

NO. 77684-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT C. WOO, D.D.S.,

Petitioner,

v.

FIREMAN'S FUND INSURANCE COMPANY, a California
corporation; and NATIONAL SURETY CORPORATION, an Illinois
corporation,

Respondents,

and

DEPOSITORS INSURANCE COMPANY, an Iowa corporation; and
THE PACIFIC UNDERWRITERS CORPORATION, a Washington
corporation,

Defendants.

SUPPLEMENTAL BRIEF OF PETITIONER WOO

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I. INTRODUCTION

Robert C. Woo, plaintiff in the trial court and respondent in the Court of Appeals, and petitioner in this Court, files this supplemental brief pursuant to RAP 13.7(d).

II. SUPPLEMENTAL ARGUMENT

A. Fireman's breached its duty to defend because the allegations of the complaint arguably could have led to a covered judgment for professional liability.

1. The professional coverage protected Dr. Woo from claims resulting from rendering or failing to render dental services -- creating the flippers and inserting them in Alberts' mouth was the practice of dentistry as defined.

Providing and supervising a legal defense for the policyholder is one of the primary benefits business owners purchase in liability insurance whether or not indemnity will ultimately exist. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). The duty to defend is broader than the duty to indemnify:

The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy. The duty to defend, on the other hand, exists merely if the complaint contains any factual allegations which could render the insurer liable to the insured under the policy.

Hayden v. Mutual of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

“The duty to defend arises whenever a lawsuit is filed against the insured alleging facts and circumstances arguably covered by the policy.” *Kirk*, 134 Wn.2d at 561.¹ “Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend.” *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). If the insurer knows or could readily determine facts that would trigger the duty to defend, the insurer must defend even if those facts conflict with the allegations in the complaint. *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 908, 726 P.2d 439 (1986).

The Court of Appeals cited those principles but then went far astray. The opinion read the policy definitions that incorporated the statute regarding the practice of dentistry narrowly rather than expansively. *Woo v. Fireman’s Fund Ins. Co.*, 128 Wn. App. 95, 102-03, 114 P.3d 681 (2005), *rev. granted* 156 Wn.2d 1035 (2006). Dr. Woo purchased a comprehensive policy from Fireman’s, including dental professional liability protection for all damages “that

¹ Under the professional liability coverage, Fireman’s promised to defend “any **claim**,” defined as any demand alleging damages. Ex. 40 pp. 080, 102. Thus, the duty to defend and investigate arose well before any complaint was filed.

result from rendering or failing to render dental services,” including “all services which are performed in the practice of the dentistry profession as defined in the business and professional codes of the state where you are licensed.” CP 162. Under the relevant Washington statute incorporated by the policy, the practice of dentistry is defined in the broadest terms. RCW 18.32.020. Further, other parts of the policy definition included conduct well beyond the narrow focus of the appellate court.²

The opinion focused exclusively on subsection (2) of the statute, “offers or undertakes by any means or methods to diagnose, treat, remove stains or concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the same, or take impressions of the teeth or jaw” Basing its entire analysis on this subsection, the appellate court held “[n]o reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to ridicule the patient.” 128 Wn. App. at

² Dental services expressly included autopsies, seminar presentations, committee memberships in the ADA, expert witness work and consultant to dental service plans. Ex. 40, pp. 102-03.

103.³ This was error because the defined practice of dentistry is not limited to diagnosis or treatment of a dental problem. Subsection (1) includes any person who represents himself or herself as being able to diagnose, treat and operate on any condition of the human teeth. Subsection (3) applies to anyone who owns, maintains or operates an office for the practice of dentistry. And subsection (5) applies to anyone who professes to the public to furnish, supply, construct, reproduce, or repair any appliance “or other structure to be worn in the human mouth.”

This broad legislative definition encompasses a person who inserts temporary flippers into a patient’s mouth. The boar flippers, even though intended to be used briefly, were clearly an appliance “or other structure to be worn in the human mouth.”

