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STATE OF WASHINGTON

No. 78247-4
Court of Appeals number 22811-8-III^{ux}

SUPREME COURT
OF THE STATE OF WASHINGTON

PARDNER WYNN,

Respondent,

v.

JOLENE EARIN, et ux.,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. COUNTER STATEMENT OF CASE

On January 31, 2003, Pardner Wynn, (hereinafter "Wynn"), Respondent in this petition for review, and Plaintiff at trial, filed a complaint for damages against Jolene Earin (hereinafter "Earin"), Petitioner in this petition for review, and Defendant in the trial court action for damages, for continuing violations of RCW 70.02, et seq., entitled the Health Care Information Access and Disclosure Act. (hereafter "The Act"). In part, Wynn claimed Earin engaged in unauthorized disclosure of medical information under RCW 70.02.020, .030, and .060, committed by five different acts, *CP 35, at paras. 59-61*, and negligence attendant to the above as a whole. *CP 37, paras. 69, 70*.

Earin, a counselor, had provided individual counseling to Wynn from September 1997 to May 1998. *CP 28*. During a later divorce action between Wynn and his then wife, Earin improperly communicated private information from Wynn's individual counseling sessions to a court appointed guardian ad litem, did so inaccurately, and did so with an agenda against Wynn. *CP 30, paras. 18-19*. In order to refute claims Earin was making, Wynn requested his medical records from Earin. *CP 30, paras. 20-22*. Earin filed a knowingly false declaration under oath on Wynn's ex-wife's behalf claiming that Wynn's records were "not readily accessible." *CP 31, paras. 23-27; 32-34*. After being ordered to produce the records by a

Superior Court Commissioner, Earin then claimed Wynn's records had been stolen from her car. *CP 33, paras. 42-47.* Earin then testified for Wynn's wife against Wynn at his divorce trial. She did so without compulsory process or authorization. *CP 33-34, paras. 49-50.* There, she offered significant information about Wynn from his private counseling sessions, and did so far outside the scope of what was asked of her in questioning. *CP 34, paras. 50, 51, 54.*

Earin denied all violations, and denied negligence. *CP 423-25.*

Prior to trial, Earin moved for partial summary judgment in an effort to exclude claims related to her volunteering to testify at Wynn's dissolution trial, and her testimony at that trial. *CP 118, para. 2.* It was uncontroverted that Earin had received no compulsory process from Wynn's ex-wife to release Wynn's information. *CP 462-63. See also, e.g. CP 509, lns. 7-17.*

The trial court granted Earin immunity for both acts. *CP 906-07; RP 63, lns. 11-13; RP 66, lns. 3-4.*

Trial on the statutory and negligence claims lasted eight days.

Wynn was allowed to pursue claims up through the time Earin lost his counseling records. Earin used the trial court's dismissal of claims related to her testimony at Wynn's dissolution trial as a break in the causal

chain for damages. *RP 1229, Ins. 11 – 22.*¹

Following the close of evidence, the court directed verdicts in Wynn’s favor on the Health Care Act (RCW 70.02) as to Earin’s disclosure of Wynn’s information without authorization to the GAL, and her violation of the security of records requirements. *CP 928, CP 1078.* The court additionally directed a verdict in Wynn’s favor on the issue of Earin’s negligence as to the record storage claim. *CP 928, inst. 17 at 3.*

The trial court then removed damage determinations from the jury related to the two statutory claims on which it had directed verdicts, reserving those damage determinations for itself.² *CP 1134, 1135, 1136, 1153-1154, CP 928 v. 923.* The jury was asked to determine both negligence and damage valuation for one unauthorized disclosure of information (via phone), and damage from one directed verdict negligence finding (records loss). *CP 933.*

The jury returned its negligence verdict in favor of Wynn, and found

¹ In closing, Defense counsel argued: “Ms. Earin, when she is subpoenaed as a witness and when she signs a declaration and when she gives testimony in depositions and when she gives testimony in trial, cannot be held liable under our law for her statements or conduct as a witness. If there was any legal claim against Ms. Earin for her testimony as a witness in the custody trial,... then you would have been instructed about it by Judge O’Connor and you would consider and be charged with considering whether or not that was appropriate and what damages flowed from it. It is not part of the case. Ms. Schultz’s straight line is, therefore, interrupted in an extremely substantial way because the outcome here would have been exactly the same.” *RP 1229, Ins. 11-22.*

