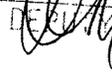


FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_



**No. 38742-5-II**

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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KIMBERLY A. COGGER, a single woman in her individual capacity

Respondent,

vs.

SANDERS S. BLAKENEY, M.D. and "JANE DOE" BLAKENEY

Appellants.

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REPLY BRIEF OF APPELLANT

---

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## MOTION TO STRIKE

Appellants ask the court to strike or disregard Respondent's statement of the case. RAP10.3(a)(5) requires the statement of the case to consist of:

A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

Respondent's statement of the case includes argument, and contains no references to the record for any statement, factual or otherwise.

## REPLY ARGUMENT

- A. **The plain wording of RCW 7.70.100 required Ms. Cogger to prove Dr. Blakeney received notice of her intention to commence the action. Proving she delivered her notice to a receptionist at his office is not sufficient.**

As it read at the times material to this case, RCW 7.70.100 said: "No action based upon a health care provider's professional negligence may be commenced unless **the defendant** has been given at least ninety days' notice of the intention to commence the action." (Emphasis added.) In the trial court, Ms. Cogger argued she complied with the statute when she gave notice to a receptionist in the office where Dr. Blakeney worked. The receptionist would not testify that she gave the notice to Dr. Blakeney. Thus, the issue in this case is whether Ms. Cogger gave Dr. Blakeney (the "defendant") the notice the statute requires. In her Response brief, Ms. Cogger avoids this issue by confusing it with others and arguing around it.

For example, Ms. Cogger argues that neither RCW 7.70.100 as it existed, nor the claims statutes in RCW 4.96 require personal service. Dr. Blakeney agrees. Unlike the 2007 version, the version of RCW 7.70.100 applicable to this case does not have any specific service or mailing requirements. Under the earlier version, Ms. Cogger could have given notice in many different ways – telephonically, verbally, leaving a note on a door, even putting a sign on a billboard. Personal service was not a requirement. The trial court improperly made it a requirement when it decided that the statute contained a distinction between “service” and otherwise “giving notice.”<sup>1</sup>

But this begs the issue. The issue is not whether RCW 7.70.100 or the claims statutes in RCW 4.96 require personal service. The issue is whether giving notice to a third person who will not testify that she gave that notice to the defendant satisfies the requirement of giving notice to the defendant. And that issue does not turn on whether the statute requires

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1. Though her argument begs the real issue in this case, it is also incorrect. Her argument is premised on the conclusion that when the Legislature uses the term “personal service” the term has a narrower meaning than the term “service.” In fact, the term “personal service” is broader than “service on the defendant.” Thus, when the Legislature specifically defined what constituted “personal service” in RCW 4.28.080, it included not only delivery to the defendant, but also delivery to a specific list of others, including residents of the defendant’s household, parents, and siblings, among others. RCW 4.28.080(11), (15), (16). If “service” included such individuals, the Legislature would not have needed to include them in the definition of “personal service.” In the absence of this expanded meaning, “service” has the meaning Ms. Cogger quotes in her brief: “The formal delivery of a notice.” Therefore, when a statute calls for “service” on a defendant, it requires the formal delivery to the defendant.

personal service. It turns on deciding what the statute means when, paraphrased, it says “give the defendant notice.”

In a limited response to this issue, Ms. Cogger discusses definitions from Black’s Law Dictionary for the terms “notice” and “service.” As noted above, these are not the operative terms. The operative terms are “give” or “given” and “notice.” Moreover, legal dictionaries are not the proper source for defining these terms. Undefined statutory terms are given their usual and ordinary meaning. *Christensen v. Ellsworth*, 162 Wn.2d 365 at ¶¶ 12-13, 173 P.3d 228 (2007). Ordinarily, that meaning is ascertained from a standard dictionary. *State v. Bainard*, \_\_\_ Wn. App. \_\_\_ at ¶35, 199 P.3d 460, 465 (2009) quoting *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001).

