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SUPREME COURT OF THE STATE OF WASHINGTON
COURT OF APPEALS, DIVISION III
CAUSE NUMBER 27370-9-III

FILED
DEC - 7 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

UNION ELEVATOR & WAREHOUSE COMPANY, INC., a
Washington corporation,

Respondent,

v.

STATE OF WASHINGTON, by and through the Washington State
Department of Transportation,

Petitioner.

**UNION ELEVATOR'S ANSWER TO
PETITION FOR REVIEW**

KEVIN W. ROBERTS, WSBA #29473
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I. IDENTITY OF RESPONDENT/CROSS PETITIONER

Union Elevator & Warehouse Company, Inc., a Washington Corporation, the Appellant below, offers this Answer to WSDOT's Petition for Review and also seeks review of a new issue.

II. CITATION TO COURT OF APPEALS DECISION

At issue is the September 10, 2009 Court of Appeals decision, Union Elevator v. State, 152 Wn. App. 199 (2009) that reversed the Trial Court's denial of interest and affirmed its denial of attorney fees and costs.

III. ISSUES PRESENTED FOR REVIEW

1. When a Washington citizen is denied required relocation assistance reimbursements which result from the condemnation of private property is he/she entitled to interest?
2. Does Washington law provide that the waiver of sovereign immunity may be implied?
3. Does WAC 468-100-105 provide a basis to award attorney fees and costs incurred "*because of a condemnation proceeding*"?

IV. STATEMENT OF THE CASE

Nearly 13 years after Union Elevator & Warehouse Company, Inc. ("Union Elevator") informally requested assistance from the Washington State Department of Transportation ("WSDOT") and seven

(7) years after it formally requested relocation assistance (May 2001), WSDOT finally reimbursed Union Elevator the moving expenses it incurred. However, it only did so after years of litigation and being ordered to do so. See Union Elevator v. State, 144 Wn. App. 593 (May 15, 2008).¹

Union Elevator then requested interest on the money WSDOT wrongfully withheld for seven years and the attorney fees and costs Union Elevator was forced to incur to obtain the relocation assistance. Fees incurred because of WSDOT's exercise of eminent domain. The Trial Court denied Union Elevator's motion for interest based on WSDOT's claim of sovereign immunity and limited the award of attorney fees to \$25,000. The Court of Appeals correctly reversed the Trial Court's decision with regard to the award of interest based on the legislative history and Washington law. Therefore, Review of that issue should be denied. Union Elevator v. State, 152 Wn. App. 199 (2009). However, the Court ignored existing Washington law providing for the award of attorney fees and costs based upon

¹ For clarity, this opinion will be referred to as Union Elevator II.

WSDOT's own relocation assistance regulation. As a result, review on the issue of attorney fees and costs should be granted.

This case has a long history. Beginning in 1996, WSDOT ignored its obligations and forced Union Elevator to seek relief through the judicial system. See Union Elevator v. State, 96 Wn. App. 288 (1999) and Union Elevator v. State, 144 Wn. App. 593 (May 15, 2008). Union Elevator's battle to enforce its constitutional rights and to be provided consistent treatment by WSDOT began in 1996 when Union Elevator discovered WSDOT planned to destroy its reasonable, adequate and commercially practicable access. At that time, Union Elevator requested WSDOT provide it compensation and/or assistance for the amounts it would incur for a replacement facility. CP 56. However, WSDOT took the unsupportable position that Union Elevator was not entitled to either compensation or relocation assistance. In 1998, Union Elevator expended \$459,000 to construct a replacement facility. Union Elevator II, 144 Wn. App. at 598. Union Elevator was then forced to seek just compensation and relocation assistance through the legal system. Below is an overview of what Union Elevator endured.

1. **July 2, 1996** – WSDOT refused to provide Union Elevator with compensation for taking Union Elevator’s property or to provide any assistance with relocation expenses. (*“I have heard that your hope was the DOT could help in the cost of your new facility”*). CP 56.

2. **January 12, 2001** – Following a remand, an Adams County jury confirmed that WSDOT took Union Elevator’s access to the East Lind Facility without paying just compensation. CP 56.

