No. 33992-1-III

COURT OF APPEALS,
DIVISION III,
OF THE STATE OF WASHINGTON

AHMET HOPOVAC,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and KIMBERLY ALLEN

Defendants-Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

On May 24, 2011, Appellant Ahmet Hopovac was interrogated and tortured by members of the Poco Locos gang. CP 151-52; 154 (Leveque Kobluck Dec., Ex. A, p. 72:6-16; p. 90:5-p. 92:9). During this ordeal, Mr. Hopovac suffered the forcible removal of both large toenails with pliers, as well as the near-amputation of three fingers with an ax. CP 153-56; 261-63 (*Id.*, Ex. A, p. 91:19-p. 92:9; p. 98:16-23; Ex. P, Surgical Consultation, Anthony M. Sestero, M.D. 5/24/11/).

At the time of this attack, Mr. Hopovac was under community supervision by Appellee Washington State Department of Corrections (hereinafter DOC). CP 217-20 (*Id.*, Ex. K). Conditions of his supervision included a requirement that he remain in Grant County and a prohibition on possession of firearms -- both of which limited his ability to protect himself from the Poco Locos gang. CP 217 (*Id.*, Ex. K). When circumstances in Grant County indicated that Mr. Hopovac was in danger of death or serious bodily injury from the Poco Locos gang, he visited his DOC community supervision office and pleaded for help to escape the danger to his parent's home in Idaho. CP 140; 137; 129-30; 135-36; 148-49 (*Id.*, Ex. A, p. 46:11-23; p. 43:1-3; p. 20-24; p. 41:16-42:1; p. 54:23-55:1-3). The Department of Corrections had previously agreed to transfer

Mr. Hopovac to Idaho but had failed to file the correct paperwork with Idaho, thus delaying approval of the transfer. CP 213; 198-200; 204-07; 164. (*Id.*, Ex. I, p. 1; Ex. E, p. 1-3; Ex. G, p. 1-4; Ex. B, p. 22:2-7.) Department of Corrections Supervisor Kimberly Allen responded to Mr. Hopovac's pleas for help and protection by telling him that she would not help him unless he first filed a police report, despite the fact that he was reasonably afraid to approach the police department due to the threat of gang violence against him if he left her office and traveled to the police department. CP 137; 136; 138-39 (*Id.*, Ex. A, p. 43:20-24; p. 42:18-43:24; p. 44:17-45:2). Ms. Allen took no action to assist Mr. Hopovac to escape his danger and refused to. CP 136-39 (*Id.*). Ms. Allen also failed to adequately review his computerized file while he was in the office with him, and thus failed to realize that the Department had the authority to take Mr. Hopovac into immediate custody and that it had failed to include the proper paperwork in its transfer request to Idaho. CP 196 (*Id.*, Ex. D, p. 68:9-12).

Mr. Hopovac's ensuing claim for damages against the DOC failed when the trial court granted the DOC's motion for summary judgment. CP 275-76 (Order Granting Summ. J.). The trial court found that the DOC did not owe Mr. Hopovac a duty of protection, because community supervisees are not entitled to the full extent of "normal opportunities for

protection" described in the Restatement (Second) of Torts § 314A as adopted by Washington courts. *See, e.g., Shea v. City of Spokane*, 17 Wn. App. 236, 242 (1977). In its ruling, the trial court declared:

> So the question then becomes are we talking about normal opportunities as it applies to the individual who has no restrictions on their liberty or are we talking about normal opportunities as it applies to somebody who has restriction on their liberty as a result of their criminal history.
>
> In this case, normal opportunities the court believes more appropriately would be normal opportunities as they pertain to somebody who has had some restrictions placed on them as a result of a prior criminal history.

Rep. of Proceedings of Summ. J. Hr'g., p. 27:21-28:8. As will be explained below, this finding contradicts the Restatement and Washington case law and violates important public policy.

