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Division II  
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NO. 53094-5-II

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

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WILLIAM A. DORN,

Appellant.

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondent.

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**BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....5

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....5

1. When the Department of Labor & Industries materially changes its position at Superior Court from its prior position taken at the Board of Industrial Insurance Appeals, is the injured worker entitled to a jury instruction advising the jury of this change of position? .....5

2. Should the Court of Appeals vacate the jury verdict and remand for a new trial after the trial court erred by excluding a jury instruction that is not misleading, and would have allowed the injured worker to argue his theory of the case? .....6

3. If a jury instruction advising on the litigation position of the Department is denied, is the injured worker prohibited from describing the position shifts to the jury in closing arguments? .....6

III. STATEMENT OF THE CASE .....6

IV. DISCUSSION .....8

1. A jury instruction in a workers' compensation appeal may state facts beyond those Findings of Facts enumerated by the Board of Industrial Insurance Appeals. ....8

2. The Department of Labor & Industries support of Mr. Dorn's position is a material fact, and he is entitled to include it in his theory of the case. .... 10

3. Not providing an instruction as to the fact that the Department is aligned with the injured worker's position was an error in law that prejudiced Mr. Dorn. ....11

4.	The proper role of the Office of the Attorney General in the Superior Court appeal was to represent the Department of Labor & Industries. ....	12
5.	The employer is the party that should be defending this appeal, not the Department of Labor & Industries. ....	15
6.	The trial court’s refusal to provide the jury with instructions on the Department’s alignment with Mr. Dorn’s case and advise the jury of this fact during closing arguments deprived him of his right to argue his theory of the case and hindered the jury’s responsibility to hear the case de novo. ....	17
7.	The trial court’s refusal to allow Mr. Dorn’s counsel to at least advise the jury during closing arguments on the Department’s shift in alignment, and instead rely on a pattern jury instruction that does not address the issue further deprived Mr. Dorn of his right to argue his theory of the case and again hindered the jury in its responsibility to hear the case de novo. ....	19
8.	A new trial under CR 59 is the only remedy for the omission of Mr. Dorn’s proposed instruction and the prohibition against discussing the Department’s position during closing arguments. ....	22
V.	CONCLUSION.....	22

**TABLE OF AUTHORITIES**

**STATE CASES**

*Gaines v. Dept. of Labor & Indus.*, 1 Wn. App. 547, 463 P.2d 269 (1969).....9

*Scott Paper Co. v. Dept. of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968) ..... 10

*Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 466 P.2d 151 (1970) ..... 13

*Blue Chelan v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 681 P.2d 233 (1984) ..... 16

*City of Bellevue v. Raum*, 171 Wn. App. 124, 286 P.3d 696 (2012) ..... 17

*City of Seattle v. Peterson*, 192 Wn. App. 802, 369 P.3d 194 (2016) ..... 17

*Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 707 P.2d 685 (1985)..... 17

**STATUTES**

RCW 51.52.115 ..... 10

RCW 51.52.110 ..... 11

RCW 51.52.140 ..... 15

**RULES**

CR 59 ..... 22

**PATTERN JURY INSTRUCTIONS**

WPI 155.04, 6<sup>th</sup> Edition ..... 20

## **I. INTRODUCTION**

This matter is before the Court of Appeals following a jury trial in Pierce County, which in turn was an administrative appeal from a Board of Industrial Insurance Appeals (“BIIA”) Proposed Decision and Order dated April 28, 2017, and a final Order Denying Petition for Review dated July 12, 2017. The BIIA affirmed a decision from the Department of Labor & Industries (“Department”) that reversed a Department order that kept Mr. Dorn’s claim open for benefits. The jury entered a verdict affirming the BIIA decision.

After the verdict, Mr. Dorn timely filed a Motion to Vacate Verdict and for a New Trial, on the basis of the trial court’s exclusion from the jury an instruction that would have advised them that the Department shifted its litigation posture during the course of the appeal.

