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STATE OF WASHINGTON

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NO. 34115-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

KRISTAL D. GIOVANNONI,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

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WHERE THE PROSECUTOR'S QUESTIONS DURING CROSS-EXAMINATION MISCONDUCT?

III. STATEMENT OF THE CASE

A. Procedural History.

The information. The Clark County prosecuting attorney charged Kristal Diane Giovannoni by an amended information with murder in the second degree in violation of RCW 9A.32.050(1)(b). CP 11-12. Specifically, the information charged Giovannoni with having caused the death of T.C. in the course and furtherance of the crime of assault of a child in the second degree. CP 11. The information also specified two aggravating factors to support the state's pursuit of an exceptional sentence upward: (1) particular vulnerability of the victim and (2) abuse of trust. CP 11. Prior to trial, Giovannoni unsuccessfully challenged the legality of the aggravating factors. CP 3-5; 1RP¹ 3-4; 2RP 84-85.

CrR 3.5 hearing. Trial proceedings began on October 11, 2005, with a CrR 3.5 hearing. 2RP 53. Judge Nichols presided over the hearing and the trial. Giovannoni did not offer any evidence at the hearing and made no argument opposing the

¹ "1RP" refers to Volume 1 of the verbatim report of the proceedings. Henceforth, the "RP" (for report of proceedings) will be immediately preceded by the correct volume where the page cite is located.

admissibility of statements she made to the police. 2RP 79-81.
The court found her statements were voluntarily made. 2RP 80-81.

Trial. Trial testimony began on October 13. 4RP 133. The state called 18 witnesses in its case-in-chief over four days. 4RP, 5RP, 6ARP, 6BRP, 7RP, 8RP. Giovannoni called three expert witnesses and also testified. 9A & 9BRP. The state called one rebuttal witness. 10RP 990.

Jury instructions. Giovannoni requested a lesser included instruction of manslaughter in the first degree. 10RP 1047. The court declined to give it in light of the decision in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005)². The court instructed that to prove the second degree assault portion of the assault of a child in the second degree that Giovannoni intentionally assaulted and recklessly inflicted substantial bodily harm on T.C. CP 23-24.

Verdict and aggravating factors. The jury returned with a guilty verdict. CP 33; 11RP 1150. After a break, the court instructed the jury both orally and in writing about the aggravating factors. CP 35-36; 11RP 1152, 1155-57. Neither the prosecutor

² Gamble holds that manslaughter is not a lesser included offense for second degree felony murder where second degree assault - intentionally assaults another and thereby recklessly inflicts substantial bodily harm - as here, is the predicate offense.

nor Giovannoni wished to make argument to the jury on the aggravating factors. 11RP 1154. The jury found particular vulnerability but not abuse of trust. CP 34; 11RP 1158.

Sentencing. The court heard sentencing on November 4, 12RP. Giovannoni had no criminal history making her standard range 123-220 months. CP 38-39; 12RP 1166. The state asked the court to impose 300 months in light of the jury's finding of the particular vulnerability aggravating factor. 12RP 1169. The court declined to find that an exceptional sentence was justified and imposed 204 months. CP 41; 12RP 1183.

Notice of Appeal. Giovannoni filed her notice of appeal on December 1. CP 51-52.

B. Factual History.

In November 2004, Kristal Giovannoni and her partner, Zara Soares, had a small in-home daycare in Vancouver, Washington. 4RP 138, 159-61, 216. T.C.³ was a 17-month old girl who they routinely cared for. 4RP 138-40, 152, 161. T.C.'s mother is Perla Xochitl-Caballero. 4RP 135. On November 13, Caballero had tickets to see the University of Oregon Ducks play football in

³ The victim is referred to as T.C. in the amended information and TAC in the judgment and sentence. CP 11, 41.

Eugene. 4RP 140. Before leaving for Eugene, she dropped T.C. off at Giovannoni's daycare. 4RP 144.

Just Giovannoni and Soares were home when T.C. arrived. Soares left for work around 10:30. 4RP 163. Before she left, she placed T.C. in bed with Giovannoni. 4RP 164. No other children were in the home when Soares left. 4RP 164. Soares described Giovannoni's relationship with T.C. as loving; Giovannoni treated T.C. as her own child. 4RP 171.

When T.C. was at the home she routinely sat and played on a couch by the front door. 4RP 177. Giovannoni's two dogs, both Lhasa Apsos, also frequented the couch. 4RP 177.

Around 1:30, Soares received a phone call from Giovannoni saying T.C. fell off the couch and was not breathing. 4RP 166-67.

