

No. 39511-8-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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Terry S. Hartman, Appellant

v.

Nationwide Mutual Insurance Company; Nationwide Life  
Insurance Company; Assurity Security Group, Inc.; Assurity Life  
Insurance Company, Respondents

RESPONDENTS' BRIEF

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
DEPUTY

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## **I. INTRODUCTION**

Appellant Terry Hartman asks this Court to overturn a Pierce County Superior Court summary judgment order so that he may obtain a windfall from an honest, inadvertent mistake by Assurity Life Insurance Company's agent. The trial court properly held that Assurity's good-faith mistake did not support a claim under the Washington Consumer Protection Act and this Court should affirm the trial court's decision.

## **II. STATEMENT OF THE ISSUES**

1. A good-faith mistake by an insurance company is not an unfair or deceptive act under the CPA. The evidence is undisputed that Assurity's agent made an isolated, inadvertent mistake when she stated Hartman's monthly benefits were \$10,000 per month – instead of the correct amount: \$5,000 – in a single conservation letter to Hartman. Should this Court affirm the trial court's decision because Hartman cannot establish an unfair or deceptive act?

2. To establish harm – the CPA's fourth element – a plaintiff must prove that its property is diminished by the defendant's act. Here, Hartman requested that Assurity cancel his policy, but because of Assurity's letter, he retained his policy and received \$255,000 in disability he would not have received if the policy had been cancelled. Should this

Court affirm the trial court's decision because Hartman benefitted immensely from the acts he complains of?

3. Proximate cause under the CPA requires a plaintiff to establish a cause that produces the injury and without which the injury would not have occurred. Hartman claims Assurity's letter caused him to be underinsured. However, it was Hartman's own acts – selecting a \$5,000 policy and paying premiums for four years – that left him underinsured (or entirely uninsured if Assurity had cancelled his policy as requested). Should this Court affirm the trial court because Hartman would have suffered the same or greater injury without Assurity's letter?

### **III. STATEMENT OF THE CASE**

Appellant Terry S. Hartman completed an Application for Individual Disability insurance form for defendant, Nationwide Insurance Company in 2000.<sup>1</sup> Nationwide issued a Guaranteed Renewable Disability Income Policy (the "Policy") to Hartman.<sup>2</sup> The rights and obligations under the Policy were subsequently reinsured and administered by defendant, Assurity Life Insurance Company.<sup>3</sup> Assurity has defended this case on behalf of both Assurity and Nationwide.

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<sup>1</sup> CP 47-52.

<sup>2</sup> CP 33-53.

<sup>3</sup> CP 30.

The Policy states that Hartman's maximum monthly benefit was \$3,800.00 with an Integrated Social Benefits Rider of \$1,200.00 for a total maximum monthly benefit of \$5,000.00.<sup>4</sup>

Even if the policy wasn't clear, Hartman then executed an Application Amendment for Health Insurance which clearly confirmed the total monthly benefit was \$5,000.00.<sup>5</sup> Hartman paid the premiums for over four years.

On an unsigned handwritten note received by Assurity on September 20, 2004, Hartman requested his disability policy be canceled.<sup>6</sup> Since Assurity's company policy requires the policy holder's signature to terminate an insurance policy, Assurity sent a conservation letter to Hartman on September 27, 2004.<sup>7</sup>

Assurity representative Linda Nettland authored the letter and inadvertently listed the benefit amount as \$10,000.00 instead of the actual \$5,000 amount.<sup>8</sup>

Nettland explained her mistake at her deposition:

- Q. All right. And what was the purpose of this letter?  
A. The purpose of the letter was to provide the policyholder with information on his policy so that he could make an informed decision.

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<sup>4</sup> CP 35.

<sup>5</sup> CP 46.

<sup>6</sup> CP 22.

<sup>7</sup> CP 24-27.

<sup>8</sup> CP 24.

- Q. All right. And is all of the information in the letter that you drafted on September 27th true?
- A. The monthly benefit amount stated is incorrect because I inadvertently miscalculated the amount of the monthly benefit.
- Q. Do you recall how you calculated the monthly benefit in Mr. Hartman's case?
- A. I don't specifically recall this case. But after looking at the policy again, I believe I added together the amount of the base policy plus what I thought were two additional riders, when, in fact, there was actually only one rider in addition to the base policy.
- ....
- Q. Okay. With regard to your miscalculation of Mr. Hartman's monthly benefit, am I correct in thinking that that miscalculation was not intentional?
- A. It was not intentional.
- Q. It was simply a mistake that you made on your part?
- A. Yes. I just made a mistake.<sup>9</sup>

Hartman decided to maintain his policy with Assurity.<sup>10</sup> On November 24, 2004, Hartman became disabled as a result of an all-terrain vehicle accident.<sup>11</sup> Hartman submitted a claim to Assurity that he was totally disabled.<sup>12</sup> Assurity began making \$5,000.00 monthly payments to Hartman—the maximum disability benefit.<sup>13</sup> Assurity continues to make

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<sup>9</sup> CP 15-16, ln. 31:20-32:13; CP 17, ln. 43:12-19

<sup>10</sup> CP 119.

