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March 28, 2014  
Court of Appeals  
Division III  
State of Washington

No. 32109-6 -III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,  
Petitioner

v.

JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital  
community, and JAVIER GUTIERREZ,  
Respondents,

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**BRIEF OF PETITIONER**

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## **I. Introduction**

This Court should reverse the Superior Court's grant of summary judgment to respondents Jorge Gutierrez and Javier Gutierrez on their claim for coverage under the automobile insurance policy that Patriot General Insurance Company issued to Jorge Gutierrez. It should also remand to the Superior Court for entry of summary judgment for Patriot declaring that Javier<sup>1</sup> is not entitled to coverage under the UIM provisions of the policy.

Javier Gutierrez, Jorge's son, filed an underinsured motorist ("UIM") claim with Patriot after he was injured in a motor-vehicle accident. Patriot correctly denied the claim because Javier was not a named insured under the policy. A long line of Washington cases holds that the UIM statute, RCW 48.22.030, permits an insurer and an insured to determine who is insured by a policy and does not require a UIM policy to cover a named insured's relatives.

## **II. Assignments of Error**

1. The Superior Court Commissioner erred by entering the order dated August 9, 2013, denying Patriot's summary judgment motion

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<sup>1</sup> For clarity, this brief uses the respondents' first names. No disrespect is intended.

and granting summary judgment to respondents ruling that there is UIM coverage under the Patriot policy for respondent Javier Gutierrez.

2. The Superior Court erred by entering the order dated November 4, 2013, denying Patriot's motion for revision of the August 9, 2013 order denying its summary judgment motion and determining that there is UIM coverage for respondent Javier Gutierrez.

#### **Issues Pertaining to Assignments of Error**

1. The Patriot policy provides UIM coverage only to the named insured, Jorge Gutierrez, and to certain relatives. Any relative who is age 14 or older must be listed on the application or policy endorsement. Javier Gutierrez was 19 and not identified in the application or in any endorsement. Does the policy provide UIM coverage to Javier?

2. An insurer and an insured are free to define the scope of who is insured by a UIM policy, so long as the scope of the liability and UIM coverage is the same. The scope of liability and UIM coverage under the Patriot policy is the same but the policy defines coverage so that it does not include persons in the position of Javier Gutierrez. Does the Patriot policy comply with the UIM statute?

3. RCW 48.22.030 requires automobile insurance policies to provide UIM coverage to "persons insured thereunder." In contrast, RCW 48.22.005 defines "insured" to include the named insured or a resident of

the named insured's household. RCW 48.22.005 was enacted as part of a personal injury protection (PIP) bill, and no case has applied RCW 48.22.005 in a UIM dispute. Does the definition of insured in RCW 48.22.005 modify RCW 48.22.030 and abrogate nearly 40 years of Washington case law such that UIM policies must cover residents of a named insured's household?

### **III. Statement of the Case**

Jorge Gutierrez completed an application for a policy with Patriot on August 11, 2010.<sup>2</sup> It identifies Jorge Gutierrez as the named insured,<sup>3</sup> and lists two drivers, Jorge Gutierrez and Maria Recarmona.<sup>4</sup> Jorge also initialed a paragraph stating that he had listed on his application everyone living with him age 14 or older:

I also certify that all persons age 14 or over who live with me temporarily or permanently and all persons who are regular operators of any vehicle to be insured have been listed on this application and reported to the Company. I declare that there are no operators of the vehicle(s) described in this application unless their names and ages are shown above or are provided in writing to the Company within 14 days of when they begin driving the vehicle(s) described in this application.<sup>5</sup>

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<sup>2</sup> CP 77, 80.

<sup>3</sup> CP 80.

<sup>4</sup> CP 81.

<sup>5</sup> CP 84.

