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Washington State Supreme Court

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Supreme Court No. 92292-6

SUPREME COURT OF THE STATE OF WASHINGTON

**Douglas S. Radabaugh and Shirley Radabaugh,
Appellants (Defendants)**

v.

**Heritage Restoration, Inc.,
Respondent (Plaintiff)**

ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

In March 2009, DOUGLAS S. RADABAUGH and SHIRLEY RADABAUGH (hereinafter collectively referred to as “Radabaughs”) entered into a contract with HERITAGE RESTORATION, INC. (hereinafter “Heritage”) whereby Heritage agreed to repair the Radabaughs’ damaged home. (CP 13.) The repairs were being paid for by Grange Insurance (hereinafter “Grange”) under the Radabaughs’ insurance claim. (CP 34.) The contract provided as follows with regard to the consideration Heritage was to receive in exchange for the repairs:

For and in consideration of the services to be rendered by [Heritage] herein, [Radabaugh] hereby agrees to pay, upon receipt of invoice from [Heritage], the actual cost for said work. [Radabaugh] agrees to immediately forward all draws issued as partial or full payment regarding this claim....

Furthermore, in consideration of the aforesaid services to be performed by [Heritage], Owner hereby authorizes and directs their insurance company to pay [Heritage] directly and/or include [Heritage] on all draws issued as partial or full payment regarding this claim.

(CP 13.) Before the contract was executed, the Radabaughs had already received \$34,715.03 from Grange, which amount represented the actual cash value of the damages. (CP 34-35, 38.)

On or about May 13, 2009, Grange sent a check to the Radabaughs, payable jointly to the Radabaughs and to Heritage, in the amount of

\$17,150.50 (hereinafter “Insurance Check”). (CP 38.) Those funds represented Grange’s calculation of the withheld depreciation, which is the difference between the actual cash value and replacement cost value. Id.

Heritage completed the repairs at the home. (CP 40, 46.) In June 2009, Heritage submitted invoices to the Radabaughs in the total amount of \$29,983.05. (CP 39.) The invoices listed prices for materials and labor that were set by a computer program called “X-actimate”, as opposed to Heritage’s actual costs for materials and labor. (CP 37, 42.) The Radabaughs asserted that certain work was not performed and other work was not completed to the standard of quality warranted. (CP 40-41.) In August 2009, the Radabaughs endorsed the Insurance Check as “Payment In Full”, and mailed it to Heritage. (CP 39.) Heritage retained but did not negotiate the Insurance Check. Id.

Having not received any monies from the Radabaughs (CP 39), Heritage instituted this action on May 7, 2010 (CP 4-22, 42, 46). In its Complaint, Heritage raised four causes of action: breach of contract, unjust enrichment, quasi contract and foreclosure of construction lien. (CP 4-22, 42.) The Radabaughs filed counterclaims. (CP 23-25.) After the lawsuit was commenced, the Radabaughs, through their attorney, asserted for the first time that Heritage was not entitled to overhead and profit on the materials and services provided because the contract stated that the Radabaughs were to pay the “actual cost for said work”. (CP 36, 40.)

On June 3, 2011, counsel for Heritage and the Radabaughs signed a document entitled: Stipulated Motion and Order Directing Funds Be Deposited Into the Court Registry. (CP 29-33, 39.) The stipulated motion requested the Court to direct Grange to deposit the \$17,157.50 insurance proceeds (hereinafter “subject funds”), which had been originally issued in the Insurance Check, into the registry of court. (CP 29-33, 38-39.) The stipulated motion contained the following key language:

This motion is made on the grounds that the Funds are insurance proceeds on a loss suffered by the defendants Radabaugh. Plaintiffs and defendants have a dispute in this case as to whom the funds properly belong.

(CP 29-33.) (emphasis added). The court granted the stipulated motion. Id.

The order stated, in part:

Once deposited, said funds shall be held in the court registry pending further order of this court.

(CP 30.)

The case was tried without a jury. (CP 34.) On September 20, 2011, the court issued its Findings of Fact and Conclusions of Law. (CP 34-47.) The Court held that the contract required Heritage to provide the Radabaughs with an invoice for the “actual cost of said work” before the Radabaughs were required to pay the invoice. (CP 35-37, 42-43, 45-46.) Heritage had only provided the Radabaughs with invoices with prices set by the “X-actimate” program. (CP 37, 42, 45.) As such, the Court concluded that the Radabaughs’

duty to pay under the contract was not triggered, and therefore ruled against Heritage on its breach of contract and lien claims. (CP 45, 47.)