Giovannoni called 911 causing paramedics to be dispatched at 1:23 p.m. and arriving at the home at 1:32 p.m. 4RP 215. One of the first paramedics through the door found T.C. on her back on the living room floor. 4RP 216. T.C. was not crying or seemingly awake. 4RP 220. The paramedic's initial assessment was that T.C. had suffered a neurological injury. 4RP 219-20. Giovannoni, through tears, told another paramedic that T.C. had fallen from the couch. 4RP 229, 232. The same paramedic noticed a bump on the

back of T.C.'s head. 4RP 232. T.C. was transported to Southwest Washington Hospital Emergency Department by ambulance. 4RP 232; 6BRP 564.

Initially, T.C.'s vital signs were stable and even improved. 6BRP 569. A CAT scan revealed that T.C. had two bilateral subdural hematomas referred to as a contracoupe injury. A contracoupe injury means that something hard hits the skull, the skull stops, but the brain travels forward and bangs the front of the skull and rebounds to the back. 6BRP 570. The original source of T.C.'s contracoupe injury was a large hematoma on the back of her skull. 6BRP 571. T.C. was at Southwest Medical for about 30 minutes before a decision was made to move her to Oregon Health Sciences University as T.C. was in rapid decline. 6BRP 573. The treating physician at Southwest medical opined that he had never seen a child who received a contracoupe injury from a short fall. 6BRP 574. The physician also checked T.C. for other injuries and found none. 6BRP 575.

Over the next few hours, various medical persons made significant efforts to save T.C.'s life. 4RP 191-195; 5RP 240-63. A craniectomy was performed on the right side of her skull so that blood could be evacuated and her rapidly swelling brain would not

be restricted by her skull. 4RP 191-93. However, T.C.'s blood pressure dropped precipitously and her body was unable to coagulate the blood. 4RP 192. These combined forces made T.C. unsalvageable. 4RP 193. T.C. died early on the morning of November 14 from the consequences of a severe head injury caused by blunt force trauma. 4RP 195, 5RP 262.

Forensic pathologist Cliff Nelson performed T.C.'s autopsy. 8RP 642. He noted that T.C. had a great deal of retinol hemorrhaging. 8RP 643-44. He opined that such hemorrhaging is consistent with a head injury with either severe acceleration and deceleration such as in a car accident when a child is forcibly slammed into something, or with a crushing head injury. 8RP 664. He did not think the injury could come from a fall from a couch. 8RP 660. He determined the cause of T.C.'s death was a closed head injury. 8RP 675. He could not be sure any sort of shaking of T.C. was a factor in her injury. 8RP 677. He also found no gripping or bruising under T.C.'s arms or legs. 8RP 687.

Pediatrician John Sterling reviewed the medical records and noted the retinal hemorrhages. 7B 613. He opined that such hemorrhages are rare to see from a fall alone. 7RP 614. More commonly hemorrhaging comes from a rotational injury where the

After gathering that information, Holladay confronted Giovannoni telling her that T.C. had life threatening injuries not consistent with a fall from the couch. 6ARP 468. Giovannoni admitted that she had not been entirely truthful. 6ARP 475. She said that she had been coming around a corner carrying a drawer, thought she had missed T.C., but must have bumped her because T.C. fell to floor. 6ARP 475. T.C. screamed and cried in response. 6ARP 476. Giovannoni felt frustrated and wanted to go to her mom's house. 6ARP 476. She felt a bump on T.C.'s head. 6ARP 477. She tried to console and rock T.C. 6ARP 477. Giovannoni said that she stood T.C. up in front of a doorway and pushed her backwards. T.C. fell and hit her head on a doorjamb between the living room and the bedroom. 6ARP 480. She then shook T.C. three or four times out of frustration. There was no one else home when this happened. 6ARP 482. She provided a written statement. 6ARP 483. Giovannoni then changed her story and said that she lied about pushing T.C. into the door jamb and that she had not done that. 6ARP 483-84. When Holladay told Giovannoni that T.C. died, she burst into tears and said, "Oh my God, I am a murderer," and that she did not mean to do it. 6ARP 492.

At trial, Giovannoni testified that she bumped T.C. with a dresser drawer. 9BRP 944. T.C. fell from the couch. 9BRP 949. She told Hollday that she was not a murderer. 9BRP 965.

