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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NO. 27969-III

ELIZABETH D. KALTREIDER,

Appellant

v.

LAKE CHELAN COMMUNITY HOSPITAL

Respondent

RESPONSE TO PETITION FOR REVIEW

EVANS, CRAVEN & LACKIE, P.S.

Robert F. Sestero, Jr., WSBA #23274
818 West Riverside, Suite 250
Spokane, Washington 99201-0919
Ph: (509) 455-5200
Attorney for Respondent

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1. Identity of Respondent.

Lake Chelan Community Hospital, hereinafter "LCCH".

2. Respondent's Additional Statement of the Case.

Ms. Kaltreider's *Petition* fails to cite any part of the record demonstrating notice of the potential of Mr. Menard's alleged actions. Mr. Menard was the subject of a background check before he was hired at LCCH in 2001. CP 29, 165. He was provided an employee handbook and trained over subsequent months. *Id.* He underwent sexual harassment training. CP 29-30. He was aware of the LCCH "zero tolerance" policy on such behavior. CP 30, 166. After leaving the hospital in 2002 to pursue another opportunity, Mr. Menard was re-hired by LCCH in March 2007. He again applied, passed a background check and underwent training. CP 30, 31, 166, 167.

Prior to Ms. Kaltreider's admission in June 2007, LCCH had not received any complaints regarding Mr. Menard, nor had anyone complained of inappropriate conduct before Ms. Kaltreider left the hospital. CP 31, 167, 169, 177-78. Ms. Kaltreider never reported any of Mr. Menard's alleged inappropriate actions while she was at LCCH, even when she became irritated at the recommendation that she extend her stay. CP 170-71, 173, 174.

At first Mr. Menard resisted Ms. Kaltreider's advances, telling her that he could "be fired for this type of activity," in seeming recognition that any sexual contact would be outside his employment and unacceptable. CP 171-72. He failed to rendezvous with Ms. Kaltreider after her discharge because it would be inappropriate. CP 172. He understood that any flirtatious or sexual activity with a patient was inappropriate, during both of his periods of employment with LCCH. CP 172. It is obvious that LCCH had no notice whatsoever of Mr. Menard's inappropriate interaction with Ms. Kaltreider.

The cornerstone of Ms. Kaltreider's argument is that because the vulnerability of an in-patient substance abuse patient is mentioned in Washington Administrative Code nursing regulations, nurse George Menard's alleged conduct was "not legally unforeseeable" by co-defendant LCCH. Ms. Kaltreider argues that the WAC composition alters existing law, removes foreseeability from summary judgment consideration and essentially imposes strict liability for any conduct of an employee. Ms. Kaltreider's argument ignores the basic tenet of foreseeability, which is "notice."

Ms. Kaltreider asked the Court of Appeals:

1. Does an inpatient alcohol treatment program at a hospital owe a vulnerable patient a duty of reasonable care to protect from foreseeable harm?

2. Is sexual misconduct by a hospital inpatient treatment facility registered nurse to a vulnerable patient legally unforeseeable harm?

Appellant's Brief, p. 3. Those are precisely the Issues raised by Ms. Kaltreider in this *Petition*. *Petition For Review*, p 1. The controlling case law cited by the parties and the Court of Appeals (examined infra) recognize the duty owed by a hospital to a patient. The second issue was decided by the Court of Appeals in this case.

For the following reasons, the *Petition For Review* should be denied.

3. Argument In Response To Petition.

The *Petition* – without citation to the Rule – is brought under RAP 13.4(b)(1) and (4), and claims that the Court of Appeals *Opinion* is in conflict with the Supreme Court decision in *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) (*Petition*, pp. 6-7), and that it involves "an issue of substantial public interest that should be determined by the Supreme Court." *Petition*, p. 8-9. According to Ms. Kaltreider, *duty* in a negligence case is "directly related to impairment." *Id.* Ms. Kaltreider then makes the illogical leap that because of her *status* as a chemical dependency patient, she was "particularly vulnerable to sexual misconduct by hospital nursing staff." *Id.* Ms. Kaltreider contends that her

mere status as an inpatient substance abuse client relieves her of the evidentiary requirements to provide evidence of notice or to raise an issue of fact regarding foreseeability.