The dictionary defines the noun “notice” as:

1. a (1) : warning or intimation of something : ANNOUNCEMENT (2) : the announcement of a party's intention to quit an agreement or relation at a specified time (3) : the condition of being warned or notified — usually used in the phrase on notice b : INFORMATION, INTELLIGENCE
- 2 a : ATTENTION, HEED b : polite or favorable attention : CIVILITY
- 3 : a written or printed announcement
- 4 : a short critical account or review

Merriam-Webster’s Collegiate Dictionary at 848 (11<sup>th</sup> Ed. 2008). In pertinent part, it defines “give” as:

- 1 : to make a present of \*give a doll to a child\*
- 2 a : to grant or bestow by formal action \*the law gives

citizens the right to vote\* b : to accord or yield to another  
\*gave him her confidence\*

3 a : to put into the possession of another for his or her use  
\*gave me his phone number\* b (1) : to administer as a  
sacrament (2) : to administer as a medicine c : to commit to  
another as a trust or responsibility and usually for an  
expressed reason d : to transfer from one's authority or  
custody \*the sheriff gave the prisoner to the warden\* e : to  
execute and deliver \*all employees must give bond\* f : to  
convey to another \*give them my regards\*

*Id.* at 529. Applied to RCW 7.70.100, the words mean “to put an  
announcement into the possession of” the defendant.

The same result follows even if the court resorts to a legal dictionary.

The legal definition of “give notice” is:

To communicate to another, in any proper or permissible legal  
manner, information or warning of an existing fact or state of  
facts or (more usually) of some intended future action.

Black’s Law Dictionary at 819 (Revised 4<sup>th</sup> Ed. 1968).<sup>2</sup> This clearly  
contemplates delivery of information to the person designated to receive it.  
In this case that is the defendant, Dr. Blakeney.

Ms. Cogger argues that reading the statute to require notice be “given  
to” the defendant “distorts the statute.” Respondent’s Brief at 7. The  
argument ignores the statute’s plain wording. The statute is written in the  
passive voice. It instructs the claimant not to commence an action until the  
defendant “has been given . . . notice.” There is no distinction between the

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2. Apologies to the Court for the older publication.

passive voice phrase “defendant has been given notice” and the active voice phrase “give notice to the defendant.” Without changing the reach of the statute one iota, the Legislature could just as easily have worded it in the active voice: “A claimant may not commence action based upon a health care provider’s professional negligence unless he or she has given at least ninety days’ notice to the defendant of the intention to commence the action.”

Ms. Cogger argues that the 2007 amendment to RCW 7.70.100 “clarified” that the Legislature never intended to require personal service. The argument misses the point. On its face, the earlier version of the statute did not require personal service. Therefore, “clarification” was unnecessary.

To the extent Ms. Cogger relies on the 2007 amendment to argue that the legislature never intended the notice be conveyed to the defendant, the amendment does not support her argument. Unlike the original version of the statute, the 2007 version defines a specific, limited method of giving notice as the critical element. When that method (mailing through the US Mail) is followed, the statute presumes or imputes actual notice to the defendant. Under the 2007 amendment, proving the claimant gave notice in the prescribed manner proves “the defendant had been given notice” regardless of whether the defendant actually received it.

In contrast, the earlier version gave no prescribed methods, and therefore created no presumptions. Under the earlier version, claimants need

not prove how they gave notice, only that the defendant was given notice. If notice is in writing, proof that the defendant got the writing is sufficient. That proof could be testimony from a person who handed the notice to the defendant, a person who saw the defendant read the notice, or a person who heard the defendant comment about the notice. If notice is given by telephone, proof may be from the caller who could identify the defendant's voice at the other end of the phone. If notice is by billboard, proof from someone who heard the defendant read it or acknowledge seeing it would be sufficient.

But, it is wrong to contend that because, with the 2007 amendment the Legislature adopted a limited process which imputes notice when certain procedures are followed, it never intended to require the defendant to actually receive notice. Applying that logic to this case, Ms. Cogger could argue that if the 2007 version applied, she would have met the requirements by mailing her notice to the receptionist at the office where Dr. Blakeney worked. That is not a reasonable interpretation of the statute or a logical intention to attribute to the Legislature.

