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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS NO. 43543-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In Re:

ERIC ALMOND,

Appellant,

and

PATRICIA ALMOND

Respondent.

OPENING BRIEF OF RESPONDENT/CROSS APPELLANT

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ASSIGNMENT OF ERRORS

1. The trial Court abused its discretion by modifying the Order on Show Cause re: Contempt/Judgment and Consolidation of Judgments, dated January 30th, 2008.

2. The trial Court abused its discretion by reducing the total principal balance of the judgments owed, pursuant to the Order on Show Cause re: Contempt/Judgment and Consolidation of Judgments, entered on January 30th, 2008, by unincurred daycare and preschool expenses for the period of time prior to the entry of said Order.

3. The trial Court abused its discretion by failing to award interest through March 31st, 2012 on the unpaid spousal maintenance for the period of time from January, 2008 through April, 2009.

4. The trial Court abused its discretion by failing to award Patricia her reasonable attorney's fees, due to Eric's intransigence.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Did the trial Court properly calculate the balance owed by Eric for child support and unpaid maintenance, subject to the offset for unincurred daycare and preschool expenses? (Eric's Assignment of Errors 1, 2).

2. Is Eric collaterally estopped from denying the terms of the Order on Show Cause re: Contempt/Judgment and Consolidation of Judgments, which was entered on January 30th, 2008? (Eric's

Assignment of Errors 1, 2).

3. Did the trial Court abuse its discretion by modifying the principal balance owed on the judgments that were entered on January 30th, 2008, by unincurred daycare expenses existing prior to the entry of the January 30th, 2008, Order on Show Cause re: Contempt/Judgment and Consolidation of Judgments? (Patricia's Assignment of Errors 1, 2).

4. Did the trial Court abuse its discretion by failing to calculate and award interest on the unpaid maintenance, for the period of time from January 1st, 2008 through April 30th, 2009? (Patricia's Assignment of Errors 3).

5. Did the trial Court abuse its discretion by failing to award Patricia her reasonable attorney's fees, due to Eric's intransigence, relating to Eric's failure to pay the prior judgments entered by the Court and Eric's failure to pay Court ordered maintenance after the entry of the January 30th, 2008 order? (Patricia's Assignment of Errors 4).

STATEMENT OF CASE

On April 30th, 2007, after a bench trial, judgments were entered against Eric totaling \$19,318.23. Ex 14. In calculating the judgments, the trial Court gave Eric credit for one-half of his Thrift Savings Plan Account. The Decree of Dissolution also required the Respondent to pay maintenance in the sum of \$1,000, per month, for a period of

twenty-four months. Ex 14.

On April 30th, 2007, the trial Court also entered a final Order of Child Support. Ex. 3. Eric was obligated to pay child support in the sum of \$1,397.24, per month, for the three children. CP 180.

On October 17th, 2007, Eric filed a Petition for Modification of Child Support. Patricia filed a Motion for Contempt. CP Motion for Order to Show Cause dated December 21st, 2007. Eric appeared at the hearing scheduled for January 8th, 2008, at which time Eric's Petition for Modification of Child Support was dismissed. In regard to Patricia's contempt motion, the trial Court continued the hearing to January 30th, 2008, to permit Eric to obtain counsel since incarceration was a proposed sanction. CP Order Dismissing Modification dated January 8th, 2008. Eric did not appear at the hearing scheduled for January 30th, 2008, and an Order on Show Cause re: Contempt/Judgment and Consolidation of Judgments was entered by the Court. Ex 27. A bench warrant was issued for Eric's arrest, based upon his failure to appear at the hearing scheduled for January 30th, 2008, and the issue of contempt was reserved. CP Warrant of Contempt dated February 5th, 2008, Ex. 27.

