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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

SHARON MAPLES, a single woman

Appellant,

vs.

CHARLES GIEFER, a single man

Respondent.

RESPONDENT'S BRIEF

Shellie McGaughey, WSBA #16809
Michael J. Kylo, WSBA #51412
McGaughey Bridges Dunlap, PLLC
3131 Western Avenue, Suite 410
Seattle, WA 98121
(425) 462 - 4000

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I. Overview

An elderly couple, both in their mid-70s, walked out of a Chinese restaurant on February 10, 2016 in Sequim, Washington. They walked side by side, arm in arm towards the parking lot. One tripped, fell, landed on her elbow, and sustained what she describes as severe injuries. Initially, she described the event as the accidental result of their legs becoming tangled. Now, she blames her former partner for the ordeal due to his alleged “negligence” in “suddenly changing direction.” The fact of the matter is Appellant Sharon Maples accidentally tripped and fell. Not every accident results in legal liability. The Trial Court should be affirmed and Appellant’s negligence claim against Respondent Giefer should remain dismissed.

This case requires this Court to consider two distinct but intertwined questions: (1) did Charles Giefer owe a duty to Sharon Maples to prevent her from tripping, and (2) are his actions the legal cause of Sharon Maples’ alleged injuries? Not only has Appellant failed to present any authority which would tend to show Charles Giefer owed Sharon Maples a duty under the circumstance, but the overarching policy considerations require that this Court find Charles Giefer’s actions were not the legal proximate cause of Sharon Maples’ injuries. To hold an elderly man to a standard of care which requires him to prevent his likewise elderly partner from tripping in a parking lot when they voluntarily strode side by side towards

their vehicle would be a miscarriage of justice. Appellant has never claimed that Charles Giefer acted in an intentional manner by tripping her. Now, she claims Charles Giefer committed some “volitional act” where “his mind directed his body to perform the movements necessary to veer to the left,” as if Charles Giefer made some conscious decision to step in front of her.

Charles Giefer made no such conscious decision. This was simply a tripping accident. Nothing Charles Giefer intentionally, recklessly, or negligently did made Sharon Maples’ injuries foreseeable or more likely. The Trial Court should be affirmed because as Judge Erickson of Clallam County Superior Court stated, “walking side by side out to the car after having had dinner together is an act in which a reasonably careful person in similar circumstances would have participated.” CP at 20.

II. Statement of the Issues

1. Should the Trial Court be affirmed when it determined that Charles Giefer owed no duty of care to prevent Sharon Maples’ injury under the circumstances?
2. Should the Trial Court be affirmed when it determined that Charles Giefer’s actions (or lack thereof) were not the legal proximate cause of Sharon Maples’ injuries?
3. Can this Court affirm the Trial Court based upon the alternative grounds of assumption of risk?

III. Counterstatement of the Case

As Sharon Maples stated, this case arises out of a trip-and-fall accident which took place as she was walking arm-in-arm with Charles

Giefer leaving Dynasty Chinese Restaurant in Sequim, Washington. Ms. Maples tripped while walking next to Mr. Giefer in the parking lot of the restaurant, causing her injury.

According to Appellant's Complaint, Charles Giefer "negligently and without warning, veered into the pathway of Ms. Maples, causing her to trip and fall onto her elbow shattering it, and causing other injuries." CP at 133. However, Ms. Maples' story has evolved over the course of time and now conveniently accuses Mr. Giefer of negligence. Ms. Maples' initial statements to her medical care providers which are admissible as admissions against interest paint a wildly different story:

"She reports she was leaving a restaurant...with a friend last night when she fell forward. She is unsure if she tripped or just lost her balance."

CP at 77-82.¹

"She was in her usual state of health, leaving the restaurant after having dinner there with a friend, and fell forward after running into her friend while walking."

Id.