Accordingly, Mr. Hopovac files this appeal seeking to reverse the trial court's grant of summary judgment on the issue of duty. A careful analysis of Restatement of Torts 2nd § 314(A) as interpreted in Washington case law points toward a duty owed by the Department of Corrections to persons under community supervision. Once the existence of a duty to protect supervisees is established, it is apparent that, had the Defendants met the standard of reasonable care proportional to their restrictions on Mr. Hopovac's ability to protect himself, Mr. Hopovac would not have been injured. The fact that Defendants may dispute the

factual testimony of Mr. Hopovac and expert Larry Valadez is a matter for the jury and insufficient to grant a motion for summary judgment under CR 56.

II. ASSIGNMENT OF ERROR

The Superior Court of Grant County, State of Washington, erred in granting Appellee's Motion for Summary Judgment on the grounds that the Department of Corrections owes no duty of protection to its supervisees. The trial court acknowledged that a duty to supervisees was an issue of first impression in Washington, and stated that the Court of Appeals might well find that such a duty exists. Rep. of Proceedings of Summ. J. Hr'g., p. 16, 28-29).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Contrary to the grant of the Department of Corrections' motion for summary judgment, does the Department of Corrections have a duty to protect persons whose ability to protect themselves is limited by the terms of Department of Corrections Community Supervision?[1]

[1] The DOC also raised an additional argument below that the trial court did not reach. *See* CP 269 (Def.'s Reply Mem. Supporting Summ. J., p. 6). This involved a relaxation of the duty owed to third party victims after a supervisee has absconded from community supervision. *Husted v. State*, 187 Wn.App. 579 (2015). *Husted* is inapplicable to duties owed to the supervisee and is factually distinguishable because the breach of duty that caused Mr. Hopovac's injury occurred while he remained under supervision and the breach is what caused him to leave supervision in order to protect himself.

IV. STATEMENT OF THE CASE

The facts of the case are largely irrelevant to this appeal, which centers simply on the existence of a legal duty. A brief outline is included here to orient the Court to Mr. Hopovac's situation.

a. Ahmet Hopovac was subject to community supervision by the Department of Corrections and its worker, Kimberly Allen. Terms of his supervision limited his ability to protect himself.

Ahmet Hopovac completed a felony drug possession sentence at the Grant County jail and was assigned to Community Corrections Officer ("CCO") Peter Markovics on January 19, 2011. CP 217-20 (Leveque Kobluk Dec., Ex. K.). Upon his assignment to CCO Markovics, Mr. Hopovac requested a transfer of his supervision to Idaho, because he did not have a permanent place to reside in Washington and had family support and a place to live in Idaho. CP 131-33; (*Id.*, Ex. A, p. 30-31; 33:4-34:7.). However, CCO Markovics failed to attach the required paperwork with his request to transfer supervision to Idaho, and for that reason it was denied on May 2, 2011, a few weeks before Mr. Hopovac was assaulted and suffered serious injuries. CP 204-07; 164 (*Id.*, Ex. G; Ex. B, p. 22:2-7.). Later on May 2, 2011, CCO Markovics re-submitted the transfer request with the required police report attached. CP 164-65 (*Id.*, Ex. B, p. 22:16-p. 23:4.). Conditions of his supervision included a

prohibition on possession of firearms, along with a requirement that he remain in Grant County. CP 217-20 (*Id.*, Ex. K).

b. Mr. Hopovac reasonably perceived an imminent threat of death or bodily harm from the Poco Locos gang.

On or about April 17, 2011, Mr. Hopovac was at the home of an acquaintance, Christopher Jones. CP 141-44 (*Id.*, Ex. A, p. 47:21-25-p. 48:25; p. 49:10-p.50:4). While Mr. Hopovac was at the Jones residence, a member of the violent gang Poco Locos arrived at the house. CP 140; 157; 269-70 (*Id.*, Ex. A, p. 46:17-23; p. 123:5-10; Ex. R). This gang member, Gilberto Valdovinos Medina (a/k/a "Diablo") was attempting to conceal a murder weapon at the home. CP 157-58 (*Id.*, Ex. A, p. 123-24). The reason Diablo left the firearm at Jones' home was because he did not want to take the risk of being pulled over with it. CP 158 (*Id.*, Ex. A, p. 124:12-17).

