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STATE OF WASHINGTON

BY NY

No. 39781-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES and DEBORAH SHARBONO,
individually and the marital community thereof;
CASSANDRA SHARBONO,

Respondents,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
a foreign insurer;

Petitioner,

vs.

LEN VAN DE WEGE and "JANE DOE" VANDE WEGE, husband and
wife and the marital community composed thereof,

Defendants,

and

CLINTON L. TOMYN, individually and as Personal Representative of the
Estate of CYNTHIA L. TOMYN, deceased; and as Parent/Guardian of
NATHAN TOMYN, AARON TOMYN, and CHRISTIAN TOMYN,
minor children,

Respondents/Intervenors.

REPLY BRIEF OF PETITIONER
UNIVERSAL UNDERWRITERS INSURANCE CO.

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A. INTRODUCTION

Universal Underwriters Insurance Company (“Universal”) has received the Tomyns’ response brief. As is typical, the Tomyns provide the Court with little in the way of meaningful legal analysis. Instead, they spend an inordinate amount of time revisiting irrelevant minutiae and misstating the facts. They also mulishly argue about prior rulings from this Court that they never sought to modify. The Court should not be deceived by the Tomyns’ transparent attempt to obfuscate the issue before the Court. This case involves a narrow, but undeniable, issue of both public importance and first impression: whether the trial court’s order compelling the disclosure of mediation communications undermines Washington’s Uniform Mediation Act (“UMA”), RCW 7.07 *et seq.*, and Evidence Rule (“ER”) 408.

The UMA protects mediation confidentiality by prohibiting the compelled disclosure of any mediation communications. ER 408 likewise makes settlement communications confidential. But here, the trial court negated the protection available in both the statute and the rule by ordering Universal and the Sharbonos to disclose privileged mediation discussions and terms of their proposed settlement to the Tomyns. Contrary to the Tomyns’ assertion, the trial court’s order is not “academic,” nor is an

appeal of that order moot.¹ This Court should reverse the trial court's order to restore the expansive mediation communication privilege available under the UMA and reinforce the confidential affect of ER 408 on settlement communications.

B. RESPONSE TO THE TOMYNS' COUNTERSTATEMENT OF THE FACTS

As Universal noted in its motion to strike the Tomyns' brief and reply in support, the Tomyns' counterstatement of the facts does not conform to the Rules of Appellate Procedure because it is overflowing with improper arguments and contains long passages lacking any reference to the record. Thus, the Court should disregard it. RAP 10.7; *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (striking portions of a brief containing factual assertions not supported by the record). Universal raises these points to highlight the Tomyns' repeated violations of the appellate rules.

The Tomyns spend an inordinate amount of time in their counterstatement of the case revisiting factual details irrelevant to

¹ Although the Tomyns contend Universal's appeal is moot in their introductory statement, Tomy br. at 1, they fail to provide legal authority or argument later in their brief to support such a contention. This Court need not consider an argument unsupported by citations to authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Moreover, the Tomyns concede Universal's arguments regarding the ripeness of this appeal, Br. of Appellant at 16-17, by failing to respond to them. *See State v. Evans*, 129 Wn. App. 211, 221 n.7, 118 P.3d 41 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007).

determining what they grudgingly admit is a limited legal issue on appeal. Tomy br. at 1, 4-6, 7-13. That the Court may have improvidently granted review or improperly rejected consolidation of this appeal with Cause No. 40245-9-II as the Tomyns' allege is not relevant to the issue before the Court.² Similarly irrelevant is any detailed discussion of the genesis of the underlying lawsuit, the settlement agreement between the Sharbonos and the Tomyns, or the Tomyns' supposed claims against the Sharbonos' counsel. The only issue for the Court to determine in this appeal is whether the trial court erred by compelling Universal and the Sharbonos to disclose settlement negotiations and proposed settlement terms achieved during mediation, and nothing more. Universal provided the Court with the necessary facts to make that determination in its opening brief.

