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## I. ASSIGNMENTS OF ERROR

1. ERROR IS ASSIGNED TO THE TRIAL COURT'S RULING AT HEARING ON PARTIAL SUMMARY JUDGEMENT ON AUGUST 20, 2010 regarding ruling on timeliness of complaint.

2. ERROR IS ASSIGNED TO THE TRIAL COURT'S RULING AT HEARING ON PARTIAL SUMMARY JUDGEMENT ON AUGUST 20, 2010 regarding whether requested records were supplied to Nervik.

3. ERROR IS ASSIGNED TO THE TRIAL COURT'S RULING AT HEARING ON PARTIAL SUMMARY JUDGEMENT ON AUGUST 20, 2010 regarding what constitutes an email record and whether it contains metadata.

4. ERROR IS ASSIGNED TO THE TRIAL COURT'S RULING AT HEARING ON SUMMARY JUDGEMENT

ON JANUARY 28, 2011 regarding whether requested records were supplied to Nervik.

5. ERROR IS ASSIGNED TO THE TRIAL COURT'S RULING AT HEARING ON SUMMARY JUDGEMENT ON JANUARY 28, 2011 regarding what constitutes an email record and whether it contains metadata.

6. ERROR IS ASSIGNED TO THE TRIAL COURT'S not forcing Defendant to answer Plaintiff's Interrogatories and denying Appellant/Plaintiff the right to conduct discovery.

7. ERROR IS ASSIGNED TO THE TRIAL COURT'S RULING AT HEARINGS ON SUMMARY JUDGEMENT ON AUGUST 20, 2010 AND JANUARY 28, 2011 as issues of material fact existed and were decided without discovery or witness testimony.

8. ERROR IS ASSIGNED TO THE TRIAL COURT'S

RULING DENYING MOTION FOR RECONSIDERATION  
DATED FEBRUARY 7, 2011.

9. ERROR IS ASSIGNED TO THE TRIAL COURT'S FAILURE TO UNDERSTAND, CONSIDER, TAKE TESTIMONY OR ALLOW DISCOVERY REGARDING METADATA AND IT BEING AN INTEGRAL, REQUIRED AND INESCAPABLE PART OF AN EMAIL RECORD.

10. ERROR IS ASSIGNED TO THE TRIAL COURT'S FAILURE TO UNDERSTAND, CONSIDER, TAKE TESTIMONY OR ALLOW DISCOVERY REGARDING THE COMPUTER PROGRAM KNOWN AS MICROSOFT OUTLOOK AND METADATA BEING AN INTEGRAL, REQUIRED AND INESCAPABLE PART OF AN OUTLOOK (.PST) RECORD.

11. ERROR IS ASSIGNED TO THE TRIAL COURT'S FAILURE TO UNDERSTAND, CONSIDER, TAKE

TESTIMONY OR ALLOW DISCOVERY REGARDING ELECTRONIC EMAIL ATTACHMENTS AND THEIR BEING A UNIQUE RECORD UNTO THEMSELVES AND ALSO CONTAINING INTEGRAL, REQUIRED AND INESCAPABLE METADATA.

12. ERROR IS ASSIGNED TO THE TRIAL COURT'S FAILURE TO UNDERSTAND, CONSIDER, TAKE TESTIMONY OR ALLOW DISCOVERY REGARDING RESPONDENT/DEFENDANT'S CONVERTING AND CREATING NEW MODIFIED AND REDUCED PUBLIC RECORDS FROM ORIGINAL ELECTRONIC RECORDS AND THE RESULTING COSTS AND DIFFERENCES THEREIN.

13. ERROR IS ASSIGNED TO THE TRIAL COURT'S FAILURE TO UNDERSTAND, CONSIDER, TAKE TESTIMONY, ALLOW DISCOVERY OR TO

CAREFULLY REVIEW THE DECLARATIONS AND EXHIBITS PRESENTED WHICH SHOW SPECIFICALLY THAT METADATA AND OUTLOOK PST FILES WERE REQUESTED NUMEROUS TIMES PRIOR TO THE FILING OF THE COMPLAINT IN THIS CASE.

