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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34449-5

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

JOHN and LORI EDWARDS, a marital
community,

Appellants/Plaintiffs

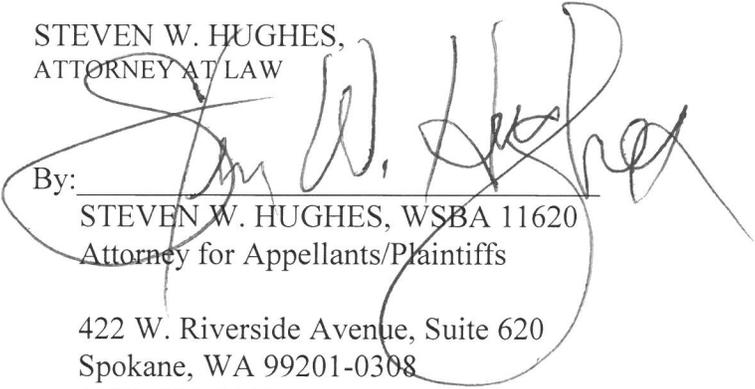
vs.

COLVILLE MOTOR SPORTS, INC., a
Washington corporation

Respondent/Defendant

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

John Edwards suffered devastating and life-changing injuries while attempting to load an 800-pound all-terrain vehicle (“ATV”) at Colville Motor Sports, Inc. (“CMS”). CMS, as the owner/occupier, failed to inspect its business premises for safety hazards; failed to exercise reasonable care to make the premises safe for its business invitees; and totally failed to give any warnings of danger, either written or verbal. Moreover, CMS was actively negligent by deceiving John Edwards into a false sense of safety by discouraging him from taking the only reasonable step that could have prevented injuries, i.e. turning the truck around, and by failing to warn John Edwards that it was necessary to lean over the handlebars to make it up the ramps.

The trial court denied John and Lori Edwards a fair trial by refusing to enforce its own order on motion in limine to exclude prejudicial helmet evidence, by erroneously instructing the jury on the all-or-nothing theory of implied primary assumption of risk, and by refusing to even allow the Plaintiffs to argue their negligence theory of the case. The jury verdict

supplied by the court was an erroneous statement of the law, confused the jury, and was irreconcilably inconsistent.

Justice requires that John and Lori Edwards be given a new trial.

II. RESPONSE TO RESPONDENT'S STATEMENT OF PERTINENT FACTS

Respondent CMS's Brief states additional facts to support the argument that John Edward's violation of the "ATV" manual caused his own injuries. Those facts, however, make it even more apparent that CMS was negligent. Moreover, this argument of CMS is based upon inapposite cases which rule contrary to their assertions and has no logical basis.

CMS cites the Polaris All-Terrain Vehicle ("ATV") Operator's Manual which discusses "improper hill climbing." (Response Brief, p. 1). The manual found at Exhibit 103, RP 499, states in pertinent part as follows:

Hill climbing is dangerous and should be attempted only by experienced operators. Start on shallow slopes and practice procedures described in the owner's manual before trying steeper terrain. Some hills are too steep to safely stop or recover from an unsuccessful climbing attempt.

In this case it is CMS who should be intimately familiar with the operator's manual for the ATV they sell, and CMS who should have recognized the extreme danger to John Edwards, who had no experience riding or loading ATVs. The Respondent attempts to analogize the facts surrounding the injury of John Edwards when he attempted to drive the ATV up the 6-foot removable ramps on to his truck at the CMS facility with improper hill climbing.

The manual suggests dismounting as a remedy if it turns out the hill is too steep, an impossibility for John Edwards. The CMS employee admitted being told that John had no experience by his wife Lori, who also asked him to load the ATV for her husband. The CMS employee, who was much more knowledgeable about the dangers of "improper hill climbing" referenced in the Polaris Manual, steadfastly refused to load the ATV and did not offer to get someone more experienced to do so. This is what the CMS employee admitted that he did if he felt it was needed. Trial Transcript, Vol. II, pp. 355, 365.

