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**Court of Appeals, Div. II,
of the State of Washington**

In re Marriage of

Rachell Daniels (n/k/a Rachell Bonds),

Appellant,

v.

Nathaniel Daniels,

Respondent.

Reply Brief of Appellant

Kevin Hochhalter, WSBA # 43124
Attorney for Appellant

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com

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1. Introduction

The parties come to this court with vastly different versions of the procedural history. Bonds' version is supported by the record. Daniels' version is not.

In the original, 2008 decree, the parties agreed to value their retirement assets and divide them as close to 50/50 as possible without dividing Daniels' federal pension or Bonds' military pension. The decree provided a framework for dividing or distributing the parties' assets. If the assets were not enough to achieve a 50/50 division, that would be the end of it. Under no circumstances was Bonds' military pension to be divided. The decree did not provide for any excess "equalization payment."

When Daniels discovered that this framework left him coming up short, he asked the court to divide Bonds' military pension. Bonds agreed to the division. The court carried it out through its 2013-14 orders amending the decree. The 2013-14 orders did not call for any "equalization payment."

Daniels' "equalization payment" theory is nothing more than revisionist history. It attempts to circumvent *Howell* through semantics. Under the USFSPA and *Howell*, the trial court was prohibited from ordering Bonds to compensate Daniels for the loss of her military retirement. This Court should reverse and vacate the trial court's erroneous 2019 order and judgment.

2. Reply Argument

2.1 Under federal law, a state court cannot order a veteran to compensate a former spouse for the loss of the spouse's share of disposable military retired pay when the veteran subsequently receives disability retirement pay instead.

In her opening brief, Bonds described the pre-emptive effect of federal law on the authority of the trial court to divide military retirement in a divorce case. Br. of App. at 11-13 (citing, *e.g.*, *Howell v. Howell*, ___ U.S. ___, 137 S.Ct. 1400, 1402-03, 197 L.Ed.2d 781 (2017)). The USFSPA, 10 U.S.C. § 1408, permits state courts to treat “disposable retired pay” as community property divisible in a divorce decree, but state courts are prohibited from dividing **disability** pay. Br. of App. at 12 (citing, *e.g.*, *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989)).

When a former spouse is entitled under a divorce decree to receive a portion of a servicemember’s “disposable retired pay” and some or all of that pay is subsequently converted to disability pay, the former spouse is no longer entitled to any portion of the disability pay. Br. of App. at 13 (citing *Howell*, 137 S.Ct. at 1405-06). In *Howell*, the U.S. Supreme Court held that state courts were prohibited from ordering any compensation for this loss. Br. of App. at 12-13 (citing *Howell*, 137 S.Ct. at 1405-06).

Yet that is precisely what the trial court did in this case when it entered its Jan. 25, 2019, order. The original divorce decree was entered July 18, 2008. CP 8. It attempted to divide the parties' assets equally without dividing their respective pensions. CP 10, 11. When the provisions of the decree proved unworkable, the parties agreed that Bonds' expected "disposable retired pay" would have to be divided. CP 19, 30. At the time, Bonds expected to retire in 2020. CP 31.

The trial court entered two orders on January 8, 2014, which divided Bonds' expected "disposable retired pay" and assigned an interest to Daniels as part of the division of the community property. CP 55-57, 223-28. This division of Bonds' retirement was proper at the time because the expectation was that Bonds' retirement would consist entirely of "disposable retired pay."

In January 2018, the Army placed Bonds on Permanent Disability Retirement. CP 118-19, 127. All of her "disposable retired pay" was converted to disability pay. CP 119. Daniels lost his entitlement to any portion of Bonds' military retirement, because it was now all disability pay not subject to division.

Under *Howell*, the trial court was prohibited from ordering Bonds to compensate Daniels for this loss. Nevertheless, the trial court ordered Bonds to pay Daniels the same \$593.22 per month that Daniels had been entitled to

receive from Bonds’ “disposable retired pay” under the 2014 orders. CP 210-11. This is exactly the kind of order that *Howell* prohibits. This Court should reverse the trial court’s January 2019 order.¹

2.2 The 2013-14 orders of the trial court divided Bonds’ military retirement as community property, awarding \$146,191.30 of it to Daniels. The trial court erred in concluding otherwise.

