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NO. 62778-3-1

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

MARY FUNG KOEHLER,

Appellant,

v.

ALLSTATE INSURANCE COMPANY, an Illinois Corporation;
HILLYARD INDUSTRIES, aka HILLTARD, INC., a Missouri
Corporation; PROFESSIONAL CLEANING AND RESTORATION
SERVICES, LLC., dba SERVPRO, a Washington Corporation; BRENT
YOUNG and JANE DOE YOUNG, husband and wife and the marital
community;

Respondents.

BRIEF OF RESPONDENT HILLYARD, INC.

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I. INTRODUCTION

Appellant Mary Fung Koehler (“Ms. Koehler”) sued Respondents Hillyard Industries (“Hillyard”), Allstate Insurance Company (“Allstate”), and Professional Cleaning and Restoration Services (“Servpro”), on June 27, 2007, alleging that she and her house were damaged in water remediation efforts. In her Amended Complaint, particularly to Hillyard, Ms. Koehler alleged that Hillyard’s product Re-Juv-Nal, which Servpro used during the water remediation, was defectively designed.

At her deposition in May 2008, Ms. Koehler testified that she would not produce any evidence of the alleged design defect, but rather, rely on her cross-examination of Hillyard’s yet unnamed experts. Ms. Koehler also testified that she did not have any expert support for her claim that the alleged defect caused her harm, and she did not need any (and would not produce any) for trial. Consequently, Hillyard moved for summary judgment on July 28, 2008, on the basis that Ms. Koehler had no evidence that Re-Juv-Nal was defectively designed, or that the alleged design defect caused her injuries. Defendants Allstate and Servpro moved for summary judgment at the same time.

The hearing on these motions was continued twice, and finally took place on October 24, 2008. The trial court granted all three defendants’ motions for summary judgment, based on Ms. Koehler’s

II. STATEMENT OF THE CASE

A. Facts.

The relevant chain of events began when Ms. Koehler discovered a water leak in her basement. She contacted her insurance company, Allstate, on June 25, 2004, and notified them of the water loss. CP 974. In turn, Allstate contacted Servpro and requested that its personnel work with Ms. Koehler to remediate the damage. CP 432, 974. That same day, two Servpro employees went to Ms. Koehler's home to begin the remediation process. CP 668. During their clean up, Servpro employees sprayed Re-Juv-Nal in Ms. Koehler's basement. *Id.*

Re-Juv-Nal is an antimicrobial disinfectant, by manufactured Hillyard, that has been on the market for nineteen years. CP 697. Re-Juv-Nal's formula has been expressly approved by the Environmental Protection Agency, and Hillyard has adhered to that formulation for every lot of Re-Juv-Nal that it has manufactured and sold. CP 699. Re-Juv-Nal has been used nationally by numerous hospitals, clinics, schools, universities and other locations as a hospital-grade disinfectant. CP 697.

On June 28, 2004, Ms. Koehler notified Allstate that she could not live in her house due to the smell of the spray, and that she was moving to a hotel. CP 432. Ms. Koehler advised Allstate that she refused to move

back into her home because it was contaminated due to the antimicrobial spray used by Servpro. CP 975.

In response, Allstate hired Indoor Air & Environmental Services (IAES) to determine whether there were any residual issues following the remediation of the water damage. CP 976. IAES inspected Ms. Koehler's home on July 7, 2004. CP 976. IAES issued its report less than two weeks later, concluding that the only remaining moisture and mold areas in Ms. Koehler's home were from ongoing plumbing problems that pre-existed the loss. CP 468-471. IAES also concluded that proper ventilation would remove any lingering odors and that IAES could not identify any remaining odors from any chemicals or disinfectants. CP 460, 470-71. IAES also researched Re-Juv-Nal and concluded that it was a mild disinfectant recommended for mild cases of contamination related to mold. CP 964. IAES also reported that the active ingredients in Re-Juv-Nal were water soluble and that no long term health effects were associated with its use. *Id.* Despite this report, Ms. Koehler refused to move back into her home. She initiated the lawsuit that is the subject of this appeal on June 27, 2007.