This totally preventable and tragic injury to John Edwards did not occur on some random hillside, but rather on the CMS business premises

where they loaded ATVs daily. CMS provided no loading dock and no alternative to loading ATVs on the sloped parking lot, but callously stood by and watched John Edwards be nearly killed. Trial Transcript, Vol. III, pp. 550-551.

Astonishingly, the Edwards even asked whether or not the truck should be turned around to face downhill so the angle would not be as steep, and were plainly told that it would not make any difference, “We do it all the time.” CMS knew that in order to safely load an ATV at that location required one to lean one’s body out over the handlebars, but incredibly failed to inform John Edwards of this technique, which is not in the ATV manual. No warnings of any type were given to Mr. Edwards, their business invitee to whom they owed all the duties of warning and precautions that category requires under the law. Trial Transcript, Vol. II, pp. 356, 357, 383.

The argument of CMS that John Edwards was to blame for his own injuries, based on his “improper hill climbing” as referenced in the operator’s manual, is not applicable to the factual setting before this Court. On the contrary, it points out even more starkly just how negligent CMS

was to allow John Edwards, a novice who asked for their help and received none, to load an 800-pound ATV on the back of a truck on the CMS parking lot which exceeded the ATV manual's maximum incline by 40 percent.

III. LEGAL ARGUMENT

A. Violation Of Court's Order On The Motion In Limine Regarding The Lack Of Use Of A Helmet By John Edwards

A motion in limine was filed on behalf of Plaintiff John Edwards prior to trial requesting the court to exclude as inadmissible and unduly prejudicial any evidence of John Edwards' lack of a helmet while loading the ATV at CMS. As noted in the Appellants' Brief, the trial judge granted the motion in limine and excluded all such evidence as to causation. The court declared at page 17, line 21, Vol. I of Trial Transcript, the following:

... but will admit the absence of a helmet to the extent it has bearing on injuries, but subject to further examination of this point that the absence of a helmet has to somehow be shown to have resulted in injuries or more severe injuries than otherwise. [Emphasis added]

At no time, either before or during the trial, did CMS identify or produce any competent witnesses to testify that the absence of a helmet

resulted in or caused more severe injuries than would have otherwise occurred.

Attorneys for CMS, however, discussed the lack of a helmet in both *voir dire* and in their opening statement. Trial Transcript, Vol. I, p. 169, ln. 4. The defense went on to question every witness regarding the lack of a helmet, including Plaintiff John Edwards. CMS argued that a helmet with a chin or faceguard would have prevented the injuries, when there was absolutely no evidence that such proposition was true. The court totally failed to enforce its order.

CMS questioned the forensic engineering expert for the Edwards, William Skelton, and invited him to speculate on what type of helmet might have prevented injuries to John Edwards. Mr. Skelton testified, on page 288, line 17, of the Transcript, when questioned by the CMS attorney as follows:

- Q: Okay. So, to repeat my question, you're not able to say whether or not injuries would be greater or lesser with a helmet?
- A: No, sir, I'm not qualified to do that.

Mr. Skelton testified that only a biomechanical engineer or a medical doctor could speak to the effect of a lack of a helmet on John Edwards' injuries. Trial Transcript, Vol. II, p. 289.

CMS cites the testimony of Dr. Neil Curtis, the surgeon who operated on John Edwards, that John Edwards sustained injuries to his neck and jaw region. CP 220. More specifically, Dr. Curtis noted that John Edwards sustained, among other things, a penetrating injury from the ATV handlebar which caused injury to his face, jaw, tongue, teeth, and lip. Id. CMS then notes that John Edwards testified that he owned several helmets, including a "full face helmet" (whatever that means), at the time of the incident. RP 513-515. CMS concludes, contrary to logic, that Dr. Curtis's identification of the areas of injury and the fact John Edwards owned a helmet, that the trial court "properly allowed this testimony as bearing on the issues of contributory negligence and causation." (Response Brief, p. 9). The court at no time altered or rescinded its Order on the Motion in Limine. The judge simply refused to enforce it over objections. This was serious error.

CMS makes three separate arguments that the court did not commit prejudicial error by allowing testimony on John Edwards' lack of a full face helmet. They are as follows: (1) Admission of evidence lies within the court's discretion; (2) expert testimony on causation of injuries is only necessary where "an injury involves obscure medical factors which are beyond an ordinary layperson's knowledge; and (3) even if admission of the evidence was error, it was simply harmless. Response Brief at pp. 8-12.

