FILED
COURT OF APPEALS
DIVISION II

2013 JUL 22 AM 10: 30

STATE OF WASHINGTON

BY _____
DEPUTY

No. 44346-II

Pierce County Superior Court No. 12-2-08809-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TORRE J. WOODS, individually.

Appellant,

v.

HO SPORTS COMPANY, INC., a for-profit Washington corporation,

Respondent,
and

MICHAEL E. WOODS, individually,
Respondent.

BRIEF OF RESPONDENT MICHAEL E. WOODS, Pro Se

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ORIGINAL

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I. INTRODUCTION

I am appearing pro se in this appeal because I have been abandoned by my attorneys, who were retained by my insurance company, Safeco. As shown by Appendix 1 to HO Sports' brief, Safeco was able to procure, in January 2013, a declaratory judgment order from the United States District Court holding that the claim brought by my son Torre, against me, in the this lawsuit did not fall within the coverage provided by my Safeco insurance policy. Unfortunately, once this order was obtained neither Safeco, nor former counsel felt obligated to finish what they had already started. As the file indicates in this matter, it was my insurance defense counsel who filed the original summary judgment motion which forms the subject matter to this appeal.

Unfortunately, retaining appellate counsel on my own would be and is a cost prohibitive proposition. Under the circumstances I am being called upon, as a pro se, to personally file a brief in this matter. This has provided me an opportunity to reflect on the clear implications of the words I use and any position I take in responding to this appeal.[1] Given the fact that I've been abandoned by my insurance company I now must reflect upon ultimately what legal position in this appeal best serves the

[1] It is my understanding that under the terms of my insurance policy with Safeco I would have a duty to cooperate with the insurance company, including the duty to cooperate with retained defense counsel, following their advice with respect to what defenses to assert with regard to any claims.

interests of myself and my wife, my son Torre and most importantly my family. I am not fully taking the position espoused by my attorneys who were retained by the insurance company, and which appear to serve no one's interest other than the interests of Safeco.

As explored below, this Respondent concurs with counsel for my son Torre that the policies which animate the "parental immunity doctrine" would not be injured by an exception is made to the application of the doctrine when insurance coverage's are available. As pointed out at Page 31 of HO Sports' brief, this issue is likely to be considered "moot" given the U.S. District Court's non-coverage decision, (Appendix No. 1 to HO Sports' brief). Nevertheless, an Appellate Court can review a moot issue if it presents a matter of continuing substantial public interest. See *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 796, 225 P.3d 213 (2009) (quoting, *In Re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004). The "parental immunity doctrine", is a matter of substantial public interest, and given the likelihood that this issue will arise and/or reoccur in other cases, it would be desirable to have an authoritative determination on this issue. See *Satomi*, 167 Wn.2d at 796.

It is also respectfully questioned as to whether or not HO Sports has any "standing" to address issues regarding my entitlement to the defense of "parental immunity". The common law doctrine of "standing"

prohibits a litigant from raising another's legal rights. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). Simply because a party may procure a litigation advantage by doing so, does not confer that party's "standing" to assert the rights of another. See *Cassell v. Portelance*, 172 Wn. App. 156, 294 P.3d 1 (2012).

In this case, clearly HO Sports is trying to assert my rights to "parental immunity" for its own litigation advantage (as discussed below) and it should not be allowed to do so.

To the extent that the Court views the issues being addressed herein, which have been provided a "fresh look", given the fact of Safeco's abandonment of my interest, as issues raised for the first time on appeal it is respectfully suggested that the Court be mindful that any prescription against raising issues "first time on appeal", is ultimately discretionary with the Appellate Court. It is well recognized that an appellate court has the discretion to decide an issue raised for the first time on appeal "when the question raised affects the right to maintain the action". See *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1999). While generally new arguments are not considered on appeal, the purpose of RAP 2.5(a) is generally met where the issue is advanced below and the trial court had an opportunity to consider and rule on the relevant authority. See *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 291,

