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NO. 67907-4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LORI S. HASKELL,

Appellant,

v.

BYERS & ANDERSON, INC. and LAUREL TERRY,

Respondents.

APPEAL FROM THE KING COUNTY
SUPERIOR COURT

(Cause No. 11-2-17775-1 SEA)

APPELLANT'S REPLY BRIEF

~~COURT OF APPEALS DIV I
STATE OF WASHINGTON~~
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ADDITIONAL STATEMENT OF FACTS	2
A. Byers & Anderson’s Policy Toward Sole Practitioners.	2
B. Application Of Byers & Anderson’s Sole Practitioner Policy To Ms. Haskell.....	3
C. Ms. Haskell’s Payment History.	4
D. Ms. Haskell’s Refusal To Issue A “Blank Check”.....	4
E. Ms. Haskell Was Not Sent The Transcript COD.	5
F. Ms. Haskell’s Attempt To Reverse Prejudicial Effect Of Late Service Of Transcript.	5
III. ARGUMENT	6
A. The Facts Contradict Defendants’ Argument That They Did Not Treat Her Differently From The Farmers Attorney Because She Is A Sole Practitioner.	6
B. A Jury Could View Defendants’ Actions Of Requiring Ms. Haskell To Provide Credit Card Information As A Policy Of Providing Court Reporter Services On Unequal Terms To Sole Practitioners.....	9
C. Providing Court Reporter Services On Unequal Terms To Solo Practitioners Is A Basis For A Civil Action.....	12

Table of Contents, continued

	<u>Page</u>
D. Providing Court Reporter Services On Different Terms To Solo Practitioners From Non Solo Practitioners Is A Basis For A Consumer Protection Act Claim.	15
E. The Evidence That Supports A CPA Claim Also Supports A Business Interference Claim.	17
IV. CONCLUSION.	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	12
<i>Crisman v. Pierce County Fire Protection Dist., No. 21</i> , 115 Wn. App. 16, 60 P.3d 652 (2002).....	14
<i>Davenport v. Washington Educ. Ass'n</i> , 147 Wn. App. 704, 197 P.3d 686 (2008).....	14, 15
<i>Easterday v. South Columbia Basin Irrigation Dist.</i> , 49 Wn. App. 746, 745 P.2d 1322 (1987).....	8
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	15
<i>Hanks v. Grace</i> , 273 P.3d 1029 (April 2, 2012).....	13, 14
<i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1977).....	16
<i>McRae v. Bolstad</i> , 32 Wn. App. 173, 646 P.2d 771 (1982).....	13, 16
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	10
<i>Schmerer v. Darcy</i> , 80 Wn. App. 499, 910 P.2d 498 (1996).....	17
<i>Seattle Pump Co. Inc. v. Traders and Gen. Ins. Co.</i> , 93 Wn. App. 743, 970 P.2d 361 (1999).....	16
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	14
<i>Weisert v. Univ. Hosp.</i> , 44 Wn. App. 167, 721 P.2d 553 (1986).....	9

Table of Authorities, continued

	<u>Page</u>
<u>Statutes</u>	
RCW 18.18	14
RCW 18.145, <i>et seq.</i>	8, 12
RCW 18.145.005	12
RCW 18.145.050(1).....	13
RCW 18.145.140	13
RCW 18.235, <i>et seq.</i>	13
RCW 48.01.030	16
<u>Rules</u>	
CR 30(e).....	11
CR 30(f)(2).....	8
<u>Regulations</u>	
WAC 308-14-130.....	1, 18
WAC 308-14-130(1).....	9, 12
<u>Miscellaneous</u>	
1989 Wash. Legis. Serv. 382	8

I. INTRODUCTION

The facts in this case raise an important issue regarding the professional standards applied to court reporters. Viewing the facts in the light most favorable to Plaintiff, a jury could find that Defendants treat sole practitioners, like Ms. Haskell, differently than non sole practitioners in violation of WAC 308-14-130.

Defendants argue that the facts support their position that they did not have a policy aimed at sole practitioners and did not treat Ms. Haskell differently based on her status as a sole practitioner. They argue further that even if they did have such a policy, they can exercise “sound business practice” in requiring credit card information from sole practitioners. The professional standards imposed by the legislature require otherwise.

