

FILED
Court of Appeals
Division II
State of Washington
1/8/2019 10:11 AM

NO. 52280-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHRISTOPHER RIGHTMYER,

Appellant,

vs.

REBECCA RIGHTMYER,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Appellant herein is Master Sergeant Christopher Rightmyer (Chris) and the Respondent herein is Rebecca Schiffman (fka, Rebecca Rightmyer) (Rebecca). First names are being used for simplification and no disrespect is intended. Chris and Rebecca were married on June 29, 2001, in Tampa, Florida. They had one child born of the marriage who is 11 now. The parties were divorced in Thurston County, Washington on April 28, 2016.

The parties agreed on all the terms of their final divorce including how to parent their son, spousal support, child support, the disposition of the family home, and the disposition of their pension benefits. The applicable portion of their Decree of Dissolution reads, “The former spouse is awarded a percentage of the member’s disposable retired pay, to be computed by ... [a formula]”

Rebecca brought the underlying Motion on April 27, 2018, because the Defense Financing and Accounting Services (DFAS) has determined that Rebecca is ineligible to receive any of Chris’ military pension. The DFAS reason for denial is, “The entire amount of the member’s retired/retainer pay is based on disability, thus there are no funds available for payment under the USFSPA.”

It is Chris’ belief that Rebecca, her attorney, and the trial court are all assuming that Chris waived retired pay in favor of disability pay. This is an incorrect assumption.

II. ASSIGNMENTS OF ERROR:

A. Assignments of Error

1. The trial court erred by finding that “Mr. Rightmyer converted his retirement to disability pay.” CP, p. 115, ¶ 3(D).
2. The trial court erred, generally, by upholding the Court Commissioner’s ruling. CP, p. 115-116, ¶ 4(A).
3. The trial court erred by finding, “CR 60(b)(6) applies as the decree is no longer equitable as the specific provision providing for the wife’s marital share of the husband’s military retirement is no longer enforceable due to a change in the law.” CP, p. 54, ¶ 3.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court erred by vacating the agreed property division on the assumption (not evidence) that Chris had “waived” or “converted” his pension benefits in favor of disability.
2. Whether the trial court erred by attempting to indemnify Rebecca which is disallowed by cases interpreting CR 60(b) and other cases cited herein.
3. Whether the trial court erred by vacating the agreed property division after Chris had reasonably relied on the parties’ agreement for over two years, sold a home, got remarried, etc.

III. STATEMENT OF THE CASE

1. Chris and Rebecca entered completely agreed orders finalizing their dissolution on April 28, 2016. CP, pp. 9-13. The terms of their comprehensive agreement included Rebecca would be the primary parent for their then 9-year-old son and Chris' time with their son was well defined and liberal. Their agreement included Rebecca being allowed to live in the family home for an additional fifteen months while Chris paid the mortgage, taxes, and insurance. CP, p. 19, lines 9-12. Their agreement included Rebecca quit-claiming the family home to Chris. Id, lines 6-8. Their agreement included Rebecca being awarded real property in Florida. Id, p. 10, lines 7-14. And, their agreement included "The former spouse is awarded a percentage of the member's disposable retired pay, to be computed by ..." Id, p. 13, lines 2-4. It is this final provision that is the subject of this appeal.

2. Chris complied with all of the provisions of the parties' agreement. CP, pp. 37-38. Chris relied on the agreement to such degree that he made several financial decisions after April 28, 2016. Id, p. 38, lines 1-2. And, he got remarried.

3. Almost two years later to the day, on April 26, 2018, Rebecca brought a Motion to Vacate. CP, pp. 15-36. In her supporting Declaration, she alleged that:

*I contacted DFAS and completed the necessary
paperwork to enforce the award of my share of Chris'*

retirement and was informed that they could not enforce this award because Chris has waived his retirement and transferred i[t] into disability pay for medical reasons.”

