

NO. 35234-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CANDY SINGLETON,
on behalf of herself and others similarly situated,

Appellant,

v.

NAEGELI REPORTING CORPORATION,

Respondent.

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STATE OF WASHINGTON
BY _____

BRIEF OF THE RESPONDENT

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BRIEF OF THE RESPONDENT

COMES NOW the Respondent, Naegeli Reporting Corporation (“NRC”), and in answer to the Opening Brief of the Appellant, Candy Singleton (“Singleton”), states as follows:

I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

1. The trial court did not commit error when it granted the motion to dismiss pursuant to CR 12(b)(6) filed by NRC. The trial court correctly articulated the legal standard for exemption of claims under the Washington Consumer Protection Act (RCW 19.86.170) and properly applied the facts in evidence before the court to the correct legal standard when ruling on the motion to dismiss pursuant to CR 12(b)(6) which was asked to be treated as a motion for summary judgment in consideration of materials outside of the pleadings presented by both parties.

The standard of review imposed on the Court of Appeals when reviewing a trial court’s order granting a motion to dismiss is a review *de novo* in consideration of the evidence of record. *Dilley v. S&R Holdings, LLC*, __ Wn. App. __, 154 P.3d 955, 956 (2007).

2. The trial court did not commit error when it denied Singleton’s motion for reconsideration of the order granting NRC’s motion to dismiss. The trial court properly exercised its discretion in

denying the motion for reconsideration which raised no new arguments, particularly since the motion to dismiss was granted after the trial court reviewed extensive briefing of the issues, arguments of counsel, and evidence from both parties.

The standard of review imposed upon the Court of Appeals when reviewing a trial court's order denying a motion for reconsideration is a determination whether the trial court committed a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554, 557-58 (1990).

II. STATEMENT OF THE CASE

On or about December 12, 2005, Singleton filed her Complaint against NRC stating claims for unjust enrichment and violation of the Washington Consumer Protection Act, RCW Chapter 19.86 (hereinafter the "CPA") (CP¹ 1-6). Singleton alleges she is representative of a class of plaintiffs. NRC responded with a Motion for More Definite Statement. After argument, the Court entered its order granting NRC's Motion for More Definite Statement, in part, on February 17, 2006. On or about March 3, 2006, Singleton filed a First Amended Complaint limiting the claims stated against NRC to the period August 22, 2002 through June 6, 2003 (CP 14-19), and restating the basis for her claims in substance.

¹ References to the Clerk's Papers are designated "CP" followed by the page number.

As stated by Singleton in her First Amended Complaint, her alleged claims are limited to the production of only four (4) deposition transcripts by NRC: (1) August 22, 2002 Deposition of Robert Kinnaird; (2) December 2, 2002 Deposition of Thomas Harlan, D.C.; (3) December 12, 2002 Deposition of Bradley J. Watters, M.D.; and (4) June 3, 2003 Deposition of Donna Elizabeth Moore, M.D (CP 15, ¶8). Singleton's first claim is that NRC was unjustly enriched due to its "charging and receiving payment for the additional transcript pages which would not have been produced had Defendant complied with Washington regulations, industry standards and its own standards" (CP 17-18, ¶ 21). Her second claim is that the "practices in which the Defendant engaged . . . from August 22, 2002 through June 6, 2003 as alleged herein [i.e. alleged alterations of transcripts resulting "in transcripts produced and sold by Defendant containing more pages than its own standards, industry standards and Washington administrative regulations required"] constitute unfair and deceptive acts and practices which are unlawful and in violation of the Washington CPA" (CP 18, ¶22).

In response to the First Amended Complaint, on March 23, 2006 NRC filed a motion to dismiss pursuant to CR 12 (b)(6) (CP 57-79). The motion contained extensive submissions of materials outside the pleadings as evidence in support of NRC's contentions (*See*, Declaration of Bradford

J. Fulton in Support of Defendant's Motion to Dismiss, CP 80, *passim*). NRC specifically indicated in its motion to dismiss that the motion was expected to be treated as a summary judgment motion as provided in CR 12(b)(6) (CP 65-66).

The motion to dismiss was argued April 28, 2006, and on May 12, 2006, the trial court rendered its decision. The trial court granted the motion to dismiss on both the unjust enrichment and CPA claims. The trial court dismissed the unjust enrichment claims for services rendered prior to December 12, 2002 because they were barred by the statute of limitations. The trial court granted Singleton leave to file an amended complaint for unjust enrichment claims after December 12, 2002 provided she make the factual allegations that she acted through her agent, her attorney, Guy Beckett, to obtain NRC's services (Verbatim Report of Proceedings, May 12, 2006, at 8-12). The trial court also dismissed Singleton's claims under the CPA with prejudice. As stated by the trial court:

Lastly, also under the Consumer Protection Act, the defendant argued that the defendant is exempt because the action is controlled by a regulatory agency. RCW 19.86.170 states that nothing in this chapter shall apply to actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state. And further, that actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 shall not be construed a violation of Chapter 19.86.

In this case the regulatory body overseeing court reporters is more than a mere monitoring of the profession. The regulatory

body does control entry into the occupation. It requires court reporters to maintain certain standards and codes of conduct. Also, the director of Department of Licensing is authorized to adopt rules under WAC 308-14-135, under which the court reporter transcripts are controlled in how they are formatted. In light of the close control and regulation of the profession and practices, I find that the alleged actions or transactions complained of in the complaint under -- as supported under the Consumer Protection Act are exempt under 19.86 of RCW. Just as the Court has found that Naegeli is liable for court reporters and their actions under an agency theory, it follows that the same theory applies as to Naegeli's exemption. If the reporters are exempt because they are closely regulated, then as agents to Naegeli, Naegeli is also exempt.

Therefore, Ms. Singleton's complaint under the Consumer Protection Act must be dismissed as a matter of law. And that is under the exemption theory.

(Verbatim Report of Proceedings, May 12, 2006, at 13-14).

The order confirming this ruling was entered June 16, 2006 and also applied the ruling to the Second Amended Complaint filed by Singleton on May 22, 2006 (prior to entry of the order) (CP 239-244). On June 26, 2006, Singleton filed her motion for reconsideration (CP 312), noting it for hearing on July 21, 2006 (See, Appendix A, Motion to Dismiss Review of Case for Failure to Timely Note Appeal and Answer to Motion for Discretionary Review filed in the instant matter). It was denied by the trial court by order entered July 18, 2006 (CP 322). Singleton's notice of discretionary review was then filed on August 16, 2006 (CP 323).