At the hearing of January 30th, 2008, the trial Court entered additional judgments for unpaid child support and maintenance, totaling \$14,213.37. Ex. 27. The new judgments were consolidated with the judgments from the Decree of Dissolution, establishing a

principal balance owed as of December 31st, 2007, for unpaid maintenance and child support, in the sum of \$31,911.50. Interest on the judgments was calculated as of December 31st, 2007, in the sum of \$1,825.52, and the Court awarded additional attorney's fees in the sum of \$1,000. At the time of the hearing on January 30th, 2008, the Court also awarded a judgment to Patricia for the portion of Eric's Thrift Savings Plan that had not been paid to Patricia. Ex. 27.

On March 5th, 2010, Eric filed a Motion and Declaration for Adjustment of Child Support. CP Motion and Declaration for Adjustment dated March 5th, 2010. On May 5th, 2011, Patricia filed a Motion and Declaration for an Order to Show Cause re: Contempt.

On February 10th, 2012, the trial Court entered an order, outlining the issues for trial. CP 42 - 43. The February 10th, 2012 order provided as follows:

1. The Order of Child Support entered with the Court on April 30th, 2007, remains in effect.
 2. The issue of the tax exemptions, pursuant to Eric's Motion to Adjust Child Support shall be addressed at the time of trial.
- CP 42.

The order also identified the following issues for trial:

1. Father's Motion to Adjust Child Support.
2. Father's right of reimbursement of daycare and preschool expenses.

3. Mother's issues as outlined in her motion dated May 5th, 2011, including back child support/maintenance, costs and attorney's fees, update of the interest calculation of the past judgments, and consolidation of all judgments.

4. Father's summer residential time, with the Court acknowledging that the issue is properly before the Court. CP 42 - 43.

On March 1st and March 5th, 2012, the issues outlined by the trial Court were presented to the Court by way of trial. RP 1 - 69, March 1st and March 5th, 2012. On March 26th, 2012, the trial Court rendered its decision. RP 1 - 15, March 26th, 2012. The issues addressed at the time of trial were outlined in the trial Court's decision. RP 2 - 3, March 26th, 2012. In its decision dated March 26th, 2012, the Court outlined the history of the judgments that had been entered against Eric. RP 5 - 9, March 26th, 2012.

In calculating child support for Patricia, the trial Court imputed income to her at 40 hours, per week, at \$13, per hour. RP 3, March 26th, 2012. In calculating Eric's income for the purpose of child support, the trial Court stated that the father had conceded in closing argument that it was inappropriate to impute Eric's income at \$3,448 per month, which had been proposed by the mother, and is the income figure utilized by the trial Court. RP 4, March 26th, 2012.

In regard to income tax exemptions, the trial Court adopted the

language from the original Order of Child Support, that was entered on April 30th, 2007. RP 5, March 26th, 2012.

In regard to the issues of back judgments and accrued interest on those judgments, the trial Court acknowledged that on January 30th, 2008, Patricia was awarded a judgment in the amount of \$31,911.50, which was a consolidation of all of the previous judgments, including delinquent child support and maintenance. RP 8, March 26th, 2012, Ex 27. Patricia was also awarded interest in the sum of \$1,825.52, attorney's fees of \$1,000, and an additional judgment for the balance owed by Eric to Patricia on the Thrift Savings Plan. RP 8 - 9, March 26th, 2012, Ex 27.

The trial Court stated that the January 30th, 2008, judgment was the law of the case, but then reduced the principal balance owed on the judgment for unincurred daycare and preschool expenses of \$429.55, per month, for eight months. RP 10, March 26th, 2012. The trial Court reduced the January 30th, 2008 judgment amount by the principal sum of \$3,463.40, and ordered that the interest accrued on the judgment, should be reduced accordingly. RP 10, March 26th, 2012. The trial Court found that based upon the January 30th, 2008 judgment, the Thrift Savings Plan would not be modified. RP 11, March 26th, 2012. The trial Court then determined that the total principal judgment amount for all judgments entered on January 30th, 2008 should be reduced to \$33,483.08. RP 11, March 26th, 2012.