However, the Court held that the Radabaughs were required to pay Heritage for the value of the work performed under quantum meruit. (CP 46-47.) The Court held the value of the work was \$24,350.00, that the Radabaughs were entitled to minor offsets, and therefore that Heritage was entitled to a net judgment of \$20,600.00. (CP 47.) In its Findings of Fact and Conclusions of Law, the Court referenced the fact that subject funds had been deposited into the court registry (CP 39), but the Court did not determine which party was the owner of the subject funds (CP 45-47).

On October 14, 2011, the Court issued a \$20,600.00 judgment against the Radabaughs. (CP 48-50.) On November 9, 2011, Heritage moved the Court to disburse the subject funds to it on the grounds of assignment. (CP 51-60.) On November 17, 2011, before the hearing on Heritage's motion, the Radabaughs filed for bankruptcy. (CP 61, 85.)

On or about February 27, 2012, the Radabaughs received a discharge in the bankruptcy action. (CP 85-86, 95.) Heritage then renewed its motion for release of the subject funds. (CP 74, 85.) The Court denied the motion without prejudice because it wanted the parties to supplement the record with regard to the Radabaughs' bankruptcy action. (RP 3/30/12 at 14-15.)

Following that hearing, the Radabaughs' bankruptcy trustee filed a

motion in the bankruptcy action to abandon the subject funds. (CP 86, 89-90, 95-96.) The Radabaughs' objected to the trustee's motion and Heritage filed a reply to the Radabaughs' objection asserting it was the owner of the subject funds. (CP 86, 96.) The trustee then voluntarily withdrew his motion. (CP 97.) Thereafter, neither the trustee nor the Bankruptcy Court took any further action with respect to the subject funds. (CP 87, 92-99.)

The Radabaughs' bankruptcy action eventually concluded and Heritage renewed its motion for disbursement of the subject funds. (CP 85-99, 117.) Heritage's motion was granted, with the Court concluding that Heritage was the owner of the subject funds by a legal and/or equitable assignment which predated the bankruptcy action. (CP 116-119; RP 2/21/14 at 15-16.)

II. ARGUMENT

A. The Court of Appeals' Decision Does Not Conflict with CalPortland Co. v. LevelOne Concrete, LLC.

The Radabaughs assert that this Court should accept review because the Court of Appeals' decision conflicts with CalPortland Co. v. LevelOne Concrete LLC, 180 Wn. App. 379, 321 P.3d 1261 (2014). (Pet. for Rev. at 4-6.) The Court of Appeals' decision does not conflict with CalPortland, however, because it was decided, in part, based on the merits of the underlying issue. (Ct. App. Op. at 9-10.)

In CalPortland, a material supplier's lawsuit was dismissed on

summary judgment because the supplier had not served the property owner where the construction project took place and because the supplier had not specifically used the term “foreclosure” in its action to foreclose a construction lien against a bond in lieu of claim of lien. CalPortland, 180 Wn. App. at 382-83. The supplier had not served the property owner because the general contractor had recorded a bond in lieu of claim of lien, releasing the underlying real property from the supplier’s lien. Id.

On appeal, in its opening brief, the supplier assigned error to the trial court’s determination that it was required to serve the underlying property owner. CalPortland, 180 Wn. App. at 392. The material supplier did not specifically assign error to the trial court’s alternative ground for granting summary judgment (the failure to use the term “foreclosure” in the complaint), but the material supplier identified and quoted the trial court’s alternative basis for its decision and presented substantial argument as to why summary judgment should not have been granted on that basis. Id. Because the appellate court felt the material supplier had made the nature of its challenge perfectly clear, it addressed the alternative summary judgment ground on its merits. Id.

Even though the Court of Appeals’ decision in this case stated that the Trial Court’s decision was affirmed, in part, based on the Radabaughs’ failure to assign error to the judgment releasing the subject funds, it also raised the

CalPortland case (Ct. App. Op. at 7) and decided the issue on the merits (Ct. App. Op. at 9). On the merits, the majority held the Trial Court did not abuse its discretion in releasing the funds to Heritage. Id. at 7.