² The court concluded that under RCW 70.02.070, the trial court itself was required to address those damages post-trial.

proximate causation for damage by Earin's negligence in losing Wynn's medical records. *CP 933*. The jury awarded Wynn the entirety of the psychological expenses sustained by him in his therapy with Dr. Paul Domitor, Ph.D. *CP 933, verdict form, and RP 343 as to costs totaling \$2,790.*³ The jury awarded \$0 for non-economic damages. *See CP 833, verdict form, p. 2.*

A. Post-trial

Following trial, Wynn requested that the trial court determine the actual damage issues from the statutory violations on which it had directed verdicts and reserved damages to itself. *CP 954*. The trial court declined to decide damages. *CP 1081, para. 12*. Wynn also moved for judgment notwithstanding the verdict on the non economic damage issue, arguing that the jury's monetary verdict on the negligence violation was inconsistent as to damages. *CP 953, 949-52*. The court denied the motion. *CP 1083-84*.

Wynn requested attorney fees and costs pursuant to RCW 70.02 for prevailing on his Healthcare Information Access and Disclosure Act claims. *CP 954*. The court found that although Wynn was the prevailing party, only ten percent of total fees and costs expended would be reimbursed. *CP 1414*,

³ Domitor counseled Wynn related to these issues of anxiety and anger towards this counselor from March 26, 2001 until his release in July of 2002. *See RP 326-27, 337*. The total bill for all of this psychological intervention was \$2,790. *RP 343*.

1417, 1080, 1077 (\$11,943 of fees and \$1,100 of costs).

Notice of Appeal in this case was filed on March 1, 2004.

B. The Published Decision

On December 22, 2005, the Division III Court of Appeals reversed the decision of the trial court excluding claims of unauthorized health care information dissemination based on witness immunity. *Wynn v. Earin*, 125 P.3d 236 (Wn.App. Div. III, 2005).

Division III also reversed the trial court's refusal to grant proper fees and costs as accrued pursuant to RCW 70.02.170 (2), when the court itself found that the statutory claims were inextricably intertwined on issues of proximate cause and damages. *Id. at 245*.

II. REVIEW SHOULD BE DENIED

Per RAP 13.4(b), the holding of Division III neither conflicts with Supreme Court precedent, nor with any other Appellate level decision. To the contrary, the decision consistently applies both judicially developed witness immunity protections and the nondisclosure provisions of the Health Care Information Act. Moreover, the decision consistently applies the law of prevailing party attorney fees relative to claims that are inextricably intertwined.

III. ARGUMENT

A. Witness immunity does not extend to situations where disclosure itself is prohibited by statute, and where a witness's testimony is for the very purpose of disclosing that information in violation of statute.

Petitioner Earin argues that Division III erred by holding that witness immunity does not apply to information acquired by a witness in a prelitigation confidential professional relationship that was formed for nonlitigation purposes. *Wynn v. Earin*, 125 P.3d 236, 241 (Wn.App. Div. III, 2005) citing *Gustafson v. Mazer*, 113 Wn.App. 770, 776-77, 54 P.3d 743 (2002), and *Childs v. Allen*, 125 Wn.App. 50, 56, 105 P.3d 411 (2004), *review denied*, 155 Wn.2d 1005, 122 P.3d 185 (2005).

Petitioner also disputes Division III's holding that statutes prevail over conflicting common law doctrines. *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 36-37, 323 P.2d 241 (1958). Division III held that witness immunity is a common law doctrine, *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 125 (1989), and the courts cannot simply ignore statutes that conflict with case law. *See Wynn v. Earin*, 125 P.3d 236, 241 -242, *citing State v. Varga*, 151 Wn.2d 179, 194, 86 P.3d 139 (2004) (*quoting Windust*, 52 Wn.2d at 37, 323 P.2d 241). Division III concluded that the Health Care Information Act expressly creates a cause

of action for unauthorized disclosures of health care information, even in judicial proceedings. RCW 70.02.060. *Id.*

Division III's holdings are proper, and are in accord with precedent, as well as the legislative act itself.