The Tomyns also continue to mischaracterize the facts. For example, they claim Universal had "some success" in its first appeal. Tomy br. at 4. Contrary to the Tomyns' spurious arguments regarding the alleged impropriety of Universal's actions on appeal, Universal succeeded in getting many of the trial court's key rulings supporting the

² Cause No. 40245-9-II is an appeal filed by the Tomyns arising from a completely unrelated issue that does not involve Universal. That appeal involves a private matter between the Sharbonos and the Tomyns relating to the Tomyns' unsuccessful attempt to disqualify the Sharbonos' counsel and the Sharbonos' objections to language in the trial court order denying the requested disqualification. Contrary to the Tomyns' insinuations, that conflict has nothing to do with Universal. More pointedly, it has nothing to do with the mediation privilege at issue in this appeal.

underlying judgment reversed. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 395-400, 407-16, 161 P.3d 406 (2007), *review denied*, 163 Wn.2d 1055 (2008). Moreover, despite the Tomyns' efforts to dismiss its appeal, Universal's appeal in Cause No. 38425-6-II remains pending.

The Tomyns also misleadingly claim the underlying judgment favors them. Tomyn br. at 4-5. But the judgment awarded damages to the Sharbonos, not the Tomyns. CP 49, 51. The Tomyns have never been a party to the Sharbonos' lawsuit against Universal. CP 21; RP 17-18. They are neither third-party plaintiffs nor defendants. CP 21. They have only limited intervenor status. CP 8-10.

The Tomyns continue to complain about their "shock" in learning about the "secret" mediation between Universal and the Sharbonos. Tomyn br. at 13-14. Their dramatics are unwarranted. If the mediation had indeed been "secret" as they contend, then it is unlikely they would have been informed of it all. Instead, the Sharbonos' counsel informed the Tomyns of the settlement and the striking of the trial as a courtesy. CP 13. And nothing prevented the Sharbonos and Universal from mediating the unresolved issues between them without the Tomyns' participation. Nothing prevented them from keeping their negotiations confidential

because the UMA specifically provides that mediation communications are confidential. The Tomyns do not dispute that confidentiality.

Nearly obscured by the Tomyns' deluge of superfluous facts are two important facts the Court should not overlook. First, the Tomyns' did not support their motion to compel disclosure of settlement negotiations and terms of proposed settlement with pertinent authority or meaningful legal analysis. CP 1-7, 16. No cases or statutes are cited in their half-page motion or in the subjoined declaration of their counsel. CP 1-7. Second, and most importantly, the Tomyns concede the Sharbonos retained *individual* claims against Universal that remained to be settled. Tomyn br. at 7, 10 (noting the Sharbonos' individual claims were reversed on appeal); RP 12. Nothing prevented Universal and the Sharbonos from mediating to settlement the Sharbonos' individual claims without the Tomyns' participation. The Sharbonos were not required to seek the Tomyns' approval to settle those individual claims. RP 12.

C. ARGUMENT IN REPLY

(1) Standard of Review and Statutory Construction

As Universal recites in its opening brief, this Court applies a *de novo* standard of review when a case turns on the interpretation of a statute. Br. of Appellant at 8. *See also, Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001) (noting statutory

construction is a question of law and is reviewed de novo). Although the Tomyns do not explicitly address this standard in their brief, they acknowledge the construction of a statute involves a question of law. Tomyn br. at 19. Questions of law are reviewed *de novo*. See *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *In re Guardianship of Matthews*, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1971666 (2010).

Universal and the Tomyns agree on the general principles of statutory construction. Br. of Appellant at 8; Tomyn br. at 19. But they disagree whether such construction is necessary in this case given the language of RCW 7.07.030.³ See Br. of Appellant at 8-9; Tomyn br. at 20. The Tomyns' position is puzzling since they never allege any ambiguity in the statute.

