

64027-5

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No. 64027-5-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ELEANOR DOERMANN,

Respondent,

v.

SUSAN RIVER IONE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
COMMISSIONER LEONID PONOMARCHUK

BRIEF OF RESPONDENT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

DUBOIS LAW FIRM, PLLC

By: Amanda H. DuBois
WSBA No. 16758
Lucia Levias
WSBA No. 39324

927 N. Northlake Way, Suite 210
Seattle WA 98103
(206) 547-1486

Attorneys for Respondent

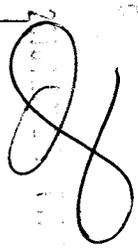


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I. INTRODUCTION

This case is not about whether a family pet is “property,” giving the owner a constitutional right to kill the pet. (App. Br. 14-21) Instead, the issue is whether the trial court abused its broad discretion in granting a protection order when it found that the appellant “committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of [the respondent].” (CP 118)

There was undisputed evidence that the appellant struck respondent in the face and smashed dishes in front of respondent while threatening suicide. Immediately after the parties’ last fight, before respondent left the home to seek a protection order, the appellant killed the family dog by drugging and hanging the dog, and then demanded that respondent dispose of the dog’s body. The respondent alleged, and the trial court agreed, that this final act was committed “as a weapon to impact” the respondent. (RP 15) In addition, there was undisputed evidence that while the hearing on the protection order was pending, the appellant violated the temporary protection order twice by attempting to contact

respondent, and five additional times by contacting respondent's employer.

Appellant disputes the trial court's characterization of these disturbing events. But there can be no serious question that there was substantial evidence to support the trial court's finding that appellant committed domestic violence and posed a credible threat to respondent's safety. This court should affirm and award attorney fees to the respondent under RCW 26.50.060(1)(g).

II. RESTATEMENT OF FACTS

Contrary to RAP 10.3(a)(5), appellant's Statement of the Case cites only to evidence that *she* presented to the trial court – evidence that the trial court found either incredible or irrelevant (see RP 15) – and ignores other evidence presented that supports the trial court's finding that appellant “committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of [the respondent].” (CP 118) This restatement fairly characterizes the substantial evidence on which the trial court relied in making its findings and entering the protection order:

A. The Parties Were Domestic Partners For Twenty Years. During The Nine Months Leading Up To Respondent Seeking A Protection Order, Appellant's Behavior Became Increasingly Erratic And Physically Aggressive.

Respondent Eleanor Doermann and appellant Susan River lone were domestic partners since 1988. (CP 6) Earlier in their relationship, Susan hit Eleanor twice. (CP 6) Starting in 2008, Susan's behavior became increasingly erratic and her physical aggression toward Eleanor increased. (CP 6) Eleanor testified by affidavit that Susan alternated between calm and "raging verbal abuse." (CP 6) Susan admitted to slapping Eleanor across the face during a fight. (CP 60) On another occasion, Susan threw a glass of ice water in Eleanor's face, ripped the sleeve off Eleanor's shirt, and threw a ceramic bowl across the room and against the wall, where it shattered. (CP 6)

Eleanor described Susan as someone who increasingly "acts out physically when her verbal efforts at control do not succeed." (CP 20) Eleanor, a law student, explained that her confidence as a "separate person" was growing by 2008, and that Susan was less able to control her, perhaps triggering Susan's "recent escalation" in physical aggression. (CP 21) Susan admitted that she believed Eleanor's "personality and manner have

changed,” and that Eleanor was less affectionate towards Susan, and more agitated. (CP 65) Susan believed that Eleanor was “leaving [Susan] for her new lover ‘Law School.’” (CP 65)

During an argument in December 2008, Susan threw an entire set of ceramic dishes across the room, shattering them all. (CP 6) Susan then pushed Eleanor, who had been standing in the doorway of their home, out the door and down two concrete steps, and locked her out. (CP 6) Soon after, Susan called Eleanor on her cell phone and demanded that she return to the home. (CP 6) When Eleanor returned, Susan took shards of the broken dishes and cut her arms while threatening suicide. (CP 6) After Eleanor called a friend for help, Susan became angry and told Eleanor that the “cutting was just for your benefit.” (CP 6) Susan did not deny pushing Eleanor out of the home during this incident and admitted that she had “pull[ed] dishes out of the cabinets and smash[ed] them to the floor,” and told Eleanor that she was suicidal. (CP 56-57) Eleanor was “deeply frightened” of Susan. (CP 19)

Shortly after this incident, Susan told friends that her brother, who was in prison for murdering his wife, had been killed in prison. (CP 21) This was untrue. (CP 21) Susan and Eleanor traveled to

