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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 69535-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EGP INVESTMENTS, LLC, a Washington Limited Liability Company,

Appellant,

v.

ERIC A. ANDREWS, as Personal Representative of the ESTATE OF
JENNIFER LUND,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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A. INTRODUCTION

This case involves the collection of a debt by a debt collector against the estate of a woman who committed suicide while suffering from addictions to drugs and gambling. Plaintiff EGP Investments, LLC is an entity related to Fair Resolutions, Inc., a collection company based in Wenatchee, WA. Fair Resolutions' President is Brian Fair. Mr. Fair is also the registered agent and manager of Plaintiff EGP. In order to prosecute its collection cases, EGP uses a Wenatchee or Spokane, Washington based attorney which then associates with an attorney in Western Washington. In this case, EGP's counsel of record, Robert Sealby of Wenatchee, Washington, associated with attorney Jeffery Yonek of Olympia. It was Mr. Yonek that appeared at oral argument on July 20, 2012 when Mr. Andrews' Motion to Dismiss was granted by Snohomish County Superior Court Judge Richard T. Okrent.

Jennifer Lund passed away on April 7, 2011. Following her death, a probate was commenced in Snohomish County under Cause No. 11-4-00713-3 with her husband Eric Andrews as Personal Representative. A creditor's claim was then filed by JRPD Investments, LLC, another collection agency related to EGP and Fair Resolutions. That claim was rejected by Eric Andrews, and EGP filed a lawsuit against the Estate on JRPD's claim under Cause No. 11-2-07231-1. Cross motions for summary

judgment were then filed with Mr. Andrews arguing EGP was not the real party in interest, since the creditor's claim was filed on behalf of JRPD. The court ruled EGP was allowed to file a new creditor's claim and had 24 months from the first filing of the Notice to Creditors to do so because it was an ascertainable creditor of the Estate. EGP filed its creditor's claim in the probate action on February 6, 2012 and that claim was rejected by Defendant Eric Andrews on February 22, 2012.

EGP then filed this lawsuit on March 22, 2012 for wrongful rejection of its creditor's claim. Mr. Andrews moved to dismiss EGP's complaint on July 12, 2012 based on improper personal service, and that Motion to Dismiss was granted on July 20, 2012 after oral argument. EGP filed for reconsideration on July 30, 2012 and Judge Okrent issued an order denying reconsideration on October 8, 2012. This appeal ensues.

B. ISSUES PRESENTED

1. Did the Trial Court properly dismiss EGP's complaint by granting the motion to dismiss when: it is undisputed Eric Andrews was not personally served the summons and complaint in this matter and Brad Domhoff never resided at 40818 May Creek Rd., Gold Bar, WA or 40816 May Creek Rd., Gold Bar, WA; the burden of proof to attack the original affidavit of service is not clear and convincing

evidence; and the Trial Court within its discretion did not hold an evidentiary hearing?

2. Did the Trial Court properly strike portions of the declaration of Laura Meas when that declaration contained hearsay statements and did not qualify for the hearsay exception applicable to affidavits of service?
3. Did the Trial Court properly deny EGP's Motion for Reconsideration when there was no evidence to show: irregularities in the proceedings; misconduct committed by Defendant Eric Andrews; EGP's additional evidence was not reasonably ascertainable; and that substantial justice had not been done?

C. STATEMENT OF THE CASE

1. Filing of EGP's Lawsuit and Mr. Andrews's Motion to Dismiss.

Plaintiff EGP filed the summons and complaint on the rejected creditor's claim in Snohomish County Superior Court on March 22, 2012. CP 318 & 320. EGP's process server Mario Robledo then allegedly served a male subject on May 30, 2012 at 5:11 p.m. at 40818 May Creek Rd, Gold Bar, Washington. CP 317. In his affidavit of service, Mr. Robledo states that he served Eric Andrews by leaving the summons and complaint

with John Doe, co-resident, being a person of suitable age who is a resident therein. Id. The John Doe served by Mr. Robledo was Brad Domhoff. Mr. Domhoff is an acquaintance of Defendant Eric Andrews' who was performing yard work on an adjacent property and who did not reside at the address where the pleadings were served, or at the adjacent address where some of the work was being done. CP 261-262.

While EGP filed its lawsuit on the rejected creditor's claim within the 30 day timeline provided by RCW 11.40.100, it did not properly serve Eric Andrews with that lawsuit within the 90 day tolling period provided by RCW 4.16.170. Because of this, the creditor's claim stood rejected and Mr. Andrews filed a motion to dismiss based on lack of personal jurisdiction. This motion was supported by the Declarations of W. Mitchell Cogdill, Eric Andrews and Brad Domhoff. CP 294-296. This motion was set on the Snohomish County Judge's Civil Motions Calendar requiring five days' notice of the motion, any response to be filed by noon two days before the hearing, and any reply to be filed by noon the day before the hearing. Id. See Snohomish County Local Rule 6(d)(1).

EGP filed and served a response supported by the Declarations of Brian Fair, Laura Meas and Howard Andreasen. CP 288. EGP asserted Mr. Robledo had spoken with Mr. Domhoff and Mr. Domhoff indicated he did reside at 40818 May Creek Road. CP 288-289. However, no

declaration of Mr. Robledo was included as evidence supporting this assertion. Id. EGP also based its argument on Mr. Andreasen's alleged conversation with individuals who did not submit declarations as well as his observations regarding the yard work done by Mr. Domhoff. CP 274-275, 288-289.

In reply, Mr. Andrews filed the Declaration of Mr. Rask, the Supplemental Declaration of Mr. Domhoff and a Motion to Strike seeking to strike statements in the Declarations of Mr. Andreasen, Ms. Meas and Mr. Robledo. CP 265-267.

