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No. 64363-1-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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LOUIS ALEXANDER DIAZ and MONA DIAZ,

Appellant,

v.

JAYANTHI KINI, M.D. and  
MEDICAL CENTER LABORATORY, INC.,

Respondents.

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OPENING BRIEF OF APPELLANT

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DIVISION I  
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## **BRIEF OF APPELLANTS**

### **A. ASSIGNMENTS OF ERROR**

The trial court erred by introducing evidence and instruction to the jury regarding the existence and amount of a pre-trial settlement with two co-defendants in a medical negligence action.

#### *Issue Pertaining to Assignments of Error*

Whether it was error to inform the jury (via instruction) that two prior co-defendants in a medical negligence action had previously settled with the plaintiffs prior to the commencement of trial.

Whether it was error to inform the jury (via instruction) as to the amount of the settlement with two prior co-defendants.

### **B. STATEMENT OF THE CASE**

#### *1. Introduction.*

This is a medical malpractice case brought by Louis and Mona Diaz against Medical Center Laboratory, Inc. ("MCL") and Jayanthi Kini, M.D. for catastrophic and disfiguring injuries caused to the plaintiff Louis Diaz in the fall of 2004. Dr. Kini, a clinical pathologist, misdiagnosed Mr. Diaz with invasive laryngeal cancer. This misdiagnosis caused Mr. Diaz to undergo an unnecessary

total laryngectomy, leaving him without natural voice or the ability to taste or smell, and with a permanent hole (stoma) in this throat.

2. *Initial diagnosis of invasive cancer by Dr. Kini.*

On October 22, 2004, Louis Diaz presented to Yakima Valley Memorial Hospital complaining of pain in his throat and difficulty swallowing. He was referred to Yakima Otolaryngologist James Abbenhaus.

On October 27, 2008 Dr. Abbenhaus examined Mr. Diaz. Using a laryngoscope, Dr. Abbenhaus noted an “exophytic mass” on the right side of the pyriform sinus.<sup>1</sup> Dr. Abbenhaus suspected that the mass was a type of cancer called squamous cell carcinoma. In his chart note (Ex. 19) he wrote: “I will await the definitive diagnosis after I biopsy the lesion.”

The next day, Dr. Abbenhaus performed a biopsy of the mass under general anesthesia. The biopsies were sent to the pathology laboratory at Yakima Valley Memorial Hospital. The laboratory is run under contract by defendant MCL. Dr. Kini was one of the pathologists at the lab.

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<sup>1</sup> The pyriform sinus is a recess on both sides of the larynx.

On the day of the biopsy (Friday, October 29, 2008), while Mr. Diaz was still in the operating room, Dr. Kini performed what is known as a “frozen section” analysis, wherein she looked at the biopsy and reported back to the surgeon.<sup>2</sup> She diagnosed “Ulcerated Squamous Cell Carcinoma” – in other words, cancer. (Ex. 1) When Dr. Kini looked at the biopsy specimen, she found it “extremely difficult” to interpret. (Ex. 6). However, she did not inform the surgeon (or anyone) that she found the biopsy “extremely difficult”. Further, she did not consult with any colleagues in her lab before (or after) issuing her diagnosis.

On Monday, November 1, 2004, Dr. Kini made a diagnosis of the permanent sections from the biopsy. She found these specimens “extremely difficult” to interpret as well. (Ex. 1). She did not perform additional immunostaining.<sup>3</sup> After reviewing the permanents, Dr. Kini diagnosed “ulcerated invasive squamous cell

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<sup>2</sup> It is generally understood by surgeons and pathologists that while frozen section analysis provides a quicker answer to a question, the techniques involved in preparing the “permanent” section for more comprehensive analysis make permanent section analysis more reliable than frozen section analysis.

