This was a breach of two contracts and the conduct was properly enjoined.

Five of the five judges who have considered Coverdale's attempts to muddy these simple facts have rejected the same. The trial court repeatedly noted that this was a straightforward case, complicated by Coverdale's obstinate obfuscation of the issues and the law. In issuing a temporary restraining order against Coverdale, the court stated:

> [T]his is a pretty simple issue. And frankly, with no disrespect to the defendants here, I haven't really wrestled with the issue. It is pretty straightforward.

Verbatim Report of Proceedings ("VRP") 11/1/12 at 29:2–6. Subsequently, when Coverdale was preliminarily enjoined from breaching her contracts with JZK, the court made another unremarkable observation that rings just as true today:

> This is simply a contract issue. . . . Like any contract, you get something; you give something up. And that is what both of these parties did.

VRP 11/14/12 at 30:25–31:7. At summary judgment, a different judge recounted the same theme:

> I have previously stated that I believe this was a simple case from the standpoint of the legal issues, but that it was not a simple case.

VRP 6/28/13 at 58:16–18. And in its unpublished opinion, the Court of Appeals similarly cut through the chaff, easily dispensing with Coverdale's strained contention that she not be bound by the contracts she signed. *JZK, Inc. v. Coverdale*, No. 46465-9-II (Div. II Jan. 19, 2016) (unpublished) (herein "Op.") at 22 ("The nondissemination clause prevents dissemination of JZK's proprietary information and techniques in exchange for the signer participating in voluntary RSE activities.").

Coverdale's petition for discretionary review—the third such request during this case[1]—fails to identify any error, let alone an error warranting review by Washington's highest court. JZK respectfully requests that the petition be denied.

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[1] *See JZK, Inc. v. Coverdale*, No. 44339-2 (Div. II Feb. 28, 2013) (denying discretionary review of preliminary injunction order); *JZK, Inc. v. Coverdale*, No. 89193 (Wash. Sup. Ct. July 9, 2014) (rejecting direct review and transferring to Court of Appeals).

II. STATEMENT OF THE CASE[2]

Before attending teaching events at RSE, students are required to sign a nondisclosure agreement known as the "Conditions of Participation" ("CoP"). Clerk's Papers ("CP") 123–24. By signing the CoP, students agree that they will not adapt or disseminate JZK's materials, nor will they assist others in doing so. CP 239–40, 242–43.

Coverdale signed the CoP twice, once in 2006 and again in 2007. *Id.* But Coverdale subsequently edited and spliced JZK's video of an RSE teaching event and posted it on YouTube, without JZK's permission. CP 33, 62, 936–37.

JZK sent a letter advising Coverdale of her breach of the CoP and directing her to take down the RSE material. CP 971, 973–76. Coverdale refused to do so, instead telling JZK that she had also posted an additional 20-minute segment of RSE video. CP 971. Only then did JZK file suit. CP 17. JZK's only causes of action were for breach of the CoP and for injunctive relief prohibiting future breaches. CP 15–16. Coverdale answered with a slew of affirmative defenses and counterclaims, none of which proved successful. CP 325–27.

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[2] This section provides a brief summary of key facts. JZK incorporates the Court of Appeals' recitation of the facts by reference. *See also* Am. Br. Resp't at 2–10.

At the preliminary injunction hearing, the trial court provided a succinct summary of the case:

> [T]he evidence before me includes the allegations, if not the fact, that the defendant, Coverdale, signed a contract with JZK, Inc. And as part of that contract, she acknowledged, on at least two separate occasions, that she would not disseminate or distribute any of the materials, essentially, at issue in this particular case.
>
> . . . .
>
> She signed that contract. She acknowledged every paragraph of that contract, and she signed it on two separate occasions. It is, at the risk of overstating it, disingenuous for her to come to court and argue, through the very passionate argument of her lawyer, that this is an adhesion contract or an unconscionable contract, when clearly the evidence shows that she had ample opportunity to ask questions, which she didn't, or to challenge any provision in that contract, which evidently she didn't.

VRP 11/14/12 at 29:18–30:24.

The parties filed cross-motions for summary judgment. CP 886–98; 1000–09; 1015–35. JZK prevailed, receiving the injunctive relief it had sought. CP 1891–97. Coverdale appealed on a wide array of issues. The Court of Appeals affirmed in all respects, save for a remand concerning one of multiple contempt findings against Coverdale.

