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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

No. 42502-5-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

SUE ANN GORMAN,

Plaintiff/Respondent/Cross-Appellant,

vs.

PIERCE COUNTY,

Defendant/Appellant/Cross-Respondent.

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

TROUP, CHRISTNACHT, LADENBURG,
McKASY & DURKIN, INC., P.S.
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ORIGINAL

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I. REPLY ARGUMENT ON CROSS-APPEAL

A. CR 50 DOES NOT BAR CONSIDERATION OF THE PURELY LEGAL ISSUE OF MS. GORMAN'S DUTY.

The Defendants assert that because Ms. Gorman did not raise the issue of her duty of care in her motion for a directed verdict, the issue cannot be considered on appeal. The Defendants are incorrect.

As the Defendants point out, when a Washington court rule is "the same" as the corresponding federal rule, Washington courts will look to federal case law for guidance in interpreting the Washington rule. *See* Evans-Hubbard's Brief at 11. *See also* Karl B. Tegland, 4 WASH. PRAC., Rules Practice CR 50, Drafters' Comment, 2005 Amendments (5th ed. 2012) ("In addition, it is beneficial in this situation to have Washington and federal practice be the same."). Federal courts have held that the requirement that identical issues be raised in pre- and post-verdict CR 50 motions only applies in appeals based on the sufficiency of evidence, **not issues of law.** *See, e.g., Bryant v. Dollar Gen. Corp.,* 538 F.3d 394, 397 n.2 (6th Cir. 2008), *cert. denied* 555 U.S. 1138 (2009); *Estate of Blume v. Marian Health Center,* 516 F.3d 705, 707 (8th Cir. 2008); *Fuesting v. Zimmer, Inc.,* 448 F.3d 936, 939-41 (7th Cir. 2006), *cert. denied* 549 U.S. 1180 (2007); *Metcalf v. Bochco,* 200 Fed Appx. 635, 637 n.1 (9th Cir. 2006) (unpublished). *See also* Miller & Wright, 9B FED. PRAC. & PROC.

CIV. § 2537 "Renewal of Motion for Judgment as a Matter of Law after Trial" (3rd ed. 2012) ("Unitherm's rationale for renewal is that the judge who saw and heard the witnesses and has the feel of the case, rather than a new judge relying on an appellate printed transcript, should decide whether a new trial should be granted or a judgment entered under Rule 50(b). This rationale does not apply to purely legal questions.").

In the present case, the existence of a duty on Ms. Gorman's part is purely a question of law. *Christensen v. Royal School Dist. No. 160,* 156 Wn.2d 62, 66, 124 P.3d 283 (2005). Under the federal authorities cited above, the fact that Ms. Gorman raised the issue in one, but not both, of her CR 50 motions does not preclude this Court from reviewing the issue.

Furthermore, even if Ms. Gorman's raising "duty" for the first time in her motion for judgment notwithstanding the verdict were objectionable, only one of the Defendants (Evans-Hubbard) actually objected. CP 1496-98; CP 1505-06. The Defendant who did not object, Pierce County, provided a substantive response and the trial court ruled on the motion. CP 1495-99; CP 1532-34; RP 1463-66. Thus, according to federal authorities, Pierce County has **waived** the objection on appeal. *Finjan, Inc. v. Secure Computing Corp.,* 626 F.3d 1197, 1203 (Fed. Cir. 2010); *Wallace v. McGlothan,* 606 F.3d 410, 418-19 (7th Cir. 2010); *Howard v. Walgreen Co.,* 605 F.3d 1239, 1243-44 (11th Cir. 2010), *cert.*

denied 132 S. Ct. 1795 (2012); *Art Attacks Ink, LLC v. MGA Entertainment*, 581 F.3d 1138, 1143 (9th Cir. 2009).