14. ERROR IS ASSIGNED TO THE TRIAL COURT'S FAILURE TO UNDERSTAND, CONSIDER, TAKE TESTIMONY OR ALLOW DISCOVERY WHICH WOULD SHOW THAT MATERIAL ISSUES OF FACT STILL EXIST AND WERE NOT DECIDED.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS**

1. Did the trial court err in its orders dated August 20, 2010 and September 10, 2010, finding at Summary Judgment that the public records requested under

Washington's Public Records Act by George Nervik were supplied to the requestor?

2. Did the trial court err in finding that the WASHINGTON STATE DEPARTMENT OF LICENSING was not required to provide the requestor Nervik with the metadata associated with the public records requested by him?

3. Did the trial court err in finding that the copying fees charged the requestor Nervik were not excessive fees under Washington's Public Records Act?

4. Is the Appellant entitled to reasonable attorney fees at trial and on appeal as a prevailing party in his Public Records Act lawsuit?

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

This is a Public Records Act (PRA) case, governed by Chapter 42.56 RCW. It was commenced by Mr. Nervik, pro se. The primary issues on appeal address the question of whether the Defendant WASHINGTON STATE DEPARTMENT OF LICENSING (DOL) established at either Partial Summary Judgment or Summary Judgment that it had conducted a reasonable search of its own records for emails of Elizabeth "Liz" Luce (the Director of DOL at that time) and whether the full and complete records (in the duly requested native Microsoft Outlook PST electronic format - their original format - which contains metadata) were ever supplied to the requestor Nervik. The DOL simply claimed that it could not produce the records in that format because they could not redact them - which is blatantly untrue as DOL has not only supplied others with Outlook PST electronic records but they have in fact provided

Outlook PST electronic records to requestor Nervik in the past - prior to the filing of this Complaint and prior to the Hearings in this case - but requestor Nervik was never allowed to depose witnesses such as but not limited to DOL employees who could testify to those facts nor was requestor Nervik allowed to put forth testimony of experts who would have testified contrary to DOL's claims regarding the handling of the electronic records.

On January 28th, 2011, the Honorable Paula Casey, Judge of the Thurston County Superior Court, granted the WASHINGTON STATE DEPARTMENT OF LICENSING's (DOL) motion for Summary Judgment CP-822-823. Mr. Nervik filed a motion for reconsideration of the order granting Summary Judgment. CP-800.

The focus of Mr. Nervik's complaint of non-

compliance with the Act's requirements was three-fold: he claimed that the Office did not honor his request for the email records of Luce. He had requested the materials in their "original format", known as "Outlook" and/or "PST" format which, to him, includes metadata, a word known not only to him but a word of fairly well known in recent controversy to the Courts, rather than alternate lesser incomplete paper or scanned, converted, reduced PDF formats CP-14, 435, 541, 542, 582, 584, 593, 594, 607, 611, 646, 647, 657, 658, 660, 661, 665, 669, 681, 689, 690, 691, 692, 695, 697, 703, 737, 740, 752, 765, 768, 769, 770, 773, 774, 779, 782, 801.

TO BE SUPPLEMENTED - APPELLANT JUST RECEIVED THE CLERKS PAPERS INDEX AND HAS NOT RECEIVED OTHER PAPERS.

### **ARGUMENT**

#### **A. Standard of review for the motion for Summary**

## **Judgment.**

The standard of review of a Summary Judgment is de novo review. Morris v. McNicol, 83 Wn.2d 491, 519 P.2d 7 (1974). RCW 42.56.550 (3); Spokane Research and Defense Fund v. City of Spokane, 155 Wn.2d 89, 97, 117 P.3d 1117 (2005). In this case, that review is to a degree complicated by the fact that after Summary Judgment was entered, and in the course of the hearing on Mr. Nervik's motion for reconsideration, the trial court considered new evidence. CP-781-797. The range of material subject to review in this case would be either the original evidence produced at Summary Judgment, or the aggregate of evidence attending the order denying reconsideration of the Summary Judgment.

In the Summary Judgment context, the Movant bears the burden of establishing the absence of a

genuine dispute regarding any material fact. Folsom v. Burger King, 135 Wn. 2d 658, 958 P. 2d 301(1998).

