

Court of Appeals No. 39301-8-II  
Thurston County Superior Court 08-2-02116-2

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DALE E. ALSAGER, D.O., individually and with  
respect to his licensure as an Osteopathic Physi-  
cian and Surgeon, Credential No. OP00001485,

APPELLANT,

v.

WASHINGTON STATE BOARD OF OSTEOPATHIC MEDICINE AND  
SURGERY, a State Board and Agency as established by  
law under RCW 18.57.003; WASHINGTON STATE DEPART-  
MENT OF HEALTH, an administrative agency of the  
State of Washington; ADJUDICATIVE SERVICE UNIT, a  
unit of the Washington State Department of Health,  
and JOHN F. KUNTZ, Health Law Judge, Presiding  
Officer, Adjudicative Service Unit, Department  
of Health,

RESPONDENTS.

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REPLY OF APPELLANT

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RHYS A. STERLING, P.E., J.D.  
By: Rhys A. Sterling, #13846  
Attorney for Appellant Alsager

P.O. Box 218  
Hobart, Washington 98025-0218  
Telephone 425-432-9348  
Facsimile 425-413-2455

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DIVISION II

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## REPLY

The most important contextual aspect of the Respondents' Brief is not what is contained therein, but what is omitted therefrom. Conspicuously and curiously absent from Respondents' Brief is any reference to or inclusion in any form whatsoever of the following term: "quasi-criminal".

We recently reiterated medical discipline is quasi-criminal in Johnston, 99 Wn.2d 466. Johnston and Kindschi are unquestionably the law of this jurisdiction.

Nguyen v. Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 528, 29 P.3d 689 (2001).<sup>1</sup> The unexplained and indefensible omission of this crucial and fundamental term fatally taints the Respondents' analysis of the evidence as to the issues presented to this Court for review,

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<sup>1</sup> Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 663 P.2d 457 (1983); In re Revocation of License of Kindschi, 52 Wn.2d 8, 319 P.2d 824 (1958). In stark contrast, the Heinmiller v. Department of Health, 127 Wn.2d 595, 903 P.2d 433, 909 P.2d 1294 (1995), case cited by Respondents for the purported proposition that medical disciplinary proceedings are not of a penal nature and are intended only to protect the public (Brief of Respondents, at p. 3) carried no sway in the Nguyen decision and was relegated solely to the dissent of Justice Ireland. Nguyen, 144 Wn.2d at 542 (Ireland, J., dissenting).

and undercuts their Conclusion that "the Board's Final Order determining that Dr. Alsager's treatment and care of Patients A through G fell below the standard of care and constituted unprofessional conduct".<sup>2</sup> That this action against Alsager was quasi-criminal means that (1) the standard of proof the Board must apply to the evidence is clear, cogent and convincing;<sup>3</sup> and (2) the appellate standard of review is the "highly probable" test.<sup>4</sup> And because constitutional protections including, *inter alia*, due process apply to professional license disciplinary actions, the civil tort standard of care in negligence cases determined on an *ad hoc* basis does not apply where the ultimate sanction against a licensee is akin to the death penalty.

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<sup>2</sup> Brief of Respondents, at p. 39.

<sup>3</sup> The standard of proof applied is that the conclusions of law must be based on findings of fact that are in turn based on evidence that is clear, cogent and convincing. Ongom v. Department of Health, 159 Wn.2d 132, 142-43, 148 P.3d 1029 (2006).

<sup>4</sup> Where the evidentiary standard is clear, cogent and convincing, the Court must determine that the competent evidence is substantial enough to allow it to conclude that the ultimate facts in issue have been shown to be "highly probable." In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

[R]evocation of a [professional] license is much like the death penalty in criminal law - it is not imposed to reform the particular person involved.