CP, p. 23, lines 10-13 (underlining added). Then, Rebecca refers to her correspondence to DFAS but did not provide any documents or other proof of her allegation to the trial court. In fact, the final page of Rebecca’s Motion and Affidavit is a letter to her from DFAS agent Diana Flama, Paralegal Specialist, dated December 5, 2017, which contains no information that would support Rebecca’s allegation. CP, p. 36. The letter simply says, “The entire amount of the member’s retired/retainer pay is based on disability, thus there are no funds available for payment under the USFSPA.” Id.

4. Judge Ann Hirsch’s Order contains this finding: “D) Mr. Righmyer converted his retirement to disability pay.” CP, p. 115, ¶ 3(D).

5. Chris filed a copy of his DD 214 which is dated 20170831 (August 31, 2017). CP, pp. 50-51. The DD 214 is a summary of Chris’ military record. At paragraph number 28, Narrative Reason for Separation as of August 31, 2017, is, “Disability, Permanent (Enhanced).”

6. Chris filed a copy of his VA determination letter dated March 13, 2018. CP, p. 52. Although the VA rates Chris as 100% disabled, this determination came six and one-half months after the Army

had discharged Chris for being disabled and almost three months after Rebecca received the DFAS denial letter.

IV. STANDARD OF REVIEW

The proper standard for review is whether the court abused its discretion in vacating the stipulated judgment under CR 60(b)(6). Gustafson v. Gustafson, 54 Wn.App. 66, 772 P.2d 1031 (Div. 1 1989), citing, State v. Santos, 104 Wash.2d 142, 145, 702 P.2d 1179 (1985). “Discretion is abused when it is exercised on untenable grounds or for untenable reasons. Jenbere v. Lassek, 169 Wn.App. 318, 321, 279 P.3d 969, review denied, 175 Wn.2d 1028, 291 P.3d 254 (2012).” In re Welfare of R.S.G., 172 Wn.App. 230, 243, 289 P.3d 708, (Div. 2, 2012).

V. APPELLANT’S ARGUMENTS

A. THE TRIAL COURT ABUSED IT’S DISCRETION BY FINDING CHRIS “WAIVED” AND/OR “CONVERTED” HIS MILITARY PENSION TO DISABILITY PENSION.

a. **Federal law does not support a finding that Chris waived retired pay for disability pay.**

The Response to the Motion to Vacate contains this Declaration by Chris, “She and I were married and she attended to me after I returned from Iraq in 2003 and Afghanistan in 2012. Besides combat, I’ve been in the infantry my entire career. I’ve subjected my body to extreme conditions in training including long field exercises, Ranger School, Pathfinder School, Jumpmaster, and Airborne School just to name a few courses that, I’m sure, contributed to my disability rating. Rebecca knew

or should have known the likelihood of my being rated at or close to 100% disabled by the VA at the conclusion of my Army career. The only difference is I intended to continue serving, but the Army decided otherwise.” CP, p. 45, lines 15-24.

Next, Chris filed his DD 214 dated August 31, 2017. CP, pp. 50-51. The DD 214, paragraph 28, provides the reason for discharge:

Disability, Permanent (Enhanced). Id.

Next, Rebecca filed the denial letter form DFAS which is dated December 5, 2017. CP, p. 36. The DFAS letter denies Rebecca’s claim providing, “The entire amount of the member’s retired/retainer pay is based on disability, thus there are no funds available for payment under the [10 U.S. Code § 1408] USFSPA.” Id. Chris filed the VA determination letter. CP, p. 52. The VA determination letter is dated March 13, 2018. Id.

So, the allegation that Chris had waived pension benefits in favor of disability pay is completely inconsistent with the facts. The DFAS letter is based on Chris’ medical/disability retirement. The DFAS letter was published 3 ½ months prior to the VA determination. The DFAS letter doesn’t mention waiver or conversion because such was unnecessary for DFAS to apply the USFSPA.