In assessing a motion for Summary Judgment the Court must view the facts in a light most favorable to the non-moving party, in this instance, Mr. Nervik.. Homeowners Association v. Tydings, 72 Wn. App. 139, 864 P.2d 392 (1993). All reasonable inferences from the evidence must be drawn in favor of the non-moving party. Tabak v. State, 73 Wn.App. 691, 870 P.2d 1014 (1994). A Summary Judgment of dismissal of this lawsuit is sustainable only if there are no genuine issues of material fact. Homeowners, *supra* at 154. The party resisting Summary Judgment must present some evidence, even inconsistent evidence, which will support the existence of a material issue of fact. Yuan v. Chow, 92 Wn. App. 137, 960 P.2d 1003 (1998); Barnes v. McLennod, 128 Wn.2d 563, 810 P.2d 469 (1996). The burden lies with

the moving party to show the absence of material facts as to the various claims. Safeco Insurance v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992); Nicholson v. Deal, 52 Wn.App 814, 764 P.2d 1007 (1988). Where issues of fact are presented, a court may not decide a factual issue unless reasonable minds can reach only one conclusion from the evidence presented. Hooper v. Yakima County, 79 Wn. App. 770, 904 P.2d 1183 (1995).

A Movant for Summary Judgment may not raise new issues in rebuttal. White v. Kent Medical Center, Inc. P.S., 61 Wn.App 163, 810 P.2d (1991).

Washington courts have established that even inmates, for Public Records Act purposes, are members of the public, and are entitled to the same access to the public records as are other members of the public. Livingston v. Cedeno 164 Wn.2d 57, 186 P.3d 1055 (2008). Additionally, Washington courts,

and the Act itself, counsel that the purposes for which public records are sought, with limited exceptions inapplicable to this case, must not impair the energies or scope of a search for public records or their disclosure. RCW 42.56.080. The generalized structure for viewing Summary Judgments seems clear. The WASHINGTON STATE DEPARTMENT OF LICENSING, as Movant, had the burden, with regard to the facts and the law, to establish the absence of a genuine issue of material fact. And it also had the burden of proving justification for any refusal to permit copying of a public record. RCW 42.56.550 (1).

**B. Principles applicable to Public Records Act requests.**

The mandates of the Public Records Disclosure Act counsel the broadest effort at making public records available. RCW 42.56.030. The definition of identifiable and disclosable " public records" includes any "writing";

and "writing" includes electronically- stored material.  
RCW 42.56.010 (2) and (3) ; O'Neill v. City of Shoreline,  
145 Wn. App. 913, 187 P.3d 822 (2008); affirmed  
Washington Slip Note 82397-9 Wn. 2d. 240 P.3d 1149  
(2010). Although production of records in an electronic  
format is not addressed in the Act itself, the requestee has  
a statutory duty to provide the "fullest assistance" to the  
requestor and a legal duty to demonstrate why production  
in that less expensive format is not "reasonable and  
feasible" Mechling v. City of Monroe, 152 Wn. App. 830,  
814, 222 P.3d 808 (2009) citing former RCW 42.17.260  
(1), now RCW 42.56.070 (1) and citing WAC 44-14-05001  
of the model rules on providing access to electronic  
records.

Washington's Public Records Disclosure Act  
provisions, as amended from time to time, constitute a  
"strongly worded mandate for broad disclosure of public

records." Hearst Corp., v. Hoppe, 90 Wn. 2d 120, 123, 127, 580 P.2d 246 (1978). The public records statutes place the onus on the governmental agency which is responding to a public records request to provide those records "unless those records fall within the specific exemptions of ... this chapter or other statutes which prevents or prohibits disclosure specific information or records." RCW 42.56.070 (1); Mechling, supra at 814. Washington courts are instructed to construe liberally the disclosure provisions of the Act and to construe narrowly its exemptions. Progressive Animal Welfare Society v. University of Washington (PAWS), 125 Wn. 2d 243, 25, 884 P.2d 594, 92 (1994). Under the Public Records Act, email communications are a part of the public record which must be disclosed. O'Neill v. City of Shoreline., 145 Wn. App. 913, 187 P.3d 822 (2008); affirmed Washington Slip Note 82397-9 Wn. 2d. 240 P.3d 1149 (2010).