3. **May 21, 2001** – Union Elevator submitted its formal claim for relocation assistance based on the jury’s confirmation its property rights had been taken. CP 57.

4. **June 13, 2001** – WSDOT ignored its obligation and denied Union Elevator’s relocation claim without providing any specific basis for the determination. WAC 468-100-207(7). WSDOT’s attorneys incorrectly argued that Union Elevator was not displaced and was not entitled to relocation assistance. Id.

5. **January 17, 2003** – Judge McCarthy granted Union Elevator’s Motion for Summary Judgment confirming Union Elevator had been displaced and was entitled to relocation assistance. Id.

6. **May 16, 2003** – Before seeing the equipment, the replacement site, or speaking with Union Elevator, WSDOT’s staff ignored its obligations and acted based only on conversations with WSDOT’s attorneys. Id.

7. **April 29, 2004** – After being forced to consider Union Elevator’s claim, WSDOT’s staff denied 82% of the claim without any factual basis. Union Elevator appealed and WSDOT again denied the appeal. CP 58.

8. **July 21, 2005** – Union Elevator incurred the expense of an adjudicative hearing and judicial review in order to obtain the required relocation assistance. Notably, WSDOT was represented by the Attorney General’s Office throughout this process. Id.

9. **August 10, 2005** – After losing the Adjudicative hearing, WSDOT petitioned the head of the agency for review of Judge McCarthy’s Proposed Decision and Order. Id.

10. WSDOT failed to timely review the Proposed Decision and Order.² More than a year after the Proposed Decision, WSDOT finally issued an arbitrary and self-serving Final Order. CP 31-49.

11. When that Order was reviewed, the Court of Appeals confirmed WSDOT's Final Order was improper and that its conduct was not substantially justified. The opinion also confirmed Union Elevator was entitled to the final \$235,000 in relocation assistance it requested and a partial award of its attorney fees on appeal. Union Elevator II, 144 Wn. App. at 607-608.

Union Elevator moved the Trial Court for an award of the attorney fees and costs it incurred throughout the process and interest on the reimbursements that were wrongfully withheld from it for seven years. From the time that Union Elevator began its formal request for relocation assistance (2001) through July 6, 2008, Union Elevator incurred attorney fees totaling \$118,025 as a result of WSDOT's refusal to provide the reimbursement required by law. CP 321; CP 334-360. In addition, although Union Elevator paid for the relocation in 1998,

² Indeed, from the start WSDOT ignored its statutory obligation to provide assistance in an expeditious manner. Thus, it has been more than a decade since Union Elevator was displaced.

WSDOT's refusal to provide the reimbursement deprived Union Elevator of the use of \$235,000 from the date the claim was made (May 21, 2001) until the reimbursement was made as ordered by this Court (July 10, 2008). Interest at 12% on these funds totals \$201,416.82. In effect, by wrongfully delaying providing Union Elevator the interest, WSDOT has had the use of funds nearly equivalent to the amount of the claim!

Based on Washington law, the Court of Appeals correctly held that Union Elevator's request for interest should have been granted in order to make Union Elevator whole as a result of having its property taken. However, the Court of Appeals ignored existing law and denied Union Elevator's request that the denial of an award of attorney fees and costs be reversed. Union Elevator seeks review of that decision.

V. ARGUMENT

A. The Court of Appeals Decision Does Not Conflict With Washington Law.

The Court of Appeals correctly held that based on the history and purpose of the Relocation Act and the language of the Eminent Domain Chapter read as a whole, the legislature provided for an

express and/or implied waiver of sovereign immunity. Union Elevator, 152 Wn.App. 199 (2009). In a footnote, WSDOT recognizes that this decision is consistent with binding precedent from this Court. See Smoke v. City of Seattle, 132 Wn.2d 214, 228 (1997).

Although the City protests RCW 64.40 lacks an express waiver of sovereign immunity from postjudgment interest, by consenting to suit for damages from land use decisions the city impliedly waived immunity from the liabilities attendant to such claims.