Christopher Jones thereafter decided to inform the police about the murder involving Diablo. CP 140 (*Id.*, Ex. A, p. 46:11-16). As a result, members of the gang began to threaten Mr. Jones. CP 139 (*Id.*, Ex. A, p. 45: 8-22). The gang members were threatening Mr. Jones and his family with harm. CP 139 (*Id.*, Ex. A, p. 45:8-22). Members attempted to break into Mr. Jones' home. CP 139 (*Id.*). Because Mr. Hopovac was staying with Mr. Jones and was present at the time Diablo dumped the murder

weapon, the gang suspected that he, too, was a snitch and informing the police. CP 140 (*Id.*, Ex. A, p. 46:11-23). Members of the gang began to follow Mr. Hopovac. CP 137 (*Id.*, Ex. A, p. 43:1-3).

c. Mr. Hopovac appealed to the Department of Corrections for help to escape the imminent threat of death or bodily harm.

On or about May 3, 2011, Mr. Hopovac had a scheduled check-in at his DOC supervision office. CP 137 (*Id.*, Ex. A, p. 43:20-24). Because he feared that his movements were surveilled by gang members, he planned to attend the regular check-in supervision meeting to avoid arousing suspicion amongst the gang. CP 137 (*Id.*, Ex. A, p. 43:20-24). He planned to use this visit to advise the Department that his life was in danger and request protection. CP 137 (*Id.*, Ex. A, p. 43:20-24).

On May 3, 2011, Mr. Hopovac met with defendant, DOC Community Corrections Supervisor ("CCS"), Kim Allen. CP 135-36; 195 (*Id.* Ex. A, p. 41:16-p. 42:1; Ex. D, Allen Dep. p. 67:14-16). CCS Allen did not ask for a DOC computer despite having access to one while meeting with Mr. Hopovac. CP 196 (*Id.*, Ex. D, p. 68:9-12). She had the authority to check the DOC database regarding Mr. Hopovac. CP 162-63 (*Id.*, Ex. B, p. 13:9-p. 14:10). Mr. Hopovac pleaded for protection and urgently requested an immediate transfer to the State of Idaho because his

life was in danger. CP 148-49 (*Id.*, Ex. A, p. 54:23-55:1-3). Mr. Hopovac testified in his deposition that:

> "When my –when the shooting happened, when I went to Kimberly Allen for my check-in date, when I had expressed to her that my life was in danger, that was the time that I told her – I told her, you know, "I need to get out of Washington. You know, I need your help," and she just pretty much, you know, shut me down."

CP 134 (*Id.,* Ex. A, p. 34:11-16).

Mr. Hopovac told CCS Allen that he witnessed a gang member attempt to "pass off" a weapon used in a murder. CP 136 (*Id.*, Ex. A, p. 42:18-22). The gang threatened Mr. Hopovac's friend which prompted his friend to move out-of-state; Mr. Hopovac believed his life was in danger as well. CP 139-40; 146-47 (*Id.*, Ex. A, p. 45:8-22; p. 46:11-23; p. 52:4-17; p. 53:13-p.54:1).

d. The Department of Corrections failed to act reasonably to protect Mr. Hopovac.

Despite being alerted to the danger, CCS Allen told Mr. Hopovac that he needed to go to the police and obtain a police report, otherwise there was nothing that she could do to help him. CP 136-39 (*Id.* Ex. A, p. 42:18-p. 43:24; p. 44:17-p. 45:2).

Mr. Hopovac left her office knowing that he could not count on any protection from the Defendants. CP 137 (*Id.*, Ex. A, p. 43:1-24). Nor

was he allowed to leave Grant County or arm himself. CP 217-25 (*Id.*, Ex. K, Ex. L).

The DOC determined that he was out of compliance and withdrew his application for transfer to Idaho. CP 202 (*Id.*, Ex. F).

e. The Department of Corrections inaction and incompetent action resulted in grievous bodily injury to Mr. Hopovac.