A public record is statutorily defined as:

"Any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, retained by and State or local agency regardless of physical form or characteristics."

RCW 42.56.010.

The Act defines a "writing" as:

"handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated."

RCW 42.56.020 (3).

The Court in O'Neill determined that metadata associated with the email falls within the broad definition of a writing and public record . O'Neill, supra .

When a request for public records is made, the recipient agency has few options: provide the records, acknowledge receipt of the request and provide a reasonable estimate of the time it would take to provide the records, or deny the request. RCW 42.56.520.

**C. The trial court erred in finding that the public records supplied to George Nervik under Washington's Public Records Act was a reasonable search as a matter of law.**

The standard at Summary Judgment was stated by the court: "An agency fulfills its obligations under the PRA if it can demonstrate beyond a material doubt that its search was 'reasonably calculated to uncover all relevant documents.' " Neighborhood Alliance, supra., at 257, citing Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984), quoting Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350-1351 (D.C. Cir. 1983). The Neighborhood Alliance court noted also that

the methods used in conducting a search must be "reasonably expected to produce the information requested." Ibid at 257, citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). The methodology employed in this case, as well as the contours of the search protocol are challenged by Mr. Nervik. The Neighborhood Alliance court noted also that a governmental agency "must show a good faith effort to conduct a search for the requested records using methods which can be reasonably expected to produce the information requested." Ibid., citing Oglesby v. U.S. Department of the Army, 920 F.2d 57, 68, (D.C. Cir. 1990).

Of particular significance for these purposes is the observation in Neighborhood Alliance that affidavits supporting a claim of reasonableness:

"such affidavits must set forth the search terms and the type of search performed, and aver that all files likely to contain responsive materials, if such records exist,

have been searched." Ibid at 257, citing Valencia-Lucena v. US Coast Guard, 180 F. 3d 321, 326 (D.C. Cir. 1990). The record in this case is devoid of any averment that all sites likely to contain responsive material have been searched nor does it indicate any credible reasons for the extensive delays in producing records yet alone the fact that the records requested, electronic Outlook PST format (which contains metadata). It would have no doubt proved faster and far less expensive to produce the records in their native, original electronic Outlook format. xxxx. In Neighborhood Alliance of Spokane County, the granting of a Summary Judgment on the issue of the reasonableness of the public entity's search was reversed, with the caution that review of a search's reasonableness must be based on what the agency has come to know at the conclusion of the search rather than what the agency speculated at its inception. Neighborhood Alliance of Spokane County, supra at 259 citing Campbell v. United

States Department of Justice, 164 F.3d 20, 28-29 (D.C. Cir. 1998).

In Mr. Nervik's case, none of the declarations of DOL employees indicated a description of any of the searches actually performed nor an indication that all sites reasonably expected to be productive were searched such as office computers, email servers, laptop computers, cell phones, Blackberry devices, thumb drives, backup drives, etc. It is submitted that in these circumstances there existed at least a genuine issue of material fact as to the reasonableness of the searches for records and the timeliness in which the searches took place. Nor does the evidence affirmatively demonstrated that reasonable methods, tools and resources were utilized.

**D. The trial court erred in finding that the response to the request for electronic records was sufficient.**

Beginning no not later than September 28, 2007, Mr. Nervik requested that all emails responsive to his disclosure request originally filed December 30, 2005, should be in their "original format, not the electronic format previously offered." CP-593, 604, 607, 765, 768. He did so because he expected that the original format would include the email metadata, without using that term, which in turn would provide the identity of the email correspondents, who might be additional sources of discoverable data. In his request he did not use the term "metadata." As noted above, email including metadata is a form of public record under the Act. O'Neill, supra. That Court indicates that a request for metadata should refer to that description.

Compliance with the request(s) for requested email records in electronic format has not been accomplished.