<sup>11</sup> CP 31.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

\$5,000.00 monthly payments and has paid Hartman \$255,000 through the summary judgment hearing.<sup>14</sup>

#### IV. ARGUMENT

The parties agree that *Hangman Ridge Training Stables v. Safeco Title Insurance Co.* provides the appropriate five-part test for establishing a CPA violation: (1) an unfair or deceptive act, (2) occurring in trade or commerce, (3) affecting a public interest, (4) causing injury to the plaintiff's business or property, and (5) and such injury was proximately caused by defendant's unfair or deceptive act.<sup>15</sup> The parties also agree that this Court shall review the trial court's decision granting Assurity's motion for summary judgment and denying Hartman's cross-motion under a *de novo* standard. The question that remains for this Court is whether Hartman can meet the *Hangman Ridge* test. This Court's review of the undisputed facts will undoubtedly lead to the conclusion that Hartman cannot establish four of the five elements and that the trial court's decision shall be affirmed.

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<sup>14</sup> CP 31. (Assurity was required by order from Washington DSHS to send a portion of the monthly payments to DSHS to pay for the plaintiff's delinquent child support payments. The \$255,000.00 includes the money paid to Washington DSHS on plaintiff's behalf.)

<sup>15</sup> 105 Wn.2d 778, 719 P.2d 531 (1986).

**A. Assurity's honest and inadvertent mistake is not an unfair or deceptive act.**

An inadvertent, isolated mistake is not an unfair or deceptive act establishing the Consumer Protection Act's first element.<sup>16</sup> The Court in *Coventry Associates v. American States Insurance Co.*, unequivocally stated Washington's policy regarding honest mistakes by insurance companies:

Of course, insurance companies, like every other organization, are going to make some mistakes. As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith **or CPA claim** against its insurer on the basis of a good faith mistake.<sup>17</sup>

Nettland testified that she made a clerical error by inadvertently adding an additional rider to Hartman's benefit amount.<sup>18</sup> Nettland's testimony that her mistake was honest is not disputed by Hartman. Nettland's good-faith mistake cannot establish an unfair or deceptive act under the law stated in *Coventry* and *Sato*.

Hartman next argues that Nettland's act was a *per se* unfair or deceptive act because it was a violation of the Insurance Code—RCW 48.30.090 and 48.30.180 – and the Washington Administrative Code

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<sup>16</sup> *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 602, 681 P.2d 242 (1984).

<sup>17</sup> 136 Wn.2d 269, 280, 961 P.2d 933 (1988).

<sup>18</sup> CP 15-16, ln. 31:20-32:13; CP 17, ln. 43:12-19.

provisions – WAC 284-30-330(1) and 284-30-350. This argument also fails.

Neither WAC section is applicable because both only apply to acts in the claims process. WAC 284-30-330 is “specifically applicable to the settlement of claims” and WAC 284-30-350 is only violated if the complained act occurs *after* a claim is presented. Because Hartman received Assurity’s letter months before he submitted a claim, Hartman’s reliance on this WAC section to establish an unfair or deceptive act fails.

Hartman also alleges Assurity violated RCW 48.30.180 – the “twisting” statute. In *Strother v. Capitol Bankers Life Insurance Co.*, a case relied on by Hartman, the Court defined twisting and explained when twisting regulations are applicable:

[The purpose of twisting regulations] is to protect the holder of an insurance policy from making an unwise choice in cancelling an existing policy *and* buying a new policy. A decision to replace an existing policy may be good or bad depending on the facts. The evil to be avoided is an unwise cancellation. The remedy should be to give the insured the benefit of his prior policy, not the benefit of his new policy.<sup>19</sup>

Hartman was not seeking to buy a new policy or replace his existing policy. Since the statute protects the insured from false comparisons and misrepresentations when the insured is considering switching policies, RCW 48.30.180 is inapplicable. Even if the twisting

statute was applicable, the remedy would be providing Hartman the benefits of his policy – exactly what Assurity has steadfastly provided.