In re Revocation of the License to Practice Dentistry of Flynn, 52 Wn.2d 589, 596, 328 P.2d 150 (1958). The *ad hoc* determination of standards in a quasi-criminal or otherwise penal proceeding distinguishes the underlying quasi-criminal action against Alsager from mere civil tort cases<sup>5</sup> and does not pass constitutional muster.<sup>6</sup> The promulgation

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<sup>5</sup> Whereas liability in civil tort cases, such as medical malpractice, is grounded on the *ad hoc* determination of the standard of care of a reasonably prudent practitioner, a quasi-criminal/penal action against a professional licensee that is subject to, *inter alia*, due process protections requires that standards of care must be announced in advance of disciplinary actions because "persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong in hindsight conception of what the public interest requires in the particular situation. . . . Where an administrative agent is given full rule-making power, he must in all fairness, bottom an alleged violation on general legislation before he may rule in a particular case. The general mandate, either statutory or administrative must precede the specific violation." Boller Beverages, Inc. v. Davis, 183 A.2d 64, 71, 73 (N.J. 1962).

<sup>6</sup> "Regulatory systems which operate without rules are inherently irrational and arbitrary. The purpose of such a system is presumably to bring primary conduct into conformance with agreed upon societal norms. Yet a system operating without rules cannot possibly achieve this goal,  
(continued...)"

of standards of care for enforcement in disciplinary actions<sup>7</sup> is very obviously based on legislative enactments empowering the Board with rulemaking authority,<sup>8</sup> is in fact doable and has been done by the

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<sup>6</sup>(...continued)

since the people being regulated are not informed of what the societal norms are." Megdal v. Oregon State Board of Dental Examiners, 605 P.2d 273, 277 n.7 (Or. 1980) (quoting Note, *Due Process Limitations on Occupational Licensing*, 59 Va L Rev 1097, 1104-1105 (1973)).

<sup>7</sup> The Courts are very familiar with adopting standards of professional conduct as applied in lawyer disciplinary proceedings, which are also quasi-criminal in nature. See Rules of Professional Conduct (where as a matter of practicality it is observed that "not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines," RPC, *Fundamental Principles of Professional Conduct*). Nevertheless, each disciplinary action taken by the Washington Bar against a lawyer is firmly grounded on the alleged violation of these very specific Rules (see, e.g., In re McMullen, 127 Wn.2d 150, 163, 896 P.2d 1281 (1995), where the Court states that "a violation of the RPC . . . is grounds for attorney discipline"). Respondents appear to take the untenable position that although the Courts have successfully promulgated such standards for lawyer discipline, it is beyond the ability of administrative agencies, such as the Board, to do so for those professions under their control. Yet contrary to its stated position, the Board has in fact promulgated standards of practice for pain management as WAC 246-853-510 through WAC 246-853-540. The Board cannot with a straight face say that to promulgate standards of practice "would be an impossible undertaking," Brief of Respondents, at p. 27, where it has in fact and legally done so.

<sup>8</sup> The Board has the following express authority as delegated by the Legislature fully considered as being within its ability and capability to accomplish: ". . . (14) to adopt standards of professional conduct or practice." RCW 18.130.050. The Legislature expressly defined "standards of practice" to mean "the care, skill, and learning associated with  
(continued...)

Board,<sup>9</sup> and moreover is supported persuasively by case law from other jurisdictions.<sup>10</sup> As so clearly held by our sister courts, it is not a question of application of the void for vagueness doctrine (as there are no standards promulgated in advance), it is rather the well-established legal principle that when legislatively empowered to adopt standards of conduct, an administrative agency acts beyond, outside and in excess of its authority to develop and enforce standards on an *ad hoc* basis in a quasi-

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<sup>8</sup>(...continued)  
the practice of a profession." RCW 18.130.020.