**E. Appellant is entitled to attorney's fees.**

In a Public Records Act case the prevailing party is entitled to attorney fees and costs by statute. RCW 42.56.550 (4); Spokane Research and Defense Fund v. City of Spokane, 155 Wn. 2d 89, 117 P.3d 1117 (2005). Assessment of attorney's fees is mandatory for the prevailing party. The amount, however, is discretionary. A question exists as to which forum, the trial court or the appellate court, should determine reasonable attorney fees.

Attorney fees are awarded on appeal pursuant to RAP 18.1 (a). Those fees and costs are requested by Mr. Nervik. The appellate court may award those fees and costs unless a statute specifies that the request is to be directed to the trial court. RAP 18.1 (a).

An additional issue of fact may relate to the

question of whether how many of Mr. Nervik's claims establish him as prevailing party. As noted in the appellant's brief, the major thrust of his claims lies with his contention that the WASHINGTON STATE DEPARTMENT OF LICENSING failed to ever provide the requested records nor did they conduct a timely and reasonable investigation of its own records for its own email records.

#### **F. WHAT CONSTITUTES A COMPLETE RECORD.**

The trial court erred in finding that the WASHINGTON STATE DEPARTMENT OF LICENSING was not required to provide the requestor Nervik with the metadata associated with the public records requested by him.

## CONCLUSION

The Public Records Act and case law interpreting that Act provides clear direction that cognizable public records shall be made available to a requestor who makes a request for identifiable records. The Act does not allow for inquiry into the motive for the request. The Act does not require that the requestor take the lead in locating the records requested. In the present case, Mr. Nervik provided what information was necessary to effect a reasonable and comprehensive search of the records of the WASHINGTON STATE DEPARTMENT OF LICENSING. What emerged in this case was evidence that the Defendant failed to supply the email records of Elizabeth A. Luce (the director) in the WASHINGTON STATE DEPARTMENT OF LICENSING. When the Office did search the appropriate computers and/or electronic devices it found the email records identified by

Nervik with no discernible difficulty yet it steadfastly refused to provide the records, first it refused to provide the records or even a reasonable estimate of time to provide them, then it refused to provide them in the original, native electronic Outlook PST format. Instead DOL chose to create newer records containing less information and then attempted to supply the stripped down records in place of the more complete original records. Further, the partial records provided do not serve, perform or maintain the same functionality as the original records in that they do not yield the same information nor are they searchable for the same type of information because they do not contain the original metadata and even if some of the metadata were present it would be in a different and less or not usable format, this was done so as to prevent the requestor from searching the information and is a blatant ploy to

further hide information from the public, again a violation of the Public Records Act.

One large issue of law I have left to last as it tends to overshadow and act as an umbrella to all of the other violations and problems with this case. While I contend that there are still many issues of fact that have not been decided there is a larger and more all-encompassing concern. Before a trier of facts can make a determination as to whether or not any issues of fact remain they must first have a clear understanding of the facts and that is not the case here.

The trial court erred first in its order dated August 20, 2010 finding for Partial Summary Judgment that the public records requested under Washington's Public Records Act by George Nervik had been supplied by the DOL to Nervik. The Court in it's own words was

"confused" and did not understand the issues, RP. page 7 lines 16-17 on August 20, 2010. The trial Court did not understand that the records requested were electronic records, that they were requested in their native format which by definition contains the metadata and that the metadata was requested (Declaration of Nervik August 9th, 2010 at page 10 paragraph 55 and Exhibit I and that the records were never supplied or produced.

When Appellant / Plaintiff's attorney stated a question during the hearing on the Motion for Summary Judgment "I'm assuming you have some knowledge of the technology involved here." the Court answered "I have knowledge of .pdf, not .pst." RP. page 11 lines 10-13 on January 28, 2011. Then when asked "Okay. Do you use Outlook in the Court?" the Court responded "I don't use Outlook" RP. page 11 at lines 14-16 on

January 28, 2011. This makes it clear to me that the Court does not understand the issues and the facts that are crucial to this case and I submit that before a Trier of Fact can hope to make even the most basic judgment as to whether any material issues of fact exist they must first at least have a basic understanding of what the issues are, and while I don't think it is reasonable to think that every Judge in every Court is going to be some "all-knowing Kreskin-like" person, I do feel that the Court owes a duty to itself and the parties to make sufficient inquiry into the issues in order to gain at least some rudimentary understanding as to what the differences and functions are between any two different items, services or technologies, in this case the difference between a .pst file and a .pdf file, which are completely different, apples and oranges. This is an area where traditionally the Courts have allowed the

parties to bring in qualified "experts" to testify and in effect teach the Court and/or Jurors as to what the pertinent differences are, be it computer technology, medical technology, firearms ballistics, land surveys, property valuation or DNA. Some demonstrative examples would have been easy to play in Court.

Because no inquiry was made by the Court and the Appellant/Plaintiff was not afforded the opportunity to conduct discovery (interrogatories went unanswered for over a year with no protective order), hold an evidentiary hearing or present evidence and fact or expert witnesses, no clear understanding was ever reached or allowed. A very recent case from our Supreme Court, NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY, Petitioner, v. COUNTY OF SPOKANE, Respondent, Case No. 84108-0, Supreme Court of Washington, En Banc, Filed: September 29, 2011 states that discovery in a PRA

case should not be any different than it would be in any other civil case. It sure was different in this case.

For the reasons set forth above, including the reasons relating to claims of attempting to charge excessive fees and incomplete revelation of requested material, Appellant/Plaintiff respectfully urges that both the Partial Summary Judgment of August 20, 2010 and the final Summary Judgment and Dismissal of January 28, 2011 were improvidently granted in this case and that this matter should be reversed and remanded to the trial court for a new trial de novo.

Dated this 17th day of October 2011 at Olympia, Washington.



---

George E. Nervik, Pro Se  
Appellant / Plaintiff  
700 Sleater-Kinney Rd SE - Suite B-188  
Olympia, Washington 98503-1150  
(360)-493-0085-Office  
George@GeorgeNervik.Com

COURT OF APPEALS  
DIVISION II

11 OCT 18 AM 9:44

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

GEORGE E. NERVIK, a single )  
man, )  
Appellant, ) No. 41834-7-II  
v. )  
 ) No. 09-2-02385-6  
STATE OF WASHINGTON )  
DEPARTMENT OF LICENSING, ) DECLARATION OF SERVICE  
 )  
Respondent. )  
\_\_\_\_\_ )

I, Les Kandel, declare as follows:

1) I am over 18 years of age and a U.S. citizen.

2) On October 18, 2011 at 8 40 A M, I caused to be delivered two true and accurate copies of the following documents to the following parties as indicated below via William Frymire, AAG, WSBA # 16551 at the Washington State Attorney General's Office at

1125 Washington Street S.E., Olympia, Washington 98504 at the first floor reception area / service desk (a date stamped copy of first page is attached):

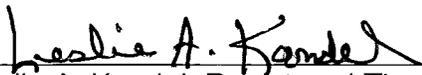
a. Appellant's Opening Brief

**Service List**

Washington Attorney General's Office Attn: Anthony Paul Pasinetti, AAG, WSBA #34305 800 5th Ave Ste 2000 Seattle, WA 98104-3188 (206) 464-7676-Office (206) 389-2800-Fax AnthonyP@atg.wa.gov	<input type="checkbox"/> Hand Delivered <input type="checkbox"/> Mailed <input type="checkbox"/> Faxed <input type="checkbox"/> Emailed
Washington Attorney General's Office Attn: Jody Lee Campbell, AAG, WSBA #32233 5th Floor Highway Licenses Building 1125 Washington Street S.E. P.O. Box 40110 Olympia, Washington 98504-0110 (360) 664-2475-Office (360) 664-0174-Fax JodyC@atg.wa.gov	<input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Mailed <input type="checkbox"/> Faxed <input type="checkbox"/> Emailed

I declare and certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (RCW 9A.72.085)

DATED this 18 day of October 2011, at Olympia, Washington.



Leslie A. Kandel, Registered Thurston Co. Process Server #2006-0207-02  
(360) 754-8178-Office (360) 943-9723-Fax leskandel@hotmail.com

Attachments:

~~Exhibit-1: Date Stamped copy of first page of Appellant's Opening Brief~~