Lastly, Hartman alleges that Assurity’s letter misrepresents the policy terms and thus violates RCW 48.30.090. The case law interpreting RCW 48.30.090 is sparse and unclear as to the requisite intent necessary to prove a misrepresentation. The parties agree that Nettland made an honest mistake, but Hartman argues that any incorrect statement about a policy, whether it is isolated and innocent or widespread and intentional, is a *per se* unfair and deceptive act. Hartman’s position would make insurance companies strictly liable for scrivener’s errors on policy amounts and would lead to absurd results—the inadvertent inclusion of an extra zero or a comma instead of a period would result in a windfall to uninjured insureds.

The *Coventry* case supports Assurity’s position that RCW 48.30.090 is not intended to hold insurers strictly liable for good-faith mistakes. While broadly discussing an insurer’s obligations under RCW 48 and WAC 284-30 our Supreme Court stated:

Either the insurer complies with [its statutory] duties or it does not. When the insurer does not comply with those obligations *in bad faith* a cause of action exists.<sup>20</sup>

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<sup>19</sup> 68 Wn.App. 224, 232 (1992) (emphasis added).

<sup>20</sup> *Coventry*, 136 Wn.2d at 280-81 (1998).

*Coventry* is a post-*Hangman Ridge Training Stables v. Safeco Title Insurance Co.*<sup>21</sup> decision and the Court went as far as stating that a CPA claim ***cannot be based on a good-faith mistake.***<sup>22</sup> This Court should apply *Coventry* to affirm the trial court's decision and confirm that insurance companies are not strictly liable under RCW 48.30.090 and the CPA for inadvertent, isolated, good-faith mistakes.

This Court can also take guidance from Washington's contract law principles on scriveners' errors. A scrivener's error is an innocent mistake by a drafter that results in an agreement different from the intent of the parties.<sup>23</sup> A court will reform the agreement using its equitable powers to remedy the clerical error.<sup>24</sup> Washington courts have applied this principle to reform insurance policies.<sup>25</sup> The same principle should be applied to a scrivener's error in a written letter between the parties to a contract, when the scrivener's error erroneously and innocently misstates the agreement of the parties.

Hartman cannot establish that Nettland's letter was either an unfair or deceptive act or a *per se* violation and this Court should affirm.

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<sup>21</sup> 105 Wn.2d 778, 719 P.2d 531 (1986).

<sup>22</sup> *Id.*

<sup>23</sup> *Reynolds v. Farmers Ins. Co. of Wash.*, 90 Wn. App. 880, 885, 960 P.2d 432 (1998).

<sup>24</sup> *Id.*

<sup>25</sup> *Reynolds*, 90 Wn. App. at 885; *See also Miller v. United Pac. Cas. Ins. Co.*, 187 Wn. 629, 649, 60 P.2d 714 (1936).

**B. Hartman has not been harmed.**

Harm is a mandatory element of any CPA claim.<sup>26</sup> The harm must not be speculative or remote, rather harm must be actual and definable.<sup>27</sup> The Washington Supreme Court stated in *Mason v. Mortgage American, Inc.* that the harm requirement under the CPA is established upon proof that the plaintiff's property interest or money is diminished because of the unlawful conduct.<sup>28</sup>

Hartman claims he was "underinsured" because he had less insurance than he expected, but Assurity's letter actually saved Hartman from being *uninsured*. Hartman asked to cancel his policy. Assurity sent him the conservation letter. At that point, Hartman had two choices:

- Cancel the policy and have no disability insurance; or
- Retain the policy and have the same insurance he originally purchased.

Hartman alleges that it was Assurity's letter that induced him to retain his policy. This was quite fortuitous, however, because according to Hartman, the letter saved him from cancelling a valuable asset and Assurity has paid \$255,000, instead of the \$0.00 he would have received

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<sup>26</sup> *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593 (2005).

<sup>27</sup> *Browne v. Avvo, Inc.*, 525 F.Supp.2d 1249 (W.D. Wash. 2007).

<sup>28</sup> 114 Wn.2d 842, 854 (1990).

had he cancelled. Hartman cannot establish harm because retaining the policy resulted in a substantial increase in his property.

Hartman ignores that he would have been uninsured if his policy had been cancelled as requested and asks this Court to conclude that because he relied on Assurity's letter he lost the opportunity to shop elsewhere or supplement his insurance. This argument was successful for the insureds in *Shah v. Allstate Insurance Co.*<sup>29</sup> and *Peterson v. Big Bend Insurance Agency*<sup>30</sup> but is inapplicable to this case as these cases are easily distinguishable.