The following facts were offered as evidence to the trial court by way of the declarations and exhibits submitted in support of NRC's motion to dismiss. These were the facts considered by the trial court (among others not relevant to this appeal) in its ruling granting NRC's motion to dismiss Singleton's CPA claims (CP 303-304).²

NRC is a legal services firm which provides various services to legal professionals, including court reporting services, in the State of Washington. NRC provides court reporting services in the state of Washington in the following manner. Clients contact NRC to schedule the attendance of a court reporter to record proceedings (either in court, in a deposition, or otherwise). NRC then contacts independently contracted, licensed court reporters to attend the proceeding. Once an independently contracted court reporter is found to cover the proceeding, a confirmation is sent to the lawyer / client who ordered the services (CP 60).

At the time of the proceeding, the independent contractor court reporter attends the proceeding and makes a record thereof. At the end of

²“The Court considered the following papers related to the motion:

1. Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted;
2. Declaration of Bradford J. Fulton in Support of Motion to Dismiss with attachments, including, without limitation:
 - a. Declaration of Marsha J. Naegeli;
 - b. Declaration of Alicia Dahlem; and
 - c. Declaration of Renee Waggoner . . .”(Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, CP 303-304).

the proceeding the court reporter is instructed by NRC to ascertain from the lawyers in attendance whether a transcript of the proceeding or a copy thereof is requested. If a transcript is requested, at that time or at any subsequent time, the independently contracted court reporter transcribes the record and forwards the transcription to NRC. Additionally, the court reporter is instructed to deliver the exhibits and audio record of the proceeding to NRC after the completion of a proceeding (CP 61).

Transcriptions received by NRC are then placed in a standard format in order to provide clients with value added services which set NRC apart from other legal services firms. This format includes synchronization of the written transcript to the audio (or video) recording of the proceeding, key-word indexing, digital scanning of all exhibits, condensed versions of the transcript, and formatting of the text into a standardized form based on the guidelines promulgated in WAC 308-14-135 and the interpretations thereof disseminated by the Washington State Department of Licensing and the Washington State Attorney General's office. After completion of transcript formatting, the transcript is delivered to the lawyer(s) who ordered the transcripts (or copies) together with invoices for the services rendered (CP 61).

During the limited period of complaint alleged by Singleton, the Attorney General's Office of the State of Washington initiated an

investigation into court reporting industry business practices. This is confirmed in Paragraph 1.3 of that certain Agreed Assurance of Discontinuance in the matter of *State of Washington v. Naegeli Reporting Corporation*, entered October 1, 2003 in the Superior Court for Thurston County at Docket No. 03-2-01958-5 (hereinafter referred to as the “Assurance of Discontinuance”) (CP 62-63).

As part of the Attorney General’s investigation of the court reporting industry, the Attorney General, through its Consumer Protection Division, contacted NRC on or about August 14, 2002. As set forth in Paragraph 2.1 of the Assurance of Discontinuance, “[d]uring the course of the Attorney General’s investigation, Naegeli Reporting Corporation was advised of written interpretations of WAC 308-14-135 by the Washington State Department of Licensing. Naegeli was also advised of the Attorney General’s opinion that WAC 308-14-135 applied to transcripts of Washington court reporters formatted by Naegeli Reporting Corporation. Immediately upon being advised of the State’s interpretation of WAC 308-14-135, Naegeli Reporting Corporation modified its transcript processing to conform with the interpretations of the Department of Licensing” (CP 63).

From August, 2002, and at all times subsequent thereto up to the present time, NRC has processed all transcripts in Washington State in

conformity with the guidelines of WAC 308-14-135 and the interpretations of the Department of Licensing known to NRC. This compliance with the guidelines of WAC 308-14-135 and the interpretations of the Department of Licensing has been undertaken voluntarily by NRC even though the Department of Licensing, as evidenced by an internal email dated June 11, 2003 obtained at the direction of NRC by counsel through a Freedom of Information Act request, admits it does not regulate “court reporting companies” (as opposed to individual, licensed court reporters) in the State of Washington (CP 63-64).

Since October 1, 2003, when the Assurance of Discontinuance was entered, NRC has worked closely with the Department of Licensing to clarify the provisions of WAC 308-14-135 and assist in educating the court reporting industry in Washington State regarding the guidelines. The end result was an amendment to regulations pertaining to court reporters under WAC 308-14-010, *et seq.* proposed in July 2, 2004 and adopted September 13, 2004. As part of this process it was demonstrated to the Attorney General’s Office and the Department of Licensing that transcript preparation software, even if set at 60 characters, often resulted in standard lines as short as 54 characters due to the fact that “carryover” words are dropped to the line below. As a result, WAC 308-14-135 was

amended to the present 54-60 character guideline to reflect this reality (CP 64).

As reflected in Paragraph 3.8 of the Assurance of Discontinuance, NRC was released, *inter alia*, from any and all claims or causes of action by the State of Washington and the Attorney General relating to NRC's formatting of transcripts by Washington court reporters in so far as such transcripts were not in compliance with "Washington statutes and regulations applicable to court reporters" through the date of entry of the Assurance of Discontinuance (October 1, 2003) (CP 64-65). Further, during the course of the above-referenced investigation (August 14, 2002 – October 1, 2003), the Attorney General's office audited transcripts produced by NRC, and all transcripts audited were found to be in compliance with the Attorney General and Department of Licensing's interpretation of WAC 308-14-135 (CP 65).

Most importantly, NRC offered evidence that all of the transcripts identified by Singleton in her complaint comply fully with the WAC provisions (CP 64). Singleton attempted to rebut this fact with a declaration from her counsel, unsupported by any competent evidence other than his opinion, that the transcripts did not comply with WAC 308-14-135 (CP 166-230).

Since the decision on the motion to dismiss, NRC has obtained a declaration of Susan Colard, Assistant Administrator for the Court Reporter Program, Business and Professions Division, Washington State Department of Licensing, the person responsible for monitoring compliance with the Washington State Court Reporting Practice Act, RCW Chapter 18.145, and the Washington Administrative Code (WAC) regulations promulgated thereunder. Ms. Colard's declaration states that each of the transcripts that Singleton has identified in her complaint as being in violation of WAC 308-14-135 actually meets the guidelines set forth in WAC 308-14-135. This declaration is incorporated into a motion for summary judgment filed by NRC with the trial court, the disposition of which has been stayed pending this appeal.

NRC respectfully requests that this declaration be presented to this Court by way of an appendix to this Brief of the Respondent pursuant to RAP 10(3)(a)(7). A copy has been submitted with this filing pending disposition of NRC's request in this regard.