Jorge never asked his agent or Patriot to add Javier to the policy.<sup>6</sup>

Patriot issued a personal automobile policy to Jorge Gutierrez with a policy period of October 29, 2010, to April 29, 2011.<sup>7</sup> The Policy Declarations list the insured as Jorge Gutierrez and list two drivers: Jorge and Maria Carmona.<sup>8</sup> Jorge's son, Javier Gutierrez, is not listed on the Policy Declarations or any endorsement to the policy.<sup>9</sup>

Javier Gutierrez was a passenger in an automobile that was involved in an accident in Walla Walla on or about January 9, 2011.<sup>10</sup> At the time, Javier was 19 years old.<sup>11</sup> He alleges that he suffered personal injuries as a result of the accident.

Jorge filed a UIM claim with Patriot on behalf of his son.<sup>12</sup> Patriot denied the claim because Javier was not an insured under the Patriot

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<sup>6</sup> CP 78.

<sup>7</sup> CP 55.

<sup>8</sup> *Id.*

<sup>9</sup> CP 55–76.

<sup>10</sup> CP 24–28, 32–33.

<sup>11</sup> *Id.*

<sup>12</sup> CP 16.



policy.<sup>13</sup>

The Patriot policy issued to Jorge Gutierrez includes several forms, one of which is titled “Underinsured Motorists Coverage Endorsement – Washington.” It reads in part as follows:

**We will pay damages for bodily injury or property damage which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle. The bodily injury or property damage must be caused by a car accident and result from the ownership, maintenance or use of an underinsured motor vehicle.**

...

**Additional Definitions Used in This Part Only**

As used in this Part:

(1) “**Insured Person**” means:

(A) **You.**

(B) Any other person **occupying your insured car** with **your** permission.

(C) Any person for damages that person is entitled to recover because of **bodily injury to you** or another occupant of **your car.**<sup>14</sup>

Part I of a form titled “Personal Auto Policy” defines the liability coverage as follows:

**We will pay damages for which any insured person is legally liable because of bodily injury and/or property damage caused by a car accident arising out of the**

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<sup>13</sup> CP 16, 19–20.

<sup>14</sup> CP 74.

ownership, maintenance or use of a **car** or **utility trailer**. . . .

**Additional Definitions Used in This Part Only**

As used in this Part,

(1) “**insured person**” or “**insured persons**” means:

(A) **You**,

(B) Any person using **your insured car**.<sup>15</sup>

The Personal Auto Policy form also sets forth definitions that are used throughout the policy:

(2) “**You**” and “**your**” mean the person shown as the named insured on the Declarations Page and that person’s spouse if residing in the same household. **You** and **your** also means any **relative** of that person if they reside in the same household, providing they or their spouse do not own a **motor vehicle**.

(3) “**Relative**” means a person living in **your** household related to **you** by blood, marriage or adoption, including a ward or foster child. **Relative** includes a minor under **your** guardianship who lives in **your** household. Any **relative** who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss.<sup>16</sup>

Patriot filed this declaratory judgment action seeking a declaration it that has no duty to pay UIM benefits to Javier because he is not insured under

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<sup>15</sup> CP 59.

<sup>16</sup> CP 58.

the policy.<sup>17</sup> Javier filed a counterclaim for UIM coverage, breach of contract, bad faith, and violation of the Consumer Protection Act.<sup>18</sup> Patriot's reply denied Javier's counterclaims.<sup>19</sup>

Patriot filed a summary judgment motion seeking a declaration that it had no duty to pay UIM benefits to Javier because he was not insured under the policy.<sup>20</sup> In response, Javier and Jorge argued that RCW 48.22.005(5) defined "insured" to include a named insured's relative, and that this definition applies to the UIM statute, RCW 48.22.030, and the policy.<sup>21</sup> A Commissioner of the Walla Walla County Superior Court denied Patriot's motion, ruling that the "definition of 'insured' in RCW 48.22.005(5) is read into the policy and replaces the policy definition. Accordingly, Javier qualifies as an 'insured' under Jorge Gutierrez's Patriot General policy for the purpose of UIM coverage."<sup>22</sup> Although neither respondent cross-moved for summary judgment, the parties agreed that, given the Commissioner's ruling and in the interest of judicial

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<sup>17</sup> CP 1–3.

<sup>18</sup> CP 147–53.

<sup>19</sup> CP 232–38.