In *Shah*, the Shahs were obtaining insurance quotes from other companies for replacement-value-property insurance and received a quote from a competing company that provided significantly more coverage than the defendant's policy.<sup>31</sup> The Shahs asked the defendant why the policy amount on the existing policy was so low and defendant's agent told Shah not to worry because he had full replacement value.<sup>32</sup> The defendant's acts induced the Shahs to not raise their property-insurance limit by

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<sup>29</sup> 130 Wn. App. 74, 121 P.3d 1204 (2005).

<sup>30</sup> 202 P.3d 372 (2009).

<sup>31</sup> *Shah*, 130 Wn. App. at 79.

<sup>32</sup> *Id.*

insuring with a competitor, which caused the Shahs to be underinsured when their property was damaged.<sup>33</sup>

In *Peterson*, Peterson requested and the defendant undertook to provide replacement value estimate for the property based on a specific formula.<sup>34</sup> The defendant failed to use the formula, which resulted in a policy amount less than the property's replacement value.<sup>35</sup> Division Three relied on *Shah* and held that the Petersons justifiably relied on the defendant's misrepresentation and therefore the Petersons had been damaged.<sup>36</sup>

Hartman was not actually shopping for additional or replacement disability insurance and never indicated an intent to be fully insured, unlike the plaintiffs in *Shah* and *Peterson*. Hartman's deposition testimony establishes he was intent on cutting costs, not purchasing supplemental insurance:

I ended up with the business in my lap as far as paperwork, so all of the bills come across my desk, my ex-wife took all the money out of the business, so there was nothing left to pay the bills and so I was tossing bills left and right on which to pay and which to not. So this came across and I didn't even know what it was, it was just a bill, for what? And I know we have a disability and we may have life insurance, but I was unsure what this exact bill was for, so

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<sup>33</sup> *Shah*, 130 Wn. App. at 79.

<sup>34</sup> *Peterson*, 202 P.3d at 375.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* At 380.

I just said close it, *I can't afford it*. And I just sent that, folded that back up in an envelope and sent it back.<sup>37</sup>

Hartman also stated on his handwritten cancellation request that his reason for cancelling was he could not afford the policy.<sup>38</sup> Hartman's financial situation at the time unequivocally indicates an effort to cut costs. Hartman could not afford to be fully insured. The lost opportunity argument is only successful if the opportunity is one that the plaintiff would have or could have taken.

Hartman's reliance – if any – on Assurity's statement did not cause Hartman to detrimentally rely or forego any opportunity. And any reliance was certainly not justifiable based on the plain language of his policy and the multiple times he had been provided documents showing the maximum monthly benefit was \$5,000. Neither *Shah* nor *Peterson* support Hartman's appeal.

Assurity's efforts to conserve Hartman's policy resulted in Hartman receiving the maximum amount he is entitled to under his disability policy and great benefit, not harm. Because Hartman cannot establish harm, this Court should affirm.

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<sup>37</sup> CP 158, ln. 12-24.

<sup>38</sup> CP 114.

**C. Assurity's isolated letter to Hartman did not affect the public interest.**

*Hangman Ridge* provides a four-part test for determining whether an act affects the public interest: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did the defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?<sup>39</sup> Not any one of these factors is dispositive and each factor need not be established.<sup>40</sup> Here, only the first, and most common factor, is present.

Assurity concedes that Nettland's letter occurred during Assurity's business. Hartman admits that the letter was not part of Assurity's advertising and there is no evidence in the record regarding Assurity advertising in general. Nettland's letter was not a solicitation. Hartman was an existing insured and had been for four years. He had requested to cancel his policy, but Assurity required the insured's signature to cancel a policy, so it responded to his request with the letter.<sup>41</sup> Assurity intended to confirm his decision, obtain his signature, and inform him of his benefits.<sup>42</sup> None of these intentions qualify as solicitation. Finally, if

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<sup>39</sup> *Hangman Ridge*, 105 Wn.2d at 790-91.

<sup>40</sup> *Id.*

<sup>41</sup> CP 116.

<sup>42</sup> *Id.*

anything Hartman had a superior bargaining position to Assurity. He was the party that was considering cancelling. This was not a contract negotiation or a “take it or leave it” situation, but one where Hartman was deciding whether to maintain his policy. Assurity had almost no power in this situation. Applying the *Hangman Ridge* factors for determining a public interest to these facts makes it clear that the isolated letter in response to Hartman’s cancellation request did not affect the public interest.