The federal law that most likely applies to Chris’ medical retirement is 10 U.S. Code § 1414, *Computation of Retired Pay* (2011). The law reads, “10 U.S. Code § 1414 - Members eligible for retired pay

who are also eligible for veterans' disability compensation for disabilities rated 50 percent or higher: concurrent payment of retired pay and veterans' disability compensation

(a) Payment of Both Retired Pay and Compensation.—

(1) In general.—Subject to subsection (b), a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability (hereinafter in this section referred to as a "qualified retiree") is entitled to be paid both for that month without regard to sections 5304 and 5305 of title 38."

(b) Special Rules for Chapter 61 Disability Retirees.—

(1) Career retirees.—

The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under section 1405 of this title, or at least 20 years of service computed under section 12732 of this title, at the time of the member's retirement is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title."

For sub (b) to apply, Chris' overall pension benefit would have to exceed

his disability rating. Here, Chris is rated 100% disabled so waiver is not applicable.

So that the COA II court may consider 10 U.S. Code § 1414 more accurately, the COA II may also consider 38 U.S. Code § 5305. § 5305 reads, “38 U.S. Code § 5305 - Waiver of retired pay
Except as provided in section 1414 of title 10, any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Secretary if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person’s retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Secretary of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.”

Here, Chris is provided for in section 1414 of title 10 as a career retiree. So, no waiver required. Rebecca mischaracterized Chris’ pension by referring to it as “waived” or “waiver.” CP, p. 23, lines 10-13. And, Ms. Card, who represented Rebecca at both the Motion to Vacate and at

the Motion to Revise hearings, also mischaracterized the facts when she argued, “The issue in this case is now that Mr. Rightmyer has voluntarily waived his retirement and converted it to disability pay.” Transcript from the Revision Hearing, dated July 20, 2018, page 7, lines 21-25, and page 8, line 1. And, Judge Hirsch mischaracterized the actions of Chris when she found, “Mr. Rightmyer converted his retirement to disability pay.” CP, p. 115, ¶ 3(D). Hence, there was no basis for the trial court to find that Chris had waived or converted any of his pension and the trial court doing so is reversible error.

b. Washington case law also supports the argument that the trial court abused its discretion.

The COA II determined that, “Discretion is abused when it is exercised on untenable grounds or for untenable reasons. Jenbere v. Lassek, 169 Wn.App. 318, 321, 279 P.3d 969, review denied, 175 Wn.2d 1028, 291 P.3d 254 (2012).” In re Welfare of R.S.G., 172 Wn.App. 230, 243, 289 P.3d 708, (Div. 2, 2012). Here, the trial court abused its discretion by finding Chris “waived” or “converted” his military pension benefits without “tenable grounds.” Rebecca claimed that DFAS told her that Chris had waived pension benefits in favor of disability benefits. However, the DFAS letter contains no such statement or support for Rebecca’s claim. Nothing filed by Rebecca supported such a finding. Ms. Card argued both “waived” and “converted” without any evidence to support her argument. And, both Commissioner Thomas and Judge Hirsch adopted Ms. Card’s baseless argument and Rebecca’s baseless

claim as if there was evidence but there was no such evidence. Hence, there is a complete absence of tenable grounds for the finding that Chris had waived or converted any of his pension to disability. And, trial court decisions that have no evidence to support them are an abuse of discretion according to Washington case law.

B. THE TRIAL COURT MISAPPLIED CR 60(B)(6) BY AFFORDING REBECCA AFFIRMATIVE RELIEF.

a. **CR 60(b)(6) may not be applied to afford a moving party affirmative relief.**

Plain and simple, the vacation of the property portion of the Divorce Decree is an attempt to indemnify Rebecca for the lost military pension benefit. Commissioner Thomas found, “CR 60(b)(6) applies as the decree is no longer equitable as the specific provision providing for the wife’s marital share of the husband’s military retirement is no longer enforceable due to a change in the law.” CP, p. 54, paragraph 3. And, Judge Hirsch upheld the Commissioner’s ruling. CP, pp. 115-116.

