NO. 99265-7

SUPREME COURT OF THE STATE OF WASHINGTON

ANDREW P. LEITNER,

Petitioner,

v.

CITY OF TACOMA, and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

CITY OF TACOMA'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

William J. Pratt, WSBA #50139
Hall & Miller, P.S.
P.O. Box 33990
Seattle, WA 98133
Ph: (206) 622-1107
Fax: (206) 546-9613
wpratt@thall.com

Attorney for Respondent, City of Tacoma

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I. IDENTITY OF RESPONDING PARTY

The Respondent, City of Tacoma ("City"), respectfully requests that Mr. Leitner's Petition for Discretionary Review of the Court of Appeals August 18, 2020 published opinion, *Leitner v. City of Tacoma*, 15 Wn. App. 2d 1, 476 P.3d 618 (Div. II 2020), be denied.

II. COUNTER-STATEMENT OF THE CASE

This case arises under the Industrial Insurance Act, Title 51 RCW.

The City presented the testimonies of cardiologist Dr. Robert Thompson (CP at 722-83), certified industrial hygienist Frank Riordan (*id*. at 656-719), and Mr. Leitner (*id*. at 483-569) in its appeal to the Board. Mr. Leitner presented the testimonies of himself (*id*. at 575-645), cardiologist Dr. Peter Chen (*id*. at 853-919), and physician assistant Aubrey Young (*id*. at 786-838).

Dr. Robert Thompson is a Board-Certified, active practice physician specializing in cardiology and internal medicine. *Id.* at 726-28. Dr. Thompson performed an Independent Medical Examination ("IME") of Mr. Leitner on May 12, 2015. *Id.* at 732. Dr. Thompson testified that Mr. Leitner has a family history of heart disease, and his mother had a heart attack at a young age (in her 50s). *Id.* at 733-34. Additionally, Mr. Leitner was "definitely overweight." *Id.* at 737.

Dr. Thompson explained that Mr. Leitner had "coronary artery disease, atherosclerosis of his coronary arteries manifesting itself at first with angina pectoris, and then later as a myocardial infarction." CP at 739. "Atherosclerosis is a buildup of cholesterol in the artery walls that narrow...the arteries" that is caused by "high blood levels of cholesterol, high blood pressure, diabetes. Family history contributes to it, and just plain ol' [*sic*] age contributes to it." *Id*. at 740. Atherosclerosis is "at its peak in your mid 50s." *Id*. Mr. Leitner was 52 years old at the time of his examination by Dr. Thompson. *Id.* at 736.

"Atherosclerosis is common in every demographic...[though] you mainly see it in people over the age of 40." *Id*. at 756. Atherosclerosis of Leitner's coronary arteries was the cause of his angina pectoris symptoms and myocardial infarction. *Id.* at 741. Dr. Thompson explained, "angina pectoris is a type of pain you get from temporary lack of blood flow to the heart through arteries that are narrower than normal...it does not damage the heart. The heart just starts to ache." *Id.* at 739.

Mr. Leitner's angina pectoris episode on December 31, 2014 did not cause any occupational disease or injury, nor did Mr. Leitner suffer any permanent damage from that episode. *Id.* at 743. Leitner "did not suffer a myocardial infarction as a result of the incident on December 31st when he pulled up this anchor line." *Id*. at 746. Further, "the underlying cause [of

the angina pectoris] was buildup of cholesterol in his arteries. The exertion just brought out symptoms of that, but it didn't cause it." *Id*. at 783.

After reviewing Mr. Riordan's fireboat diesel exhaust exposure report, Dr. Thompson opined that "the exposure was not severe enough to pose any threat to the Claimant." CP at 749. Dr. Thompson observed, "If smelling diesel fumes caused – triggered immediate heart attacks, we would have heart attacks all over the place. It's just not one of the things that causes heart attacks." *Id.* at 751.

Dr. Thompson explained that Mr. Leitner's "heart problem" included his myocardial infarction and atherosclerotic buildup in his arteries. *Id*. at 755. Dr. Thompson could find no evidence that Leitner's employment with the City of Tacoma proximately caused, aggravated, or lit up his heart problems. *Id*. Mr. Leitner's employment did not proximately cause his myocardial infarction or atherosclerosis. *Id.* at 757. Mr. Leitner's "heart problem that was treated on" February 28, 2015 did not arise naturally and proximately from the distinctive conditions of his employment with the City. *Id.* at 758.