In regard to delinquent spousal maintenance, the Court found that Eric had not paid maintenance from January, 2008 through April, 2009, at \$1,000, per month, for a total amount of \$16,000. RP 11, March 26th, 2012. After making findings relating to daycare expenses and mediation costs, the trial Court determined that Eric had overpaid child support, based upon unincurred daycare expenses, in the sum of \$8,249.55. RP 12, March 26th, 2012. The trial Court determined that the \$8,249.55 would then be deducted from the delinquent maintenance of \$16,000 and a deduction for mediation costs of \$328.50, resulting in a principal balance of unpaid maintenance totaling \$7,426.95. CP 36.

The trial Court denied an award of attorney's fees to Patricia stating that Patricia had already been awarded \$6,650 in fees and costs, pursuant to prior orders and that Eric was facing another substantial judgment. RP 12 - 13, March 26th, 2012. The trial Court found that Patricia had limited income. RP 13, March 26th, 2012.

The trial Court's Order and Judgment on Motion for Adjustment of Child Support, Reimbursement of Unincurred Daycare Expenses/Judgment for Maintenance/Clarification dated January 30th, 2008 Order was filed on May 8th, 2012. CP 34 - 36.

Eric filed his Notice of Appeal on June 6th, 2012. Patricia filed her Notice of Appeal (cross-review) on June 15th, 2012. CP 192 - 196.

ARGUMENT

A. Standard of Review.

An action for modification of child support is reviewed for a manifest abuse of discretion. *In re: Marriage of McCausland*, 159 Wn.2d 607, 616, 152 P.3d 1013 (2007). The parent who challenges the trial Court's decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial Court. *In re: Marriage of Landry*, 103 Wn.2d 807, 809 - 10, 699 P.2d 214 (1985).

A trial Court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re: Marriage of Littlefield*, 133 Wn.2d 39, 46 - 47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.* at 47.

B. The trial Court correctly established the offset to be awarded to Eric, for unincurred daycare expenses and preschool expenses, for the period of time from January 1st, 2008 through March 31st, 2012.

RCW 26.19.080 provides that daycare and special child rearing expenses are not included in the economic table, and these expenses

shall be shared by the parents in the same proportion as the basic child support obligation. RCW 26.19.080(3). If an obligor parent pays for Court ordered daycare or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment. RCW 26.19.080(3). As indicated in the order entered on February 10th, 2012, one of the issues for trial was Eric's right of reimbursement of daycare and preschool expenses. CP 42.

The trial Court correctly stated that Eric's total child support obligation, pursuant to the Order of Child Support, totaled \$71,257.71, for the period of time from January 1st, 2008 through March 31st, 2012, i.e., \$1,397.21 x 51 months. CP 183. It was also stipulated that Eric was entitled to reimbursement of \$429.55, for unincurred daycare and preschool expenses from January 1st, 2008 through March 31st, 2012, a period of fifty-one (51) months. The total amount to be reimbursed to Eric for the unincurred expenses was \$21,907.05. CP 184. Additionally, Patricia had provided proof of daycare expenses, with Eric's proportionate share being \$733.36. Ex 32, 33. After deducting the unincurred expenses and adding back in the \$733.36, which had been incurred, Eric's child support obligation for the period of time from January 1st, 2008 through March 31st, 2012, totaled \$50,084.02. CP 184.

The trial Court then utilized the Case Payment History from the Division of Child Support, which established that Eric had paid the

sum of \$58,333.57, from January 1st, 2008 through March 31st, 2012. CP 23 - 26, Ex 11. The Court then ruled that the result was an overpayment made by Eric, in the sum of \$8,249.55. CP 184.

RCW 26.19.080 provides that any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. RCW 26.19.080(3). Instead of applying the offset to the prior judgments for back child support, the trial Court offset the overpayment against Eric's delinquent spousal maintenance, which had the same ultimate effect on the principal balance owed by Eric, for delinquent child support and delinquent maintenance.