"When she left the restaurant somehow

¹ In reviewing the Clerk's Papers, it appears that during transmission and conversion from color to black and white that the formerly highlighted portions of the medical records and discovery materials now appear nearly black, as if they were redacted. However, Appellant Maples has never challenged Respondent's recitation of those statements in Respondent's various pleadings for accuracy. The undersigned attests to their recitation here, as was including in the pleadings below.

tumbled and fell to the ground below,
landing on her elbow.”

Id.

“Pt states she was walking out of the
Dynasty Restaurant with her friend they
bumped into each other and she then tripped
on his leg.”

Id.

While Appellant claims she has “abandoned” her theory regarding Charles Giefer’s alleged medical ailments, for purposes of the assumption of risk defense, those facts are pertinent. While Charles Giefer may have had an assortment of medical ailments throughout the course of his life, no medical conditions bestows upon him a duty to warn or a duty to prevent this type of harm. As stated previously, Sharon Maples and Charles Giefer are intimately familiar. The parties were in a romantic relationship as early as February of 2015. CP at 99. Ms. Maples had extensive knowledge of Mr. Giefer’s medical history, attended all of his various doctors’ appointments, which she helped him schedule, and disclosed his entire medical history to the undersigned throughout the course of prior litigation which was eventually dismissed upon motion under CR 41. CP at 85-97. Ms. Maples brought suit *pro se* in the previous matter. Ms. Maples is more familiar with Charles Giefer’s medical history than Mr. Giefer is himself.

Ms. Maples suffered injury as a result of her fall and now seeks to

blame her ex-boyfriend Charles Giefer simply because they were walking next to each other when she fell. Ms. Maples has changed her story throughout her medical treatment to shift blame to Charles Giefer where she placed none before. Her story was uniform prior to September of 2016, eight months after the incident when she sought out statements from her doctors in anticipation of litigation. Although her Complaint and Brief do not state as much, Ms. Maples theory of the case amounts to Mr. Giefer being strictly liable for simply walking in public as an elderly gentleman.

IV. Argument

A. Standard of Review.

Respondent agrees review is de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154 (1975). Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” CR 56(c).

In order to overcome a motion for summary judgment, the non-moving party must do more than express an opinion or make conclusory statements. *Marquis v. City of Seattle*, 130 Wn.2d 97, 105 (1996). They

must establish specific and material facts to support each element of their prima facie case. *Id.* “The party opposing a motion for summary judgment may not rely on speculation or argumentative assertions that unresolved factual issues remain.” *Herman v. Safeco Ins. Co.*, 104 Wn. App. 783, 787-88 (2001). Nor may the non-moving party rely on mere allegations made in its pleadings. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989).

“In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.” *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 127–28 (1994). “The threshold determination of whether a duty exists is a question of law.” *Id.* at 128; *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762 (2015).

B. Appellant’s Statements to Medical Providers.

As this Court reviews the Verbatim Report of Proceedings and Judge Erickson’s memorandum opinion granting summary judgment, it is clear the Trial Court did not articulate any reliance upon Ms. Maples’ statements made to her medical providers. CP at 17-21; *see also* VRP. Instead, the Trial Court made a determination as a matter of law that Mr. Giefer did not owe Ms. Maples a duty of care to prevent the incident which occurred. The Trial Court likewise determined that Appellant failed to

prove the legal causation element of her claim which asks whether liability should attach for Respondent's alleged actions. *See Tallariti v. Kildare*, 63 Wn. App. 453, 456 (1991) quoting *Christen v. Lee*, 113 Wn.2d 479, 508 (1989). However, "[t]his court may affirm summary judgment on any grounds supported by the record." *Blue Diamond Grp., Inc. v. KB Seattle I, Inc.*, 163 Wn. App. 449, 453 (2011). An Appellate Court "may affirm the trial court on an alternative theory, even if not relied on below, if it is established by the pleadings and supported by proof." *State v. Lakotiy*, 151 Wn. App. 699, 707 (2009) citing RAP 2.5.