A. There Is No Conflict Between The *Opinion* And Previous Washington Supreme Court Case Law.

The Court of Appeals began its analysis by noting that "an essential element in any negligence claim is the existence of a legal duty the defendant owes to the plaintiff." *Opinion*, p. 3. The existence of duty is a legal question. *Id.* Ms. Kaltreider claimed that LCCH failed in its "duty to protect" her from Mr. Menard's advances.

Ms. Kaltreider's analysis mistakenly focuses on her status as a patient and not on the actions of the perpetrator, Mr. Menard. In so doing, Ms. Kaltreider asserts that her status, in-and-of-itself, establishes against LCCH the foreseeability of Menard's conduct. Stated another way, throughout the course of this litigation Ms. Kaltreider has relied solely on her status as the recipient of inpatient substance abuse care as *the* indicator of foreseeability rather than providing evidence that LCCH had notice of Mr. Menard's conduct in time to prevent his advances toward Ms. Kaltreider, or evidence that there had been similar instances at LCCH prior to Ms. Kaltreider's admission.

There is no conflict between the *Opinion* of Division III, Court of Appeals herein, and *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997). *Niece* was quite fact-specific in that it involved a victim who was significantly developmentally disabled, a group home with a history of assaults by staff on patients, and a policy by the group home against such contact between its staff and residents because of those previous assaults. None of those facts are present here. Notably Ms. Kaltreider testified to being "independent" and "absolutely" capable of making her own decisions. CP 171. In fact, Kaltreider voluntarily left Lake Chelan Hospital against medical advice for reasons unrelated to the Menard interactions. CP 170-71.

Here, unlike in *Niece*, Ms. Kaltreider was not completely impaired. She voluntarily admitted herself to LCCH and engaged in consensual sexual acts with Mr. Menard.

See Opinion, p. 5, (likening Ms. Kaltreider's claim to those in *Smith v. Sacred Heart Medical Center*, 144 Wn.App. 537, 545-546, 184 P.3d 646 (2008), wherein neither patient claimed physical or mental disability). "Because Ms. Kaltreider was not a vulnerable adult, LCCH did not have a duty to protect against the actions of a third party." *Opinion*, p. 5. Ms. Kaltreider's own actions and decision-making demonstrate that she was not "vulnerable" or disabled.

Yet Ms. Kaltreider claims simply that because a patient is described as “vulnerable” under state nursing regulations it was foreseeable that Mr. Menard would pursue a relationship with her. Even *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) recognizes that it was the extent of the patient's disability that in large part placed the duty upon Elmview:

While an employer generally does not have a duty to guard against the possibility that one of its employees may be an undiscovered sexual predator, *a group home for developmentally disabled persons* has a duty to protect residents from such predators regardless of whether those predators are strangers, visitors, other residents, or employees.

Niece v. Elmview Group Home, 131 Wn.2d at 49 (emphasis added). The *Niece* Court then explained foreseeability as it related to a group home for the developmentally disabled as follows:

. . . Given Niece's total inability to take care of herself, Elmview was responsible for every aspect of her well being. This responsibility gives rise to a duty to protect Niece and other similarly situated vulnerable residents from a universe of possible harms. *This duty is limited only by the concept of foreseeability. Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

Given Elmview's duty to protect Niece from all foreseeable harms, the next issue is whether, as Elmview suggests, sexual assault was legally unforeseeable. [Staff member's] assault was not legally unforeseeable as long as the possibility of sexual assaults on residents by staff was within the general field of danger which *should have been anticipated*. . . . The *prior sexual assaults at Elmview*, the

earlier policy against unsupervised contact with residents, the opinion of Niece's expert that such unsupervised contact is unwise, and Legislative recognition of the problem of sexual abuse *in residential care facilities*, all demonstrate that sexual abuse by staff *at a group home for developmentally disabled persons* may be a foreseeable hazard against which reasonable precautions must be taken.