Despite case law and additional authority that caution against confusing jurors with the fluid posture the Department has taken over the course of this workers’ compensation appeal, the trial court denied Mr. Dorn’s motion. This improper exclusion prevented Mr. Dorn from arguing his theory of the case.

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

1. When the Department of Labor & Industries materially changes its position at Superior Court from its prior position taken at the

Board of Industrial Insurance Appeals, is the injured worker entitled to a jury instruction advising the jury of this change of position?

2. Should the Court of Appeals vacate the jury verdict and remand for a new trial after the trial court erred by excluding a jury instruction that is not misleading, and would have allowed the injured worker to argue his theory of the case?
3. If a jury instruction advising on the litigation position of the Department is denied, is the injured worker prohibited from describing the position shifts to the jury in closing arguments?

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

This case stems from a Department Notice of Decision dated July 20, 2015, that kept Mr. Dorn's workers' compensation claim open for benefits (CP at 35). Mr. Dorn's employer Colvico, Inc., which was represented by counsel through a retrospective ratings group, appealed the Department decision to the BIIA (CP at 36). Throughout the BIIA appeal, the employer was represented by its own counsel.

On March 25, 2016, the Department through its counsel the Office of the Attorney General ("AG") notified Mr. Dorn's counsel that "as our positions our aligned ... I will only participate to the extent it is necessary to defend the Department's order." (CP at 563). Department support for

Mr. Dorn also consisted of payment for Mr. Dorn's witnesses up to a limit set forth in a Department fee schedule (CP at 564).

Department counsel appeared at all BIIA hearings and witness depositions (CP at 34). Department counsel's participation in those proceedings took place in accordance with the correspondence of March 25, 2016, with examination of witnesses taking place under the auspices of defending the Department's order. At no point in the BIIA appeal process did the Department notify Mr. Dorn that its position had changed on defending the Department's order.

As there is no self-insured employer in this action, Mr. Dorn's appeal to Superior Court listed the Department as a defendant in this action (RCW 51.52.110) (CP at 1). The appeal also listed the employer itself as a defendant, with counsel appearing on the employer's behalf (CP at 474). The employer's attorneys withdrew from the matter before trial (CP at 474).

At trial, Mr. Dorn's proposed jury instructions included one that stated the following facts contained in the BIIA's Proposed Decision and Order: That the litigation commenced when the Department issued an order keeping Mr. Dorn's claim open; that the employer appealed that order; and that the BIIA sided with the employer (CP at 491-492). Mr. Dorn's counsel briefed the instruction to the Court, explaining that the

instruction was essential to Mr. Dorn's theory of the case, and that it was necessary for prevention of misleading the jury as to what the Department's role in the matter was (Exhibit A to Notice of Appeal to Division II). Over the objections of Mr. Dorn's counsel, this proposed instruction was kept from the jury (Exhibit B to Notice of Appeal to Division II).

The court also prohibited Mr. Dorn's counsel from discussing the alignment of Mr. Dorn and the Department in closing statements (Exhibit C to Notice of Appeal to Division II). Mr. Dorn's counsel objected to this prohibition, too (Exhibit C to Notice of Appeal to Division II).

#### IV. DISCUSSION

**1. A jury instruction in a workers' compensation appeal may state facts beyond those Findings of Facts enumerated by the Board of Industrial Insurance Appeals.**

In the instant matter, the Court allowed as a jury instruction the recommended Pattern Jury Instruction 155.02, which lists the BIIA's findings of fact, as set forth in its Decision & Order. There is nothing that prevents the Court from instructing a jury on other material facts necessary for a party to present its theory of the case.

RCW 51.52.115 mandates that, in appeals to the Superior Court, only issues of fact "as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board" may

be raised. The three facts in the proposed jury instruction at issue are contained in the employer's notice of appeal (that the Department kept the plaintiff's claim open with its order of July 20, 2015; and that the employer is the appealing party) and the Certified Appeal Board Record ["CABR"] (that the BIIA ultimately sided with the employer).