C. The trial Court abused its discretion by modifying the Order on Show Cause re: Contempt/Judgments and Consolidation of Judgments, which was entered on January 30th, 2008.

The doctrine of res judicata or claim preclusion ensures finality of judgments. *Marino Property Company v. Port Commissioner's*, 97 Wn.2d 307, 644 P.2d 1181 (1982). Once a judgment is final, a Court may reopen it only when specifically authorized by statute or Court rule. See *Lejeune v. Clallam County*, 64 Wn.App. 257, 823 P.2d 1144, review denied, 119 Wn.2d 1005 (1992). CR 60 sets forth the general conditions under which a party may seek relief from judgment. RCW 26.09, which governs dissolution actions, sets forth

additional grounds applying solely to such actions. See *In re: Timmons*, 94 Wn.2d 594, 617 P.2d 1032 (1980). In this case, Eric did not argue to the trial Court that CR 60 applied, nor did the Court mention the rule in its oral ruling. Under these circumstances, the appellate Court has nothing to review, relating to CR 60.

RCW 26.09.170 sets forth the conditions for modifying a Child Support Order. RCW 26.09.170. In relevant part, the statute provides, as follows:

Except as otherwise provided . . . the provisions of any decree respecting maintenance or support may be modified: (a) only as to installments accruing subsequent to the Petition for Modification . . .

RCW 26.09.170(1). The statute reflects well-established law that a modification of child support may not operate retroactively. See *Wilburn v. Wilburn*, 59 Wn.2d 799, 370 P.2d 968 (1962).

When the trial Court modified the judgment and order entered on January 30th, 2008, the Court improperly vacated/modified the prior judgment that was entered on January 30th, 2008. The effect of the Court's order was a retrospective modification of a prior Court order and thus was legally prohibited. RCW 26.09.170(1).

Generally, child support payments become vested judgments as the installments become due. *In re: Marriage of Capetillo*, 85 Wn.App. 311, 932 P.2d 691 (1997). The accumulated child support judgments generally may not be retrospectively modified. *Capetillo*, 85 Wn.App. 316. See RCW 26.09.170(1) (providing support

modification applies solely to obligations subsequent to modification petitions).

When *res judicata* is used to mean claim preclusion, it encompasses the idea that when the parties to two successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding. *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983).

The Washington Supreme Court has used *res judicata* to mean both claim preclusion and issue of preclusion, saying, for example, that *res judicata* refers to the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 887 P.2d 898 (1995).

Claim preclusion, traditionally known as *res judicata*, prohibits a party from bringing a claim already litigated or a claim that could have been litigated in a prior action. *Pederson v. Potter*, 103 Wn.App. 62, 11 P.3d 833 (2000). This doctrine prevents repetitive litigation of the same matters, ensuring integrity and finality in the legal system. *Pederson*, 103 Wn.App. at 71. A prior judgment has preclusive effect when the party proves that the two actions are identical in four

respects: (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made. *Kuhlman v. Thomas*, 78 Wn.App. 115, 897 P.2d 365 (1995). Whether res judicata bars an action is a question of law we review de novo. The threshold requirement of res judicata is a valid and final judgment on the merits.

A judgment is the final determination of the rights of the parties in the action and includes a decree and order from which an appeal lies. CR 54(a). An order is every direction of a Court, made or entered in writing, not included in a judgment. CR 54(b). A final judgment ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631 (1945). A final judgment concludes the action by resolving the Plaintiff's entitlement to the requested relief. *Purse Seine Vessel Owners Association v. State*, 92 Wn.App. 381, 966 P.2d 928 (1998). It is evident, by its terms, that the Order on Show Cause re: Contempt/Judgments and Consolidation of Judgments, entered on January 30th, 2008, was a judgment and a final order. Ex 27. The order fully and finally disposed of the matters at hand, i.e., Patricia's Motion for Contempt, Judgment and Consolidation of Judgments.