Generally, the admission of evidence does indeed lie within the trial court's discretion. Burnside v. Simpson Paper Co., 123 Wn.2d. 93, 107 P.2d 937 (1994). However, in the present case the trial judge entered an order excluding such evidence, but failed to enforce the order over objection. The defense violated that order, and the violation of a court order is not discretionary.

In State v. Evans, 96 Wn.2d 119, 634 P.2d 845 (1981), a trial judge entered an order on a motion in limine to "limit the damage issue as to the value of property before the taking, minus the market value of the property remaining after the acquisition." Id. However, the trial court failed to

enforce its own order, over objection, and allowed an appraiser to testify as to the value of adjacent properties to that which was condemned. The Supreme Court of Washington held that the trial court “should have stricken the testimony of the appraiser” which was in violation of the court’s order. The Supreme Court in Evans ruled that the trial judge committed “prejudicial error.” Id.

CMS argues that neither expert nor medical testimony is necessary in Washington to prove the causation of an injury. A totally incorrect statement of the law. CMS then concludes, against all reason, that therefore a lay witness can testify that the use of a helmet would have prevented injuries. Such a proposition is impossible to support by case law and frankly defies logic.

CMS cites Riggins v. Bechtel Power Corp., 44 Wn.App. 244, 254, 722 P.2d 819, 824 (1986), to support their incorrect proposition. The Riggins case involved an employee who brought a personal injury action against a construction manager. The jury rendered verdict for the plaintiff. There, the defendant, Bechtel, argued that Ms. Riggins, the plaintiff, was required to prove injuries by expert medical testimony. The court declared,

on page 253, “we agree.” The court held that medical testimony was required to show that the plaintiff’s fall necessitated a surgery. Medical testimony was not required to show that one experienced “hip pain and headaches” after the surgery. CMSs argument in the present case based on the Riggins’s decision, which is inapposite, is diametrically contrary to the ruling and does not follow logically.

CMS argues in its response brief that, “When the results of an alleged act of negligence are within the experience and observation of an ordinary layperson, the trier of fact can draw a conclusion as to a causal link without resort to medical testimony.” For that proposition, they cite Sacred Heart Medical Center v. Carrado, 92 Wn.2d 631, 600 P.2d 1015 (1979). The Sacred Heart case cited, however, is a Labor and Industry claim based on a worker who contracted hepatitis in the course of her employment at a hospital. Contrary to what CMS asserts, Justice Rosellini stated on page 636 the following:

We are mindful that medical testimony forms a vital part of a claimant’s proof, particularly where it involves matters which are beyond the knowledge and understanding of laymen. Accordingly, we have adhered to the rule that the causal connection between a claimant’s physical condition and his employment must be established by such testimony.

CMS cites Christian v. Tohmeh, 191 Wn.App. 709, 366 P.3d 16 (2015), for the proposition that precise testimony on the nature and extent of injuries/damages is not required and, therefore, laypeople can testify that a helmet which was not produced at trial would have prevented the injuries to John Edwards in this case. However, the Christian case involved a **lost chance of better outcome** based on medical negligence.

The court declared on page 734 the following:

[W]e hold that a plaintiff need only provide testimony from a qualified expert that the violation of the standard of care caused some injury or reduced the chance of a better outcome by a stated percentage to survive a summary judgment motion. A physician need not particularize those symptoms that would have decreased.

The Christian case, just as the others cited by CMS, has no application to the present matter and in fact rules in a diametrically opposite direction.

CMS argues that it was appropriate to violate the court's order on the motion in limine by discussing the lack of a helmet by John Edwards when he loaded the ATV at CMS's parking lot. This despite the fact that CMS failed to identify or call any qualified experts to connect the lack of a helmet to the causation of Mr. Edwards' injuries, as required by the judge

in the Order on the motion. CMS further attempts to justify its clear violation of the Order arguing that since the jury did not reach the issue of the amount of damages, the evidence regarding the helmet was harmless. Again, this is faulty reasoning on a large scale. When coupled with the absolutely inappropriate instruction on the implied primary assumption of risk, this was totally prejudicial error.