Oregon in February 2009 so that Susan could visit her brother. (CP 21) Susan told friends that the parties' trip to Oregon was to attend the brother's memorial service, and described the "service" in detail. (CP 21)

Eleanor did not contradict Susan's story about the "service" to their friends. (CP 21) Eleanor believed that Susan had made up the story as a way to "excuse" her behavior, including threats of suicide, abuse of Eleanor, and destroying property, which their friends had begun to both notice and confront Susan about. (CP 21) Eleanor believed that telling their friends the truth about Susan's brother would put her in danger from Susan. (CP 21) Susan admitted that had Eleanor revealed the truth about her brother, she would believe that Eleanor betrayed a "sacred trust." (CP 55)

B. Respondent Sought A Protection Order After Appellant Killed The Family Dog, Shortly After The Parties Had A Fight About A Confrontation With Neighbors.

Susan's erratic behavior continued. On one occasion, Susan struck Eleanor hard on the buttocks, telling Eleanor that she "deserved it." (CP 6) On May 30, 2009, Susan threatened Eleanor to never reveal the truth about her brother to any of their friends.

(CP 6, 21) The following day, the parties fought again, over a confrontation that Susan had with the neighbors. (CP 6) Later that day, Susan killed the family dog by drugging and then hanging the dog by its neck. (CP 6)

Eleanor and Susan had previously discussed their concerns about the dog, which had “biting behavior.” (CP 6-7) They had discussed putting the dog down. (CP 7) But immediately after the fight about the neighbors, Susan “suddenly,” and in an “agitated and upset” state, decided to kill the dog herself. (CP 7) Susan said “she couldn’t take the frustration anymore. She couldn’t wait a day to take the dog to the vet. She said the dog was too neurotic. She said [the parties] were too broke to pay for a vet.” (CP 7)

Although the parties’ granddaughter and her friend, both age 11, were home at the time, Susan fed the dog its food mixed with sedatives, causing it to stagger. (CP 7, 19) Susan directed Eleanor to take the children out of the house and return to the house alone. (CP 7) Eleanor was “petrified to challenge” Susan. (CP 19) Eleanor complied because she was afraid that Susan would “escalate” and hit her if Eleanor interfered. (CP 19)

When Eleanor returned to the house alone, as Susan demanded, she found the dog hanging by its neck. (CP 7) Susan later claimed that she hanged the dog to ensure that it was dead after drugging it – although listening for a heartbeat or breath would have accomplished the same. (CP 107, 114-15) Susan described being too “upset” to have listened for a heartbeat (CP 107), but she was not too upset to hang the dog by its neck.

Susan told Eleanor that they would tell the children that the dog was hit by a car. (CP 20) Susan then told Eleanor to cut the dog down and bury it. (CP 7) Due to the closeness in time to their fight and Susan’s threat to Eleanor to maintain the “secret” about her brother a day earlier, Eleanor believed that killing their dog was an “implied threat” that Eleanor should not “cross some undefined line of frustrating [Susan]” and to show Eleanor what Susan “is capable” of if she revealed the “secret” about Susan’s brother. (CP 7, 21)

After Susan killed the family dog, Susan admitted to Eleanor that she had stood on the Aurora Bridge that night and contemplated suicide. (CP 7) Susan then began cutting herself with razor blades while threatening suicide to Eleanor. (CP 7)

After Eleanor turned the lights off to go to sleep, Susan continued to “furious[ly]” argue with Eleanor – angry that Eleanor had briefly left the home when Susan claimed to be suicidal, and for involving a family friend from whom Eleanor sought help. (CP 7, 20, 113)

C. Frightened By Appellant’s Escalating Behavior And Aggression, Including Threats Of Suicide And Cutting Herself, Respondent Left The Home And Sought A Protection Order.

Eleanor finally left the home on June 2, 2009. (CP 113)

Susan’s emotional instability, her physical aggression toward Eleanor, her threats of suicide, her cutting herself, and the buildup in tension between the parties culminating in Susan killing the family dog, caused Eleanor to believe that she was in danger. (CP 7) Eleanor believed that Susan was a “serious physical threat to [Eleanor] as her primary partner.” (CP 7) Because Susan continued to cut herself and threaten suicide, Eleanor called friends and family to tell them of her concern that Susan might harm herself. (CP 7) The friends intervened with Susan, resulting in medics taking Susan to Highline Community Hospital. But Susan was released only a few hours later. (CP 7)