Ms. Cogger's argument also is wrong because it selectively applies the amendment. If Dr. Blakeney applied her reasoning, he could argue the 2007 amendment shows the Legislature intended the notice required under the earlier version could only be given by mail, which Ms. Cogger did not do.

In other words, it is just as reasonable to conclude that if the amendment indicates a legislative intent that notice to the defendant is presumed when written notice is mailed, then Ms. Cogger must show she mailed written notice. Since she did not mail her notice to Dr. Blakeney, but rather delivered it to a third person to give to Dr. Blakeney, she cannot have the benefit of the amendment. The bottom line is that Ms. Cogger cannot pick and choose how the amendment affects the earlier version of the statute.

The 2007 amendment does nothing more than recognize that, given modern postal practices, it is so sufficiently certain defendants will receive notice if it is mailed directly to them through the United States Mail that it is fair to impute actual notice when the notice is mailed.<sup>3</sup> The Legislature did not allow for a similar imputation if the notice was delivered to a third person like the receptionist at Dr. Blakeney's office. The 2007 amendment does not impact this case.

Dr. Blakeney does not dispute that, unlike the 2007 version, the version of RCW 7.70.100 applicable to this case does not have any specific service or mailing requirements. In this case, Ms. Cogger chose to deliver her notice to a third person to deliver to Dr. Blakeney. While that process does

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3. A question to be left for another day is whether, by stating "The notice required by [RCW7.70.100] shall be given" by mail, the Legislature intended that to be the only method for notice, so that giving notice by any other method is insufficient.

not violate the statute, it is sufficient under the statute only if Ms. Cogger established that the third person, or someone in the chain of custody from the third person, ultimately delivered the notice to Dr. Blakeney.

That is where Ms. Cogger failed. She did not fail because she did not “personally serve” Dr. Blakeney; the statute does not require personal service. She did not fail because she left the notice with a third person; the statute does not require any particular individual to give notice to the defendant. Ms. Cogger failed because she did not establish that under the method she chose, Dr. Blakeney got the notice.

Stated another way, Ms. Cogger failed because she did not prove she gave notice to Dr. Blakeney. All she proved was she gave notice to a third person to give to Dr. Blakeney. But that third person will not testify she ever gave it to Dr. Blakeney or to anyone else who gave it to Dr. Blakeney. Her situation is like giving a summons and complaint to a process server but never getting a declaration that the server served it. Because the statute required that she give notice to Dr. Blakeney, she failed to meet the requirements of the statute.

Finally, Ms. Cogger’s constitutional argument rests on a misinterpretation of the statute. She argues that because the statute requires “service” of the notice but fails to say how service should be accomplished, the statute is vague. Her argument fails because, as pointed out above, the

statute does not require service of the notice. It merely requires the plaintiff to give notice to the defendant. Formal service is a way of giving that notice, but not the only way. The operative phrase for constitutional analysis is not “service” but “the defendant has been given at least ninety days’ notice.”

A statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

Due process does not require impossible standards of specificity or absolute agreement. Vagueness is not simply uncertainty as to the meaning of a statute. In determining whether a statute is sufficiently definite, the provision in question must be considered within the context of the entire enactment and the language used must be afforded a sensible, meaningful, and practical interpretation. A court should not invalidate a statute simply because it could have been drafted with greater precision.

*American Legion v. Wash. Dept. of Health*, \_\_\_ Wn.2d \_\_\_, ¶¶66, 192 P.3d 306, 328 (2008)(Act prohibiting smoking “in a public place or in any place of employment” is not impermissibly vague).

There is nothing remotely vague about the phrase “the defendant has been given at least ninety days’ notice.” The fact that Ms. Cogger raises the argument for the first time on appeal supports that conclusion. Giving notice to someone means just that: give notice to them.