(2) The Trial Court Erred By Compelling the Disclosure of Confidential Mediation Communications Between Universal and the Sharbonos because the UMA Provides a Privilege Against Such Disclosure

The Tomyns spend the first few pages of their argument reciting the general principles applicable to privileges, but ultimately fail to

³ The Tomyns' citation to *State v. Sanders*, 66 Wn. App. 878, 883, 833 P.2d 452 (1992), *review denied*, 120 Wn.2d 1027 (1993), is inexplicable since that case neither mentions RCW 7.07 nor involves a confidential mediation communication.

evaluate them in the context of this case. Tomy br. at 21-23. For example, they argue four fundamental considerations must be examined in the context of the relationship being protected when determining the need, scope, and purpose of a privilege. *Id.* at 22. But they never allege those conditions were not satisfied here or indicate the trial court considered them when deciding the motion to compel.

They spend the next four pages of their brief listing certain provisions of the UMA. *Id.* at 23-26. But they fail to analyze how those provisions related to the specific facts of this case. Moreover, the one case they cite at pages 26 and 38 as persuasive authority is not controlling because it was decided under the old mediation act, RCW 5.60.070. In *Hoglund v. Meeks*, 139 Wn. App. 854, 170 P.3d 337 (2007), the Court of Appeals upheld the trial court's ruling that an attorney could introduce evidence from a prior mediation to support his claim for unpaid attorney fees in a subsequent action. That court relied on ER 408, which "allows evidence of settlements and settlement negotiations for purposes other than to prove liability." *Id.* at 876. The court further found that "[t]his admissible purpose of such evidence . . . echoes a similarly admissible purpose" under RCW 5.60.070, "which allows evidence of a mediation . . . [w]hen those communications or written materials pertain solely to administrative matters incidental to the mediation proceeding, including

the agreement to mediate[.]” *Id.* That exception does not appear in the UMA. Moreover, the scope of the general privilege statute was far narrower than the UMA, extending only to mediations when there was a court order to mediate, the parties agreed to mediation in writing, or the dispute involved a healthcare malpractice claim. RCW 5.60.070(1). The UMA is not so limited.

The Tomyns finally get to the crux of their argument 27 pages into their brief when they allege Universal failed to meet its burden of proof. The Tomyns’ argument ultimately fails.

First, the Tomyns neglect to mention *they never raised this argument below*. CP 1-7; RP 3-11, 20-24. Accordingly, this Court should decline to consider it for the first time on appeal. RAP 2.5(a). *See also, Boeing Co. v. State*, 89 Wn.2d 443, 451, 572 P.2d 8 (1978) (declining to consider an argument raised for the first time on appeal). Second, even if the Tomyns had made the argument below, it still fails because Universal satisfied its burden of proving it is entitled to the confidentiality the mediation privilege bestows.

The party asserting a privilege has the burden of showing the privilege exists. *See, e.g., Calbom v. Knudtson*, 65 Wn.2d 157, 166, 396 P.2d 148 (1964). As Universal noted in its opening brief, RCW 7.07.030 encapsulates the mediation communication privilege. Br. of Appellant at

11-12.⁴ The statute allows a mediation party to refuse to disclose mediation communications. *Id.* The flaw in the Tomyns' argument is that the privilege is not limited to only communications with the mediator made during the actual mediation. Tomyn br. at 27-28.

A "mediation" is defined broadly to include "a process in which a mediator facilitates communication and negotiation" between mediation parties to "assist them in reaching a voluntary agreement regarding their dispute." RCW 7.07.010(1). To promote candor, the privilege applies to an array of mediation communications, including some communications not made during the actual mediation. A "mediation communication" means:

A statement, . . . , that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation[.]

RCW 7.07.010(2).