Defendants argue that a party harmed by violation of the statute has no recourse either through a private cause of action, the Consumer Protection Act or a claim of intentional interference of business relations. However, applying the elements of each of these claims to the facts in this case supports Ms. Haskell’s position that each of these claims is cognizable under the law.

The order granting Defendants’ summary judgment should be reversed and the case should be determined by the trier of fact.

II. ADDITIONAL STATEMENT OF FACTS

A. Byers & Anderson's Policy Toward Sole Practitioners.

Defendants point out in their brief that “a significant number of lawyers will not return the courtesy of credit with the courtesy of timely payment.” Respondent’s Brief at p. 6. More particularly, Byers & Anderson has claimed that the “majority of [its] clients with a poor payment history are sole practitioners.” CP 60. Effective February 25, 2010, Byers required court reporters obtain credit card information from “ALL sole practitioners”. CP 210 (e-mail from Jenny Anderson to all court reporters, emphasis in original); 214 (“These policies are for sole practitioners and also small 2-3 person firms...”).

Byers & Anderson points out that it doesn’t require credit information from sole practitioners with whom they already have an established financial relationship. Respondent’s Brief at p. 12. However, it “candidly” admits that the form is “often” presented to sole practitioners and the practice is “at times even ...referred to as a policy regarding sole practitioners.” *Id.* at p. 11, 12.¹

¹ Further proof that Ms. Haskell was singled out because she was a sole practitioner is when she talked to the billing department of Byers & Anderson about its practice of requiring her to promise to pay for the deposition before being sent the transcript, she was told it was a policy for sole practitioners (CP 197).

B. Application Of Byers & Anderson’s Sole Practitioner Policy To Ms. Haskell.

At the beginning of her client’s deposition, Ms. Haskell whose firm is entitled “Law Offices of Lori S. Haskell”, was asked by the court reporter defendant Laurel Terry if she was a sole practitioner. CP 195. According to Ms. Terry, she asked Ms. Haskell to provide credit card information because she “was not familiar with” Ms. Haskell. CP 114. This is consistent with the policy established by Byers & Anderson regarding sole practitioners. CP 115, 209 (“so I’m asking you all to [sic] vigilant about sole practitioners with whom you have never worked who are ordering transcripts.”).

Byers & Anderson states that Ms. Haskell had not “established [a] positive payment history” and “as a result”, Ms. Haskell was asked to provide credit card information. Respondent’s Brief at p. 14 (the document that supports this statement is the declaration of Jenny Anderson, rather than the declaration of Laurel Terry at CP 114, lines 17-18). Ms. Haskell’s payment history was not known to the court reporter at the time Ms. Haskell was asked to provide credit card information. CP 115. Meagan Barrow, Byers & Anderson’s billing representative, stated in an

e-mail that Ms. Haskell was asked to provide credit card information “cuz [sic] she was solo.” CP 271.²

C. Ms. Haskell’s Payment History.

Byers & Anderson states that when an attorney refuses to provide the credit card information, Byers & Anderson will agree to provide the transcript if the attorney provides verbal assurance that the payment will be made within 30 days of invoicing. Respondent’s Brief at p. 10. Defendants omit to inform the court that this offer is extended only to attorneys that do not have an established negative payment history. CP 59. Ms. Haskell was offered this opportunity. CP 123.³

D. Ms. Haskell’s Refusal To Issue A “Blank Check”.

Byers & Anderson omits the fact that when Ms. Haskell called Byers & Anderson to inquire why she had not been sent the transcript, she asked for the amount that she owed. CP 196-197. At the time of the conversation, the transcript has already been sent to the defense attorney, thus the cost of a copy of the deposition was already known (the conversation took place on May 12, 2011 and the defense attorney had received the transcript on May 5, 2011). CP 196, 205. Ms. Haskell

² The billing department later obtained Ms. Haskell’s billing information but questioned whether the history required credit card information.” *Id.*

³ Even the billing department questioned whether Ms. Haskell’s payment history required credit card payment.

declined to give assurance of payment without being told the cost of the transcript. CP 196. Ms. Haskell talked with Byers & Anderson billing a second time in which the representative again refused to give the amount of the transcript. CP 197. Byers & Anderson characterizes Ms. Haskell as angry and unwilling to provide the “requested assurance” of payment, omitting the salient point that Byers & Anderson refused to tell Ms. Haskell what amount she was required to pay.

