

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

66878-1-I

---

GASTON BROTHERS EXCAVATING, INC.,

Appellant,

v.

S.D. DEACON CORPORATION OF WASHINGTON,

Respondent.

---

APPEALED FROM KING COUNTY SUPERIOR COURT  
THE HONORABLE SUZANNE M. BARNETT

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BRIEF OF RESPONDENT

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**ORIGINAL**

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## I. INTRODUCTION

Respondent S.D. Deacon Corporation of Washington (“Deacon”), by and through its counsel of record, Oles Morrison Rinker & Baker, LLP, hereby submits the Respondent’s Brief in this matter.

This is the second time that Appellant Gaston Brothers Excavation, Inc. (“Gaston”) has appealed from this cause. See, *S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating, Inc.*, 150 Wn. App. 87, 206 P.3d 689 (2009).

When this Court overturned Deacon’s successful RCW 60.04.081 Petition and Order to Show Cause in 2009, it held that on remand Gaston was entitled to an award of fees and costs “*for the earlier proceedings*” in the Superior Court. Those “earlier proceedings” involved only a determination under RCW 60.04.081 of the efficacy of a mechanic’s lien recorded by Gaston. The action below on Deacon’s RCW 60.04.081 motion occurred between March 6 and April 22, 2008.

Yet when Gaston applied to the Superior Court for its attorney’s fees under the Mandate--more than 16 months after it was issued—Gaston impermissibly sought attorney’s fees and costs it alleges to have incurred before Deacon ever filed its

Petition and Order to Show Cause in March 2008 and notably, more than \$20,000 in fees it alleges were incurred after the date of the Mandate.

This appeal demonstrates either Gaston's profound misunderstanding or an alarming disregard of the law applicable to the issues in it. The lack of understanding may explain why Gaston cites no precedential authority but this Court's previous decision in this cause to support its appeal. Gaston's request for costs and attorney's fees in the Superior Court clearly exceeded the scope of this Court's remand, and therefore the fee request below was correctly denied in part by the trial court. There was no abuse of discretion, because the trial court was powerless in the face of this Court's remand to award Gaston any costs or fees not incurred in "the earlier proceedings" before it.

Gaston cites no authority supporting any entitlement to an award beyond that included in the remand, and certainly none that allowed the Superior Court to award on any basis other than RCW 60.04.081. Therefore, Deacon respectfully requests that the Court affirm the Superior Court's award of attorney's fees to Gaston, and award Deacon its costs and fees on this appeal, either under RCW 60.04.081 or under CR 11.

## **II. COUNTER-STATEMENT OF THE ISSUES**

Did the trial court abuse its discretion in making an award of attorney's fees to Gaston and denying the award of any costs under this Court's mandate, when Gaston: a) waited 16 months after the mandate to seek an award of its costs and fees for opposing Deacon's RCW 60.04.081 Motion and Order to Show Cause; b) impermissibly sought thousands of dollars in additional, post-remand attorney's fees to which it was not entitled; c) impermissibly sought an award of costs and attorney's fees under the parties' subcontract; and d) made no proper application whatever for its costs?

### **(Assignments of Error Nos. 1-3)**

Did the trial court err in denying Gaston's request for "interest" on the attorneys' fees awarded by the trial court when Washington authority specifically disallows an award of prejudgment interest on an award of attorneys' fees?

### **(Assignment of Error No. 4)**

## **III. COUNTER-STATEMENT OF THE CASE**

Gaston was a subcontractor to Deacon on a construction project located in Seattle. When a dispute arose regarding

payment under Gaston's subcontract with Deacon, Gaston recorded a lien against the project real property. CP 101-02.

Deacon, asserting the lien was wrongful because the whole of Gaston's subcontract amount had been paid, filed a Petition Order to Show Cause in the Superior Court under RCW 60.04.081, seeking to have the lien expunged. CP 103-11. The Superior Court granted Deacon's motion for summary removal of the lien, denied Gaston's motion to reconsider the decision, and awarded Deacon attorneys' fees and costs. CP 112-114. Gaston appealed.

In a decision dated May 11, 2009, this Court reversed the Superior Court's decision. CP 2-11. In its opinion, this Court remanded the matter to the Superior Court, reversing its award of costs and fees to Deacon. CP 11. The remand also provided, in pertinent part:

*On remand, the trial court shall award fees to Gaston for the earlier proceedings in that court. Gaston is awarded costs and reasonable attorneys' fees for this appeal, subject to compliance with RAP 18.1.*

CP 11 (emphasis added). On September 1, 2009, this Court issued its Mandate. CP 1.