As will be discussed below, in its motion for Reconsideration and in the declaration of Robert Sealby, EGP raised as an issue timeliness of service of Mr. Andrews' Motion to Strike and declarations filed in support of his Motion to Dismiss. CP 239-254. EGP's attorney declared he had not received Mr. Andrews' Motion to Strike or declarations in reply until the day of the Motion to Dismiss hearing, and therefore was unable to respond or provide them to his associated counsel who appeared at oral argument. CP 239-240. However, as evidenced in pleadings filed by Mr. Andrews, the date stamps used in Mr. Sealby's declaration to support the argument for late service are different from those on the actual conformed copies of the pleadings provided to Mr. Andrews' process server by Mr. Sealby's office. CP 86-89. Copies of the pleadings actually served on Mr. Sealby

on June 19, 2012 with the “received” date stamps are contained in the Declaration of Sue Egbert. CP 78-85. Appendix C.

At the July 20, 2012 hearing on the Motion to Dismiss, the Trial Court entered an order striking the inadmissible statements in the declarations of Ms. Meas and Mr. Andreasen and dismissed the complaint. CP 258-259. Nowhere in any of its pleadings on the Motion to Dismiss, or on the notes of the record of proceedings or in any of its pleadings on reconsideration is there is any notation or record of EGP asking for an evidentiary hearing on Mr. Andrews’ motion to dismiss. CP 260. Furthermore, at no time during that hearing did Mr. Yonek object to any pleadings or declarations considered by the Trial Court or suggest that he did not have knowledge of any of the pleadings considered by the Court. CP 70.

2. EGP’s Motion for Reconsideration.

On August 1, 2012, EGP filed a Motion for Reconsideration of the order dismissing its complaint, and legal memorandum arguing that irregularity in the proceedings, misconduct on the part of Mr. Andrews, newly discovered evidence and substantial justice all warranted reconsideration of that ruling. CP 103-106 & 174. In support of this motion, EGP filed the declarations of Brian Fair, Robert Sealby, Mario Robledo and two declarations of Howard Andreasen. EGP argued it could

submit this additional evidence because it was not timely served with Mr. Andrews' Motion to Strike, and the new information presented by EGP on reconsideration was not reasonably ascertainable before the order of dismissal. CP 103-106.

In addition to arguing the untimeliness of Mr. Andrews' reply pleadings in support of his Motion to Dismiss, EGP argued Mr. Domhoff was not the original party served. CP 176. EGP bases this argument on Mr. Robledo apparently viewing a photograph of Mr. Domhoff and then concluding he was not the person who received process. Id. However, this photograph was never submitted by EGP in any proceedings in this matter and was not attached to the declaration of Mr. Robledo. Id.

The declaration of Brian Fair filed in support of EGP's Motion for Reconsideration purports to contain the criminal histories of Mr. Rask and Mr. Domhoff and the policies of the Gold Bar Nature Trails RV Park. CP 120-121. Mr. Fair also references certain photographs allegedly shown to Mario Robledo and Howard Andreasen. CP 121. These photographs were never filed in this matter and they are not part of this record. Id.

EGP also submitted the Declaration of Robert Sealby regarding when he received Mr. Andrews' reply in support of the Motion to Dismiss. CP 158-159. Mr. Sealby declared he was out of the office in advance of that motion, and he attached copies of Mr. Andrews' pleadings with a

stamp showing they were received by his office on July 20, 2012. CP 161, 170, 172. Appendix D.

EGP further submitted two declarations of process server Howard Andreasen. Mr. Andreasen was never responsible for any of the service allegedly perfected on Mr. Andrews, but was used as an investigator. CP 120. Mr. Andreasen's first declaration includes his observations of the property where EGP alleges service occurred and conclusions made based on a photograph that was not introduced into the record. CP 115-116. Mr. Andreasen's second supplemental declaration contains his investigation regarding the Gold Bar Nature Trails RV Park, that location's rules and regulations and conversations he had with unknown individuals. CP 107-112.

In response to EGP's Motion for Reconsideration, Mr. Andrews filed a response and motion to strike, and declarations of Eric Andrews, Mr. Rask, Mr. Domhoff, W. Mitchell Cogdill, Sue Egbert and Yvonne Larsen. Mr. Andrews' motion to strike sought to strike all of EGP's newly submitted "evidence" on reconsideration, all hearsay statements, and all statements lacking foundation or supporting evidence. CP 42-47. This included the criminal histories of Jason Rask and Brad Domhoff, the rules and regulations of the Nature Trails RV Park and various statements by Mr. Fair, Mr. Andreasen, Mr. Robledo and Mr. Sealby. Id.

Mr. Andrews argued EGP was timely served the pleadings on the Motion to Dismiss. CP 42-45. Proof of this service is evident in the declarations of Sue Egbert and Yvonne Larsen, showing EGP's Attorney's "received" stamp on the cover page of the pleadings served by EGP's process server. CP 78-89. It is clear these stamps are different from those presented by Mr. Sealby in his Declaration. CP 161, 170 & 172. Appendices C & D. Mr. Andrews has no knowledge of the origination of the stamped copies in Mr. Sealby's declaration, but Mr. Andrews had received conformed pleadings in cause number 11-2-07231-1 from EGP containing the same stamp as was received by Mr. Andrews and his process server in this matter. CP 11-18. Appendix A.

In support of his response to EGP's motion for reconsideration, Mr. Andrews submitted his own declaration stating on the day of alleged service, he was working his regular job and was not at the property where service allegedly took place. CP 67-68. Mr. Andrews also submitted a supplemental declaration of Brad Domhoff. CP 65-66. Mr. Domhoff states where he lived at the time service was alleged to have occurred and where he lived at the time of making the declaration. Id. Mr. Andrews also submitted a supplemental declaration of Mr. Rask. In this declaration, Mr. Rask corrects an error he made in a previous declaration and describes where he lives. CP 38-39.

