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DIVISION ONE
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No. 63923-4-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

JAMES and KAY MORGAN, husband and wife,

Plaintiff-Appellant,

v.

AURORA PUMP COMPANY, et al.,
Defendants-Respondents.

**BRIEF OF RESPONDENT
WM. POWELL COMPANY AND
JOINDER IN BRIEFS OF CO-RESPONDENTS**

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I. PROCEDURAL HISTORY

Plaintiff has changed her “theory” of this case as it suits her needs.¹ Plaintiff’s original theory was based upon manufacturers being responsible for third-party insulation and replacement packing and gaskets. (CP 6-11). On September 9, 2008, Wm. Powell Company (“Powell”) challenged this theory and filed a motion for summary judgment for lack of product identification and lack of causation. (CP 6929-6944). Plaintiff responded by filing a response which included expert opinions not previously disclosed. Wm. Powell Company filed a CR 56(f) continuance motion based upon the submittal of new opinions. (CP 7160-7165). The continuance request was granted. (CP 7196-7197).

On December 23, 2008, Powell re-filed its Motion for Summary Judgment for Lack of Product Identification and Lack of Causation. (CP 7199-7211). Powell’s summary judgment reply was filed two weeks after the Washington State Supreme Court issued its ruling in Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127 (2008) and Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 198 P.3d 493 (2008). (CP 7010-7015).

¹ Mr. Morgan passed away prior to Appellant filing her request for Discretionary Review. Powell will refer to Mrs. Morgan as “Plaintiff” and Mr. Morgan as “Decedent.”

In light of the Simonetta and Braaten rulings, Plaintiff attempted to change her theory of the case by attempting to turn her “duty to warn” allegation into a “design defect” claim. (CP 2803-2818).

On May 15, 2009, the issue presented to Judge Trickey on summary judgment was whether the design of Powell valves was defective as “some” Powell valves utilized asbestos-containing materials. (CP 7143-7157). Plaintiff argued, “[t]he holdings of Simonetta and Braaten apply solely to failure to warn claims and not those for design defect.” (CP 4681).

In granting defendants’ summary judgment motions, Judge Trickey recognized that the “design defect” theory fit squarely into the Supreme Court’s logic in Simonetta and Braaten. Judge Trickey stated:

I cannot conceive of a way to be intellectually honest and apply this case to these two decisions, taken together, remove the design defect theory from the case, because it is precisely the same material – that is, the asbestos gaskets – that would give rise to either a failure to warn or a design defect.

...

So I just don’t think that the design defect theory survives in the post Simonetti (sic) and the post Braaten world.

Even resolving all inferences in favor of the non-moving party in the factual issues, I think that there is insufficient evidence that the new material internal to the product here would be enough to be a substantial factor in the tragic mesothelioma that Mr. Morgan suffered.

(CP 6766-6767).

Plaintiff filed for Discretionary Review where her appeal brief conveniently ignores the design defect allegation and instead returns to the duty to warn theory.

Powell joins with other Respondents' briefs on the similar issues of substantial factor causation, duty to warn, design defect admissibility of the testimony of Dr. Marks and Dr. Millette and governmental contractor defense. See RAP 10.1(g).

II. STATEMENT OF THE CASE

A. James Morgan (Decedent).

Mr. Morgan worked as a pipefitter at Puget Sound Naval Shipyard ("PSNS") from 1952-1957 and 1959-1963. (CP 710, CP 6931). Mr. Morgan worked as a mechanical engineer technician and design division test coordinator (desk positions) at PSNS from 1963-1989 but did not perform any "hands-on" work on vessels. (CP 710, CP 6931). Mr. Morgan passed away on March 27, 2008. Mr. Morgan's discovery deposition started but was not completed prior to his death. During three days of discovery testimony, Mr. Morgan did not mention working with or around a Powell product.

B. Powell Valves.

Powell is a manufacturer of metal valves. Powell valves sent to the U.S. Navy were manufactured and distributed in strict compliance and conformance with mandatory, precise military specifications. The Navy governed all aspects of the design and construction of valves that were installed to its ships, including the internal gaskets and packing. (CP 3265-3302, CP 6070-74).