<sup>20</sup> CP 4–15.

<sup>21</sup> CP 86–101, 109–127.

<sup>22</sup> CP 160–63.

economy, it was appropriate to enter summary judgment for the respondents only on the issue of coverage for Javier.<sup>23</sup> Patriot filed a motion for revision of the Commissioner's order,<sup>24</sup> which the Superior Court denied.<sup>25</sup>

Patriot filed a notice for discretionary review,<sup>26</sup> and Jorge and Javier agreed that discretionary review was appropriate. This Court granted discretionary review under RAP 2.3(b)(4).<sup>27</sup>

#### **IV. Argument**

##### **1. Standard of Review.**

The Court of Appeals reviews a summary judgment order de novo, engaging in the same inquiry as the trial court.<sup>28</sup> Summary judgment is proper if the records on file show there is no genuine issue as to any

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<sup>23</sup> CP 162–63.

<sup>24</sup> CP 164–70.

<sup>25</sup> CP 223–26.

<sup>26</sup> CP 227–31.

<sup>27</sup> CP 248–49.

<sup>28</sup> *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

material fact and the moving party is entitled to a judgment as a matter of law.<sup>29</sup>

**2. The policy does not cover Javier because he is not an insured person under the policy.**

Determining whether coverage exists is a two-step process. In the first step, the insured must show the loss falls within the scope of the policy's insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language.<sup>30</sup> It is the first step that is at issue here: the respondents must show that Javier is an insured under the policy. No exclusions are at issue on this appeal.

Insurance policies are contracts, and rules of contract interpretation apply.<sup>31</sup> Washington courts will enforce unambiguous insurance policy language.<sup>32</sup> If policy language is clear, a court must enforce it as written and may not create an ambiguity where none exists.<sup>33</sup>

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<sup>29</sup> CR 56(c).

<sup>30</sup> *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn. 2d 724, 731, 837 P.2d 1000 (1992).

<sup>31</sup> *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 399, 135 P.3d 941 (2006).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Javier Gutierrez is not entitled to UIM coverage because that coverage applies only to an “insured person” and he does not come within that definition. The policy defines “insured person” as “You,” which is defined as the named insured and any “relative” residing in the same household who does not own a motor vehicle. “Relative” in turn is defined to include a person related by blood age 14 or older who is listed on the application or endorsed on the policy before a car accident. Javier does not qualify as “you” because the Declarations Page does not identify him as a named insured, and he is over the age of 14 and not listed on the application or any endorsement. Javier has no coverage under the UIM provision, and Patriot properly denied his UIM claim.

**3. The UIM statute does not mandate a definition of insured that includes a named insured’s relatives.**

The UIM statute did not require Patriot to include Javier among the class of persons insured by the Patriot policy. Washington courts have long held that the UIM statute “does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.”<sup>34</sup> As the Supreme Court has explained,

The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of

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<sup>34</sup> *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976).

‘insureds’ that is at least as broad as the class in the primary liability sections of the policy. *It does not preclude the parties from reaching agreement as to the scope of the class in the first instance.*<sup>35</sup>

The Court of Appeals reiterated this holding in March 2013:

Underinsured motorist coverage is limited personal accident insurance chiefly for the benefit of the named insured. Limiting the scope of the definition of who else is an “insured” does not run afoul of the public policy behind Washington’s UIM statute.<sup>36</sup>

A total of seven Washington cases spanning almost forty years supports this holding.<sup>37</sup>

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<sup>35</sup> *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443, 563 P.2d 815 (1977) (emphasis added) (quoting *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972)), *abrogated in other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987).

<sup>36</sup> *Vasquez v. Am. Fire & Cas. Co.*, 174 Wn. App. 132, 138, 298 P.3d 94 (citing *Smith*, 128 Wn.2d at 83), *review denied*, 178 Wn.2d 1006, 308 P.3d 641 (2013).