E. Ms. Haskell Was Not Sent The Transcript COD.

Defendants point out that their policy required credit card information or the transcript is sent COD. Respondent’s Brief at p. 12; CP 210. The declarations of the court reporters who described the standard practice in the state acknowledged that a transcript can be provided to all parties at the same time by providing a transcript COD when the likelihood of an attorney paying the bill is in question. CP 233 (“If there is an issue with payment because of previous unpaid invoices from that attorney, then the standard of practice is to send the transcript to the attorney COD”); CP 236. Ms. Haskell was never sent the transcript COD.

F. Ms. Haskell’s Attempt To Reverse Prejudicial Effect Of Late Service Of Transcript.

Byers & Anderson states that Ms. Haskell sought a restraining order against it. Respondent’s Brief at p. 18. In addition, to obtaining an

order restraining Byers & Anderson from treating solo practitioners differently from other attorneys, she sought to obtain additional time to allow her client to review the deposition transcript. CP 98, 101. By the time Ms. Haskell had received the deposition, 12 days of the 30-day time period for reviewing the deposition had elapsed. CP 76, 204.

III. ARGUMENT

A. **The Facts Contradict Defendants' Argument That They Did Not Treat Her Differently From The Farmers Attorney Because She Is A Sole Practitioner.**

In her brief, appellant quoted e-mails authored by Byers & Anderson establishing its policy that sole practitioners were required to give credit card information at the beginning of depositions. CP 209, 210, 215. In these e-mails, Defendants characterized sole practitioners as plaintiffs "who will pay if they win, but not pay if they lose." CP 209. Court reporters were urged to determine "whether it is obvious that the client has little or no money, whether it appears the attorney seems to have little or no money..." *Id.* Ms. Haskell as a sole practitioner fell within this policy and was required to give credit card information before receiving a copy of her client's deposition.

Defendants dispute that they require only sole practitioners to present credit card information. Respondent's Brief at p. 4. Defendants state that they require credit card information from all attorneys,

regardless of the size of their firm if Byers & Anderson does not have an established positive credit history with the attorney. *Id.* Defendants state Ms. Haskell did not have an “established positive payment history.” Respondent’s Brief at p. 2. Ms. Haskell’s history consisted of paying for two depositions, one of which within three months rather than 30 days of the date of invoice. Respondent’s Brief at p. 14. Defendants fail to show that this history was researched and made known to the court reporter at the time she requested the credit card information from Ms. Haskell. At the time the court reporter asked for credit card information from Ms. Haskell’s, she was unaware of Ms. Haskell’s payment history. CP 115. After the deposition, Byers & Anderson’s billing representative stated Ms. Haskell was asked for credit card information because Ms. Haskell was a “solo gal” not because of her credit history. CP 217.

Defendants’ characterization of her credit history is also suspect. At the time of this incident, Ms. Haskell was offered the opportunity to “promise to pay” the cost of the transcript. CP 196. Defendants allowed a sole practitioner who wouldn’t give them credit card information the alternative to promise to pay the bill if the sole practitioner did not have a “negative payment history.” CP 59. By inference, Defendants did not consider Ms. Haskell’s credit history to be “negative.” Therefore, Byers & Anderson’s tactic of requiring a promise to pay was likely not the result

of Ms. Haskell's credit history but was just another stumbling block for sole practitioners.

Defendants argue that they have a legitimate business interest in securing payment which justifies its policy requiring credit card information. Respondent's Brief at p. 7. The practice recognized in the state of serving the transcript COD achieves the same purpose of securing payment from an attorney as obtaining credit card information, but unlike the Defendants' policy, provides the transcript to all parties at the same time. Defendants were aware of this practice but chose not utilize it in Ms. Haskell's case. *See* CP 210.