In *Bruce v. Bryne – Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d, 123, 776 P.2d 666 (1989), this State's Supreme Court explained the policy behind witness immunity—a policy not implicated in this case. Immunity is deemed proper to preserve the integrity of the judicial system by encouraging full and frank testimony. *Bruce*, 113 Wn.2d. at 126, 776 P.2d at 667. The idea is to prevent “self censorship” by witnesses through apprehension of subsequent damage liability. *Id.* Such censorship may “deprive the finder of fact of candid, objective and undistorted evidence.” *Id.* The rule in favor of immunity also rests on inherent safeguards against “false or inaccurate testimony which inure in the judicial process itself”—i.e. a witness's oath, prosecution for perjury and the hazard of cross examination. *Id.* Immunity is thus given for a reason, and the reason is to promote the integrity of the judicial process.

But here, such a judicial policy of encouraging health-care provider witnesses to come forward and give “candid and accurate testimony” directly contradicts statutory law restricting medical professionals from providing such “candid” disclosure of protected patient information without proper

releases from the patient. Thus, a judicially created impetus to disclose without penalty directly contravenes the enacted legislative intent of ensuring confidentiality of patient information *by* penalizing such disclosure.

Moreover, as to the second basis for such immunity, “safeguards” of accuracy through cross examination and threat of perjury are not at issue here. Accuracy is not the point—disclosure is the point. The law against disclosure is violated when the healthcare provider witness *releases the information, regardless of its accuracy.*

Thus, neither judicial purpose for immunity is implicated or furthered by a civil action against a health care provider under RCW 70.02 for improper release of medical information without authorization.

Moreover, judicial doctrines of immunity cannot override statutory law. Public policy is created by the legislature. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014, 1019 (2001). In enacting RCW 70.02, the legislature has granted medical patients certain privacy rights enforced specifically through a statutory civil action with remedies for violation. Judicially created policies of witness immunity created to promote the integrity of the judicial system cannot trump statutorily granted actions just because the violator violated the law in the course of a judicial proceeding. This law does not except judicial proceedings. To the contrary, the Act encompasses proper processes for dealing with such proceedings. *See e.g.*

RCW 70.02.060 (compulsory process).

Earin's analysis on this issues simply refuses to acknowledge the critical difference between the *Bruce* Court's urging "frank and objective testimony" when the testimony is *properly before the court* and the trial court's application of the same rule in this case where Earin's testimony was *expressly prohibited by the legislature*.

Division III's analysis of this issue is a proper means of reconciling both the judicial policies of witness immunity, as well as the body of law contained in RCW 70.02 prohibiting disclosure of sensitive medical information.⁴

B. Attorney fees cannot be properly segregated on statutory claims if the same evidence and procedures are required to prove the statutory claims as well as the common law claims.

Petitioner also disputes the reversal of the trial court in failing to award proper fees to Wynn for showing the violations of the Health Care Act which he suffered. Division III held that Wynn's statutory and common law claims were inextricably intertwined on the issues of

⁴ In *Deatherage v. State Examining Bd. Of Psychology*, 134 Wn.2d 131, 140, 948 P.2d 828 (1997), the court held immunity improper to shield a professional from disciplinary proceedings based upon unprofessional conduct while testifying as an expert witness, distinguishing such a proceeding from a civil suit against the professional. Here, a civil suit is against the professional, so the reasoning of *Bruce* is more on point. Moreover, this is not a case based on negligent formulation of an opinion by a retained expert—it is the case of a non expert who violates the law in testifying at all.

proximate cause and damages. *Wynn*, 125 P.3d at 245. Division III held that, as Wynn alleged a course of conduct comprising a series of breaches--some statutory, some common law, some both--that caused a single injury, then he was entitled to argue to the jury that the ultimate emotional distress was proximately caused by a series of acts and conditions. *Id.*, citing e.g. *Caughell v. Group Health Corp. of Puget Sound*, 124 Wn.2d 217, 233-34, 876 P.2d 898 (1994). As a result, absent “some principled way to sort out what caused what,” the statute entitles Wynn to attorney fees for establishing the entire series of events that form the basis of his alleged damages. *Id.* This holding is also in accord both with existing precedent and with RCW 70.02.170.