In response to the Motion for Reconsideration, Mr. Andrews submitted a declaration of his counsel, W. Mitchell Cogdill. This declaration shows EGP filed an affidavit of service under a different cause number stating process server Bryan Milbradt served the pleadings in that case on the same 'John Doe' and at the same exact time and date as did Mario Robledo on May 30, 2012 in this cause number. CP 69-73. Appendix B. Mr. Cogdill's declaration also states that at no time during the hearing on the Motion to Dismiss did Mr. Yonek object to consideration by the Trial Court of the pleadings EGP had allegedly not received prior to that hearing. CP 70-71.

EGP's reply in support of its Motion for Reconsideration consisted of a legal memorandum and the declaration of Mr. Sealby. In the memorandum, EGP explains that the declaration filed in a separate Snohomish County case showing Mr. Milbradt served Mr. Andrews at the same exact time and place as Mr. Robledo was a simple misfiling. CP 31-33. Mr. Sealby's declaration contains an explanation for the differing date stamps, and why they could be different from those presented in the declarations of Sue Egbert and Yvonne Larsen. CP 28-30.

Finally, Mr. Andrews filed a second Motion to Strike and a second declaration of Sue Egbert. CP 11 & 19. Mr. Andrews sought to strike statements in EGP's Supplemental Legal Memorandum that were hearsay

and made without foundation. CP 19-20. The declaration of Sue Egbert filed with this Motion to Strike contains pleadings from cause number 11-2-07231-1 that show the stamp from EGP's Attorney's office to be the same "received" stamp as is evidenced in the earlier declarations of Sue Egbert and Yvonne Larsen, and different from the stamp in the Declaration of Mr. Sealby. CP 11-18, 158-173. Appendices A, C & D.

After considering all of the pleadings and evidence on reconsideration, the Trial Court entered an order on October 8, 2012 denying EGP's Motion for Reconsideration and granting Mr. Andrews' motion to strike statements in the declarations of Mr. Fair, Mr. Robledo, Mr. Andreasen and Mr. Sealby. CP 9-10.

D. ARGUMENT

1. The Trial Court Properly Dismissed EGP's Complaint by Granting Mr. Andrews' Motion to Dismiss.

(a) The Trial Court's Ruling Should be Upheld on De Novo Review.

An appeal from a ruling on a motion for reconsideration under CR 59 brings the final judgment up for review. RAP 2.4(c). When the trial court considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, appellate courts review the trial court's ruling under the de novo standard of review for summary judgment. Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC, 155

Wn. App 643, 653, 230 P.3d 625 (2010). Based on this authority, the Trial Court's ruling on the Motion to Dismiss is up for review, and because the Court considered matters outside the pleadings when making that ruling, the standard of review for this Court is de novo.

There are two undisputed facts in this case. First, Eric Andrews was not personally served on May 30, 2012 with the summons and complaint in the Snohomish County case with cause number 12-2-03800-5. CP 67-68 & 304. Mr. Andrews submitted two declarations stating that he was not present at either of his properties on the day in question and was not personally served. Id. Second, Brad Domhoff did not reside and has never resided at any relevant time herein at 40818 May Creek Rd., Gold Bar, WA or 40816 May Creek Rd., Gold Bar, WA. CP 66, 261 & 310. Mr. Domhoff submitted three declarations all stating that he has never resided at either of those locations. Id. EGP has not submitted any evidence showing that Mr. Andrews was personally served or that Mr. Domhoff ever resided at the properties in question.

In order to show that service was effective, EGP relies on the original affidavit of service of Mario Robledo. This affidavit states substitute service took place by serving the summons and complaint with a John Doe of suitable age who is a resident at the place of service. CP 317. However, in response to Mr. Andrews' Motion to Dismiss, EGP could not

produce any substantiating declaration from Mr. Robledo due to his alleged move out of Washington State. CP 119. Upon reconsideration, however, Mr. Robledo was conveniently located within the state and testified based on a picture not included with his declaration, that he did not serve Brad Domhoff with substitute service. CP 121 & 176. Additionally, EGP filed a third affidavit of service signed by Bryan Milbradt in the other cause number involving these same parties stating it was Mr. Milbradt that allegedly effected the substitute service. CP 73. Appendix B. Based on this evidence, it is apparent EGP cannot decide whom it wants to have been served on May 30, 2012 and which process server it wants to have effected that service.

In response to EGP's declarations of service and complete lack of evidence to the contrary, throughout this entire matter Mr. Andrews has shown the two key undisputed facts: Defendant Eric Andrews was not personally served and Brad Domhoff, who received the pleadings on May 30, 2012, did not reside and has never resided at any relevant time herein at 40818 May Creek Rd., Gold Bar, WA or 40816 May Creek Rd., Gold Bar, WA. CP 66-68, 261, 304 & 310. Therefore, in evaluating the evidence de novo, the only logical conclusion that can be made is that of the Trial Court: Eric Andrews was not personally served, substitute

service on him via Mr. Domhoff was ineffective, and EGP's complaint was properly dismissed.

(b) Mr. Andrews Need Not Prove by Clear and Convincing Evidence that Personal Service Upon Him was Ineffective.

An affidavit of service, regular in form and substance, is presumptively correct. The return, however, is subject to attack and may be discredited by competent evidence. Dubois v. Western States Inv. Corp., 180 Wn. 259, 39 P.2d 372 (1934). Here, clear and convincing evidence is not required to prove service was improper. The case cited by EGP for this proposition involves a situation in which the party attacking the service was attempting to vacate a default judgment entered against them based on the service in question. See Miebach v. Colasurdo, 35 Wn. App. 803, 808, 670 P.2d 276 (1983). While a clear and convincing standard may be in line with the common law of judgments requiring such a burden to challenge or vacate a judgment, such is not the case here. Mr. Andrews was never challenging or seeking to vacate any judgment, and therefore there is no reason for a higher burden when attacking the affidavit of service. See Farmer v. Davis, 161 Wn. App. 420, 428-429, 250 P.3d 138 (2011). In Farmer, the court opines the clear and convincing standard should apply when an affidavit of service is being attacked by a party attacking an underlying judgment. However, when no judgment is

being attacked, the higher burden of proof is unnecessary. 161 Wn. App. at 428-429, 250 P.3d 138. Here, Mr. Andrews is not attacking any judgment and therefore the clear and convincing evidence standard should not apply.