**B. Ms. Cogger failed to present substantial evidence that any negligence by Dr. Blakeney was a proximate cause of her injuries.**

Regarding the sufficiency of the evidence, Ms. Cogger claims the court should not consider Dr. Blakeney's argument because he failed to raise it in the trial court. Our appellate courts have stated repeatedly, however, that a defendant may raise sufficiency of the evidence for the first time on appeal. *Roberson v. Perez*, 156 Wn.2d 33, 39-40, 123 P.3d 844 (2005); *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998); *State v. Alvarez*, 128 Wn.2d 1, 9, 904 P.2d 754 (1995). The rule is memorialized in RAP 2.5(a)(2) which expressly identifies a parties' failure to establish facts upon which relief can be granted as an issue which can be raised for the first time on appeal.

On the merits of this issue, Ms. Cogger misses the point. Actions for injuries resulting from health care are governed by chapter 7.70 RCW. Plaintiff's must establish that their "injury resulted from the failure of a health care provider to follow the accepted standard of care[.]" RCW 7.70.030(1). RCW 7.70.040(1) provides that the plaintiff in an action for medical malpractice must show the defendant health care provider "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar

circumstances[.]” Generally, expert testimony is necessary to establish the standard of care for a health care provider in a medical malpractice action. *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

Plaintiffs have the burden of establishing every element essential to their case. *Miller v. Jacoby*, 145 Wn.2d 65, 74, 33 P.3d 68 (2001). One of those elements is causation. *Id.* It is not enough merely to prove that the defendant engaged in misconduct. “Negligence in the air” is not enough. *Hansen v. Washington Nat. Gas Co.*, 95 Wn.2d 773, 780, 632 P.2d 504 (1981). Plaintiffs must also prove that the misconduct brought about the harm they claim.

In her statement of the case, Ms. Cogger clearly and succinctly described her claim against Dr. Blakeney: He did not properly repair the initial tear, and he did not properly test the repair. Brief of Respondent at 1. Ms. Cogger’s injury was the subsequent bladder rupture. Thus, it was her burden to show that Dr. Blakeney’s failures caused the subsequent bladder rupture. That meaning proving either that the laceration Dr. Blakeney repaired failed, that Dr. Blakeney negligently caused a new rupture, or that a second defect was present when Dr. Blakeney performed his surgery which he should have seen and repaired.

Ms. Cogger presented no testimony that Dr. Blakeney’s repair failed.

The repair was at the front of Ms. Cogger's bladder along a vertical line. (RP 316-17, 319-20, 356-57, 560.) According to Dr. Ward, the rupture he repaired was at the back along a horizontal line. (CP 259, lns. 5-13).

Ms. Cogger's failure is glaringly illustrated by the bullet points at pages 10 and 11 of her brief. One more bullet point is needed to make her case: "The hole in her bladder was the hole Dr. Blakeney had repaired." That statement is absent because Ms. Cogger could not and did not present evidence to support it.

The same problem undermines her "alternate theories." At page 11 she claims the jury could have concluded that Dr. Blakeney "misidentified the location of the laceration he caused" implying that Ms. Cogger suffered only one bladder intrusion, at the back along a horizontal line, which later failed. But she presented no evidence that Dr. Blakeney actually misidentified the location. She did not call any of the nurses or other doctors who attended the surgery to testify. As a result, no one testified that the laceration Dr. Blakeney caused was in the back of the bladder and horizontal rather than in the front and vertical, or that Dr. Blakeney's description of the laceration in his operative reports was erroneous. Even Dr. Ward testified that Dr. Blakeney's repair could have healed to the point where it would not have been visible on August 17<sup>th</sup> when he (Dr. Ward) operated on Ms. Cogger. (CP 260; 304-05) That Dr. Blakeney "misidentified the location of the laceration he caused"

is pure speculation, and simply assumes the central fact of Ms. Cogger's case.