<sup>3</sup> Immunostaining is a method of using antibodies to detect specific proteins in a sample. Often immunostains are used to determine whether abnormal cells are “invasive” – thus demonstrating the presence of genuine cancer.

carcinoma with extensive necrosis and reactive changes.” Again, Dr. Kini called it cancer. She did not, however, communicate or note in her report the “extreme difficulty” she had in making her diagnosis to anyone.

3. *Treatment at UWMC.*

The general practice in cancer treatment is that a definitive treatment for a cancer is not rendered without having a definitive pathology diagnosis. RP (7/14/2009) p. 61. Following the “definitive” diagnosis of Dr. Kini, Mr. Diaz presented to the University of Washington Medical Center (“UWMC”) for treatment. He met with otolaryngologist Neil Futran, M.D. Based on the presentation of the mass *and* the definitive diagnosis of cancer by Dr. Kini, University of Washington surgeon (Neal Futran) recommended that Mr. Diaz undergo a total laryngectomy and right neck dissection. RP (7/16/09) p. 33. 4

At trial, Dr. Futran testified that he would never have recommended a total laryngectomy without a definitive diagnosis of invasive squamous cell carcinoma. RP (7/16/09) p. 34.

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4 A “neck dissection is a surgical procedure intended to remove lymph nodes and surrounding tissue from one side of the neck into which cancer cells may have migrated.

Specifically, he testified that had Dr. Kini provided him the information contained in the handwritten note prior to surgery, he would not have performed or recommended the laryngectomy:

Q: I want you to assume for these questions that Mr. Diaz had come to you, the same as he did, with the exact same symptoms, the exact same history, the same imaging, and everything you could see when you looked, the same clinical presentation, but with a pathology report that contained the language ...[w]ith the pathology report contained in Exhibit 1, which is Dr. Kini's report...[b]ut also with an attached note, which is Exhibit 6. Without any further information, would you have offered or performed surgery for Mr. Diaz?

A. No.

Q. Why not?

A. Because there is a question about the diagnosis based on the note, not based on the pathology report. And whenever there is a question about something, you have other people and yourself help answer it before you move with definitive therapy.

RP (7/16/09) at 33-34. Dr. Futran went on to give the same answer with respect to every other diagnosis offered by the other defense pathologists who testified. RP (7/16/09) p. 34-37.

Mr. Diaz, after consultation with his family, made the choice to have his larynx removed. On November 29, 2004, Dr. Futran removed Louis Diaz's larynx. Ex. 10. The surgery resulted in a

tracheostomy stoma (a permanent hole) in Mr. Diaz's throat, through which he breathes and attempts to speak. *Id.*

4. *The post-surgery investigation by UWMC.*

As a matter of course, the material removed from Mr. Diaz was sent to the UWMC pathology laboratory for analysis. When the UWMC pathologists reviewed the material, they found no cancer anywhere. (Ex. 2)

After finding no cancer in the larynx, the UWMC pathologists, concerned they were "missing cancer", then requested the original biopsy slides from MCL and Dr. Ex. 4). When transmitting the slides to the UWMC, Dr. Kini handwrote a note to Dr. Futran. The note reads:

*Dear Dr. Futran:*

*Enclosed are slides from Diaz Louis. The biopsy was extremely difficult to interpret, mostly ulcerated with atypical reactive changes. The squamous epithelial changes were more than what I would like to see in reactive conditions. Please give me a call to see what your pathologist's interpretation is.*

*Thanks, J. Kini, MD.*

(Ex. 6)(emphasis added).

The slides were received by the UWMC on December 15. Six UWMC pathologists reviewed the slides (the same slides Dr. Kini had based her diagnosis on) and found no cancer. (Ex. 3). At that point, the UWMC pathology department requested the original biopsy material (paraffin blocks).<sup>5</sup> The UW made their own slides of the paraffin material (known as “recuts”) and performed immunostaining. The immunostaining demonstrated that there was no “invasive” component to the cells. (Ex. 3 p. 2). This was again confirmed by six UW pathologists. *Id.* In addition, other experts (including pathologist Stephen Sarewitz, M.D.) determined that none of the slides showed invasive cancer:

Q. In your opinion, the biopsy slides demonstrate any level of invasive cancer?

A. No they do not.

RP (7/14/2009) p. 27. He further determined that Dr. Kini did not meet the standard of care in making the diagnosis. RP (7/14/2009) p. 28.