Frank Riordan is a certified industrial hygienist who testified at the request of the City. *Id.* at 660. Mr. Riordan performed exposure assessments on October 14th and 16th, 2015, aboard the fireboat Destiny. *Id*. at 664. Riordan's exposure assessments tested for a wide variety of

diesel exhaust constituents. *Id.* at 666. Mr. Riordan took measurements at the front and back of the boat, as well as inside the cabin. *Id*. at 665. During each assessment, the boat motor was operated at idle for two-hours. *Id*. at 666. The sensors used to collect the data were all placed in "breathing zones" that would be representative of worst-case exposure situations. *Id*. at 674-75.

Mr. Riordan explained that the levels of diesel byproducts that he measured were "typical for a city" though "I'd expect higher levels of diesel exhaust particulates during certain times of the day." CP at 693. From an industrial hygiene perspective, no special precautions were deemed necessary when doing work on this boat because the exhaust was adequately controlled. *Id.* at 694.

Dr. Peter Chen testified that a myocardial infarction is a progression of atherosclerosis. *Id.* at 861. Dr. Chen also identified six cardiac risk factors: diabetes, hypertension, high cholesterol, smoking, and family history; however, it was only reluctantly that Dr. Chen conceded obesity as a risk factor. *Id*. at 866; *see also, id*. at 873. Dr. Chen later explained, "obesity is important, no question…[obesity] increase all the risks… [Mr. Leitner] is obese, no question." *Id*. at 880.

When asked whether diesel fumes play any role in cardiac conditions, Dr. Chen explained that the articles provided to him by

Leitner's counsel say there is a connection, but "I don't know." *Id.* at 874. Indeed, the cause of Mr. Leitner's myocardial infarction was because he had coronary artery disease, which is the most common cause of death in America. *Id*. at 881-82.

Dr. Chen issued a concurrence with Dr. Thompson's May 12, 2015 IME. CP at 887-89. This concurrence was never withdrawn. *Id*. at 889. On June 11, 2015, the day after Dr. Chen issued his concurrence to Dr. Thompson's IME, Dr. Chen's office received a phone call from Mr. Leitner who was offering "advice" to Dr. Chen whilst "filling out his independent medical exam" and offering to come in to "see" Dr. Chen. *Id.* at 891-93. Mr. Leitner called Dr. Chen's office twice that day. *Id.* at 904.

Aubrey Young, physician assistant, also testified at the request of Mr. Leitner, when Leitner's attorney wasn't testifying on her behalf.[1] Ms. Young's work as a physician assistant has been in a family/general practice setting. *Id*. at 812. Ms. Young was not familiar with what "odds ratios" or "confidence intervals" were, nor how they influenced the credibility or weight of medical studies. *Id*. at 809. Ms. Young did not compare Mr. Meyers' articles to other relevant medical literature that has been published. *Id.* at 810.

[1] Leitner's attorney took the liberty of offering approximately six pages of testimony during his deposition of Ms. Young. *See* CP at 798-804.

Ms. Young testified that she "assumed" Leitner's myocardial infarction was work related because their office had done cholesterol labs (at some undisclosed time in the past), and he was not on any cholesterol medications that she was aware of. *Id*. at 806. Ms. Young did acknowledge that "age" is a risk factor for heart disease. *Id*. at 818-19.

Ms. Young also testified that on August 12, 2015, she had put in her chart notes that Mr. Leitner was "here today to discuss what has been going on with his L&I case so we are on the same page." CP at 824. Ms. Young confirmed that on Mr. Leitner's March 4, 2015 visit (shortly after his mild heart attack), Leitner made zero mention of any fume exposure whatsoever. *Id.* at 832-33.

On February 8, 2017, the Board issued its Decision and Order reversing the October 13, 2015 Department order allowing this claim for myocardial infarction under 6. *Id.* at 113-23. The Board noted that "critical" to the analysis "is understanding the nature of the heart problem that the Department allowed and when the problem started. The Department order allowed Mr. Leitner's claim for the heart problem treated on February 28, 2015…myocardial infarction, commonly called a heart attack." *Id.* at 116.