The following legal arguments were embedded in Chris’ Response to the Motion to Vacate. CP, pp. 45-46. “CR 60(b)(6) allows a court to set aside whole orders or judgements if the court can find that enforcement of a court order is no longer equitable. There is limited case law available interpreting CR 60(b)(6), but “Washington courts look to federal cases interpreting federal counterparts to state court rules as persuasive authority when the rules are substantially similar. See, e.g., Lockett v. Boeing Co., 98 Wn.App. 307, 311-12, 989 P.2d 1144 (1999); Peoples State Bank v.

Hickey, 55 Wn.App. 367, 370-71, 777 P.2d 1056 (1989). Fed.R.Civ.P. 60(b)(5) is substantially similar to Washington's CR 60(b)(6). As the Ninth Circuit Court of Appeals has stated: "Rule 60(b) is available only to set aside a prior judgment or order; courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment." Delay v. Gordon, 475 F.3d 1039, 1044-45 (9th Cir. 2007) (quoting 12 James Wm. Moore, Moore's Federal Practice § 60.25 (Daniel R. Coquillette et al., eds., 3d 2004)). We find federal case law interpreting the federal counterpart to CR 60(b) persuasive and hold that the trial court did not have authority to grant affirmative relief under CR 60(b). Geonerco Inc. v. Grand Ridge Properties, [248 P.3d 1047, 159 Wash.App. 536 (Div. 2, 2011)] (partially published opinion)." In my opinion, what happened in this case is that Commissioner Thomas and Judge Hirsch both felt bad that Rebecca will not be receiving any of Chris' military pension because none of it was disposable retired pay. And, they both realized that they have no authority to divide disability pay. So, they vacated the parties' agreed property division relying on CR 60(b)(6).

b. The trial court erred in equating the US Supreme Court ruling in the Howell case as a change in the law.

Chris and Rebecca both asked the trial court to consider the Howell case in support of their respective positions. Howell vs. Howell, U.S., 137 S.Ct. 1400 (2017). Commissioner Thomas determined, "Here, your decree just isn't equitable anymore. You had a specific provision

that she would get her marital share of your retirement and that if it was reduced by disability that she would still get those payments, and that's not enforceable because of a change in the law that has nothing to do with anything the two of you did but she thought was saying that which she anticipated, her marital share of the retirement. So, it is appropriate for me to set this aside on CR 60(b)(6)." CP, pp. 110-111 (underline added). In her Order, Re: Motion to Revise, Judge Hirsch found, "(E) Subsequent to the decree, the US Supreme Court decided the Howell case." CP, p. 115.

First, Commissioner Thomas' summary of the parties' Decree is incorrect. The Commissioner summarized as, "You had a specific provision that she would get her marital share of your retirement and that if it was reduced by disability that she would still get those payments, ..." CP, pp. 110-111. However, the Decree reads, "3.15 Other. 1. The following portion of the husband's military pension: The former spouse is awarded percentage of the member's disposable retired pay, ..." CP, p. 13, lines 2-5. And, the only agreed contingency was, "If DFAS cannot pay the wife directly, the husband shall pay this amount to the wife each month, along with a copy of the statement from DFAS." Id. So, the wife agreed to receive a percentage of any "disposable retired pay" and that was ultimately determined to be zero by DFAS.

Second, Judge Hirsch based her decision to uphold Commissioner Thomas' ruling because, "(E) Subsequent to the decree, the US Supreme Court decided the Howell case." CP, p. 115. The Howell court did not

create new law. Supreme Court decisions do not create new law. In fact, the Howell court reversed the Arizona Supreme Court after the Arizona court system granted Ms. Howell, who was a former spouse like Rebecca is here, affirmative relief after Mr. Howell waived a portion of his military pension in favor of disability pay. Howell, at 1401.

The Howell case helps us understand the application of 10 U.S.C. § 1408 as well as 38 U.S. Code § 5305. “The Uniformed Services Former Spouses' Protection Act authorizes States to treat veterans' " disposable retired pay" as community property divisible upon divorce, 10 U.S.C. § 1408, but expressly excludes from its definition of " disposable retired pay" amounts deducted from that pay " as a result of a waiver . . . required by law in order to receive" disability benefits, § 1408(a)(4)(B).” Id. And, “To receive disability pay, federal law required John to give up an equivalent amount of retirement pay. 38 U.S.C. § 5305.”