The Radabaughs attempt to dismiss the fact that the majority decided the case on the merits by arguing that because the majority mentioned the Radabaughs' failure to assign error to the issue in the portion of the opinion that addressed the merits, the majority "in reality" did not address the merits. (Pet. for Rev. at 6.) Although the Radabaughs may not be pleased with the majority's conclusion, the merits were clearly addressed in the decision. The majority began by setting forth facts from the record they felt were relevant to the Trial Court's finding that Heritage was the true owner of the subject funds. (Ct. App. Op. at 1-2.) It was noted that the Radabaughs' home was damaged by snow and rain, that the Radabaughs submitted a claim to their insurer, and that the Radabaughs hired Heritage to repair their home. Id. at 1. They quoted terms from the parties' contract providing that, "[the Radabaughs agree] to immediately forward all draws issued as partial or full payment regarding this claim" and, "the Radabaughs authorized and directed Grange to "pay [Heritage] directly and/or include [Heritage] on all draws issued as partial or full payment regarding this claim." Id. at 1-2. The majority noted that the parties disputed to whom the subject funds belonged and jointly moved the Trial Court for an order providing that

the insurer deposit the subject funds into the registry of court. Id. at 2. Noting that the Trial Court had broad discretion in determining the owner of subject funds and that there was nothing in the record to indicate that the bankruptcy court's actions affected the funds, the majority held that the Trial Court's decision was not manifestly unreasonable or based on untenable grounds. Id. at 10. Because the majority opinion addressed the merits of the Radabaughs' appeal, the decision does not conflict with the holding in CalPortland.

B. The Court of Appeals' Decision that Nothing in the Record Shows that the Bankruptcy Court's Actions Affected the Subject Funds Does Not Conflict with Decisions of this Court or Other Decisions of the Courts of Appeal.

The Radabaughs assert that the Court of Appeals' ruling conflicts with In re Marriage of Myers, 54 Wn. App. 233, 773 P.2d 118 (1989), Arreygue v. Lutz, 116 Wn. App. 938, 69 P.3d 881 (2003), and Emigh v. Lohnes, 21 Wn.2d 913, 153 P.2d 869 (1944). (Pet. for Rev. at 6-8.) However, the Court of Appeals' decision does not conflict with those cases.

In re Myers involved an ex-wife's motion to increase maintenance payments after her ex-husband discharged in bankruptcy community debts for which he was responsible. In re Myers, 54 Wn. App. at 234-35, 238-39. The appellate court affirmed the trial court's ruling that, although the ex-husband could not be recharged with the debts, the discharge of them and the creditors' pursuant of the ex-wife could be considered in determining

whether to increase spousal maintenance payments. Id. at 235, 238-39. The Court of Appeals' decision in this case does not conflict with In re Myers because it did not recharge the Radabaughs with a debt owed to Heritage. Rather it merely affirmed the Trial Court's conclusions that ownership of the subject funds was in dispute, and as such, the funds were not part of the Radabaughs' bankruptcy estate, and therefore the Trial Court had the authority to award them to Heritage.

In Arreygue, after an automobile accident but before the injured party filed suit, the tortfeasor filed for bankruptcy and obtained a discharge of her debt to the injured party. Arreygue, 116 Wn. App. at 939-40. The trial court dismissed the case on summary judgment on the basis of the bankruptcy discharge, but the appellate court reversed holding that the injured party had the right to sue the tortfeasor for the sole purpose of pursuing liability against her insurance carrier. Id. at 940-45. The Court of Appeals' decision in this case does not conflict with Arreygue because Heritage had not attempted to hold anyone liable for the debt after discharge. Rather, Heritage merely asserted that it was the owner of the subject funds, the Trial Court agreed, and the Court of Appeals held that decision was not an abuse of discretion.