In her instant petition, Coverdale abandons the majority of the issues that she raised before the Court of Appeals. Regarding the core contractual dispute, she does not challenge the Court of Appeals' conclusions that (1) the 2007 CoP was not a substitute agreement, Op. at

13–14; (2) the nondissemination clauses are unambiguous, *id.* at 14–18; (3) there was no anticipatory breach, *id.* at 18–19; and (4) she was not fraudulently induced to sign the CoPs, *id.* at 24–25.

III. ARGUMENT

According to Coverdale, attendees at private seminars cannot legally agree not to disseminate the speaker's materials. This is neither the law in Washington nor anywhere else. Nonetheless, Coverdale relies on two of the four exclusive grounds for the acceptance of discretionary review under RAP 13.4(b):

> A petition for review will be accepted by the Supreme Court *only*:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; [or]
>
> . . . .
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (emphasis added).

On the two remaining issues presented for review—that the Court of Appeals made a factual error and that the appellate record is incomplete—Coverdale fails to identify any provision of RAP 13.4(b) as warranting review. None are satisfied.

A. *McKee* holds that contracts for basic consumer services that require *dispute resolution* to occur in secret are unconscionable.

There is no conflict with this Court's decision in *McKee v. AT&T*, 164 Wn.2d 372, 191 P.3d 845 (2008). As the Court of Appeals recognized, Coverdale badly misreads two paragraphs of the 31-page *McKee* decision for a proposition far broader and less tenable than anything articulated by this Court. In deciding *McKee*, a case that in part addressed the open administration of justice, this Court never so much as hinted at the notion that no consumer could ever be bound by a nondisclosure agreement.

1. Public policy does not prohibit attendees at presentations from agreeing not to disseminate proprietary materials.

McKee involved a challenge to a dispute resolution clause in an AT&T cell phone contract. *Id.* at 378. The Court found several provisions unconscionable, including one requiring *arbitration* to take place in secret. *Id.* at 398–99. For this, the Court's analysis relied exclusively on other cases addressing contracts purporting to require confidential arbitrations. *Id.* at 398 (citing *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (provision requiring "any *arbitration* to remain confidential" was unconscionable); *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1181 (W.D. Wash. 2002) ("repeat *arbitration participants* enjoy advantages over one-time participants"); *Zuver v. Air Touch Commc'ns,*

Inc., 153 Wn.2d 293, 315, 103 P.3d 753 (2004) ("keeping past findings secret undermines an employee's confidence in the fairness and honesty of the *arbitration* process")).

McKee articulates the public policy that "*justice* should be administered openly and publicly." *Id.* at 398 (emphasis added). "[C]ontracts that require secrecy violate *this* important policy." *Id.* at 399 (emphasis added).

This Court did not announce some vast and unprecedented prohibition against all nondissemination agreements within the 251-word section of *McKee* on which Coverdale relies. *See id.* at 398–99. Coverdale remains unable to cite any case, from anywhere, supporting her expansive reading. Indeed, such nondissemination agreements are commonplace and regularly enforced by courts. *E.g.*, *Art of Living Found. v. Does 1-10*, 5:10-CV-05022-LHK, 2012 WL 1565281 (N.D. Cal. May 1, 2012) (that spiritual school "required students to sign a nondisclosure agreement upon enrollment in one of Plaintiff's courses" constituted a reasonable effort to protect that information); *Shell v. Am. Family Rights Ass'n*, 899 F. Supp. 2d 1035 (D. Col. 2012) ("Complaint alleges that [defendant] signed a nondisclosure agreement but nonetheless disseminated confidential

materials from the training seminar . . . . This is sufficient to state a claim for breach of contract"); CP 130–42.[3]

Coverdale therefore points to a single sentence in *McKee* that notes that the several provisions held unconscionable in AT&T's contract "have nothing to do with arbitration." *See id.* at 404. But Coverdale misunderstands the significance of the remark. Under the Federal Arbitration Act ("FAA"), Washington courts may only invalidate an agreement to arbitrate upon "'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* at 396 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)); *see also* 9 U.S.C § 2 (arbitration agreements to be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract"). As such, *McKee* begins its unconscionability analysis by acknowledging the well-established prohibition that "states

[3] *See also, e.g., Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 512, 278 P.3d 197, 201 (2012) (recognizing the validity of Commercial Aircraft Interiors' nondisclosure agreement); *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC*, 303 F.3d 1332, 1342 (Fed. Cir. 2002) (substantial evidence supported existence of enforceable nondisclosure agreement); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1991) (noting that a confidentiality agreement is a reasonable step to ensure secrecy); *Technical Indus., Inc. v. Banks*, 419 F. Supp. 2d 903, 915 (W.D. La. 2006) (plaintiff established substantial likelihood of success on the merits of enforcing nondisclosure agreement); *Newport-Mesa Unified Sch. Dist. v. State of Cal. Dept. of Educ.*, 371 F. Supp. 2d 1170, 1179 (C.D. Cal., 2005) (nondisclosure agreement a valid way to reduce risk of disclosure of copyrighted materials); *APAC Teleservices, Inc. v. McRae*, 985 F. Supp. 852, 868 (N.D. Iowa, 1997) (public interest served by protecting disclosure of trade secrets by enforcing nondisclosure agreement); *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 762 (Iowa 1999) (nondisclosure agreement reasonably necessary to protect plaintiff's business interests).