Following two weeks of trial, directed verdicts in Wynn’s favor on both statutory and negligence claims, the jury’s affirmation of two negligence claims, and an award of full medical damages, Wynn presented a detailed cost bill of over \$130,000 of fees and \$11,000 of costs under RCW 70.02.170, including expert fees, all of which had been accrued over two years of litigation and trial. *CP 1414, 1417.*

The trial court held that it had “difficulty segregating work on the statutory violations from work performed on other claims.” *CP 1080, para. 6.* It thus selected a figure of 10 percent of this fee bill to reflect work it felt was “allocated to discovery regarding theft of the medical records and

analyzing them in the context of the statutory violations.” *CP 1080 para. 8.*

Wynn thus received recovery of only \$11,900 for fees – the equivalent of less than five days of legal work-- and recovered only \$1,100 of over \$11,000 in actual costs. While not directly commenting on a trial court’s awarding fees only for parts of discovery and “analysis” of that discovery—neglecting that trial itself was required on the statutory claims-- Division III reversed the trial court’s segregation of claims, and awarded full fees. This holding is consistent with the law.

1. Unitary claims under a public policy act are not properly segregated to reduce fees.

Mandatory fee provisions tend to occur in actions which are consistent with “private attorney general” theories. *See e.g. Fahn v. Civil Serv. Comm’n of Cowlitz County*, 95 Wn.2d 679, 684-85, 628 P.2d 813 (1981); *see Martinez v. City of Tacoma*, 81 Wn.App. 228, 235, 914 P.2d 86 (1996). The purpose of fee statutes is to enforce a legislative goal, and to make it financially feasible for private individuals to litigate these sorts of violations. *See Martinez*, 81 Wn.App. at 235, 914 P.2d at 90. In such areas, “liberal instruction of attorney fee entitlement” is called for in order to encourage private enforcement. *Id. See Blair v. Washington State Univ.*, 108 Wn.2d 558, 570, 740 P.2d 1379, 1385 (1987)(noting that remedial

provisions are to be construed liberally to encourage private enforcement of the law). The point of liberal construction in public policy matters is to put aggrieved parties in as good a position as if the other party had performed. *See e.g. Eagle Point Condo. Owners Ass'n.*, 102 Wn.App. 697, 9 P.3d 898 (2000). Indeed, in matters of public policy, lodestar methods are universally used as a starting point for determining the amount of a reasonable fee, i.e. the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193, 203-04 (1983).

In *Brand v. Dept. of Labor & Indus.*, the court held that worker's compensation claims under the Industrial Insurance Act formed a "unitary nature" of claims. *139 Wn.2d 659, 673, 989 P.2d 1111, 1118 (1999)*. The statutory chapter is a "self-contained system that provides specific procedures and remedies for injured workers." *Id. at 668*, 989 P.2d at 1115. The degree of overall recovery is inconsequential. *Id. at 670*, 989 P.2d at 1116.

Claims brought under such statutory acts are thus different from discrete, unrelated claims, such as those at issue in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Statutorily based claims often "deal with one set of facts and related issues." *Brand*, 139 Wn.2d at 673, 989 P.2d at 1118. On such closely related claims, an attorney's work on each theory is work "expended

in pursuit of the ultimate result achieved.” *Id.*, quoting *Hensley*, 461 U.S. at 435. Such claims are not to be segregated in terms of successful and unsuccessful claims for the purpose of calculating fees. This interpretation is consistent with the purpose of the Industrial Insurance Act as a whole. *Id.*

This reasoning is directly on point. Wynn’s claims were brought under the Health Care Information Access and Disclosure Act’s provisions. The Act serves a state interest. *RCW 70.02.005*. It is a “self contained system” of violations and remedies to promote a public policy. The trial court agreed that the Health Care Act involves public policy issues. *CP 1080, para. 7*. It agreed that segregation of statutory violations and negligence was improper because these were many acts causing one injury. *RP 1144-45*. These were thus “unitary claims,” based on one set of facts and related legal issues under one act.