There is no proof that the Decedent ever worked on the internal components of a valve manufactured by Powell. As a pipefitter, he simply did not perform that kind of work. There is no proof that the Decedent was exposed to asbestos from a Powell valve. (CP 4741 p. 17:3-8, CP 4742 p. 23:22-25).

Powell valves were sent “bare” to the customer. Powell never manufactured, sold or supplied exterior insulation or exterior flange gaskets with its valves. Some Powell valves contained internal gaskets. Types of gaskets internal to a Powell valve could include flat metal gaskets, solid metal gaskets, or encapsulated spiral wound gaskets with Teflon or asbestos filler. (CP 729, CP 4742 p. 22:4-7). There is no evidence or allegation in this record that the Decedent worked with or around any internal asbestos gaskets. (CP 5000, p. 122:13-19).

Powell also manufactured valves that contained packing and valves that did not contain packing. The packing could be asbestos or Teflon. Teflon packing was used in bronze and stainless steel valves. (CP 4743 p. 27:21-24). The record is absent of any evidence of the Decedent being exposed to original asbestos-containing packing in a Powell valve.

Upon the rare customer request, Powell would supply replacement packing. (CP 4784 pp. 143:18-144:25). This happened very infrequently as the customer would receive a cost savings from ordering the packing directly from the manufacturer. (CP 4794 p. 144:8-16).

C. Michael Farrow (PSNS Pipefitter and Co-Worker).

Mr. Farrow was a co-worker of Mr. Morgan's and worked as a fellow pipefitter at PSNS. Mr. Farrow testified to seeing Mr. Morgan work on two Powell valves. (CP 726, CP 6932). Mr. Farrow testified that he did not witness Mr. Morgan working on the internal parts of a Powell valve. (CP 723, CP 6932). He further testified that he had no reason to believe that Powell valves were sold with insulation or that Powell recommended or specified asbestos-containing materials. (CP 724).

Mr. Farrow purported that he saw Mr. Morgan "work on" two Powell valves and this work involved the removal of four flange gaskets. There is no admissible evidence that the flange gasket contained asbestos. Flange gaskets were not products manufactured or supplied by Powell.

Mr. Farrow further testified that he never saw Mr. Morgan work on the internals of any Powell valve. The testimony of Mr. Farrow purports Powell's argument that Mr. Morgan as not exposed to asbestos from a Powell valve.

D. Melvin Wortman (PSNS Employee).

There is no evidence in this record that Powell sold replacement packing to Puget Sound Naval Shipyard. Fact witness and former PSNS employee Melvin Wortman had no recollection of "Wm. Powell" or "Powell" valves at Puget Sound Naval Shipyard ("PSNS"). During Mr. Wortman's April 3, 2009 deposition, he was asked if he recalled various brands of valves at PSNS.

Q: Let me ask you the name of some valves and see if they sound familiar to you, okay?

A: Yes.
...

Q: Powell or William Powell valves?

A: No.

(CP 6661).

E. Jack Knowles (PSNS Pipefitter and Co-Worker).

Plaintiff attempts to rely upon the deposition testimony of Jack Knowles who was a pipefitter and co-worker of the Decedent. When

asked if replacement packing was supplied by valve manufacturers, Mr. Knowles answered “probably.” (CP 5001 p. 126:6-12). Mr. Knowles provided no basis, reasoning or foundation for his speculative “probably” response. Mr. Knowles did affirmatively state that he did not know the manufacturer or supplier of replacement packing. (CP 5133 p. 125:5-126:12).

Plaintiff has no admissible evidence that the Decedent was exposed to asbestos from either an original or replacement asbestos-containing product which was put into the stream of commerce by Powell. It is appropriate for this Court to uphold the trial court’s summary judgment ruling.

III. STATEMENT OF FACTS

A. External Insulation and Flange Gaskets².

Plaintiff does not dispute that Braaten and Simonetta effectively disposes of the duty to warn allegation regarding external insulation and flange gaskets from new or existing Powell valves. There is no admissible evidence that Powell manufactured, sold or supplied the external insulation or flange gaskets that the Decedent worked with or around. (CP 6062).