In Emigh, a builder who was under contract with a property owner to construct a dwelling submitted plans and specifications for the dwelling

to a third party who claimed he could obtain construction financing for the property owner. Emigh, 21 Wn.2d at 916-17. Rather than assisting with financing, however, the third party altered the plans to make it appear as if he prepared them and then convinced the property owner to contract with him for the construction of the dwelling. Id. at 917. The builder obtained a judgment against the third party based on breach of trust and the third party subsequently received a general discharge in bankruptcy. Id. at 913-14, 917. On the third party's later motion to quash a writ of garnishment on the basis of the discharge, the court held that the builder had not met his burden of proof on his assertion that the judgment was exempted from the discharge because the underlying debt was based on fraud. Id. at 914. The Court of Appeals' decision here does not conflict with Emigh because the question of whether the Radabaughs' debt to Heritage was discharged was not at issue. Rather, the issue was whether Heritage owned the funds before the bankruptcy filing on the basis of an assignment. The Trial Court held that Heritage was the owner of the funds and the Court of Appeals held that decision was not an abuse of discretion.

The majority fully addressed the Radabaughs' arguments regarding bankruptcy law and did not reverse the burden of proof on the issue of discharge. The majority noted that, at the time the Radabaughs' filed for bankruptcy, the ownership of the subject funds was in dispute and had not

been resolved by the Trial Court. (Ct. App. Op. at 4, fn. 5.) The majority referenced the Trial Court's unchallenged finding that the bankruptcy trustee never filed a motion in any court asserting that the Radabaughs owned the subject funds. Id. at 7-8. The majority noted that even though the Radabaughs were given the opportunity to supplement the record with bankruptcy documents and orders, in the end there was nothing in the record that showed the bankruptcy court's actions affected the subject funds. Id. at 8, 10. Finally, the majority recognized that the Trial Court did not reform its initial money judgment post-bankruptcy, but rather it merely determined the rightful owner of the funds in the court registry. Id. at 8.

C. The Court of Appeals' Decision Does Not Conflict with Wilson v. Henkle.

The Radabaughs argue that the Court of Appeals' decision conflicts with Wilson v. Henkle, 45 Wn. App. 162, 724 P.2d 1069 (1986) because the Trial Court did not make findings of fact to support its conclusion that Heritage was the owner of the subject funds. (Pet. for Rev. at 8.) However, the Trial Court did make findings of fact which supported its conclusion.

In the Henkle case, the Henkles purchased real property at a trustee's sale that had been owned by Wilson. Henkle, 45 Wn. App. at 164. Excess funds raised from the sale were deposited into the court registry. Id. Wilson sued the Henkles to set aside the trustee's sale, the Henkles sued Wilson for

unlawful detainer and the actions were consolidated. Id. Later Wilson's complaint was dismissed and the Henkles were awarded a money judgment. Id. The Henkles then filed a motion asking the court to release the court registry funds to them in satisfaction of their judgment. Id.

With full knowledge of the Henkles' pending motion, Wilson's attorney, who had also obtained a judgment against Wilson, obtained a writ of garnishment against the court registry funds without informing the court that ownership of the funds was controverted. Henkle, 45 Wn. App. at 165. After the Henkles became aware of the attorney's actions, the writ of garnishment was vacated and the funds were awarded to the Henkles. Id. That order was affirmed because the funds were not subject to garnishment while on deposit in the registry of court and the decision to disburse the funds to the Henkles was not an abuse of discretion. Id. at 169-70.

Here, Henkle supports the Court of Appeals' decision. The Henkles, as pure judgment creditors, requested that surplus proceeds of a trustee's sale, which belonged to Wilson, should be disbursed to them in satisfaction of their judgment. Henkle, 45 Wn. App. at 164. The Henkles did not assert that they were the owners of the funds in any way. Id. While their motion was pending, another creditor of Wilson (his attorney) obtained a judgment against Wilson and a writ of garnishment against the funds. Id. at 165. But even under those set of facts, the court of appeals affirmed the trial court's

discretionary decision to award the money to the Henkles. Id. at 171.

Contrary to the Radabaughs' contention, the Trial Court made several findings which supported its decision to order the subject funds disbursed to Heritage. Some of those facts were contained in the Findings of Fact and Conclusions of law issued after the trial. (CP 34-47.) They included: the Radabaughs hired Heritage Restoration to repair their home under an insurance claim (CP 34), the Radabaughs signed a contract agreeing to forward all insurance draws for payment of Heritage's work and authorizing the insurer to pay Heritage directly (CP 36-37), that the insurer held proceeds of \$17,157.50, and those funds were paid into the registry of court (CP 38). In its order disbursing the subject funds, the Trial Court found that the funds were insurance proceeds issued for work performed by Heritage. (CP 117.) Based on those findings, the Trial Court held Heritage was the true owner of the subject funds under an assignment. (CP 118.) Many of those factual findings were cited in the majority opinion. (Ct. App. Op. at 1-2, 10.)