840 P.2d 860 (1992). Appellate courts also may consider important public policy issues for the first time on appeal. See *Marshall v. Higginson*, 62 Wn. App. 212, 813 P.2d 1275 (1991); or if matters should be considered because "fundamental justice" requires it. *State v. Card*, 48 Wn.2d 781, 741 P.2d 65 (1987).[2]

In this case, given the writer's current pro se status, as a matter of fundamental justice and fairness it is respectfully suggested that the views of a parent whose child has suffered catastrophic injuries should be heard. This is particularly so, when such views previously were filtered through the self interest of an insurance company, and this Respondent's current position may ultimately aid in the arrival at the right decision, and help define the parameters of what cause of action can be maintained by my son.

As it is, what is addressed below, are not so far afield that the purposes of RAP 2.5(a) will not be met.

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[2] Additionally, pursuant to RAP 12.1(b) the appellate court, as a matter of discretion may consider issues needed to properly decide a case and may or may not call for additional briefing under such circumstances. See *State v. Barker*, 98 Wn. App. 439, 990 P.2d 438, reversed on other grounds 143 Wn.2d 915, 25 P.3d 423 (2001) (sometimes additional briefing is not necessary to full and fair resolution of an issue raised by appellate court *sua sponte*. Appellate court will in rare occasion decide the issue without additional briefing).

II. CROSS-ASSIGNMENT OF ERROR

1. The Trial Court erred in failing to recognize an exception to the parental immunity doctrine which would permit recovery up to, but not in excess of, available insurance policy coverages applicable to a claim brought by a child against a parent.

III. ISSUES

1. Did the Trial Court commit error by failing to recognize an exception to "parental immunity", which would permit a recovery by a child against a parent, when, at least in part, the injury to the child was due to the negligence of a parent, up to, but not in excess of available insurance coverage's?

2. Is "parental immunity" an immunity from suit or simply a recognition that under the laws of the State of Washington, that a parent has no duty to supervise their children in a non-negligent manner?

3. If "parental immunity" is properly interpreted to mean that a parent who is negligent in the supervision of their children has breached no cognizable legal duty under the laws of the State of Washington, then can the actions of a parent benefited by that doctrine, nevertheless be considered by the jury when allocating fault under the terms of

RCW 4.22.070(1), which by its terms appears to permit allocation of fault to parties otherwise "immune" from liability?

4. Should allocation of fault to "immune" parties set forth within RCW 4.22.070 be construed to exclude parents entitled to "parental immunity" from its terms, in order to harmonize the terms of this statute with the terms of RCW 4.22.020 which has been interpreted to mean that the negligence of the parent is not imputable to his child in an action by a child against a third party for damages?

5. Does HO Sports have "standing" to raise and/or assert Michael Woods "parental immunity" in this case?

6. Will the Appellate Court, given the circumstances of this case, consider issues which were clearly touched on below, but which are now more fully developed from a parent's perspective, given respondent's Michael E. Woods' current status as a pro se Respondent in this action?

IV. FACTUAL BACKGROUND

Your Respondent does not quarrel with the statement of facts set forth at Pages 2 through 4 of Appellant's Opening Brief and Pages 2 through 6 of Respondent HO Sports' Brief. However, your Respondent would add that what transpired in July 2010 was a parent's worst nightmare. A parent, who was factually, involved in events which resulted

in catastrophic injury to his child, and who carries with him thoughts about that event every waking moment of every day.

Respondent is naturally reluctant to take a position contrary to that advocated by the able counsel, who is representing his son's interests. Nevertheless in order to ensure that Torre's family, inclusive of myself and my spouse, are not ultimately subject to grievous financial ruin, potentially to the detriment of all members of the family, Respondent must take the below stated position. Otherwise, as suggested by HO Sports in its brief at Page 31-32 our family will be a victim of "... the unfortunate Hobson's choice of extending substantial sums of money to defending this matter, or proceed pro se and running the high risk of being found at fault of his son's substantial injuries (and possibly subsequent claims for 'contribution')".