Finally, an appellate court can review an issue that was not raised in a motion for judgment as a matter of law if needed to prevent a "manifest injustice." *Clergeau v. Local 1181,* 162 Fed. Appx. 32, 34 (2nd Cir. 2005) (unpublished); *Rodick v. City of Schenactady,* 1 F.3d 1341, 1347 (2nd Cir. 1993). *See also* Miller & Wright, 9B FED. PRAC. & PROC. CIV. § 2537 "Renewal of Motion for Judgment as a Matter of Law after Trial" (3rd ed. 2012). "Manifest injustice" occurs when a jury's verdict wholly lacks legal support. *Pahuta v. Massey-Ferguson, Inc.,* 170 F.3d 125, 129 (2nd Cir. 1999).

Here, the Defendants provided no authority for the proposition that Ms. Gorman owed a duty to close her back door in the morning when she had only seen Betty and Tank loose in the afternoons and early evenings, and she had no way of knowing that Betty and Tank would enter her home and attack her while she was sleeping. Based on "mixed considerations of 'logic, common sense, justice, policy, and precedent,'" Ms. Gorman owed no duty to close her back door. *Christensen,* 156 Wn.2d at 66.

> In particular, the plaintiff may not be required to surrender a valuable right or privilege merely because the defendant's conduct threatens him with what would otherwise be an unreasonable risk. Because the defendant builds a powder mill or runs a railroad near his property, he need not

> abandon it, or take special precautions against fire. He is not to be deprived of the free, ordinary and proper use of his land because his neighbor is negligent, and he may leave the responsibility to the defendant.

William L. Prosser, THE HANDBOOK OF THE LAW OF TORTS § 65, "Contributory Negligence," p. 425 (4th ed. 1971). To allow the jury's finding of comparative negligence to stand when Ms. Gorman owed no legal duty would result in a manifest injustice. Thus, Ms. Gorman respectfully requests that the Court reverse the denial of Ms. Gorman's motions for directed verdict and judgment notwithstanding the verdict, and strike the 1% comparative fault assessed by the jury.

B. A MERE SCINTILLA OF EVIDENCE WAS NOT ENOUGH TO ALLOW COMPARATIVE NEGLIGENCE TO GO TO THE JURY.

There must be "substantial evidence," as opposed to a "mere scintilla" of evidence, to support a verdict; substantial evidence is evidence of a character "which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Hojem v. Kelly,* 93 Wn.2d 143, 145, 606 P.2d 275 (1980). A verdict cannot be based on mere theory or speculation. *Id.* In addition, as the Court conducts its *de novo* review,[1] it must remember that a victim of an

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[1] Pierce County argues that the Court should not "reweigh the evidence and substitute its judgment for that of the jury." Pierce County's Response at 21. However, the Court is required to conduct a *de novo* review of the record, so examination of the evidence and the drawing of reasonable inferences based on the evidence is necessary. *See Jacob's*

accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident. *Hines v. Chicago, M. & St. P. Ry. Co.,* 105 Wn. 178, 184-85, 177 P. 795 (1918). *See also Hojem,* 93 Wn.2d at 145 ("The standard must be one of conduct, rather than of consequences.").

There is no dispute that at the time of Sue's August 21 attack, she and her neighbors felt that the area was safe enough for people to leave their sliding doors open overnight. Rick Russell and Defendant Zachary Martin testified that they did leave their doors open. Sue had been able to leave her sliding door open overnight during the **five years** prior to the August 21, 2007 attack without incident. This included a period of **more than a year** between the time that Betty came to live on the Wilson property and Betty's first attempted attack on Sue as she brought in her groceries on February 10, 2007.[2] Sue had never seen Betty or Tank roaming loose in the morning hours prior to August 21, 2007.[3] Moreover,

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Meadow Owner's Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 767 n.12, 162 P.3d 1153 (2007) (standard of review).

[2] Betty began living on the Wilson property in December 2005. RP 1080-81.