III. ARGUMENT

A. Summary.

Singleton argues that the trial court, in granting NRC's motion to dismiss her CPA claims, applied the "wrong test" when it found NRC to be exempt under the provisions of RCW 19.86.170. The record indicates

the contrary. The trial court specifically articulated the applicable provisions of RCW 19.86.170 and followed the legal standards set forth by the Supreme Court in its most recent decision addressing RCW 19.86.170, *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 817 P.2d 1364 (1991). In light of these standards, the provisions of the Court Reporting Practice Act, RCW Chapter 18.145 (the "CRPA"), and the facts in evidence, the trial court could only conclude that the formatting of court reporter transcripts is regulated by the Director of the Department of Licensing ("DOL"). This being the case, claims regarding the formatting of transcripts pursuant to the DOL regulations, particularly WAC 308-14-135, are exempt from claims under the CPA as a matter of law (RCW 19.86.170).

Further, based on the evidence of record, the trial court found that there was "no demonstrated distinction between general industry standards and the Washington Administrative Code" (Verbatim Report of Proceedings, May 12, 2006, at 14). Singleton advanced no evidence contrary to that submitted by NRC in this regard. Accordingly, the trial court found, "clearly, the WAC is intended to regulate the industry and that [*sic*], therefore, that appears to be the standard applied to court reporters in the State of Washington" (Verbatim Report of Proceedings, May 12, 2006, at 14). This conclusion is amply supported by the law and

facts of record. As such, Singleton's contention that the trial court erred in dismissing the CPA claim based on NRC's alleged failure to comply with general industry standards is without foundation.

As the trial court correctly applied the law to the facts evidenced in the record, its decision to deny Singleton's motion for reconsideration was well within its discretion. This is particularly so since the trial court already considered extensive briefing, argument, and evidence on the matter with no new arguments advanced by Singleton for reconsideration by the court.

Finally, the Court of Appeals is technically without jurisdiction over this appeal as Singleton failed to timely file her notice of discretionary review for the trial court's order entered June 16, 2006. The notice of discretionary review was filed August 16, 2006.

B. Application of the Standard for Exemption from CPA Claims Pursuant to RCW 19.86.170.

The Washington Supreme Court has thoroughly reviewed the standards under which courts are to address exemption from CPA claims pursuant to RCW 19.86.170 in its opinion in *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 817 P.2d 1364 (1991). This is the most recent case addressing the issue, and it addresses RCW 19.86.170 after its amendment in 1974 (discussed by Singleton in her Opening Brief, 7-13).

RCW 19.86.170 reads in relevant part:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States. . . . PROVIDED, FURTHER, that actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW. . . .

The Supreme Court, in the *Vogt* opinion, instructs courts on how to analyze an exemption under RCW 19.86.170:

In *Dick* [*Dick v. Attorney General*, 83 Wn. 2d 684, 521 P.2d 702 (1974)] the court stated that the proper approach to an exemption issue is to analyze whether the action or transaction in question was itself the subject of permission, prohibition or regulation before exempting the conduct. While the *Dick* appeal was pending, the Legislature considered an amendment to narrow the exculpatory provisions of the Consumer Protection Act. The amendment was approved 4 days after this court's decision in the *Dick* case in 1974. The amendment mainly affected the scope of the exemption available to, and the jurisdiction of the courts over, those industries regulated by “other” regulatory bodies or officers. . . .

The analytical concept discussed in *Dick* remains intact even after the 1974 amendment. ***Exemption under the Consumer Protection Act is applied only after determining whether the specific action is permitted, prohibited, regulated or required by a regulatory body or statute. . . .***

This court in *In re Real Estate Brokerage Antitrust Litig.* addressed the meaning of “specifically permitted” under the 1974 amendment to the Consumer Protection Act, RCW 19.86.170. The court determined that under that portion of the statute, ***an agency must take “overt affirmative actions specifically to permit***

the actions or transactions engaged in” by the person or entity involved in a Consumer Protection Act complaint.

Id. at 117 Wn.2d 550-51, 817 P.2d 1369-70 (citations omitted, emphasis added).

In the instant matter, the trial court ruled:

Lastly, also under the Consumer Protection Act, the defendant argued that the defendant is exempt because the action is controlled by a regulatory agency. RCW 19.86.170 states that nothing in this chapter shall apply to actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state. And further, that actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 shall not be construed a violation of Chapter 19.86.

In this case the regulatory body overseeing court reporters is more than a mere monitoring of the profession. The regulatory body does control entry into the occupation. It requires court reporters to maintain certain standards and codes of conduct. Also, the director of Department of Licensing is authorized to adopt rules under WAC 308-14-135, under which the court reporter transcripts are controlled in how they are formatted. In light of the close control and regulation of the profession and practices, I find that the alleged actions or transactions complained of in the complaint under -- as supported under the Consumer Protection Act are exempt under 19.86 of RCW.

(Verbatim Report of Proceedings, May 12, 2006, at 13-14).

The first quoted paragraph contains a nearly verbatim restatement of the relevant portions of the statute. Thus, the trial correctly applied the post-1974 amendment language of RCW 19.86.170 in its analysis despite Singleton’s protestations to the contrary in its Opening Brief.

The second paragraph demonstrates the trial court's correct application of the standards enunciated by the Supreme Court in *Vogt*. In analyzing an exemption claim under RCW 19.86.170, the court must first determine "whether the specific action is permitted, prohibited, regulated or required by a regulatory body or statute." *Vogt* at 117 Wn.2d 551, 817 P.2d 1370. In order to ascertain this, the trial court had before it the provisions of the Court Reporting Practice Act, RCW Chapter 18.145 (the "CRPA").³

The express purpose of the CRPA is set forth in RCW 18.145.005: "[t]he legislature finds it necessary to regulate the practice of court reporting at the level of certification to protect the public safety and well-being." RCW 18.145.010 provides that "[n]o person may represent himself or herself as a court reporter without first obtaining a certificate as required by this chapter." Pursuant to RCW 18.145.050, the legislature grants the director of the Department of Licensing the authority to adopt rules necessary to implement the chapter. One such rule is WAC 308-14-130 ("Standards of Professional Practice"). WAC 308-14-130 states:

All certified court reporters (CCR) shall comply with the following professional standards except where differing standards are established by court or governmental agency. Failure to comply with the following standards is deemed unprofessional conduct. Certified court reporters shall:

³ NRC set forth the applicable provisions of the CRPA in its motion to dismiss (CP 74-76).

(1) Include on all transcripts, business cards, and advertisements their CSR reference number.

(2) Prepare transcripts in accordance with the transcript preparation guidelines established by WAC 308-14-135 or court.

(3) Preserve and file their shorthand notes in a manner retrievable. Transcribed notes shall be retained for no less than three years. Untranscribed notes shall be retained for no less than ten years or as required by statute, whichever is longer.

(4) Meet promised delivery dates.

(5) Prepare accurate transcripts.

(6) Disclose conflicts, potential conflicts, or appearance of conflicts to all involved parties.

(7) Be truthful and accurate in advertising qualifications and/or services provided.

(8) Preserve confidentiality of information in their possession and take all steps necessary to insure its security and privacy.