At trial, Dr. Futran testified that he did not believe that Mr. Diaz ever had cancer:

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<sup>5</sup> Biopsy material is generally preserved in paraffin blocks so that later testing may be performed on it, if necessary.

Q. Based on everything you know, do you think Mr. Diaz ever had cancer of the larynx?

A. In my opinion, he never had laryngeal cancer.

Q. Why do you think that?

A. For two reasons. Number one, based on the totality of the information, and again what we are relying on most specifically is the final pathology report. Review of the entire specimen revealed by the UW Medical Center pathologists revealed no cancer cells within the specimen, and on their ultimate review of at least the information they have...the report I received, revealed no evidence of cancer. And ultimately the fact that Mr. Diaz is still here without evidence of any recurring cancer, without any additional treatment.

Q. By that you mean without any radiation that he was supposed to have?

A. Yes.

RP (7/16/09) p. 36-37. Expert witness (and pathologist) Steven Sarewitz testified that there "was no cancer of any type in those slides." RP 7/14/2009 at p. 49.

5. *The lawsuit against Dr. Kini, MCL, UWMC, and Dr. Futran, and the settlement with Dr. Futran and UWMC.*

Plaintiffs commenced this lawsuit against the State of Washington (UWMC), Dr. Futran, Yakima Valley Memorial Hospital

Association, and Dr. Kini.<sup>6</sup> The plaintiff alleged against Dr. Kini, in part:

[Dr. Kini was] negligent in interpreting pathology slides performed upon biopsy of the plaintiff's lesion and failing to properly identify it as a non-cancerous entity.....in failing to request a second biopsy of the lesion in question....[and] failing to get a second pathological opinion on the biopsy specimens before reporting a diagnosis.

CP 132. The plaintiff alleged against Dr. Futran and UWMC, in part:

[They] were negligent in failing to perform an independent biopsy with pathological examination of the lesion in the plaintiff's throat prior to performing the laryngectomy....[and] failing to obtain a review of the pathology slides prepared at Yakima Valley Memorial Hospital...prior to performing surgery....

CP 132-133.

In response, neither MCL nor Kini alleged that Dr. Futran or UWMC had been negligent in their treatment of Mr. Diaz. Neither MCL nor Kini produced any evidence or expert testimony that Dr. Futran and/or UWMC had been negligent in their treatment of Mr. Diaz. In discovery responses, Dr. Kini and MCL stated:

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<sup>6</sup> Yakima Valley Hospital Association was voluntarily dismissed. MCL was added in April 2007.

Dr. Kini and Medical Center Labs do not specifically contend that any person is responsible for or has contributed in any way to plaintiff's injuries or damages.

CP 184.

At the end of a second mediation, the plaintiffs settled all of their claims against UWMC and Dr. Futran, weeks before the first trial. The amount of the confidential settlement was for \$400,000.

CP 301. 7

Once UWMC and Dr. Futran had settled, MCL and Dr. Kini moved the trial court to compel production of the settlement agreement and also moved the court to:

admit evidence of compensation in the amount of \$\_\_\_\_\_ received on plaintiffs' behalf from another source...

CP 108. They moved the trial court to admit the First Amended Complaint. CP 117. Three days before trial, Dr. Kini and MCL for the first time tried to argue that Dr. Futran and UWMC were an "intervening cause." CP 122, CP 186.