The Board found that "Mr. Leitner's myocardial infarction was caused by the progressive buildup of atherosclerotic plaque in his arteries

over many years combined with a portion of the plaque…breaking loose," his "myocardial infarction was not caused by any strenuous physical exertion at work, nor was it caused by his exposure to diesel fumes within the 72 hours just prior to his heart attack," and his "myocardial infarction did not arise naturally and proximately out of the distinctive conditions of his employment." *Id.* at 119. The Board found that "[T]he City soundly rebutted the statutory presumption." *Id*. at 115. On March 6, 2017, Mr. Leitner appealed the Board's February 8, 2017 Decision and Order to Pierce County Superior Court. *Id*. at 1-2.

On November 14, 2018, after the testimony was read to the jury, the jury was instructed, the Parties gave their closing arguments, and the jury was sent out for deliberation. VRP at 928-1004. On November 15, 2019, the jury returned its Verdict, finding that the Board was correct in deciding that the City had rebutted the RCW 51.32.185 statutory presumption, and that the Board was correct in deciding that Leitner did not prove by a preponderance of the evidence that his "heart problems" were an occupational disease. *Id*. at 1009-1011, CP at 1951. On December 14, 2018, the superior court entered a Judgment and Order affirming the February 8, 2017 Board Decision and Order denying this claim. CP at 1953-55. Mr. Leitner appealed the superior court judgment to the Court of Appeals, Division II.

On August 18, 2020, Division II filed its opinion affirming the December 14, 2018 Pierce County Superior Court Judgment. On November 24, 2020, the Court of Appeals granted the Department's Motion to Publish its opinion: *Leitner v. City of Tacoma*, 15 Wn. App. 2d 1, 476 P.3d 618 (Div. II 2020). Mr. Leitner's present Petition for Discretionary Review follows.

III. ARGUMENT

The Court of Appeals' published decision in this case is correct, soundly reasoned, and should not be disturbed. Mr. Leitner's petition fails to plead any colorable basis under RAP 13.4(b) to warrant this Court's review. Leitner's apparent arguments in support of his petition range widely in topic and clarity of argument, and each will be addressed to the extent permitted in the space allowed herein.

A. Whether the Board of Industrial Insurance Appeals Erred is Not an Issue Before This Court.

Division II correctly observed, "On an appeal of an industrial insurance claim from the superior court, the appellate court reviews the superior court's decision, not the Board's order." *Leitner*, 15 Wn. App. 2d at, 12 (citing RCW 51.52.140 and *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 200, 378 P.3d 139 (2016)). RCW 51.52.140 explains that "Appeal shall lie *from the judgment of the superior court* as in other civil

cases." Emphasis added. There is no authority supporting the notion that Leitner can appeal the Board's Decision and Order a second time, or indeed a third time, years after the issuance of the Board's decision below. *See* RCW 51.52.110.

Mr. Leitner's attempts to portray the Board of Industrial Insurance Appeals Decision as incorrect or flawed should be rejected as improper, irrelevant, and beyond the Court's present scope of review.

B. The Superior Court Permitted Leitner to Argue All Conceivable "Heart Problems" As Basis for Claim Allowance.

In no universe did the superior court limit Leitner to arguing for claim allowance for only his mild myocardial infarction, as Leitner (again) baselessly claims. *See* Petition at 9. The superior court enabled Leitner and the Department to argue any and all "heart problems" as bases for claim allowance and reversal of the Board's Decision and Order. *See* VRP at 83-86 (oral argument regarding the superior court's proper scope of review); CP at 1922 (Instruction No. 9 framing the issues for the jury in terms of "heart problems" versus "myocardial infarction"); *id.* at 1877, 1923 (Instruction No. 10 framing the burden of proof at the Board as being "on the employer to rebut the presumption with respect to all "*heart problems*"), emphasis added; *id*. at 1933 (Instruction No. 13, directing the jury, "*You* are to presume that if a firefighter experienced *any heart*

problems…then those activities were a cause of those *heart problems*"), emphasis added; *id*. at 1935 (Verdict form inviting the jury to consider all of Leitner's various alleged (and argued) "heart problems" in rendering their decision).

Leitner's briefing points to nowhere in the record that he was precluded by the superior court from arguing his various presumptive "heart problem" theories, because he never was. "Because the court did not limit the jury's consideration to only Leitner's February 28, 2015 myocardial infarction, Leitner's claim fails." *Leitner*, 15 Wn. App. 2d at 14-15; *see also, id.* at 17.