B. Procedural History.

Hillyard moved for summary judgment in July 2008. CP 945. After two continuances of the hearing, on October 24, 2008, all three

defendants argued motions for summary judgment dismissal. The court granted all three motions. CP 106, 111, 114. The trial court also granted defendants' motions to strike inadmissible portions of declarations that Ms. Koehler submitted in opposition to defendants' motions for summary judgment. CP 108-10, RP 30. In its Order, the Court ruled, "[a]ll statements that contain hearsay, speculation, and unfounded expert opinions are stricken. The remaining statements of the declarations will be considered by the court." CP 110.

Ms. Koehler filed a motion for reconsideration of the trial court's order granting Hillyard's motion for summary judgment. CP 1389-1396. The trial court denied the motion on November 18, 2008. CP 122. Ms. Koehler filed a notice of appeal on December 19, 2008. CP 124.

III. ISSUES

1. Did the trial court err in granting Hillyard's Motion for Summary Judgment?
2. Did the trial court err in striking portions of Ms. Koehler's declarations submitted with her opposition to defendants' motions for summary judgment, for containing hearsay, unfounded allegations, and unqualified expert witness testimony?

3. Did the trial court err in denying Ms. Koehler's Oral Motion to Continue under CR 56(f)?

IV. ARGUMENT

1. The Trial Court Properly Dismissed Ms. Koehler's Claims against Hillyard

The Court should affirm the trial court's dismissal of Ms. Koehler's claims against Hillyard because of her failure to address her assignments of error against Hillyard in the body of her brief. Ms. Koehler raised two assignments of error specific to Hillyard; Number 12, that the court erred in stating that under the WPLA there must be expert testimony on the design defect of the product and some medical testimony on causation, and Number 13, that the court erred in dismissing Hillyard with prejudice. However, in the analysis portion of her brief, Ms. Koehler completely fails to support her argument with citations to the record or authority. Thus, the Court should refuse to consider them further and instead should affirm the trial court's rulings dismissing Koehler's claims against Hillyard. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (an appellate court will not consider an assignment of error unsupported by citation to the record and citation of authority.)¹

¹ Also, though Ms. Koehler is proceeding *pro se*, she is a former attorney, and must also be acutely aware of the fact that she must support assignments of error with argument or

Even if the Court does consider Ms. Koehler's unaddressed assignments of error against Hillyard, it should affirm the trial court's ruling that Ms. Koehler failed to demonstrate a genuine issue of material fact with respect to any of her claims against Hillyard. An appellate court reviews a summary judgment decision *de novo*, reviewing the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 429, 38 P.3d 322 (2002). Summary judgment is appropriate when there is no genuine issue of material facts and the moving party is entitled to judgment as a matter of law. CR 56(c).

Further, the nonmoving party cannot rely on speculation, but must assert specific facts to defeat summary judgment. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Self-serving testimony that is contrary to all of the documentary evidence in the record will be insufficient to raise a genuine issue of material fact. *Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.")

assertions to the record, given that she has recently been chastised by this Court for similar conduct in *Lawrence v. Koehler*, 2009 WL 2939072 at *5 (2009).

outweighed the manufacturer's burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative would have on the product's usefulness. RCW 7.72.030(1)(a); *Soproni*, 137 Wn.2d at 326. Alternatively, the plaintiff may use the "consumer expectation" test, which requires plaintiff to show the product was "unsafe to an extent beyond that which would be contemplated by the ordinary consumer." *Falk*, 113 Wn.2d at 654; RCW 7.72.030(3).

i. Re-Juv-Nal Contains No "Unnecessary Hazardous Substances."