D. The Court of Appeals' Decision Does Not Conflict with Amende v. Town of Morton.

The Radabaughs assert that the Court of Appeals' decision conflicts with Amende v. Town of Morton, 40 Wn.2d 104, 241 P.2d 445 (1952). (Pet. for Rev. at 8-10.) Once again, however, there is no conflict.

In Amende, a man asserted he was the assignee of certain bonds. Amende, 40 Wn.2d at 105. The contracts between the man and the bond owners stated they were made for the purpose of liquidation and that the owners could terminate the agreements, they referred to the owners as the sole owners, and terms such as ‘power of attorney’ and ‘bond liquidating agreement’ were utilized. Id. at 108. Since the agreements limited the man’s authority over the bonds and since they were terminable by the owners, the court held that the owners retained control over the bonds, and therefore, the agreements did not constitute assignments. Id.

Unlike the agreements in the Amende case, here, the Radabaughs signed a contract not only providing that all insurance draws were to be immediately forwarded to Heritage, but also directing the insurer to pay Heritage directly. (CP 13.) A major factor cited in Amende in determining whether there was an assignment was whether the transfer was of such a character that, “the fund-holder can safely pay [the assignee directly], and is compellable to do so”. Amende, 40 Wn.2d at 107. Under the clear terms of the assignment here, the insurer could have paid Heritage directly and Heritage could have compelled the insurer to pay.

Furthermore, the Radabaughs did not retain control over the funds. Under the assignment, the Radabaughs agreed to “immediately forward all draws issued as partial or full payment regarding this claim”. (CP 13.) As

to insurance draws issued for payment of work performed by Heritage, the assignment was unconditional. There is no support in Amende for the Radabaughs' new contention that just because the insurer initially included the Radabaughs' name on the check the Radabaughs retained control over the funds. Finally, unlike the situation in Amende, the Radabaughs did not have any power to revoke the assignment at any time. As such, the assignment in this case is distinguishable from those in Amende.

E. The Court of Appeals' Decision to Award Heritage Restoration Attorneys' Fees On Appeal Does Not Conflict with Phillips Bldg. Co., Inc. v. An.

The Radabaughs assert that the Court of Appeals' decision to award Heritage attorneys' fees on appeal conflicts with Phillips Bldg. Co., Inc. v. An, 81 Wn. App. 696, 915 P.2d 1146 (1996). (Pet. for Rev. at 10-11.) In Phillips Bldg. Co., parties to a construction contract entered into an agreement providing that, "[a]ll attorneys fees and costs will be awarded to the prevailing party." Phillips Bldg. Co., 81 Wn. App. at 698. The parties arbitrated a dispute and the arbitrators made a small award to the Ans but declined to award attorneys' fees. Id. at 699-700. The trial court denied the Ans' motion to modify the arbitration award and grant them attorneys' fees as the prevailing party because it could not be determined from the face of the award that the arbitrators exceeded their authority. Id. at 700, 704.

The Court of Appeals' decision does not conflict with Phillips Bldg.

Co. That case involved the arbitrators' refusal to award attorneys' fees. This case was tried to the Superior Court, who determined that neither party prevailed at trial. (CP 47.) Neither party appealed that decision. However, the majority determined that Heritage was the prevailing party on appeal because Heritage successfully defended against all of the various assignments of error asserted by the Radabaughs. (Ct. App. Op. at 10.) The Court of Appeals had the authority to award attorneys' fees to Heritage on appeal because the agreement signed by the parties provided, "In the event this account is referred to an attorney for collection, [the Radabaughs agree] to pay reasonable attorney fees and court costs." (CP 13.) As the majority pointed out, the Radabaughs' account was referred to Heritage's attorney for collection when the Complaint was filed. (Ct. App. Op. at 10.)

F. **The Radabaughs' Contention that the Majority Went Out of Its Way to Avoid Deciding Case on the Merits Does Not Provide Sufficient Basis to Accept Review.**

The Radabaughs assert that this Court should accept review because the majority, "went out of its way to avoid deciding the case on the merits", and as such, this case presents an issue of substantial public interest. (Pet. for Rev. at 11-13.) However, the substance of the Radabaughs' argument on this point is nearly identical to their argument in Section 5.1.1 of their Petition for Review. As such, Heritage incorporates its response to that section, which is set forth in Section A above.