On November 2, 2010, more than 14 months after the date of the Mandate, Gaston filed its first post-appeal pleading in the

Superior Court, which it titled a “Motion for Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien Order, Tolling of Limitation Period, Order Vacating Earlier Court Order, Order Awarding Fees and Costs, Order for Notice to Third Parties, Order Directing Recording of Order Reinstating Lien, and Order for New Case Schedule.” CP 90-168. Deacon opposed Gaston’s motion. CP 172-173. On January 3, 2011, the trial court granted Gaston’s motion. CP 215-19. Ultimately, on February 28, 2011, the Superior Court denied Deacon’s motion for reconsideration on that motion. CP 561-63.

During the pendency of Deacon’s motion for reconsideration, on January 6, 2011, more than 16 months after the Mandate, Gaston filed a motion in the Superior Court for award of attorney’s fees and costs. CP 274-336. Overall, Gaston sought in excess of \$30,000 in costs and attorney’s fees. *Id.*

In addition to the fees and costs alleged to have been incurred by Gaston “in the earlier proceedings in that court,” Gaston sought from the Superior Court costs and fees for a period of time *preceding* Deacon’s RCW 60.04.081 motion, asserting those fees were recoverable under the parties’ contract. *See, e.g.,* CP 282 and CP 340.

Gaston further asserted a right to an award of more than \$21,000 in “new fees” incurred between August 2010 and January 2011, 11 to 16 months *after* the Mandate, long after the “earlier proceedings” in the Superior Court. Gaston asserted those post-remand costs and attorney’s fees were awardable “under the parties’ contract.” CP 462. Finally, Gaston asserted a right to “interest” on the costs and attorney’s fees awarded in the Mandate. CP 343-44.

Deacon opposed Gaston’s motion, asserting that the only Superior Court costs and attorney’s fees to which Gaston was entitled under the remand and Mandate were those incurred in defending the original RCW 60.04.081 motion. *See, generally*, CP 458-72.

On February 28, 2011, the Superior Court entered an Order Granting in Part and Denying in Part Gaston’s Motion for Award of Attorneys’ Fees, Costs and Interest. CP 564-66. That Order included the following findings:

1. Under the Mandate received from Division I of the Washington Court of Appeals, Respondent Gaston Brothers Excavation, Inc. (“Gaston”) is entitled under RCW 60.04.081 for an award of its reasonable attorney’s fees and statutory costs for the period between March 6, 2008 and April 22, 2008, the time period that comprised the trial court

defense of Applicant S.D. Deacon's prosecution at the trial court of its RCW 60.04.081 Petition and Order to Show Cause; and

2. Gaston's Motion for Award of Attorneys Fees, Costs and Interest provides no information regarding any costs it purports to request; and
3. Washington authority does not permit the award of interest on a previous award of attorney's fees....

CP 565.

The Superior Court's Order dated February 28, 2011 awarded Gaston a total of \$7,608.00 in attorney's fees, and denied both Gaston's motion for an award of costs, and its motion for an award of interest. CP 564-66. This appeal followed.

#### **IV. AUTHORITY**

##### **A. STANDARD OF REVIEW**

Gaston failed to identify the standard of review in its Opening Brief. Washington appellate courts review a trial court's award of costs and attorney's fees under the abuse of discretion standard. See, e.g., *Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (1999); see also, *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The Superior Court did not abuse its discretion in this matter, and therefore its award to Gaston should be affirmed.

A Washington trial court abuses its discretion when its decision is manifestly unreasonable, is exercised for untenable reasons, or is based on untenable grounds. See, e.g. *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010), review denied, 170 Wn.2d 1024, 249 P.3d 1187 (2010), citing *Lian v. Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001); see also, *Mayer v. Sto. Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A Washington court also abuses its discretion if it takes a position no reasonable person would adopt. See, *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. See, *Demery* at 758, citing, *State v. Sutherland*, 3 Wn. App. 20, 22, 472 P.2d 584 (1970).

On this appeal, Gaston has wholly failed to show that the Superior Court's award, made in strict accordance with the scope of this Court's remand and Mandate, was either "manifestly unreasonable" or was the kind of decision that "no reasonable person would adopt." The Superior Court simply did not abuse its discretion in this matter, and therefore should be affirmed.