Beyond setting the boundaries of what facts are at issue, RCW 51.52.115 requires the Court to instruct a jury on those facts: "Where the court submits a case to the jury, the court *shall* by instruction advise the jury of the exact findings of the board on each material issue before the court" (*emphasis added*).

"Findings of the board" are not limited to the Findings of Fact in its Decision & Order. "Findings" must be placed in the proper context and purpose in order to fulfill the legislative intent of the Industrial Insurance Act. *Gaines v. Dept. of Labor & Indus.*, 1 Wn. App. 547, 463 P.2d 269 (1969) In the context of a Superior Court appeal of a BIIA decision, the Findings of Fact in the Decision & Order do not have to be accepted as though the jury is acting in an appellate capacity – the instant trial was de novo (RCW 51.52.115), and the trier of fact "be it a court or jury, is at liberty to disregard board findings and decision if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial

evidence is more persuasive.” *Ibid; Scott Paper Co. v. Dept. of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968)

The Court need not have relied on a strict reading of RCW 51.52.115 to allow Mr. Dorn’s proposed instruction. *Gaines* states that the entire statute should be liberally construed to allow the jury to be instructed on more than the BIIA’s enumerated Findings of Fact, “so as to conform to the spirit as well as the letter of the [Industrial Insurance Act]”, and “so that any doubt as to the meaning of the statute should be resolved in favor of the claimant for whose benefit the act was passed.”

**2. The Department of Labor & Industries support of Mr. Dorn’s position is a material fact, and he is entitled to include it in his theory of the case.**

As the AG noted (CP at 563), the Department’s involvement in the BIIA appeal was solely to defend its own decision: The Department allowed Mr. Dorn to choose his own witnesses, and offered to pay for his witness fees (up to a certain amount). The CABR also reflects that level of support – the AG’s examination of witnesses was supportive of Mr. Dorn and hostile (in the context of ER 611) toward the employer (all objections to Department’s counsel’s examination of witnesses were made by the employer, and Department counsel raised no objections to any questions posed by Mr. Dorn’s counsel).

As noted above, trial in this matter was de novo, and Mr. Dorn is allowed to raise all issues of fact included in the employer's notice of appeal to the BIIA or in the **complete** record of the proceedings before the Board. The following objection is taken from the BIIA hearing testimony of Mr. Dorn, as contained in the CABR, that occurred at the outset of his examination by counsel for the Department:

**Employer's counsel:** I'd like to interpose an objection; it's cumulative. I'd note that the Department and the claimant are aligned in this appeal.

(CP at 115 - 116)

It is reasonable to infer from this objection, presented during the crucial testimony of the injured worker, that the employer finds the Department's alignment a matter of some import and is at issue, at either the BIIA or Superior Court.

**3. Not providing an instruction as to the fact that the Department is aligned with the injured worker's position was an error in law that prejudiced Mr. Dorn.**

It should be pointed out that no error is to be assigned to Mr. Dorn for naming the Department as a defendant in this suit, as RCW 51.52.110 requires that the Department file a notice of appearance upon receipt of an appeal that does not involve a self-insured employer, which requires that it be listed as a defendant.

Through no fault of the injured worker and contrary to the manner in which testimony and evidence were placed into the BIIA record, the jury was misled from the very outset of the Superior Court appeal, starting with the announcement of the parties, then continuing with the reading of the joint statement of the case, opening statements, and closing statements, that an adversarial relationship exists between Mr. Dorn and the Department on the issue of claim closure. The remedy for this prejudice was a simple one, the inclusion of the instruction clarifying the actual standing of the parties. That no instruction was included with the jury during deliberations is an error of law.

**4. The proper role of the Office of the Attorney General in the Superior Court appeal was to represent the Department of Labor & Industries.**

The Department's participation in an appeal taken from the BIIA to Superior Court begins with RCW 51.52.110. That statute requires that the Department be named as a party in an appeal to superior court from a decision of the BIIA, and that the Department file a notice of appearance. The same statute allows the Department itself to appeal a BIIA order reversing a Department order solely on questions of law or mandatory administrative actions of the Department's director.