(c) The Trial Court Did Not Abuse its Discretion When it Did Not Conduct an Evidentiary Hearing on Mr. Andrews' Motion to Dismiss.

An evidentiary hearing was not necessary to determine if substitute service on Mr. Andrews was proper. Nowhere in any of its pleadings or on any record of proceedings did EGP ask for an evidentiary hearing until this appeal. Furthermore, the Trial Court, in its discretion, may direct that an issue raised by motion be heard in an evidentiary hearing if it believes such a hearing is necessary for a just determination. Swan v. Landgren, 6 Wn. App. 713, 495 P.2d 1044 (1972). Here, because EGP was unable to provide any evidence that Mr. Andrews was personally served or that Mr. Domhoff was a resident of 40818 May Creek Rd., Gold Bar, WA or 40816 May Creek Rd., Gold Bar, WA, the Trial Court simply did not need to conduct an evidentiary hearing. Mr. Andrews filed a brief supported by the law regarding service of process and declarations, and EGP filed a response and declarations containing hearsay and statements that lacked foundation. The Trial Court, as indicated in the order, considered all of the evidence submitted by both parties, struck portions of

the Declaration of Ms. Meas and Mr. Andreasen, and dismissed EGP's complaint. CP 258-159.

EGP cites State ex rel. Coughlin v. Jenkins, 102 Wn. App. 60, 7 P.3d 818 (2000) and quotes Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745 (1997) in support of its argument that the Trial Court erred in not ordering an evidentiary hearing. Nowhere in State ex rel. Coughlin does the court hold or even discuss the issue of a trial court's decision whether or not to order an evidentiary hearing. Furthermore, EGP's quote from the Woodruff case is nonexistent. It is in the trial court's discretion to order an evidentiary hearing and in this case, the Trial Court did not need such a hearing to make a decision on the Motion to Dismiss, neither party requested such a hearing, and therefore the appropriate order was entered.

2. The Trial Court Did Not Abuse its Discretion When it Struck the Declaration of Laura Meas.

The Trial Court did not abuse its discretion when it struck portions of the declaration of Laura Meas. A trial court's evidentiary rulings are reviewed for an abuse of discretion. Reese v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995) (a trial court's decision admitting or excluding evidence is reviewed for abuse of discretion, which occurs only when the exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons).

Here, EGP offered the declaration of Ms. Meas, process server at Pacific Coast Attorney Services, LLC, in support of its response to Mr. Andrews' motion to dismiss. CP 292 & 293. EGP offered this declaration as proof that a process server from Ms. Meas' office effected substitute service on Mr. Andrews. CP 288-289. However, Ms. Meas was not the process server alleged to have effected service on Mr. Andrews, and none of records referenced in her declaration were produced in response to the Motion to Dismiss. For this reason, Mr. Andrews moved to strike her declaration, and that motion was granted along with the Motion to Dismiss. CP 259, 266 & 269.

The Trial Court properly struck a portion of the declaration of Ms. Meas as inadmissible hearsay and a statement lacking foundation, and did not abuse its discretion in doing so. The declaration of Ms. Meas should not have been considered by the Trial Court under the process server exemption in CR 4(g) as discussed in Marsh McLennan Bldg., Inc. v. Clapp, 96 Wn. App. 636, 980 P.2d 311 (1999). Ms. Meas was not the process server that allegedly served Mr. Andrews. She was a co-worker of Mr. Robledo who made statements regarding documents in her company's possession which were never produced. CP 293. She also made statements regarding the alleged service performed by a different person, of which she had no personal knowledge. Id.

EGP rests its argument for admission on the following proposition from Marsh, “Proofs of service of summons by affidavit prepared under CR 4(g) have been identified as a type of hearsay evidence whose admission has been preserved under ER 802’s statement that ‘[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute’.” 96 Wn. App. at 641, 980 P.2d 311. CR 4(g) states that if someone other than the sheriff serves process, that person’s affidavit filed with the summons can be proof of service. It follows that the exception EGP attempts to apply to the declaration of Ms. Meas is only applicable to the individual process server that served the documents in question.

Therefore, because Ms. Meas did not serve Mr. Andrews or produce any of the records referenced in her declaration, the statements stricken from her declaration lacked foundation and personal knowledge, and the Trial Court did not abuse its discretion in striking the inadmissible portions of her declaration.

3. The Trial Court Properly Denied EGP’s Motion for Reconsideration.

The appellate courts review a trial court's denial of a motion for reconsideration for abuse of discretion. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 684–85, 41 P.3d 1175 (2002). A

reviewing court will not reverse a trial court's ruling on reconsideration absent a showing of manifest abuse of discretion, which occurs when the trial court's decision is based on untenable grounds or reasons. Wilcox v. Lexington Eye Institute, 130 Wn. App 234, 241, 122 P.3d 729 (2005).

(a) The Trial Court Properly Denied EGP's Motion for Reconsideration as There Were No Irregularities in the Proceedings Under CR 59(a)(1).

The Trial Court properly did not grant reconsideration for irregularities in the proceedings under CR 59(a)(1). EGP argues that because the Trial Court struck certain portions of the declaration of Laura Meas and dismissed EGP's complaint without a full evidentiary hearing, the Court committed an abuse of discretion.