**B. THE TRIAL COURT STRICTLY FOLLOWED THE SCOPE OF THIS COURT'S REMAND, WHILE GASTON IMPERMISSIBLY SOUGHT TO EXPAND IT.**

It is a long-settled issue in Washington that in a matter remanded from an appellate court, the Mandate is "binding" on the trial court, and must be "strictly followed" by that court. See, e.g., *Harp v. Am. Sur. Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957). In *State ex rel. City of Seattle v. Superior Court of Washington for King County*, 1 Wn.2d 630, 96 P.2d 596 (1939), the Washington Supreme Court held that:

...[a] trial court is without power, after [an action's] remand, to vacate or otherwise modify [the decision] on motion or petition, except in such manner as may be necessary to carry out the court's mandate...

1 Wn.2d at 633, *citing inter alia*, *In re Shilshole Avenue*, 101 Wn. 136, 141, 172 P. 338, 339 (1918) (citations omitted); *see also*, *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006) ("Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court.")

Here, this Court's remand on the previous appeal was absolutely clear: "On remand, the trial court shall award fees to Gaston for the earlier proceedings in that court." *S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating, Inc.*, 150 Wn. App. 87, 96, 206 P.3d 689, 694 (2009) (emphasis added). The only

“earlier proceedings” in the Superior Court were Deacon’s RCW 60.04.081 Petition and Order to Show Cause, from which the initial appeal was taken.

Here, in addition to the fees to which Gaston is entitled under the remand for defending Deacon’s 2008 RCW 60.04.081 proceedings, Gaston asserted entitlement to recover an additional \$21,164 in wholly unrelated costs and attorney’s fees, incurred either *prior to* Gaston’s Petition and Order to Show Cause, or *after* this Court issued the Mandate.

The costs and fees sought by Gaston and alleged to have been incurred prior to March 6, 2008 pre-date Deacon’s Petition and Order to Show Cause, and therefore were not incurred “in the earlier proceedings in th[e Superior] [C]ourt.” Given that the Superior Court was bound to strictly comply with this Court’s remand, it did not abuse its discretion in denying Gaston costs and fees alleged to have been incurred before Deacon brought its RCW 60.04.081 Motion and Order to Show Cause.

Similarly, the Superior Court merely complied with this Court’s mandate when it denied Gaston’s request for the more than \$20,000 in costs and attorney’s fees it alleged to have incurred *after* the Mandate, and therefore also *after* “the earlier proceedings”

below. In addition to the fact that Gaston's post-"earlier proceedings" request violates the Mandate, Gaston waited 16 months to move for fees in the Superior Court, during which its time entries show that it spent an enormous amount of time getting a new lawyer up to speed, researching and pre-writing motions, and engaged in other activities completely divorced from the 60.04.081 proceedings contested between these parties during March and April 2008. Still, Gaston inexplicably asserted (and continues to assert) that it was entitled to an award for all that time, not a single minute of which was incurred "in the earlier proceedings" before the Superior Court.

The Superior Court's award of attorney's fees to Gaston strictly complied with the remand and Mandate. It acted prudently in exercising its discretion as to the amount awarded, and properly ignored Gaston's requests to expand the award beyond costs and attorney's fees incurred in "the earlier proceedings" before it. For those reasons alone, the Superior Court's award of attorney's fees should be affirmed.

**C. THE TRIAL COURT CORRECTLY DENIED GASTON AN AWARD OF COSTS OR ATTORNEY'S FEES UNDER THE PARTIES' CONTRACT.**

Washington's appellate courts have repeatedly outlined the RCW 60.04.081 proceeding as "summary." See, e.g., *Gray v. Bourgette Constr., LLC*, 160 Wn. App. 334, 337, 249 P.3d 644 (2011). In its earlier decision in this matter, this Court made two holdings that fly directly in the face of Gaston's argument that it is somehow entitled to recover fees and costs under the parties' subcontract:

The summary procedure provided by the statute is not to be used as a substitute for trial where there is a legitimate dispute about the amount of work done and money paid.

*S.D. Deacon, supra*, 150 Wn. App at 90, citing, *Williams v. Athletic Field, Inc.*, 142 Wn. App. 753, 765 n.5, 139 P.3d 426 (2006).

"Nowhere in the statute does the legislature give the trial court authority to expand this summary proceeding into a suit to foreclose the lien or to recover on a contractual theory."

*Id.* at 90-91, quoting *Andries v. Covey*, 128 Wn. App. 546, 550, 113 P.3d 483 (2005).

Under this Court's previous rulings, an RCW 60.04.081 hearing cannot resolve whatever underlying contractual disputes exist between the parties. Rather, the "summary" nature of an

RCW 60.04.081 hearing is determinative *only* of the efficacy of a claimant's mechanic's lien. And, the factual determinations made in an RCW 60.04.081 hearing are limited to those required to determine whether the lien is so flawed as to be "frivolous."