**D. Hartman cannot establish proximate cause.**

The Washington Supreme Court in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington* held that proving proximate cause requires a plaintiff to show a causal link between an unfair or deceptive act and the injury.<sup>43</sup> The Court adopted WPI 15.01 as the test for proving a causal link, which defines proximate cause as a cause that (1) produces the injury, and (2) without which the injury would not have happened.<sup>44</sup> Hartman alleges that Assurity’s letter proximately caused him to be underinsured. This allegation fails as a matter of law.

Hartman’s argument ignores that he had always been willfully underinsured. Hartman chose a policy that did not provide a sufficient monthly benefit to cover his costs. He accepted this policy and made

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<sup>43</sup> 162 Wn.2d 59 (2007).

monthly payments for more than four years – not once questioning the monthly benefit amount or seeking out coverage that fully insured him. Hartman was underinsured when he sent his cancellation request, underinsured when Assurity sent the letter, and underinsured when he chose to retain his policy. Because Hartman was equally underinsured both before and after Assurity’s letter, the letter did not produce any injury and Hartman cannot establish that Assurity’s letter caused an injury – the first element of WPI 15.01. Similarly, Hartman cannot establish the second element because if the letter had not been sent, Hartman still would have been underinsured (or if Assurity had cancelled the policy, as Hartman had requested, *uninsured*).

Another reason Hartman cannot establish proximate cause is because his injuries, if any, were caused by his own misunderstanding of the policy terms – despite multiple clear statements outlining his maximum \$5,000 disability benefit. Hartman never read the policy or the policy amendment.<sup>45</sup> Parties to an insurance contract have an affirmative duty to read the insurance contract.<sup>46</sup> If an insured does not read the insurance contract, they are barred from later claiming ignorance as to the

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<sup>44</sup> *Indoor Billboard*, 162 Wn.2d at 83.

<sup>45</sup> CP 153, ln. 23-25.

<sup>46</sup> *Michalak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003).

policy's terms.<sup>47</sup> If Hartman had read the policy schedule or the policy amendment that he signed, the monthly benefit amounts were clearly spelled out, as seen here:

<p>3. [X] THE BENEFIT AMOUNTS HAVE BEEN CHANGED AS FOLLOWS.</p> <p>ACCIDENT MONTHLY AMOUNT=\$3800; ELIMINATION PERIOD=90 DAYS; BENEFIT PERIOD=5 YEARS. SICKNESS MONTHLY AMOUNT=\$3800; ELIMINATION PERIOD=90 DAYS; BENEFIT PERIOD=5 YEARS. "YOUR WORK PERIOD" FOR THIS POLICY IS: 5 YEARS.</p> <p>[X] INTEGRATED SOCIAL BENEFIT RIDER AMOUNT=\$1200/MONTH.; ELIMINATION PERIOD=90 DAYS; BENEFIT PERIOD=5 YEARS.</p>	48
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Instead of reading the policies, Hartman simply relied on representations from his insurance broker – Pilkey Insurance, a non-party to this action – and incorrectly understood that his policy was originally worth about \$8,000 per month and would increase as his income increased.<sup>49</sup> When Assurity sent the letter at issue, Hartman already incorrectly believed that since his income had increased, his benefits would equally increase.<sup>50</sup> Because Hartman would have misunderstood the terms of his policy with or without Assurity's letter, the letter is not the proximate cause of any damages suffered by Hartman and this Court should affirm.

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<sup>47</sup> *Michalak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003).

<sup>48</sup> CP 35; CP 46.

<sup>49</sup> CP 152, ln. 12-CP 153, ln. 16.

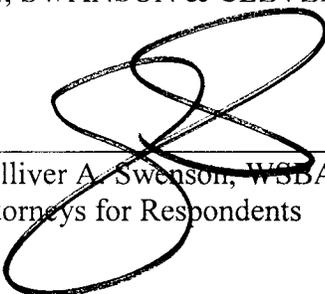
<sup>50</sup> CP 160, ln. 9-18.

## V. CONCLUSION

To defeat Hartman's motion for summary judgment and to prevail on its own summary judgment motion, Assurity had to establish that Hartman could not prove one element of the CPA as a matter of law. Assurity proved that Hartman has failed to prove (1) an unfair or deceptive act; (2) harm; or (3) proximate cause. This Court should affirm the trial court's order granting Assurity's motion for summary judgment.

RESPECTFULLY SUBMITTED this 5 day of November, 2009.

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By  \_\_\_\_\_  
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**DECLARATION OF SERVICE**

I declare that on the 5 day of November, 2009, I caused to be served the foregoing document on Appellant, via hand delivery, at the following addresses:

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Virginia Lee Ramirez

Dated: November 5, 2009

Place: Seattle, WA

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