<sup>37</sup> *See also Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997) (“[W]hen the question revolves around the initial extension of coverage, that is, the definition of who is and is not an insured, public policy is not violated so long as insured persons are defined the same in the primary liability and UIM sections of the policy.”); *see also Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 53, 702 P.2d 1214 (1985) (“[T]he parties may agree to a narrow definition of insured so long as that definition is applied consistently throughout the policy[.]”) (quoting *Raynes*, 88 Wn.2d at 444); *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 874, 103 P.3d 240 (2004)

Here, the scope of who is insured is consistent in the UIM and liability coverages because each applies to “you,” which is defined the same way throughout the policy. The Patriot policy therefore fully complied with the UIM statute.

**4. RCW 4.22.005 does not require automobile insurance policies to provide UIM coverage to a named insured’s family members.**

The respondents have argued that the policy’s definition of “insured person” is invalid because it conflicts with RCW 48.22.005. They contend that RCW 48.22.005 defines “insured” as all residents of the named insured’s household, and that this definition is incorporated into the UIM statute, RCW 48.22.030. This argument is, however, unsupported by the statutes, the legislative history, and the case law.

RCW 48.22.005 defines “insured” and “named insured” as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

...

(5) “Insured” means:

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(stating that insurer may choose not to include certain persons in definition of “insured” in UIM policies).



(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

....

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

The definition of "insured" in RCW 48.22.005(5) does not modify the UIM statute, RCW 48.22.030, because the latter statute does not use the term "insured" standing alone. Rather, the critical subsection of RCW 48.22.030, subsection (2), uses the terms "person insured thereunder" and "named insured":

No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of *persons insured thereunder* who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the *named*

*insured* or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.<sup>38</sup>

If the legislature had intended “insured” in RCW 48.22.005(5) and “persons insured thereunder” in RCW 48.22.030(2) to mean the same thing, it would have used the same term in both statutes.<sup>39</sup> Giving both terms the same meaning would deviate from the fundamental rules that statutes must be interpreted so that all the language used is given effect, with no portion rendered meaningless or superfluous.<sup>40</sup> As the courts have said many times, the intent of RCW 48.22.030 is to make each person who is an insured for liability coverage also an insured for UIM coverage—not to expand that coverage beyond the terms of the policy to include all relatives of named insureds.<sup>41</sup>

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<sup>38</sup> RCW 48.22.030(2) (emphasis added).

<sup>39</sup> See *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

<sup>40</sup> *Id.*

<sup>41</sup> E.g., *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 444, 563 P.2d 815 (1977) (“The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of ‘insureds’ that is at least as broad as the class in the primary liability sections of the policy.”), *abrogated in other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987).

Javier has also argued that “insured” is used in subsections of RCW 48.22.030 other than subsection (2), and that therefore RCW 48.22.005(5)’s definition of “insured” must apply to RCW 48.22.030. Subsection (2), which uses the separate term “persons insured thereunder,” is the critical portion of RCW 48.22.030 because it imposes on insurers the duty to offer UIM coverage to the same extent as liability coverage. Other subsections flesh out other aspects of that coverage. Subsection (3), for instance, defines the amount of that coverage. Those subsections implicitly refer to subsection (2) and its use of the term “persons insured thereunder.”

To the extent the terms “insured” and “persons insured thereunder” create ambiguity, we must turn to the legislative history of RCW 48.22.005.<sup>42</sup> That history makes it clear that that statute applies only to personal injury protection (PIP) coverage, and not to UIM coverage. The bill passed in 1993 that was later codified in part as RCW 48.22.005 was entitled “Motor Vehicle Insurance—Personal Injury Protection

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<sup>42</sup> *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228, 232 (2007) (“If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.”).

Benefits.”<sup>43</sup> That bill makes many references to PIP, but does not once mention “underinsured” or “UIM.”<sup>44</sup> Moreover, the House Bill Report describes the bill as one “[r]egulating the mandatory offering of personal injury protection insurance.”<sup>45</sup> The Report also makes no mention of UIM. A 2003 amendment to RCW 48.22.005 also pertained exclusively to PIP coverage.<sup>46</sup>

A review of case law also shows that the definition of “insured” in RCW 48.22.005 is not incorporated into the UIM statute. Not one of the scores of cases interpreting the UIM statute<sup>47</sup> relies on RCW 48.22.005 to define “insured” or any similar term in the UIM statute.