² The Morgans used the term “gasket” generically and do not differentiate between exterior flange gaskets and interior bonnet gaskets with respect to valves. Mr. Knowles testified that he never saw Mr. Morgan remove, scrape or replace an internal gasket on a valve. (CP 5000).

B. Replacement Packing and Gaskets.

Examining Mr. Knowles' deposition testimony a few lines prior and a few lines after the testimony quoted by Plaintiff on page 8 of Brief of Appellants reveals that Mr. Knowles did not know the manufacturer or supplier of any packing materials removed or replaced at PSNS. Mr. Knowles stated that he would "have no idea" whether packing inside existing valves was original. In response to questions regarding Powell valves, Mr. Knowles stated:

Q: [D]o you have any basis for believing that the packing you were taking out was the original packing that had come with the valve?

A: I would have no idea of whether it was the original.
...

Q: [Y]ou don't know whether that packing had been changed previously anyway?

A: Nope, absolutely not.

(CP 6064, CP 7119 p. 124:8-9, 124:19-21).

Mr. Knowles went on to testify that he did not know the source [i.e., the manufacturer or supplier] of the packing he removed from valves or the source of the packing that he and Mr. Morgan installed in valves.

Q: You don't know whether the valve manufacturer had specified the particular packing that was reinstalled in that valve, do you?

A: I do not.

(CP 6064, CP 7119-7120 pp. 123:22-125:15, 126:8-12).

Mr. Knowles had no personal knowledge or information regarding who supplied, specified or manufactured the packing that Mr. Morgan used in existing Powell valves:

Q: Okay. And do you know who supplied that packing?

A: No.

Q: And do you know who specified that packing?

A: No.

Q: Okay. And do you know who manufactured that packing?

A: No.

(CP 5000, p. 124:25-125:4, CP 6064, CP p. 396:6-15).

The Plaintiff's other fact witness, Melvin Wortman, specifically testified that he had no recollection of Powell valves as PSNS. (CP 6661).

Based on the above, there is no foundation or basis for the court to conclude that Powell ever supplied replacement components to PSNS.

C. New Internal Packing.

Mr. Knowles only recalled the Decedent connecting new Powell valves into a system. Mr. Knowles did not provide any testimony regarding the Decedent's work with or around new packing in relationship to a Powell valve. Mr. Knowles testified to the following:

Q: I want to talk to you about the new Powell valves that you recall, sir. Again, only that Mr. Morgan worked with or around. What do you recall Mr. Morgan doing?

A: Just dropping them in between two – two flanges.

...

Q: And so I am correct that the only memories you have of Mr. Morgan working with a new Powell valve is simply flanging up or putting gaskets in the flanges and sealing them up, and that would be it? Only for new Powell valves.

A: For new valves?

Q: Correct.

A: Correct.

...

Q: Okay. Anything else that Mr. Morgan would have done with a new Powell valve other than connecting the flanges?

A: Not that I witnessed.

(CP 6065, CP 7123-7124 pp. 397:16-24, 403:6-20).

Mr. Knowles testified that there would be no reason to replace packing in new valves. (CP 5000, p. 123:10-18, CP 6066, CP 7097 p. 24:12-14).

D. Plaintiff's Industrial Hygienist's Opinion on New Packing.

Dr. Millette, Plaintiff's industrial hygienist, testified that packing in new valves was **not friable and did not produce respirable dust.** (CP

4590 ¶18). According to her own expert, the Decedent could not have been exposed to asbestos from packing in a new Powell valve.

E. Powell Steel Valves Utilized Teflon Packing.

Joseph McClure, Powell's person most knowledgeable, testified that Powell valves manufactured from steel utilized non-asbestos containing packing:

Q: Did you have some packing that was nonasbestos?

A: We used Teflon packing for some of – for the bronze valves, particularly in the small valves, and in the stainless steel, they were primarily Teflon.

(CP 6066, CP 7098 p. 27:21-24) (emphasis added).

Mr. Knowles only recalled Powell valves being made of steel:

Q: Could you tell me the type of metal the Powell valves were, either existing or new, that Mr. Morgan worked with or around?