Niece v. Elmview Group Home, 131 Wn.2d at 50-51 (emphasis added).

In the case at bar, there is no evidence that LCCH was on notice that Mr. Menard or any other nurse had a history of sexual contact with patients or that the hospital had previous experience indicating that substance abuse inpatients were in fact vulnerable to sexual advances, like those developmentally disabled patients at Elmview Group Home.

In determining whether sexual misconduct by a staff member is foreseeable, this court may look to whether there were prior sexual assaults at the facility or by the individual in question. *Niece*, 131 Wn.2d at 50. Here, LCCH did not have knowledge of prior misconduct at the hospital or by Mr. Menard. Further, Mr. Menard's actions were outside the scope of his duties. Without evidence that Mr. Menard's conduct was known or reasonably foreseeable to LCCH, there was no duty to protect. (Emphasis added).

See Opinion, p. 5, Ms. Kaltreider has produced no evidence of previous reported assaults at LCCH, unlike *Niece*. The facts in *Niece* result in a distinct rule: the special relationship *between a group home for the developmentally disabled and its vulnerable residents* creates a duty of reasonable care, owed by the group home to its residents, to protect them

from all foreseeable harms including assaults by staff. *Niece v. Elmview Group Home*, 131 Wn.2d at 51. The *Niece* factors are not present here.

The record in this case shows that LCCH performed a background check before hiring Mr. Menard. CP 29, 165. Mr. Menard was given training and materials regarding hospital policy, including its zero-tolerance policy on sexual communications between anyone on hospital grounds, whether patient or staff. CP 29-30, 165, 166. No evidence suggested that Mr. Menard had any such proclivity. CP 30, 166. There were never any complaints about Mr. Menard prior to Ms. Kaltreider's discharge from LCCH. CP 31, 167, 169, 177-178.

Upon admission to LCCH, Ms. Kaltreider understood that sexual contact between staff and patients was prohibited. CP 170. She specifically denied any physical or cognitive disabilities. CP 171. She described herself as "absolutely" capable of making her own decisions. CP 171. The acts between Mr. Menard and Ms. Kaltreider were admittedly consensual. CP 173.

Ms. Kaltreider argues simply that because she was inpatient for substance abuse treatment foreseeability becomes a question of fact. The *Niece* Court refused to adopt such a non-delegable duty of protection rule in the situation of a group home for the profoundly disabled, which is in essence the argument made by Ms. Kaltreider and rejected in this case.

Kaltreider instead posits that because Mr. Menard may have violated nursing regulations, LCCH is responsible for his actions regardless of an absence of notice or foreseeability. Rejecting evidence similar to what Ms. Kaltreider tried to introduce through Dr. Ethier (CP 227-232; 235-236; 238-239; *Petition*, p. 4), the *Niece* Court held:

But the broad negligence liability that we have already recognized creates adequate incentives for the operators of group homes for developmentally disabled persons to take all reasonable precautions against sexual abuse in their facilities. The nondelegable duty theory would only impose additional liability without corresponding fault, making group homes the insurers of their employees' conduct. If a group home is to be held liable for an employee's sexual assault even where the group home is without fault, there must be some other sound policy reason to shift the loss created by the employee's intentional wrong from one innocent party to another. . . .

Niece v. Elmview Group Home, 131 Wn.2d at 56. Without evidence that Mr. Menard's actions were foreseeable to LCCH, Ms. Kaltreider advocates the adoption of a nondelegable duty and strict liability cause of action. The *Opinion* by the Court of Appeals in this case is entirely consistent with *Niece v. Elmview Group Home*, supra.

Smith v. Sacred Heart Medical Center, 144 Wn.App. 537, 184 P.2d 646 (2008), is a clear statement of Washington law as applied to a fact pattern like Ms. Kaltreider's. In *Smith*, two former psychiatric patients sued Sacred Heart Medical Center (SHMC) in negligence,

stemming from the patients' sexual contact with a former nursing assistant after each patient's discharge. Part of the alleged conduct occurred while each of the plaintiffs was an inpatient at SHMC. While the plaintiffs argued that SHMC was liable based upon its "special relationship" with each of the plaintiffs, the Court rejected that argument:

Mr. Judici worked as a nursing assistant for Sacred Heart. But there is no showing here that Sacred Heart knew or should have known that Mr. Judici was a danger to its patients. There is no showing that he had engaged in similar acts before he committed the intentional torts alleged here. [Plaintiffs] have not established that Sacred Heart negligently supervised Mr. Judici. The court then properly dismissed the negligent supervision claim against Sacred Heart.