There is no doubt (and Appellant did not argue below) that Ms. Maples' statements to her medical providers are admissible.² Ms. Maples statements are (1) not hearsay as they are admissions of a party opponent; and (2) fall within the hearsay exception of statements provided for purposes of medical treatment or diagnosis. *See* ER 801(d)(2); 803(a)(4).

With regard to admissions of a party opponent:

Statements falling within this limited class are so treated because they 'derive much of their value from the fact they were made in a context very different from trial' and '[e]ven when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of

² Appellant did object to the foundation for authenticity despite providing the medical records herself throughout the course of discovery. However, the Trial Court made no determination on admissibility of the medical records at issue.

his statements during the course of the conspiracy.’

State v. Rohrich, 132 Wn.2d 472, 480 (1997) citing *U.S. v. Inadi*, 475 U.S. 387, 395 (1986).

“[G]iven a declarant's likely change in status by the time the trial occurs, simply calling the declarant in the hope of having him repeat his prior out-of-court statements is a poor substitute for the full evidentiary significance that flows from statements made when the conspiracy is operating in full force.” *White v. Illinois*, 502 U.S. 346, 354 (1992).

“[T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.” *Id.* at 355. “Similarly, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.” *Id.* Ms. Maples’ statements, *supra* at p. 2-3 (CP at 77-82), are inherently the most accurate recollection of the events leading up to her injury. Ms. Maples in essence admitted that she was not tripped by Charles Giefer.

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C. Charles Giefer Did Not Owe Sharon Maples a Duty to Refrain From Walking Next to Her.

Throughout the Trial Court proceedings below, Appellant Maples had a difficult time describing the duty owed. Appellant fell back upon an ordinary general duty of care and a pedestrian duty of care owed in automobile cases. CP at 64; VRP at 8-9. The fact of the matter is “[n]ot every act that causes harm results in legal liability.” *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 42, 51 (2008). As stated by Respondent and as the Trial Court relied upon below, “[t]he mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence.” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 377 (1999). “Whether a defendant owes a duty of care to the complaining party is a question of law.” *Hansen v. Friend*, 118 Wn.2d 476, 479 (1992). A defendant must have owed a duty of care to avoid engaging in the conduct they engaged in to have legal liability. *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 127-128 (1994). “In general, courts will find a duty where reasonable persons would recognize it and agree that it exists.” *Tallariti v. Kildare*, 63 Wn. App. 453, 456 (1991). The legal determination of duty “depends on mixed considerations of ‘logic, common sense, justice, policy, and precedent.’” *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243 (2001) quoting *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67 (2005).

A threshold determination in any negligence case asks whether or

not the defendant's conduct was unreasonable. "Of course, only in those cases where the plaintiff can succeed in showing that the defendant's conduct was unreasonable will the plaintiff be successful in a negligence case. It is the creation of the risk of harm that triggers the duty to act reasonably toward the plaintiff." 16 Wash. Prac., Tort Law and Practice § 2:4 (4th ed.). What is required here is for Appellant Sharon Maples to show that Respondent Charles Giefer's actions did not arise to "that degree of care which the reasonably prudent person would exercise in the same or similar circumstances." *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 684 (2017).

"Reasonable care is an external standard, based upon what society demands of an individual rather than upon the individual's own notions of what is proper conduct." 16 Wash. Prac., Tort Law And Practice § 2:29 (4th ed.). "It follows that, if the conduct of the actor does not involve an unreasonable risk of harm to the person injured, he owes no duty to that person and, therefore, there is no actionable negligence." *Rose v. Nevitt*, 56 Wn.2d 882, 885 (1960). It is not enough to show that Ms. Maples' injuries occurred. Instead she must show that Charles Giefer's conduct presented her with an unreasonable risk of that harm.