As shown below, the most logical and fairest result would be the abrogation of parental immunity up to insurance policy limits and recognition that "parental immunity" is not an immunity at all, but rather is simply a recognition that for public policy reasons a parent owes no duty to anyone, including the child, not to engage in negligent parental supervision. If it is recognized that "parental immunity" is just simply a shorthand way of stating that there exists no such duty, then any concerns regarding the use of "alleged" negligence by a parent's as a damage-

reducing factor under the allocation of principles set forth in RCW 4.22.070(1), would be assuaged. Such a result benefits injured children.

V. ARGUMENT

A. Parental Immunity Should Not be Applied when there is Available Insurance Providing Coverage for the Claim of the Child Who is Injured by the Negligent Conduct of the Parent.

Your Respondent concurs with the analysis set forth on Pages 19 through 20 of Appellant's Opening Brief regarding a lack of any particular need for "parental immunity" when insurance is available which provides coverage for any claim made by a child against his or her parent. Your Respondent would like to echo the sentiment set-forth in *Jilani, by and through, Jilani v. Jilani*, 767 S.W.2d 671, 674 (Tex. 1988) which provides:

> When insurance involved, the action between a parent and child is not truly adversary; both parties seek recovery from the insurance carrier to create a fund for the child's medical care and support without depleting the family's other assets. Far from being a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal – the easing of financial difficulties stemming from the child's injuries.

In this case, Torre has received catastrophic injuries. He is a quadriplegic. Your Respondent, as a prudent consumer, has purchased a variety of insurances in order to protect his family. It would not disrupt

family harmony should an injured child be able to make claim against the parent's liability insurances. Additionally, should insurance be available, one the concerns expressed as justifying a rule of immunity would have no application. As recognized in *Borst v. Borst*, 41 Wn.2d 642, 644, 251 P.2d 149 (1952) one of the rationales for granting such "immunity" is to ensure that the financial welfare of a minor family member should not be utilized as a justification for taking away funds from the remainder of the family, which may include other minor children. See also *Roller v. Roller*, 37 Wn. 242, 79 P. 788 (1905). When liability insurance is available such a concern is nonexistent.

However, to the extent that a judgment could be entered beyond available liability insurance against a parent the policy justifications for "parental immunity" retain relevancy and have continuing value.

One could conceive of a scenario under our current fault allocation regime, which is set forth in RCW 4.22. Et. seq., where a denial of "parental immunity" to your Respondent could have disastrous results which could negatively impact Torre in a variety of ways. Assuming arguendo that Torre is determined to be a "fault free" plaintiff under the terms of RCW 4.22.070(1)(b) then your Respondent and Co-Respondent HO Sports would be jointly and severally liable for Torre's injuries, which are obviously catastrophic. Such liabilities could well be in the tens of

millions of dollars, and, even if, your Respondent was allocated only a small percentage of fault, given the potential of a large amount, it could result in financial ruin and bankruptcy, should HO Sports seek contribution as it could be entitled to under the terms of RCW 4.22.040.[3]

Unfortunately, under the current alternative which was espoused by the insurance defense lawyers hired by Safeco, who has now abandoned us, Torre's interests will be potentially negatively impacted by the maintenance of parental immunity.

B. "Parental Immunity" Should be Construed to Mean that a Parent Owes No Duty to a Child to Engage in "Non-negligent Supervision."

Torre was a minor at the time of his injuries. It has long been the public policy, and the common law of the State of Washington that "the negligence of a parent is not imputable to his child in an action by a child against a third party." See *Vioen v. Cluff*, 69 Wn.2d 306, 316, 418 P.2d 430 (1966); *Adamson v. Traylor*, 60 Wn.2d 332, 373 P.2d 961 (1962); and *Gregg v. King County*, 80 Wn. 196, 141 P. 340 (1914). As the comment to WPI 11.04 indicates, RCW 4.22.020 is a codification of this long-recognized common law principle.

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[3] Assuming Torre prevails and is awarded an amount commensurate with his catastrophic injuries, it is likely that funds will be available under the terms of a reasonable life care plan for the payment of a professional caretaking services. Nevertheless, your Respondent and his wife would still desire to remain active in Torre's care and have at least some level of involvement for the remaining of our lives. The ability to maintain such involvement could be negatively impacted by financial ruin.