The key disagreement between the parties, and the central question for this Court on appeal, is whether the 2013-14 orders of the trial court divided Bonds’ expected “disposable retired pay” as community property. If the 2013-14 orders divided Bonds’ military retirement, the trial court was prohibited from ordering Bonds in 2019 to compensate Daniels for the loss, and the trial court’s order must be reversed.

Bonds’ opening brief argued that this court must determine, de novo, the interpretation of the 2013-14 orders. Br. of App. at 14-15. The language of the orders themselves demonstrates that the court intended to divide Bonds’ military retirement as part of the division of community property. Br. of

¹ Daniels misunderstands Bonds’ arguments in this respect. Bonds is not challenging the 2008 decree or the 2014 amendments to the decree. Rather, Bonds is relying on the fact that the 2014 amendments divided her military retirement as community property. The inevitable consequence of the 2014 orders is that the trial court could not, under *Howell*, compensate Daniels for his loss when the Army retired Bonds for disability. This Court should reverse the 2019 order and judgment.

App. at 15-17 (quoting, *e.g.*, CP 224 (“[A]s part of the division of the couple’s Community Property, the Member shall pay the Former Spouse, Nathaniel Daniels, a portion of her disposable military retired pay in the amount of \$593.22 per month.”)). The context surrounding entry of the orders lends further support to that interpretation, as the motions of the parties leading up to the 2013-14 orders speak in clear terms of “dividing [Bonds’] military retirement.” Br. of App. at 18-19 (quoting, *e.g.*, CP 19 (Daniels’ motion)). Bonds also argued that the trial court’s interpretation of the orders as requiring an “equalization payment” not tied to any of the parties’ assets was an absurd result. Br. of App. at 19-20.

Daniels incorrectly attempts to frame the question as an equitable exercise subject to review for abuse of discretion. But even he admits that an error of law is an abuse of discretion for untenable reasons. Errors of law are themselves subject to de novo review. The trial court’s misinterpretation of the 2013-14 orders is a question of law subject to de novo review. *In re Marriage of Thompson*, 97 Wn. App. 873, 877, 988 P.2d 499 (1999). This Court should apply the de novo standard and hold that the 2013-14 orders divided Bonds’ expected “disposable retired pay” and that the 2019 order was an impermissible compensatory order under *Howell*.

Daniels does not engage in any meaningful examination of the language of the 2013-14 orders, even though the plain language of the orders is the starting point for any interpretive analysis. *See Stokes v. Polley*, 145 Wn.2d 341, 346, 37 P.3d 1211 (2001). And even though the context surrounding entry of an order can aid in discerning the meaning of the words used, *see Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502-04, 115 P.3d 262 (2005), Daniels asks this Court to rely entirely on his version of “the procedural history of the case” to arrive at an interpretation that is contrary to the written words. Daniels’ twisted vision of the case centers on the notion that Bonds owed him an “equalization payment,” a term that appears nowhere in the original decree or the 2013-14 orders and was only introduced by him in a memorandum filed three days before the trial court’s 2019 order (CP 174).

As Bonds argued in her opening brief, the procedural history supports her interpretation of the 2013-14 orders. The original 2008 decree was the result of agreement. Initially it was proposed that the parties’ pensions would be divided if necessary to achieve a 50/50 result. CP 256. But Bonds refused to agree to a provision that would have required her to pay compensation to Daniels in the event that any portion of her retirement was converted to disability. CP 258. Instead the parties agreed that the pensions would **not** be divided, even if it meant one party or

the other ended up with less than a 50 percent share of the total assets. CP 236-27.

In 2012, Daniels came before the trial court, alleging that Bonds owed him \$146,191.30 based on the valuation of the accounts and pensions. CP 16-19. Daniels asserted, “The decree of dissolution states that the retirement account shall not be divided, but the only way for me to get the funds owed to me by [Bonds] is for the court to divide her military retirement because there is only \$14532.16 in her TSP account. Therefore I have prepared and submitted with this motion my proposed order dividing [Bonds]’s military retirement.” CP 19.