In *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App 819 (2003) plaintiff Paula Suriano fell in a Sears store. She alleged the base of an

advertising sign located in the center of a main aisle caused her fall and injury. Ms. Suriano filed a personal injury action against Sears. *Id.* at 821. The jury ultimately rendered a defense verdict for Sears. Plaintiff appealed. In affirming the trial court's entry of judgment, the Court of Appeals found persuasive the fact that: "Ms. Suriano admitted previously stating that she initially thought she tripped over her own feet. But she added, 'I don't know why I said that. I didn't really think that.'" *Id.* at 824. Additionally, a witness stated: "As I was walking towards the sign, another lady [plaintiff] was walking towards me on the same side of the sign. And she appeared to be walking in an unsteady manner. And she passed the sign and crossed in front of the sign, she fell." *Id.* "I don't know if she tripped on the leg of the sign, or whether she just fell." *Id.* The Court of Appeals found the eye witness testimony along with the plaintiff's own previous testimony persuasive in affirming dismissal based upon a failure to prove negligence in a walking trip-and-fall accident. That situation is analogous here where Appellant Maples made repeated statements regarding the cause of her fall prior to this lawsuit.

D. Charles Giefer Was Not the Legal Proximate Cause of Sharon Maples' Alleged Injuries.

Before the defendant can be made liable for the plaintiff's injury, the defendant must have contributed in some way to making the plaintiff's injury more likely. 16 Wash. Prac., Tort Law And Practice § 2:4 (4th ed.).

That is described as the “proximate cause” of an injury. “The doctrine of proximate cause entails two elements: (1) cause in fact; and (2) legal causation.” *Tallariti v. Kildare*, 63 Wn. App. 453, 456 (1991). “Legal causation ‘concerns whether liability should attach as a matter of law given the existence of cause in fact.’” *Id.* quoting *Christen v. Lee*, 113 Wn.2d 479, 508 (1989). “The Supreme Court has noted that ‘the question of whether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists.’” *Id.* quoting *Hartley v. State*, 103 Wn.2d 768, 780 (1985) (internal citations omitted). “Legal cause is a question of law for the court to decide.” *Minahan v. W. Washington Fair Ass’n*, 117 Wn. App. 881, 888 (2003), *as corrected* (Oct. 14, 2003). Defendant respectfully submits that a finding of legal causation here would be beyond bad policy. When two elderly people are walking together and one falls over it is not the other person’s fault. Accidents happen and legal blame is not always required.

“It is quite possible, and often helpful, to state every question which arises in connection with ‘proximate cause’ in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?” *Minahan v. W. Washington Fair Ass’n*, 117 Wn. App. 881, 888 (2003), *as corrected* (Oct. 14, 2003) citing William L. Prosser, *The Law of Torts* 244–45 (4th ed.1971). Mr. Giefer had no duty to

protect Ms. Maples from falling. Every person is responsible for their own safety when walking. No affirmative action by Respondent Giefer caused Appellant Maples' injuries. This Court should affirm the Trial Court's finding that Respondent was not the legal proximate cause of Appellant's injury.

E. Sharon Maples Assumed the Risk of Her Injuries.

While the Trial Court did not indicate any reliance on the assumption of risk theory, this Court can affirm summary judgment based upon any theory supported by the record. *State v. Lakotiy*, 151 Wn. App. 699, 707 (2009) citing RAP 2.5. Appellant Sharon Maples had an admittedly intimate relationship with Respondent Charles Giefer and a large portion of their relationship surrounded discussions about various medical ailments and providers as they aged. Ms. Maples sat down with Charles Giefer, gathered all of his medical documentation, and drafted a letter to his care providers eliciting specialist assistance with determining his ongoing medical ailments. CP at 40, 61, 85-87, 90-97, 99-106. “[S]ometimes assumption of risk relieves the defendant of a duty.” *Pellham v. Let's Go Tubing, Inc.*, 199 Wn. App. 399, 408 (2017) citing *Brown v. Stevens Pass, Inc.*, 97 Wn. App. at 523 (1999); *Codd v. Stevens Pass, Inc.*, 45 Wn. App. at 402 (1986). “Every person has a duty to look out for his own safety and to use a degree of care which a ‘reasonably prudent person

of ordinary intelligence would exercise under like or similar circumstances.” *Daly v. Lynch*, 24 Wn. App. 69, 72 (1979) citing *Smith v. Mannings, Inc.*, 13 Wn.2d 573, 577 (1942).