³ To focus on “ridicule,” the Court unfairly ignored Woo’s decision they should not show Alberts the pictures once he saw them, by calling it his “later claim.” 128 Wn. App. 106. This came out “later” only because Fireman’s claim staff missed the appointment to interview Dr. Woo and assistants, then never rescheduled it. Fireman’s admitted it wanted to interview the insureds to investigate. RP 60-61. The assistants were part of the genesis of the joke, they thought Alberts would laugh and participated from the start. RP 471-72. Fireman’s is bound by the information it could have readily discovered. **Industrial Indem. v. Kallevig**, 114 Wn.2d 907, 792 P.2d 520 (1990), **E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.**, 106 Wn.2d at 908 (1986). This was never challenged by Fireman’s, at summary judgment or at trial. See note 9 for procedural history of the assistants.

Woo was further practicing dentistry under subsection (3) (any person who “owns, maintains or operates an office for the practice of dentistry . . .”). It is undisputed that Alberts was Woo’s employee as well as his patient. The plan to create and insert boar flippers was conceived during her treatment while taking molds of her teeth. Its genesis with the participation of the other female staff was part of the larger picture of employee relations within Woo’s office, that he also thought would help put patients at ease. RP 457-60, 64-68. Although no doubt ill-conceived in hind-sight, the plan was intertwined with employee and patient relationships, areas of Woo’s ownership and operation of the dental office. Indeed, Alberts’ complaint places the entire incident squarely within the context of her employment by Woo. CP 31. The appellate court completely ignored the employee relations and business operation aspects in both the definition of dentistry and the allegations of Alberts’ complaint.

Fireman’s argues the boar tusk flippers were not a “prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth” within the meaning of RCW 18.32.020(5), claiming that, “[t]he boar teeth flippers clearly were not intended to replace Ms. Alberts’ baby teeth.” Answer at 14. To the contrary,

the flippers indeed were to replace Ms. Alberts' extracted teeth, if only temporarily, just as the second flipper also did temporarily. That is why both flippers were correctly molded at the dental lab. The insertion also fell within the express definition of the statute. If unlicensed charlatans made temporary flippers or inserted them for the shortest time, is there any doubt they could be charged with practicing dentistry without a license under the statute? The insurer chose to cover such matters by its definitions.⁴

Moreover, the appellate court impermissibly narrowed the alternative nature of Alberts' pleading by tying its coverage analysis to the specifics of only some allegations, while ignoring the presence and import of others. Alberts stated three "alternative causes of action." Complaint, CP 37 (copy appended to Fireman's Answer to Petition). Alberts' tenth cause of action was medical negligence:

⁴ In any event, Fireman's wrongly interpreted the statute to require that the word "prosthetic" modify more than the term that followed, "device," but also all the later terms, including "bridge, appliance, or other structure to be worn in the human mouth." Anyone who has consulted an orthodontist knows that an "appliance" is not a prosthetic device intended to replace a missing body part. Rather, it is a device "designed to redirect teeth and surrounding tissues." WAC 388-535A-0010. The construction is plainly wrong.

16.1 Ms. Alberts incorporates paragraphs 1.1 through 2.25 as if fully set forth herein. Specifically, and in the alternative, she alleges that Woo's conduct constitutes medical negligence in that he failed to comply with the accepted standard of care as required by RCW 7.0.030(1) [*sic* 7.70.030(1)]. As a result, his medical negligence caused Ms. Alberts damages in an amount to be proved at trial.

CP 37. By describing this as an "alternative" cause of action, Alberts asserted this claim if the trier of fact did not believe there was a "scheme to humiliate and denigrate."

Alberts' eleventh cause of action similarly pleads "in the alternative" that "Woo failed to provide her with informed consent (written or otherwise) as required by RCW 7.70.050." CP 37-38. Again, this is an allegation of negligence, not of intentional conduct.

Alberts' twelfth cause of action alleged negligent infliction of emotional distress:

18.1 Ms. Alberts incorporates 1.1 through 2.25 as if fully set forth herein. Specifically, and in the alternative, she alleges that Woo acted in such a manner as to constitute negligent infliction of emotional distress causing her damages in an amount to be proved at trial.