C. The Superior Court Properly Allocated Burdens of Proof at Trial.

The trial court gave Leitner's and the Department's proposed Instructions regarding the RCW 51.32.185 presumption and burdens of proof before the Board and before the trial court. The superior court did not misapply the burdens of proof at trial, and even if it did, this would have been error invited by Leitner and the Department through their requested Instructions and the trial court abiding those requests.

Spivey explains the burden upon employers appealing to the Board under RCW 51.32.185:

> We thus apply the Morgan theory to the presumption: once a firefighter shows that he or she suffers from a qualifying

> disease, RCW 51.32.185(1) imposes on the employer the burden of establishing otherwise by a preponderance of the evidence. To be clear, this is a burden both to produce contrary evidence and to persuade the finder of fact otherwise**...**
>
> We stress, however, that this standard does not impose on the employer a burden of proving the specific cause of the firefighter's melanoma. Rather, it requires that the employer provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors.

Spivey v. City of Bellevue, 187 Wn.2d 716, 735, 389 P.3d 504 (2017), emphasis added. "Whether the City rebutted the firefighter presumption by a 'preponderance of the evidence' is a question of fact that may be submitted to the jury." *Id*. at 727-728.

Mr. Leitner offered an Instruction that informed the jury of two Board "determinations": that the employer rebutted the presumption by a preponderance of the evidence, and that Leitner did not suffer an occupational disease. CP at 1875. Leitner's proposed instruction was given by the court as Instruction No. 8, with additional language added. *Id*. at 1921.

The trial court also gave Instruction No. 10, which explained the burdens of proof before the superior court, and before the Board. *Id*. at

1923. This instruction was offered by Leitner.[2] *Id.* at 1877-78. Instruction No. 10 explained that it was Leitner's burden at trial to

> establish by a preponderance of the evidence that the decision of the Board is incorrect.
>
> At the hearing before the Board…the burden of proof is on the employer to rebut the presumption that 1) claimant's heart problem(s) arose naturally out of his conditions of employment as a firefighter and, 2) his employment is a proximate cause of his heart problem(s).

The superior court also gave Instruction No. 13, providing that "*You* are to presume that if a firefighter experienced any heart problems within seventy-two hours of exposure to smoke…or within twenty-four hours of strenuous physical exertion…then those activities were a cause of those heart problems."[3] *Id.* at 1926, emphasis added. Instruction No. 14 then told the jury that "*If the employer cannot meet this burden*…the firefighter employee maintains the benefit of the occupational disease

[2] However, Leitner offered additional language that was not given, underscored and bolded here: "The burden of proof is on the firefighter to establish by a preponderance of the evidence that the decision of the Board is incorrect **by showing that the Board did not meet the burden or correctly apply the presumption**."

[3] "RCW 51.52.115 does not fundamentally flip the burden of proof applicable at department or board proceedings. Rather, it imposes on the party challenging a board decision the burden to show that the Board's decision was incorrect by demonstrating that the Board's "findings and decision are erroneous." *Gorre*, 184 Wn.2d at 36. Accordingly, it was proper for the jury to be informed of the employer's burden at the board level so that it could determine whether the firefighter had made this demonstration." *Spivey*, 187 Wn.2d at 736-37.

presumption." *Id*. at 1927, emphasis added. This Instruction, too, was offered by Leitner. *Id.* at 1894, 1902.

The superior court gave Leitner and the Department the RCW 51.32.185 instructions they requested, with only minor revisions. The burden of production and persuasion was placed squarely on the shoulders of the City at trial, with only a cursory nod to Leitner's statutory burden as petitioner/plaintiff under RCW 51.52.115. Leitner's claim that the superior court committed "reversible error by failing to place the proper burden of proof on the City" is meritless.

D. The City Rebutted the Statutory Presumption of Causation.

While Leitner failed to present or preserve any colorable argument before the Court of Appeals that the City failed to present substantial evidence to support the jury's Verdict, other sufficiently vague arguments by Leitner could arguably be construed as Leitner intending such an argument. The City argues here (in an abundance of caution) that substantial evidence supports the superior court's Verdict and Judgment, and that Leitner was not entitled to judgment as a matter of law.