As he feared, on May 24, 2011, Mr. Hopovac was interrogated, beaten and savagely tortured by members of the Poco Locos gang. CP 151-54. (*Id.*, Ex. A, p. 72:6-16; p. 90:5-p. 92:9). Mr. Hopovac's index, middle and ring fingers were nearly amputated with an ax and both of his large toenails forcibly removed with pliers. CP 153-55; 254-55 (*Id.*, Ex. A, p. 91:19-p. 92:9; p. 98:16-23; Ex. P, Surgical Consultation, Anthony M. Sestero, M.D. 5/24/11). Fortunately, his fingers were surgically re-attached but he has not fully recovered function in his hand or arm. CP 128-30; 155-56; 257-59 (*Id.*, Ex. A, p. 19:16-p. 21:15; p. 98:24-p. 99:4; Ex. Q, Sacred Heart Medical Operative Report 5/25/11).

f. Procedural History.

Mr. Hopovac filed a Complaint for Damages against the DOC and CCS Allen on June 13, 2014. CP 1-12 (Compl.). Defendants DOC and Allen filed a Motion for Summary Judgment on November 3, 2015, asserting that the DOC does not owe a duty of protection to supervisees

such as Mr. Hopovac. CP 264-72 (Def.'s Mot. and Mem. for Summ. J. Re: Duty). After oral arguments on December 3, 2015, The Superior Court of Grant County found that the duty of protection does not exist and granted the DOC's motion for summary judgment. Rep. of Proceedings of Summ. J. Hr'g., p. 28-29. Mr. Hopovac here appeals that ruling.

V. STANDARD OF REVIEW

Summary Judgment

CR 56(c) states that: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact..." A genuine issue of fact exists which precludes summary judgment, when reasonable minds could reach different factual conclusions after considering the evidence. *Klinke v. Famous Recipe Fried Chicken, Inc.* 94 Wn.2d 255 (1980). When reasonable minds could differ, the motion for summary judgment must be denied and the case must proceed to trial. In this case, Ms. Allen has a different version of events than Mr. Hopovac regarding whether or not she offered to assist him and the Department also contests the evidence of Plaintiff's expert, Larry Valadez, who opined that the Department violated the minimum standard of care that it owed to Mr. Hopovac. CP 173-75; 181-82 (*Id.*, Ex. C Valadez Dep. 48:11-p. 50:10; p. 60:17-p. 61:12). In

addition to the substantial dispute of material facts, it is the jury that decides the scope and application of any duty owed. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 763 (2015).

LEGAL ARGUMENT

THE DEPARTMENT OF CORRECTIONS HAS A DUTY TO PROTECT ITS COMMUNITY SUPERVISEES, TO THE EXTENT SUPERVISION DEPRIVES THOSE SUPERVISEES OF "NORMAL OPPORTUNITIES FOR PROTECTION."

1. The plain language of the Restatement of Torts and Washington case law suggests a DOC duty to protect community supervisees whose ability to protect themselves is limited by the terms of their supervision.

There is no affirmative duty to protect others from the criminal acts of third parties. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192 (1997) (internal citations omitted). However, when a "special relationship" exists between a defendant and either a third party *or* a foreseeable victim of the third party's tortious conduct, a duty arises. *See Couch v. Washington Dept. of Corrections*, 113 Wn. App. 556, 564 (2002). The Restatement (Second) of Torts, as adopted by Washington courts, identifies legal custody as such a special relationship:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Restatement (Second) of Torts § 314A, p. 118; *see also Shea v. City of Spokane*, 17 Wn. App. 236, 242 (1977). In *Shea*, the Court found that jailors have a duty toward prisoners because a prisoner is "deprived of his liberty, as well as his ability to care for himself." *Id.* (citing Restatement (Second) of Torts § 314A, p. 118.). The duty in *Shea* was found to be absolute and non-delegable because the plaintiff's ability to care for himself was absolutely abridged by his incarceration. *Id.* at 241-42. The duty of care includes a duty to protect against intentional misconduct of third parties, including assaults. *See generally Winston v. State*, 130 Wn. App. 61 (2005).

Washington law recognizes a special relationship between parole officers and their parolees. *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 318 (2005). That relationship and its corresponding duty is created by "the judgment and sentence and the conditions of release. . ." *Id.* Those in DOC charge need not be in physical custody to have a special relationship with the DOC. *Taggart v. State,* 118 Wash.2d 195, 223 (1992). While neither *Joyce* nor *Taggart* involved a § 314A(4) duty to protect the supervisee, they provide an analysis of the "special" relationship between the DOC and its supervisees which is helpful in this matter of first impression for the Court.