IV. ARGUMENT

I. **INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL DENIED GIOVANNONI THE COUNSEL GUARANTEED BY THE WASHINGTON STATE AND FEDERAL CONSTITUTION.**

Under Washington Constitution Article I, Section 22, and United States Constitution Sixth Amendment, an accused is guaranteed effective counsel. By definition, counsel is ineffective when both prongs of a two-prong test are met: (1) deficient performance and (2) resulting prejudice.⁴ Deficient performance is shown if counsel's conduct falls below an objective standard of reasonableness based on a consideration of all the circumstances.⁵ If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel.⁶ To satisfy the prejudice prong, a defendant

⁴ State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)(citing Strickland v. Washington, 466 U.S. 668, 668-69, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S.Ct. 328 (1986).

⁵ State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997)

⁶ State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999)

must show that counsel's performance was so inadequate that there exists a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.⁷ Both prongs of the ineffective assistance test are satisfied by defense counsel's failure to challenge the corpus delicti of the charge at the end of the state's case.

Under the corpus delicti rule, a defendant's extrajudicial statements cannot be admitted into evidence absent independent proof of the existence of every element of the crime charged. State v. Ashurst, 45 Wn. App. 48, 50, 723 P.2d 1189 (1986). The rule was established to protect a defendant from the possibility of an unjust conviction based upon a false confession. State v. Smith, 115 Wn.2d 775, 781, 801 P.2d 975 (1990).

"Corpus delicti" literally means "body of the crime." State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In a homicide case, the corpus delicti consists of two elements that the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a criminal act. Id. The corpus delicti may

⁷ State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999)

be proved by either direct or circumstantial evidence. State v. Thompson, 73 Wn. App. 654, 659, 870 P.2d 1002, review denied, 125 Wn.2d 1014 (1994). The independent proof of the crime charged need not be sufficient to support a conviction beyond a reasonable doubt or even by a preponderance of the evidence. It is sufficient if it prima facie establishes the corpus delicti. State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951). But, as the rule indicates, if no such evidence exists, the defendant's confession or admission cannot be used to establish the corpus delicti and prove the defendant's guilt at trial. Aten, 130 Wn.2d at 656.

The corpus delicti rule is a judicially created rule of evidence. State v. C.D.W., 76 Wn. App. 761, 763, 887 P.2d 911 (1995). Thus, any error in admitting an uncorroborated confession is a non-constitutional error and, accordingly, the use of an uncorroborated confession to establish the corpus delicti of a crime must be objected to and ruled upon at the trial court level before it can be raised as an issue on appeal. Id. at 763-64. Under our facts, there was no objection at trial to the use of Giovannoni's uncorroborated admissions and confession to establish the corpus delicti of the acts that led to T.C.'s death. However, Giovannoni

can still challenge the effectiveness of her counsel's representation for failure to challenge the State's compliance with the rule.

For example, in C.D.W., C.D.W. was charged with rape of a child. C.D.W., 76 Wn. App. at 761. At trial, N.T. testified C.D.W. had molested him several times and described the different acts. Id. at 762. During trial testimony, N.T. never said that C.D.W. penetrated him. Id. The only evidence of penetration came from the testimony of the police detective who testified that C.D.W. admitted to having oral and anal sex with N.T. Id. Defense counsel did not object to the detective's testimony on corpus delicti grounds. Id.

On appeal, in determining that counsel was deficient, the court concluded that there was no conceivable tactical advantage to be had in failing to raise a corpus delicti objection. C.D.W., 76 Wn. App. at 762. Rather, the omission was deemed an inexcusable omission on the part of defense counsel. Id. The court also found that C.D.W. was prejudiced by the deficient act. Id.

Attempting to establish a corpus delicti because a defendant has the mere opportunity to commit a crime fails. In State v. Ray, 130 Wn.2d 673, 926 P.2d 904 (1996), the court affirmed the dismissal of a first degree child molestation charge due to lack of a

corpus delicti of the crime absent Ray's confession. Ray woke up when his three-year-old daughter asked him for a glass of water. Id. at 675. Ray, who normally slept in the nude, left the room with his daughter to get the water. Id. Shortly thereafter, Ray returned to his bedroom and woke his wife; Ray was upset and crying. Id. After a discussion with his wife, Ray placed an emergency call to his sexual deviancy counselor. Id. He later confessed to an investigating officer that while tucking his daughter back into bed, he had intentionally caused her to touch his penis. Id. at 675-76. He made similar admissions to his wife and to his deviancy counselor. Id. at 675.

At trial, the court found the daughter unavailable as a witness and that statements she made to investigators were inconclusive and unreliable. Ray, 130 Wn.2d at 676. Absent Ray's confession and admissions, the only remaining evidence of the molestation consisted of Ray getting out of bed nude to get his daughter a glass of water, taking the daughter to her bedroom, shortly thereafter returning to his own bedroom upset and crying, and, after talking to his wife, placing an emergency call to his sexual deviancy counselor. Id. at 680.