The privilege is not limited to communications made only during the course of the mediation. National Conference of Commissioners on Uniform State Laws, *The Uniform Mediation Act*, 22 N. Ill. U. L. Rev. 165, 200 (Spring 2002) ("NCCUSL"). Other non-session communications

⁴ Similar language in ER 408 addresses the admissibility of compromises and offers to compromise. Br. of Appellant at 12. Like RCW 7.07.030, ER 408 expresses the strong public policy that settlement negotiations should be exempted from disclosure to encourage freer communications in compromise negotiations. *Id.*

related to the mediation are considered “mediation communications.” NCCUSL, Reporter’s Notes at 183, 200. *See also*, Alan Kirtley, *The Top 10 Reasons for Adopting the New Uniform Mediation Act in Washington*, WSBA Bar News at 21 (Nov. 2004) (noting post-session communications attempting to bring about, resurrect, or finalize a settlement are protected by the mediation privilege). Nor is the privilege limited to communications only between the mediator and the parties as the Tomyns suggest. It also protects communications between the parties that do not involve the mediator. *See* RCW 7.07.010(2).

As the Commissioner noted in his ruling granting discretionary review, the Tomyns *conceded* the communications at issue here were mediation communications. Comm’r Ruling at 5. Although the Tomyns object to this characterization in their brief, *see e.g.*, Tomyn br. at 29 n.7, they did not move to modify the Commissioner’s ruling. It is too late for them to do so now. *See State v. Rolax*, 104 Wn.2d 129, 136, 702 P.2d 1185 (1985) (failure to file a motion to modify terminates further appellate review of an issue).

Universal informed the trial court it mediated its dispute with the Sharbonos before the Honorable Michael Spearman (retired)⁵ on

⁵ Judge Spearman served on the King County Superior Court and was recently appointed to serve on the Court of Appeals, Division I.

August 18, 2009. CP 16, 19, 36. That mediation was successful and resulted in a proposed settlement, which at the time of the Tomyns' motion the Sharbonos and Universal were attempting to finalize. CP 19, 36; RP 13-14, 17. The Tomyns do not dispute these facts in their brief. Instead, they try to raise doubts about Universal's account of the mediation proceedings. Tomyn br. at 27. But Universal's counsel stated under penalty of perjury that her declaration was true and correct. CP 36. In particular, she stated Universal and the Sharbonos participated in a successful mediation and that "with the mediator's assistance Universal and the Sharbonos agreed on terms. As a continuation of the mediation process, Universal and the Sharbonos are preparing a final written agreement." *Id.* The Tomyns admit the proposed settlement agreement was generated following the mediation. Tomyn br. at 23. Clearly, the information they were seeking relating to those negotiations and proposed settlement terms should not have been disclosed because post-session communications attempting to bring about or finalize a settlement arising out of mediation are protected. NCCUSL, Reporter's Notes at 183, 200; Kirtley, WSBA Bar News at 21. Providing any more details about the mediation as the Tomyns suggest is necessary here would invade the confidentiality Universal sought to invoke under the UMA.

Once Universal satisfied its burden of proving the mediation communication privilege applied to the information the Tomyns sought, the burden shifted to the Tomyns to demonstrate that an exception to the privilege existed. NCCUSL, Reporter's Notes at 220 (noting the exceptions place the burden on the proponent to persuade the court on these points). As Universal indicated in its opening brief, the Tomyns did not satisfy this burden. Br. of Appellant at 15-16.

The Tomyns first contend without analysis that an exception to the privilege exists under RCW 7.07.050(1)(f) based on the alleged malpractice or misconduct of the Sharbonos' counsel. Tomyn br. at 36-37. As the Commissioner noted in his ruling granting discretionary review, *the Tomyns did not raise this argument below*. Comm'r Ruling at 7. Accordingly, the Court should not consider it. RAP 2.5(a). *See also, Boeing*, 89 Wn.2d at 451. Even if the Court were to allow the Tomyns to raise this issue for the first time on appeal, they fail to develop it. *See Cowiche*, 118 Wn.2d at 809 (arguments not supported by authority or analysis need not be considered). Even so, the legal malpractice/professional misconduct exception does not apply because it is limited to "a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during the

mediation.” RCW 7.07.050(1)(f) (emphasis added). The Tomyns are clearly not a mediation party, nonparty participant, or representative of a mediation party such that they can invoke the statute to force the requested disclosure. In fact, they never claim to be. Thus, the “exception” they claim exists is inapplicable.