[3] Defendant Zachary Martin testified that Betty **always** slept with him in his bed, and that was where Betty was on the night before Sue's attack. RP 1060 (emphasis added). Mr. Martin also testified that Betty and Tank were both playing **inside the house** in the morning prior to Sue's attack. RP 1061 (emphasis added). If Mr. Martin's testimony was accurate, then Sue would have had no reason to expect that Betty and Tank would be running loose in the early morning.

when Betty had tried to attack Sue in the past, it was always at times when Sue was outside with Misty; Betty and Tank had never entered Sue's home when Misty had not been active or making noise outside. Ex. 12; RP 1262-65; Ex. 14; RP 1269-70. Betty and Tank had never entered Sue's home while she was sleeping prior to August 21, 2007. Based on these facts, a jury could **only speculate** that Sue should have known that Betty and Tank would enter her home in the morning while she was asleep. Speculation is not sufficient to sustain a verdict.

This case is similar to *Hojem v. Kelly,* 93 Wn.2d 143, 606 P.2d 275 (1980). There, the plaintiff sued the owners of a riding stable, alleging that they were negligent in failing to warn her of and insulate her from riderless horses in the riding area. *Id.* at 144. The trial judge granted the defendant's motion or judgment notwithstanding the verdict, and the plaintiff appealed. The evidence showed that the plaintiff had ridden in the presence of riderless horses in the past, but there was no evidence that Midnight, the horse in question, had exhibited dangerous or vicious propensities before. *Id.* at 146. The owner testified that horses sometimes nipped at each other, and conceded that in the past a horse may have attempted to bite a horse with a rider. *Id.* at 146-47. There was testimony that on the date of the incident, Midnight had approached the plaintiff's horse and followed or run alongside. *Id.* at 146. However, there was no

evidence that Midnight nipped or attempted to nip the plaintiff's horse. *Id.* at 147. The Washington Supreme Court affirmed the trial court's dismissal of the plaintiff's claims:

> We agree with the trial court and the majority of the Court of Appeals that there was insufficient evidence to establish negligence on the part of the Kellys and the case should not have been submitted to the jury. To hold to the contrary would indeed be focusing upon the consequences rather than the conduct before the event.

Id. at 147-48.

Just as there was no evidence of Midnight having nipped the plaintiff's horse on prior occasions in *Hojem,* there was no evidence here that Betty and Tank had ever been loose in the late evening or early morning hours prior to August 21, 2007. *See* RP 1060-61. There was no evidence that Betty and Tank had ever entered Sue's home in the early morning prior to August 21. There was no evidence that Betty and Tank had attempted to enter Sue's home at a time when Misty had not been running or making noise outside immediately prior to Betty and Tank's entry. There was no evidence that Betty and Tank had entered Sue's home while she was sleeping prior to August 21. There was no evidence suggesting that having entered Sue's home, Betty and Tank would stay in Sue's bedroom and attack her instead of following and attacking Misty as Misty ran out of the bedroom. Under these circumstances, there was

insufficient evidence of comparative negligence to support the jury's verdict. The Defendants' comparative negligence defense should have been dismissed.

C. ALTERNATIVELY, THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE EMERGENCY DOCTRINE.

If the Court determines that the comparative negligence defense should have gone to the jury, then the Court should also find that the trial court erred in failing to give an emergency doctrine instruction.

The Defendants incorrectly assert that Ms. Gorman did not propose an instruction on the emergency doctrine. Although the argument below was somewhat convoluted, once the trial court decided that Ms. Gorman's actions after the pit bull attack had begun could constitute a separate basis for comparative negligence,[4] Ms. Gorman requested that the standard emergency doctrine instruction (WPI 12.02) be given so that she could argue the theory to the jury:

> MR. McKASY: With regard to the Court's decision to remove Item No. 2 on Instruction No. 5 –
>
> THE COURT: Correct.

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[4] This was an issue the trial court raised *sua sponte* after the parties had already worked through the jury instructions. RP 1380-82. Previously, the trial court did not see the events which took place after the pit bull attack started as a separate basis for comparative negligence, so Ms. Gorman had argued against inclusion of the emergency doctrine instruction. *Id.* Only later, after the trial court changed its mind upon hearing argument from the parties, did Ms. Gorman find it necessary to propose inclusion of WPI 12.02. RP 1472-73.

MR. McKASY: —and the determination that the second provision of the comparative negligence would remain in that instruction, just for the record, the plaintiff would take exception. . . .