CP 38. This allegation presupposed that if fully intentional conduct was not found, the trier of fact could still find against Woo for negligence in his acts or omissions.

The existence of a duty to defend depends not on whether the trier of fact believes any particular set of allegations, but whether any allegation could arguably lead to a covered judgment.

2. The Court of Appeals incorrectly extended the intentional sexual assault cases of *Blakeslee* and *Hicks* to non-criminal conduct at worst involving an ill-conceived joke to deny a duty to defend.

Washington Ins. Guar. Ass'n. v. Hicks, 49 Wn. App. 623, 744 P.2d 625 (1987) and *Standard Fire Ins. Co. v. Blakeslee*, 54 Wn. App. 1, 771 P.2d 1172, *rev. denied*, 113 Wn.2d 1017 (1989) were cases where doctors fondled breasts or had intercourse with their patients. The *per se* coverage rules in such cases have their genesis in *Rodriguez v. Williams*, 107 Wn.2d 381, 729 P.2d 627 (1986). There, male sexual abusers claimed they did not intend their conduct to harm the children, which supposedly created a coverage issue. The application of *per se* rules to an innocently conceived group joke is patently inappropriate. Among other problems discussed at BR 36-37, the appellate court mistakenly assumed Woo intended to inflict injury on Alberts (discussed above).

Ironically, the very cases on which the Court of Appeals relied – the prior appellate decisions in *Hicks* and *Blakeslee* and

the authorities cited therein – support a duty to defend. In **Hicks** the doctor’s insurer did defend the action under a reservation of rights, then filed a declaratory judgment. 49 Wn. App. at 624. **Hicks** relies heavily on two Idaho cases holding that a physician’s sexual conduct is not part of medical treatment. 49 Wn. App. at 627, citing **Standlee v. St. Paul Fire & Marine Ins. Co.**, 107 Idaho 899, 693 P.2d 1101 (Ct. App. 1984), and **Hirst v. St. Paul Fire & Marine Ins. Co.**, 106 Idaho 792, 683 P.2d 440 (Ct. App. 1984). Even though they ultimately found no indemnity coverage, both Idaho cases found the insurer should have defended. The Court held in **Hirst**:

In their complaint against Donahue, the Hirsts alleged generally that Donahue had “committed various acts of negligence and professional malpractice.” . . . Although these allegations later were determined not to be supported by the record, they stated a claim broad enough to include potential liability of St. Paul to Donahue as its insured, at the outset of the suit. [citation omitted] We affirm the district court’s conclusion that St. Paul breached its duty to defend the suit.

Hirst, 106 Idaho at 798. *Accord*, **Standlee**, 107 Idaho at 901.

Blakeslee relied heavily on both **Hicks** and the Idaho decision in **Hirst**. 54 Wn. App. at 8-10. The **Blakeslee** court fails to discuss the distinction between the duty to defend and the duty to indemnify. The court simply affirmed the trial court’s judgment

that the insurer had no duty under either. 54 Wn. App. at 3. If **Blakeslee** had consistently applied the decisions in **Hicks** and **Hirst**, the Court would have found a breach of the duty to defend.

The appellate court made the same mistake here, relying heavily on **Hicks** and **Blakeslee** without differentiating the duty to defend from the duty to indemnify.

3. **Because application of the *Blakeslee/Hicks* sexual misconduct rule to this case was very uncertain, Fireman's had a duty to defend until the law was clarified.**

Fireman's breached its duty to defend even if this Court were now to extend the sexual misconduct rule of **Blakeslee/Hicks** to this office prank. Part of why the duty to defend is broader than the duty to indemnify is that the time to determine a defense is at the outset. Prior to the Court of Appeals' decision, it was completely unknown whether any court would extend the **Blakeslee/Hicks** rule to this vastly different setting. Until a declaratory judgment or other court ruling, the Alberts' complaint had the potential to end up with a covered judgment, requiring a defense.

For decades it has been the burden of the insurer to establish that there is no potential for any covered liability under the complaint and facts known. It would be grossly unfair if not

impossible to shift the burden to insureds to prove actual coverage exists at the start. Accordingly, even if this Court were to extend the *Blakeslee/Hicks* rule to this case, Fireman's still owed a defense.