Contrary to Daniels’ version of events, Bonds **did not agree** that she owed Daniels a lump sum payment. CP 30:11-12. She did not agree to an “equalization payment.” What Bonds agreed to was the valuation of the accounts. CP 30:2-3. She agreed that there were insufficient funds in the other accounts to achieve a 50/50 division of the assets without dividing her military retirement. CP 30:4-10. Bonds agreed that the court should amend the original decree and divide her military retirement, and she proposed alternative ways to do so. CP 30-33, 39-40.

The trial court did not order Bonds to pay a lump sum “equalization payment.” The trial court did not enter a judgment against Bonds. Instead, the trial court liquidated the amount

that would need to be divided to Daniels, ordered Daniels to select one of Bonds' proposed options for dividing her military retirement, and ordered the parties to return for entry of an "order dividing the wife's military retirement" to assign the liquidated sum to Daniels. CP 48-49. When the parties did return, the trial court entered orders that expressly divided Bonds' expected "disposable retired pay," "as part of the division of the couple's Community Property," and assigned Daniels an interest in the amount of \$593.22 per month up to a total of \$146,191.30. CP 50, 224.

None of this procedural history indicates that Bonds ever agreed to make an "equalization payment" other than by dividing and distributing assets that were in existence at the time of the 2008 decree. None of this procedural history indicates that the trial court ever ordered an "equalization payment" other than by dividing and distributing assets that were in existence at the time of the 2008 decree. No judgment was ever entered against Bonds.

Daniels does not explain where or when the trial court allegedly ordered an "equalization payment." He admits that the intent of the 2008 decree was to balance the assets as equally as possible by dividing and distributing the existing assets other than the parties' respective pensions. Br. of Resp. at 6. The 2008 decree contained a road map for how the assets should be

distributed or divided but did not call for any payment independent of those assets and did not call for a judgment to be entered against either party. CP 9-11. After the assets were valued, the 2013 order liquidated the amount but did not call for payment independent of assets that existed at the time of the decree and did not enter judgment against Bonds. CP 48-49. The 2014 orders again liquidated the amount but did not call for payment independent of assets that existed at the time of the decree and did not enter judgment against Bonds. CP 50, 224. Instead, the 2014 orders expressly divided Bonds' expected "disposable retired pay" and assigned an interest to Daniels. CP 224. Nowhere did the trial court order an "equalization payment."

Even if the trial court had previously ordered an "equalization payment," it would have been based on dividing the value of Bonds' expected "disposable retired pay" under the calculations in the 2008 decree. If Bonds had been disabled at the time, such a mathematical division would have been prohibited. *See In re Marriage of Kraft*, 119 Wn.2d 438, 447-48, 832 P.2d 871 (1995) (a court may consider disability pay as an economic circumstance and award maintenance or a proportionately larger share of the community property, but may not divide or distribute the disability pay as an asset or directly offset it against other assets). For the trial court to order an

“equalization payment” in 2019 when Bonds **is disabled** is equally prohibited under *Kraft*.

The trial court’s use of the term “equalization payment,” is just another name for dividing and distributing Bonds’ military retirement. It is a direct offset of the retirement against other assets. *Howell* looks at the substance of the order, not the name given to it by the state court: “The difference is semantic and nothing more. ... Regardless of their form, such [dollar-for-dollar] reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.” *Howell*, 137 S.Ct. at 1406. This Court agreed when it looked to the substance of an order and held, “A trial court may not divide a veteran’s disability pension and award part of it to the nondisabled spouse, even if the court labels its award as ‘maintenance.’” *In re Marriage of Perkins*, 107 Wn. App. 313, 327, 26 P.3d 989 (2001). Regardless of the name given to it by the trial court after the fact, the 2014 orders divided Bonds’ military retirement. *Perkins* and *Howell* look to the substance and prohibit the trial court from ordering Bonds to compensate Daniels for the loss occasioned by her disability.