Your Honor, also if that language is left in, should not the plaintiff then get the emergency instruction –

MR. WILLIAMS: I don't think so.

MR. McKASY: —and be allowed to argue from that?

MR. WILLIAMS: It was not raised by the plaintiff. It was not raised or anything.

MR. McKASY: Well, this revision, or this addition was not made – this determination was made, **but if that is going to remain in the instruction, I think Instruction 12.02 should be included, then, as well with regard to the emergency doctrine.**

THE COURT: And, again, based on Mr. Williams' and Mr. Lancaster's argument, I'm going to say no because they're saying that the choice would have been between two alternatives of avoiding or minimizing injury such as going through the window or the door as opposed to a choice between herself or the dog. I think that's the difference in the analysis, and so I'm not going to allow the emergency instruction 12.02.

MR. McKASY: For the record, the plaintiff would take exception to that, Your Honor.

RP 1472:6 – 1473:18 (emphasis added).

Ms. Gorman's request that WPI 12.02 be given was made in response to the trial court's *sua sponte* inquiry regarding the Defendants'

proposed alternative theories of comparative negligence, and the trial court's decision to leave a second comparative negligence theory in instruction no. 5. Although Ms. Gorman's request for WPI 12.02 was not made in writing, the request was made on the record and the other parties had the opportunity to respond.

The Defendant's cited case, *Todd v. Harr, Inc.,* 69 Wn.2d 166, 417 P.2d 945 (1966), is inapposite. There, the defendant wanted an instruction stating that it was not in violation of a particular ordinance. *Id.* at 170. However, the trial court determined that the ordinance did not apply in the case. *Id.* That, coupled with the fact that the defendant had not proposed a written instruction based on the ordinance, led the appellate court to conclude that the trial court's refusal to give a negative instruction was not an abuse of discretion. *Id.*

Here, Ms. Gorman was not proposing a non-standard or negative jury instruction; she specifically requested WPI 12.02, an approved instruction, on the record. While it is true that Ms. Gorman did not submit a sheet of paper with WPI 12.02 typed out separately, the trial court certainly had access to the bound Washington Practice copy of the instruction as it considered the parties' arguments regarding the emergency doctrine. Thus, the language of the proposed instruction was before the trial court, and the trial court refused to give the instruction.

This is a factually distinguishable situation from *Todd, supra.*

The Defendant's other cited case, *Heggelund v. Nordby,* 48 Wn.2d 259, 292 P.2d 1057 (1956), is also not helpful. The case contains no discussion of the circumstances under which the plaintiff's requests for instructions arose, and the case cites to a court rule which is no longer in effect. *Id.* at 263-64.

The rule that was in effect at the time of trial, CR 51, provides that "the trial court may disregard any proposed instruction not submitted in accordance with this rule." CR 51(e). Here, however, the trial court not only considered Ms. Gorman's verbal request that WPI 12.02 be given, the trial court raised the issue *sua sponte* and asked to hear argument from the parties as to whether the instruction should be given. Ms. Gorman specifically referenced WPI 12.02 and requested that the standard language be given. The trial court decided before a written instruction could be submitted that the instruction would not be read to the jury. Under these unusual circumstances, the trial court's decision not to give the instruction should be reviewed for abuse of discretion.

Based on the trial court's ruling, it is clear that it abused its discretion in failing to give the emergency doctrine instruction simply because Ms. Gorman was faced with choosing between different courses of action after the pit bulls started attacking her. RP 1472 – 1473.

The emergency doctrine is specifically meant to deal with choices:

> The doctrine applies only in limited circumstances and recognizes the necessity of **quick choice between courses of action** when such peril arises. [citation omitted] Importantly, the doctrine "comprehends the **availability of and a possible choice between courses of action** after the peril arises. Otherwise, the doctrine blends or merges with the theory of unavoidable accident." . . . Even where there is conflicting evidence, the emergency instruction may be proper.