A: I'm going to say steel.

(CP 6066, CP 7124 p. 404:6-9).

Based on the above testimony, there is no evidence in this record that the Decedent was ever exposed to asbestos-containing packing from a new or original Powell valve.

F. **Fact Witness Jack Knowles Lacks Personal Knowledge and has No Foundation to Opine on Replacement Components for Powell Valves.**

Mr. Knowles testified he had no personal knowledge of and was not involved in the purchase of replacement gaskets or packing at PSNS:

Q: So as to who supplied what, for example, the gaskets and packing to the toolroom, you don't – you don't know; correct?

...

A: That's correct.

...

Q: But as to how the gaskets and packing, who supplied that to the toolroom, you don't – you don't have any personal knowledge of that; is that correct?

A: No personal knowledge.

(CP 6066-6067, CP 7127 pp. 266:8-13, 266:20-23).

There is no evidence in this record that the Decedent was exposed to asbestos from the internal components of a Powell valve. Based on this lack of evidence, Plaintiff cannot establish causation against Powell.

IV. ARGUMENT

A. **Manufacturers Owe No Duty to Warn of the Danger of Exposure to Packing and Gaskets Manufactured and Supplied by Third Parties Under Common Law Negligence or Strict Liability.**

A duty to warn is limited to those in the chain of distribution of the hazardous product. Under Restatement (Second) of Torts § 402A, strict

liability applies equally well to cases involving manufacturing defects, design defects, and failures to warn.

The Supreme Court in Simonetta and Braaten held that equipment manufacturers had no duty under strict liability or negligence principles to warn of the dangers of exposure to asbestos in other manufacturers' products, when the defendants did not:

- Manufacture, sell or supply the replacement products;
- Place the replacement products in the stream of commerce; or
- Specify asbestos-containing products be used with their equipment, and materials without asbestos could have been used with such equipment.

The Supreme Court stated:

We held in Simonetta that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation and was not in the chain of distribution of the insulation. It makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation.

Braaten, 165 Wn.2d at 385 (emphasis added).

Under a claim of negligence, a Plaintiff will have the burden of proving: 1) the defendant manufactured, supplied or sold the hazardous product and 2) the defendant placed the hazardous product in the chain of distribution.

In the case at hand, Plaintiff has no admissible evidence that Powell manufactured, sold or supplied replacement components to PSNS. The record is also void of the Decedent working on or around any original asbestos-containing components original to a Powell valve. There is no evidence that Powell placed a hazardous product in the stream of commerce that exposed the Decedent to asbestos.

Under strict liability principles, the Plaintiff must prove that the defendant manufactured or marketed the hazardous product. There is no strict liability for failure to warn of the hazards of a third-party component part when the defendant's product itself was not unreasonably dangerous. Powell manufactured a metal valve which was a safe product. There is no admissible evidence that the Decedent ever worked with or around asbestos from the internal components of a Powell valve.

Plaintiff tries to create a question of fact by stating on page 16 of Appellant's Brief that: 1) "most" of Powell's valves were sold with asbestos packing already in them and 2) Powell sold replacement asbestos gaskets and packing for its valves. The Supreme Court addressed the exact same issues in the opinion issued in Braaten, 165 Wn.2d at 394-95.

In Braaten, Plaintiff cited defendant's corporate representative's testimony that defendant supplied pumps that contained gaskets and packing in them. However, there was no evidence that the defendant

supplied replacement gaskets and packing. Id. Braaten also argued that defendant's catalog advertised asbestos packing for use with their valves; however, the same catalog also listed non-asbestos-containing packing material. Id. at 395.

In both scenarios, the Supreme Court held that Braaten had not met his burden of proof regarding exposure to asbestos from a product placed in the stream of commerce by defendant.

The facts in Braaten are analogous to the case at hand. Powell did not manufacture the gaskets and packing included in its equipment and was not in the chain of distribution of replacement packing and gaskets. Additionally, some gaskets and packing internal to Powell valves contained asbestos and others, such as steel valves, contained non-asbestos packing.