CR 59 required Eric to bring a motion to alter or amend the judgment not later than 10 days after entry of the judgment, dated

January 30th, 2008. An Order Clarifying a Judgment explains or refines rights already given. *Rivard v. Rivard*, 75 Wn.2d 415, 451 P.2d 677 (1969). A modification, amendment, or alteration of an order or judgment must be accomplished under CR 59, CR 60, or through the appellate Court. When a judgment disposes of all claims of the parties, it is both appealable and preclusive. RAP 2.2(a)(1), (d); CR 54(a), (b). If not appealed within the applicable time period, the judgment directly precludes all further proceedings, relating to the issues presented, except clarification and enforcement proceedings. *Rivard at 418*; RAP 7.2(c).

Because the Order on Show Cause re: Contempt/Judgment and Consolidation of Judgments, entered on January 30th, 2008, was a final order, the Court had no legal authority to modify that Order. The Court specifically stated that the judgment entered on January 30th, 2008 was the law of the case, but the trial Court then reduced the prior judgment amounts by the sum of \$3,463.40. CP 182. The trial Court also ordered that the interest reflected in the January 30th, 2008 order would be reduced, based upon the reduction in the principal balance of the judgment. Under the circumstances, the judgment amounts and interest amount established in the January 30th, 2008 order should be reinstated.

Although the Court addressed the issue of Eric's Thrift Savings Plan, the Court found that Eric had not proven that the judgment

entered on January 30th, 2008, relating to the Thrift Savings Plan amount was in error. As stated above, the trial Court did not have any legal authority to modify the January 30th, 2008 order, relating to the judgment for the Thrift Savings Plan. It should also be noted that the issue of the Thrift Savings Plan was not delineated as an issue for trial. CP 42 - 43.

D. The trial Court erred and abused its discretion by failing to award interest on the unpaid maintenance.

Each installment of maintenance or child support, when unpaid, becomes a separate judgment and bears interest from the due date. *Valley v. Selfridge*, 31 Wn.App. 908, 639 P.2 225 (1982). The trial Court has no power to decline to award the full amount of statutory interest due on a judgment for overdue child support and/or spousal maintenance. *In re: Marriage of Glass*, 67 Wn.App. 378, 835 P.2d 1054 (1992).

In its findings, the trial Court stated that Eric owed maintenance from January, 2008 through April, 2009, in the sum of \$1,000, per month, pursuant to the Decree of Dissolution. CP 183. The total amount owed by Eric was \$16,000. After determining the amount of offset for unincurred daycare expenses and preschool expenses, the trial Court deducted the amount from the principal balance of delinquent spousal maintenance owed by Eric. CP 184. The trial Court specifically ruled that no interest would be awarded for the

delinquent maintenance payments. CP 184. Patricia had established that as of February 28th, 2012 interest had accrued on the delinquent maintenance, in the sum of \$ 6,800. Ex 34. Because each maintenance payment became a judgment, as of the date the payment was owed, and because statutory interest at 12% on maintenance arrearages is mandatory, the trial Court erred in failing to award the interest on the delinquent spousal maintenance, prior to awarding the offset for unincurred daycare and preschool expenses.

E. The trial Court abused its discretion by failing to award reasonable attorney's fees to Patricia, based upon Eric's intransigence.

On May 5th, 2011, Patricia filed a Motion/Declaration for an Order to Show re: Contempt. CP Motion/Declaration for an Order to Show Cause re: Contempt, dated May 5th, 2011. In her motion, Patricia requested reasonable attorney's fees, as outlined in paragraph 1.3 of her motion.

At the time of trial, Patricia filed an Affidavit of Attorney's Fees, which indicated that she had incurred the sum of \$15,879, as reasonable attorney's fees, through February 26th, 2012. CP 92 - 96. In addressing Patricia's request for attorney's fees, the trial Court denied an award of attorney's fees to both parties. CP 184. For unexplained reasons, the trial Court found that Patricia had already been awarded the sum of \$6,650 in fees and costs, pursuant to prior

orders. CP 185. The award of fees at trial and based upon prior contempt findings against Eric have no relationship to Patricia's request for attorney's fees as a result of the current action. The trial Court did make a finding that Patricia had limited income. CP 185.