Kappelman v. Lutz, 167 Wn.2d 1, 9-10, 217 P.3d 286 (2009) (emphasis added). Even if the evidence was conflicting, the trial court should have given the instruction. *Id.*

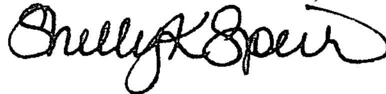
The Defendants argue that the emergency doctrine does not apply in this case because Ms. Gorman was found negligent. However, the trial court had not ruled as a matter of law that Ms. Gorman was comparatively negligent; that issue was left for the jury to decide. Thus, at the time the trial court was considering whether to give the emergency doctrine instruction, the jury could just as easily have found that Ms. Gorman was not negligent. The doctrine would have applied in that circumstance, so the trial court should have given the instruction. Because the trial court did not give the instruction, the jury was not given the law regarding Ms. Gorman's actions after the pit bull attack commenced. Ms. Gorman was prejudiced by this failure because the jury could not properly consider the evidence.

II. CONCLUSION

Based on the foregoing, Ms. Gorman respectfully requests that the Court reverse the trial court's rulings on her motions for a directed verdict and judgment notwithstanding the verdict, and strike the 1% comparative fault assessed by the jury. If the Court does not strike comparative fault, Ms. Gorman asks that the Court find that the emergency doctrine instruction should have been read to the jury, and remand to the trial court for further proceedings.

Respectfully submitted this 14th day of May, 2012.

TROUP, CHRISTNACHT, LADENBURG, McKASY & DURKIN, INC., P.S.



SHELLY K. SPEIR, WSBA # 27979
Of Attorneys for Respondent

APPENDIX 1

HANDBOOK
OF
THE LAW OF TORTS

By

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Professor of Law
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FOURTH EDITION

HORNBOOK SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1971

166-168

itself is concerned, however, the reasonableness of the plaintiff's conduct is to be determined by balancing the risk against the value which the law attaches to the advantages which he is seeking.

In particular, the plaintiff may not be required to surrender a valuable right or privilege merely because the defendant's conduct threatens him with what would otherwise be an unreasonable risk. Because the defendant builds a powder mill [81] or runs a railroad [82] near his property, he need not abandon it, or take special precautions against fire. He is not to be deprived of the free, ordinary and proper use of his land because his neighbor is negligent, and he may leave the responsibility to the defendant. At least this is true where the danger is still relatively slight, and the alternative means of protection expensive or burdensome. And due regard must be given to the importance of the plaintiff's interest in asserting the legal right itself. But on the other hand, there are situations where insistence upon a right, such as the use of a highway,[83] or the right of way,[84] or the boarding of an overcrowded street car,[85] may clearly involve a risk out of all proportion to its value, and the plaintiff may then be negligent.

Scope of the Defense

Within the limits above indicated, and in the absence of modifying legislation,[86] the contributory negligence of the plaintiff is a complete bar to his action for any common law negligence of the defendant. Whether it is a bar to the liability of a defendant who has violated a statutory duty is a matter of the legislative purpose which the court finds in the statute. If it is found to be intended merely to establish a standard of ordinary care for the protection of the plaintiff against a risk, his contributory negligence with respect to that risk will bar his action, as in the case of common law negligence.[87] But there are certain unusual types of statutes, such as child labor acts,[88] those prohibiting the sale of dangerous articles such as firearms to minors,[89] the Federal Safety Appliance and

81. Judson v. Giant Powder Co., 1895, 107 Cal. 549, 40 P. 1020. Cf. North Bend Lumber Co. v. City of Seattle, 1921, 116 Wash. 500, 199 P. 988 (dam); Spencer v. Gedney, 1927, 45 Idaho 64, 260 P. 699 (fire).

82. Leroy Fibre Co. v. Chicago, M. & St. P. R. Co., 1914, 232 U.S. 340; Louisville & N. R. Co. v. Malone, 1897, 116 Ala. 600, 22 So. 897; Martin v. Western Union R. Co., 1868, 23 Wis. 437; Donovan v. Hannibal & St. J. R. Co., 1886, 89 Mo. 147, 1 S.W. 232; Kellogg v. Chicago & N. W. R. Co., 1870, 26 Wis. 223.