Ms. Koehler alleged in her Amended Complaint and at her deposition that Re-Juv-Nal had a design defect because (1) it contained unnecessary hazardous substances, and (2) the size of the product's container could lead to improper dilution. CP 646, 951. However, Ms. Koehler failed to provide any evidence of either assertion and as such, the trial court properly dismissed her design defect claim. First, with respect to Ms. Koehler's theory that Re-Juv-Nal contained unnecessary hazardous substances, she has provided no evidence whatsoever to buttress this assertion. In her Response to Hillyard's Motion for Summary Judgment, Ms. Koehler submitted a number of declarations of various individuals, Timothy Ronald Fung, Jerry Bedlington, Nicholas Chariton, Mark Keltner and Maria Roberts. CP 1148-52, 1160-65, 1166-69, 1170-75, 1324-1321. None of these individuals are qualified as experts in this area sufficient to

testify regarding the alleged design defect, and none of them purport to address the unnecessary hazardous substances allegedly contained in Re-Juv-Nal. *Id.*²

And, even if the Court does consider the portions of these declarations containing hearsay, speculation, and unfounded expert opinions, the statements made therein still do not establish a genuine issue of material fact on Ms. Koehler's design defect claims. Timothy Ronald Fung, a lay person with no expert credentials, stated that the smell in Ms. Koehler's house was intense. He did not claim that Re-Juv-Nal contains unnecessary hazardous substances or that Re-Juv-Nal was defectively designed. CP 1148-1152.

Jerry Bedlington never addresses Ms. Koehler's theory on unnecessary hazardous substances or that Re-Juv-Nal contains a design defect. CP 1160-1165. Likewise, he does not set forth the necessary qualifications to allow him to testify to this effect. *Id.* Nicholas Chariton's only comment on the application of Re-Juv-Nal is hearsay: "[w]e later learned that she had been evicted from her house due to a chemical contamination", which the trial court properly struck. CP 1167.

² Further, the trial court properly struck the majority of these declarations, and as that decision is reviewed for abuse of discretion, this Court may only consider the information set forth in the original declarations if it determines that the trial court abused its discretion in striking them. This is discussed in further detail, below.

Mark Keltner does not address any alleged design defect, and only sets forth a litany of symptoms, on which he is not qualified as a medical expert sufficient to testify on causation. CP 1324-1328. Last, Maria Robert does not address anything about a design defect, but instead, merely sets forth a litany of alleged symptoms she had after going into Ms. Koehler's house approximately nine months after the application of Re-Juv-Nal. CP 1170-1175. Ms. Roberts is not qualified as an expert, medical or otherwise, nor does she purport to be. *Id.*

Likewise, nothing in Ms. Koehler's Response to Hillyard's Motion for Summary Judgment creates a genuine issue of material fact on whether Re-Juv-Nal contained a design defect. Instead, her Response merely summarizes the litany of alleged physical symptoms experienced or witnessed by the above listed individuals who were present at Ms. Koehler's house some months after the application of Re-Juv-Nal, or who encountered Ms. Koehler after June 28, 2004. CP 1156-1158.

This failure of proof resulted from a legal error on Ms. Koehler's part; *i.e.*, she testified at her deposition that she was not required to produce any evidence on her design defect claim, and that the only evidence she would offer on her design defect claims would be her cross-

examination of Hillyard's experts. CP 783.³ As such, Ms. Koehler was unable to create a genuine issue of material fact on her claim that Hillyard's product was defectively designed because it contained unnecessarily hazardous substances, and the trial court properly dismissed the claim on this basis.

ii. Ms. Koehler Failed to Produce any Evidence of "Improper Packaging"

Ms. Koehler was also unable to establish that Re-Juv-Nal's packaging was defectively designed. Ms. Koehler did not address this claim at any point in her Response. CP 1153-1159. Similar to her "unnecessary hazardous substances" claim, Ms. Koehler also stated she had no expert opinion testimony that Re-Juv-Nal's container size constituted a design defect, but that her "own brains" proved that it was so. CP 781.

Q. I just have what I have here. Let me show you Exhibit 5 which is, again, a product description and it also lists on the bottom the size of the containers that it can be obtained

³ Q. Let me ask you this, Mary. I mean you're a lawyer, law trained, practiced for 16 years. Tell me how are you going to prove your case against my client, Hillyard, unless you have expert testimony that's going to come in and say the product was defective, not reasonably safe and warnings weren't accurate? How are you going to do that?