In entering its 2019 order, the trial court erred when it concluded that the liquidated amount represented an “equalization payment” not tied to any particular asset. The

trial court's 2013-14 orders expressly divided Bonds' military retirement and assigned an interest to Daniels. When Bonds was involuntarily retired and placed on disability, Daniels' interest lost all value. Under *Howell*, the trial court was prohibited from ordering Bonds to compensate Daniels for that loss. This Court should reverse the trial court's order and vacate the judgment.

2.3 Under *Howell*, the trial court did not have authority to order Bonds to indemnify Daniels for the loss of his portion of the military retirement.

Bonds' opening brief concluded by applying the preclusive effect of *Howell* and the USFSPA to the facts of this case. Br. of App. at 21-22. Daniels acknowledged in his 2018 motion that if *Howell* applied, the trial court could not order Bonds to pay him anything without first finding cause to vacate the decree and its 2014 amendments. CP 66. The 2014 amendments expressly divided Bonds' expected "disposable retired pay." CP 224. It was not until three days before the 2019 order that Daniels first claimed it was an "equalization payment," not a division. CP 174. The trial court erroneously accepted this last-minute recharacterization of the case. The trial court apparently believed that Daniels was entitled to "his share." This was precisely the error that the Supreme Court reversed in *Howell*. This Court should do the same.

2.4 Daniels' alternative arguments for affirming are not well taken.

Daniels makes alternative arguments for affirming the trial court's order, but they are unavailing. Daniels argues at length that a trial court may consider disability pay as an economic factor relevant to division of property or an award of spousal maintenance, Br. of Resp. at 16-22, but that is not what the trial court did here. Daniels argues that the parties had agreed that he would be indemnified, Br. of Resp. at 23, but he does not identify the alleged indemnification clause or explain how it has the effect he desires. Daniels argues that Bonds' appeal is barred by res judicata, Br. of Resp. at 25-27, but the doctrine does not apply because Bonds is not challenging the 2008 decree or the 2013-14 amendments to it.

2.4.1 A trial court may consider disability pay as an economic factor but may not order dollar-for-dollar compensation as the trial court did here.

Daniels argues at length that a trial court may consider disability pay as an economic factor relevant to division of property or an award of spousal maintenance, but he does not explain how this principle has any application in this case. Both *Kraft*, 119 Wn.2d at 447-48, and *Perkins*, 107 Wn. App. at 321-23, are clear that a trial court making a division of property or an award of maintenance may consider disability pay as an

economic factor but **may not** calculate the value and directly offset it against other assets.

This creates two problems for Daniels' arguments. First, this analysis must take place at the time of the original decree, not in an order to enforce the decree. Here, the trial court never had the occasion to consider disability pay because in 2008 and in 2013-14, Bonds was not disabled. Even if the trial court had considered the possibility that Bonds would become disabled, it did not make any adjustments or provisions on account of that possibility. *Kraft* and *Perkins* have no bearing on the 2008 decree or the 2013-14 amendments.

Second, even if the 2019 order to enforce could be viewed as a re-determination of the division of property, the order did what *Kraft* and *Perkins* expressly say a trial court cannot do. The 2019 order calculated the value of the disability pay and directly offset it, dollar-for-dollar, with a judgment to be paid out of Bonds' current assets. Such an offset is the functional equivalent of dividing the disability pay and is equally prohibited by federal law. *Kraft*, 119 Wn.2d at 448.

2.4.2 The alleged indemnification clause is of no effect.

Daniels fails to explain how the alleged indemnification clause has the effect he desires. He appears to be referring to an

unnumbered paragraph on page 3 of the 2014 Military Retired Pay Division Order, which reads,

The Member agrees that in the event that DFAS is unable to pay the former spouse the the full amount of \$593.22 due to 10 USC 1408 limiting provision of 50% of total retirement benefits payable to the Former Spouse because of any voluntary election she may have made in conjunction to her military pension, including but not limited to acceptance of lump-sum retirement, election of Veterans Disability Benefits, to pay to the Former Spouse the difference between any amount received from DFAS and the amount awarded the Former Spouse as monthly maintenance.