First, the Trial Court properly struck the portions of the declaration of Laura Meas. As is stated above, Ms. Meas declaration was made based on documents not provided in the record and without personal knowledge, and was offered as an affidavit of service, when it is only a declaration from an employee that worked with the gentleman alleged to have effected service on Mr. Andrews. CP 293. For this reason, the Trial Court properly exercised its discretion and struck the inadmissible portions of that declaration. CP 269 & 259.

Second, as is discussed above, EGP argues Reconsideration of the order on the Motion to Dismiss should have occurred because an

evidentiary hearing was not held on the validity of the alleged substitute service. However, the record reflects EGP never requested an evidentiary hearing at any point in this litigation, and the Trial Court exercised its discretion in deciding not to hold an evidentiary hearing absent a request from the parties. CP 260.

For these reasons, the Trial Court did not commit an abuse of discretion when it did not reconsider the ruling on the Motion to Dismiss under CR 59(a)(1).

(b) The Trial Court Properly Denied EGP's Motion for Reconsideration as Mr. Andrews did Not Commit Misconduct Under CR 59(a)(2)

The Trial Court properly denied the Motion for Reconsideration as Eric Andrews did not commit misconduct. EGP argues that because one of the declarations submitted by Mr. Andrews had to be corrected and because it believes all of Mr. Andrews' declarations lack veracity, Mr. Andrews committed misconduct. In the Motion for Reconsideration and in its opening brief, EGP did not cite to any authority to support this contention other than CR 59 and the Oxford English Dictionary. CP 106.

Here, there has been no misconduct by Mr. Andrews. EGP argues because Mr. Andrews has used two gentlemen that have criminal records as witnesses in this matter, he has somehow committed misconduct. What EGP forgets is that it is EGP itself that brought these men into this

situation by effecting inadequate service on Mr. Andrews via Mr. Domhoff, and by investigating the situation by employing Mr. Andreasen to interview Mr. Rask. CP 275, 310 & 317. Therefore, arguing that Mr. Andrews somehow committed misconduct by having these witnesses submit testimony on his behalf is baseless, as they were originally pulled into this action by EGP.

EGP also points to inconsistencies in the declarations of Mr. Domhoff and Mr. Rask, while it ignores inconsistencies and flagrant contradictions and irregularities in its own evidence and declarations. The bulk of EGP's argument on reconsideration relied on the allegation it was not timely served with Mr. Andrews' Motion to Strike and reply declarations. CP 105-106. In support of this argument, EGP submitted copies of those reply pleadings with a different date stamp and a later date than is shown on the conformed copies received by Mr. Andrews from its process server, and contrary to the declarations of that process server and Sue Egbert. CP 78-85 & 86-89. Appendix C. EGP's copies are submitted in the declaration of Robert Sealby. CP 158-173. Appendix D. By using these pleadings, EGP claimed that it was not served the reply documents as is required under the Snohomish County Local Rule. Id.

However, as is shown attached to the declarations of Yvonne Larsen and Sue Egbert, Mr. Sealby's office was served the reply pleadings

at 11:16 a.m. on July 19, 2012, and copies of those pleadings were stamped accordingly. CP 78-85 & 86-89. Appendix C. Those conformed copies were then faxed to Mr. Andrews' counsel at 11:33 a.m. on July 19, 2012. Id. Furthermore, Mr. Andrews submitted a supplemental declaration of Sue Egbert showing that in Snohomish County cause number 11-2-07231-1, the other civil action between the same parties, Mr. Andrews received from its process server pleadings stamped with the same "received" stamps as Mr. Andrews presented as proof of service in this action. CP 11-18. Appendix A.

Furthermore, under the other civil cause of action involving these parties, EGP filed a second affidavit of service. CP 69-77. Appendix B. Filed June 19, 2012, this declaration alleges that Bryan Milbradt, a process server and Manager with Pacific Coast Attorney Services, LLC, served a John Doe co-resident with pleadings in that matter on May 30, 2012 at 5:11 p.m. at 40818 May Creek Rd, Gold Bar, WA. Id. Coincidentally, this is the same exact date, time and location at which Mr. Robledo states in his declarations that he served substitute service on Eric Andrews. Id. The purpose of this declaration is unclear, and its existence calls into question the declarations of service of Mr. Robledo. Id. EGP attempts to argue that Mr. Milbradt's declaration was a simple administrative error and that Mr. Milbradt was making a declaration similar to that of Laura Meas. CP 33.

However, the declaration speaks for itself where it states “the undersigned duly served the following documents...upon Eric A. Andrews” and below appears the name and signature of Mr. Milbradt. CP 73. Appendix B.

In light of the date stamped pleadings EGP purports to have received in an untimely fashion, Mr. Andrews’ evidence of previous pleadings with the same “received” stamp found in two different actions, and the duplicate declaration of a different process server filed under a related cause number, EGP’s assertions that Mr. Andrews somehow committed misconduct are untenable. There was no misconduct by Eric Andrews, and the Trial Court correctly did not grant reconsideration under CR 59(a)(2).

(c) The Trial Court Properly Denied EGP’s Motion for Reconsideration Despite Its Assertion of Newly Discovered Evidence Under CR 59(a)(4).

Under CR 59(a)(4), a motion for reconsideration may be granted if the moving party presents material and newly discovered evidence, which they could not have discovered with reasonable diligence before the trial court ruled on the underlying motion. This means the evidence must truly be newly discovered and not simply evidence that was available but not presented at the time argument was heard by the Trial Court. Morinaga v. Vue, 85 Wn. App. 822, 935 P.2d 637 (1989).

On reconsideration, EGP submitted a considerable amount of evidence it argued was newly discovered. EGP argued it did not have enough time to obtain the evidence prior to the Motion to Dismiss due to late service of pleadings by Mr. Andrews. CP 106. EGP seems to assert because it only had one day's notice of Mr. Andrews' reply pleadings, it could not have obtained the Westlaw background search of Jason Rask and Brad Domhoff and neither could it have conducted any type of investigation. CP 104, 119-121.