B. Under the employment practices coverage, which protected against claims for wrongful discharge, Alberts' complaint that she left Woo's employ and never returned could be considered a claim for constructive discharge.

Fireman's policy promised to defend Dr. Woo against claims seeking damages as a result of "**wrongful discharge** that arise[s] out of a **wrongful employment practice.**" Ex. 40, p. 94 (Emphasis in original). Fireman's defined those terms unexpectedly broadly too. The defined terms require only an "unfair or unjust termination" that "...inflicts emotional distress [,] . . . defames the employee, [or] invades the employee's privacy" that stemmed from "any negligent act...or breach of duty committed in the course . . . of relations with employees." Ex. 40 at 106. Alberts' complaint alleged that after she received the boar tusks and photos, she collapsed sobbing, "told the office manager not to have anyone contact her, left her employer and has never returned." She sought "front pay" as a remedy. CP 38. These allegations can fairly and reasonably suggest a claim that Dr. Woo's negligent acts – committed in the course of the employment relationship – caused so much emotional

distress and so invaded Albert's privacy that she could no longer reasonably work at Dr. Woo's office. Under Washington law, involuntary or coerced resignation is equivalent to a discharge. See BR 38. Fireman's file also disclosed that same assertion expressly stated by Alberts' attorney: "Dr. Woo's actions forced Tina to leave her employment." Ex. 43 p. 258. Yet the Court of Appeals found Fireman's owed no defense because Alberts' pleading was defective:

There is no wrongful termination tort based on boorish behavior by one's employer, unless such behavior violates an employment contract, discrimination statutes, the constitution, or public policy. Dr. Woo focuses his argument on the language of his insurance policy, but Albert was not a party to that contract. The first step in analyzing whether a duty to defend existed is to determine whether a cognizable cause of action has been pled. None was, so Fireman's Fund had no duty to defend under the employment liability portion of the policy.

128 Wn. App. at 105.

The criticism of Woo's reliance on the policy language is astonishing. The law cannot be that a duty to defend is not anchored in the language of the policy. The court's requirement "a cognizable cause of action [be] pled" raises the ghosts of code pleading and demurrers, long replaced by notice pleading and alternative pleading under CR 8. Fireman's promised to defend any

“**claim**” for employment practices liability, not just a “cognizable cause of action.” Fireman’s promised to defend “even if the allegations of the **claim** are groundless, false or fraudulent.” CP 154 (emphasis in original). A business owner purchases an insurance policy for the peace of mind that comes from knowing allegations will be competently defended and defeated. It is the job of the defense to prove a claim is not cognizable, not a test whether to defend.

C. Under the general liability coverage, Alberts’ distress was accidental because Dr. Woo did not intend the photo and flippers be shown to Alberts and Woo’s actions did arise out of his business.

Fireman’s business liability section protected Dr. Woo against claims for bodily injury⁵ from “a fortuitous circumstance, event or happening that takes place and is neither expected nor intended from the standpoint of the insured.” Ex. 40 at 032, 043, 045. The appellate court denied any duty to defend stating the complaint unambiguously alleged “only intentional conduct by Dr. Woo leading to Alberts’ injuries” 128 Wn. App. at 106. Fireman’s is charged with knowing Woo did not intend the photos be given to Alberts nor did paragraph 2.21 of the complaint allege

⁵ Fireman’s admits that Alberts’ complaint alleges bodily injury. BA 55.

he did. CP 33. The court below also ignored the alternative allegations of Alberts' complaint that separately alleged negligent infliction of emotional distress. CP 38 (quoted supra).

Alberts had also explicitly pleaded invasion of privacy, CP 35, which is a specifically covered "offense" under CGL personal injury coverage. Ex. 40, p. 32, 46. CGL policies promise to cover claims "arising out of your business." That is extremely broad, requiring only a causal nexus with some business activity. See Woo's Answer To WSTLA at 2-3. Yet the appellate court concluded Woo's actions did not "aris[e] out of [Woo's] business" -- it was "not incident to providing the professional dental services of administering anesthesia, removing teeth, and fitting temporary false teeth." 128 Wn. App. at 106, 107-108.