The Tomyns also contend an exception exists under RCW 7.07.050(2) for what they characterize as the Sharbonos’ breach of contract and “work product.” Tomyn br. at 37-39. But that “exception” does not apply here. Under the breach of contract exception, a trial court may order the disclosure of confidential mediation communications only if the evidence is otherwise unavailable and the need for the evidence outweighs the policies underlying the privilege. RCW 7.07.050(2). As Universal noted in its opening brief, the problem the Tomyns cannot overcome is that they are not seeking to prove a claim regarding a contract arising out of the mediation. Br. of Appellant at 15. They cannot because they are not parties to the mediation contract between Universal and the Sharbonos.

More importantly, when the disclosure of evidence is opposed on the basis of a privilege, an *in camera* review is the only way a court can determine whether a document is exempt from disclosure. *See State v. Jones*, 96 Wn. App. 369, 377, 979 P.2d 898 (1999). *See also*, NCCUSL

Reporter's Notes at 212; RCW 7.07.050(2)(b). The evidence should not be disclosed absent findings balancing the needs of the party seeking the disclosure against the mediation participant's interest in confidentiality. *Id.* But here, the trial court refused to conduct an *in camera* hearing because it thought doing so would present "ethical problems." RP 28. It also failed to enter the required findings balancing the parties' interests. CP 29-30.

The Tomyns argue the trial court's error, if any, in ordering the disclosure without an *in camera* hearing was harmless. Tomyn br. at 40 n.12. They also claim it was reasonable for the court to decline to do so to avoid retaining "too much information regarding the minutiae of settlement negotiations out of fear that it could result in recusal[.]" Tomyn br. at 40-41 n.12. They are mistaken. By failing to conduct an *in camera* review before ordering the disclosure, the trial court erred in granting the Tomyns' motion. *See Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 331 n.27, 111 P.3d 866 (2005), *review denied*, 156 Wn.2d 1008 (2006).

As a last ditch effort to convince this Court to affirm, the Tomyns contend Universal waived the mediation communication privilege. Tomyn br. at 22, 28-30. Once again, they are mistaken. Under

RCW 7.07.040,⁶ a mediation party may be precluded from asserting the privilege in situations in which mediation communications have been disclosed before the privilege has been asserted. NCCUSL, Reporter's Notes at 207. Significantly, this provision does not permit waiver to be implied by conduct. *Id.* Instead, waiver must be express and either recorded through a writing or made orally during specified types of proceedings. RCW 7.07.040(1); NCCUSL, Reporter's Notes at 207.

As an initial matter, the Commissioner noted in his ruling granting discretionary review that the Tomyns *conceded* neither Universal nor the Sharbonos waived the mediation confidentiality privilege. Comm'r Ruling at 5. As previously noted, the Tomyns never moved to modify that ruling. The time to do so has passed. *See Rolax*, 104 Wn.2d at 136.

⁶ RCW 7.07.040 provides, in part:

(1) A privilege under RCW 7.07.030 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(a) In the case of the privilege of a mediator, it is expressly waived by the mediator; and

(b) In the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(2) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under RCW 7.07.030, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

Universal did not waive the privilege with respect to the *draft* agreement merely by offering to provide the *final* agreement. At no time did Universal offer to provide the draft agreement or to disclose mediation communications with the Sharbonos. Universal's offer was clear: it was willing to provide the final, executed settlement agreement to the Tomyns if the Sharbonos did not object. CP 19, 36; RP 18. The final agreement was more than sufficient to verify that the Tomyns' interests were not going to be impacted by the mediated settlement.