Plaintiff's evidence is insufficient to establish that the Decedent was exposed to original asbestos-containing gaskets or packing and there is no admissible evidence that Powell supplied replacement packing or gaskets to PSNS. Plaintiff has not established a connection between the Decedent's injury and Powell valves.

B. Plaintiff Has Not Established a Reasonable Connection Between Mr. Morgan's Disease and Exposure to Asbestos From a Powell Valve.

Regardless of whether recovery is sought on the basis of negligence, strict liability, or failure to warn, the Plaintiff must establish that the product they associate with Powell proximately caused the Decedent's alleged injury. Lockwood v. AC&S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605, 612 (1987).

While the Lockwood decision allows a Plaintiff to rely on circumstantial evidence in addition to his own recall to establish exposure to an asbestos-containing product, proof of an asbestos-containing product and exposure to that product is certainly required. Id. at 247 (i.e., use of Raymark asbestos cloth at Todd Shipyard established by testimony from co-worker; exposure to respirable asbestos from that cloth established by expert testimony).

In developing a strategy for assessing causation, the Lockwood court noted, "it is extremely difficult to determine if exposure to a particular defendant's asbestos product actually caused the Plaintiff's injury." Id. at 248. The court then identified several factors to consider when evaluating whether sufficient evidence of causation exists: 1) Plaintiff's proximity to the asbestos containing product when the exposure occurred and the expanse of the work site; 2) the extent of time the

Plaintiff was exposed to the product; 3) the types of asbestos products to which Plaintiff was exposed and the ways in which the products were handled and used; and 4) expert testimony on the effects of inhalation of asbestos by Plaintiff. Id. at 248-249; see also Berry v. Crown Cork and Seal Co., Inc., 103 Wn. App. 312, 323-324, 14 P.3d 789 (2000) (“Lockwood identified several factors a court must consider”).

In Lockwood, there was no question that the product at issue – Raymark asbestos cloth – contained asbestos. Lockwood, 109 Wn.2d at 239. Likewise, in Berry, the Plaintiff’s circumstantial evidence established that Brower Company supplied asbestos-containing thermal insulation to the shipyard where the Plaintiff worked. 103 Wn. App. at 315-317. Again, there was no question that the product at issue – asbestos insulation supplied by Brower – contained asbestos. Both Lockwood and Berry focus on the Plaintiffs’ ability to prove that their asbestos exposures caused their respective illnesses. Additionally, the Plaintiffs in Lockwood and Berry both worked at the site in question as full-time employees for 20 plus years. Lockwood, 109 Wn.2d 235, 238; Berry, 103 Wn. App. 312, 315.

This case is different. The record has no evidence of the Decedent working with an asbestos-containing product placed into the stream of commerce by Powell. On the other hand, the evidence does show that

Powell did not supply exterior insulation, did not supply exterior gaskets and did not supply replacement internal gaskets or packing to PSNS.

The evidence goes onto to show that the Decedent did not work with or around gaskets internal to a Powell valve. Finally, the record indicates that there would be no need to remove internal packing from a new valve and that packing in Powell steel valves was made of Teflon.

Plaintiff cannot establish even one of the Lockwood elements. There is no evidence of: 1) the Decedent's exposure to an asbestos-containing product supplied by Powell; 2) the extent of time that the Decedent was allegedly exposed to asbestos from a Powell valve; or 3) that any of the Powell valves contained asbestos.

C. **Dr. Mark and Dr. Milette's "Opinion" that Powell was a Cause of Mr. Morgan's Asbestos-Related Disease Has No Basis and Lacks Foundation.**

Plaintiff attempts to use experts to opine that her husband was exposed to asbestos from a Powell valve. (CP 4555-4561). Rule 705 of the Federal Rules of Evidence allows experts to present naked opinions. Admissibility does not imply utility. Rule 56(e) of the Rules of Civil Procedure provides that affidavits supporting and opposing motions for summary judgment must do more than present something that will be admissible in evidence. They shall "set forth facts" and by implication in the case of experts (who are not "fact witnesses") a process of reasoning

beginning from a firm foundation. The judge must look beyond the expert's ultimate conclusion and analyze the adequacy of its foundation.