Had Judge Hirsch required additional briefing on federal law, the Howell case, etc., it is likely that she would have been able to follow the law and case law as follows:

As previously briefed, 38 U.S.C. § 5305, requires waiver of military pension benefits when the retired servicemember's disability is not defined by section 1414 of title 10. Section 1414 of title 10 applies to Chris because he was medically retired following a medical board determination that he was disabled. The VA determination that came later has no bearing on his pension.

As for the Howell case, the US Supreme Court summarized, “We recognize, as we recognized in *Mansell*, the hardship that congressional preemption can sometimes [197 L.Ed.2d 789] work on divorcing spouses. See 490 U.S. at 594, 109 S.Ct. 2023, 104 L.Ed.2d 675. But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support. See, *Rose v. Rose*, 481 U.S. 619, 630-634, and n. 6, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987); 10 U.S.C. § 1408(e)(6).

We need not and do not decide these matters, for here the state courts made clear that the original divorce decree divided the whole of John's military retirement pay, and their decisions rested entirely upon the need to restore Sandra's lost portion. Consequently, the determination of the Supreme Court of Arizona must be reversed. See *Mansell*, *supra*, at 594, 109 S.Ct. 2023, 104 L.Ed.2d 675.”

Howell, at 1406.

So, when Judge Hirsch's ruled, she expressed her reasoning as, “Mr. Rightmyer, if the Court were to deny this request to set aside, I think, frankly, would have a windfall that neither party contemplated at the time they entered into their agreement.” Report of Recorded Proceedings, Judge Hirsch ruling on July 20, 2018, p. 16, lines 1-4. Her expression seems no different than that expressed by the Arizona trial court who

described the former spouses right as “vested.” And, the US Supreme Court held, “A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. This Court's decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675, determines the outcome here. There, the Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible [197 L.Ed.2d 784] community property. *Id.*, at 594-595, 109 S.Ct. 2023, 104 L.Ed.2d 675. The Arizona Supreme Court attempted to distinguish *Mansell* by emphasizing the fact that the veteran's waiver in that case took place before the divorce proceeding while the waiver here took place several years after the divorce. This temporal difference highlights only that John's military pay at the time it came to Sandra was subject to a future contingency, meaning that the value of Sandra's share of military retirement pay was possibly worth less at the time of the divorce. Nothing in this circumstance makes the Arizona courts' reimbursement award to Sandra any the less an award of the portion of military pay that John waived in order to obtain disability benefits. That the Arizona courts referred to her interest in the waivable portion as having "vested" does not help: State courts cannot "vest" that which they lack the authority to give. Neither can the State avoid *Mansell* by describing the family court order as an order requiring John to "reimburse" or to "indemnify" Sandra,

rather than an order dividing property, a semantic difference and nothing more. Regardless of their form, such orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. Family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support. Here, however, the state courts made clear that the original divorce decree divided the whole of John's military pay, and their decisions rested entirely upon the need to restore Sandra's lost portion. Howell, pp. 1401-1402 (emphasis added).

While the Howell decision may be relatively new, the cases and law cited in the Howell case have been in place since the US Supreme Court ruled in the Mansell case in 1989. In Howell, the US Supreme Court applies Mansell and the applicable sections of chapter 10 U.S.C. to overturn the Arizona court system that attempted to do exactly what the trial court in this case is attempting to do. Attempting to fashion a work around in order to indemnify Rebecca is reversible error.

c. The law favors amicable agreements.