Id. See also Hyde v. Wellpinit Sch. Dist. No. 49, 32 Wn.App. 465, 472 (1982) (“*The District has had the use of Mr. Hyde’s compensation for 2 years. During our present-day inflationary spiral, the payment of interest for the use of one’s money is common, necessitous and in this instance, legally necessary.*”). The Court of Appeals decision in this case is consistent with that precedent. The Legislature, as identified by the history of the eminent domain chapters and the Relocation Assistance Act, consented to suit allowing landowners to seek the additional damages incurred during a forced move. As a result, the Legislature also expressly and/or impliedly waived immunity from the liabilities attendant to such claims. Supra. Therefore, the decision is

consistent with binding authority and WSDOT's Petition for Review should be denied.

In this case, WSDOT improperly claimed that sovereign immunity allowed it to avoid paying Union Elevator, who had its private property taken by eminent domain, interest on relocation assistance reimbursements wrongfully withheld for seven (7) years. Like Hyde, an award of the reimbursement without an award of interest on funds withheld for seven (7) years would not place Union Elevator in as good a position as it would have been if WSDOT had paid the assistance owed. Hyde, 32 Wn.App. at 471; Infra.

WSDOT's position also ignored the Constitution and the specialized area of law at issue in this case. When the power of eminent domain is used, the founders from our State provided a self-executing constitutional right for citizens to pursue a cause of action against the State. WASH. STATE CONST. Art. I, § 16. Our legislature later expanded the damages recoverable to include reimbursement of moving expenses. RCW 8.26 et seq. As a result, the State's sovereign immunity for eminent domain claims was waived.

1. The Legislature Provided An Express And/Or Implied Waiver Of Sovereign Immunity For Eminent Domain Proceedings.

In Washington, “[p]rejudgment interest is favored in the law based on the premise that he who retains money he should pay to another should be charged interest on it.” Universal/Land Constr. Co. v. Spokane, 49 Wn. App. 634, 641, 745 P.2d 53 (1987). While the right to prejudgment interest is well established in Washington, the interest at issue here goes beyond mere “prejudgment” interest. Instead, at issue are relocation assistance statutes that expanded the constitutional protections provided to landowners in Washington.

It has long been recognized that the legislative intent behind Washington’s eminent domain statutes is to make whole citizens who have their property taken by the Government. State v. Lange, 86 Wn.2d 585, 589, 547 P.2d 282 (1979). (“[A] condemnee is entitled to be put in the same position monetarily as he would have occupied had his property not been taken”). To accomplish this, the Legislature placed statutes in the eminent domain chapter requiring relocation assistance for citizens who have their property taken by the government. RCW 8.26 et seq. The purpose of the Act is to “establish

a uniform policy of fair and equitable treatment of persons displaced...and to minimize the hardship of displacement on such persons.” RCW 8.26.010(1)(a); Union Elevator II, 144 Wn. App. at 602. The relocation assistance statutes provide additional damages to citizens who have their property taken by eminent domain. This includes the right to be reimbursed for certain moving expenses. See RCW 8.26 et seq.

As the Union Elevator II Court pointed out, it has been recognized that “*Congress indicated a willingness to depart from traditional methods of evaluating property because such methods result in inequitable treatment for many people displaced by public action.*” Union Elevator II, 144 Wn. App. at 607. In order to further these goals, the Legislature waived the State’s sovereign immunity by specifically including relocation assistance as part of Washington’s Eminent Domain Law and interest is necessary to provide a complete remedy. See RCW 8.04 et seq. - RCW 8.28 et seq. A review of the relocation assistance statutes within the Eminent Domain chapter confirms that the Legislature provided for either an express or implied waiver of sovereign immunity relating to all damages a condemnee is entitled to

recover relating to the taking of his/her private property. See e.g. RCW 8.28.040; In Re Anacortes, 81 Wn.2d 166, 169 (1972)(Condemning authority is liable for interest once it takes possession); State v. Hallauer, 28 Wn.App. 453, 455 (1981); and Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 656 (1997). Thus, the Court of Appeals decision is proper. The award of interest to Union Elevator makes sure it does not “*bear the burden of the state’s highway project.*” Union Elevator II, 114 Wn. App. at 607.