During the first trial, the trial court did not compel production of the settlement agreement or permit evidence regarding the fact

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7 Because the Court ultimately ordered disclosure of the settlement amount and agreement, and no party has appealed, the settlement amount is no longer confidential.

or amount of the settlement agreement. During deliberations, the jury for the first trial hung, and a mistrial was ultimately declared. CP 213.

Between the first trial and the second trial (approximately 14 months), the trial court changed its ruling on production and admissibility of the settlement agreement. CP 358. The trial court issued a written opinion describing its reasoning. CP 358-362.

Prior to opening statements, the court ruled that “evidence of plaintiffs’ settlement with Dr. Futran and UW, and of the amount of the settlement was admissible.” CP 361. Based on this pretrial ruling (and based only this ruling), plaintiffs’ counsel discussed this fact during opening statements. CP 361.

At the end of the evidence, the court instructed the jury as to the amount of the settlement and the fact that the UWMC and Dr. Futran had been defendants. CP 301.

The jury deliberated and returned a verdict for the defendants. CP 362. Plaintiffs timely brought a motion for new trial, which was denied . CP 363.

## C. SUMMARY OF ARGUMENT

The trial court committed prejudicial error when it admitted evidence of a settlement agreement between plaintiffs and other health care providers. RCW 7.70.080 does not permit evidence of settlements with co-defendant health providers. Settlement funds are not “collateral sources” within the scope of the statute. Permitting introduction of this type of evidence will have a chilling effect on pretrial resolution of medical negligence claims in the State of Washington.

D. ARGUMENT

1. *Standard of review.*

This court reviews the trial court’s interpretation of statutes and evidentiary rules de novo. *State v. Foxhoven*, 161 Wn.2d 168, 174 (2007). A trial court’s decision to admit evidence (under a correctly interpreted rule) is reviewed for abuse of discretion. *Doe v. Gonzaga Univ.*, 99 Wn.App. 338, 363 (2000). “Discretion is abused if it is exercised on untenable grounds or for untenable reasons.” *State v. Thang*, 145 Wn.2d 630, 642 (2002). “Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.” *State v. Neal*, 144 Wn.2d 600,

609 (2001).<sup>8</sup>

2. *The fact and terms of the settlement are inadmissible under ER 408.*

ER 408 provides, in part, that evidence of “accepting...consideration in compromising or attempting to compromise a claim which was disputed...is not admissible to prove...invalidity of the claim or its amount.” “ER 408 was enacted to protect parties and witnesses from the potentially corrosive effect settlement evidence may have on a jury.” *Northington v. Sivo*, 102 Wn.App. 545, 550 (Div. 1 2000).

In *Grigsby v. City of Seattle*, 12 Wn.App. 453 (1975) a passenger involved in an automobile accident brought an action against the driver and the City of Seattle for negligence. Prior to trial, the passenger and the driver settled their claims. At trial, the court permitted the City to present evidence about the prior claims and the settlement. The Court of Appeals reversed, holding that it “was error for the trial court to reveal to the jury that Grigsby settled a claim against his driver.” *Id.* at 458.

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<sup>8</sup> In this case, the fact of settlement and the amount of settlement was not in dispute. Rather, the *admissibility* of this information was disputed.

In *Byerly v. Madsen*, 41 Wn.App. 495 (1985), a patient brought a medical malpractice action against physicians and a hospital. Prior to trial, the patient settled with the physicians for \$100,000. Both before and during juror deliberations, one juror told the others that the physician group had been a defendant and had settled for \$100,000. As a result, the trial court granted a new trial. On appeal, the Court of Appeals affirmed that ruling. Rejecting the hospital's argument that knowledge of a settlement could only affect a jury's determination of 'proximate cause' and not liability.

The court responded:

This argument does not withstand scrutiny. The fact of settlement has no more bearing on the issue of proximate cause than it does on the issue of negligence. Such settlements are inadmissible. We believe an additional reason supporting the inadmissibility of settlements is a justifiable fear that a juror with such knowledge may conclude the plaintiff has already received sufficient satisfaction for his or her injuries and further compensation from a remaining defendant is unwarranted

*Id.* at 501 (emphasis added).