Given that the Superior Court awarded Gaston the reasonable attorney's fees it incurred during March and April 2008—the period of time it was defending Deacon's RCW 60.04.081 Petition and Order to Show Cause—the Superior Court was "strictly following" not only the plain language of this Court's remand, but also was prudently steering clear of any impropriety with regard to enlargement of the scope of that remand.

This Court was quite specific in *Andries v. Covey*, when it forbade a trial court from expanding an RCW 60.04.081 proceeding into a trial on the merits. Among the specific prohibitions was that no party in an RCW 60.04.081 proceeding is allowed to "recover on a contractual theory." See, 128 Wn. App. at 550.

Yet, despite the clear language of the remand, and the authority established by this Court in *Andries* (and repeated in this Court's earlier decision in this cause), Gaston inexplicably asserted both to the Superior Court and again on this second appeal that the parties' subcontract entitles it to recover thousands of dollars in

costs and attorney's fees not incurred during "the earlier proceedings" below. The Superior Court was correct to have denied Gaston any costs or attorney's fees incurred other than during those "earlier proceedings," and particularly to deny costs and attorney's fees sought under the parties' subcontract. Those determinations of the Superior Court should be affirmed.

**D. THE SUPERIOR COURT EXERCISED PROPER DISCRETION IN ITS DETERMINATION OF THE COSTS AND ATTORNEY'S FEES AWARDED TO GASTON.**

RCW 60.04.081(4) requires that attorney's fees awarded to a prevailing party in a frivolous lien action be "reasonable." That statute provides, in pertinent part:

If the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

"Whether attorney's fees are reasonable is a factual inquiry depending on the circumstances of a given case." *Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn. 2d 299, 335, 858 P.2d 1054 (1993).

To determine whether the party requesting fees spent a reasonable amount of hours on the case, the trial court must first determine a raw figure of how many hours the party's attorney

actually spent and then must eliminate wasted hours. See, *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980); accord, *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) (citations omitted).

The trial court must independently decide what is reasonable, rather than relying on billing records. *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). Therefore, the exercise of what constitutes an appropriate award of attorneys' fees and costs in a given Washington case necessarily requires that the trial court use its independent discretion.

As set forth above, Gaston impermissibly asserted entitlement on remand to attorney's fees and costs: a) incurred both prior and subsequent to the "earlier proceedings" below; b) unrelated to the RCW 60.04.081 proceedings; and c) awardable under the parties' subcontract. The Superior Court did not abuse its discretion by determining which portions of Gaston's requests were sought on these wrongful bases, and then deciding which of the attorney's fees incurred during "earlier proceedings" before it were reasonable. Rather, by so doing, the Superior Court exercised its proper discretion.

sought. Consequently, the Superior Court's Order Granting in Part and Denying in Part properly included a finding to that effect, and denied any costs.

**G. DEACON IS ENTITLED TO ITS COSTS AND ATTORNEY'S FEES ON THIS APPEAL.**

In order to be awarded costs and attorney's fees on an appeal, a party must devote a section of its opening brief to that request. See, RAP 18.1(b). Further, argument and citation to authority are required under the rule. See, e.g., *Austin v. U.S. Bank of Wash.*, 73 Wn. App 293, 313, 869 P.2d 404 (1994).

RCW 60.04.081 provides, in pertinent part:

If, following a hearing on the matter, the court determines that the lien is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order releasing the lien if frivolous and made without reasonable cause, or reducing the lien if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant. If the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

Washington appellate courts have repeatedly held that this provision applies when an RCW 60.04.081 proceeding is the subject of an appeal. See, e.g., *Geo Exchange Systems, LLC v. Cam*, 115 Wn. App. 625, 633, 65 P.3d 11 (2003); *Intermountain*

*Elec., Inc. v. G-A-T Bros. Const., Inc.* 115 Wn. App. 384, 395-96, 62 P.3d 548 (2003); and *W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.*, 85 Wn. App. 744, 753, 934 P.2d 722 (1997).

The single issue in this action has been Deacon's original RCW 60.04.081 Motion and Order to Show Cause. As both the Superior Court and this Court have acknowledged, an award of costs and fees the prevailing party in an RCW 60.04.081 proceeding are mandatory. See, *W.R.P. Lake Union Ltd. Partnership, supra*, at 753. Should this Court determine that no cause exists to reverse the Superior Court's award of attorney's fees to Gaston on remand, it should also determine Deacon to be the prevailing party on this appeal under RCW 60.04.081, and award Deacon its costs and fees on this appeal under that statute.