On June 15, 2009, Eleanor filed a petition for a protection order against Susan. (CP 1, 6-7) Eleanor asked for and received a

temporary protection order pending a hearing on her petition, originally scheduled for June 29, 2009. (CP 2-3, 8-10) This order prevented Susan from, among other things, "having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly," except for contact by her lawyer with Eleanor. (CP 8-9) The court also ordered that Eleanor be allowed use of her vehicle and possession of her personal effects. (CP 9)

The hearing on Eleanor's petition for a protection order was continued a number of times at Susan's request. (CP 134-35) While the hearing was pending, Susan violated the temporary protection order on June 28, 2009 by calling Eleanor and leaving her a threatening phone message. (CP 112) Eleanor immediately reported this violation to the police. (CP 112) Even after Susan was contacted by the police regarding this violation, Susan violated the temporary protection order a second time by once again leaving Eleanor a phone message on July 5. (CP 112)

In addition to the calls made directly to Eleanor, Susan called Eleanor's employer, where she works as a physical therapist, four times expressing her alleged concern that Eleanor would access her confidential medical information. (CP 133) Although

the employer assured Susan of the policies and safeguards that would ensure the confidentiality of her medical records, Susan continued to call and leave messages. (CP 133, 135) "Given the number of calls and messages," the employer consulted its Employees Relations Department and Human Resources Department, which directed the employer to not respond to any further calls from Susan. (CP 133) A fifth phone call was made after the employer signed her declaration in this proceeding. (CP 135) Eleanor expressed concern that "the fact that Susan has knowingly violated the order and repeatedly made disparaging calls to [her] supervisor suggests a pattern of escalation that continues to make [her] terribly afraid." (CP 135)

In addition to Susan's violations of the order restraining contact, Susan also threatened that she would sell Eleanor's personal belongings that remained in the house they had shared, despite the order granting Eleanor possession of those belongings. (CP 9, 113) When Eleanor returned to the house to retrieve her belongings, per a negotiated agreement between the attorneys, she discovered that Susan had stripped the house of most of its furnishings and some of Eleanor's personal belongings. (CP 113)

D. The Court Granted A One-Year Protection Order.

On July 20, 2009, the parties appeared before King County Superior Court Commissioner Les Ponomarchuk. At the hearing, Susan specifically denied only two of Eleanor's allegations of physical abuse – pushing Eleanor down the stairs the night she broke a set of dishes and threatened suicide Eleanor. (RP 7) While Susan admitted hitting Eleanor on the buttocks in May, she described it as being “playful.” (RP 12) Susan spent much of the time during the hearing explaining why she killed the family dog, asserting the parties had no money for a vet, lamenting the end of the parties' relationship by describing the “cruel” way in which Eleanor had “abandoned” her, and complaining about Eleanor's handling of financial matters. (See RP 7-13)

The Commissioner noted that “most of the defense here focused in on the demise of the relationship, which is unfortunate. It has to do with financial issues that are not part of a protection order but would underscore the fact that [Susan had] an ax to grind because you're unhappy with how [Eleanor] treated [Susan].” (RP 15) The Commissioner granted Eleanor's request for a one-year protection order against Susan. (CP 118) In its written findings,

the court found that Susan “committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of [Eleanor].” (CP 118)

Susan appeals. (CP 125)

III. ARGUMENT

A. Substantial Evidence Supports The Trial Court's Finding That The Appellant Committed Domestic Violence And Represented A Credible Threat To The Physical Safety Of Respondent. (Response to Assignments of Error 1 and 3)

“The decision to grant or deny a protection order is reviewed for an abuse of discretion. Findings will be upheld on appeal if they are supported by substantial evidence in the record.” *Marriage of Stewart*, 133 Wn. App. 545, 550, ¶ 13, 137 P.3d 25 (2006), *rev. denied*, 160 Wn.2d 1011 (2007). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. On appeal, [this court] view[s] the evidence in the light most favorable to the prevailing party.” *Pilcher v. State*, 112 Wn. App. 428, 435, 49 P.3d 947 (2002), *rev. denied*, 149 Wn.2d 1004 (2003) (*citations omitted*). Substantial evidence may support a finding of fact even if the reviewing court could interpret the evidence differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149

Wn.2d 873, 879, 73 P.3d 369 (2003). This court defers to the trial court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony. ***State v. Ainslie***, 103 Wn. App. 1, 6, 11 P.3d 318 (2000).

1. The Trial Court's Finding That The Appellant Committed Domestic Violence And Represents A Credible Threat To The Physical Safety Of Respondent Was A Sufficient Basis For Its Protection Order.

Contrary to appellant's claim in her opening brief (App. Br. 1, 2, 8, 11-12), the trial court did in fact make a written finding to support entry of its protection order. The trial court found that Susan "committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of [Eleanor]." (CP 118) This finding was more than adequate as a basis for the trial court's protection order, especially in light of the fact that RCW ch. 26.50 does not require that the trial court make any specific findings before it has authority to grant a protection order.