2. Sovereign immunity does not bar the award of interest as part of the relocation assistance.

In Sintra, the Supreme Court explained that sovereign immunity does not protect the government from the award of interest in eminent domain cases.

The City correctly points out that municipalities are generally immune from prejudgment interest. See Fosbre v. State, 76 Wn.2d 255, 456 P.2d 335 (1969). Here, however, the interest awarded is not prejudgment interest. The interest awarded is part of the damages and is required as part of the just compensation. Therefore, we dispense with the City’s immunity argument.

Sintra, 131 Wn.2d at 657 (emphasis added). WSDOT incorrectly claims that the Court of Appeals found relocation assistance to be “*part*

of just compensation". That is not accurate, instead, it simply confirmed that the relocation assistance was intended to address damages beyond just compensation that is suffered by landowners when private property is taken. See Union Elevator, 152 Wn.App. at 205 ("*...the amount of compensation to be made and the amount of damages arising from the taking...*").

Like Sintra, in this case interest is an extension of the damages WSDOT caused by taking Union Elevator's property. The Legislature specifically added moving expenses as a category of eminent domain damages in order to make citizens who have their property taken whole. RCW 8.26.010. Although it provided for these amounts to be pursued through an administrative process, they are nonetheless an additional element of damages recoverable as the result of an eminent domain action. See e.g. Union Elevator II, 144 Wn. App. at 607 ("*...such methods result in inequitable treatment for many people displaced by public action*"). Consequently, the relocation assistance statutes provide for these damages to be determined based on the property owners being reimbursed for actual moving expenses. See RCW 8.26.035. Thus, the damages at issue are more like the compensation

for loss of the use of property than mere “*prejudgment*” interest. See Sintra, 131 Wn.2d at 656.

WSDOT chose to withhold reimbursement from Union Elevator for seven years for expenses Union Elevator paid to move to its replacement facility. Thus, Union Elevator was deprived of the use of its funds for seven years. CP 322. These were funds that Union Elevator could have put to a beneficial use during that time. Sintra, 131 Wn.2d at 656 (“*We assume a person who received the money value of his or her property as of the date of the taking has a beneficial use available for these funds.*”). As a result, the interest at issue is “*not an award of prejudgment interest on a liquidated sum in the traditional sense, but is a measure of the rate of return on the property’s owner’s money had there been no delay in payment.*” Id. Therefore, it should be awarded in this case.

B. The Decision To Deny The Attorney Fees Union Elevator Incurred As A Result Of WSDOT’s Wrongful Conduct Conflicts With Washington Law.

This dispute arose directly from WSDOT’s taking of Union Elevator’s private property rights. In other words, it is because of the condemnation proceeding. From March, 2001 through July 6, 2008,

Union elevator incurred \$118,025 in attorney fees as a result of WSDOT's refusal to provide it the reimbursement required by Washington law. CP 360. Under Washington law, attorney fees and costs may be awarded if authorized by contract, statute, or a recognized ground in equity. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004). With regard to relocation assistance, WSDOT implemented a regulation that provides a basis for an award of attorney fees and costs. WAC 468-100-105.

WAC 468-100-105 was adopted based on the authority of RCW 8.26 et seq. and provides for the award of attorney fees "*incurred because of a condemnation proceeding...*" WAC 468-100-105. Here, the fees incurred to obtain relocation reimbursement caused by the taking of private property were incurred "*because of a condemnation proceeding*". Under the WSDOT's argument and the Court of Appeals decision, WAC 468-100-105, which is found within the relocation assistance regulations, would be meaningless and superfluous. However, the regulation provides authority to award Union Elevator attorney fees and costs it incurred pursuing the additional damages it was entitled to receive as a result of the taking. Id.

WSDOT forced Union Elevator to bring an inverse condemnation action to receive payment for property which the State took. The jury confirmed that Union Elevator had its access taken. Nonetheless, when Union Elevator made its claim for relocation assistance the State argued that Union Elevator had not been displaced because it continued to claim it had not taken property. As a result, Union Elevator was forced to seek review of WSDOT's denial. Union Elevator prevailed with regard to the relocation assistance that resulted because of the condemnation proceeding. Therefore, pursuant to WSDOT's own regulation, Union Elevator is entitled to an award of the attorney fees and costs WSDOT forced it to incur to obtain relocation assistance necessary "*because of a condemnation proceeding*". Therefore, the Court's decision with regard to a basis for an award of attorney fees and costs is contrary to Washington law. Supra. Consequently, review should be accepted on this issue.

VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

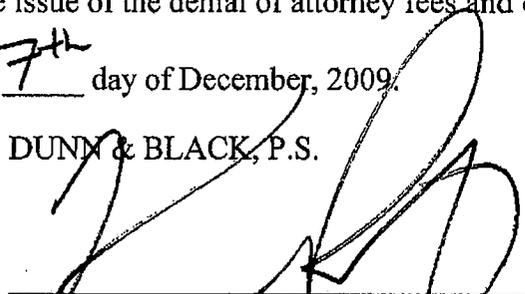
Based on RAP 18.1 and WAC 468-100-105, Union Elevator respectfully requests an Award of the reasonable attorney fees and costs incurred responding to WSDOT's Petition for Review.

VII. CONCLUSION

Based on Washington law, Union Elevator respectfully requests that WSDOT's Petition for Review be denied and that review be accepted only on the issue of the denial of attorney fees and costs.

DATED this 7th day of December, 2009.

DUNN & BLACK, P.S.

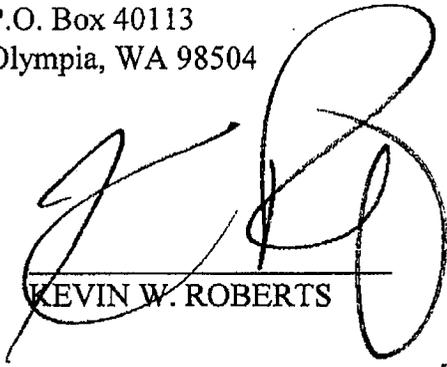


KEVIN W. ROBERTS, WSBA #29473
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Attorneys for Appellant Union Elevator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of December, 2009, I caused to be served a true and correct copy of the foregoing document to the following:

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RCW 8.26.010

Purposes and scope.

(1) The purposes of this chapter are:

(a) To establish a uniform policy for the fair and equitable treatment of persons displaced as a direct result of public works programs of the state and local governments in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons;

(b) To encourage and expedite the acquisition of real property for public works programs by agreements with owners, to reduce litigation and relieve congestion in the courts, to assure consistent treatment for owners affected by state and local programs, and to promote public confidence in state and local land acquisition practices.

(2) Notwithstanding the provisions and limitations of this chapter requiring a local public agency to comply with the provisions of this chapter, the governing body of any local public agency may elect not to comply with the provisions of RCW 8.26.035 through 8.26.115 in connection with a program or project not receiving federal financial assistance. Any person who has the authority to acquire property by eminent domain under state law may elect not to comply with RCW 8.26.180 through 8.26.200 in connection with a program or project not receiving federal financial assistance.

(3) Any determination by the head of a state agency or local public agency administering a program or project as to payments under this chapter is subject to review pursuant to chapter 34.05 RCW; otherwise, no provision of this chapter may be construed to give any person a cause of action in any court.

(4) Nothing in this chapter may be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately before March 16, 1988.

[1988 c 90 § 1; 1971 ex.s. c 240 § 1.]

RCW 8.26.035

Payment for moving and related expenses.

(1) Whenever a program or project to be undertaken by a displacing agency will result in the displacement of any person, the displacing agency shall provide for the payment to the displaced person of:

(a) Actual reasonable expenses in moving himself or herself, or his or her family, business, farm operation, or other personal property;

(b) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate the property, in accordance with criteria established by the lead agency;

(c) Actual reasonable expenses in searching for a replacement business or farm; and

(d) Actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, in accordance with criteria established by the lead agency, but not to exceed fifty thousand dollars.

(2) A displaced person eligible for payments under subsection (1) of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (1) of this section may receive an expense and dislocation allowance determined according to a schedule established by the lead agency.