may not refuse to enforce arbitration agreements based upon state laws that apply only to [arbitration]." *Id.* (citing *Doctor's Assocs., Inc.*, 517 U.S. at 687); *see also, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 321, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (FAA preempts unconscionability rules developed by state courts that are unique and hostile to the enforcement of agreements to arbitrate).

In stating, as it must, that its rationale was not unique to arbitration agreements, this Court did not hold that all contracts requiring confidentiality are unconscionable. Rather, it held that certain contracts purporting to require the private administration of justice are unconscionable. *McKee*, 164 Wn.2d at 399. While arbitration may be the most common scenario in which the issue may arise, one could no sooner enforce a consumer contract that preemptively treats all mediated settlements as confidential or waives objections to the sealing of records in judicial proceedings. It is in this way that the holding in *McKee* is not unique to arbitration.

Therefore, the Court of Appeals correctly concluded:

> *McKee* holds that a contract requiring secrecy violates the public policy of the open administration of justice in the context of an arbitration clause. In other words, *McKee* holds that a consumer contract of adhesion may violate public policy by requiring secrecy in a dispute resolution provision. Thus, contrary to Coverdale's arguments, ***McKee* does not broadly hold that any secrecy in a**

> **consumer contract is a violation of public policy**. Thus, we disagree with Coverdale's broad argument about secrecy clauses.

Op. at 23–24 (citations omitted) (emphasis added).

2. Coverdale's untenable reading of *McKee* would not apply because attendance at a spiritual school is purely elective.

Coverdale cannot even show a conflict between her flawed interpretation of *McKee* and the Court of Appeals' decision. By its terms, *McKee* is limited to "consumer contract[s] of adhesion for a *basic consumer service* . . . ." 164 Wn.2d at 399 (emphasis added).

While Coverdale's petition speaks in terms of "contractual gag orders imposed on consumers," Pet. at 7, the reality is that Coverdale *chose* to attend an entirely elective school of spiritual enlightenment. This is hardly a basic consumer service so necessary to everyday life as to trigger some weighted balancing for which Coverdale appears to advocate. *E.g.*, WILLISTON ON CONTRACTS § 19:25 (4th ed. 1993) ("courts tend to be less sympathetic to parties who enter into releases so they may engage in voluntary recreational activities"); *Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 73 (S.D.N.Y. 2012) ("At the risk of stating the obvious, the setting in which Crewe enrolled for the Rich Dad training course is a far cry from the paradigmatically coercive one in which harsh terms are foisted on a consumer, in connection with the purchase of a necessity, with

little practical ability to resist.") (collecting cases). Even Coverdale's erroneous reading of *McKee* is inapplicable to this case.

B. Coverdale's isolated personal quarrel with JZK is not an issue of substantial public interest.

Coverdale dedicates several pages of her petition to uncontroversial generalities about free speech and open government. But the mere fact that we have a First Amendment, or that the legislature or judiciary has recognized some public policy or another, does nothing to explain why there is a substantial public interest in *this* case. Coverdale disregards the fact that no constitutional restriction was "imposed upon" her or anyone else; ignores the absence of any state action; and even misstates the law through blatant omission. Embellishments aside, whether consumers can contractually agree not to disseminate materials that do not belong to them is neither controversial nor of substantial public interest.

First, no limitation was "imposed upon" Coverdale's rights of free speech or expression. Coverdale *chose* to attend RSE. In exchange, she *voluntarily* agreed not to disseminate JZK's materials or assist others to do so. "The Supreme Court recognizes that knowing and voluntary waivers of constitutional rights are valid." *State v. Noah*, 103 Wn. App. 29, 51, 9 P.3d 858 (2000) (settlement agreement not to protest in front of clinic enforceable). Coverdale identifies no instance, in Washington or

elsewhere, of an individual agreeing not to disclose certain information and then successfully avoiding that agreement on free speech grounds. She fails to explain why her personal decision to sign a nondissemination agreement and then disseminate protected materials in violation of that agreement is of any importance to the people of Washington.