83. Wright v. City of St. Cloud, 1893, 54 Minn. 94, 55 N.W. 819; Harris v. Clinton, 1887, 64 Mich. 447, 31 N.W. 425. Cf. Clayards v. Dethick, 1848, 12 Q.B. 439; Holle v. Lake, 1965, 194 Kan. 200, 398 P.2d 300; Provenzo v. Sam, 1967, 27 App.Div.2d 442, 280 N.Y.S.2d 308, reversed on other grounds, 1968, 23 N.Y.2d 256, 296 N.Y.S.2d 322, 244 N.E.2d 26.

84. Rosenau v. Peterson, 1920, 147 Minn. 95, 179 N.W. 647.

85. Harding v. Philadelphia Rapid Transit Co., 1907, 217 Pa. 69, 66 A. 151. Compare, as to fa take precautions against defendant's threat of fire: Pribonic v. Fulton, 1922, 178 Wis. 393, 190 N.W. 190; Nashville, C. & St. L. R. Co. v. Nants, 1933, 167 Tenn. 1, 65 S.W.2d 189; Morgan & Bros. v. Missouri, K. & T. R. Co. of Texas, 1917, 108 Tex. 331, 193 S.W. 134.

86. See infra, § 67.

87. Dart v. Pure Oil Co., 1947, 223 Minn. 526, 27 N.W.2d 555; Wertz v. Lincoln Liberty Life Ins. Co., 1950, 152 Neb. 451, 41 N.W.2d 740; Payne v. Vance, 1921, 103 Ohio St. 59, 133 N.E. 85; Richardson v. Fountain, Fla.App.1963, 154 So.2d 709; Browne v. Siegel, Cooper & Co., 1901, 191 Ill. 226, 60 N.E. 815.

88. Karpeles v. Heine, 1919, 227 N.Y. 74, 124 N.E. 101; Pinoza v. Northern Chair Co., 1913, 152 Wis. 473, 140 N.W. 84; Dusha v. Virginia & Rainy Lake Co., 1920, 145 Minn. 171, 176 N.W. 482; Terry Dairy Co. v. Nalley, 1920, 146 Ark. 448, 225 S.W. 887; Boyles v. Hamilton, 1965, 235 Cal.App.2d 492, 45 Cal.Rptr. 399.

89. Tamiami Gun Shop v. Klein, Fla.1959, 116 So.2d 421; McMillen v. Steele, 1923, 275 Pa. 584, 119 A. 721. Compare, as to protection of intoxicated persons: Hauth v. Sambo, 1916, 100 Neb. 160, 158 N.W. 1036; Soronen v. Olde Milford Inn, 1964, 84 N.J.Super. 372, 202 A.2d 208; Schelin v. Goldberg, 1958, 188 Pa.Super. 341, 146 A.2d 648. Also Van Gaasbeck v. Webatuck Cent. School Dist. No. 1, 1968, 21 N.Y.2d 920, 287 N.Y.S.2d 77, 234 N.E.2d 243 [illegible] n school bus how to cross

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STATE OF WASHINGTON

BY
DEPUTY

CERTIFICATE OF SERVICE
Pursuant to CR 5(b), I certify that copies of this document were mailed or transmitted by messenger this date to all parties or their counsel of record.
DATED this 14th day of May, 2012.

Shelly K. Speir, WSBA # 27979

IN THE COURT OF APPEALS, DIVISION II, OF THE STATE OF WASHINGTON

SUE ANN GORMAN, Respondent/Cross-Appellant, v. PIERCE COUNTY, Appellant.	NO. 42502-5-II **CERTIFICATE OF SERVICE**

Shelly K. Speir, on oath, hereby states and declares:

On May 14, 2012, I caused copies of the Respondent/Cross-Appellant's Reply Brief and this Certificate of Service to be filed with the Court and served via legal messenger on the following:

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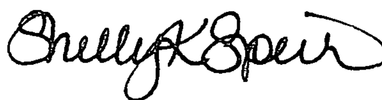
I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate to the best of my knowledge.

DATED this 14th day of May, 2012 at Tacoma, Washington.



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