However, what EGP fails to acknowledge is Mr. Andrews included a declaration from Mr. Domhoff in support of his Motion to Dismiss, and it was EGP who approached Mr. Rask and allegedly spoke to him regarding Mr. Domhoff's whereabouts. CP 275 & 310. Therefore, nothing prevented EGP from running an internet background check to use in its responsive pleadings as it had knowledge of the two men before it filed its responsive pleadings. Further, it appears from the pleadings submitted by EGP that Mr. Andreasen had ample time to investigate, as is shown by his declaration in response to the Motion to Dismiss describing such an investigation. CP 274-275. The fact that Mr. Andreasen's investigation was either fruitless or inadequate does not justify reconsideration.

EGP additionally argues Mr. Robledo left Washington State right before Mr. Andrews' filed his Motion to Dismiss and therefore it could

not provide a declaration to contradict assertions made in that motion. CP 119. However, only six days after the order to dismiss was entered by the Trial Court, Mr. Robledo was apparently found in Washington State and was able to make a declaration and view pictures (never provided in the record) relating to his alleged service on Mr. Andrews two months earlier. CP 121 & 176. If EGP was able to contact Mr. Robledo in time to file a Motion for Reconsideration, the argument that he was unavailable to reply to Mr. Andrews' Motion to Dismiss is flawed.

Finally, even if EGP's additional evidence had not been stricken, that evidence would not have made a difference if considered on the Motion to Dismiss. EGP submitted the criminal records of Mr. Domhoff and Mr. Rask, and argued that their theft convictions impact the veracity of their statements. CP 105 & 120. However, these criminal histories are irrelevant to the issue at hand, and even if this available information was considered by the Trial Court on reconsideration, the parties' arguments would have been the same.

The same premise applies to the rules and regulations of the Gold Bar Nature Trials RV Park and Mr. Andreasen's subsequent investigation. CP 107, 110 & 152. These rules and regulations, used to argue that Mr. Domhoff could not possibly live at the RV park, are irrelevant and inconclusive as they do not show that Mr. Domhoff was not residing at the

park. Further, there is no evidence offered from Mr. Andreasen's investigations other than unsupported hearsay statements from employees and members of the park that form the basis for concluding Mr. Domhoff did not live there. CP 107 & 120-121. Finally, the information provided by Mr. Andreasen regarding the vehicles and yard work at Mr. Andrews' property as well as the property records provided by Mr. Fair are irrelevant and have no bearing on any issues at hand. CP 115-116 & 156-157. The number of vehicles present at certain locations and the contents of those vehicles do not show that Mr. Domhoff either lived at the address where he was served or that he was not doing yard work as he stated in his declaration. Therefore, based on the substance of EGP's newly submitted evidence, even if it had not been stricken on reconsideration, it was not material and would not have influenced the Trial Court.

For these forgoing reasons, the Trial Court did not abuse its discretion when it refused to grant EGP's Motion for Reconsideration under CR 59(a)(4).

- (d) The Trial Court Properly Denied EGP's Motion for Reconsideration Under CR 59(a)(9) as Substantial Justice Has Been Done.

The Trial Court properly did not grant EGP's Motion for Reconsideration pursuant to CR 59(a)(9). There has not been a showing

that substantial justice has not been done, and EGP has not cited any authority to support its position.

Situations where reconsideration has been granted under CR 59(a)(9) include instances where such a large accumulation of errors requires a court to order a new trial or reconsideration. See State v. Badda, 63 Wn.2d 176, 358 P.2d 859 (1963) and State v. Marks, 71 Wn.2d 295, 427 P.2d 1008 (1967). Substantial justice can also necessitate a new trial or reconsideration when the failure is attributed to an erroneous instruction given without objection. See Cerjance v. Kehres, 26 Wn. App. 436, 613 P.2d 192 (1980). Finally, reconsideration and new trials should rarely be granted under the “catch-all” substantial justice provision under CR 59(a)(9) in light of the many other grounds listed in the rule. Haladay v. Merceri, 49 Wn. App. 321, 742 P.2d 127 (1987).

Here, it is clear from the record there is not such a large accumulation of errors made by the Trial Court that would have necessitated reconsideration. Furthermore, if EGP is attempting to argue substantial justice has not been done due to the consideration by the Trial Court of Mr. Andrews’ reply pleadings on his Motion to Dismiss, a party cannot later argue substantial justice has not been done if they fail to object in front of the trier of fact. Cerjance, 26 Wn. App. at 441, 613 P.2d 192. Here, EGP never objected to the consideration of Mr. Andrews’ reply

pleadings at the hearing on the Motion to Dismiss. CP 70. Finally, granting a new trial or reconsideration on the basis that substantial justice has not been done should rarely be the lone basis for reconsideration. Haladay, 49 Wn. App. at 132, 742 P.2d 127. EGP has failed to show the Trial Court abused its discretion by not granting reconsideration for any of the other enumerated grounds under CR 59. Therefore, this Court should not overturn the Trial Court's decision denying reconsideration under CR 59(a)(9) in light of the existing authority commanding rare use of that section as a basis for such a decision.

4. EGP Should not be Awarded Attorney's Fees on Appeal and Defendant Eric Andrews Requests Such an Award if He Prevails.

Attorney's fees and expenses on appeal may be recoverable if applicable law grants that right. RAP 18.1 (a). Pursuant to RCW 11.96A.150 and CR 11, Plaintiff's request for fees should be denied and Mr. Andrews should be awarded reasonable attorney's fees incurred on appeal.