Unfortunately, the language within RCW 4.22.020 is far from a model of clarity. Nevertheless our Supreme Court in a fairly recent opinion *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 615 260 P.3d 857 (2011) recognized that RCW 4.22.020 continues to stand for the proposition that "the negligence of a parent may not imputed to the child."

Given such common law concepts, it should be presumed that when our Appellate Courts considered "parental immunity" prior to the 1986 adoption of RCW 4.22.070, it was with the recognition that by granting "parental immunity" to a parent, it would not serve to injure or undermine the child's ability to recover damages from otherwise responsible third parties, particularly when liability was predicated on concurrent liability principles. See, WPI 15.04; *Phennah v. Whalen* 28 Wn. App. 19, 23-24, 621 P2d 1304 (1980); *Mason v. Bitton*, 85 Wn. 2d. 321, 326-27, 534 P2d 1360 (1975).

Unfortunately, such a straightforward concept i.e. that a parent's negligence cannot be imputed to a child, has now been blurred by the adoption of RCW 4.22.070(1) which provides:

> (1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages **except entities immune from liability to claimant under Title 51 RCW.** The sum of the percentage of total fault attributed to at-fault entities shall equal 100 percent. The entities whose fault shall be determined includes the claimant or a person suffering

> personal injury or a current property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant **and entities immune from liability of the claimant,** but shall not include those entities immune from liability to claimant under Title 51 RCW ... (emphasis added).

Thus, if parental immunity is deemed to be an immunity under the terms of RCW 4.22.070, even though it is the public policy of the State of Washington that the negligence of a parent shall not be imputed to a child, the provision of parental immunity to this Respondent potential's could result in a substantial reduction of the damages collectible by Torre in his claim against HO Sports. Presumptively this is the reason why HO Sports has been advocating Respondent's claim for parental immunity, despite its absolute lack of standing to do so. Arguably, the only purpose behind such advocacy is an attempt to gain a litigation advantage i.e. a reduction of damages which will actually have to be paid by it, to Torre, due to Torre's grievous and catastrophic injuries.

Such a result can be avoided by interpreting "parental immunity" as simply meaning that a parent owes no actionable duty to a child to engage in non-negligent supervision. For the purposes of RCW 4.22.070(1) fault is defined in RCW 4.22.015:

> Acts or omissions, including misuse of a product, that are in any measure negligent or reckless towards the person or property of the actor or others, or that subject person to strict liability or liability on a product liability claim. The term also includes breach of

> warranty, an unreasonable assumption of risk, and unreasonable failure to avoid injury or to mitigate damages. See *Hensrude v. Sloss*, 150 Wn. App. 853, 860, 209 P.3d 543 (2009).

A discussed in *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994) children under 6 are incapable of "fault" as the terms is used in RCW 4.22.070(1) and as such they are not entities whose fault may be apportioned under the terms of the statute.

For slightly different reasons, the same is true with respect to parents of children who are bringing claims. This is because in order to establish "fault" there must be a showing of negligence (i.e., a breach of a duty), as well as proximate cause. See *Welch v. Southland*, 134 Wn.2d 629, 634-37, 952 P.2d 162 (1998). As discussed in *Welch*, in order to be an entity towards whom fault can be apportioned under RCW 4.22.070, it must first be established that the entity engaged in "any measure of negligence or reckless conduct ..." which caused or contributed to the injury complained of. Intentional acts are not within the statutory definition. *Id.*

This is significant in this case because the only fault that can be apportioned to the plaintiff's father, Michael Woods would be based on a determination that there exists a duty on the part of a parent to generally to supervise their children in a non-negligent manner. No such duty exists as a matter of law due to the reasons which continue to animate the "parental

immunity doctrine". See, *Zellmer v. Zellmer*, 164 Wn.2d 147, 161-62, 188 P.3d 497 (2008). In *Zellmer* the Court held that the doctrine of parental immunity precluded any claim against a parent for "negligent parental supervision." As discussed in *Zellmer* at 154 the Supreme Court has "... consistently held a parent is not liable for ordinary negligence in the performance of parental responsibilities." (Citations omitted). At 161 *Zellmer* goes on to provide "[t]hus, we continue to agree with those jurisdictions that have declined to permit an action for negligent parental supervision as it accords little respect to the family autonomy and parental discretion". (Citations omitted).