"Findings of fact supported by substantial evidence are verities on appeal…Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992), internal quotations and citations omitted.

The medical testimony unequivocally proves that Leitner had two of the risk factors identified by statute as rebutting the statutory presumption under RCW 51.32.185. Former RCW 51.32.185(1)(c) expressly stated that the "presumption of occupational disease…may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, **physical fitness and weight**, lifestyle, **hereditary factors**, and exposure from other employment or nonemployment activities." Emphasis added; *see also*, current RCW 51.32.185(1)(d). **Mr. Leitner was obese and had a family history of heart disease**. CP at 630, 733-34, 737, 880.

Dr. Thompson, and Dr. Chen, testified that Leitner also had non-occupational risk factors for heart attack, as recognized by current medical science, which include a family history of heart disease, advancing age, and obesity. *See, e.g.*, *id*. at 740, 866, 873.

Leitner's argument that the City was unable to produce sufficient evidence to rebut the statutory presumption of RCW 51.32.185, as a matter of law, is without merit. As this Court pointed out in *Spivey* – whether the presumption was rebutted is a question of fact properly given to the jury. Leitner's summary judgment motion arguing to the contrary was properly

rejected. *See also*, *Leitner*, 15 Wn. App. 2d at 18-19 (declining to review summary judgment denial after the case had been submitted to the jury).

E. The Superior Court Judge Lacked Authority to Revise the Findings of Fact Read to the Jury, or to Usurp the Jury's Role in Rendering Verdict in this Case.

The superior court judge lacked authority to unilaterally dispose of Leitner's appeal on the merits after a jury had been demanded, or to edit/revise the Board's findings of fact prior to providing those findings to the jury pursuant to WPI 155.02. RCW 51.52.115 does not bestow upon the trial judge the authority to usurp the role of a jury in workers' compensation appeals. The Court of Appeals' analysis rejecting Leitner's unsupported theory to the contrary is correct. *Leitner*, 15 Wn. App. 2d at 16-17. Leitner's conflated and unsupported requests for review of the Court of Appeals Decision on these bases are without merit and should be rejected. *See* Petition at 15, 17, 19.

F. The Court of Appeals Correctly Declined Review of Summary Judgment Denial.

Division II correctly declined to review the superior court's denial of Leitner's motion for summary judgment because "the superior court denied his motion…on the grounds that there was a genuine issue of material fact and the case went to trial thereafter." *See Leitner*, 15 Wn. App. 2d at 18-19. Leitner's petition incorrectly asserts that the Court of Appeals

erred in rejecting review of his summary judgment motion because his motion turned "solely on a substantive issue of law." Petition at 13.

However, Leitner's motion was expressly *fact* dependent, not "solely" based upon "a substantive issue of law." Leitner's summary judgment motion argued that he was entitled to judgment as a matter of law because "There is no preponderance of relevant, admissible evidence with which to rebut the presumption" in this case. CP at 1030. Again, whether an employer has rebutted the firefighter presumption by a "preponderance of the evidence" ***is a question of fact*** that may be submitted to the jury. *Spivey*, 187 Wn.2d at 727-28. Emphasis added. And as underscored previously in briefing to the Court of Appeals, and above, there is substantial evidence in the record supporting the Jury's findings that the City rebutted the statutory presumption, and that Mr. Leitner did not sustain any heart problems as a proximate result of his employment with the City.

G. The Superior Court Did Not Abuse Its Discretion by Refusing to Strike Mr. Riordan's Deposition, and the Court of Appeals Correctly Rejected Leitner's Attempt to Reverse the Judgment on this Basis.

Leitner's exception to Mr. Riordan's deposition not being stricken at trial was not preserved before the Court of Appeals, and should be deemed waived. *See Leitner*, 15 Wn. App. 2d at 19-20, FN 7. Further, even if Leitner had not waived this argument, he fails to present colorable

argument or citation to the record in support of the notion that the superior court judge abused his discretion in refusing to strike Mr. Riordan's deposition on relevance grounds.

"The admission of evidence will be reversed only for an abuse of discretion." *Holbrook v. Weyerhaeuser Co*., 118 Wn.2d 306, 314-315, 822 P.2d 271 (1992). "A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id*. at 315, internal quotations omitted. The trial court did not abuse its discretion in refusing to strike Mr. Riordan's deposition.