As an alternate to awarding Deacon its costs and fees under RCW 60.04.081, the Court should also consider awarding costs and fees to Deacon due to Gaston's violations of CR 11 on this appeal. In order to impose sanctions under CR 11, a Washington court must find that the pleading or claim was without a factual or legal basis, and also that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal bases of the claim. See, e.g., *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220,

829 P.2d 1099 (1992). RAP 18.9 also provides this Court with the power to impose sanctions for a frivolous filing.

CR 11 imposes three duties on attorneys: a) the duty to conduct a reasonable inquiry into the facts supporting the pleading; b) the duty to conduct a reasonable inquiry into the law, such that the pleading embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing law; and c) the duty not to interpose the pleading for purposes of delay, harassment, or increasing the costs of litigation. See, e.g., *Watson v. Maier*, 64 Wn. App. 889, 896, 827 P.2d 311 (1992). In determining whether an attorney's investigation is reasonable, Washington courts ask whether an attorney in similar circumstances could believe that his or her actions were factually and legally justified. See, *Bryant, supra*, 119 Wn.2d at 220-21.

Here, the citation by Gaston to but one case—this one—in support of its appeal demonstrates that this appeal was filed without the requisite legal bases, and without adequate inquiry to the law involving it. Gaston wholly ignored on this appeal the significant authority that militates against overturning the Superior Court's Order Granting in Part and Denying in Part.

Gaston cited nothing contrary to the authority that contractual issues (and therefore an award of costs or attorney's fees under the provisions of a contract) are not properly before the Superior Court in an RCW 60.04.081 proceeding. Gaston also failed to recognize, dispute or cite any contrary precedent to the authority Deacon provided (first to the Superior Court and again here) for the proposition that interest is not available on an award of attorney's fees. Finally, and perhaps most egregiously, Gaston has not provided this Court with even the slightest authority that would have allowed the Superior Court, under the terms of the remand, to award any of the many thousands of dollars sought by Gaston, which were unquestionably incurred outside of the time of "the earlier proceedings" in the Superior Court.

Gaston's wholesale lack of authority supporting this appeal is abusive, dilatory and a waste of both the tribunal's and Deacon's time and resources. Consequently, whether under RCW 60.04.081 or CR 11, Deacon requests that the Court award it its costs and attorney's fees on this appeal.

## **V. CONCLUSION**

The woeful lack of authority cited by Gaston reveals the weakness of its assertions regarding the Superior Court's award,

and the bases under which it urges this Court to overturn that award.

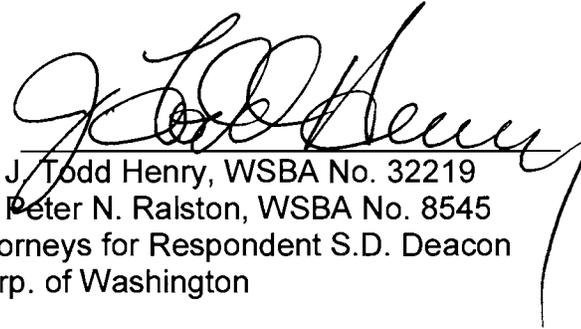
Gaston wrongfully sought to have the Superior Court expand the scope of this Court's remand, which the Superior Court properly refused to do. Gaston has now compounded its earlier wrongful requests by pursuing this wasteful and baseless appeal.

Deacon respectfully requests that the Court: a) affirm the Superior Court's award of attorney's fees to Gaston; b) terminate their appeal; and c) make an award to Deacon of its costs and fees on appeal.

DATED this 26<sup>th</sup> day of September, 2011.

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DECLARATION OF SERVICE

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Phone: (206) 623-3427  
Fax: (206) 682-6234  
Attorneys for Respondent

**ORIGINAL**

I, Catherine A. Melland, declare under penalty of perjury as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause;
2. I am employed by the law firm of Oles Morrison Rinker & Baker LLP. My business and mailing address is 701 Pike Street, Suite 1700, Seattle, WA, 98101-3930.
3. On September 26, 2011 I served by legal messenger a copy of the following documents on the following party:

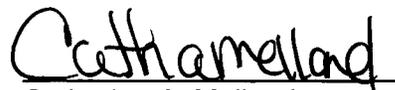
Larry Linville, Esq.  
Linville Law Firm  
800 Fifth Avenue, Suite 3850  
Seattle, WA 98104

Entitled exactly:

- 1) BRIEF OF RESPONDENT;
- 2) and THIS DECLARATION OF SERVICE.

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

Dated this 26<sup>th</sup> day of September, 2011.

  
Catherine A. Melland

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I  
2011 SEP 26 PM 1:18