The expert testimony of Dr. Marks and Dr. Millette lacks foundation. Dr. Marks and Dr. Millette opine that the Decedent had a “significant” or “substantial” exposure to asbestos from Powell valves. However, these opinions are based upon the Decedent’s exposure to exterior insulation and exterior flange gaskets that were not placed into the stream of commerce by Powell. Under the standard established in Lockwood, the evidence of exposure and causation is not sufficient to take the case against Powell to the jury.

1. Dr. Millette.

Dr. Millette opined that the Decedent had a “significant level of exposure” to asbestos from: 1) removal and scraping of flange gaskets and 2) the fabrication of flange gaskets. (CP 4590). Potential exposure to asbestos from the fabrication and removal of flange gaskets is the only exposure that Dr. Millette attributes to Powell. (CP 4594-4598).

Powell never manufactured or supplied flange gaskets or flange gasket material. As such, Dr. Millette’s opinion that Powell is liable for flange gaskets: 1) calls for a legal conclusion, 2) is outside of the scope of his expertise and 3) lacks foundation.

Dr. Millette goes onto opine that packing in its original, unused condition **is not friable**. (CP 4590). This opinion strengthens Powell's position that any manipulation of packing inside of a new Powell valve **would not release** respirable asbestos fibers. And there is no evidence in this record that the Decedent removed or disturbed any original packing from a "used" Powell valve.

2. Dr. Mark.

Dr. Mark's declaration has no basis and lacks foundation as he attributes fault to Powell for the Decedent's exposure to products, such as exterior insulation and gaskets that were not placed into the stream of commerce by Powell. (CP 4560 ¶ 26).

Court Rule 56(e) specifically requires that:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Instead of differentiating potential exposures, Dr. Mark bundles gaskets (internal and external), packing and exterior insulation into one ball and tosses liability onto the shoulders of Powell. The Washington State Supreme Court has already held that Powell is not liable for products it did not place into the stream of commerce. As such, Dr. Mark's opinion

lacks foundation as it does not address the Decedent's alleged exposures to products manufactured, sold or supplied by Powell.

The opinions of Drs. Millette and Marks are just that; opinion and not fact. Both doctors lack the factual support and personal knowledge needed to opine on the Decedent's alleged exposure to asbestos from a Powell valve. The opinions of these doctors are not substantive evidence and are not admissible regarding causation.

V. CONCLUSION

In her effort to withstand summary judgment dismissal, Plaintiff has avoided the real issue: the complete lack of evidence that the Decedent was ever exposed to an asbestos-containing product from a Powell valve.

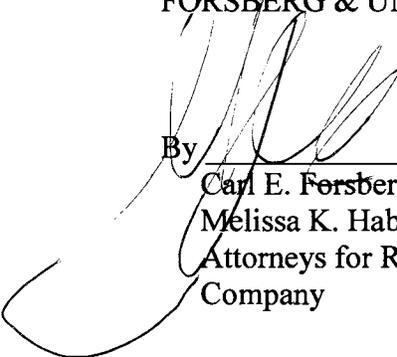
This court should therefore affirm the dismissal of her claims against Powell on any of these bases:

- Plaintiff failed to show that any Powell valves contained original asbestos-containing components to which the Decedent was exposed.
- Powell had no duty to warn Decedent of the dangers of asbestos in products not placed in the stream of commerce by Powell.
- Plaintiff has not established a design defect.

- Plaintiff's exposure, if any, to a Powell valve was not a substantial factor in causing the Decedent's disease.

RESPECTFULLY SUBMITTED this 15th day of April, 2010.

FORSBERG & UMLAUF, P.S.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing **BRIEF OF RESPONDENT WM. POWELL COMPANY AND JOINDER IN BRIEFS OF CO-RESPONDENTS** on the following individuals in the manner indicated:

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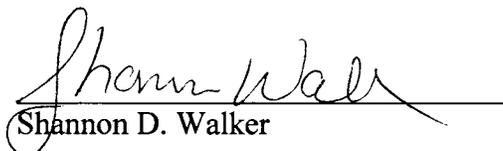
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SIGNED this 15th day of April, 2010, at Seattle, Washington.


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