Current Washington law includes, "Before the adoption of RCW 26.09.070 in 1973, the provisions of a separation agreement were to be adopted by the trial judge only if its terms were deemed "fair and equitable." In re the Marriage of Little, 96 Wash.2d 183, 192, 634 P.2d 498 (1981). Such agreements between spouses could be disregarded if the

trial court was satisfied that the terms "do not constitute a proper division of the property." Lee v. Lee, 27 Wash.2d 389, 400, 178 P.2d 296 (1947). See, State ex rel. Atkins v. Superior Court, 1 Wash.2d 677, 97 P.2d 139 (1939). In essence, the trial court needed to pay only slight deference to the separation agreement of the parties because the trial court was bound in any case to make a "just and equitable" division of the property. RCW 26.08.110. Repealed by Laws of 1973, 1st Ex.Sess., ch. 157, § 30. Under the current statute, RCW 26.09.070(3), "**amicable agreements are preferred to adversarial resolution of property ... questions, ...**", and the separation contract is, therefore, binding on the parties unless the trial court finds it "unfair" at the time of execution. Little, 96 Wash.2d at 193, 634 P.2d 498. RCW 26.09.070(3) "gives even wider latitude to marital partners to independently dispose of their property by contract, free from court supervision, ..." In re Estate of Nelson, 85 Wash.2d 602, 610, 537 P.2d 765 (1975). See also H. Cross, The Community Property Law in Washington, 49 Wash.L.Rev. 729 (1974)." Shaffer v. Shaffer, 47 Wn.App. 189, 193-194, 733 P.2d 1013, (Div. 2 1987) (emphasis added). This case was not decided at trial, it was agreed by the parties. There was complete disclosure as to all property involved in the ultimate division of assets and liabilities. There was shared risk. The parties entered into a full and complete agreement which is embodied in their Final Parenting Plan, Final Order of Child Support, Child Support Worksheets, Findings of Fact/Conclusions of Law, and the Decree of Dissolution. The division of

their assets and debts is a relatively small part of their overall agreement. The military pension is just a part of their agreed asset and debt division. So, the setting aside of a relatively small part of the parties' full settlement seem inconsistent with idea of upholding amicable agreements.

VI. CONCLUSION

I have no doubt that Commissioner Thomas and Judge Hirsch were empathetic toward Rebecca. Such empathy is completely understandable. However, federal law determined Chris' retirement to be based on disability pursuant to 10 U.S.C. § 1414 without the need for him to make a waiver decision.

The Howell case may be recent, but it is not new law. The Howell court reversed the Arizona Supreme Court's decision to indemnify Ms. Howell who lost a small portion of a military pension benefit 13 years after she'd begun to receive it. There is no measurable difference between a court calling a former spouse's right to a member's military pension as "vested" or telling the disable Veteran, Chris in this case, that his disability pay is a "windfall."

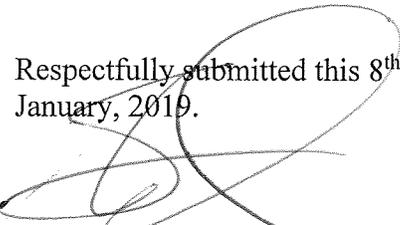
CR 60(b)(6) may not be used to attempt indemnification or other types of affirmative relief.

Therefore, Chris respectfully requests that the Order to Vacate be reversed and the parties' 2016 agreement reinstated.

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Respectfully submitted this 8th day of
January, 2019.



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Declaration of Transmittal

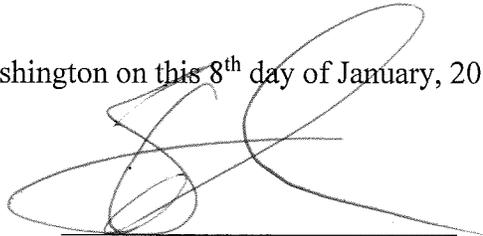
Under penalty of perjury under the laws of the State of Washington, I affirm the following to be true:

I transmitted Appellant's Opening Brief by electronic filing to:

Washington State Court of Appeals
Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

on January 8, 2019, and by either hand delivery to or electronic service (pre-arranged and agreed to Respondent's attorney of record, Sophia Palmer, WSB #37799.

Signed at Tumwater, Washington on this 8th day of January, 2019.



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