Second, even though no speech restriction has been "imposed upon" Coverdale, "[a] First Amendment violation requires state action." *Id.* at 48. The "state action" doctrine similarly applies to Article 1, Section 5 of the Washington Constitution. *Id.* "[T]he free speech provision of the Constitution applies only against official state action, not to protect against action of private individuals." *Id.* "State enforcement of a contract between two private parties is not state action, even where one party's free speech rights are restricted by that agreement." *Id.* at 50. Again, the petition fails to explain how a standard nondissemination agreement, among private parties, is of any public interest.

Third, the imagined impacts of the CoP restrictions to which Coverdale agreed are greatly exaggerated. The suggestion that JZK, or any other entity, could use a contract clause that protects proprietary information to conceal illegal activity is without basis. JZK has never made such an absurd assertion, and, as the Court of Appeals recognized, those are not the facts anyway. Op. at 24 ("Coverdale has not shown that

the information and techniques are illegal"). In her petition, Coverdale herself concedes that she lacks evidence establishing that anything illegal has occurred, as she can claim no more than that "there is at least a basis to investigate JZK[.]" Pet. at 9 n. 4.

Similarly, the suggestion that the CoP unduly inhibits public dialogue about JZK and RSE is demonstrably false. For some time there has been a small but vocal group of disgruntled former RSE students—of which Coverdale is a member—who have operated websites dedicated to criticizing RSE. CP 262–64, 765–66. JZK supports their right to do so and to air their opinions. CP 128. JZK only insists that critics like Coverdale do so in their own words and not through the misappropriation of JZK's materials. *Id.*

Fourth, Coverdale's reliance on RCW 4.24.601 for a legislative statement of public policy is both misleading and misplaced. At the outset, she fails to mention that the section "is part of an act relating to public access to information about product liability and hazardous substances claims." *T-Mobile USA, Inc. v. Huawei Device USA, Inc.*, 115 F. Supp. 3d 1184, 1197 (W.D. Wash. 2015). This breach of contract action involves neither. Moreover, RCW 4.24.601 is unhelpful because through it, "the legislature has limited gag orders in settlement agreements *only* in cases of

certain toxic torts and product liability cases." *Noah*, 103 Wn. App. at 50 (citing RCW 4.24.601) (emphasis added).

Even so, Coverdale cites RCW 4.24.601—for the first time ever in this case—for the proposition that "[t]he Washington Legislature has expressly found that a public policy exists as to consumer information[.]" Pet. at 8. But in quoting the statute, she leaves out the last two sentences, which are as follows:

> The legislature also recognizes that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.

RCW 4.24.601. In short, Coverdale presents an untimely and unpreserved argument; on an inapplicable statute; that Washington courts recognize as limiting "gag orders" in only very narrow circumstances; and then omits key language from that statute that is antithetical to the point she tries to make.

Fifth, there can be no dispute that justice has been administered openly and publicly in this case. Enforcement of the CoPs has taken place in the Superior Court, Court of Appeals, and Supreme Court of Washington in open and transparent proceedings. Nothing in the CoP prevents this, nor is that the CoP's intent. Indeed, the CoPs expressly

contemplate public judicial action. *E.g.*, CP 240 ("these conditions may be enforced by equitable proceedings, including court injunction").

Finally, Coverdale's musings about what she perceives as shifting balances of power in the "post-internet age" are confounding. She cites a Florida publication that apparently discusses a dispute over a nursing home arbitration clause. Pet. at 10. This is a curious example as federal arbitration law largely preempts state law and strongly *upholds* the enforcement of contractual waivers of constitutional rights such as the right to a trial by jury. *E.g. Concepcion*, 563 U.S. 321. Regardless, this lawsuit is not a vehicle for Coverdale to address her general dissatisfaction with corporate, political, or judicial power dynamics. Internet or no internet, 2006 or 2016, people are still bound by the contracts they sign.

C. The Court of Appeals did not misunderstand the facts.

Coverdale wrongly claims that the Court of Appeals' decision is premised on the "false assumption" that she "participated in the event via livestream." Pet. at 6, 13. Not so. The Court of Appeals wrote: "It is undisputed that *Coverdale did not attend the live stream event* from which the video came." Op. at 3 (emphasis added). Coverdale's whole argument that the court misunderstood the facts crumbles on this basis alone.