(9) Notify all involved parties when transcripts are ordered.

(10) Notify all involved parties, when a transcript is ordered by a person not involved in the case, before a copy of the transcript is furnished. If any party objects, the transcript is not provided without a court order.

(11) Supply certified copies of transcripts to any involved party, upon appropriate request.

(emphasis added).

At the time relevant to Singleton's claims, WAC 308-14-135

("Transcript preparation format") provided:

The following transcript format will be followed by all certified shorthand reporters (CSR's), except where format are recommended or established by court or agency.

(1) No fewer than twenty-five typed lines on a standard 8 1/2 x 11 inch paper.

(2) No fewer than ten characters to the typed inch.

(3) No fewer than sixty characters per standard line.

The transcript preparation guidelines set forth in WAC 304-14-135 are the only formatting requirements required by the DOL. There is nothing more required for transcripts to be compliant with the regulation.

Given this statutory scheme, one must conclude that the "specific action" complained of by Singleton, the formatting of transcripts, is "regulated or required by a regulatory body or statute." *Vogt* at 117 Wn.2d 551, 817 P.2d 1370. Thus, the first element of an exemption under RCW 19.86.170 is met.

Further, one must conclude that under the CRPA the DOL took "overt affirmative actions specifically to permit the actions or transactions engaged in by the person or entity involved in a Consumer Protection Act complaint." *Vogt* at 117 Wn.2d 551, 817 P.2d 1370. The DOL, authorized pursuant to WAC 308-14-130, promulgated explicit rules under WAC 308-14-135 regulating the formatting of court reporter transcripts. The evidence presented by NRC was that the transcripts complied with the

provisions of WAC 308-14-135. Singleton presented no competent evidence to rebut the evidence presented by NRC.

NRC specifically indicated in its motion to dismiss that the motion should be treated as a summary judgment motion as provided in CR 12(b)(6): “If materials outside the pleadings are considered, a motion to dismiss for failure to state a claim upon which relief can be granted is treated as a summary judgment motion. *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273, *review denied*, 150 Wash.2d 1015, 79 P.3d 445 (2002); *Sims v. Kiro, Inc.*, 20 Wn. App. 229, 580 P.2d 642 (1978)” (Motion to Dismiss, CP 65-66).

“After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts [that] sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.” *Meyer v. Univ. of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). A nonmoving party, however, “may not rely on speculation, argumentative assertions that unresolved factual issues remain or in having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

In rebuttal to NRC's evidence all Singleton was able to offer was the opinion of her own attorney, without evidence of any qualification or technical expertise, that he thought that two (2) of the four (4) transcripts

identified by Singleton did not comply with WAC 308-14-135 (Supplemental Declaration of Guy W. Beckett for Opposition to CR 12(b)(6) Motion, CP 168-170).⁴ Counsel's speculation does not rise to the level of evidence that must be recognized by the trial court, and, in fact, it was not.

Since the evidence presented to the trial court indicated the transcripts at issue complied with WAC 308-14-135, a claim under the CPA based on the allegation that the transcripts do not comply with WAC 308-14-135 must necessarily be barred by RCW 19.86.170. RCW 19.86.170 provides that "actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be

⁴ The Court will note that at argument on April 28, 2006, counsel for Singleton sought, and was granted, leave to produce further affidavits in support of Singleton's factual allegations:

MR. BECKETT: With respect to this issue, with respect for continuance, if the court considers this to be a 56 motion, is there something I could be doing in the meantime? Because really what it amounts to is filing a declaration with a bunch of transcripts, then a ruler showing at least with respect to the issues that we have – that we have in evidence. We don't have all the roughs, but we have the original transcripts. And you can see the extra tabs. You can see the number of characters per inch. And if we're talking about a motion for summary judgment on no evidence, but presuming that you're going to consider there's some evidence, I'd ask for that.

THE COURT: Any objection to that?

MR. PETTLER: We don't have any objection, Your Honor, because I don't think its going to show it's out of compliance with the WAC

THE COURT: Well, I will give you leave to go ahead and file something in addition. But that will have to be done – can you do that in the next week?

MR. BECKETT: Yes.

(Verbatim Report of Proceedings, April 28, 2006, at 51-52).

a violation of chapter 19.86 RCW.” DOL is a regulatory board established under Title 18 RCW. The formatting of court reporter transcripts is “specifically permitted within the statutory authority granted to” the DOL. Therefore, an action based on the formatting of court reporter transcripts “shall not be construed to be a violation of chapter 19.86 RCW.” This is precisely what the trial court held in the instant matter, and it is a correct statement of the law of the State of Washington.

C. The Authority Cited by Singleton in her Opening Brief Regarding Statutory Exemptions from CPA Claims.

In her Opening Brief, Singleton discusses at great length the pre-1974 language of RCW 19.86.170, its amendment, and a number of cases decided under the old and new language (Opening Brief at 7-13). The cases with holdings under the old language contained in RCW 19.86.170 are inapposite to the instant appeal as the trial court correctly applied the current language of the statute in its decision. Those cases are *Allen v. American Land Research*, 95 Wn.2d 841, 846, 631 P.2d 930, 933 (1981) [cited in the Opening Brief at 8-9]; *Dick v. Attorney General*, 9 Wn. App. 586, 513 P.2d 568 (1973) [cited in the Opening Brief at 10]; *Lidstrand v. Silvercrest Industries*, 28 Wn. App. 359, 369, 623 P.2d 710, 716-717 (1981) [cited in the Opening Brief at 12].

Singleton also cites two (2) cases applying the new exemption language. The opinion *In re: Real Estate Brokerage Antitrust Litigation*, 95 Wn.2d 297, 622 P.2d 1185 (1981) is cited by Singleton for the proposition, “[i]n order for the exemption to apply, the regulated person “must prove that the activity was authorized by statute and that acting within this authority the agency took overt affirmative action specifically to permit the actions or transactions engaged in by the [regulated person].” *Id.* at 95 Wn.2d 301, 622 P.2d 1187 (Opening Brief at 13). This is a correct statement of the law applicable to this case. In the *Real Estate Brokerage* case, the Supreme Court affirmed the trial court’s ruling that:

under RCW 18.85 which relates to real estate brokers and salespersons [the Brokers Act], neither the Director of the Department of Licensing, nor the Real Estate Commission, nor the real estate division of the business and professions administration of the Department of Licensing has regulatory or licensing authority to deal with alleged antitrust violations. The court further ruled that the exemption under RCW 19.86.170 does not apply as antitrust violations are not specifically permitted by the language of RCW 18.85.

Id. at 95 Wn.2d 300, 622 P.2d 1187.