The Trusts and Estates Dispute Resolution Act, TEDRA, under RCW 11.96A.150, allows the Court in its discretion to order costs and reasonable attorney's fees from any party to the proceedings in all such proceedings governed by RCW Title 11. The Court may order fees under

CR 11 if the arguments made by EGP “[are not] well-grounded in fact,” “advanced” with “reasonable cause” or “warranted by existing law” for purposes of CR 11 and RCW 4.84.185. Mr. Andrews may be awarded fees and costs because the position advanced by EGP remains “wholly unsupported by fact or law.” Harrington v. Pailthorp, 67 Wn. App. 901, 911, 841 P.2d 1258 (1992).

EGP has pursued an appeal in a matter in which at the trial court level it submitted pleadings and declarations consisting entirely of inadmissible hearsay, evidence that lacked foundation, statements lacking personal knowledge and evidence EGP claimed was newly discovered, but that was properly disregarded by the Trial Court on reconsideration. Essentially, EGP has pursued an appeal based on inadmissible and questionable evidence so it may continue to stretch for second chances after its case was dismissed and reconsideration was denied, causing Mr. Andrews to use significant time and resources to respond.

The bulk of EGP’s argument on reconsideration and on appeal is based on the allegation it was not timely served Mr. Andrews’ Motion to Strike and reply declarations. In support of this argument, EGP submitted copies of these pleadings with a different date stamp and a later date than is shown on the conformed copies received by Mr. Andrews from his process server, and contrary to the declarations of that process server and a

paralegal in the office of Mr. Andrews' counsel. While EGP's counsel argued to the Trial Court on reconsideration that the stamps were correct and ensured that proper office protocols were followed, there is no denying the pleadings provided by Mr. Andrews from two different cases between the instant parties contain the *same exact conforming stamps* from Mr. Sealby's office. CP 17, 28-29 & 83. Appendices A & C.

Furthermore, in prosecuting this action, EGP has submitted multiple declarations of service alleging two different process servers originally effected substitute service on Mr. Andrews at the *same exact time and date and at the same exact place*. Appendix B. This casts doubt on all of the declarations provided by Pacific Coast Attorney Service, LLC in this matter, and could lead to the conclusion that EGP could not decide who it wanted to have allegedly served Mr. Andrews with process.

In light of these discrepancies, it was clear at the Trial Court level, and remains clear now, that EGP was attempting to transform the evidence in its favor so it could introduce previously available evidence on reconsideration. EGP is now continuing this action on appeal and thereby forcing Mr. Andrews to incur considerable expense. For these reasons, EGP's request for fees should be denied, and Defendant Eric Andrews should be granted his reasonable attorney's fees on appeal.

F. CONCLUSION

The Trial Court, Judge Richard T. Okrent, correctly granted Mr. Andrews' Motion to Dismiss and struck EGP's evidence submitted in response. The Trial Court properly denied EGP's Motion for Reconsideration and struck its inadmissible and untimely evidence submitted in support of that motion. Defendant Eric Andrews thereby requests that this Court affirm the Trial Court's rulings and grant him an award of attorney's fees against Plaintiff EGP for having to respond to this appeal.

Dated this 24 day of April, 2013.

Respectfully submitted:

COGDILL NICHOLS REIN WARTELLE
ANDREWS

By: 
W. Mitchell Cogdill, WSBA 1950
William W. Mitchell, WSBA 44301
Attorneys for Respondent

APPENDIX A

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CARLSON, MCMAHON & SEALBY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

EGP INVESTMENTS, LLC, a
Washington Limited Liability Company,

Plaintiff,

v.

ERIC A. ANDREWS, as Personal
Representative of the ESTATE of
JENNIFER LUND,

Defendant.

Cause No. 11-2-07231-1

ORDER ON SUMMARY
JUDGMENT

THIS MATTER having come on regularly for hearing upon Plaintiff's Motion for Summary Judgment against Defendant for Plaintiff's claims for breach of contract and unjust enrichment seeking Judgment in the amount of \$25,303.64 as of March 31, 2009, plus interest and attorneys' fees, and on Defendant's Motion for Summary Judgment of Dismissal, and Plaintiff appearing by and through its attorney, Brad L. Williams, and Defendant Eric Andrews as personal representative of the estate of Jennifer Lund appearing by and through his attorney, W. Mitchell Cogdill, and the court having reviewed the records and files herein, including the following:

ORDER ON SUMMARY JUDGMENT - 1

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111

RECEIVED
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CARLSON, MCMAHON & SEALBY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

BGP INVESTMENTS, LLC, a
Washington Limited Liability Company,

Plaintiff,

v.

ERIC A. ANDREWS, as Personal
Representative of the ESTATE of
JENNIFER LUND,

Defendant.

Cause No.: 11-2-07231-1

DEFENDANT'S OPPOSITION TO
ENTRY OF PROPOSED
JUDGMENT AND ORDER
GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

This response is submitted in opposition to entry of plaintiff's Proposed Judgment and
Order Granting Plaintiff's Motion for Summary Judgment. Opposition is based on two grounds
as follows:

- First, is plaintiff entitled to any Judgment other than a determination that the
Creditor's Claim submitted on behalf of JPRD Investments, Inc. was not a Creditor's Claim of
Plaintiff; and that Plaintiff was not precluded from filing its own Creditor's Claim because as an
ascertainable creditor, it had 24 months to submit the Claim, which it did on February 6, 2012.

RESPONSE - 1

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
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Phone: (425) 259-6111

APPENDIX B

FILED

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

EGP Investments LLC, a Washington Limited Liability Company

Plaintiff(s),

vs.

ERIC A ANDREWS, as Personal Representative of the ESTATE of JENNIFER LUND

Defendant(s).

Case No.: 11-2-07231-1

DECLARATION OF SERVICE



State of Washington
County of King ss.