Though the Court of Appeals plainly understood the facts, Coverdale cannot even show that the supposed "false assumption" she has

conjured would change the outcome. Indeed, the opinion contains an entire section analyzing and rejecting the very argument that Coverdale now claims was misunderstood. *Id.* at 17 ("Coverdale argues that the CoPs are ambiguous regarding whether they protect RSE information *from events the signer did not attend.* Again, we disagree." (Emphasis added.)). Furthermore, the court repeatedly recognized that the CoPs are broad. They "prohibit the signer from disseminating JZK's information and techniques, *without limitation on how the signer receives them.*" *Id.* at 16 (emphasis added). "[T]he CoPs unambiguously protect RSE's information and techniques from distribution without JZK's consent *regardless of whether the signer obtains them directly from RSE or through a third party.*" *Id.* at 16–17 (emphasis added). "Moreover, the CoPs prohibit assisting or facilitating other persons in disclosing RSE's information and techniques, evincing a clear intent to apply to information or techniques that the signer did not learn from an event she attended." *Id.* at 17.

It is also worth noting that the sentence from the opinion that Coverdale misconstrues does in fact accurately describe an argument that Coverdale actually made. *See* Am. Br. Appellant at 41–42 (arguing that the CoP is *ambiguous* because Coverdale "signed [it] at least two years prior to JZK, Inc. first offering 'livestream' events").

Finally, "[t]he Supreme Court, in passing upon a petition for discretionary review, is not operating as a court of error, but rather is functioning as the highest policy-making judicial body of the state." *Wash. App. Prac. Deskbook* § 27.11 (3d ed. 2005). Coverdale does not explain how a (nonexistent and, even so, inconsequential) factual error warrants discretionary review under RAP 13.4(b).

D. This Court does not review rulings by commissioners of the Court of Appeals.

"A ruling by a commissioner or clerk of the Court of Appeals is not subject to review by the Supreme Court." RAP 13.2(e). "Rather, a party must first move to modify the commissioner's ruling, and then may seek review by this court of the Court of Appeals decision on the motion to modify." *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 501, 798 P.2d 808 (1990).

Despite RAP 13.2(e)'s unambiguous prohibition, Coverdale asks this Court to review the August 5, 2014 "Ruling by Commissioner Schmidt." Notably, her own brief acknowledges that she never moved to modify Commissioner Schmidt's ruling. Am. Br. Appellant at 7 n.4. The issue is not properly before this Court.

Beyond her incurable noncompliance with RAP 13.2(e), Coverdale also fails, once again, to explain how any video being in the record would

either alter the decision below or warrant review under RAP 13.4(b). As the Court of Appeals observed, "[n]either party argues that the contents of the video were not RSE's 'information and techniques.'" Op. at 3 n.1. Coverdale's stated reason for wanting video in the record is to evoke an emotional response from the appellate courts. *See, e.g.*, Am. Br. Appellant at 7 n.4 ("JZK, Inc. has successfully insulated this appellate review from the full shock" of the video's contents).[4] This is irrelevant to appellate review. Coverdale's naked, vitriolic desire to "take JZ Knight down" is no basis for Supreme Court review. CP 306–07.

E. Uncited and unsubstantiated assertions of fact should be disregarded.

JZK does not attempt to go "tit for tat" correcting every sensationalized yet irrelevant "fact" in Coverdale's petition. Rather, JZK asks the Court to strike or disregard the many factual assertions that are unaccompanied by "*appropriate* references to the record." RAP 13.4(c)(6) (emphasis added).

F. Fees and expenses.

JZK was awarded fees and expenses by the Court of Appeals as authorized by the CoP. Op. at 33–34. JZK similarly requests an award of

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[4] Coverdale's repeated, procedurally improper attempts to supplement the appellate record have consistently been rejected—by a commissioner of this Court, by a commissioner of the Court of Appeals, and by the Superior Court. For a more detailed summary of the procedural history of this issue, *see* Am. Br. Resp't at 48 n.28.

fees and expenses for the preparation and filing of this answer. RAP 18.1(j).

IV. CONCLUSION

Stripped of the hyperbole, insinuation, and interesting personalities, this case presents a black letter breach of contract. It has already occupied far more of the courts' time and resources than appropriate. Discretionary review is unnecessary, unwarranted, and should be denied.

Respectfully submitted this 25th day of March, 2016.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Respondent JZK, Inc.'s Answer to Petition for Discretionary Review, via email on the 25th day of March, 2016 to counsel of record for Appellant Virginia Coverdale at their following email addresses:

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Attached for filing in pdf format is Respondent JZK, Inc.'s Answer to Petition for Discretionary Review submitted by Respondent in *JZK, Inc. v Virginia Coverdale*, Supreme Court No. 92803-7. The attorney for Respondent filing this Answer is Eric Gilman, WSBA #41680, egilman@gth-law.com.

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