That focus improperly ignores all business conduct other than the actual service or end product of a business. All businesses must deal with personnel policies, management activities, leasing space, erecting signs and so forth. These acts are part of a business even though they are not themselves part of the direct medical treatment of the patient's teeth or the core activity of another business. See Woo's Motion For Recon. 18-19.

Other coverage cases similarly find unexpected and unusual conduct still arises out of business pursuits. **Jackson v. Frisard**, 96-0547 (La. App. 1 Cir. 12/20/96) 685 So.2d 622 is one such case. The Court of Appeals incorrectly believed **Jackson** approved a narrow reading of what claims arise from business activities. **Woo**, 128 Wn. App. at 107. **Jackson** actually held that even the intentional conduct of striking another on the back in horseplay during training arose from business activity. Woo's Answer To WSTLA at 3-5.⁶

Confusion can arise because if the specific business conduct was also "ordinarily incident to non-business pursuits," the exclusion is cancelled. Thus statements the business pursuits exclusion did not apply do not mean the conduct did not arise from business activity. The case of **New Jersey Prop. Liab. Guar. Ass'n v. Brown**, 174 N.J.Super. 629, 417 A.2d 117, 119 (1980) well explained the potential confusion. The trial court found the accidental discharge of a gun kept by a bail bondsman at his office arose from a business pursuit and was therefore excluded. The

⁶ Fireman's complains that Dr. Woo provided no "supporting analysis" of **Jackson v. Frisard**. Answer at 19, n. 13. To the contrary, Woo's brief reference to **Jackson** directed the Court to Woo's Motion For Reconsideration 19-20, n. 4. Petition at 18, n. 2.

appellate court found the acts were not excluded but only because the acts were also ordinarily incident to non-business pursuits. The opinion further addressed the potential confusion: “However, the courts have often obscured rather than elucidated the distinction between an activity that is not itself a business pursuit of the insured ...and one that, though arising out of a business pursuit, is not ordinarily associated with it.” ***New Jersey Prop.***, supra, at 632. That is precisely what happened in this case -- the actions arose from business pursuits, even though not normally associated with that business.

Further examples abound in homeowners cases. See for example ***State Farm Fire & Cas. Co. v. National Union Fire Ins. Co.***, 87 Ill. App. 2d 15, 230 N.E.2d 513, 515 (1967) (“It must be conceded that [in striking a rubber mallet in anger against an elevator door] he was generally engaged in a 'business pursuit'”) and ***Economy Fire & Cas. Co. v. Beeman***, 656 F.2d 269 (7th Cir. 1981) (including survey of many odd claims that still arose from business pursuits).

Fireman’s argues the Court of Appeals ruling was not too narrow under respondeat superior law. It essentially contends an employee’s claim is within the scope of business if the employee is

the victim of horseplay, but not if the employee is the perpetrator. Fireman's Answer To WSTLA at 1-2. That conundrum accompanies misapplication of **Strachan v. Kitsap County**, 27 Wn. App. 271, 616 P.2d 1251, *rev. denied*, 94 Wn.2d 1025 (1980) to this case.⁷ **Strachan** held vicarious liability attaches to employee actions intended to be "*in the furtherance of the employer's interest.*" **Strachan**, 27 Wn. App. at 274 (emphasis in original). Woo was the employer. He also tried to create a personal and joking relationship with his staff in order to foster a desired staff atmosphere he hoped would have patients more at ease. RP 457-467. The joke was not just for Alberts but also the other female assistants who participated from the start. In **Strachan** on the other hand, the officer testified he had no business purpose for pulling out his gun. This conduct arose from parts of the business the Court of Appeals ignored.

⁷ Respondeat superior was not in issue in this case. Dr. Woo's conduct was directly covered as the named insured. Ex. 40, p. 1. The other female surgical staff were sued by Alberts too but were dismissed after Dr. Woo agreed to protect them.