CP 225.

The plain language of the clause does not operate to allow the trial court's 2019 order under the facts of this case. First, the clause only applies if Bonds makes a voluntary election to waive her "disposable retired pay" in order to receive some other benefit, including VA disability benefits. In simplified terms, the triggering language for the clause reads, "In the event that DFAS [does not pay Daniels] ... because of any voluntary election ... in conjunction to her military pension..." CP 225. Bonds never made any voluntary election.

After 27 years of service, Bonds was involuntarily placed on Permanent Disability Retirement by the Army. CP 118-20. Because she had over 20 years of service and 70 percent

disability, Bonds was not required to waive any portion of her vested military pension. 10 U.S.C. § 1414(a)(1) and (b)(1). There was no election or waiver to be made, voluntary or otherwise. The alleged indemnification clause was not triggered.

However, even though Bonds has not waived, her military pension is still exempt from treatment as community property under the USFSPA. The statute exempts from “disposable retired pay” any amounts waived “in order to receive compensation under title 5 [federal civil service] or title 38 [Veterans’ benefits].” 10 U.S.C. § 1408(a)(4)(A)(ii). That is the waiver the alleged indemnification clause was designed to address. But the statute also excludes from “disposable retired pay,” “for a member entitled to retired pay under chapter 61 of this title ... the amount of retired pay of the member under that chapter.” 10 U.S.C. § 1408(a)(4)(A)(iii). “Chapter 61 of this title” refers to statutory provisions for retirement or separation on account of physical disability. Bonds was involuntarily retired under chapter 61, namely 10 U.S.C. § 1201. *See also* CP 134-35. Thus, under the USFSPA, Bonds’ disability retirement was not the result of an election or waiver but is still excluded from the statutory definition of “disposable retired pay” and cannot be divided as community property. *See also* CP 135-36. The alleged indemnification clause was not triggered and has no effect. It cannot justify the trial court’s erroneous 2019 order.

Second, even if the clause was triggered, the language defining what Bonds must pay is of no effect because no amount was ever awarded to Daniels as monthly maintenance. The clause states that when it is triggered, Bonds will pay to Daniels “the difference between any amount received from DFAS and the amount awarded the Former Spouse as monthly maintenance.” CP 225. This appears to be a simple enough calculation. The amount of Bonds’ direct payment to Daniels in any given month is equal to “the amount awarded [to Daniels] as monthly maintenance” minus any amount Daniels receives from DFAS. But this language fails under the facts of this case because there was never **any amount** awarded to Daniels as monthly maintenance. Therefore the calculation here is \$0 maintenance minus \$0 received from DFAS equals \$0 to be paid by Bonds to Daniels. The clause cannot support the trial court’s 2019 order.

Finally, the presence of the clause in the order is suspect. Bonds had always been consistent in refusing to agree to indemnify Daniels if she ever became disabled. *See, e.g.*, CP 184, 318-19. Bonds testified that she did not sign the Military Retired Pay Division Order that was filed. CP 184. She signed a different version of the order that did not have an indemnification clause. CP 184, 188. It would have been inconsistent with the position Bonds had taken all along for her to have agreed to indemnify Daniels in the event she became

disabled. This Court should decline to rely on the alleged indemnification clause as an alternative grounds to affirm the trial court's 2019 order. The order was improper under *Howell*, *Kraft*, and *Perkins*. The alleged indemnification clause does not justify the order. This Court should reverse and vacate the judgment.

2.4.3 The doctrine of res judicata has no application in this case.

Daniels argues that the doctrine of res judicata is a bar to collateral attacks on pre-*Howell* judgments, but Bonds is not collaterally attacking anything in this appeal. Bonds does not challenge the 2008 decree. The decree did not divide her military retirement. It was the result of an agreement. There was no reason to appeal it then, and Bonds does not challenge it now.