There are four classifications of assumption of risk in Washington: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Pellham, supra*. “Implied primary assumption of risk follows from the plaintiff engaging in risky conduct, from which the law implies consent.” *Id.* at 410 citing *Kirk v. Washington State University*, 109 Wn.2d 448, 453 (1987); *Erie v. White*, 92 Wn. App. 297, 303 (1998). “When express or implied primary assumption of the risk applies, the plaintiff’s consent negates any duty the defendant would otherwise have owed to the plaintiff.” *Hvolboll v. Wolff Co.*, 187 Wn. App. 37, 48 (2015). In other words, implied primary assumption of the risk is a complete bar to recovery because it relieves the defendant of any duty entirely. *Id.*; *see also* 16 Wash. Prac., Tort Law And Practice § 9:11 (4th ed.).

Implied primary assumption of risk is likewise known as “inherent peril assumption of risk.” *Pellham*, 199 Wn. App. at 411. “We now focus on inherent peril assumption of risk. Inherent peril assumption bars a claim resulting from specific known and appreciated risks impliedly assumed often in advance of any negligence of the defendant.” *Id.* citing *Scott v. Pacific West Mountain Resort*, 119 Wn.2d at 497 (1992); *Boyce v. West*,

71 Wn. App. 657, 666-67 (1993). “Plaintiff’s consent to relieve the defendant of any duty is implied based on the plaintiff’s decision to engage in an activity that involves those known risks.” *Id.* citing *Egan v. Cauble*, 92 Wn. App. 372, 376 (1998); *Gleason v. Cohen*, 192 Wn. App. at 797 (2016) (emphasis added).

In order to meet the elements of implied primary assumption of risk, “[t]he evidence must show (1) the plaintiff possessed full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” *Id.* citing *Kirk, supra*, 109 Wn.2d at 453. “The participant must know that the risk is present, and he or she must further understand its nature; his or her choice to incur it must be free and voluntary.” *Id.* citing *Brown, supra*, 97 Wn. App. at 523. Ms. Maples cannot deny that she knowingly, freely, and voluntarily dated Charles Giefer, went with him to Dynasty Chinese Restaurant, and exited, walking with him arm-in-arm. She cannot deny that she possessed a full subjective understanding of any medical ailments he had. Although she “abandoned” her theory that Charles Giefer was liable because he had specific medical ailments which made him allegedly unsteady on his feet including potential after effects of spinal meningitis and Agent Orange exposure during the Vietnam War, that was the original cause of action pled in her Complaint, which she never amended. CP at 132-135. However, it is

undisputed that Ms. Maples had the complete subjective understanding of his medical ailments. CP at 90-107.

Whether a plaintiff decides **knowingly** to encounter a risk depends on whether the plaintiff in fact understood the risk. *Home v. North Kitsap School Dist.*, 92 Wn. App. at 720 (emphasis added). Ms. Maples various strategic and directed discovery requests seeking specific documents from each and every one of Mr. Giefer's various medical providers as well as her statements contained within show that she understood his ailments likely more than Mr. Giefer did.

Whether a plaintiff decides **voluntarily** to encounter a risk depends on whether she elects to encounter it despite knowing of a reasonable alternative course of action. *Erie v. White*, 92 Wn. App. 297, 304, 966 P.2d 342 (1998) (emphasis added). The plaintiff "must have had a reasonable opportunity to act differently or proceed on an alternative course that would have avoided the danger." *Id.* at 304-05. Ms. Maples had every opportunity to avoid walking next to Charles Giefer – that is assuming with admitting that his medical conditions caused this incident.