Given the fact that parents have no duty to refrain from "ordinary negligence" in the supervision of their children, they simply cannot be "at fault" for the purpose of RCW 4.22.070(1). Someone cannot be at"fault" under RCW 4.22.070(1) if there otherwise does not exist a cause of action against them, which in theory, could have been brought by the plaintiffs but for an impediment such as immunity of suit. See *Humes v. Fritz Co.*, 125 Wn. App. 477, 490, 105 P.3d 1000 (2005). While the doctrine is called "parental immunity" it is really not immunity per se, but rather a determination on public policy grounds that there is no duty and thus no cause of action against a parent absent wanton and willful misconduct.

The *Humes* case provides an example of the kind of "immunity" referenced within RCW 4.22.070 which is a true immunity as opposed to a legal determination that there's an absence of duty. In *Humes* the court determined that an Indian tribe's sovereign immunity did not bar the allocation of fault to the tribe in a personal injury action by an injured worker against a truck driver and a trucking company arising from an accident that occurred on a tribal reservation. Sovereign Immunity is a true impediment to suit because it bars what otherwise would be actionable claims. In marked contrast, "parental immunity" is nothing more than a public policy determination that there is simply no enforceable duty.

To construe the statute otherwise would place RCW 4.22.070(1) in direct conflict with RCW 4.22.020 which expresses the public policy that the negligence of a parent should not be utilized as a damage-reducing factor when it comes to claims brought by their children against third parties.

While it is interesting to note that the comments to WPI 11.04 suggests that RCW 4.22.020 "may have" been abrogated by RCW 4.22.070, it has also been noted that implicit repeal of statutes is strongly disfavored. See *Tollycraft Yacht Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993). As noted above, the Supreme Court in *Anderson v. Akzo Nobel Coatings*, *supra.*, strongly suggests that the

Supreme Court still recognizes the continuing vitality of RCW 4.22.020. Thus, this section of the statutory scheme must be harmonized with the language or RCW 4.22.070.

It is long recognized when interpreting words of a statute, courts seek to determine legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 21 (2005). If the plain language is clear and unambiguous the legislative intent is also clear. See *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The meaning of a statutory provision is also harmonized with the other provisions in the statute and with the statutory scheme as a whole. *Id.*

It is suggested that there is very little difficulty in harmonizing RCW 4.22.020 with RCW 4.22.070(1). Under the terms of Section .020 the contributory fault of a parent simply cannot be used in a manner which serves to "diminish recovery in an action" brought by a child against a third party. This means that "any fault" that potentially could be allocated to a parent is precluded as being a damage-reducing factor under the terms of RCW 4.22.070(1). Otherwise, RCW 4.22.020 would be rendered at least partially meaningless and would serve no purpose.

Such a proposition is consistent with the notion that children should not suffer the errors of their parents. By allowing the actions of this Respondent to be a damage-reducing factor would be entirely contrary

to the terms of RCW 4.22.020, and undermine the rationale underlying for the existence of "parental immunity". It would impose through the backdoor a duty upon this Respondent, which otherwise does not exist as a matter of law.

In other words, the path of least resistance obviously is to simply acknowledge that when someone is entitled to "parental immunity" this essentially means that there is no actionable duty. If they breached no actionable duty, then under the terms of the *Price* case, and the language of RCW 4.22.015, they simply have not engaged in any action which could be characterized as a "fault"-producing event and **cannot** be allocated fault under RCW 4.22.070(1).