Contrary to Singleton’s assertions, the holding in the *Real Estate Brokerage* case supports dismissal of her CPA claims pursuant to RCW 19.86.170. Unlike in the *Real Estate Brokerage* matter, in the instant case the Director of the Department of Licensing “has regulatory or licensing authority to deal with” the “actions or transactions engaged in by the

[regulated person]” and took “overt affirmative action” regarding such actions or transactions. In the *Real Estate Brokerage* case, the Supreme Court held there was no regulatory body, commission or officer empowered to regulate the conduct complained of in that case, as such, the exemption under RCW 19.86.170 did not apply to the facts in that matter. In the instant matter, the DOL has been expressly authorized to regulate the conduct complained of (formatting transcripts) and has taken overt, affirmative action do so by enacting WAC 308-14-135.

The other opinion addressing exemption under RCW 19.86.170 cited by Singleton is the opinion in *State v. Tacoma-Pierce County Multiple Listing Service*, 95 Wn.2d 280, 622 P.2d 1190 (1980) [cited in the Opening Brief at 14-15]. Singleton cites *Tacoma-Pierce* as support for the proposition, “[a]ccordingly, it is of no consequence that a profession (such as court reporting) is generally regulated. The exemption under RCW 19.86.170 only applies if the defendant’s action or transaction complained of is *specifically permitted*” (Opening Brief at 15). The *Tacoma-Pierce* case in no way stands for this proposition which would be contrary to the express language of RCW 19.86.170 that the action or transaction be “specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18

RCW.” Singleton mis-reads the *Tacoma-Pierce* holding and renders much of the language in RCW 19.86.170 superfluous.

In *Tacoma-Pierce*, the issue was whether a Multiple Listing Service (“MLS”) could be subject to the CPA because the members of the MLS were real estate brokers subject to the Brokers Act. *Tacoma-Pierce* at 95 Wn.2d 283, 622 P.2d 1192. As stated in the opinion:

The Multiple Listing Service is described in the complaint as follows:

The MLS is an arrangement between brokers in the Pierce County (Spokane County and Benton County) area(s) in which any member broker is authorized to sell property exclusively listed with any other member broker. Member brokers obtain exclusive listings from home sellers and register such listings with the MLS. Such listings give all member brokers the right to sell the homes and permit the brokers obtaining the listings to prevent the sale of the homes through brokers who are not members of the MLS. The MLS compiles the listings, together with detailed information regarding the listed homes, and disseminates it in publications to all member brokers, who attempt to sell the listed homes. Most homes sold in the Pierce County (Spokane County and Benton County) area(s) are sold through listings with the MLS. Membership in the MLS is important to a broker's ability to engage in the trade and commerce described above because only MLS members have the right to sell homes listed with the MLS, and only MLS members have the right to list homes with the MLS and to have access to MLS listing information.

Ibid. Based on these facts the Supreme Court held:

Nothing in the statutes indicates the courts should defer to the administrative body for its view. The only statutory reference to multiple listing associations is RCW 18.85.010(8), which defines multiple listing associations, and RCW 18.85.400 which sets forth entrance requirements. RCW 18.85. does not give the Department of Licensing or the Real Estate Commission any regulatory power

over antitrust violations by a multiple listing service. While a person licensed under RCW 18.85. may, for the commission of certain acts, have a license suspended, revoked or denied (RCW 18.85.230), ***this does not apply to a multiple listing association but only to individual license holders.*** There is no “special competence” given to the agencies to determine violations of the Consumer Protection Act by a multiple listing association. . . . Under these circumstances, we hold it is an abuse of discretion to apply the doctrine of primary jurisdiction.

Id. at 95 Wn.2d 285-286, 622 P.2d 1193 (emphasis added).⁵ In other words, an MLS, which is a certain type of association, is not subject to the same regulations as its member brokers. For this reason the Supreme Court held further:

There is nothing in RCW 18.85. which confers on the Department of Licensing or the Real Estate Commission the authority to approve the restrictions for membership in a multiple listing service which were allegedly required by defendants. RCW 19.86.170 does not provide an exemption for defendants.

Id. at 95 Wn.2d 287, 622 P.2d 1194.

In summation, in the *Tacoma-Pierce* case the provisions of the RCW 19.86.170 exemption did not apply to the MLS because the MLS was an association composed of real estate brokers and was not otherwise regulated by a regulatory body under Washington law. Accordingly, this case stands for the correct statement of the law in Washington: if the

⁵ The Court will note that the section of the *Tacoma-Pierce* opinion cited by Singleton in part does not address the issue of whether the MLS is exempted from a CPA claim pursuant to RCW 19.86.170, rather this language appears in the discussion of the issue of primary jurisdiction raised by the defendants. This is further evidence of Singleton’s misguided reliance on this opinion.

conduct complained of (formatting transcripts) is specifically permitted within the statutory authority granted to a regulatory board under Title 18 (the DOL), then the conduct is exempt from claims under the CPA.

The other cases cited by Singleton in her Opening Brief do not even address RCW 19.86.170. In *Harstad v. Frol*, 41 Wn. App. 294, 704 P.3d 638 (1985) [cited in the Opening Brief at 16], there was apparently no assertion by the defendant real estate broker that its conduct was regulated by a regulatory body and it was, therefore, exempt from a claims under the CPA pursuant to RCW 19.86.170. The issue is not discussed in any way. Rather, the Court of Appeals addressed the situation where, at the time of trial, a violation of a state statute was a *per se* violation of the CPA, but, upon appeal, the common law of Washington had changed such that the violation of a state statute was no longer a *per se* violation of the CPA. Because of this, the Court of Appeals had to address whether the record supported the specific elements of a CPA claim instead of relying upon the *per se* violation theory to establish liability under the CPA. *See, Harstad* at 41 Wn. App. 299-300, 704 P.3d 642-643. The *Harstad* opinion has no applicability to the instant matter where NRC claims exemption from CPA claims pursuant to RCW 19.86.170.

Similarly, the case of *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982) [cited in the Opening Brief at 17] offers no support to

Singleton. The defendant real estate broker again did not raise the exemption in RCW 19.86.170 in its defense. The issue is not discussed. The Court of Appeals in deciding that matter was again faced with the issue of whether a violation of RCW 18.85 (The Real Estate Broker's Act) occurred, and thus, under the law applicable at that time, whether there was a *per se* violation of the CPA. The Court of Appeals found in the *Nuttall* case that the defendant did not violate RCW 18.85.230 as alleged, and, therefore, there was no *per se* violation of the CPA. *See, Nuttall* at 31 Wn. App. 109-112, 639 P.2d 839-840.

As pointed out by Singleton, "*Nuttall* illustrates that despite regulation by a Title 18 agency, a plaintiff can pursue a CPA claim against a professional licensee subject to state regulation" (Opening Brief at 17). This is true, but only so long as the Title 18 agency is not granted the authority to regulate the conduct complained of and does so. If the Title 18 agency is granted the authority and undertakes to regulate the conduct complained of, then the conduct is exempt from CPA claims under RCW 19.86.170.