The quandary presented by the Department fluidly shifting its litigation posture in a workers' compensation appeal such as this one was

anticipated by the Supreme Court in *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 466 P.2d 151 (1970). In that matter, two employees of Aloha Lumber Corporation were injured while on their way to work in a company vehicle. The Department issued orders stating that the employees were not covered under the Industrial Insurance Act, orders overturned following a consolidated appeal to the Board of Industrial Insurance Appeals. The employer appealed the Board's decision to Grays Harbor County Superior Court. The superior court appeal was unsuccessful, as were subsequent appeals to the Court of Appeals and to the Washington Supreme Court.

The run-up to the superior court trial in *Aloha Lumber Corp.* mirrors the instant case: the Department issued an order in which the aggrieved party appealed to the BIIA, with the Attorney General defending the Department decision at the BIIA, which overturned the Department decision. The employer in *Aloha Lumber* and the plaintiff in this case then appealed to superior court, where for the first time each was placed in an adversarial stance with the Department. The *Aloha Lumber Corp.* employer, asserting that the Department's flipping of position caused "embarrassment," raised the issue with the Supreme Court on the role of the AG in carrying out its statutory duties in that appeal.

The Supreme Court ruled that “the Attorney General must, of course, be guided by the interests of his client in determining the extent of his participation in the appeal. We merely rule that the department remains his client, even though it is neither the appellant nor the prevailing party before the board.” The court cautioned in its opinion that the Attorney General did not have to “zealously defend” the orders issued by the Department, advancing an alternative stance that the Attorney General should play a “passive role” at superior court. *Ibid*, at 776.

In its trial brief, the Department draws the conclusion from *Aloha Lumber Corp.* that its “participation will be guided by its interests.” The proper conclusion to draw is that the Department, in a superior court appeal in which the Department has sided with the injured worker all the way through the final Decision & Order of the BIIA, should take a position that defends the Department orders, or take no stance against the injured worker. Instead, the Attorney General participated in these proceedings as the de facto counsel for the employer, who was represented by its own counsel in the protest of the Department orders, the BIIA appeal, and the outset of the superior court proceedings until counsel for the employer withdrew. In essence, the employer took advantage of the injured worker’s statutory requirement.

**5. The employer is the party that should be defending this appeal, not the Department of Labor & Industries.**

The employer's counsel's withdrawal undermines the legislative policy for naming the Department as a party in an appeal to superior court: "to allow the Department to defend its position" in an appeal such as this. *Ibid*, at 776. Elaborating further on legislative intent, the Supreme Court says that RCW 51.52.110 was "hardly intended that [the AG] should abandon the department on an appeal to the superior court, merely because the supervisor's order was reversed by the board and the department itself is not authorized to institute an appeal." *Ibid*, at 775.

As the AG is the legal advisor to the BIIA (RCW 51.52.140), the Department could advance the proposition that the AG's role in an appeal to superior court is to represent the BIIA.. However, the BIIA is not a party to this action, and in any event the Attorney General's notice of appearance states that the Attorney General represents only the Department. Again, looking to *Aloha Lumber Corp.* for guidance, the Supreme Court presumes "the party in whose favor the board has ruled will defend its decision on the appeal." *Ibid*, at 775.

Employer's counsel withdrew from the superior court appeal, though the employer, as a named defendant, was still a party to the action. For whatever reason, employer's counsel's withdrawal triggered within

the AG a duty to assail the Department's actions on behalf of the employer. Granted, the bulk of defense testimony obtained in this case was taken by employer's counsel at the BIIA level. But the AG's office undertook all responsibilities in this case at Superior Court. It drafted trial pleadings, it undertook voir dire and jury selection; it argued motions in limine and jury instructions; it performed opening and closing statements. It was far from "passive."