The Court held that these sparse facts failed to rule out Ray's criminality or innocence. Ray, 130 Wn.2d at 680-81. Corpus delicti is not established when independent evidence supports reasonable and logical inferences of both criminal agency and non-criminal cause. Id. Even though Ray speculatively could have molested his daughter and even though he had the opportunity to do so, the mere opportunity to commit a criminal act, standing alone, provides no proof that the defendant committed the criminal act. Id. at 681.

Aten is similar. Aten babysat four children overnight while their mother was at work. Aten, 130 Wn.2d at 643. In the morning, the youngest child, four-month old Sandra, was dead. Id. When paramedics arrived, Aten was holding the dead child and was extremely upset. Id. at 645. She said that Sarah had a bad cold and that she stayed up with her most of the night. Id. at 646. The pathologist who performed the autopsy said that he found no evidence that the child had been ill and concluded that she died either from sudden Infant Death Syndrome (SIDS) or acute respiratory failure. Id. at 646.

Thereafter, Aten was hospitalized and diagnosed with acute grief and a depressed mood. Id. at 648. Sandra's mother visited

Aten in the hospital. Aten told the mother that Sandra cried all night and that she killed her by smothering her with a pillow. Id. at 649. Aten later told a police sergeant that she put a hand over Sandra's nose and mouth. Id. at 652. Aten was subsequently charged, tried, and convicted of second degree manslaughter.

In determining that the corpus delicti of manslaughter had not been established⁸, the court specified that the corpus rule required corroboration of not just confessions and admissions, but any statement made by the defendant whether inculpatory, exculpatory or facially neutral. Aten, 130 Wn.2d at 657-58. The court agreed that Sandra's death established the first element of the corpus delicti – the fact of Sandra's death. Id. at 658. But that the second element of the corpus delicti, whether the independent evidence corroborating Aten's confession or admissions supported a reasonable and logical inference that Sandra's death was caused by a criminal act, was not sufficient. There was insufficient independent prima facie evidence that Aten acted with the requisite negligence required to support the second degree manslaughter charge. Id. at 658. Most importantly, the Aten court held corpus

⁸ The facts of Aten are different from Giovannoni's in that Aten's trial counsel made a corpus delicti challenge at the end of the state's case.

delicti is not established when independent evidence supports reasonable and logical inferences of both criminal agency and non-criminal cause. Id. at 660. See accord, State v. Bernal, 109 Wn. App. 150, 154, 33 P.3d 1106 (2001) (under controlled substance homicide charge, insufficient corpus delicti that anyone delivered heroin to deceased absent defendant's statements).

Similar to both Aten and Bernal, there is no question that the first element of corpus delicti is established by the facts – T.C. died. But also like Aten and Bernal, the corpus delicti is not established when independent evidence supports reasonable and logical inferences of both criminal agency and non-criminal cause. Giovannoni is charged with felony murder in the second degree for having intentionally assaulted and recklessly inflicted substantial bodily harm on T.C. as part of the crime of assault of a child in the second degree. Absent Giovannoni's statements to Zara Soares, to 911, to the EMTs, to the police detectives, there is insufficient independent prima facie evidence that Giovannoni intentionally assaulted and reckless inflicted any injury on T.C. Assault requires an intentional act. CP 24. Reckless conduct is shown when a person disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from

conduct that a reasonable person would exercise in the same situation. CP 25. Under the independent proof in this case, T.C. could have been unintentionally and accidentally struck on the head. Or, she could have been intentionally and recklessly struck on the head. Either type of blow caused her death. The independent evidence supports reasonable and logical inferences of both criminal agency and non-criminal cause.

II. THE PROSECUTOR COMMITTED ACTS OF MISCONDUCT BY ASKING A WITNESS AND GIOVANNONI IF POLICE WITNESSES WERE UNTRUTHFUL.

The prosecutor has a duty to see that an accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Id. at 664. A prosecutor commits unjust misconduct when his cross-examination seeks to compel a witness' opinion as to whether another witness is telling the truth. State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994); State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). Asking a witness to judge whether or not another witness is lying invades the jury's province and is

unfair and misleading. State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991).

Here, the prosecutor called upon both Giovannoni and Zara Soares to comment on the credibility of police officers.

During its cross examination of Giovannoni, the prosecutor repeatedly asked her to say whether Detective Holladay's testimony was truthful.

PROSECUTOR: So Detective Holladay is just mistaken or he's taken something out of context is that --

GIOVANNONI: That's his opinion on the way the interview went.

PROSECUTOR: Okay: So you don't recall that, though, so that's not how it happened.