Bonds does not challenge the 2013-14 amendments to the decree. The 2013-14 orders amended the decree and divided Bonds' expected "disposable retired pay." This division was proper at the time. The orders were at least partially the result of agreement. There was no reason to appeal the orders then, and Bonds does not challenge them now. In fact, this appeal relies upon the fact that the 2013-14 orders divided her military retirement.

What Bonds **does** challenge in this appeal is the trial court's 2019 order and judgment. This most recent decision of the trial court was erroneous as a matter of law. The trial court misinterpreted the plain language and context of the 2013-14 orders and attempted an end-run around *Howell* by reasoning that the orders called for an "equalization payment" rather than the division of Bonds' retirement that both parties requested in 2013-14. The "equalization payment" is nothing more than division of property by another name. It is prohibited under *Howell*, *Kraft*, and *Perkins*.

Because Bonds is not collaterally attacking any prior orders, the doctrine of res judicata has no application here. There is no bar to Bonds' appeal of the recent, 2019 order and judgment. Because the 2019 order and judgment ordered a compensatory payment that is prohibited under *Howell*, this Court should reverse the order and vacate the judgment.

2.5 The Court should not award attorney's fees to either party.

Daniels requests an award of attorney's fees under two grounds, both of which fail. Under RCW 26.09.140, the Court may award fees based on the financial need of one party and the other party's ability to pay. Here, both parties are financially able to bear their own attorney's fees. Daniels does not have a level of financial need that would justify an award.

The Court may also award fees for a frivolous appeal, under RAP 18.9. The primary inquiry under this rule is whether, when considering the record as a whole, the appeal presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980). “In determining whether an appeal is frivolous ... we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Streater*, 26 Wn. App. at 434-35.

Bonds’ appeal is not frivolous. In making its 2019 decision, the trial court erroneously interpreted the effect of the 2013-14 orders and improperly ordered Bonds to compensate Daniels for his loss occasioned by Bonds’ disability. The plain language of the 2013-14 orders and the procedural context surrounding their entry support Bonds’ interpretation: that the 2013-14 orders divided Bonds’ expected “disposable retired pay” and assigned an interest to Daniels. When Bonds was

subsequently involuntarily retired due to disability, Daniels was no longer entitled to receive any portion of Bonds' military retirement. Under *Howell*, the trial court was prohibited from ordering Bonds to compensate Daniels for this loss.

Daniels complains that this result is an unfair windfall to Bonds, but the Supreme Court disagrees. In *Howell*, the Court noted, "We recognize ... the hardship that congressional preemption can sometimes work on divorcing spouses." *Howell*, 137 S.Ct. at 1406. Nevertheless, the Court did not shy away from carrying out the Congressional intent of the USFSPA. The Court further explained that a division of military retirement pay is, at best, contingent and subject to a reduction in value in the event the servicemember becomes disabled. *Howell*, 137 S.Ct. at 1405.

The loss in value that Daniels experienced comes with the territory. In seeking a division of Bonds' military retirement in 2013-14, Daniels took a gamble on the contingency that Bonds would remain healthy and the retirement payable to him. Daniels lost that gamble. Far from a windfall, this is the result the USFSPA requires. The trial court's 2019 order and judgment trying to avoid that result were in error. This Court should reverse the order and vacate the judgment. The Court should not award attorney's fees to either party.

3. Conclusion

The parties agreed and the court ordered in 2013-14 that Bonds' disposable military retired pay would be divided and a share assigned to Daniels. Bonds' subsequent disability retirement resulted in the loss of the disposable military retired pay. Under *Howell*, the trial court had no authority to compensate Daniels for this loss.

The result mandated by *Howell* may be a hardship for Daniels, but it is the result the law requires. The trial court's 2019 order and judgment were legal error. This Court should reverse and vacate the order and judgment.

Respectfully submitted this 12th day of November, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 12, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

Sophia May Palmer
Law Office of Sophia M. Palmer, PLLC
615 Commerce St Ste 101
Tacoma, WA 98402-4605
sophia@sophiampalmerlaw.com

SIGNED at Lacey, Washington, this 12th day of November, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

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