D. The “reasonable expectations” test argued by Fireman’s has been rejected and would support a duty to defend.

In its Answer to the Petition for Review, Fireman’s for the first time argued for a new “reasonable expectations” test for insurance coverage issues. Answer at 10, 11, 13 and quoting ***E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.***, *supra*. The ***E-Z Loader*** quote is not the same as the reasonable expectations test. This Court has described the reasonable expectations test:

The courts adopting this doctrine have varied in their requirements, but the basic approach permits the court to look beyond the four corners of the document to specific, external evidence of ambiguous circumstances which reasonably justified the insured's expectation of coverage.

State Farm Gen. Ins. Co. v. Emerson, 102 Wn.2d 477, 485, 687 P.2d 1139 (1984). The Court expressly has not adopted this doctrine. ***Keenan v. Indus. Indem. Ins. Co. of NW.***, 108 Wn.2d 314, 322, 738 P.2d 270 (1987), *overruled on other grounds by Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 946 P.2d 388 (1997).

According to Fireman’s, the Court of Appeals adopted a “focus on reasonable expectations” when it concluded that “[n]o reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to

ridicule the patient.” Answer at 11, quoting 128 Wn. App. at 103. The statement is not only not from the viewpoint of the insured, it was also a truncated view of just one subsection of the statute incorporated by the policy definitions. It was not an inquiry into the reasonable expectations of a dentist in light of the policy language.

This dentist bought a comprehensive package policy. He insured every risk his businesses faced—professional coverage, employee liability coverage, and general liability coverage. It is hard indeed to see how such policyholders would not reasonably expect a defense for these claims. They alleged medical negligence, negligent infliction of emotional distress, expressly claimed invasion of privacy and implied a constructive discharge, and the conduct arose from both treatment and employee relationship policies. They would expect a defense at least until the facts, the claims, the law or all three were clarified by a court.

E. Dr. Woo requests fees and costs on appeal.

The trial court awarded Dr. Woo attorney fees and costs on three grounds: *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991); for Fireman's breach of the common law duty of good faith; and under the Consumer Protection Act. CP 2723. Dr. Woo is also entitled to fees and costs on appeal

and asks that they be awarded by the Court. **Amazon.com Int'l, Inc., v. Am. Dynasty Surplus Lines Ins. Co.**, 120 Wn. App. 610, 619-20, 85 P.3d 974; **Svensen v. Stock**, 143 Wn.2d 546, 560, 23 P.3d 455 (2001).

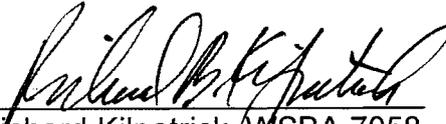
III. CONCLUSION

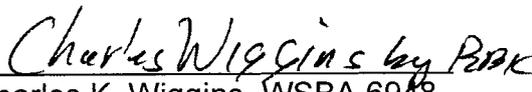
Dr. Woo respectfully asks the Court to reverse the decision of the Court of Appeals and reinstate the judgment based on the jury's verdict.⁸

DATED this 29th day of June 2006.

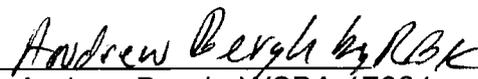
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⁸ An alternative basis for the judgment is evident. Fireman's also acted in bad faith while it did defend the claim and the suit. Fireman's did not at the outset apprise the insured of its coverage doubts, apprise the insured it was defending under a reservation of rights, causing the prime settlement opportunity to pass before Woo knew he was at personal risk. Ex. 43, p 609 & 670, RP 290-91, BR 21-22, 26. Woo urges this court to address the important coverage analysis problems raised by the published Court of Appeals opinion.

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONER WOO** postage prepaid, via U.S. mail on the 29th day of June 2006, to the following counsel of record at the following addresses:

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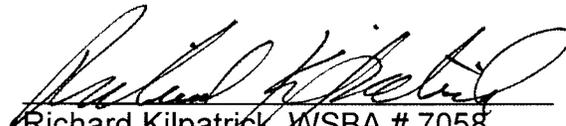
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