As a basis for declining to award fees to Patricia, the Court found that Eric was facing another substantial judgment. CP 185. Based upon the evidence produced at trial, the reason that Eric was facing another substantial judgment was based upon his inconsistent payment of child support for the three children and based upon his contemptuous behavior, in failing to pay maintenance. It is also clear that virtually all of the prior judgments issued against Eric were the result of his contemptuous behavior in failing to comply with the Court's Order of Child Support, Order regarding maintenance, Order to comply with the Decree of Dissolution, and Order to pay attorney's fees.

Intransigence will support an award of attorney's fees. *In re Marriage of Crosetto*, 82 Wn.App. 545, 918 P.2d 954 (1996). Such an award is justified where the conduct of one of the parties causes the other to incur unnecessary and significant attorney's fees. *In re: Marriage of Burrill*, 113 Wn.App. 863, 56 P.3d 993 (2002). It is well-settled that a trial Court may consider whether additional legal fees were caused by one party's intransigence and award attorney's fees on that basis. *In re: Marriage of Greenlee*, 65 Wn.App. 703, 829 P.2d

1120 (1992).

In this case, Eric's intransigence is well-documented. On December 19th, 2006, a judgment was entered against Eric based upon a Motion to Compel. CP 178. On February 27th, 2007, Patricia was awarded a judgment for \$7,625.41 for back child support and maintenance and additional judgments for expenses that were not paid by Eric. CP 178 - 179. Additional judgments were entered against Eric on April 19th, 2007. CP 179. At trial, the judgments were consolidated, and no payments were made on the judgments issued at the time of the Decree of Dissolution.

On January 30th, 2008, additional judgments were entered against Eric for his failure to pay child support, maintenance, and the balance on the Thrift Savings Plan. Ex 27. A Bench Warrant was issued for Eric's arrest, and the issue of contempt was reserved. Again, Eric made no payments on the judgment entered on January 30th, 2008.

In essence, Eric has, by his actions, made it perfectly clear that he does not intend to comply with the prior orders of the Court. His actions are not only grounds for contempt, they also establish his intransigence. Based upon Eric's behavior, the trial Court erred in failing to award Patricia her reasonable attorney's fees.

F. Patricia should be awarded her reasonable attorney's fees on appeal.

Patricia should be awarded her reasonable attorney's fees and statutory costs incurred in the course of the appeal, pursuant to RAP 18.1. RCW 26.09.140 provides in pertinent part:

upon any appeal, the Appellate Court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

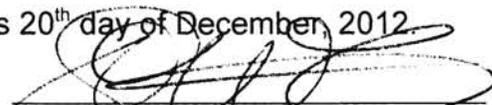
Choate v. Choate, 143 Wn.App. 235, 177, P.3d 175 (2008).

Similarly, a party's intransigence at the trial level may support an award of attorney's fees on appeal. *In re: Marriage of Mattson, 95 Wn.App. 592, 967 P.2d 157 (1999).* Patricia should be awarded her reasonable attorney's fees as a result of this appeal.

CONCLUSION

Patricia requests that Eric's appeal be denied and that the trial Court's order regarding the offset for unincurred day care and preschool expenses be affirmed. Patricia also requests that the trial Court's offset against the January 30th, 2008 judgment be overturned, that she be awarded interest on the delinquent maintenance and that the denial of fees and costs to Patricia be remanded for determination.

Respectfully submitted this 20th day of December, 2012.


Stephen W. Fisher, WSBA#7822
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the 20th day of December, 2012, I mailed a true and accurate copy of the foregoing Opening Brief of Respondent/Cross Appellant, by first class mail, postage prepaid, to:

Kathleen A. Forrest
Attorney at Law
P.O. Box 88702
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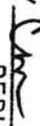


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