Smith v. Sacred Heart Medical Center, 144 Wn.App. at 544, citing *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). The *Smith* Court held that an employer has a duty to prevent its employees from harming victims, and that foreseeability requires that the alleged harm fall within the general field of danger covered by the employer's duty.

While "sexual assault by a staff member is not a legally unforeseeable harm," *Niece*, 131 Wn.2d at 51, 929 P.2d 420, there must be something more than just speculation and possibility. *See id.* at 49 . . . ("an employer generally does not have a duty to guard against the possibility that one of its employees may be an undiscovered sexual predator"); *see also Schooley vs. Pinch's Deli Market, Inc.*, 80 Wn.App. 862, 869, 912 P.2d 1044 (1996) ("[F]oreseeability means foreseeability from the point of

view of a reasonable person *who knows what the defendant's conduct will be*, but who does not know the specific sequence of events that ultimately will ensure therefrom" . . .).

Smith v. Sacred Heart Medical Center, 144 Wn.App. at 546. The *Smith* Court reconciled both its decision and the *Niece* decision. Further, the *Smith* Court rejected any notion of vicarious liability since the nursing assistant's actions were all personal and did not further the business of the hospital. *Smith v. Sacred Heart Medical Center*, 144 Wn.App. at 543.

None of the arguments made by Ms. Kaltreider demonstrate any conflict among the controlling cases on this issue. In opposing the summary judgment, Ms. Kaltreider merely relied upon her designation as a "vulnerable" person under regulations concerning the licensure and discipline of nurses, failing to provide any factual evidence that Mr. Menard's actions toward Ms. Kaltreider were foreseeable. Under the controlling case law, evidence of foreseeability, beyond speculation and possibility, was required to defeat summary judgment. The Court of Appeals *Opinion* was correct.

B. There Is No Issue Of Substantial Public Interest Presented Under The Facts Of This Case.

Ms. Kaltreider misstates this case under RAP 13.4(b)(4):

The issue of a hospital's duty of reasonable care to vulnerable patients is an issue of substantial public interest. Under the holding of the majority in the decision . . . a

vulnerable but not completely incapacitated patient is owed no duty of protection by a hospital or care provider.

Petition, p. 8, §2. First, that was not the rule of *Niece v. Elmview Group Home*, supra, nor the rule in *Smith vs. Sacred Heart Medical Center*, supra, and certainly not the rule of the Court of Appeals in this case.

Second, the Court of Appeals *Opinion* determined that Ms. Kaltreider was not a "vulnerable" adult under those same cases and that Mr. Menard's actions were not foreseeable. *Opinion*, pp. 5-6. Ms. Kaltreider, like any patient, is owed a duty of reasonable care.

Ms. Kaltreider and the dissent rely solely on her status secondary to state nursing regulations. The goal of a statute regulating health professionals is to protect the public from the hazards of health care professional incompetence and misconduct. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 903 P.2d 433 (1995). The regulations cited by Kaltreider acknowledge that as a general proposition, inpatient substance abuse patients may be less likely to guard against the advances of others. That a substance abuse patient might be described as "vulnerable" in nursing discipline regulations does not translate to a factual finding of vulnerability, to a finding of foreseeability, or to a nondelegable duty simply because of the described general status of the patient. But that is Ms. Kaltreider's argument, ignoring the element of duty and foreseeability

entirely. It appears to be a "negligence per se" argument under the guise of "the public interest." See *Petition For Review*, E.2., pp. 8-9. *Compare* RCW 5.40.050.