Her second alternate theory is that the defect Dr. Ward repaired was present and should have been seen and treated by Dr. Blakeney during the surgery on August 5<sup>th</sup>. (Respondent's Brief at 14.) She cites Dr. Ward's testimony that he believed the defect he saw on August 17<sup>th</sup> when he treated Ms. Cogger "in some shape or form existed on August 5, 2003" when Dr. Blakeney performed his surgery. Brief of Respondent at 13, citing CP 325-26. He also testified that if the defect had been discovered on August 5<sup>th</sup>, Ms. Cogger would have been better off. Of course, Dr. Ward later recanted part of that testimony, admitting he could not tell when the defect first might have appeared. (CP 315-17) But more importantly, no one testified either that if a defect "in some shape or form" did exist, Dr. Blakeney could have discovered it, or that Dr. Blakeney violated the standard of care by not discovering it. That was essential testimony Ms. Cogger did not present.

Put simply, neither of Ms. Cogger's expert witnesses connected their conclusions to her harm. It is true, as Dr. Blakeney readily acknowledged in his opening brief (Brief of Appellant at 16), Dr. Ross testified that Dr. Blakeney fell below the standard of care when he removed the catheter from Ms. Cogger four days after the surgery. (CP 353.) But, the catheter was placed to relieve pressure on the laceration Dr. Blakeney caused. Unless that laceration failed, removing the catheter too early is a violation of the standard

of care without a consequence. And, no one testified Dr. Blakeney's repair failed. Likewise, it is just as true Dr. Ward testified he believed the defect he saw on August 17<sup>th</sup> when he treated Ms. Cogger "in some shape or form existed on August 5, 2003" when Dr. Blakeney performed his surgery. (CP 325-26) But no one testified that if the defect existed Dr. Blakeney violated the standard of care by not discovering it. Because no evidence connected any misconduct by Dr. Blakeney to her injury, Ms. Cogger's evidence was insufficient to support the jury's verdict.

**C. Dr. Blakeney's passing reference to other incidents, even if considered "opening the door" to evidence of other wrongful acts, did not justify the admission of unsubstantiated, unspecific, and unchallengeable testimony, or justify allowing the testimony to be used to attack Dr. Blakeney's skills as a physician.**

Dr. Blakeney assigned error to the trial court's decision to allow deposition testimony by Dr. Ward that he had treated other of Dr. Blakeney's patients for similar injuries. Initially Ms. Cogger argues Dr. Blakeney did not preserve the error for review.

To be sufficient, objections to evidence must state specific grounds so that the court is informed and the opposing party has an opportunity to correct the error. *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426 (1994). Objections afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *State v. Avendano-*

*Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), *review denied* 129 Wn.2d 1007 (1996).

Here, Dr. Blakeney voiced his objections and the trial court clearly understood the issues. Dr. Ward's testimony was located at page 46 of his deposition. (CP 281-85; Brief of Appellant, Appendix A.) Ms. Cogger originally asked to read that testimony in her case in chief. Dr. Blakeney specifically objected. (RP 182, Ins. 18-24.) The court sustained the objection. (RP 186, Ins. 11-19.) Ms. Cogger renewed her request after Dr. Blakeney testified. (RP 482, ln. 18.) Dr. Blakeney again challenged the accuracy of the testimony. (RP 483, Ins. 5-10.) Then, the trial judge himself expressed doubts about the foundation for the testimony. (RP 484.) Dr. Blakeney agreed with the judge's observation that Dr. Ward had not checked any records (RP 484, ln. 10), and went on to point out that the testimony did not identify any patient (RP 488, ln. 24). The testimony gave evidence of other alleged wrongs. Dr. Blakeney clearly challenged it, and the trial court clearly understood both the challenge and the problems the testimony carried with it. Indeed, of all the evidentiary issues raised in the trial court, this occupied more time than any other. The error was adequately preserved for review.

On the merits, Ms. Cogger justifies the evidence as impeachment. Her argument fails for at least four reasons. First, her attorney's emphasis on

the testimony during closing argument was not limited to impeachment. He went so far as to read Dr. Ward's testimony verbatim regarding each incident. (RP 548-49; Brief of Appellant, Appendix B.) He also made a specific point of noting as "significant" that one incident occurred before Ms. Cogger's surgery and three occurred after. (RP 549, Ins. 20-23; Brief of Appellant, Appendix B.) The time of the incidents had no value except to imply to the jury that Dr. Blakeney's skills were deficient when he operated on Ms. Cogger, that was continuing to harm patients at time passed, and something needed to happen to get him to stop practicing medicine.