In this case, the protection order is limited in time – one-year. (CP 118) But as this court recently held with regard to entry of a *permanent* protection order, "certain information must, by statute, be included on an order of protection, such as notice of

criminal penalties resulting from violation of the order. No such similar requirement exists as to the court's finding on which it determines to make the protection order permanent." **City of Seattle v. May**, 151 Wn. App. 694, 698, ¶ 9, 213 P.3d 945 (2009), *rev. granted*; 168 Wn.2d 1006 (2010); *see also Spence v. Kaminski*, 103 Wn. App. 325, 332, 12 P.3d 1030 (2000).

In **Spence**, the Court of Appeals rejected the appellant's claim that "preprinted findings on a form are insufficient to indicate the factual basis for the court's conclusions." 103 Wn. App. at 332. In rejecting the appellant's comparison of findings for protection orders with the requirement for specific findings in involuntary commitment cases, the **Spence** court held that a "protection order authorized by the chapter 26.50 RCW does not result in a massive curtailment of [appellant]'s liberty." 103 Wn. App. at 332. So long as the restrictions are reasonable "based on a demonstrated need to protect [the petitioner] from domestic violence," the preprinted form finding referencing the definition of domestic violence is sufficient. **Spence**, 103 Wn. App. at 332-33.

2. The Trial Court's Finding That Appellant Committed Domestic Violence Is Supported By Substantial Evidence.

Domestic violence is defined in part as "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." RCW 26.50.010. Here, there is substantial evidence to support the trial court's finding that Susan committed domestic violence.

In her opening brief, Susan focuses almost entirely on Eleanor's allegation that the killing of the family pet was an act of aggression toward her, claiming that this was the sole basis for the trial court's protection order. (See App. Br. 14-20) But this ignores all of the other evidence of domestic violence by Susan against Eleanor that the trial court considered. Susan admitted to slapping Eleanor, breaking a whole set of dishes in Eleanor's presence, and threatening suicide. (CP 56-57, 60) There was evidence that Susan had twice in the past hit Eleanor, pushed Eleanor down concrete stairs, and hit Eleanor hard on the buttocks, asserting that Eleanor "deserved it." (CP 6) Further, Eleanor testified that there were occasions when she was scared that Susan would harm her,

including when she threw dishes in front of her, grabbed her, ripped her sleeve, and threw water in her face. (CP 6, 112)

Finally, Eleanor testified that she felt threatened by Susan when Susan killed their family pet shortly after they had a fight and after Susan threatened Eleanor to never reveal the truth about Susan's brother. (CP 7) While Susan attempted to justify killing the dog, the trial court simply did not believe her story. The trial court found that Eleanor's allegation that the dog was "destroyed as a weapon to impact [her]," made "more sense" than Susan's explanation. (RP 15) This was a sufficient basis to warrant a protection order for Eleanor. See e.g. ***State v. Goodman***, 108 Wn. App. 355, 361-62, 30 P.3d 516 (2001) (even if destroying the community property home and killing the spouse's dog is not a crime against the co-owner spouse, if it was intended to cause emotional harm to the spouse, the court may consider it as an act of domestic violence and a permissible aggravating factor for purposes of sentencing for arson), *rev. denied*, 145 Wn.2d 1036 (2002).

Regardless whether Susan disputed some of Eleanor's claims of domestic violence, including the reason for killing the

family dog (App. Br. 9-10), “because of a trial court’s unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence, its decisions are allowed broad discretion.” **Marriage of Woffinden**, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983). This court does not review the trial court’s credibility determinations, nor weigh the conflicting evidence. **Woffinden**, 33 Wn. App. at 330. “So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.” **Marriage of Burrill**, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003). Here, there was substantial evidence to support the trial court’s determination that Susan committed domestic violence, and this court should affirm the trial court’s order protecting Eleanor from Susan.