Unauthorized disclosure was found in Earin’s acts of releasing information to a GAL without authorization and by her act of losing Wynn’s records. Improper record retention was also found as a statutory violation in the transport of records.⁵ Thus, segregating acts which caused those claims, or even segregating the “claims” themselves from other acts or claims for the

⁵ In fact, the only “acts” resulting in “unsuccessful” claims were those not determined based on immunity, and an amended claim for violation of Wynn’s rights to his records under compulsory process as both a statutory and a negligence claim, where the court itself granted the amendment, but then did not allow the claim to be determined. *See p. 1 above identifying claims and CP 1078*.

purpose of calculating fees, was contrary to the purpose of the Act as a whole.

2. Statutory fees are not properly reduced or segregated simply because those violations also proved negligence.

Moreover, per Wynn's complaint itself, the evidence obtained and used for the demonstrated statutory violations was the very same evidence used to demonstrate negligence. *CP 37, para. 69, 70*. The trial court itself noted this intertwining in its discussion on bifurcating statutory damages from negligence damages: "...it is one injury, and the totality of the circumstance... the violation of the act is the lynch pin of what constitutes a violation of the standard of care." *RP 1144, lns. 16-25*. The court further noted, "The negligence, the violation of the standard of care, and of the violation of the statute is, *they are inextricably entwined.*" *RP 1146, lns. 14-16. (Emphasis added.)* There were many acts but only one injury. *See RP 1144, lns. 8-15*.

It was thus error of law for the court to segregate proof of negligence from proof of statutory violations in an effort to reduce fees. The evidence was one in the same. All that differed was the law acting on that evidence. Division III noted as much.

Finally, RCW 70.02.170 does not base prevailing party fees on a

showing of any degree of damage. To the contrary, under RCW 70.02.170, fees are based *purely* on demonstrating a violation of the Act. Thus, the violations alone, found both by Earin's acts of releasing information to a GAL without authorization and by her act of improper record retention, provided for Wynn to be redressed his fees and costs for having to go to trial to demonstrate such.

Policy concerns overwhelmingly mitigate in favor of such a theory. Damage for records loss, even without a surrounding divorce action, is elusive. There is normally little in the way of an emotive component. No possibility of any reasonable contingency exists to motivate private enforcement through private counsel. *See CP 982-983, paras. 15-19 (Declaration of Plaintiff's counsel as to undesirability of the case)*. Thus, no private party would have reason to exercise this legislative right of relief at all, even if they are wronged, because they would be harmed financially from the pursuit of violations if they were not fully compensated for fees and costs.

Further, the idea of bringing such a matter against a medical malpractice carrier with million-dollar coverage carries with it all of the attendant aggressive defenses of such coverage. *See, e.g. CP 983, para. 18; 984, para. 22; 986-988 paras. 24-31*. Pursuing such a case is beyond the means of most persons wronged, even if the violations are a matter so

evident as to be subject to a directed verdict even as to negligence.

As evidenced here, throughout a five-volume record, this unrepentant health care provider at no time acknowledged *any* violation of statute or negligence. She instead concocted defense theories designed to increase litigation costs to force settlement, refused to comply with discovery requests, refused to appear at depositions, ignoring subpoenas served on her to compel her to appear (*CP 1097-1101*), disputed show cause orders that were properly issued (*CP 1096-1150, 1160-1162, 1190-1193, 1181-1182*), litigated and forced bizarre interpretations of every word of the relevant statute on which supplemental instructions were required (*see e.g. CP 808, 888-898*)(at least one proposed interpretation of which survived until the trial court directed a verdict, and then directed the jury otherwise (*CP 928, para. 2*)), argued for such things as “waiver” of privileges (*CP 904-905*), and claimed that the law required the “clarification” of the phrase “health care provider” for the counselor to understand her duties under the act, but then noted, after all of this, that she wouldn’t change her conduct anyway.⁶ In closing, defense counsel proclaimed that Earin would do the same things all

⁶ The findings made by the court, stated defense counsel, “provided needed clarification to this area of law,” *RP 1224*, as if the statutes are not clear on their face, and that the counselor simply refused to follow their plain language. Defense argued that the court’s clarification “certainly helped Ms. Earin in terms of the way she will comport her conduct in the future, and it certainly provided some clarification with respect to the issues that you need to decide in this case.” *RP 1224*. Fees were available to Wynn for having demonstrated these violations whether or not Earin ultimately lost his records. That loss simply caused more damage.

over again if asked, because, impliedly, violating the law was the right thing to do if children were involved. She equated following the law as being offensive under “considerations of humanity.”⁷

Even after directed verdicts were entered against her on her theories and claims,⁸ and jury verdicts entered, Earin requested that her *own* fees be covered as the “prevailing party.” *CP 1505-1508*.