G. The Radabaughs' Contention that Majority Opinion and Trial Court Refused to Recognize and Enforce the Radabaughs' Bankruptcy Discharge Is Inaccurate and Does Not Provide Sufficient Basis to Accept Review.

The Radabaughs assert that this Court should accept review because the lower courts refused to recognize and enforce the Radabaughs' bankruptcy discharge, and that is an issue of substantial public interest. (Pet. for Rev. at 11, 13-15.) However, the substance of the Radabaughs' argument on this point is nearly identical to their argument in Section 5.1.2 of their Petition for Review. As such, Heritage incorporates its response to that section, which is set forth in Section B above.

H. The Radabaughs' Contention that the Trial Court Contradicted Its Own Final Judgment Is Inaccurate and Does Not Provide Sufficient Basis to Accept Review.

Lastly, the Radabaughs assert that this Court should accept review because the Trial Court contracted its own earlier judgment in releasing the subject funds to Heritage, and as such, this case presents an issue of substantial public interest. (Pet. for Rev. at 11, 15-16.) However, as the majority pointed out, "The Radabaughs' arguments misconstrue the trial court's order. The trial court never reformed Heritage's judgment. It merely determined who rightfully owned the funds in the court registry." (Ct. App. Op. at 8.) In the Findings of Fact and Conclusions of Law issued after the trial, although it mentioned that the subject funds had been deposited into

the registry of court, the Trial Court did not determine the owner of the funds. Because it had not then determined ownership of the subject funds, the Trial Court was correct in finding that, “the Radabaughs have never made any payment to Heritage”. (CP 39.) Plus, even after the Trial Court ruled there was an assignment, the payment came from the insurer. It would therefore be correct to find that even as of today the Radabaughs have never made any payment to Heritage. As such, the Trial Court did not contradict its own findings and therefore, this issue is not one of substantial public interest.

I. **Heritage Requests an Award of Attorneys’ Fees and Expenses for Answering the Radabaughs’ Petition for Review.**

Pursuant to RAP 18.1(j), Heritage respectfully requests the Supreme Court to award Heritage its reasonable attorneys’ fees and expenses in answering the Petition for Review. In Washington, a prevailing party may recover attorneys’ fees authorized by statute, equitable principles, or an agreement between the parties in a trial court action or on appeal. See, Thompson v. Lennox, 151 Wn. App. 479, 484, 212 P.3d 597, 599 (2009). Here, the contract between the parties provides, “In the event this account is referred to an attorney for collection, [Radabaugh] agrees to pay reasonable attorney fees and court costs.” (CP 13.) Heritage referred the Radabaughs’ account to an attorney for collection when it filed the

Complaint in this action. (CP 4-22). As such, if this Court does not accept review, Heritage is entitled to an award of its attorneys' fees and expenses in answering the Petition for Review.

III. CONCLUSION

Heritage respectfully requests the Court decline to accept review because the Court of Appeals' decision does not conflict with any of the cases cited by the Radabaughs and the other issues they raised are inaccurate or not of substantial public interest.

DATED this 29th day of October, 2015.

SWANSON LAW FIRM, PLLC



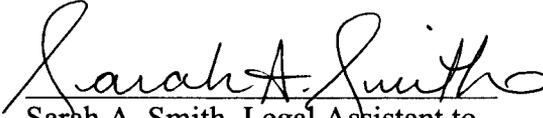
Trevor A. Zandell, WSBA #37210
Of Attorneys for Respondent, Heritage
Restoration, Inc.

DECLARATION OF SERVICE

I, Sarah A. Smith, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am over the age of 18, I am competent to give testimony in court, and I make this declaration based on personal knowledge. On the 30th day of October, 2015, I served, via legal messenger, the foregoing Answer to Petition for Review on the Appellants, via their attorneys, Ben D. Cushman and Kevin Hochhalter of Cushman Law Offices, P.S., addressed to 924 Capitol Way South, Olympia, Washington 98501.

DATED this 30th day of October, 2015.

SWANSON LAW FIRM, PLLC



Sarah A. Smith, Legal Assistant to
Trevor A. Zandell