Ms. Kaltreider provided argument and exhibits which were intended to raise issues concerning whether Mr. Menard's conduct failed to meet the accepted standard of care *for nurses* and therefore whether she was adequately "safeguarded" by LCCH. *Petition*, p. 6. What Ms. Kaltreider ignores is the distinction between her *status* as a substance abuse patient and the required element of foreseeability and instead asserts that Menard's alleged actions were *per se* foreseeable.

The WAC regulations are not a *per se* recognition of the propensity of one particular registered or licensed nurse to violate hospital and state regulations. Kaltreider focuses on the patient, but the law focuses on what the defendant knew or should have known about the employee. The trial court and Court of Appeals recognized no evidence that LCCH was on notice of Mr. Menard's conduct or alleged propensities. See *Schneider v. Strifert*, 77 Wn.App. 58, 63-64, 888 P.2d 1244 (1995); *Opinion*, p. 5. It has long been the law in negligence cases that the duty to use care is predicated on knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge,

actual or imputed, of the danger to another in the act to be performed. *Leek vs. Tacoma Baseball Club*, 38 Wn.2d 362, 365, 229 P.2d 329 (1951).

It is well settled Washington law that a special relationship may exist between a residential caregiver and a patient. See *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.3d 420 (1997). In this case there is no question that LCCH owed Ms. Kaltreider a duty of reasonable care while she was an inpatient resident in the LCCH substance abuse program. The same Division III Court of Appeals has recognized that a special relationship between a facility and a patient is not a prerequisite to imposing a duty upon the facility to protect patients from sexual assaults by third persons. *Shepard v. Mielke*, 75 Wn.App. 201, 877 P.2d 220 (1994). In such a setting, the duty of ordinary care includes the duty of taking reasonable precautions "to protect those who are unable to protect themselves." *Shepard*, 75 Wn.App. at 205-206. LCCH had such a duty of ordinary care. Whether Ms. Kaltreider was "vulnerable" or not does not change the fact that she must prove foreseeability. The public interest is not served by making caregivers the insurers of their patients.

A provider of health care will be liable only to those persons foreseeably endangered by its conduct. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 98 P.2d 460 (1983). Liability is not predicated on the ability to foresee the exact manner in which the injury might be sustained.

King vs. City of Seattle, 84 Wn.2d 239, 525 P.2d 228 (1974). While it might be recognized by the administrative code that Ms. Kaltreider is "vulnerable" in the treatment setting, that does not in turn translate to notice that Mr. Menard would violate his instructions and duties as a licensed nurse, particularly in the absence of any such propensity in the past. There still must be some evidence that Mr. Menard was inclined to such activities, or that LCCH had experienced the problem in the past. Just because a person in Ms. Kaltreider's position is administratively recognized as "vulnerable" does not justify the leap past foreseeability that Ms. Kaltreider sought at the trial court and the Court of Appeals. The simple fact is that she never presented credible evidence indicating notice. Ms. Kaltreider's case is fact-specific and does not involve a matter of significant public interest.

C. The Regulations Cited By Ms. Kaltreider Do Not Create Notice To Hospitals.

Any claim of nursing negligence was dismissed at summary judgment, and that decision has not been preserved or presented. Instead, Menard acknowledged an intentional, personal and non-work function course of conduct giving rise to Kaltreider's claim. CP 173. In the absence of factual evidence showing that LCCH knew or should have known of such conduct, Kaltreider argues that if certain conduct is

“unprofessional” under the of nursing licensure and discipline, then that conduct is “legally foreseeable” to a hospital in all instances.

RCW 18.79.010, regarding nursing care, provides:

It is the purpose of the nursing care quality assurance commission to regulate the competency and quality of professional health care providers under its jurisdiction by establishing, monitoring, and enforcing qualifications for licensing, consistent standards of practice, continuing competency mechanisms, and discipline. Rules, policies, and procedures developed by the commission must promote the delivery of quality health care to the residents of the state of Washington.

The Uniform Disciplinary Act, RCW 18.130, governs unlicensed practice, the issuance and denial of licenses, and the discipline of licensees under RCW 18.79. RCW 18.79.120. When considering tort liability for the violation of a statute or regulation, the court must be careful not to exceed the purpose which is attributed to the legislation. *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976).