The Industrial Insurance Act does not permit new evidentiary objections to be raised for the first time on appeal to superior court, nor do Board regulations permit objections to be lodged after a deposition has been concluded. RCW 51.52.115, WAC 263-12-117(5)(a)[4]. It was not until the end of Leitner's and the Department's cross-examinations of Mr. Riordan that the Department's attorney moved to strike "the deposition and the testimony as not being relevant." CP at 713. Leitner's counsel joined that objection. *Id.* No other objections to Riordan's deposition were lodged prior-to or during his deposition.

[4] "The board may make rules and regulations concerning its functions and procedure, which shall have the force and effect of law until altered, repealed, or set aside by the board." RCW 51.52.020.

On May 3, 2018, Leitner filed his Motions in Limine with Pierce County Superior Court. CP at 1210. Leitner sought to exclude Mr. Riordan's testimony on the basis of "ER 702, ER 703, lack of foundation, prejudice, confusion, incomplete and unrealistic test conditions, and lack of scientific validity." *Id.* at 1211. These objections were not "relevance" and had therefore been waived by Leitner and the Department when they failed to timely make those objections before the Board.

The City argued to the trial court that Mr. Riordan's testimony was relevant because he tested for airborne diesel particulate matter on and around the fireboat Leitner worked aboard on February 25, 2015, which purportedly triggered the RCW 51.32.185 presumption due to exposure to diesel exhaust. *See* VRP at 10-11. "This fireboat Destiny thing is very critical, and Mr. Riordan testifies to what those particulates were…That makes the fact that Mr. Leitner was exposed to fumes or toxic substances maybe a little less likely the cause of a myocardial infarction." *Id.* at 11. The City also emphasized that it was "not waiving its objection that…The presumption shouldn't apply and the reason that the City argues that, Your Honor, is because as we go back to Mr. Riordan's report, we're talking about ambient level of these diesel particulates…the City doesn't believe that there's any exposure [on February 25, 2015] within the meaning of the statute." *Id.* at 12.

The trial court judge refused to strike Mr. Riordan's testimony as irrelevant, explaining that "I think an honest application of the law requires me to rule on it on an objection-by-objection basis, and that will be my approach to it." *Id.* at 12. The trial court did not abuse its discretion in refusing to strike Mr. Riordan's entire deposition on "relevance" grounds.

IV. CONCLUSION

The Court of Appeals' August 18, 2020 published decision does not warrant review pursuant to the conditions enumerated by RAP 13.4(b), the Court of Appeals Decision was correct and well-considered, and Mr. Leitner's Petition for Discretionary Review should be denied.

RESPECTFULLY SUBMITTED this 28th day of January, 2021.

WILLIAM J. PRATT, WSBA #50139
Hall & Miller, P.S.
P.O. Box 33990
Seattle, WA 98133
Ph: (206) 622-1107
Fax: (206) 546-9613
wpratt@thall.com
Attorney for Respondent, City of Tacoma

NO. 99265-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ANDREW LEITNER, Appellant, v. CITY OF TACOMA and WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the City of Tacoma's Answer to Petition for Discretionary Review and this Certificate of Service in the below-described manner:

Via Washington State Appellate Courts' Portal:

Ms. Susan Carlson
Supreme Court Clerk
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Via agreed electronic service:

Ron Meyers
Ron Meyers & Associates
ron.m@rm-law.us
mindy.l@rm-law.us
matt.j@rm-law.us

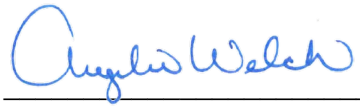
Agreed e-service via Washington State Appellate Courts' Portal:

Steve Vinyard, AAG
Pat DeMarco, AAG
Attorney General's Office
liolyce@atg.wa.gov
steve.vinyard@atg.wa.gov
PatL.DeMarco@atg.wa.gov

Via US Mail, first-class, postage-prepaid:

Eberle Vivian
206 Railroad Ave N
Kent, WA 98032

Signed this 29th day of January, 2021, in Everett, Washington by:



ANGELINE WELCH
Paralegal
Hall & Miller, P.S.
P.O. Box 33990
Seattle, WA 98133-0990
(206) 622-1107 (phone)
(206) 546-9613 (fax)
abounds@thall.com

HALL & MILLER, P.S.

January 29, 2021 - 9:30 AM

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