Shea stands for the proposition that, because custodial limitations on a person's liberty interfere with that person's ability to care for and

protect himself, the individual or entity imposing such limitation owes that person a duty to replace his lost ability to protect himself. *Shea,* 17 Wn. App. at 242. While the particular fact pattern in *Shea* involved an incarcerated jail inmate, *id.*, nothing in Washington case law or in the Restatement language limits the proportional application of that duty to other supervisees of DOC who are only partially restricted by the DOC in their ability to protect themselves. To the contrary, *Shea* and the Restatement language simply assert that the deprivation of one's ability to avail himself of his "normal opportunities for protection" gives rise to a duty to provide protection in lieu of the person's own ability to protect himself. Adding to this the special relationship recognized between parole officers and parolees in *Taggart* and *Joyce*, the plain language of the Restatement and the case law point to a duty on the part of the DOC to protect those subject to community supervision in proportion to the degree that their ability to protect themselves is limited by the DOC.

2. Public policy and logic support a DOC duty of protection toward community supervisees.

"Whether an affirmative duty to act exists depends upon many factors, including mixed considerations of logic, common sense, justice, policy, and precedent." *Rochon v. Saberhagen Holdings, Inc.*, 2007 WL 2325214,

at *1 (Wash. App. Div. 1, 2007) (citing *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243 (2001) (internal quotation omitted)).

It is established in Washington that the DOC owes duties of care and protection to inmates in physical custody. *Shea,* 17 Wn. App. at 242, *Winston v. State*, 130 Wn. App. at 61. These duties are based on the policy that, to the extent a legal custody relationship limits a person's normal opportunities to protect himself, the custodial entity or individual must provide protection to replace the curtailed normal opportunities to protect. *Shea,* 17 Wn. App. at 242. The policy is intended to restore the person in custody to the same level of care and protection he would have but for the custodial relationship, by imposing a duty on the entity limiting the person's ability to care for himself. This policy requires that the DOC have a duty to protect all in its custody, community supervisees as well as those in physical custody, unless and until the legislature or the courts decree otherwise.

Further, logic requires that the DOC have a duty to care and protect, proportionate to the extent a supervisee is deprived by the DOC of opportunities to protect himself. In *Shea*, the jail was found to bear full responsibility for the health and safety of an inmate in physical custody, because that inmate's ability to secure care for himself was completely extinguished by the conditions of his incarceration. *Id.* When a person is

subject to DOC supervision, the conditions of which limit, but do not extinguish, the supervisee's ability to care for and protect himself, it stands to reason that the DOC has a duty to care and protect that person to the degree the DOC limits the person's ability to protect himself. Such duty is not the absolute duty the DOC owes to inmates subject to 24/7 physical incarceration because their ability to protect themselves is only partially restricted by the DOC. Since individuals on community supervision have some ability, albeit restricted, to protect themselves, the DOC's duty exists to the extent the supervisee is deprived by the DOC of opportunities to protect himself. The extent of the duty will vary with the extent of limitation on the supervisee's options to protect himself, but the duty itself is required by public policy, logic and common sense.

3. The trial court erroneously created an exception to the § 314A duty of protection, disadvantaging individuals on probation or supervision.

Section 314A(4) of the Restatement (Second) of Torts, as adopted in *Shea*, imposes a duty upon persons or entities which take legal custody of individuals and limit those individuals' "normal opportunities for protection." Restatement (Second) of Torts, § 314A(4), p. 118; *Shea,* 17 Wn. App. at 242. Rather than follow the plain language of the Restatement and case law, which point to a DOC duty to all individuals whose ability to protect themselves is reduced by the government in the terms of their

imprisonment or community supervision, the trial court singled out those on community supervision for a lesser degree of safety. Rep. of Proceedings of Summ. J. Hr'g., p. 27:7-29:11. The court created a new distinction, not found in the Restatement, between normal opportunities for protection for individuals not in any sort of custody from normal opportunities for individuals under community supervision:

> So the question then becomes are we talking about normal opportunities as it applies to the individual who has no restrictions on their liberty or are we talking about normal opportunities as it applies to somebody who has restriction on their liberty as a result of their criminal history.