Defendants cite to CR 30(f)(2) and *Easterday v. South Columbia Basin Irrigation Dist.*, 49 Wn. App. 746, 745 P.2d 1322 (1987) for the proposition that a court reporter can require payment before delivery of a transcript. Respondent's Brief at p. 24. Both CR 30(f)(2), 71 Wn.2d lxxvi (1967), and *Easterday* predate the passage of RCW 18.145, *et seq.* 1989 Wash. Legis. Serv. 382. Defendants cannot argue that the court rule preempts the legislature from imposing standards on court reporters to require equal treatment of all parties. The court rule and case have little to do with this appeal.

B. A Jury Could View Defendants' Actions Of Requiring Ms. Haskell To Provide Credit Card Information As A Policy Of Providing Court Reporter Services On Unequal Terms To Sole Practitioners.

Defendants argue that Judge Hayden's statement that Ms. Haskell was treated differently from the Farmer's attorney is not a finding of fact but rather "prefatory comments". Respondent's Brief at p. 21. The plain meaning of the words indicates otherwise:

I look to see if there are genuine issues of material fact, and I don't think there are any genuine issues. The plaintiff's lawyer, as a sole practitioner, was treated differently than the attorney for Farmers...

RP 17.

Although Defendants flatly deny a difference in treatment of the two attorneys at the deposition, a jury could conclude that Defendants "offered arrangements on a case concerning court reporting services or fees to all parties" on unequal terms in violation of WAC 308-14-130(1). Defendants' argument that the policy of requiring credit card information is equally applied to all parties and was applied indiscriminately to Ms. Haskell is a question of fact that should be resolved by a jury. Where different inferences may be drawn from evidentiary facts, summary judgment is not warranted. *Weisert v. Univ. Hosp.*, 44 Wn. App. 167, 721 P.2d 553 (1986).

Here, a jury could determine that Defendants' policy of "obtaining payment guarantees or assurances from clients without an established positive payment history" (Respondent's Brief at p. 12) is merely a pretext for treating sole practitioners differently from other attorneys based on the assumption that sole practitioners are less likely to pay their bills. *See, Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004) (a genuine issue of material fact exists as to whether employer's stated reasons for firing and not rehiring employee were pretext for a discriminatory purpose). A jury could find that the prior payment history of Ms. Haskell had nothing to do with the way she was treated in this instance.⁴

A jury could also conclude that equitable treatment of the two attorneys in the provision of court reporting services is achieved by providing each attorney with the transcript at the same time, conditioned on payment at delivery (COD).⁵ Defendants' argument that they are not required to extend credit to all attorneys is not an excuse for failing to provide the transcript to the parties at the same time.

⁴ Defendants state that Ms. Haskell has "never denied that she did not have an established positive payment history with B&A." Respondent's Brief at p. 26. Plaintiff has denied that the payment history (the characterization of which by Defendants is open for question – see additional Statement Of Facts Section C) was the basis for Defendants' requirement of credit card information from her, as opposed to Defendants' discriminatory policy toward sole practitioners.

⁵ Contrary to the Defendants' assertion (Respondent's Brief at p. 30), providing the transcript to the party COD is not the same as requiring a party to give the court reporter credit card information without being informed of the cost of the transcript and without being provided the transcript simultaneously.

A jury could further find that Ms. Haskell sustained costs and fees in obtaining the deposition transcript and obtaining court permission through the ex parte department for an extension of the thirty day period for the plaintiff to review the deposition. Defendants state that they provided the transcript to Ms. Haskell the day she filed her motion for a temporary injunction. They fail to note that Ms. Haskell did not become aware of the e-mail containing the transcript until after she had filed her motion. CP 230. They also fail to note that Ms. Haskell's motion sought additional time for her client to review the transcript. Twelve days of the 30-day period to review the deposition had elapsed.⁶

Defendants argue that Ms. Haskell's injuries now "focus" on insult and embarrassment from being asked credit card information. Respondent's Brief at p. 15. Defendants ignore the time and effort Ms. Haskell devoted to obtaining the deposition transcript and to filing the motion for a temporary restraining order with incurred fees. Appellant's Brief at p. 25; CP 199. A jury could find that the Defendants' actions caused harm to Ms. Haskell.