Second, the court did not give a limiting instruction. As a result, the jury was not informed that the evidence could only be considered for impeachment. Third, using testimony as impeachment does not make otherwise inadmissible testimony admissible. Even as impeachment testimony, it was so vague, lacked any foundation to support its reliability, was so highly inflammatory, un rebuttable and unchallengeable, and created such risk that it would be interpreted as showing that Dr. Blakeney was unskilled and unqualified, the testimony was clearly otherwise inadmissible. Fourth, "opening the door" to an issue as inflammatory as other wrongs did not justify the disproportionate response the court allowed. It bears repeating (See Brief of Appellant at 21): The testimony that "opened the door" was a single passing sentence in Dr. Blakeney's review of his medical background.

(RP 276, Ins. 15-18.) The trial court could easily have addressed the matter with an instruction to the jury to ignore the testimony, and an instruction to Dr. Blakeney not to raise the matter again. The court's decision allowed Ms. Cogger to make it a center point of her case.

Ms. Cogger's characterization of Dr. Ward's testimony as being "minor and insignificant" in the face of "overwhelming evidence" of Dr. Blakeney's guilt (Brief of Respondent at 17) just ignores the record. As discussed previously, Ms. Cogger's trial tactic was to present a list of wrongs without ever actually connecting them to Ms. Cogger's injuries. Dr. Ward's testimony then allowed her to attack Dr. Blakeney's surgical skill. With Dr. Ward's testimony, Ms. Cogger portrayed Dr. Blakeney as a bad surgeon before her surgery and a worsening surgeon after. The prejudice was extreme.

### CONCLUSION

Pro se litigants are held to the same standards as attorneys. That does not mean, however, that ordinary citizens who must represent themselves are rightly viewed as proverbial fish in a barrel. A fair trial in a fair tribunal is a basic requirement of due process. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002).

In this case, a trial occurred that should not have occurred. Ms. Cogger failed to give Dr. Blakeney the notice specifically required under

RCW 7.70.100. Her case should have ended there. When it did not, Ms. Cogger presented a case to the jury based on nothing more than a list of wrongs she could not connect to her injuries, and the inference that Dr. Blakeney was hurting his patients and would hurt more unless he was stopped. In allowing this to occur, the trial court failed to assure that Dr. Blakeney received a fair trial.

Because Ms. Cogger's case fails as a matter of law and fact, the judgment against Dr. Blakeney should be reversed, and the case remanded to the trial court to vacate the judgment and dismiss the case. In the alternative, because the trial court wrongfully allowed evidence of other wrongful acts prejudicing Dr. Blakeney's ability to receive a fair trial, the judgment should be reversed and vacated, and the case should be remanded for re-trial of all issues.

Dated this 4<sup>th</sup> day of December, 2009.

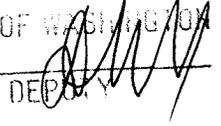
GOSSELIN LAW OFFICE, PLLC

By: 

TIMOTHY R. GOSSELIN, WSBA #13730  
Attorney for Appellant

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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

KIMBERLY A. COGGER, a  
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Respondent,

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SANDERS S. BLAKENEY,  
M.D. and "JANE DOE"  
BLAKENEY

Appellants.

NO. 38742-5-II

DECLARATION OF  
SERVICE OF REPLY  
BRIEF OF APPELLANT

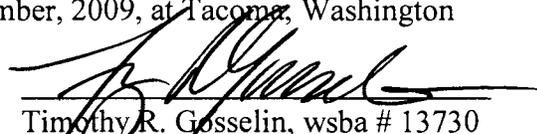
On said day below, I personally delivered a true and correct copy of  
the Reply Brief of Appellant to the following:

Salvador A. Mungia  
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I declare and state under the penalty of perjury under the laws of the  
state of Washington that the foregoing is true and correct.

Signed this 4th day of December, 2009, at Tacoma, Washington

  
Timothy R. Gosselin, wsba # 13730  
Gosselin Law Office, PLLC