B. Implied Primary Assumption of Risk

A jury instruction that contains a clear misstatement of the law is presumed to be prejudicial. Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). The modified implied primary assumption of risk instruction given by the Court in this case contained a clear misstatement of law, and is therefore presumed prejudicial. The knowledge element added by the Court had no bearing on whether implied primary assumption of risk applies. Respondent offers little in the way of proof to rebut this point, and merely concludes the Court's modified instruction was a "correct statement of the law."

Respondent further confounds the issue with its attempt to distinguish Gleason v. Cohen, 192 Wn.App. 788, 368 P.3d 531 (2016).

Respondent claims Gleason involved the “active negligence” of defendants, yet respondent conveniently disregards the conduct of its own employee in this case. Will Harris brought the Edwards’ ATV out from the back of CMS’s shop and parked it two or three feet behind the loading ramps. CMS’s own expert testified this was insufficient room to gain enough momentum to clear the threshold of the ramp. Mr. Harris then refused to load the ATV himself when asked, and misled the Edwards into believing the unreasonably dangerous condition was in fact safe. This is the exact kind of “active negligence” considered in Gleason took the risks outside of those inherent in the injury causing activity.

Additionally, Gleason is not the only case in Washington that stands for the proposition that primary assumption of risk is inapplicable when a plaintiff knowingly encounters a risk created by the defendant, so the fact it was decided at the summary judgment stage is inapposite. The Washington Supreme Court in Scott v. Pac. W. Mountain Resort similarly found that **implied reasonable and unreasonable assumption of risk, and not implied primary, “arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet**

chooses to encounter it.” 119 Wn.2d 484, 499, 834 P.2d 6 (1992). In such a case, plaintiff’s conduct is not truly consensual, but is a form of contributory negligence. Id. That is exactly what happened in this case, and it was error for the Court to give an instruction on implied primary assumption of risk when it does not apply to risks created by the negligence of defendant.

Respondent cites Jessee v. City Council of Dayton, 173 Wn.App. 410, 293 P.3d 1290 (2013), to support its notion that the implied primary instruction was properly given. The case is distinguishable on several important points. First, Jessee was decided at the summary judgment stage—a jury never determined that the defendant was negligent and that negligence caused plaintiff’s injuries. Id. The jury in this case found CMS negligent, and said negligence caused Mr. Edwards’ injuries, but then found Mr. Edwards’ assumed the risk of injury under a theory of implied primary assumption of risk. This is an irreconcilable finding under Washington law. Implied primary assumption of risk does not apply for a risk created by the negligence of the defendant. Scott, 119 Wn.2d at 499.

Second, the plaintiff in Jessee observed the “taller than normal stairs,” and was able to navigate them successfully before falling on the descent. 173 Wn.App at 412-13. In this case, Mr. Edwards had never loaded or unloaded the ATV at Colville Motor Sports, where its sloped parking lot created an unreasonably dangerous angle. In other words, he had never successfully navigated the dangerous condition like the plaintiff in Jessee. CMS’s employees had done the loading/unloading in the past, and Mr. Edwards anticipated the same on the day he was injured.

Third, the plaintiff in Jessee did not have one of the defendant’s employees standing over her shoulder ensuring the staircase was safe because “people climb it all the time,” and it “doesn’t make much difference if the stairs are different sizes.” That is exactly what happened in this case. After parking the ATV unreasonably close to the loading ramps, William Harris dismounted and refused to load the ATV, even after being asked by Mrs. Edwards. John Edwards then asked if the truck should be turned around, to which Mr. Harris negligently responded by saying “No, nah, we, we do this all the time,” and “I don’t think it makes much difference.” This was an incorrect and misleading statement, and it was

negligence that could not be assumed under implied primary assumption of risk.