<sup>9</sup> Not formally promulgated by the Board until 2007, its Guidelines for Management of Pain have been in effect since 1997. See Brief of Respondents, Appendix "B" at p. 1. As clearly stated by the Board in its promulgation of the Guidelines as a WAC, the purpose of these Guidelines even when not adopted as law was to set forth "**recognized national standards** in the field of pain treatment." WAC 246-853-520(1) (emphasis added). These were the recognized uniform standards of care applied by Alsager, as a pain management specialist, CAR Bates No. 10924, in his treatment of Patients "A" through "G" (CAR Bates Nos. "A"/10709-10712; "B"/10637-10643; "C"/10754-10757; "D"/10791-10793; "E"/10828-10830; "F"/10870-10873; "G"/10894-10896) that were found not to have been violated by an expert in such standards. CAR Bates Nos. 10294 - 10295. It is obvious that the Board ignored all substantial evidence presented by Alsager. Brief of Respondents, at pp. 4 - 16.

<sup>10</sup> Megdal v. Oregon State Board of Dental Examiners, 605 P.2d 273 (Or. 1980); Pennsylvania State Board of Pharmacy v. Cohen, 292 A.2d 277 (Pa. 1972); Boller Beverages, Inc. v. Davis, 183 A.2d 64, 71, 73 (N.J. 1962).

criminal/penal proceeding against a licensee.<sup>11</sup>

Alsager conformed his professional conduct and care for each patient with all known and available rules, regulations and guidelines.<sup>12</sup> It is only with those *ad hoc* standards first announced by the Board **after** the hearing that Alsager has found himself subject to sanctions significantly and adversely affecting his license, his professional

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<sup>11</sup> "Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong in hindsight conception of what the public interest requires in the particular situation. . . . As has already been pointed out, it is the antithesis of legislation to make law from case to case and after the fact. Where an administrative agent is given full rule-making power, he must in all fairness, bottom an alleged violation on general legislation before he may rule in a particular case. The general mandate, either statutory or administrative must precede the specific violation." Boller Beverages, 183 A.2d at 71. See also Cohen, 292 A.2d at 280.

<sup>12</sup> The Board concluded as a matter of fact and law that Alsager had not violated any State or federal rule or regulation regarding pain management. CAR Bates No. 4980 (referencing RCW 18.130.180(7)). Contrary to the Respondents' contentions, Statement of Charges ¶ 1.23 had previously been removed from Board consideration at the hearing by its omission from Prehearing Order No. 8 which set the issues and agenda for the hearing. Bates No. 4695; WAC 246-11-390(5)(a). This removal was merely clarified prior to the hearing and outside the presence of the Board; and such matter was not an issue for Board consideration. The Board's Conclusion of Law ¶ 2.5 (CAR Bates No. 4980) is NOT restricted or limited in any way, shape or form to addressing, and moreover does not even reference at all, ¶ 1.23 of the Statement of Charges. The purpose and scope of the Board's Conclusion is as broad as it is written.

reputation, and his livelihood.<sup>13</sup>

As an administrative agency the Board has only such powers as expressly given by statute or as are necessarily implied to carry out its authority.<sup>14</sup> The controlling statute expressly limits "unprofessional conduct" to only those enumerated "following conduct, acts or conditions". RCW 18.130.180.<sup>15</sup> However, the Board is expressly granted APA rule-making authority to define standards of practice/care on which to ground disciplinary actions against licensees. RCW 18.130.050. The Board exceeded its statutory authority by its *ad hoc* development and application of standards of care against Alsager initially in a quasi-criminal professional

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<sup>13</sup> Direct and competent evidence that standard-making results in arbitrary and inconsistent requirements that absolutely no reasonable practitioner could ever anticipate is in the conflicting so-called standard of care announced *ad hoc* by the Board regarding Patients "E" and "F" with respect to second opinions and co-management of patient care. Compare CAR Bates No. 4975 with CAR Bates No. 4977.

<sup>14</sup> In re Electric Lightwave, Inc., 123 Wn.2d 530, 537, 869 P.2d 1045 (1994); Anderson, Leach & Morse, Inc. v. State Liquor Control Board, 89 Wn.2d 688, 694, 575 P.2d 221 (1978).