I affirm that according to the records maintained in this office, service/attempts were made in the following manner:

That on 05/30/2012 at 5:11 PM, at the address of 40818 May Creek Rd, Gold Bar, within SNOHOMISH County, WA, the undersigned duly served the following document(s): SUMMONS; COMPLAINT; MILITARY DEPENDENT NOTICE in the above entitled action upon ERIC A ANDREWS, by then and there, at the residence and usual place of abode of said person(s), personally delivering 1 true and correct copy(ies) of the above documents into the hands of and leaving same with John Doe, co-resident, being a person of suitable age and discretion, who is a resident therein. Desc: Sex: Male - Skin/Race: White - Hair: Black - Age: 20s - Height: 5'11" - Weight: 150

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

Date: 6/18/12

X *Bryan Mulbradt*
Bryan Mulbradt, Manager
Process Server
Pacific Coast Attorney Services LLC
2926 6th Ave S
Seattle, WA 98134
206.652.2692

TOTAL: \$45.00



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APPENDIX C

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

EGP INVESTMENTS, LLC, a
Washington Limited Liability Company,

Plaintiff,

Cause No.: 12-2-03800-5
DECLARATION OF
JASON RASK

v.

ERIC A. ANDREWS, as Personal
Representative of the ESTATE of
JENNIFER LUND,

Defendant.

I, Jason Rask, declare as follows:

1. Competency. I am over the age of 18; competent to testify herein and make this declaration based on personal knowledge.
2. I own and currently reside at the residence located at 21011 164th Drive SE, Monroe, Washington.
3. On July 17, 2012 a person unknown to me asked if I knew the whereabouts of Brad Domhoff and if Brad lived at my residence. Brad Domhoff is my former roommate and had lived with

DECLARATION OF JASON RASK- 1

COGILL NICHOLS REIN WARTELLE ANDREWS
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CARLSON, MCMAHON & SEALBY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

EGP INVESTMENTS, LLC, a
Washington Limited Liability Company,

Plaintiff,

v.

ERIC A. ANDREWS, as Personal
Representative of the ESTATE of
JENNIFER LUND,

Defendant.

Cause No.: 12-2-03800-5

SUPPLEMENTAL DECLARATION
OF BRAD DOMHOFF

I, Brad Domhoff declare as follows:

1. Competency. I am over the age of 18, competent to testify herein and make this declaration based on personal knowledge.

2. On May 30, 2012, I was working as a landscaper at 40816 May Creek Rd., Gold Bar, Washington. On this date I was not a resident at this address, and never have been a resident at this address. On that day and at that residence I was handed papers by a gentleman that was looking for Eric Andrews. These papers turned out to be the summons and complaint in this case.

3. At the time this occurred, I informed the person handing me the papers that I was not Eric Andrews. The gentleman asked if I knew Eric Andrews and if I would give him the

DECLARATION OF BRAD DOMHOFF - 1

COGILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111



RECEIVED
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 CARLSON, MCMAHON & SEALBY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF SNOHOMISH

EGP INVESTMENTS, LLC, a
 Washington Limited Liability Company,

Cause No.: 12-2-03800-5

Plaintiff,

DEFENDANT'S MOTION TO
 STRIKE

v.

ERIC A. ANDREWS, as Personal
 Representative of the ESTATE of
 JENNIFER LUND,

Defendant.

I. Relief Requested

Defendant moves to strike certain hearsay statements in the Declaration of Laura Meas filed on July 16, 2012 and the Declaration of Howard Andreasen filed July 18, 2012 and statements made without foundation in the Declaration of Mario Robledo.

II. Statement of the Issue

Should this Court strike certain statements in the Declarations of Laura Meas, Howard Andreasen and Mario Robledo?

Motion to Strike -- 1

COGDILL NICHOLS REIN
 WARTELLE ANDREWS
 3232 Rockefeller Avenue
 Everett, WA 98201
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APPENDIX D

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CARLSON, MCMAHON, & SEALBY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

BGP INVESTMENTS, LLC, a
Washington Limited Liability Company,

Plaintiff,

v.

ERIC A. ANDREWS, as Personal
Representative of the ESTATE of
JENNIFER LUND,

Defendant.

Cause No.: 12-2-03800-5

DECLARATION OF
JASON RASK

I, Jason Rask, declare as follows:

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Dombhoff and if Brad lived at my residence. Brad Dombhoff is my former roommate and had lived with

DECLARATION OF JASON RASK- 1

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JUL 20 2012

CARLSON, MCMAHON, & SEALBY

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IN AND FOR THE COUNTY OF SNOHOMISH

EGP INVESTMENTS, LLC, a
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Plaintiff,

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ERIC A. ANDREWS, as Personal
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Defendant.

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DECLARATION OF BRAD DOMHOFF - 1

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CARLSON, MCMAHON, & SEALBY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

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Plaintiff,

v.

ERIC A. ANDREWS, as Personal
Representative of the ESTATE of
JENNIFER LUND,

Defendant.

Cause No.: 12-2-03800-5

DEFENDANT'S MOTION TO
STRIKE

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Motion to Strike -- 1

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WARTELE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
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Fax: (425) 259-6435

DECLARATION OF SERVICE

On said day below I caused to be delivered via North Sound Legal Messenger Service a true and accurate copy of the following document: Brief of Respondent in Court of Appeals Cause No. 69535-5-I to the following:

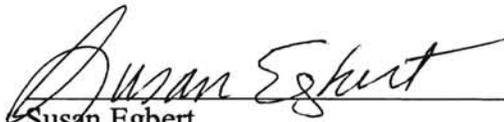
Mr. Alexander S. Kleinberg
Eisenhower Carlson PLLC
1201 Pacific Ave., Ste. 1200
Tacoma, WA 98402

Original and copy filed with:

Court of Appeals, Division 1
Clerk's Office
600 University Street
Seattle, WA 98101

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

Dated April 24, 2013 at Everett, Washington.


Susan Egbert
Cogdill Nichols Rein Wartelle Andrews