A. When you bring in your experts, I will get them on cross-examination.

Q. But I don't have to bring in any experts so you bring in some to get you past first base.

A. No, I don't believe I have to because under strict liability, the obligation is on you according to my research.

Q. You still got to prove the product is defective and that it caused the harm.

A. Well, from the facts. It'll come out from the facts and it's up to the jury to decide.

CP 783 (emphasis added).

in from the quart size to the 275-gallon size. Do you see that on the bottom?

A. Those are bulk concentrates.

Q. That's right. It's a concentrated product that needs to be diluted before it's used, correct?

A. I don't know. I never saw the containers or anything.

Q. Have you consulted with any expert who opines or offers the opinion that the providing of Re-Juv-Nal in these various sizes is somehow a violation of any law or statute?

A. Well, it doesn't have to be a violation as long as it's –

Q. My question is have you consulted with anyone who has told you that the array of sizes of these containers is somehow a violation of law?

A. No. That's my own brains.

Q. That's your own brain.

A. That's right. I haven't been able to find anybody that can analyze it.

Id. (emphasis added).

As stated above, self-serving allegations do not rise to the level of creating an issue of material fact. Because Ms. Koehler could not demonstrate a genuine issue of material fact on her second design defect theory, the trial court properly dismissed her product liability claims against Hillyard.

b. Ms. Koehler failed to prove that Re-Juv-Nal caused any of Ms. Koehler's alleged damages

The Court may also affirm the trial court's decision to dismiss Ms. Koehler's product liability claims against Hillyard because she failed to produce admissible evidence, in the form of expert testimony, sufficient to permit a finding that Re-Juv-Nal caused her alleged damages.

In a products liability case, the plaintiff must present expert medical testimony to establish causation when the nature of the injury involves obscure medical factors beyond an ordinary lay person's knowledge, which would necessitate speculation in order to make findings. *Fabrique v. Choice Hotels Intern., Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008) (quoting *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986)). After the defendant meets its burden by showing that the plaintiff lacks admissible testimony to support her case, the burden shifts to the plaintiff to show competent medical expert testimony establishing that the alleged injury was caused by the defendant's action. *Fabrique*, 183 P.3d at 1123. Summary judgment is appropriate if the plaintiff fails to come forward with the requisite expert medical testimony. *Berger v. Sonneland*, 144 Wn.2d 91, 111-12, 26 P.3d 257 (2001).

Ms. Koehler did not even address this argument in her Response to Hillyard's Motion for Summary Judgment. CP 1153-1159. And, at her deposition, Ms. Koehler testified that she did not have any medical expert testimony to link the alleged design defect (yet unnamed) to her damages.

Q. Tell me who you have in terms of expert witnesses to say that you were damaged.

A. I told you I don't have them at this point.

Q. And then in terms of your damages which you claim here, can you tell me how you have been damaged as a result of these alleged defects in the product and failure to

warn and the other claims you've made against Hillyard.

A. Well, I've got the health problems associated with it and I think – If you had a chance to read the interrogatories, I had operations for lipoma which are toxins and what happened was I had this fast growing egg-shaped lipoma and that's where the toxins are stored and that was – I had that operated on last June.

Q. Let me stop you there. Are you claiming in this lawsuit that the lipoma that you had that was removed last year – are you claiming that that was caused by the Re-Juv-Nal and the episode in June of 2004?

A. I believe it was.

Q. Has any expert told you that?

A. Well, I haven't been able to talk to my surgeon much, but –

...

Q. All I want to know, Mary, is whether or not Doctor Chung told you after the operation that the lipoma contained the toxins.

A. No. She didn't tell me that. That's my own deduction. The more educated you get, the more you can figure out things.

CP 787.

Plaintiff further testified:

Q. What's wrong with your skin?

A. You have an employee named Lee and my skin on the face used to be as nice as hers was, soft. It's full of pock mark and scarring and white heads that keep coming to the surface.