<sup>15</sup> The specific list of 25 types of "conduct, acts or conditions" is therefore all inclusive.

license disciplinary action rather than first through the rulemaking process of the APA as legislatively intended and constitutionally required.<sup>16</sup> RCW 34.05.570(3)(b).

As for the Board's patent disregard of substantial competent evidence that the death of Patient "A" was in fact SUDEP, such abdication of its constitutional mandate as fact-finder in a quasi-criminal proceeding can be traced directly to the cause of death attributed by the King County Medical Examiner as a conclusive presumption created by RCW 70.58.180. CAR Bates No. 4969. It is by no stretch of the imagination, and likely well-grounded in fact, that based on this conclusive presumption the Board focused solely on Alsager's pain

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<sup>16</sup> Again contrary to the Respondents' assertions (Brief of Respondents, at p. 32 n.7), the Board in fact had actually adopted its Guidelines for Management of Pain as a formal statement of policy well prior to 2002. Under the APA the Board issued notice of modification of its adopted Guidelines on May 2, 1997 with respect to consultations. See WSR 97-15-013 (July 7, 1997). These Guidelines were thus clearly in effect at all times during the course of Alsager's treatment and care of Patients "A" through "G". It was also clear that the Board intended to periodically update its Guidelines to provide practitioners with any changes or new standards of care as such became available and accepted by the profession. (Consistent with the notice given in WAC 246-853-520(3).)

management treatment and care for Patient "A" when such care by reasonable medical certainty was not the cause of death of Patient "A" and was not likely to cause him risk of harm.<sup>17</sup> It cannot be said as "highly probable" that the Board properly concluded based on substantial competent evidence that Alsager's care of Patient "A" fell below accepted standards where its analysis of the evidence was short-circuited and tainted by its blind application of an unconstitutional conclusive presumption.<sup>18</sup>

As an alternative to a conclusive presumption, Respondents appear to frame RCW 70.58.180 as creating but a rebuttable presumption; namely a "rule of

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<sup>17</sup> CAR Bates Nos. 10286 - 10287; CAR Bates No. 10292; CAR Bates No. 10522.

<sup>18</sup> Contrary to the Respondents' assertions (Brief of Respondent, at p. 23 n.4), there is no indication in law that Alsager had standing to pose a legal challenge to a death certificate. RCW 68.50.015 and case law applying such statute and its related parts strongly indicate that reviews are limited to family members and typically challenge suicide as a cause of death. See Thompson v. Wilson, 142 Wn. App. 803, 175 P.3d 1149 (2008); State ex rel. Taylor v. Reay, 61 Wn. App. 141, 810 P.2d 512 (1991); State ex rel. Murray v. Shanks, 27 Wn. App. 363, 618 P.2d 102 (1980). In fact, pursuant to RCW 68.50.105 "reports and records of autopsies or post mortems shall be confidential" and only certain designated persons "may examine and obtain copies of any such report or record." And such exclusive list of persons would exclude Alsager.

evidence . . . constituting *prima facie* proof of the fact to be proved and the fact presumed." Brief of Respondents, at p. 22. Even if such be true, and it is not, "*prima facie* evidence can be rebutted." United States v. Deaconess Medical Center, 140 Wn.2d 104, 108, 994 P.2d 830 (2000). Under a somewhat analogous statutory scheme it was held that "the coroner's factual determinations concerning the manner, mode and cause of death, as expressed in the coroner's report and the death certificate, create a nonbinding rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary." Vargo v. Travelers Insurance Company, 516 N.E.2d 226, 229 (Ohio 1987). Here, there was much substantial competent evidence presented by experts stating that with reasonable medical certainty the cause of death of Patient "A", a person diagnosed with epilepsy, was SUDEP and not from any combination of pain modalities prescribed or given to Patient "A"

by Alsager<sup>19</sup> during the course of treatment.<sup>20</sup> This substantial competent evidence was totally ignored by the panel as it expressly excluded such evidence from consideration and treated the ME Report and Death Certificate cause of death as a conclusive presumption and in so doing it acted unconstitutionally and violated Alsager's rights to due process and a fair hearing all to his substantial and severe prejudice. As rightly observed by the courts, "conclusive presumptions deprive defendants of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." State v. Belmarez, 101 Wn.2d 212, 217, 676 P.2d 492 (1984).<sup>21</sup>