Summary judgment based on implied primary assumption of risk has been upheld in many cases because reasonable minds could not differ: *Taylor v. Baseball Club of Seattle, L.P.*, 132 Wn. App. 32, 38-40 (2006) (implied primary assumption of risk barred injured spectator's negligence

action because errant throws into the stands are an inherent risk of baseball which plaintiff assumed by attending the game); *Wirtz v. Gillogly*, 152 Wn. App. 1, 9 (2009) (plaintiff, injured when assisting defendants in the felling of a tree, voluntarily assumed the risk inherent in felling trees; reasonable minds could not differ when the evidence showed the defendant (1) knew he needed a safety strap and (2) had reasonable alternative courses of action); *Erie v. White*, 92 Wn. App. at 306 (tree worker knowingly and voluntarily assumed the risk of using pole-climbing equipment rather than tree-climbing equipment; reasonable minds could not differ on whether plaintiff knew all the facts a reasonable person would have known, and thus appreciated the risk; nor could reasonable minds differ on whether plaintiff had reasonable alternative courses of action).

“[W]hether implied primary assumption of risk applies does not depend of [sic] whether the plaintiff has voluntarily encountered the known risk. It depends on whether the risk the plaintiff encountered was inherent in the activity in which plaintiff was engaged.” *Gleason v. Cohen*, 192 Wn. App. 788, 800 (2016). The hallmark of the assumption of risk defense is whether the plaintiff actually and subjectively knew all of the facts that a reasonable person in the plaintiff’s shoes would want to consider in deciding to knowingly encounter the risk. *Egan* at 377-79.

Sharon Maples knew Charles Giefer was an elderly man with some

medical ailments. She knew the specific nature of those ailments. In fact, she knew much more than any reasonable person would want to consider in deciding whether to encounter Mr. Giefer in public. Appellant Maples assumed the risk of her injuries under a theory of implied primary assumption of risk – a complete bar to her claim. Summary judgment can be affirmed on these grounds alone.

V. Conclusion

This was a trip and fall accident between two elderly people who were leaving a date at a Chinese restaurant. Ms. Maples was walking arm-in-arm with Mr. Giefer when she either tripped or their legs became entangled. There was no specific duty owed by Mr. Giefer to Ms. Maples. Simply put, his conduct did not come with a specific degree of risk of harm that should have made him foresee that Ms. Maples may trip. No “volitional act” was committed by Mr. Giefer. He made no conscious decision to tangle his feet with Ms. Maples, if that is what occurred. Further, Ms. Maples initially stated to each medical provider that it was an accidental trip and she was unsure of the cause. Only after she retained an attorney did she change her story to reflect the negligence of Charles Giefer. Mr. Giefer did not trip Ms. Maples. Even if he did, a simple accident occurred. Mr. Giefer owed no duty to prevent the injury which occurred.

Although the Trial Court below did not explicitly grant summary

judgment based upon the assumption of risk affirmative defense, this Court can affirm based upon alternative grounds that are supported in the record. There is no question Appellant Maples subjectively knew the alleged risk and chose to engage in a consensual romantic relationship with Respondent Giefer.

Summary judgment should be affirmed on any of the grounds outlined above.

DATED this 2nd day of December, 2019.

McGAUGHEY BRIDGES DUNLAP, PLLC

/s/ Michael Kylo, WSBA 51412

By: _____
Shellie McGaughey, WSBA 16809
Michael Kylo, WSBA 51412
Attorneys for Respondent Giefer

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

SHARON MAPLES, a single woman,)
)
Appellant,)
)
vs.)
)
CHARLES GIEFER, a single man,)
)
Respondent.)

53738-9 II

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused RESPONDENT’S BRIEF to be delivered via Court of Appeals electronic service to:

Daniel Whitmore
Law Offices of Daniel Whitmore
2626 15th Avenue W, Suite 200
Seattle, WA 98119
dan@whitmorelawfirm.com
Ana Rojas – Paralegal
ana@whitmorelawfirm.com

Dated this 2nd day of December, 2019, at Seattle, Washington.


Emily Rayborn, Paralegal

MCGAUGHEY BRIDGES DUNLAP, PLLC

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