Singleton also cites *Wilkinson v. Smith*, 31 Wn. App. 1, 639 P.2d 768 (1982) [cited in the Opening Brief at 17]. Again in this case, the defendant does not raise RCW 19.86.170 as a defense and the issue is not discussed. The issue presented again to the Court of Appeals is whether a

violation of the Brokers Act constitutes a *per se* violation of the CPA. The court did find that the defendants violated the Brokers Act in this case and such violation constituted a *per se* violation of the CPA. *Wilkinson* at 31 Wn. App. 9-10, 639 P.2d 772-73. However, this finding is under the prior decisional law regarding *per se* violations of the CPA, and the opinion is inapposite to the facts and law applicable to this case.

Singleton's citation to *Sing v. John L. Scott Real Estate, Inc.*, 83 Wn. App. 55, 920 P.2d 589 (1996) [cited in the Opening Brief at 18] is also inapposite. Although this opinion does address a defendant's claim of exemption from a CPA claim under RCW 19.86.170, in the very quote cited by Singleton (Opening Brief at 18), the Court of Appeals specifically states that because the defendant's acts that were determined to be violations of the CPA were *not* regulated by the Department of Licensing "or any other agency or commission," the defendant was not entitled to exemption from a private claim under the CPA. *Id.* at 83 Wn. App 68-69, 920 P.2d 597.

Likewise, Singleton's reliance on the opinion in *Edmonds v. John L. Scott Real Estate Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997) [cited in the Opening Brief at 19] is misplaced. In *Edmonds* the defendant asserted "that its method of disbursing earnest money is specifically authorized under WAC 308-124E-013(3) and therefore may not be construed as a

violation of the CPA [under the RCW 19.86.170 exemption].” *Id.* at 87 Wn. App. 844, 942 P.2d 1078. The Court of Appeals noted that the defendant’s reliance on WAC 308-124E-013(3) was misplaced. That provision regulates how a broker disburses earnest money after an earnest money agreement “terminates according to its own terms prior to closing.” The Court of Appeals noted that the earnest money agreement in the case at issue did not terminate under its own terms; instead, there was a dispute regarding its termination. Therefore, since the condition precedent that allowed the defendant to disburse earnest money pursuant to WAC 308-124E-013(3) (termination of the agreement on its own terms) did not occur, the Court found that disbursement by the defendant was not regulated by the Department of Licensing. *Id.* at 87 Wn. App. 844-45, 942 P.2d 1078.

Singleton states, in summary and after citing the foregoing cases, “in each of these cases regulation by a Title 18 agency did not preclude a CPA claim because the alleged violations of the relevant statute or regulation were not actions or conduct ‘specifically permitted’ by a regulatory agency” (Opening Brief at 19). As addressed above, Singleton’s characterization of these cases is inaccurate. A number of the cases cited by Singleton do not even address exemption claims under RCW 19.86.170 (*Harstad, Nuttall, Wilkinson*), and the ones that do (*Real*

Estate Brokerage, Tacoma-Pierce, Sing, Edmonds) stand for the proposition that if a Title 18 agency is specifically permitted to regulate conduct and takes “overt affirmative actions” to regulate such conduct, then the conduct is exempt from CPA claims under RCW 19.86.170.

The cases cited by Singleton from foreign jurisdictions are of no assistance to the Court in this matter. The statutory language cited in each case under the particular state’s Consumer Protection Act is different than that adopted by the Washington legislature. None of the cases cited applied statutory exemption language with the provision “specifically permitted within the statutory authority granted to any regulatory board or commission.” *See, Skinner v. Wheeler*, 730 S.W. 2d 335, 337 (Tenn. Ct. App. 1987) [cited in the Opening Brief at 19-20]; *Robertson v. State Farm Fire & Casualty Co.*, 890 F.Supp. 671-675 (E.D. Mich. 1995) [cited in the Opening Brief at 20-21]; *Ward v. Dick Dyer & Assoc.*, 304 S.C. 152-154, 403 S.E.2d 310-311 (S.C. 1991) [cited in the Opening Brief at 21-22]; *WVG v. Pac. Ins. Co.*, 707 F.Supp. 70, 72 (D. N.H. 1986) [cited in the Opening Brief at 22-23]; and *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 56 (Colo. 2001) [cited in the Opening Brief at 23-24].

In summation, Singleton fails to cite any authority which would compel a different result than that reached by the trial court in this matter given the facts and law before the court.

D. Singleton's Claim Under "Industry Standards," Tabbing and Spacing.

Singleton states, "[i]n response to the motion to dismiss, Ms. Singleton produced evidence showing how Naegeli inflated the number of pages in its transcripts by adding tab spaces and inserting new paragraphs to the rough drafts of its transcripts. CP 168-73 at ¶¶ 6, 9; CP 241 at ¶9" (Opening Brief at 27). As discussed above (*supra* at 19-20), the speculation of plaintiff's counsel does not rise to the level of competent evidence which a court must consider from a plaintiff when faced with a motion for summary judgment. Yet, this is the sole evidentiary basis upon which Singleton relies to support her assignment of error that the trial court erred in granting the motion to dismiss the CPA claims because DOL regulations do not address "inserting unnecessary tabbing and new paragraphs" (Opening Brief at 1).

Singleton offered no evidence that the spacing and paragraph formatting in the transcripts complained of was "unnecessary." In order to have done so, Singleton would have to first establish a standard against which to measure its claims. Rather than doing this, Singleton merely offered her counsel's opinion that two (2) of the four (4) transcripts contained "unnecessary" paragraphs and indenting (Supplemental

Declaration of Guy W. Beckett for Opposition to CR 12(b)(6) Motion, CP 168-171).

On the other hand, the court had before it the CRPA, the WAC provisions promulgated by the DOL pursuant to the CRPA, and the declaration of Marsha J. Naegeli, President and owner of NRC since 1981. Weighing this evidence against that offered by Singleton (none), the trial court concluded:

The plaintiff claims that it should still be able to pursue the Consumer Protection Act under general industry standards. Given that the Washington Administrative Code regulates the industry in Washington, there is no demonstrated distinction between general industry standards and the Washington Administrative Code. And clearly, the WAC is intended to regulate the industry and that, therefore, that appears to be the standard applied to court reporters in the state of Washington.

And therefore, the Court denies the request of the plaintiff to maintain the Consumer Protection Act cause of action under general industry standards.

(Verbatim Report of Proceedings, May 12, 2006, at 14).