In short, the employer got a free ride on its duty to defend the BIIA order. *Blue Chelan v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 681 P.2d 233 (1984) cites *Aloha Lumber Corp.* in discussing the Department's role in an appeal taken in a workers' compensation case, from superior court to the Court of Appeals. The employer's role in that case was limited to making the appeal, with the Attorney General thereafter undertaking the heavy lifting. The opinion's author found it "unfortunate, however, that the Department was clearly shouldering a disproportionate responsibility on appeal and [does] not condone such action."

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**6. The trial court’s refusal to provide the jury with instructions on the Department’s alignment with Mr. Dorn’s case and advise the jury of this fact during closing arguments deprived him of his right to argue his theory of the case and hindered the jury’s responsibility to hear the case de novo.**

Jury instructions are sufficient when they allow parties to argue their theory of the case, are not misleading, and when taken as a whole, inform the jury of the applicable law. *City of Bellevue v. Raum*, 171 Wn. App. 124, 142, 286 P.3d 696 (2012). If the court’s jury instructions are otherwise sufficient, the court does not need to give a party’s proposed instruction, though that instruction may be an accurate statement of the law. *City of Seattle v. Peterson*, 192 Wn. App. 802, 821, 369 P.3d 194 (2016). The trial court may decide which instructions are necessary to “guard against misleading the jury.” *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

Mr. Dorn’s proposed instruction reflects his theory of the case: that the Department, by siding with the absent employer, has flipped its position about whether Mr. Dorn’s claim should be left open. This material fact is contained in the CABR, the entirety of which is at issue. By failing to instruct the jury on this fact, and by instructing the jury only on the Findings of Fact contained in the BIIA’s Decision & Order, the

court has deprived the jury of its statutory duty to review the BIIA decision de novo.

Once more, we turn to the *Aloha Lumber Corp.* opinion, and the clarification sought by the appellant and the Attorney General on the latter's duty in a case of this sort when the Department changes its posture. *Aloha Lumber Corp., at 775.* Though the superior court appeal in that matter was a bench trial, the appellant believed that the Department's position shift would prejudice the jury. The Supreme Court found that possibility of prejudice concerning enough that it took time to include in the opinion its advice on when the question occurred in a case that is a matter of fact rather than as a matter of law.

Also, the Department's trial brief contains a statement of the facts in this case, distilling a 468-page Certified Appeal Board Record to about one page. Assuming that the Department kept only the facts most essential to this case, the following are included and should be deemed material: that the Department accepted Mr. Dorn's claim; that the Department issued an order keeping the claim open for treatment; that the Department did not present any witnesses at the BIIA level; and that the employer's counsel withdrew from the superior court appeal. The Department's involvement in this claim and its posture throughout are thus material facts.

**7. The trial court's refusal to allow Mr. Dorn's counsel to at least advise the jury during closing arguments on the Department's shift in alignment, and instead rely on a pattern jury instruction that does not address the issue further deprived Mr. Dorn of his right to argue his theory of the case and again hindered the jury in its responsibility to hear the case de novo.**

Prior to closing argument, counsel for Mr. Dorn asked the judge if, as an alternative to providing an instruction to the jury on the shift of the Department's position. The response was "no":

**Mr. Dorn's counsel:** I just want to – if we would, could we put on the record our discussion about what is allowable? We had an extensive discussion about what's allowable argument and what's not. Is that appropriate to put on the record at this point?

...

**The Court:** I think I've indicated somewhat in my discussions here on the record about my reasons for not giving the instruction. I think that the concern I have is in going into the Department's flip-flopping, as far as its position, but I think an explanation as to what was going on below is discussed to a certain extent in Instruction No. 2, and you're able to explain to the jury further about that, other than going into the argument of saying that they have changed their position.

**Mr. Dorn's counsel:** Just to confirm, Your Honor, I am able to tell the jury that there was an order issued and that below, the employer appealed to the Board of Industrial Insurance Appeals and the employer prevailed before the Board of Industrial Insurance Appeals and Mr. Dorn took an appeal from that action; is that correct?