⁶ Defendants state that they unilaterally extended the time period for review of the deposition. Respondent's Brief at p. 39. Defendants fail to explain on what authority they changed the time period for reviewing the deposition. Ms. Haskell believed that only a court could increase the time for reviewing a deposition. *See*, CR 30(e).

C. Providing Court Reporter Services On Unequal Terms To Solo Practitioners Is A Basis For A Civil Action.

Both parties rely on *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) to determine whether Ms. Haskell has a right of action based on a violation of the court reporter statutes. Appellant's Brief at p. 18; Respondent's Brief at p. 32. Defendants however, ignore the purpose of RCW 18.145, *et seq.* and conclude that an implied cause of action cannot be found in this case.

Defendants state the primary purpose of the court reporter statutes is to ensure that reporters "are certified to have certain minimum competence and skills." Respondent' Brief at p. 33. As a consequence, Defendants argue that implying a cause of action to enforce standards of court reporting established under WAC 308-14-130(1) would not further the purpose of "this certification statute." *Id.* Defendants' logic fails because they ignore the additional language in RCW 18.145.005 which states:

The legislature finds it is necessary to regulate the practice of court reporting at the level of certification to protect the public safety and well-being. **The legislature intends that only individuals who meet and maintain minimum standards of competence may represent themselves as court reporters.** (Emphasis added).

Pursuant to the intent expressed in RCW 18.145.005, the legislature set standards governing the practice of court reporting in

addition to the requirements for certification to be a court reporter. RCW 18.145.050(1), .130. Based on this stated intent, implying a private cause of action to enforce these regulations would further the purpose of the statute.

Defendants also argue that a private cause of action should not be implied from the statute because the legislature assigned the Department of Licensing with administrative responsibilities to enforce the statute as a replacement for a private cause of action. Respondent's Brief at p. 34. The courts have not adopted Defendants' interpretation of the legislative intent. (Defendants fail to cite a case in support of their argument).

The same statute that governs the administrative enforcement of the court reporter statutes also governs the administrative enforcement of many other professionals, including real estate agents and cosmetologists. RCW 18.145.140, RCW 18.235, *et seq.* Despite this administrative system designed to regulate these professions, courts have recognized private causes of action against these professionals for incompetence or violation of the standards of their profession. *See Hanks v. Grace*, 273 P.3d 1029 (April 2, 2012) (verdict against real estate agent affirmed); *McRae v. Bolstad*, 32 Wn. App. 173, 646 P.2d 771 (1982) (verdict against real estate broker affirmed; court notes "heavy regulation" of industry supports applying Consumer Protection Act to broker's actions);

Thomas v. French, 99 Wn.2d 95, 96, 659 P.2d 1097 (1983) (suit allowed against a cosmetology school, regulated by RCW 18.18. *et. seq.*). This Court's recent opinion in *Hanks v. Grace* explicitly acknowledges that the actions of the real estate agent on which the private suit was based are regulated by chapter 18.85, 18.86 and 18.235 RCW. *Id.*, 273 P.3d at 1029. Contrary to Defendants' assertion, the administrative enforcement of the statutes does not indicate that a private cause of action is prohibited by the legislation.

The two cases cited by Defendants in support of their argument that a private cause of action should not be recognized here are substantially different from the facts in this case. In *Crisman v. Pierce County Fire Protection Dist., No. 21*, 115 Wn. App. 16, 23-24, 60 P.3d 652 (2002), the court stated that the public disclosure act whose purpose is to fully disclose to the public political and lobbying contributions could not be the basis of a lawsuit by a political candidate against a public official who violated the act. The court held that the act was intended to allow public scrutiny of government "rather than to promote public scrutiny of particular individuals who are unrelated to any governmental operation." *Id.*, 115 Wn. App. at 23. This case is distinguished from the court reporter act which is intended to focus on the competence and practice of individuals. In *Davenport v. Washington Educ. Ass'n*, 147 Wn.