(3) A displaced person eligible for payments under subsection (1) of this section who is displaced from the person's place of business or farm operation and who is eligible under criteria established by the lead agency may elect to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (1) of this section. The payment shall consist of a fixed payment in an amount to be determined according to criteria established by the lead agency, except that the payment shall be not less than one thousand dollars nor more than twenty thousand dollars. A person whose sole business at the displacement dwelling is the rental of that property to others does not qualify for a payment under this subsection.

[2003 c 357 § 1; 1988 c 90 § 3.]

RCW 8.28.040

Interest on verdict fixed — Suspension during pendency of appeal.

Whenever in any eminent domain proceeding, heretofore or hereafter instituted for the taking or damaging of private property, a verdict shall have been returned by the jury, or by the court if the case be tried without a jury, fixing the amount to be paid as compensation for the property so to be taken or damaged, such verdict shall bear interest at the maximum rate of interest permitted at that time under RCW 19.52.020 from the date of its entry to the date of payment thereof: PROVIDED, That the running of such interest shall be suspended, and such interest shall not accrue, for any period of time during which the entry of final judgment in such proceeding shall have been delayed solely by the pendency of an appeal taken in such proceeding.

[1984 c 129 § 2; 1943 c 28 § 1; Rem. Supp. 1943 § 936-4.]

WAC 468-100-105

No agency filings affecting this section since 2003

Certain litigation expenses.

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, and expert witness fees, which the owner actually incurred because of a condemnation proceeding; pursuant to RCW 8.25.020 and 8.25.075.

General requirements — Claims for relocation payments.

(1) **Documentation:** Any claim for a relocation payment shall be supported by such documentation as may be reasonably required to support expenses incurred, such as, bills, certified prices, appraisals, or other evidence of such expenses. Payment for a low cost or uncomplicated move may be made without documentation of actual costs when payment is limited to the amount of the lowest acceptable bid or estimate obtained by the agency. A displaced person must be provided reasonable assistance necessary to complete and file any required claim for payment.

(2) **Expeditious payments:** The agency shall review claims in an expeditious manner. The claimant shall be promptly notified as to any additional documentation that is required to support the claim. Payment for a claim shall be made as soon as feasible following receipt of sufficient documentation to support the claim.

(3) **Advance payments:** If a person demonstrates the need for an advance relocation payment in order to avoid or reduce a hardship, the agency shall issue the payment, subject to such safeguards as are appropriate to ensure that the objective of the payment is accomplished.

(4) **Time for filing:**

(a) All claims for a relocation payment shall be filed with the agency within eighteen months after:

(i) For tenants, the date of displacement;

(ii) For owners, the date of displacement or the date of the final payment for the acquisition of the real property, whichever is later.

(b) This time period shall be waived by the agency for good cause.

(5) **Notice of denial of claim:** If the agency disapproves all or part of a payment claimed or refuses to consider the claim on its merits because of untimely filing or other grounds, it shall promptly notify the claimant in writing of its determination, the basis for its determination, and the procedures for appealing that determination.

(6) **No waiver of relocation assistance:** A displacing agency shall not propose or request that a displaced person waive his or her rights or entitlements to relocation assistance and benefits provided by the Uniform Act and this regulation.

(7) **Expenditure of payments:** Payments, provided pursuant to this part, shall not be considered to constitute federal financial assistance. Accordingly, this part does not apply to the expenditure of such payments by, or for, a displaced person.

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Cc: Kevin Roberts
Subject: RE: Union Elevator & Warehouse Company, Inc. v. State of Washington, Supreme Court Case No. 83771-6

Rec. 12-7-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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To: OFFICE RECEPTIONIST, CLERK
Cc: Kevin Roberts
Subject: Union Elevator & Warehouse Company, Inc. v. State of Washington, Supreme Court Case No. 83771-6

Good afternoon:

Attached for filing in the above referenced matter please find *Union Elevator's Answer to Petition for Review*.

This document is being filed by Kevin W. Roberts, WSBA #29473, 509-455-8711, kroberts@dunnandblack.com.

Thank you. Please do not hesitate to call or email if you have questions.

Maureen

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