Finally, this case involves the creation of risks not inherent in the normal operations of an ATV. For example, the sloped parking lot where CMS's customers load their ATVs, motorcycles, snowmobiles, etc. created an angle on the loading ramp that exceeded the manufacturer's maximum by 40 percent. This was not a risk inherent in the normal operation of an ATV, as the manual specifically indicated the maximum incline to ascend was 25 degrees. See Kirk v. Washington State Univ., 109 Wn.2d 448, 746 P.2d 285 (1987) (plaintiff did assume the risks inherent in cheerleading, however, she did *not* assume the risks caused by the university's negligence provision of dangerous facilities or improper instruction or supervision. Those were not risks "inherent" in the sport.)

Other risks created by the negligence of CMS include: (1) the fact Will Harris parked the ATV two to three feet behind the loading ramp, which was insufficient space to gain enough momentum to clear the ramp; (2) Will Harris telling the Edwards that they load ATVs in that location all the time, but then he refused to do it himself or get another employee to do

it; (3) Will Harris telling the Edwards that it would not make much difference if they turned their truck around, when in fact it would have made a 40 percent difference in the angle of the ramp; and (4) the fact that Will Harris and other employees of CMS knew that you had to stand and lean way over the handle bars when loading the ATV, yet failed to warn Mr. Edwards of this requirement when he attempted to load.

These were all risks created by the negligence of CMS, and risks that cannot be assumed under implied primary assumption of risk. The jury in this case found CMS was negligent for creating these risks, and it is wholly irreconcilable to say implied primary assumption of risk still applied.

C. The Trial Court's Special Verdict Form Was Inconsistent And Confusing To The Jury

CMS cannot explain away the inconsistencies in the Special Verdict Form given to the jury in this case, nor can it support it with relevant Washington precedent. Here, the jury found specifically that CMS, as property owner, breached its duties to the Edwards, its invitees. The jury also answered in the affirmative when asked if CMS's negligence was a proximate cause of injury or damage to the Edwards. However, the jury

inconsistently declared that Mr. Edwards impliedly assumed the risk of loading the ATV on the back of his truck. Thus, the jury found CMS breached its duties to the Edwards and that breach was a proximate cause of their injuries, but there was no duty because Mr. Edwards totally assumed the risk. Therefore CMS had no duty to the Edwards. This is totally inconsistent and case law in Washington declares it so.

CMS attempts in vain to distinguish the Supreme Court's holding in Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 875 P.2d 621 (1994). Tincani involved a student who sued a zoo for personal injuries when he fell off a rock on a school trip. The plaintiff couched his claim for damages in both premises liability and negligence, the same claims of the Edwards here. The Tincani jury completed a special verdict form and determined that Tincani was a licensee, and answered "yes" to the question of whether the defendant zoo was negligent. The jury also answered "yes" in the verdict form to the question, "Was such negligence a proximate cause of the injury to the plaintiff?" Finally, the jury additionally answered "yes" to the question, "Was the plaintiff Richard

Tincani, negligent, or did he assume the risk of injury?” Judgment was entered for the defendant zoo since the plaintiff assumed the risks.

The Tincani Court ruled that the verdict was inconsistent and the responses were in conflict. Id. at p. 131. CMS, in the present case attempts to distinguish Tincani by arguing that the plaintiff in that case was merely a “licensee.” However, in the present matter, John Edwards was an “invitee” who was therefore owed an even greater duty of care, not less, by the owner/occupier of land. The present Special Verdict Form here is in conflict and inconsistent exactly as that in Tincani.

CMS cites the case of Gjerde v. Fritzschi, 55 Wn.App. 387, 777 P.2d 1071 (Div. I 1989), review denied, 113 Wn.2d 1038, 785 P.2d 826 (1990), as support for its argument that the present jury verdict inconsistency was waived. CMS argues that the Edwards waived the issue of the inconsistent verdict by failing to bring the inconsistency in the answers to the interrogatories to the attention of the court at the time the jury was polled. Gjerde at 393.

However, unlike the present case, the Gjerde matter involved a claim for malpractice, and the jury found against the plaintiffs on their claim for

negligence and lack of informed consent. The form, however, did not tell the jury to stop at that point, as it should have done. The jury continued to answer questions finding for the defendant on contributory negligence, but only found the plaintiff to be 45 percent responsible. It was clearly impossible for the plaintiff to be found only 45 percent comparatively negligent and then rule 100 percent for the defendant.