In sum, the forced enlightenment of one indignant and unrepentant health care provider for the benefit of society cost over \$100,000 of Wynn’s own resources. The defense itself spent \$50,000 claiming no violations occurred, while justifying defiance of the law.

Anything less than an award of full fees in this case results in the aggrieved patient being damaged again – first by the violation, then by the

⁷ Defense counsel: “When this case is over, Jolene Earin is, obviously, going to have releases in her possession before she talks to anyone, and she is, obviously, leaving this courtroom much wiser than she walked in, but I will tell you something else, when an officer of the court and a child psychologist who is charged with probably the most solemn duty that I can imagine, deciding where kids are going to be raised, who is the custodial parent, . . . in the best interests of those children’s health and welfare and safety, you know what she is going to do? She is going to answer the questions truthfully...when Earin is contacted and when she is asked by someone who has this obligation from the court to find out about where these kids should leave (sic) and how often the other parents should see them, she is going to answer those questions truthfully and honestly and to the best of her ability, and she is not going to spin her responses and she is not going to temper her responses. She is going to act in the best interests of her patient, those children, and any suggestion that she should do any less than that is offensive under any consideration of public policy or any consideration of humanity.” *RP 1238 – 1239*.

⁸ The instructions themselves reflect the contentiousness with which this matter was addressed. Not only did Earin deny liability whether statutory or negligent, but litigated nearly every word in the operative statutes. *See CP 1067, 1068, 1070, 1074-1075*. Ultimately the court provided jury instructions addressing these defenses. *RP 923, 924, 925, 927*, and ended up directing a verdict on such. *RP 928*.

healthcare provider's aggressive denial of the violation, and her aggressive defense against it, and, upon directed verdicts being entered against her, by her continued claim of justification and by then finding out, to his dismay, that the court would not – despite directing verdicts in his favor – allow him to recover what it cost him to reach a just result.

Division III properly held that it was abuse of discretion for the trial court to arbitrarily reduce fees to allow for only some work performed pretrial, and remanded for a proper fee award.

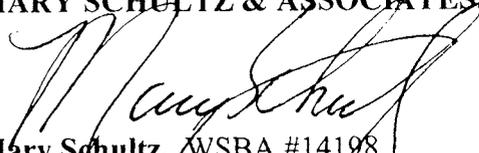
IV. CONCLUSION

The holding of Division III as to witness immunity is the *only* result consistent with both established judicial precedent, and statutory law. Moreover, its holding as to fees and costs on inextricably intertwined claims is in accord with established precedent. Under RAP 13.4 (b), there is no basis for Supreme Court review.

DATED this 21 day of Feb, 2006.

Respectfully submitted,

MARY SCHULTZ & ASSOCIATES, P.S.,

A handwritten signature in cursive script, appearing to read "Mary Schultz", written over the printed name and contact information.

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SUPREME COURT

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CERTIFICATE OF SERVICE
BY C. J. HERRITT

The undersigned hereby certifies that she is a person of such age
and discretion as to be competent to serve papers.
CLERK

That on the 21st day of February, 2006, she served via regular mail a copy of Respondent's Answer to Petition for Review to the persons hereinafter named at the places of address stated below which are the last known addresses.

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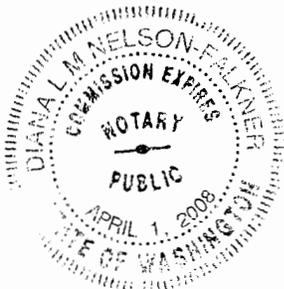
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Becky Gilbreth

BECKY GILBRETH

SUBSCRIBED AND SWORN to before me this 21st day
of February, 2006.



Diana Nelson-Falkner

NOTARY PUBLIC in and for the State of Washington,
Residing in Spokane. Commission Expires: 04/01/08