9ARP 974.

PROSECUTOR: So when [Holladay] testified that he only mentioned it once and you became quiet, and you told him --

GIOVANNONI: What do -- what --

PROSECUTOR: -- that he's mistaken.

9ARP 974.

PROSECUTOR: So when [Holladay] testifies and indicates that that -- he didn't tell you that, that he didn't talk about whether she was alive or dead until after you asked a question at the end --

GIOVANNONI: Un-huh.

PROSECUTOR: -- that again he's mistaken on that point?

GIOVANNONI: I would say yes on that one.

9ARP 975-76.

During its cross examination of Soares, the prosecutor's approach was somewhat different but equally inappropriate and equally in error. The prosecutor repeatedly asked Soares if review of a police officer's report would help her remember what she told the police.

PROSECUTOR: So do you remember telling the police officers that you were told that [T.C.] had fallen and hit her head --

...

PROSECUTOR: If I show you the police report, would that help refresh you memory?

4RP 166.

PROSECUTOR: All right; But your conversation with the detective, okay, would that refresh your memory about what you told the detective?

4RP 166.

PROSECUTOR: Okay. If the detective said you did talk about that, do you want to see the police report to refresh your memory, or --?

...

PROSECUTOR: -- a memory of it, would it -- would it potentially refresh your memory if I showed the police report to you?

4RP 169.

SOARES: Possibly.

PROSECUTOR: Okay (pause; reviewing documents.) Okay. In terms of Kristal's stress level that day, if you could read through here, that's page 5, and read that first paragraph; see if that refreshed your memory at all.

4RP 169.

PROSECUTOR: So if the detective says otherwise, you -- you don't recall?

4RP 170.

Prosecutorial misconduct requires reversal only when there is a substantial likelihood the jury's verdict was affected. State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). In Suarez-Bravo, 72 Wn. App. 359, the court found the requisite substantial likelihood. In that case, defendant Suarez-Bravo was convicted of possession of cocaine with intent to deliver. Id. at 360. Testifying on his own behalf, Suarez-Bravo said he was tricked into driving to a parking lot where a controlled buy with undercover police officers was to occur. Id. at 361-62. When he arrived at the parking lot, one of the undercover officers got into the car with Suarez-Bravo and asked Suarez-Bravo to hand him a

bag from under the driver's seat. Id. at 361. Suarez-Bravo complied. Id. The bag contained a substantial quantity of cocaine. Id. Suarez-Bravo's defense was that he did not know what was in the bag when he handed it to the undercover police officer and that he had gone to that location to help jump-start another car, not to deal cocaine. Id. at 361-62.

During cross-examination, the prosecutor repeatedly asked Suarez-Bravo if the State's police officer witnesses had lied about contested aspects of the case. Suarez-Bravo, 72 Wn. App. 362-64. Despite the prosecutor's flagrant misconduct, Suarez-Bravo never objected to the questioning, never moved for a mistrial, and never requested a curative instruction. Id. at 367. When the defendant has failed to object to the impropriety at trial, request a curative instruction, or move for a mistrial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

In finding that Suarez-Bravo was denied his due process rights to a fair trial by the flagrant and ill-intentioned questions of the prosecutor, the court focused on the prosecutor's clearly

improper attempts to induce Suarez-Bravo to call the State's witnesses liars. Suarez-Bravo, 72 Wn. App. at 367.

Here, as in Suarez-Bravo, defense counsel never objected to the questioning, never moved for a mistrial, and never requested a curative instruction. But just as in Suarez-Bravo, the prosecutor's conduct was equally as flagrant and ill-intentioned and could not be remedied by a curative instruction and caused jury prejudice.

V. CONCLUSION

Giovannoni is entitled to a new trial with effective representation and free of prosecutorial misconduct.

Respectfully submitted this 2nd day of October, 2006

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', is enclosed within a large, thin, horizontal oval shape.

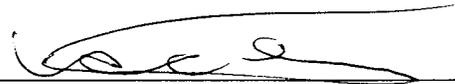
LISA E. TABBUT/WSBA #21344
Attorney for Appellant

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And that said envelope contained the following:

- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

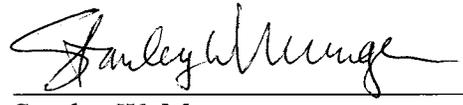
Dated this 2nd day of October 2006.



 LISA E. TABBUT, WSBA #21344
 Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 2nd day of October 2006.





 Stanley W. Munger
 Notary Public in and for the
 State of Washington
 Residing at Longview, WA 98632
 My commission expires *May 24, 2008*