Taken together, Ms. Kaltreider and the dissent argue that these nursing regulations and statues impose a sort of strict liability on a hospital just because such untoward conduct by a nurse is possible. This extension of civil liability is not recognized in the regulation:

The purpose of defining standards of nursing conduct or practice through WAC 246-840-700 and WAC 246-840-710 is to identify responsibilities of the professional registered nurse and the licensed practical nurse in health care settings and as provided in the Nursing Practices Act,

RCW 18.79. Violation of these standards may be grounds for disciplinary action under chapter 18.130 RCW. . . .

WAC 246-840-700.

The statutes and regulations cited by Ms. Kaltreider and the dissent are intended to explain and define the practice of nursing, by nurses, and the responsibilities of the Commission which oversees their licensure and discipline. Kaltreider's argument that licensure and discipline regulations for nurses places a hospital on notice of the potential violation of those regulations is contrary to *Smith v. Sacred Heart Medical Center*, 144 Wn.App. at 546. Foreseeability must be "reasonable," and may not be based on speculation and conjecture. *Id.* at 546. Second, the employer "generally does not have a duty to guard against the possibility that one of its employees may be an undisclosed sexual predator." *Id.* at 546.

Hospitals are required to report violations of the nursing standards to the Commission after-the-fact. WAC 246-840-730(1)(b)(ix). Clearly the intent of the Commission is to regulate the relationship between nurse and patient for the patient's protection.

There is no significant public interest served by imposing liability on a hospital for the unforeseeable, intentional and non-work-related conduct of a nurse. Even when nursing conduct may be prohibited under the licensing and disciplinary regulations, the basic requirement of notice

before liability can be imposed, particularly when an agent's regulatory violation is intentional and falls outside of the scope of his or her employment, is a central tenet of tort law and preserving notice as condition precedent to liability is an important public interest that can be protected with a rejection of Kaltreider's argument. For these reasons Ms. Kaltreider's *Petition* should be denied.

4. Conclusion.

The *Opinion* of the Court of Appeals, Division III (2009 WL 4912642) is a correct application of Washington law. There is no conflict between the *Opinion* and the case of *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997). Both *Niece* and the present case are factually specific. Summary judgment is appropriate if the patient/plaintiff fails to present any evidence of foreseeability, which is an essential component of "duty." Ms. Kaltreider failed to present any evidence which would demonstrate that LCCH knew or should have known of Mr. Menard's propensities, either through evidence of Mr. Menard's previous activities in the same or similar circumstances, or by showing that LCCH had experienced the problem before Ms. Kaltreider became a patient. Under *Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 365, 229 P.2d 329 (1951) and its progeny, the duty of care is proportionate

to the knowledge of the defendant. In this case there simply was no notice or warning that Mr. Menard would act as alleged.

Furthermore, there is no "substantial public interest" presented by the facts of this case. With all due respect, the public cannot be interested in foisting a duty of care upon a hospital which is gleaned from the statutes and regulations applicable to licensing requirements and discipline of nurses. Utilizing nursing regulations to impose a non-delegable duty on a hospital is not in the interest of the citizens of the state of Washington and is contrary to long held tort principles with our jurisprudence.

RESPECTFULLY SUBMITTED this 12th day of February, 2010.

EVANS, CRAVEN & LACKIE, P.S.



PATRICK M. RISKEN, WSBA #14632
ROBERT F. SESTERO, JR, WSBA#23274
Attorneys for Respondent
Lake Chelan Community Hospital

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 the 12 day of February, 2010, the foregoing was delivered to the following persons in the manner indicated:

Danielle R. Marchant
Johnson, Gaukroger, Drewelow &
Woolett, P.S.
139 South Worthen
P.O. Box 19
Wenatchee, WA 98807-0019

VIA REGULAR MAIL
VIA CERTIFIED MAIL []
VIA FACSIMILE []
HAND DELIVERED []
VIA EMAIL X

2/12/10 /Spokane, WA Shawna G. Wade