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<sup>19</sup> Alsager testified as to the entire personal history of diagnosis and treatment of Patient "A" over the many years he was a patient for pain management. CAR Bates Nos. 10649-10674; 10709-10712.

<sup>20</sup> CAR Bates Nos. 10265 - 10294.

<sup>21</sup> It is perhaps but a mere distinction in name without a substantive difference to consider the Board's treatment of this issue as a conclusive presumption that is unconstitutional on its face or as *prima facie* proof as to which all substantial competent rebuttal evidence was summarily ignored in violation of due process. Either way, the Board violated Alsager's constitutional rights that was not harmless.

The Board's Final Order must be reversed and vacated as its conclusions are based on findings that patently ignore constitutional mandates and principles of due process and are clear errors of law that are not harmless and that substantially and severely prejudice Alsager.<sup>22</sup>

As for sanctions imposing conditions on Alsager's license and right to practice as an Osteopathic Physician and Surgeon, the authority of the Board to impose conditions is statutorily tied to the requirement that the licensee must be on probation.<sup>23</sup> The Board did not place Alsager on probation (his license is restricted only with respect to prescribing certain controlled substances); therefore, his professional license cannot be subject to conditions as a matter of law. Accordingly, Final Order ¶ 3.2 must be stricken as it is in excess of the Board's statutory authority.

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<sup>22</sup> RCW 34.05.570(3)(a), -(c), -(d), and -(e).

<sup>23</sup> Only those licensees placed on probation are subject to conditions on practice. RCW 18.130.160(7). There is nothing confusing about this, again contrary to Respondents' contentions. Brief of Respondent, at p. 35 n.8.

As for the monetary fine the Board assessed against Alsager that exceeds its statutory authority to impose and is unconstitutionally excessive, the rule of lenity applies in this quasi-criminal action<sup>24</sup> in such manner as to make a sanctionable violation of Chapter 18.130 RCW singular in nature regardless of how many individual patients may be in issue. Cf. State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009) (determination of the proper unit of prosecution is an issue of law that is reviewed *de novo*, and the rule of lenity applies to avoid turning a single transaction into multiple offenses).

As for the *ex parte* summary restrictions imposed by the Board on Alsager's osteopathic physician's license, the Board improperly relied on and

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<sup>24</sup> The rule of lenity applies to both criminal and quasi-criminal actions. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Under this principle, penalties are to be strictly construed and all ambiguities must be resolved in favor of lenity to the defendant to avoid imputing to the Legislature an enactment that lacks necessary precision. In re Personal Restraint of Stenson, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004); United States v. Enmons, 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

acted on the same errors of fact and law it applied in its Final Order. Alsager's license and livelihood were severely impacted by application of an unconstitutional conclusive presumption and moreover on facts unsupported by substantial competent evidence. The imposition of substantial license restrictions *ex parte* is a taking or substantial destruction of property interests as to which a post-deprivation hearing provides no adequate remedy.<sup>25</sup> The damage done to one's professional reputation and livelihood cannot be undone.<sup>26</sup> With any reversal and vacation of the Final Order must also go the reversal and vacation of the Ex Parte Order of Summary Restriction.<sup>27</sup>

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<sup>25</sup> Cf. In re Impoundment of Chevrolet Truck, 148 Wn.2d 145, 150 n.3, 60 P.3d 53 (2002) (in the context of the seizure of an automobile by mandatory impoundment).