Q. And are you claiming that's caused by the events in June of 2004?

A. Absolutely. I never had that, not that way.

Q. So who told you that these skin problems are caused by the 2004 events?

A. I don't need anybody to tell me. If you don't know your own body, nobody else is going to know it.

Q. What other claims of damage to your body?

A. Hoarseness in the throat and probably – I mentioned that I'm going to have to – I've been concerned because of

not being able to breathe and stuff like that that there's been pulmonary damage.

Q. Has your doctor told you you've got pulmonary damage?

A. No, I haven't gone to see them yet. First you need money for a co-pay.

CP 788.

Plaintiff confirmed this position later.

Q. And at this point, you don't have any evidence of what concentration of Re-Juv-Nal was sprayed at your house; do you?

A. That's correct.

Q. And at this point, you don't have any evidence from any expert witness linking the spraying of the Re-Juv-Nal to any of your physical symptoms; do you?

A. No.

CP 798.

And, she confirmed it again.

Q. Just so the record is clear, at this point, there is no medical or industrial hygienist or expert testimony linking Re-Juv-Nal exposure to any of your symptoms?

A. Yeah, because I didn't see any medical doctors for it.

CP 804.

Again, this failure of proof springs from Ms. Koehler's misapprehension of the **burden of proof** on the causation element of her design defect claim:

Q. And as far as the chemicals in the Re-Juv-Nal, the active ingredients, the two that are listed, you have not consulted any chemist or any professional that indicates that the exposure to those chemicals can cause the symptoms that you are experiencing?

A. It's in their own literature that those are the symptoms.
Q. The question is have you consulted any experts –
A. No because I haven't found them.
Q. So there's no expert at this point that will give an opinion linking the Re-Juv-Nal exposure that you have to your current symptoms?
A. That's correct because I need to get – I need to find out if anybody has worked with the substance.
Q. And at this point, simply you don't have the proof at this point?
A. No. I don't need it. I didn't spray it and your people did it and they said so and then they gave me the material data sheet on September 3rd and they wouldn't tell me where and what was sprayed.

CP 805.

Because Ms. Koehler failed to address the fact that she needed expert testimony, and also clearly established she would not be retaining anyone to testify on her behalf on this point, the trial court properly dismissed her claims against Hillyard on the causation element alone.

2. The Trial Court Did Not Err in Striking Portions of Koehler's Declarations submitted in Response to Defendants' Motions

The Court should also affirm the trial court's decision to strike portions of the declarations submitted by Ms. Koehler in support of her Responses to Defendants' Motions for Summary Judgment. Prior to the summary judgment hearing, Allstate filed a Motion to Strike certain portions of the declarations of Timothy Ronald Fung, Jerry Bedlington, Mark Keltner, Nicholas Chariton and Maria Roberts, which motion the trial court granted. CP 108-110. The trial court also properly refused to

consider any unqualified expert opinions contained in the declarations submitted by Ms. Koehler. CP 110.

The appellate courts will review a trial court's decision to exclude inadmissible hearsay for abuse of discretion. *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007). Similarly, the trial court's exclusion of unqualified expert testimony by a trial court will not be disturbed absent abuse of discretion. *State v. Perez*, 137 Wn. App. 97, 151 P.3d 249 (2007). The trial court did not abuse its discretion in striking the portions of the above referenced declarations that contained hearsay, speculation and unfounded expert opinions.

In Washington, affidavits submitted in support of a summary judgment motion must set forth facts that would be admissible in evidence. CR 56(e); *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002). A declaration containing beliefs formed on the basis of hearsay is not made on personal knowledge and is therefore inadmissible. *Charbonneau v. Ellis Co.*, 9 Wn. App. 474, 512 P.2d 1126 (1973). Further, because hearsay statements, speculation and unqualified testimony are not admissible in evidence, these statements cannot be considered by the Court in determining a motion for summary judgment. *See* ER 802, 602, 701, 702 and 901; *also Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004).