The record before the trial court and the record now before this Court on review are the same. In the face of the evidence offered by NRC, it was incumbent upon Singleton to offer evidence of an industry standard other than WAC 308-14-135 applicable to the formatting of court reporter transcripts. *Meyer v. Univ. of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Singleton failed to do so, and NRC

submits, she cannot do so. Therefore, the industry standard for formatting court reporter transcripts in the State of Washington in evidence is WAC 308-14-135. Faced with this evidence the trial court was compelled to conclude that there was “no demonstrated distinction between general industry standards and the Washington Administrative Code” (Verbatim Report of Proceedings, May 12, 2006, at 14). As such, the trial court did not commit error in its ruling to dismiss Singleton’s CPA claims based upon an alleged failure to comply with unspecified “industry standards.”

E. There Was No Manifest Abuse of Discretion Demonstrated by the Trial Court in its Denial of the Motion for Reconsideration.

In the opinion in *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990), the Court of Appeals, Division 1, engaged in a lengthy analysis of judicial discretion when faced with the issue of whether the trial court committed a manifest abuse of discretion when ruling on a motion for reconsideration. *Id.* at 56 Wn. App. 499, 504-07, 784 P.2d 554, 557-59 (1990). The *Coggle* court concluded, “[t]he proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion.” *Id.* at 56 Wn. App. 507, 784 P.2d 559 (1990).

In the instant matter, there is no evidence from which to conclude that the trial court abused its discretion in denying Singleton’s motion for

reconsideration of its June 16, 2006 order granting NRC's motion to dismiss. To the contrary, the record shows that extensive briefs were submitted to the court regarding the motion to dismiss and Singleton's opposition (CP, *passim*), extensive argument was presented to the trial court (Verbatim Report of Proceedings, April 28, 2006), the trial court took the matter under advisement after argument (Verbatim Report of Proceedings, April 28, 2006, at 50-51), and the trial court even granted Singleton leave to file supplementary affidavits to support her allegations before the it made its ruling (Verbatim Report of Proceedings, April 28, 2006, at 51-52).

In light of the consideration originally given by the trial court to the motion to dismiss, it is not "untenable" that the trial court denied Singleton's motion for reconsideration. This is particularly so given the fact that Singleton presented no new substantive arguments or evidence to the trial court for reconsideration (Motion for Reconsideration, CP 312).

Accordingly, the trial court did not commit error or manifest abuse of discretion as a matter of law in denying Singleton's motion for reconsideration of the June 16, 2006 order.

F. The Court of Appeals Technically Does Not Have Jurisdiction Over This Appeal.

On June 16, 2006, the trial court entered the order granting NRC's motion to dismiss (CP 303-304). On June 26, 2006, Singleton filed her motion for reconsideration of the June 16, 2006 order. Attached as Appendix A to NRC's motion to dismiss review of case for failure to timely note appeal and answer to motion for discretionary review filed in this matter is a copy of the Note for Motion Docket filed and served with the motion for reconsideration. The note sets the matter for hearing before the trial court on July 21, 2006.

On July 18, 2006 the trial court issued its order denying the motion for reconsideration (CP 322). Singleton filed her notice of discretionary review to the Court of Appeals on August 16, 2006 (CP 323). In her notice, Singleton states she "seeks review . . . of the order Granting in Part and Denying in Part Defendant's Motion to Dismiss Pursuant to CR 12(b)(6) entered June 16, 2006 and the Order Denying Singleton's Motion for Reconsideration entered July 18, 2006."

RAP 5.1 (a) requires, in part, "[a] party seeking review of a trial court decision subject to discretionary review must file a notice for discretionary review. Each notice must be filed with the trial court within the time provided by Rule 5.2." RAP 5.2 (b) requires that a notice of

discretionary review be “filed in the trial court within 30 days after the act of the trial court which the party filing the notice wants reviewed.” RAP 18.9 (c)(3) states in relevant part, “[t]he appellate court **will**, on motion of a party, dismiss review of a case. . . (3) except as provided in RAP 18.8 (b), for failure to timely file a . . . notice of discretionary review (emphasis added). RAP 18.8 (b) specifies that only under “extraordinary circumstances” will the appellate court extend the time within which a party must file a notice of appeal.

In the matter of *Hoirup v. Empire Airways, Inc.*, 69 Wn. App. 479, 482, 848 P.2d 1337, 1339 (1993), the Court of Appeals held:

A specific exception to the rule of liberality is RAP 18.8(b), which limits the court's ability to grant extensions of time for certain filings. The procedures listed in RAP 18.8(b), and RAP 18.9(b) and (c) (notice of appeal, notice for discretionary review, motion for discretionary review of a decision of the Court of Appeals, petition for review, or a motion for reconsideration) **are the modern equivalent of jurisdictional requirements. Failure to timely file any of these will result in dismissal, except in extraordinary circumstances or to prevent a gross miscarriage of justice.** “Extraordinary circumstances” include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control.

(emphasis added).

In the instant matter, the trial court’s ruling to dismiss Singleton’s CPA claims was actually rendered on May 12, 2006 (Verbatim Report of Proceedings, May 12, 2006). However, due to procedural issues initiated

by Singleton's filing a Second Amended Complaint before the entry of the order (CP 239), entry of the order dismissing the CPA claims was delayed until June 16, 2006 (CP 303). This delay gave Singleton ample time to prepare for and file a timely notice of discretionary review of the trial court's ruling. Therefore, there were no extraordinary circumstances, as required under RAP 18.8 (b), which permit the Court of Appeals to extend the time for filing the notice of discretionary review. *See, Hoirup, supra*, and *City of Spokane v. Landgren*, 127 Wn. App.1001, 107 P.3d 114, 118 (2005).

Singleton filed her notice of discretionary review sixty (60) days after the June 16, 2006 order was entered. Accordingly, her motion for discretionary review must be dismissed pursuant to RAP 18.9 (c)(3) for failure to timely file the notice for discretionary review in so far as it pertains to the decisions of the trial court reflected in the order entered June 16, 2006. *City of Spokane* at 107 P.3d 118 ["Because we find this issue dispositive, we need not address the other issues presented by the parties."].

Further, CR 59 (b) requires that a motion for reconsideration shall be filed not later than ten (10) days after the entry of the order, and further requires:

The Motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order or other decision, unless the court directs otherwise.

Singleton's note for motion docket filed at the same time the motion for reconsideration was filed (Appendix A, Motion to Dismiss Review of Case for Failure to Timely Note Appeal and Answer to Motion for Discretionary Review) set the matter for hearing on July 21, 2006, thirty-five (35) days after entry of the June 16, 2006 order for which reconsideration was sought. On July 18, 2006 the trial entered its order denying the motion for reconsideration, thirty-one (31) days after entry of the June 16, 2006 order.

CR 6 (b) dictates the parameters of a court's authority to enlarge the time for actions under the rules of court:

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; ***but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).***

(emphasis added).