B. The Trial Court Did Not Abuse Its Discretion In Considering Appellant’s Violation Of The Temporary Ex Parte Protection Order When Entering Its Final Protection Order. (Response to Assignment of Error 2)

The trial court properly considered Susan’s violations of the temporary protection order at the hearing on Eleanor’s request for a one-year protection order. Contrary to Susan’s claim in her opening brief, evidence of her violations were not “raised for the

first time at the hearing.” (App. Br. 13) Eleanor presented evidence that Susan violated the protection order by leaving her threatening voice mail messages in her reply declaration in support of her petition for a protection order. (CP 112-13) Although not allowed by the rules (see LFLR 6(b)(2)), Susan responded to these allegations by filing a response before the hearing in which she admitted calling Eleanor after the temporary protection order was entered. (See CP 105)

Susan presents no authority for the argument that violations of the temporary protection order could not be considered by the trial court in determining whether Susan presented a credible threat to Eleanor’s safety and whether a final protection order was warranted under the circumstances. The trial court did not consider these violations as a basis for criminal action against Susan under RCW 26.50.110, which might warrant further protections of her due process rights. See *Blackmon v. Blackmon*, __ Wn. App. __, ¶¶ 12-13, __ P.3d __ (April 27, 2010) (the remedy sought in a protection order – to prohibit contact – is not a massive curtailment of liberty amounting to incarceration, and the parties are not entitled to the same due process rights as in a criminal trial). Instead, the

court properly considered the violations of the protection order for purposes of determining whether a protection order was warranted based on Eleanor's assertion that "Susan's blatant violation of the provisions of the protection order and complete disregard for the law and my fear of her, are convincing evidence of her ability and willingness to harm [her]." (CP 113) See *Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002) (fear of physical harm based on uninvited contact and threats is sufficient to support a protection order).

As a matter of policy, a trial court must be allowed to consider violations of a temporary order for protection under RCW 26.50.070 in determining whether to grant or deny a protection order after hearing. By its terms, these temporary orders are short-term, effective only for fourteen days. RCW 26.50.070(4). If a responding party to a petition for an order of protection does not comply with terms of a temporary protection order for this short time, this is relevant evidence that the responding party poses a threat to the petitioner's safety. This is especially true when the order, as here, specifically warns that a violation of the order will subject that party to criminal penalties, including arrest. RCW

26.50.035(1)(c). (CP 10) Because the trial court did not abuse its discretion in considering Susan's violations of the temporary protection order in deciding whether to grant a protection order, this court should affirm.

C. This Court Should Deny Appellant's Request For Attorney Fees And Award Respondent Attorney Fees For Having To Respond To This Appeal.

To receive an award of attorney fees on appeal, a party must devote a section of the brief to the fee request. RAP 18.1(b). "The rule requires more than a bald request for attorney fees on appeal." *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 704-05, 915 P.2d 1146 (1996). This court should deny Susan's demand for attorney fees as she cites and there is no basis for an award of attorney fees to Susan for her bringing this appeal.

Instead, this court should award attorney fees to Eleanor for having to respond to this appeal. An award of attorney fees for an appeal may be awarded as part of the cost of litigation when there is a contract, statute, or recognized ground in equity for awarding such fees. *Thompson v. Lennox*, 151 Wn. App. 479, 491, ¶ 27, 212 P.3d 597 (2009). Here, RCW 26.50.060(1)(g) provides that the court may require a respondent to a petition for a protection order

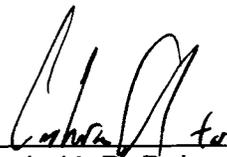
to “reimburse the petitioner for costs incurred in bringing the action, including reasonable attorney fees.” Because this appeal is an extension of Eleanor’s original action seeking protection from Susan, this court should award attorney fees to Eleanor. RAP 18.1(a).

IV. CONCLUSION

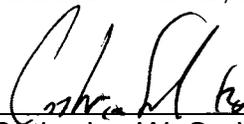
This court should affirm the trial court’s order of protection against appellant and award attorney fees to respondent for having to respond to this appeal.

DATED this 24th day of May, 2010.

DUBOIS LAW FIRM, PLLC

By  _____
Amanda H. DuBois
WSBA No. 16758
Lucia Levias
WSBA No. 39324

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By:  _____
Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

927 N. Northlake Way, Suite 210
Seattle WA 98103
(206) 547-1486

1109 First Avenue, Suite 500
Seattle, WA 98101-2988
(206) 624-0974

Attorneys for Respondent

DECLARATION OF SERVICE

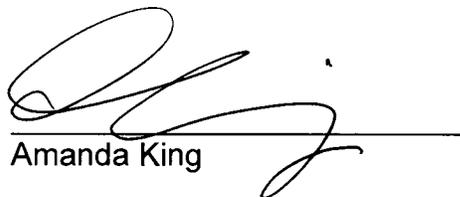
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 24, 2010, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
William C. Budigan Attorney at Law 2601 42nd Avenue West Seattle, WA 98199	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Amanda DuBois Attorney at Law 927 N. Northlake Way, Suite 210 Seattle WA 98103	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

2010 MAY 24 PM 4:31

DATED at Seattle, Washington this 24th day of May, 2010.


Amanda King