The Court of Appeals reaffirmed the inadmissibility of pretrial settlements in *Vasquez v. Markin*, 46 Wn.App. 480 (1986). *Vasquez* was a medical malpractice case against several

physicians and Valley Memorial Hospital. Prior to trial, Vasquez settled with two physicians and the hospital. During deliberations, the bailiff inadvertently informed the jury of the prior case name (which included a settling physician). *Id.* at 483. The jury found in favor of the remaining defendants and the plaintiff appealed. The Court of Appeals unequivocally stated that “[E]vidence of settlements is inadmissible....and juror statements regarding settlements may warrant a new trial.” *Id.* at 484 (citations omitted). Because there was no evidence that the jurors had *actually* been informed of the settlement, the *Vasquez* court did not reverse the verdict. *Id.* at 485. In this case the jury was told about the other defendants, the settlement, and the *amount*. See also *SVEA Fire & Life Ins. Co. v. Spokane, Portland & Seattle Ry.*, 175 Wn. 622 (1933)(compromises are favored in law and parties should not be penalized by having their efforts used against them).

3. *RCW 7.70.080 does not modify ER 408 or otherwise permit introduction of settlement information when the settlement proceeds come from a co-defendant health care provider.*

a. *RCW 7.70.080 does not apply to settlements with co-defendants.*

At trial the defendant-appellants argued that the settlement from the University of Washington and Futran was admissible pursuant to RCW 7.70.080 which provides in part:

Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. Compensation as used in this section shall mean payment of money or other property to or on behalf of the plaintiff, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

RCW 7.70.080 (emphasis added). The final sentence of this statute is clear and unambiguous. The plain language contemplates the "compensation by a health care provider" refers to health care providers who are defendants at the time the agreement to pay compensation is made.

It is undisputed that the money received via settlement was from the defendant health care providers State of Washington and Futran. See RCW 7.70.020(1). Neither UWMC nor Futran offered such evidence at trial.

*b. Settlement proceeds are not collateral sources within the meaning of RCW 7.70.080.*

Collateral source evidence relates to “benefits received by the plaintiff from sources wholly independent of and collateral to the wrongdoer.” *Bowman v. Whitelock*, 43 Wn.App. 353, 357 (Div. 1 1986). A medical negligence settlement with a settling co-defendant cannot be viewed as “wholly independent and collateral to the wrongdoer”, and therefore is not collateral source evidence as contemplated by RCW 7.70.080.

No Washington case discussing the admissibility of pretrial settlements in a medical negligence action has held that RCW 7.70.080 permits the introduction of evidence of settlements with other parties. The statute has been the law in Washington since 1976. Both *Bylerly* and *Vasquez* were decided in the mid 1980s. Both cases found the introduction of settlement evidence in medical negligence cases to be error.

Since that time, the only appellate decision addressing RCW 7.70.080 is *Adcox v. Children's Ortho. Hosp. & Med. Center*, 123 Wn.2d 15, 39 (1993). In *Adcox*, the trial court did not permit the admission of some collateral source evidence in a medical negligence action. The trial court determined that it would apply collateral sources (if proven) and apply them to any jury verdict. The Supreme Court found that although it was error not to present the evidence to the jury (although not reversible error). However, the *Adcox* opinion itself demonstrates the type of collateral source evidence that was proffered in that case:

school districts; state medical care; state respite care; state payments of foster care expenses; state insurance pool for the uninsurable; and charitable organizations providing services.

*Adcox*, 123 Wn.2d at 20 fn. 11. The *Adcox* case has no discussion about the admissibility of settlements with other parties to the litigation.