App. 704, 197 P.3d 686 (2008), the other case cited by Defendants, the court held that the initiative prohibiting the Washington Education Association (WEA) from using agency shop fees of nonmembers for political candidates did not provide a private right of action for misuse of the shop fees. *Id.*, 147 Wn. App. at 709. The Court held that the statute explicitly provided the right of the attorney general or the prosecuting attorney to bring a civil action of “any appropriate civil remedy”. In this case, there is no such right of the attorney general or the prosecuting attorney to bring such a suit. The cases cited by Defendants do not support the Defendants’ argument that in this case there is no implied cause of action from the court reporting statutes.

D. Providing Court Reporter Services On Different Terms To Solo Practitioners From Non Solo Practitioners Is A Basis For A Consumer Protection Act Claim.

The five *Hangman Ridge* elements are met in this case: 1) an unfair act or practice; 2) in trade or commerce; 3) that affects the public interest; 4) which injures plaintiff in her business or property; and 5) there is a causal link between the unfair act complained of and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-86, 719 P.2d 531 (1986). Defendants argue that there is no dispute as to the facts and therefore, the court should conclude that they did not commit an unfair act under the CPA. Respondent’s Brief

p. 35. In fact, the parties strongly disagree as to whether Defendants violated the court reporter regulations in their treatment of Ms. Haskell, treating her differently from the Farmers attorney because she was a sole practitioner. Violation of statutory regulations is precisely the type of claim which fits within the requirements of the CPA. *See, McRae v. Bolstad, supra.*

Defendants also argue that they acted in good faith which constitutes a defense under the CPA. Respondent's Brief at p. 36. Defendants cite two cases arguing that acts performed in good faith cannot be a violation of the Consumer Protection Act. Respondent's Brief at p. 35-36. Both of those cases involve insurance and do not involve facts that support violations of any professional standards. The statutes governing insurance explicitly require dealing in good faith. RCW 48.01.030. A comparable statute does not exist in the court reporter statutes. In *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1977), the court noted that there was no evidence the insurance company violated any regulations and in fact, two court of appeals decisions had previously supported the insurance companies' actions. *Id.*, 131 Wn.2d at 153, 155. In *Seattle Pump Co. Inc. v. Traders and Gen. Ins. Co.*, 93 Wn. App. 743, 752-753, 970 P.2d 361 (1999), the court held that there was nothing the insurance company did that violated the recognized

principles governing insurance (there were no allegations of violation of regulations). These cases are not applicable here where there is no comparable good faith statute governing court reporters and there is evidence of violation of a regulation.

E. The Evidence That Supports A CPA Claim Also Supports A Business Interference Claim.

Similar to their response to the CPA claim, Defendants argue that “good faith” is a defense to a business interference claim. Respondents Brief at p. 40. The case cited by Defendants, *Schmerer v. Darcy*, 80 Wn. App. 499, 910 P.2d 498 (1996), does not support their position in this case. In *Schmerer*, there were no regulations governing professional conduct at issue, and the evidence of interference was deemed by the court as “innocuous”. *Id.* at 506. In this case, the Defendants’ actions resulted in a scramble to obtain the deposition transcript so that Ms. Haskell’s client could review it in a timely manner, purportedly caused by Ms. Haskell’s poor credit history (how else would the client view it?). A viable claim of interference with a business relationship is supported by the facts in this case.

IV. CONCLUSION

The order granting summary judgment to Defendants should be reversed. At a minimum, a question of fact exists as to whether Defendants treated Ms. Haskell differently from the Farmers attorney in

violation of WAC 308-14-130. There is an implied cause of action under the statutes and regulations governing court reporters. The facts when viewed in the light most favorable also support a Consumer Protection Act claim and a claim for intentional interference with business relations.

RESPECTFULLY SUBMITTED this 25th day of June, 2012.

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COURT OF APPEALS,
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PROOF OF SERVICE

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LAUREL TERRY,

Respondents

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 25, 2012, the original and one copy of Appellant's Reply Brief was sent via U.S. Mail for delivery and filing with the Court of Appeals, Division I. I also certify that on June 25, 2012, a copy of the foregoing document was sent via U.S. Mail to the following counsel of record:

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DATED in Seattle, Washington this 25th day of June, 2012.

SCHROETER, GOLDMARK & BENDER

A handwritten signature in cursive script, appearing to read "Susan Shaver", written over a horizontal line.

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