<sup>26</sup> This Board action alone cut Alsager's professional practice by over 70 percent. CAR Bates No. 10926.

<sup>27</sup> And with such vacation must also be the instruction from the Court to the Board and Department to immediately remove and correct in any public registry or posting that references or includes such restrictions on Alsager's license. This public notice alone has caused Alsager irreparable harm and has made it impossible for him to obtain admission into training and/or residency programs. Final Order, at p. 25 ¶ 3.1.

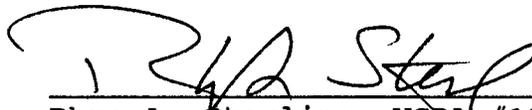
CONCLUSION

The Board and its panel committed many errors in its quasi-criminal prosecution of Dr. Dale E. Alsager, D.O., many of which are contrary to our Constitutions and statutes, and most assuredly were severely prejudicial and were not harmless to Alsager and his professional license, reputation and livelihood. The harm of these errors of fact and law can never truly be undone, but nevertheless can only be addressed and corrected by this Court by the complete reversal and vacation of both the Board's *Ex Parte* Order of Summary Restriction and its Final Order (Corrected).

DATED this 6<sup>th</sup> day of October, 2009.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



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Rhys A. Sterling, WSBA #13846  
Attorney for Appellant Dale E.  
Alsager, D.O.

Court of Appeals No. 39301-8-II  
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and JOHN F. KUNTZ, Health Law Judge, Presiding  
Officer, Adjudicative Service Unit, Department  
of Health,

RESPONDENTS.

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DECLARATION OF SERVICE BY MAIL

---

RHYS A. STERLING, P.E., J.D.  
By: Rhys A. Sterling, #13846  
Attorney for Appellant Alsager

P.O. Box 218  
Hobart, Washington 98025-0218  
Telephone 425-432-9348  
Facsimile 425-413-2455

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STATE OF WASHINGTON  
BY  
RHYS A. STERLING

COURT OF APPEALS  
DIVISION II

STATE OF WASHINGTON )  
 ) ss. DECLARATION OF RHYS  
 ) A. STERLING  
COUNTY OF KING )

RHYS A. STERLING hereby says and states under penalty of perjury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the attorney of record representing Appellant Dale E. Alsager, D.O. in the action captioned Alsager v. Board of Osteopathic Medicine and Surgery, et al., Court of Appeals, Division II No. 39301-8-II.

3. By postage prepaid first class mail on October 6, 2009 I served on the counsel of record for Respondents a copy of the REPLY OF APPELLANT and the DECLARATION OF SERVICE BY MAIL filed in this matter, by placing in the United States mail the same addressed to:

DECLARATION OF SERVICE  
BY MAIL  
-- PAGE 1 OF 2

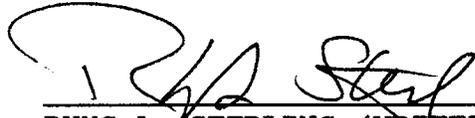
Callie A. Castillo and Cassandra Buyserie  
Assistant Attorneys General  
Gov't Compliance and Enforcement Div'n  
P.O. Box 40100  
Olympia, Washington 98504-0100

4. By postage prepaid first class mail on October 6, 2009 I filed with the Court of Appeals, Division II, the original and one (1) copy of the REPLY OF APPELLANT and the original of this DECLARATION OF SERVICE BY MAIL by placing in the United States mail the same addressed to:

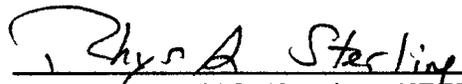
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, Washington 98402  
Attn: David C. Ponzoha  
Clerk/Administrator

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

October 6, 2009  
DATE

  
RHYS A. STERLING (WRITTEN)  
WSBA # 13846

H. Bond, WA  
PLACE OF SIGNATURE

  
RHYS A. STERLING (PRINTED)

DECLARATION OF SERVICE  
BY MAIL  
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