Id., p. 27:21-28:1. The court then found that supervisees are entitled only to the normal opportunities for protection permitted under the terms of their supervision, which are necessarily fewer than those enjoyed by individuals not on supervision:

> In this case, normal opportunities the court believes more appropriately would be normal opportunities as they pertain to somebody who has had some restrictions placed on them as a result of a prior criminal history.

Id., p. 28:4-8. This finding is in direct contradiction to the language and meaning of § 314A, which provides that one whose custody of another deprives the other of his normal opportunities for protection (enjoyed by everyone) has a duty to protect that person. Restatement (Second) of Torts § 314A, p. 118. The Court of Appeals in *Shea* found § 314A to require

that the jail completely replace an inmate's ability to care for himself when incarcerated. Nowhere in the Restatement or in Washington case law is there support for the proposition that supervisees alone have a lesser claim on safety. Such logic by extension would potentially overrule *Shea* since prisoners are also subject to restricted conditions of self-protection not experienced by individuals not in custody.

The trial court acknowledged the uncertainty of this position, and invited appellate review to clarify it:

> In addition, I don't find any case law that appears to cover this circumstance or these circumstances. . . . And without that type of support of case law or better interpretations from Appellate Courts under 314A or talking about 314A the court does not find that there is a duty in this case. . . . [T]here is the ability of the plaintiff to go appeal this and create new case law . . .

Rep. of Proceedings of Summ. J. Hr'g., p. 29:3-11. Because Washington appellate courts have described the applicable duty under the Restatement as matching the duty owed with the corresponding restriction imposed, this case must be reversed so that this trial court's new test based on confusion in applying the Restatement to community supervision does not confuse subsequent courts in fulfilling the public policies behind the Restatement as adopted by several Washington cases. *See, e.g., Shea v. City of Spokane*, 17 Wn. App. 236 (1977); *Winston v. State*, 130 Wn. App. 61 (2005); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628 (2010)

(holding that a jailor's duty is not subject to the defenses of assumption of the risk and contributory negligence in situations where the inmate caused his own harm).

VI. CONCLUSION AND PRAYER FOR RELIEF

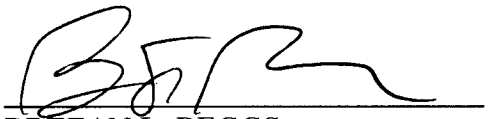
Applying the Restatement (Second) of Torts § 314A to the Department of Corrections in a community supervision factual scenario may be a matter of first impression in Washington, but applying that duty belongs to a jury when the material facts are disputed. The trial court, faced with a lack of case law on the subject and acknowledging a need for higher-court guidance, erroneously carved out a new exception to the duty of protection articulated in the Restatement (Second) of Torts § 314A. Under this ruling, the government can endanger a supervisee by limiting his or her right to protect themselves from dangerous third parties even though the government would be held liable for similarly endangering inmates or individuals outside the criminal justice system. In effect, a supervisee is punished for his offenses, not simply with restrictions on his liberty, as contemplated by our criminal code, but with an increased risk of danger from the torts of third parties. This risk is not shared by the general public or by inmates in physical custody. Logic, public policy, and the plain language of § 314A and Washington case law do not support this

lowered standard of safety for this class of citizens without a clear justification by the Legislature.

Mr. Hopovac respectfully requests that the Court reverse the trial court, find that the Department of Corrections owes a duty to protect its community supervisees from harm at the hands of third parties proportional to the limitations imposed by the Department on the supervisee to protect himself, and remand this case to trial on the issue of whether the Department of Corrections breached its duty, causing Mr. Hopovac's damages.

Respectfully submitted this 16th day of May, 2016.

PAUKERT & TROPPMANN, PLLC



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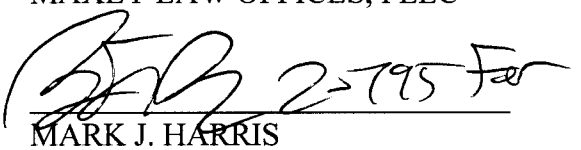

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