Each of the declarations submitted by Ms. Koehler contained hearsay statements originally made by third parties. These statements are hearsay and lacking in personal knowledge, and as such, cannot be considered. ER 602, 801(c) and 802. Further, the trial court properly determined that none of the declarants, Mr. Fung, Mr. Keltner, Mr. Chariton, Mr. Bedlington, and Ms. Roberts, qualified as expert witnesses sufficient to testify about Re-Juv-Nal or medical causation. RP 31. None of the declarants provide any background, training or experience in their declarations sufficient to qualify themselves as experts. CP 1148-52, 1160-65, 1166-69, 1170-75, 1324-1321. A witness must qualify as an expert to provide expert testimony. ER 701, 702, *Phillippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004). Accordingly, the trial court did not abuse its discretion in striking portions of these declarations, and they should not be considered by this Court.

3. **The Trial Court Properly Denied Ms. Koehler's Oral Motion to Continue under CR 56(f)**

Ms. Koehler also argues that the trial court improperly denied her oral motion to continue the motion. At the hearing, Ms. Koehler requested that the trial court continue the motion, which would have been the third continuance of the hearing. RP 15. Ms. Koehler requested the continuance in order to conduct additional discovery. *Id.* The trial court denied Ms. Koehler's oral request, stating that Ms. Koehler failed to meet

any of the grounds required in CR 56(f) to justify such a continuance. RP 30.

A trial court's denial of a continuance pursuant to CR 56(f) is reviewed for abuse of discretion. *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 68 P.3d 1093 (2003). A trial court has not abused its discretion in denying a motion to continue if: (1) the moving party has not offered a good reason for the delay in obtaining the necessary evidence, (2) stated what evidence it would obtain through additional discovery, or (3) the desired evidence would raise a genuine issue of material fact. *Id.*

Prior to or at the hearing, Ms. Koehler did not submit an affidavit identifying why she was unable to obtain evidence to support her opposition to Hillyard's motion for summary judgment. She also failed to identify what evidence she believed she would obtain through additional discovery that would create a genuine issue of material fact to defeat summary judgment. In fact, as stated above, Ms. Koehler testified that she was not required to obtain such evidence. Accordingly, the trial court did not abuse its discretion in denying Koehler's request for a continuance.

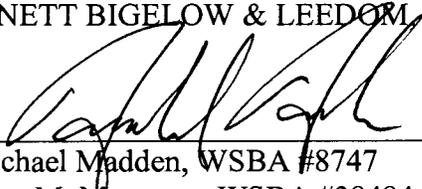
V. CONCLUSION

This Court should uphold the summary judgment dismissal of Ms. Koehler's claims against Hillyard. The ruling was appropriate given that Ms. Koehler failed to establish a genuine issue of material fact that

Hillyard's product was defectively designed, or that it caused her harm. Further, the trial court's decision to strike portions of the declarations Ms. Koehler submitted with her Response was proper, as they contained hearsay, speculation and unfounded expert opinions. Finally, this Court should also affirm the trial court's denial of Ms. Koehler's CR 56(f) motion, due to her failure to address why she had delayed in obtaining the necessary evidence or what evidence she even hoped to obtain.

Respectfully submitted this 13 day of August, 2010.

BENNETT BIGELOW & LEEDOM P.S.

By: 

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Attorneys for Respondent Hillyard, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of **BRIEF OF RESPONDENT HILLYARD, INC.**, along with the attached exhibits, to be mailed, via postage prepaid First Class Mail, to Appellant at the following address of record:

Mary Fung Koehler
2629 B 11th Avenue East
Seattle, WA 98102-3902

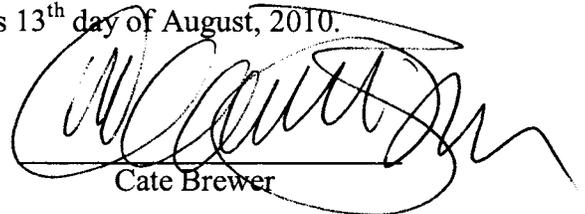
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 13th day of August, 2010.



Cate Brewer