*c. Permitting introduction of evidence of settlements with defendants will have a chilling effect on extrajudicial resolution of health care disputes.*

Settlement efforts are favored in public policy as an alternative means of dispute resolution outside the courtroom. See

RCW 7.70.100(4). If non-settling defendants are able to admit evidence of settlement of a co-defendant under RCW 7.70.080 and still limit their liability to a proportionate share of fault under RCW 4.22.070(1), there will be a dramatic reduction in settlements since no entity would want to be the first to settle.

4. *The error was prejudicial.*

As has been previously noted by this Court, admission of evidence regarding settlements can have a “corrosive” effect on the jury. *Northington v. Sivo*, 102 Wn.App. at 550. The argument (which will presumably be made by Respondent) that because the jury did not find liability and therefore did not reach damages should be rejected, as it was in *Byerly*:

In their view, knowledge of the settlement logically could affect the jury only in its consideration of whether the negligence of the doctors and the hospital or that of the anesthesiologist was the proximate cause of Mr. Byerly’s death. Since the special verdict found the doctors and the hospital without negligence, they reason that the jurors’ knowledge had no effect on their verdict. The argument does not withstand scrutiny. The fact of settlement has no more bearing on the issue of proximate cause than it does on the issue of negligence. Such settlements are inadmissible.

*Byerly v. Madsen*, 41 Wn.App. 495, 501 (1985). The fact that the jury was informed that the Diaz's had already obtained a substantial settlement from former parties laid the groundwork for the exact "fear" the court discussed in *Byerly*; namely the fear that a jury with information about prior parties and settlements will be induced to find no liability on the part of the defendant regardless of the evidence.

Additionally, informing the jury about the amount of the settlement with UWMC and Dr. Futran was likely to lead the jury to deny the claim against Dr. Kini and MCL based on the perception that UWMC would not have paid the substantial sum of \$400,000 if it were not the party at fault. See.e.g. *McHann v. Firestone Tire and Rubber Co.*, 713 F.2d 161, 166 (5<sup>th</sup> Circ. 1983)(admission of "covenant not to sue would have led the jury to deny [plaintiff's claim] against Firestone based on the perception that [the settling defendant] would not have paid the substantial sum...if it were not the party at fault.")

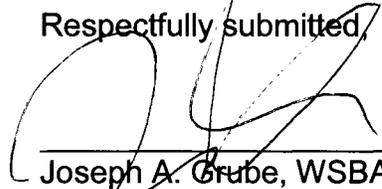
#### D. CONCLUSION

The trial court erred when it admitted evidence about the settlement with prior co-defendant health care providers. The

settlement was not a collateral source, and its disclosure to the jury is not permitted by RCW 7.70.080. To permit this type of evidence to be presented to a jury in a medical malpractice cases will have a chilling effect on settlements between plaintiffs and less than all the parties to such an action. The trial court should be reversed, and this matter remanded for a new trial.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Grube', is written over a horizontal line. The signature is stylized and somewhat cursive.

Joseph A. Grube, WSBA #26476  
Ricci Grube Breneman, PLLC  
Attorney for Appellants

## CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Ricci Grube Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On May 10, 2010, I caused a copy of the foregoing BRIEF to be served on the following parties:

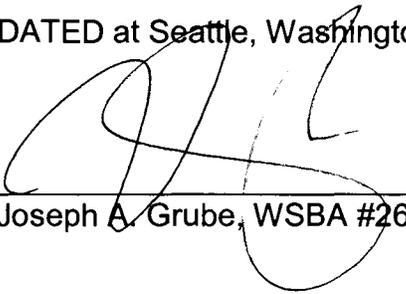
Via U.S. Mail:

Jeffrey Street  
1620 SW Taylor, Suite 350  
Portland, OR 97205

Mary H. Spillane  
Williams, Kastner & Gibbs PLLC  
601 Union Street, Suite 4100  
Seattle, WA 98101

I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 10<sup>th</sup> day of May 2010.

  
\_\_\_\_\_  
Joseph A. Grube, WSBA #26476