The trial court error in ordering the disclosure of the proposed settlement agreement was not harmless as the Tomyns contend. Tomyn br. at 30-31. Universal and the Sharbonos were entitled to freely communicate during the mediation process without fear that their confidential communications would be revealed to a non-participant. The immediate effect of the court's order was to jeopardize settlement negotiations between Universal and the Sharbonos. RP 34. Such an outcome contradicts the clear purpose of the UMA.

Finally, the Tomyns repeatedly object to the Commissioner's ruling declining to consolidate this appeal with the appeal in Cause No. 40245-9-II. Tomyn br. at 31, 36 n.10, 37 n.11. But they never moved to modify that ruling, and the time to do so has passed. Any attempt to "re-

visit” the issue as the Tomyns now suggest should be denied. *See Rolax*, 104 Wn.2d at 136.

The trial court invaded the mediation confidentiality privilege that existed between Universal and the Sharbonos when it compelled them to disclose to the Tomyns their mediation discussions and the terms of their proposed settlement. To allow the trial court’s decision to stand would eviscerate the effectiveness of the UMA and ER 408 by undercutting the willingness of parties to candidly communicate in a mediation for fear that a court could order the disclosure of such communications. The Court should uphold the clear intent of the mediation communication privilege to enhance the confidence of mediation participants in the confidentiality of their communications, and reverse the trial court’s disclosure order.

(3) Universal Is Entitled to Attorneys Fees and Costs under RAP 18.9(a)

The Court may award terms and compensatory damages for a frivolous appeal or for a party’s failure to comply with the rules of appellate procedure. RAP 18.9(a); RAP 18.1. *See also, In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *review denied*, 100 Wn.2d 1023 (1983) (noting an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees).

An appeal is frivolous when it presents no debatable issues and is so devoid of merit that there is no possibility of reversal. *See Streater v. White*, 26 Wn. App. 430, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). “A lawsuit is frivolous when it cannot be supported by an[y] rational argument on the law or facts.” *Forster v. Pierce County*, 99 Wn. App. 168, 183, 991 P.2d 687, *review denied*, 141 Wn.2d 1010 (2000). In the instance of a frivolous appeal, an award of attorney fees is appropriate. *See Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987).

The issues the Tomyns present on appeal are so devoid of merit as to be frivolous and advanced without reasonable cause. They present numerous arguments never raised in the trial court and fail to adequately develop others. They argue issues they previously conceded and continually object to the Commissioner’s ruling granting discretionary review despite not moving to modify that ruling. The Tomyns waste this Court’s time and the parties’ time with meritless arguments. Even resolving all doubt in favor of the Tomyns, they raise no debatable issues upon which reasonable minds could differ.

This Court has the authority to sanction the Tomyns or their counsel by awarding Universal its reasonable attorney fees. RAP 18.9(a). Universal respectfully requests this appropriate sanction.

D. CONCLUSION

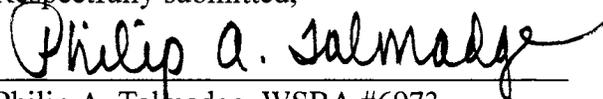
The UMA provides a privilege against the disclosure of mediation communications. The fundamental policy underlying the statute is clear: to protect mediation confidentiality to encourage the effective use of mediation to resolve disputes.

Despite this strong public policy, the trial court here ordered Universal and the Sharbonos to disclose to the Tomyns settlement negotiations and terms of a proposed settlement reached during mediation. This order undermines the confidentiality available under the UMA and ER 408, especially where no exceptions to the mediation communication privilege apply under the circumstances of this case.

The trial court erred by granting relief to the Tomyns that is prohibited by law. Accordingly, this Court should reverse the trial court's order to compel disclosure of settlement negotiations and proposed terms. The Court should award costs on appeal, including attorney fees under RAP 18.9(a), to Universal.

DATED this 15th day of July, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I deposited in the U. S. mail a true and accurate copy of the following document: Reply Brief of Petitioner in Court of Appeals Cause No. 39781-1-II to the following:

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Clerk's Office
950 Broadway Ste. 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 16, 2010, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick