

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. The Trial Court’s Decision Waiving the Attorney-Client Privilege Should Be Reversed Because the Implied Waiver Under *Pappas* Does Not Extend Beyond Attorneys Involved in the Underlying Matter 1

 1. Diminished recovery in the CMN litigation is not at issue in this case 2

 2. Even if relevant, the privileged information is available from other, unprivileged sources 5

 3. The trial court abused its discretion 7

 4. Applicable case law does not support Sussman Shank’s arguments 9

 B. The Trial Court’s Decision Disqualifying Cushman Law Offices Should Be Reversed Because It Was Contrary to Law and Based on Untenable Reasons 12

 C. The Trial Court’s Findings of Fact Are Not Supported By the Record 16

 D. Pamela Dana Is a Party To This Appeal 17

III. CONCLUSION 18

TABLE OF AUTHORITIES

Table of Cases

Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao, 153 Wn.App. 461, 220 P.3d 1283 (2009) 15

<u>Pappas v. Holloway</u> , 114 Wn.2d 198, 787 P.2d 30 (1990)	1, 2, 4, 6, 9, 10
<u>Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.</u> , 124 Wn.2d 789, 881 P.2d 1020 (1994)	12, 15
<u>Ramey v. Graves</u> , 112 Wn. 88, 191 P. 801 (1920)	14
<u>State v. Tobin</u> , 161 Wn.2d 517, 166 P.3d 1167 (2007)	2, 8
<u>Taylor v. Shigaki</u> , 84 Wn.App.723, 930 P.2d 340 (1997) (citing <u>Ramey v. Graves</u> , 112 Wn. 88, 191 P. 801 (1920)	14

Table of Cases From Other Jurisdiction

<u>1st Sec. Bank of Wash. v. Eriksen</u> , 2007 WL 1888881 (W.D. Wash. 2007)	10
<u>Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.</u> , 189 Ill.2d 579, 727 N.E.2d 240 (2000)	10
<u>Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.</u> , 136 F.3d 695, 701 (10 th Cir., 1998)	5, 6
<u>Hearn v. Rhay</u> , 68 F.R.D. 574, 581 (E.D. Wash. 1975)	4, 5, 7
<u>Rutgard v. Haynes</u> , 185 F.R.D. 596 (S.D. Cal. 1999)	11

Rules

RAP 1.2	18
---------------	----

Other Authorities

RPC 1.7	13, 14, 17
RPC 1.9	13, 14, 17
RPC 1.10	14
RPC 3.7	12, 13, 14

I. INTRODUCTION

Troy and Pamela Dana (collectively, “Mr. Dana”) ask this court to reverse the erroneous decisions of the trial court. Mr. Dana did not waive the attorney-client privilege as to his attorneys in the CMN litigation. The trial court abused its discretion in ordering production of the privileged files of those attorneys based on the erroneous legal conclusion that the privilege had been waived. The trial court further abused its discretion by disqualifying the entire litigation firm based on erroneous interpretation of the Rules of Professional Conduct and on untenable grounds.

II. ARGUMENT

A. **The Trial Court’s Decision Waiving the Attorney-Client Privilege Should Be Reversed Because the Implied Waiver Under *Pappas* Does Not Extend Beyond Attorneys Involved in the Underlying Matter.**

A plaintiff in a legal malpractice action impliedly waives the attorney-client privilege as to communications with the defendant attorney or with other attorneys involved in the same underlying matter from which the malpractice claim arose. *Pappas v. Holloway*, 114 Wn.2d 198, 208, 787 P.2d 30 (1990). The *Pappas* court carefully distinguished cases involving attorneys who were *not* involved in the same underlying matter. *Id.* at 204-06. The court clearly agreed that in such cases the privilege was

not waived. *Id.* at 206.

By its own terms, *Pappas* does not waive the privilege in the present case. Mr. Dana's malpractice claim arose from Sussman Shank's representation of Mr. Dana in the *transaction* with CMN, two years before the CMN litigation began. Communications between Mr. Dana and his attorneys in the CMN litigation are entirely irrelevant to the central issue of Sussman Shank's malpractice in the transaction two years before. Since Mr. Dana's attorneys in the CMN litigation were not involved in the same underlying matter—the *transaction*—the privilege was not waived under *Pappas*.

The trial court abused its discretion in ordering Mr. Dana to produce the privileged documents based on its erroneous conclusion that the privilege had been waived. *See State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007) (A trial court abuses its discretion when it bases a decision on an error of law.).

1. Diminished recovery in the CMN litigation is not at issue in this case.

Sussman Shank attempts to convince this court that this malpractice case revolves around the settlement of the CMN litigation. Sussman Shank invents its theory of the case from whole cloth, ignoring

the allegations in the First Amended Complaint (CP at 9-13), Mr. Dana's answers to interrogatories (CP at 54-58), and Mr. Dana's arguments before the trial court (*e.g.*, CP at 261). Despite these clear articulations of Mr. Dana's claims, Sussman Shank insists that "the only possible claim" is that Sussman Shank's malpractice caused a "diminished recovery" in the CMN litigation. (Respondent's Brief at 7.) Mr. Dana has never made such a claim.

Mr. Dana does not seek from the defendants in this case any damages related to the CMN litigation. In this malpractice suit, Mr. Dana seeks recovery for Sussman Shank's negligence in negotiating, drafting, and advising Mr. Dana to sign the agreements related to the transaction. The measure of damages is the difference between the injured position in which Mr. Dana found himself under the agreements as written and his rightful position had Sussman Shank lived up to the proper standard of care as his attorneys in the transaction. In the CMN litigation, a breach of contract case, those same agreements dictated the "rightful" position to measure recovery from CMN. Any "diminished recovery" in the CMN litigation is outside the proper measure of damages claimed by Mr. Dana in this case and is simply not at issue here.

Since Sussman Shank's entire argument for waiver of the attorney-

client privilege rests on its mischaracterization of Mr. Dana's claims, the argument must fail. Contrary to Sussman Shank's arguments, the CMN litigation is not at issue in this case. The acts and opinions of Mr. Dana's attorneys in the CMN litigation have nothing to do with the recovery Mr. Dana seeks here. There is no possible "fault of others" to reduce Mr. Dana's recovery against Sussman Shank, because only Sussman Shank was involved in the transaction, which is the central, underlying matter at issue. The settlement of the CMN litigation and the reasons for that settlement are entirely irrelevant to Sussman Shank's malpractice or the damages that Mr. Dana seeks to recover in this case.

Under the *Hearn* test adopted by the court in *Pappas*, Mr. Dana did not waive the attorney-client privilege. He did not "put the protected information at issue by making it relevant to the case." *Pappas*, 114 Wn.2d at 207 (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)). Mr. Dana's communications with his attorneys in the CMN litigation are not relevant to Mr. Dana's claims here. Sussman Shank's creative rewriting of those claims cannot make the protected information relevant. The privilege was not waived, and the trial court abused its discretion in ordering the privileged documents produced based on its erroneous conclusion of law.

2. Even if relevant, the privileged information is available from other, unprivileged sources.

Even if information related to the CMN litigation were relevant to the issue of damages, the third prong of the *Hearn* test would not be satisfied, because the files would not be vital to the preparation of Sussman Shank's case. Information is vital under the *Hearn* test only where it is unavailable from any other, unprivileged source.¹ *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 701 (10th Cir., 1998) (citing *Hearn*, 68 F.R.D. at 581). Mere relevance is insufficient to justify invading the privilege. *Id.* Evidence to challenge Mr. Dana's claimed damages, if relevant, would be readily available from other sources, so it would be unnecessary to invade the attorney-client privilege and work product protections.

Sussman Shank misunderstands this rule, arguing there are no alternative sources for the file materials of the attorneys in the CMN litigation. This is the wrong inquiry. The test is not whether the same documents can be obtained elsewhere, but whether the relevant *information* can be obtained from an unprivileged source. *Id.* at 702;

¹ Sussman Shank argues that the "unavailable from other sources" rule applies only to work-product, but it also applies to attorney-client privilege by operation of the *Hearn* test. Similarly, it is part of the test of whether an attorney is a necessary witness.

accord Pappas, 114 Wn.2d at 210 (“a party must show the importance of the *information* to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent *information* from other sources” (emphasis added)). In *Frontier Refining*, the court held that the privilege was not waived because information relevant to the reasonableness of a settlement was available through expert opinion testimony, from a third party, or from the third party’s attorney. 136 F.3d at 702. The same is true here.

Sussman Shank complains that Mr. Dana has not previously identified the potential alternate sources, but this is untrue. In Mr. Dana’s motion for reconsideration of the order granting the motion to compel, Mr. Dana identified these sources to the trial court: expert witnesses, employees of CMN, or Mr. Dana himself (who could testify to his own knowledge and actions without disclosing privileged communications with his attorneys). (CP at 263.) Attorneys for CMN could also testify regarding the reasons for the settlement and the actions of Mr. Dana’s attorneys. Any relevant information regarding the meaning and effect of the transactional documents, the conduct of CMN or its employees, the conduct of Mr. Dana’s attorneys in the CMN litigation, Mr. Dana’s understanding of

various issues, or the reasonableness of the settlement,² would be discoverable from these unprivileged sources.

Since the privileged information would be available from other, unprivileged sources, it would not be vital to Sussman Shank's defense. Thus, even if the CMN litigation were somehow relevant to Mr. Dana's claims, the third prong of the *Hearn* test would not be met, and the attorney-client privilege would not be waived. The trial court abused its discretion.

3. The trial court abused its discretion.

Sussman Shank finds fault in Mr. Dana's prior argument to the trial court that there was substantial room for a difference of opinion on the issue of implied waiver of the attorney-client privilege. Sussman Shank appears to argue that, if this is true, the trial court could not have abused its discretion because any legal conclusion it reached would have been reasonable based on the split authorities. However, the trial court's legal conclusion was not a matter of discretion. It was a question of law, and there was only one correct answer. On review, this court must determine de novo whether the trial court was right or wrong in its legal

² These are, generally, the types of information identified in Sussman Shank's summary of the privileged file materials. (*See* Respondent's Brief at 15-29.)

conclusion. A trial court abuses its discretion when it bases a discretionary ruling on an erroneous legal conclusion. *State v. Tobin*, 161 Wn.2d at 523. This is true even if the trial court was faced with conflicting authority.

Here, since Mr. Dana did not waive the attorney-client privilege as to his attorneys in the CMN litigation, the trial court was wrong. It based its decision to order production of the attorney files on this erroneous legal conclusion. It was untenable and manifestly unreasonable to order Mr. Dana to produce these *privileged* materials. The trial court abused its discretion.

Sussman Shank attempts to argue that the trial court could not have abused its discretion because it reviewed the privileged files *in camera* and determined they were relevant. The problem with this argument is that the trial court found they were relevant to the issue of “fault of others” based on Sussman Shank’s “diminished recovery” theory. (*See* CP at 437 (Finding of Fact #12), 439 (Conclusion of Law #3).) But, as shown above, diminished recovery in the settlement of the CMN litigation is not at issue in this case. As such, the privileged documents were not relevant to any material issue in the case. The trial court’s conclusion to the contrary was an error of law. The trial court’s decision to order production of the privileged documents based on that error of law was an abuse of

discretion.

4. Applicable case law does not support Sussman Shank's arguments.

Sussman Shank attempts to draw a parallel between itself and the *Pappas* case because Sussman Shank did not participate in the CMN litigation or its settlement. However, this attempt fails because it points to the wrong underlying matter and the wrong attorneys. The *Pappas* court held that the privilege was waived as to other attorneys involved in the same underlying matter from which the malpractice claim arose. *Pappas*, 114 Wn.2d at 208. In *Pappas*, the malpractice claim arose from Mr. Pappas's representation of his clients in the brucellosis litigation, from which he withdrew prior to trial or settlement. *Id.* at 200-01. Here, the malpractice claim arose from Sussman Shank's representation of Mr. Dana in the *transaction* with CMN. It is entirely irrelevant that Sussman Shank did not participate in the subsequent CMN *litigation*, because that is not the underlying matter from which the malpractice claim arose.

In addition, the proper inquiry focuses not on the defendant, Sussman Shank, but on the attorneys from which Sussman Shank seeks to discover privileged information. *Pappas* extends waiver of the privilege to other attorneys who were involved in the same underlying matter—in this

case, the transaction. The *Pappas* court clearly agreed that the privilege was *not* waived in cases where the other attorneys were *not* involved in the same underlying matter. *Id.* at 204-06. Thus, here, the privilege was not waived because Mr. Dana's attorneys were not involved in the underlying transaction. Sussman Shank's lack of involvement in the later CMN litigation is entirely irrelevant.

As discussed in Appellant's Opening Brief (at 15-16), the Illinois Supreme Court case of *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240 (2000), is a much closer parallel to the facts in the present case. Even where the malpractice plaintiff had clearly made a claim for damages arising out of subsequent litigation, the court held that the privilege was not waived because the subsequent litigation was not at issue and evidence on damages was available from unprivileged sources. *Id.* at 586-87, 589.

Similarly, in *1st Sec. Bank of Wash. v. Eriksen*, 2007 WL 188881 (W.D. Wash. 2007), discussed in Appellant's Opening Brief (at 16-18), where again the malpractice plaintiff had made a clear claim for damages arising from settlement of subsequent litigation, the court held that the privilege was not waived because communications with the attorneys in the subsequent litigation was not at issue and information related to the

reasonableness of the settlement was available from unprivileged sources, such as expert witnesses. *Id.* at *3.

The only other case discovered by the parties with similar facts is *Rutgard v. Haynes*, 185 F.R.D. 596 (S.D. Cal. 1999), discussed in Respondent's Brief (at 11-12). In *Rutgard*, the malpractice plaintiff explicitly sought to recover the amount paid in settlement of subsequent litigation. The court held that this claim for damages from the settlement placed the reasonableness of the settlement in issue, including any information about the actions of the attorneys related to the settlement. *Id.* at 599-600. However, the court also indicated that if the malpractice plaintiff had not sought damages from the settlement, as Mr. Dana did not, the privilege would not have been waived. *Id.* at 599.

Thus, all of the relevant case law supports maintaining Mr. Dana's attorney-client privilege on the facts of this case. Mr. Dana did not make a claim for damages arising from the settlement of the CMN litigation, so information regarding that litigation or the settlement is not at issue. The trial court's conclusion that the privilege was waived was an error of law. This court should reverse all of the five orders being reviewed, which are all based on this erroneous legal conclusion. They were an abuse of discretion.

B. The Trial Court's Decision Disqualifying Cushman Law Offices Should Be Reversed Because It Was Contrary to Law and Based on Untenable Reasons.

The plain language of RPC 3.7 only disqualifies a lawyer from acting as an advocate in a trial in which the lawyer is a necessary witness. RPC 3.7(a). This disqualification is not imputed to other members of a law firm. RPC 3.7(b). Disqualification under this rule requires a finding that the lawyer (1) will provide material evidence (2) that is unobtainable elsewhere and (3) the testimony is prejudicial to the testifying lawyer's client. *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994) ("PUD No. 1").

None of the Cushman attorneys were necessary witnesses. Only two of the five attorneys in the firm even had personal knowledge of the CMN litigation. None of the attorneys had any non-consentable conflicts that would disqualify them under other rules. Even if disqualification of the Cushman attorneys under RPC 3.7 was proper, the rule allows them to continue to represent Danas in every way *except* acting as advocates at trial. The trial court abused its discretion by making its disqualification decision contrary to law and on untenable grounds.

Sussman Shank complains that Mr. Dana has not cited any cases with the precise facts regarding disqualification that are present here. Yet

Sussman Shank does not cite so much as one single case, with any set of facts, to support its arguments on disqualification. Nor does Sussman Shank refer to the language of RPC 3.7 nor argue why that rule would require disqualification on the facts of this case. Instead Sussman Shank relies on emotional appeals and conclusory statements. These arguments must fail. The rules and the case law mandate reversal of the disqualification order, as explained in Appellant's Opening Brief.

Sussman Shank has not attempted to address Mr. Dana's analysis of RPC 3.7, nor has it attempted to demonstrate that the trial court's analysis of the rule was correct. Indeed, it is not possible to do so. The trial court's analysis was clearly erroneous and constituted an abuse of discretion.

Sussman Shank complains that if Mr. Dana's analysis is correct, it is "difficult to imagine" any situation in which an entire law firm would be disqualified. However, there is no reason to complain because that is precisely the result mandated by the plain language of the rule. The rule provides: "A lawyer *may act as advocate* in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." RPC 3.7(b) (emphasis added). The only situation in which an entire firm would be disqualified would be if all

attorneys in the firm are either necessary witnesses or all are disqualified by non-consentable conflicts under RPC 1.7 or RPC 1.9.³ Sussman Shank argues that a trial court is not required to agree to such an arrangement. However, the rule provides no discretion on this point. It clearly provides that “A lawyer may act as advocate.” RPC 3.7(b).

Sussman Shank further complains that it is inappropriate for the Cushman attorneys to be witnesses while working for a contingent fee. However, disqualification does not remove the Cushman firm’s financial interest in the outcome of the case. If Dana eventually prevails, the Cushman firm will be entitled to reasonable fees for services rendered. *Taylor v. Shigaki*, 84 Wn. App. 723, 728, 930 P.2d 340 (1997) (citing *Ramey v. Graves*, 112 Wn. 88, 91, 191 P. 801 (1920)). Even if properly disqualified, the Cushman attorneys will still be entitled to compensation based on the outcome. To the extent the trial court may have relied on this line of reasoning, it is an error of law and an abuse of discretion.

It is no “gross distortion of the record” to say that Sussman Shank’s motion for disqualification was only two pages long. (*See* CP at

³ Note that conflicts under RPC 1.7 and RPC 1.9 can be imputed to the entire firm under RPC 1.10, but the lawyer-witness “conflict” of RPC 3.7 is *never* imputed to other lawyers. RPC 3.7, Comment [8]; RPC 1.10. Many conflicts under RPC 1.7 and RPC 1.9 can be resolved by obtaining informed consent from the client as provided in RPC 1.7.

296-98.) Nor that it was unsupported by any declarations, rules, statutes, case law, or arguments that would meet the moving party's burden on a motion to disqualify. *See Id.*; *PUD No. 1*, 124 Wn. 2d at 812. Most of the content of the motion is actually arguments in response to Mr. Dana's second motion for protective order. *See Id.* It made no reference to the extensive summary of file materials that Sussman Shank now claims supports the disqualification order. *Id.* It purported to incorporate by reference arguments presented *three days later*, in Sussman Shank's response to Mr. Dana's second motion for protective order, which was filed three days later. (CP at 298, 341.) That response makes no arguments related to disqualification. (CP at 341-55.)

It is clear from the face of Sussman Shank's motions that it failed to meet its burden. The appellate courts of this state have required that a motion to disqualify be *supported by a showing* that the attorney will give material evidence, unobtainable elsewhere, that is prejudicial to the client, and that the trial court enter findings to that effect. *PUD No. 1*, 124 Wn.2d at 812; *Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wn. App. 461, 467, 220 P.3d 1283 (2009). Sussman Shank's motion made no such showing, and the trial court made no finding that evidence was unobtainable elsewhere. The trial court abused its discretion.

Sussman Shank claims that Mr. Dana conceded his attorneys would have to withdraw. This is absolutely untrue. The quote, which Sussman Shank pulls entirely out of context, was not a concession, but rather described for the court the result that Sussman Shank was attempting to bring about through its abuse of the discovery process:

Just as Plaintiff expected, Defendants have used the disclosed documents to find justification for taking the depositions of Plaintiff's attorneys in the CMN, Inc. litigation so that Defendants can make the attorneys witnesses **and seek to disqualify them** from representing Plaintiff in this malpractice action. Defendants make that intent clear in the first page of their March 25 letter. This is a blatant abuse of the discovery process with the specific purpose to use it as a litigation tactic to throw Plaintiff's case into disarray and impose additional burden and expense, as Plaintiff would be required to seek new counsel and get them up to speed on the case.

(CP at 336 (emphasis added).)

C. **The Trial Court's Findings of Fact Are Not Supported By the Record.**

Sussman Shank argues that the trial court's findings of fact are supported by the record because the trial court reviewed the privileged file materials *in camera*. However, no amount of *in camera* review by the court can change what legal issues are involved in the case. As demonstrated above, Sussman Shank's "diminished recovery" theory is not a material issue in this case. The conduct and settlement of the CMN

litigation have nothing to do with any of the material issues in this case. There is simply no way that the testimony of the Cushman attorneys regarding the CMN litigation could be “central” to the claims in this malpractice lawsuit.

In addition, there is no evidence in the record that information related to the CMN litigation is unavailable from unprivileged sources. In fact, Mr. Dana demonstrated to the trial court that the information would *all* be available from unprivileged sources. (CP at 388-93.)

There is also no evidence in the record that any of the Cushman attorneys would have any conflicts of interest under RPC 1.7 or RPC 1.9. In fact, as Sussman Shank has pointed out on multiple occasions, the depositions of Mr. Dana and the Cushman attorneys have not been taken, so there is no evidence from which the trial court could have concluded that the testimony of the attorneys would differ from that of Mr. Dana. The only evidence in the record regarding conflicts shows that the Cushman attorneys would have no conflicts. (CP at 368-71.) Any other conclusion is not supported by the evidence. The trial court’s findings of fact were unsupported and should be reversed.

D. Pamela Dana Is a Party To This Appeal.

The Rules of Appellate Procedure are liberally interpreted to

facilitate the decision of cases on the merits. RAP 1.2. “Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances.” *Id.* The absence of Pamela Dana as a Petitioner in the original notice of discretionary review was a correctable clerical error—one that has recurred throughout this case, as can be seen from papers filed by both parties, including two of the five orders being reviewed (drafted by counsel for Sussman Shank). (*See* CP at 292, 294.)

This clerical error was corrected by this court during the discretionary review process. At the recommendation of the clerk of this court, Mr. Dana filed an Amended Notice of Discretionary Review, adding Pamela as a Petitioner. The clerk accepted this amended notice and modified the case file accordingly. The Ruling Granting Review in this case lists both Troy and Pamela Dana as parties in the caption and notes in its first sentence: “Troy and Pamela Dana (Dana) seek discretionary review. . . .” The Order Granting Motion to Modify similarly acknowledges Pamela as a party to the appeal (“Troy Dana, et ux, Petitioners” and “Petitioners Troy Dana and Pamela Dana moved to modify. . . .”). There is no good reason to deny Appellants relief in this case based on an inadvertent clerical error.

III. CONCLUSION

For the reasons stated above, Mr. Dana asks this court to reverse the decisions of the trial court and remand with instructions to enter orders that will protect Mr. Dana's attorney-client privilege and allow the attorneys at Cushman Law Offices to continue to represent him.

Respectfully Submitted this 30th day of March, 2012.

CUSHMAN LAW OFFICES, P.S.

A handwritten signature in black ink, appearing to read "Kevin Hochhalter", is written over a horizontal line.

Kevin Hochhalter, WSBA #43124
Attorney for Troy and Pamela Dana

CERTIFICATE OF SERVICE

12:00:30 PM 3/30/12

I certify, under penalty of perjury under the laws of the State of Washington, that on March 30, 2012, I caused to be served a true copy of the foregoing Brief, by the method indicated below, and addressed to each of the following:

STATE OF WASHINGTON
BY [Signature]
DEPUTY

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
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DATED this 30th day of March, 2012 in Olympia, Washington.

[Signature]
M. Katy Kuchno
Paralegal to Kevin Hochhalter