C. Other Considerations

Even though the current language of RCW 4.22.070(1) appears to permit the allocation of fault to "immune" entities, it does not appear to alter the fact that a grant of "parental immunity" however characterized, precludes claims for contribution. See *Baughn v. Honda Motor Co.* 105 Wn 2d 118, 712 P2d 293 (1986); *Talerico v. Foremost Insurance Co.* 105 Wn 2d 114, 712 (1986).

Thus, out of concern that a denial "parental immunity" could result in a contribution claim, your Respondent respectfully disagrees

"recreational activity" is not part of the parenting function. Respondent also respectfully disagrees with the notion that his actions rose to the level of willful and wanton misconduct.

It is counterintuitive to suggest that a parent involving their children in wholesome recreational activity is not engaging in a parental function. Not only do family recreational activities provide an opportunity to strengthen the family bond, but they also may be vital for the physical development and physical fitness of children. It goes without saying that providing a teenage boy, such as Torre, an opportunity for recreational activity also provides the benefit of providing an outlet for pent up energies that a teenager might otherwise direct towards negative behaviors.

Also, your Respondent's actions did not arise to willful and wanton misconduct, which requires an aggravated form of negligence, akin to recklessness, where a parent knows or should know of the "highly dangerous character of his conduct" but engages in such conduct anyway. See *Livingston v. City of Everett* 50 Wn App. 655, 660, 751 P2 1199 (1988).

We were "tubing", an activity we had performed many times in the past. I had no idea that the product sold by HO Sports suffered from dangerous design flaws as alleged in the complaint. (CP 1-8). Under the

circumstances, a reasonable person in your Respondent's position, would not have known or suspected, he was engaging in "highly dangerous" conduct, particularly in the absence of any knowledge of the flaws inherent in the HO Sport product which contributed to my son's catastrophic injuries.

VI. CONCLUSION

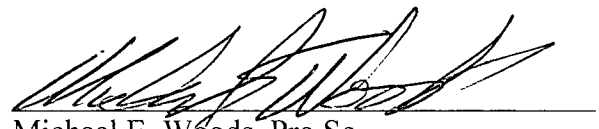
For the reasons stated above, the Respondent concurs that "parental immunity" should not preclude a claim up to the limits of available insurance coverage. Such a position strengthens rather than erodes the policies animating "parental immunity".

This Respondent does not agree that "parental immunity" should not apply to family recreational activities. Nor does this Respondent agree that his conduct, in any way, meets the high threshhold of willful and wanton misconduct. This Respondent takes no position regarding the propriety of consideration of new evidence on reconsideration.

Further, Respondent urges the Appellate Court to adopt the views, discussed above, reflective that "parental immunity" is not a true "immunity" but is simply an acknowledgment that a parent has no legally enforceable duty to non-negligently supervise his or her children.

This matter should be remanded for trial with proper guidance and direction.

Dated this 21 day of July, 2013.



Michael E. Woods, Pro Se

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS DIVISION II, STATE OF WASHINGTON

TORRE J. WOODS, INDIVIDUALLY,
APPELLANT,
Plaintiff/Petitioner

vs.
HO SPORTS COMPANY, INC., A FOR-PROFIT CORPORATION; ET AL.,
Defendant/Respondent

Cause #: 44346-II

Declaration of Service of:
BRIEF OF RESPONDENT MICHAEL E. WOODS, PRO SE

Hearing Date:

Declaration:

The undersigned hereby declares: That s(he) is now and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On the date and time of Jul 22 2013 3:35PM at the address of 18010 SOUTHCENTER PKWY TUKWILA, within the County of KING, State of WASHINGTON, the declarant duly served the above described documents upon PHILIP ALBERT TALMADGE, TALMADGE/FITZPATRICK by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with Paula Chapler LEGAL ASSISTANT TO PHILIP ALBERT TALMADGE, EMPLOYEE, who accepted service, with identity confirmed by verbal communication, a brown-haired white female approx. 45-55 years of age, 5'4"-5'8" tall and weighing 120-160 lbs..

No information was provided that indicates that the subjects served are members of the U.S. military.

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

Dated: July 23, 2013 at Seattle, WA

by _____
C. Brown 9509005

Service Fee Total: $ 104.50