

**Supreme Court No. 94711-2
Court of Appeals No. 48644-0-II**

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**City of Olympia,
Petitioner**

v.

**Nova Contracting, Inc.,
Respondent**

**RESPONDENT NOVA'S REPLY IN SUPPORT OF MOTION
TO STRIKE CITY OF OLYMPIA'S REPLY
TO NOVA'S ANSWER TO OLYMPIA'S
PETITION FOR DISCRETIONARY REVIEW**

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Nova Contracting Inc., the Respondent in this matter, has filed a motion to strike the City of Olympia's Reply to Nova's Answer. Olympia's Reply violates RAP 13.4(d), which only permits a party to file a Reply to An Answer if "the answering party seeks review of issues not raised in the petition for review." Nova raised no new issues in its Answer. Therefore, RAP 13.4 prohibits Olympia from filing the Reply brief it filed.

Olympia's Response to the Motion to Strike asserts that because Nova raised arguments different from those Olympia raised and because Nova challenged the procedural propriety of Olympia's Petition for Discretionary Review, rather than limiting its Answer to the merits of the Request for Review, Nova has raised "new issues" entitling Olympia to file a Reply in support of its Petition for Discretionary Review. However, if the arguments raised on any given issue on appeal were identical for both the Appellant and the Respondent, then the appeal would be a trivial matter. Mere difference in arguments does not indicate that any new Issues on Appeal have been presented in response.

The word "Issue" is a term of art in the appellate context. Its meaning is different than the meaning of an "argument." An issue is an overarching legal point of dispute about which each side makes arguments. Each side should be expected to make different arguments, as the arguments made should support one side or the other. As long as the

arguments are about the same overarching legal point of dispute, the arguments are about the same issues and, therefore, the counter-arguments do not present any new "Issues on Appeal."

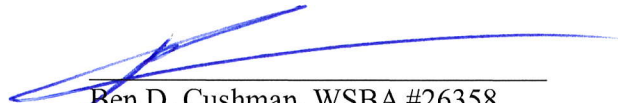
Both Olympia and Nova dedicated a portion of their briefing on the request for discretionary review to "Issues Presented for Review." These sections provide a telling comparison. Olympia's "Issues Presented for Review" section states two issues: (1) Failure to Exhaust Administrative Remedies and (2) Failure to Comply with Claim Notice Procedures. Nova's "Issues Presented on Review" does not present any other or distinct issue which Nova requests the Supreme Court to consider along with the Issues presented by the City. Rather, Nova's "Issues Presented for Review" section contains two paragraphs in which Nova analyses and critiques the Issues presented by the City of Olympia.

Nova is not seeking, through cross-review, discretionary review of any issue in this case. Rather, Nova's Response to the Petition for Discretionary Review was a strict reply to the issues raised by the City of Olympia. The mere fact that Nova raised arguments different from those made by the City of Olympia does not indicate that Nova has added any new issue to this appeal. Rather, it indicates that the City of Olympia's position on those issues was not the final word and, in fact, ignored the procedural infirmity of the issues it raised for discretionary review (which

were issues not properly raised in the Trial Court, to which Nova was therefore unable to fully respond).

Nova's Motion to Strike the City's Reply to Nova's Answer should be granted and that Reply should be removed from the record, unread by the Court, and preserved for historical document purposes only.

DATED this 17th day of August, 2017.



Ben D. Cushman, WSBA #26358
Attorney for Respondent
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CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be filed with this Court, and electronically served upon Petitioner's attorneys of record.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 17th day of August, 2017, in Olympia, Washington.



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Appellate Court Case Title: Nova Contracting, Inc. v. City of Olympia
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The following documents have been uploaded:

- 947112_Answer_Reply_20170817125706SC684974_7492.pdf
This File Contains:
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A copy of the uploaded files will be sent to:

- Doreen@deschuteslawgroup.com
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Comments:

Nova's Reply in Support of Motion to Strike Olympia's Reply to Nova's Answer to Olympia's Petition for Discretionary Review

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