The Washington Supreme Court addressed circumstances analogous to the facts in the instant matter in its opinion in *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 849 P.2d 1225 (1993). In *Schaefco* the appellant, Schaefco, Inc. ("Schaefco") appealed an administrative decision, which decision was confirmed by the trial court on July 2, 1991. Schaefco then filed a motion for reconsideration on July 12, 1991, within the ten (10) day period required under CR 59 (b). However, Schaefco did not serve the motion for reconsideration on the opposing party until July 16, 1991. On August 16, 1991 the trial court denied the motion for reconsideration. Schaefco then filed its notice of appeal on September 9, 1991. *Id.* at 121 Wn.2d 366-367 849 P.2d 1225-1226.

The appellee, the Columbia River Gorge Commission ("Commission"), filed a motion to dismiss the appeal in the Court of Appeals because Schaefco's appeal as not filed within the applicable thirty (30) day time period. The Commission argued that the period within which Schaefco had to file its notice of appeal dated back to the trial court's July 2, 1991 order because the motion for reconsideration was untimely, and, therefore, did not extend the thirty (30) day time period for filing a notice of appeal. The Commissioner for the Court of Appeals ruled in the Commission's favor, but his decision was later modified by the

Court of Appeals without explanation. The Court of Appeals then certified the appeal to the Supreme Court. *Id.* at 121 Wn.2d 367, 849 P.2d 1226.

The Supreme Court held:

A party is allowed 30 days in which to file a notice of appeal. RAP 5.2(a). This 30-day time limit can be extended due to some specific and narrowly defined circumstances (none of which apply here). RAP 5.2(a). It can also be prolonged by the filing of “certain *timely* posttrial motions”, including a motion for reconsideration. (Italics ours.) RAP 5.2(a), (e). A motion for reconsideration is timely only where a party both files and serves the motion within 10 days. CR 59(b). A trial court may not extend the time period for filing a motion for reconsideration. CR 6(b); *Moore v. Wentz*, 11 Wash. App. 796, 799 525 P.2d 290 (1974).

Here, Schaefco filed the motion for reconsideration within 10 days of the Superior Court's July 2 order. However, it did not serve the motion on the Commission until July 16-4 days past the allowable time limit. Because Schaefco's motion for reconsideration was not timely, it did not extend the 30-day limit for filing the notice of appeal. As such, the notice of appeal Schaefco filed on September 9 was well outside the 30-day time limit.

Id. at 121 Wn.2d 367-368, 849 P.2d 1226.

The only factual difference between the instant matter and the facts in *Schaefco* is that Singleton failed to have the matter heard or considered by the trial court within the time required by the rules after the motion itself was timely filed. In *Schaefco*, Schaefco failed to serve the motion within the time required by the rules after the motion was timely filed.

CR 6 (b) is unambiguous: the trial court may not extend the time to take *any action* under Rule 59 (b). This includes enlarging the time within

which a motion for reconsideration must be “heard or otherwise considered” (“within thirty (30) days after the entry of the . . . order”). This prohibition also precludes the enactment of local rules of court which provide for longer periods of time.

As noted by the Commissioner in the ruling granting Singleton’s petition for review and denying NRC’s motion to dismiss review of case for failure to timely note appeal in this matter (October 31, 2006), Kitsap County Local Rule KCLCR 59 (b) states that a motion for reconsideration “shall be noted on the trial judge’s departmental motion docket to be heard not sooner than thirty (30) but not later than forty (40) days after entry of the judgment, decree, or order, unless the court directs otherwise.” However, in enacting local rules, the Superior Court has no authority to supersede the rules of court enacted by the Supreme Court. This is enjoined by GR 7 (“Local Rules”), subsection (b) (“Form”), “[a]ll local rules shall be consistent with rules adopted by the Supreme Court. . . .” Clearly, KCLCR 59 (b) is inconsistent with the provisions of CR 6 (b) adopted by the Supreme Court because KCLCR 59 (b) enlarges the time within which a motion for reconsideration may be considered by a trial court under CR 59 (b). As such, KCLCR 59 (b) is improper and of no legal import in so far as it is contrary to the rules of court adopted by the

Supreme Court. It cannot be used to create jurisdiction for Singleton's appeal contrary to that created under the rules of court.

This being the case, in this matter, as in *Schaefer*, the filing and disposition of a motion for reconsideration which does not comport with the rules of court does not extend the time within which to file a notice of discretionary review related to the underlying order for which reconsideration was sought. As Singleton's motion for reconsideration was not timely disposed, its filing did not extend the period within which she could note her motion for discretionary review of the trial court's order entered June 16, 2006.

Since the notice of discretionary review was filed sixty (60) days after the order of June 16, 2006, this court does not have jurisdiction to review the court's order entered that date. *Hoirup* at 69 Wn. App. 482, 848 P.2d 1339.

IV. CONCLUSION

For the reasons contained herein, this Honorable Court must affirm the ruling of the trial court in denying Singleton's motion for reconsideration, and, further, find that it has no jurisdiction to review this matter with regard to error assigned to the trial court's order entered June 16, 2006 dismissing Singleton's CPA claims. In the event this court does take jurisdiction over Singleton's motion for discretionary review of the

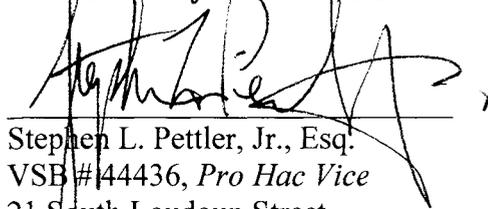
June 16, 2006 order, then the trial court's decision, as reflected therein, must be affirmed as it is in conformity with the laws of the State of Washington and the evidence of record in the proceeding.

Respectfully submitted this 14th day of May, 2007.

**NAEGELI REPORTING
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By Counsel

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DECLARATION OF SERVICE

Stephen L. Pettler, Jr. declares that on May 14, 2007, I caused copies of the foregoing Brief of the Respondent to be mailed by United States first-class mail, postage pre-paid, to counsel for the Appellant as follows:

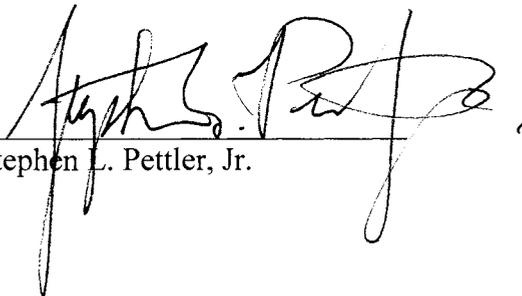
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OFFICE OF THE
STATE CLERK
BY _____
MAY 15 2007

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 14 day of May, 2007 at Winchester, Virginia.



Stephen L. Pettler, Jr.