Nor do any cases decided after the 1993 amendment to the UIM statute even suggest that the amendment abrogated the pre-1993 cases. If RCW 48.22.005 actually abrogated this line of cases, surely the Supreme Court or the Court of Appeals would have made that clear in the 20 years since the statute’s passage. Instead, as discussed above, cases interpreting the UIM statute—including one decided just last year—hold that it does

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<sup>43</sup> CP 36.

<sup>44</sup> CP 36–39.

<sup>45</sup> CP 41.

<sup>46</sup> CP 44–51.

<sup>47</sup> The annotations to RCW 48.22.030 have 82 sections.

not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.<sup>48</sup> Indeed, only five published Washington cases even cite RCW 48.22.005, and only one of those cases refers to that statute's definition of "insured."<sup>49</sup> In sum, not a single legal authority supports the respondents' position regarding RCW 48.22.005.

## V. Conclusion

This Court should reverse the Superior Court's order granting summary judgment to Jorge and Javier Gutierrez and remand to that court with instructions to enter summary judgment for Patriot. Javier Gutierrez is not entitled to UIM coverage because he is not an insured under the

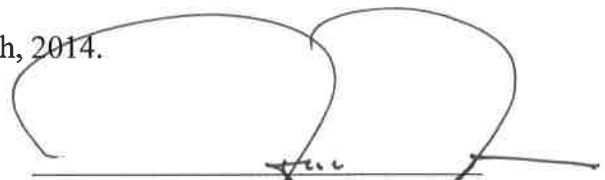
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<sup>48</sup> *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995) (quoting *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976)); *Vasquez v. Am. Fire & Cas. Co.*, 174 Wn. App. 132, 138, 298 P.3d 94, review denied, 178 Wn.2d 1006, 308 P.3d 641 (2013).

<sup>49</sup> *Ainsworth v. Progressive Cas. Ins. Co.*, \_\_\_ Wn. App. \_\_\_, 2014 WL 1016225, \*15 n.7 (Feb. 10, 2014) (citing RCW 48.22.005(3), which defines "income continuation benefits"); *Am. States Ins. Co. v. Bolin*, 122 Wn. App. 717, 721 n.6, 94 P.3d 1010 (2004) (citing RCW 48.22.005(1)(b) for definition of "automobile"); *Boag v. Farmers Ins. Co.*, 117 Wn. App. 116, 122 n.4, 69 P.3d 370 (2003) (referring, in PIP case, to definition of "income continuation benefits" in RCW 48.22.005(3)); *Daley v. Allstate Ins. Co.*, 86 Wn. App. 346, 355, 936 P.2d 1185 (1997) (citing definition of "bodily injury" in RCW 48.22.005(2)), *rev'd*, 135 Wn.2d 777, 958 P.2d 990 (1998); *Cherry v. Truck Ins. Exch.*, 77 Wn. App. 557, 563 n.3, 892 P.2d 768 (1995) (citing, in dicta, definition of insured and named insured).

Patriot policy. That definition complies with RCW 48.22.030 and the long line of cases interpreting that statute.

Dated this 27<sup>th</sup> day of March, 2014.

A large, handwritten signature in black ink, appearing to be "Patrick M. Paulich", written over a horizontal line.

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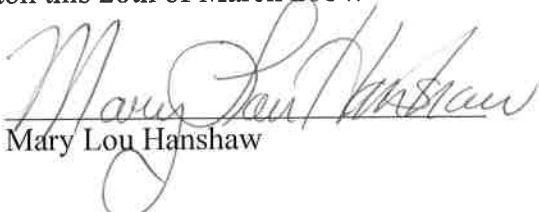
**Certificate of Service**

I declare under penalty of perjury under the laws of the State of Washington that I caused the document to which this certificate is affixed to be served on the following counsel in the manner described below:

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Executed at Seattle, Washington this 28th of March 2014.

  
Mary Lou Hanshaw