The Gjerde court stated, “The verdict was received without either court or either counsel responding to the obvious inconsistency by inquiry to the jury or by stipulation.” Id. at 390. Such an obvious mathematical inconsistency in a special verdict form is capable of being spotted as the jury is polled, unlike the situation in the present case. The Gjerde decision is inapposite here.

CMS also cites Minger v. Reinhard Dist. Co., Inc., 87 Wn.App. 941, 943 P.2d 400 (1997), for the proposition that John Edwards failed to object regarding the responses to the Special Verdict Form at the time the jury was polled and thus waived the error. Again, however, Minger involved an obvious omission and error. There, the jury specifically found the respondent was liable for sexual harassment but simply left the damage

line blank. In that case it would be impossible not to spot the obvious inconsistency when the jury was polled.

In the present matter, just as in Tincani, the inconsistent responses to the Special Verdict Form was not the sort of mathematical error that could be immediately addressed while the jury was being polled. The inconsistency here was caused by the trial court's improper instruction on the implied primary assumption of risk instead of the comparative negligence and the dismissal on directed verdict of the Edward's general negligence claim. Under the holding in Tincani, such substantive error in the verdict form could not be remedied by the trial court when the jury was polled. A new trial was necessary there and is necessary here.

IV. CONCLUSION

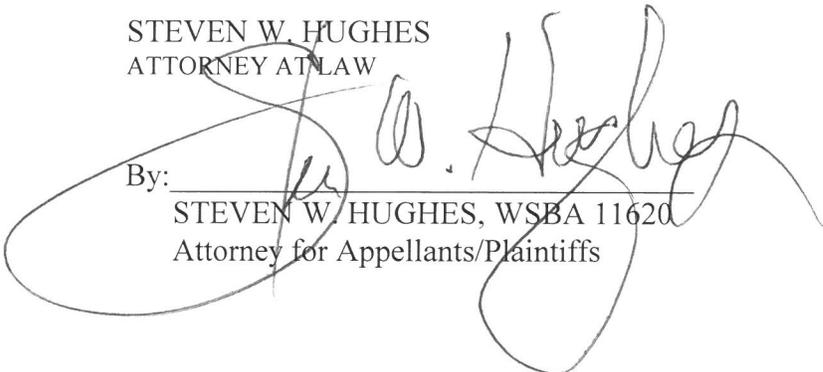
The trial court committed substantial and prejudicial errors in failing to enforce its own order on the Plaintiffs' motion in limine by directing the verdict in favor of Respondent CMS, which prohibited the Plaintiffs from arguing general negligence, by instructing the jury on implied primary assumption of risk, and by giving the jury an inconsistent and confusing Special Verdict Form. Respondent CMS has attempted to argue that none

of the errors were committed, however, if they were they were simply harmless. The court's action in this matter, however, denied John and Lori Edwards a fair trial and fair compensation for their life-altering injuries.

This Court is respectfully requested to reverse the trial court's judgment and to order a new trial.

DATED this 18TH day of April 2017.

STEVEN W. HUGHES
ATTORNEY AT LAW

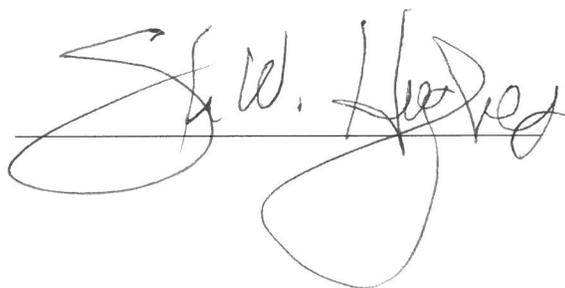
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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on April 19, 2017, the foregoing was delivered to the following persons in manner indicated

Mark Louvier Evans, Craven & Lackie, P.S. 818 W. Riverside, Suite 250 Spokane WA 99201	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivery/Messenger <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Fax: 509-455-3632 <input type="checkbox"/> Email: mlouvier@ec-law.com
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A handwritten signature in black ink, appearing to read "J. W. Hedley", is written over a horizontal line.