**The Court:** Yes.

(Exhibit C to Notice of Appeal to Division II)

Jury Instruction No. 2 was taken from Washington Pattern Jury Instruction 155.04, “Explanation of the Industrial Insurance System” and as modified for this case reads:

This case is brought pursuant to the Industrial Insurance Act. The purpose of the Industrial Insurance Act is to provide benefits to workers and their dependents for disabilities or deaths caused by industrial injuries or occupational diseases.

The Department of Labor and Industries is the state agency that administers the Industrial Insurance Act. It is the Department's duty to determine what benefits are to be provided to a worker under the Industrial Insurance Act and to issue all orders relating to claims under the Act.

Once the Department makes a determination regarding a worker's benefits, those benefits are provided from a fund that is administered by the Department from premiums collected from employers and employees statewide.

The Board of Industrial Insurance Appeals is a separate state agency that is independent of the Department of Labor and Industries. It is the Board's function to review the Department's determinations when there is an appeal by interested parties.

(CP at 529)

With due respect to the trial court, the Department’s shift in position is not addressed “to a certain extent” in this instruction – it is not discussed to any extent at all. It is wholly inadequate for providing the clarity requested by counsel for Mr. Dorn.

The Washington State Supreme Court Committee on Jury Instructions comment for WPI 155.04 does provide support for Mr. Dorn's assertion that removing ambiguity concerning the Department's position shift is essential to discussing his theory of the case: "For the current edition, the committee deleted language about the Department's role as a trustee for the funds collected pursuant to the Act. The language is extraneous to the issues before the jury and *could cause confusion or cause jurors to give undue weight to the Department's position.*" (WPI 155.04, 6<sup>th</sup> ed., *emphasis added*)

Whether the Department acts as a trustee is indeed extraneous to the instant matter – what the instruction shows is the existence of an authority other than the *Aloha Lumber Corp.* that anticipated a confusing Department stance would mislead and prejudice jurors. The trial court's reliance on the instruction alone to advise jurors, after the instruction was changed in an effort to avoid confusing jurors vis-à-vis the Department's position, subverts the clear intent of the jury instruction committee, to Mr. Dorn's detriment.

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**8. A new trial under CR 59 is the only remedy for the omission of Mr. Dorn's proposed instruction and the prohibition against discussing the Department's position during closing arguments.**

CR 59 allows for a verdict to be vacated and a new trial granted for one or more causes, including "Error in law occurring at the trial and objected to at the time by the party making the application;" and "That substantial justice has not been done." In the instant matter, the court erred by refusing the proposed instruction, and by forbidding Mr. Dorn's counsel from discussing the fact that the Department backed the injured worker's claim before it was forced into defending the employer's appeal, thus misapplying the law as set forth in *Gaines v. Department of Labor & Indus., supra*.

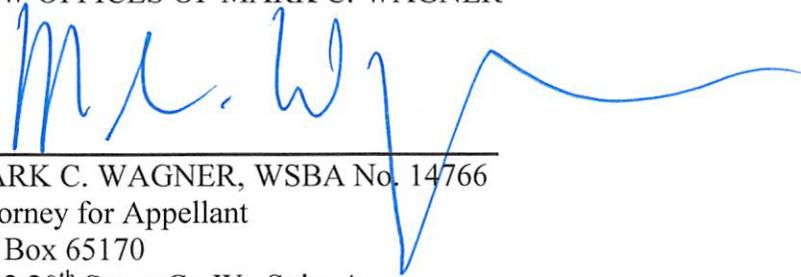
## V. CONCLUSION

In order to carry out its duties, the jury should have been made aware of the fact that the Department supported the injured worker's claim before it was against him. Instead, the trial court did not heed the Supreme Court's guidance on the possibility of misleading jurors with a confusing Department position, placing a Department imprimatur on the employer's case, while depriving Mr. Dorn of his right to a fair trial.

Mr. Dorn respectfully requests that the Court of Appeals vacate the verdict in this matter and grant a new trial, allowing a jury to carry out its statutory duties

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of June, 2019.

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**CERTIFICATE OF SERVICE**

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