74068-7

74068-7

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

NO. 74068-7-I

Mr. and Mrs. Kirk and Jennifer Banks as assignees of Mrs. Billie E. Getschmann Skyles

Appellant

v.

Mr. and Mrs. Mark and Georgia Hopkins,

Respondents

APPELLANT'S REPLY BRIEF

Jose F. Vera, WSBA #25534
Attorney for Appellants
Kirk and Jennifer Banks as assignees of Mrs. Billie E. Getschmann Skyles, Appellants
VERA & ASSOCIATES PLLC
200 W. Thomas St., Suite 420
Seattle, Washington 98119
(206) 217-9300

2016 AUG 15 AM 11:51

I. TABLE OF CONTENTS

I.	INTRODUCTION		1
II.	FACTAUL ACCOUNTABILITY		1
	WAGNER'S SERVICE EFFORTS		1
	COURT'S RESPONSE TO WAGNER'S STATEMENT		5
	REASON TO ASSESS MRS. SKYLES		6
	HOPKINS DISTORT OR SHADE LEGAL AUTHORITY		9
	THE TWO KEY FACTS ON APPEAL		13
III.	ANALYSIS		14
IV.	CONCLUSION		16

II. TABLE OF AUTHORITIES

WASHINGTON CASES

Bour v. Johnson, 80 App. 643, 910 P.2d 548 (Div. II 1996)	14
Dlouhy v. Dlouhy, 55 Wn.2d 718, 349 P.2d 1073 (1960)	14
Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979)	14
Hwang v. McMahill, 103 Wn. App. 945, 949, 15 P.3d 172 (2000), *review denied*, 144 Wn.2d 1011 (2001)	14
In re Marriage of Markowski, 50 Wash. App. 633, 749 P.2d 754 (Div. III 1988	14

Johnny Ware et al., v Al Phillips, 77 Wn.2d 879, 468 P.2d 444 (1970)	15
Muncie v. Westcraft Corp., 58 Wn.2d 36, 360 P.2d 744 (1961)	10
Salts v. Estes, 133 Wn.2d 160, 943 P.2d 275 (1997)	16
Schell v. Tri-State Irrig., 22 Wn. App. 788, 591 P.2d 1222 (Div. III 1979)	15
Sheldon v. Fettig, 129 Wash. 2d 601, 919 P.2d 1209 (1996)	9, 10

STATUTORY AUTHORITY

RCW 4.28.080	10
RCW 4.28.080 (16)	13
RCW 9A.72.085	10, 11

WASHINGTON GENERAL RULES

General Rule 13	10, 11

WASHINGTON CIVIL RULES

Civil Rule 5	12
Civil Rule 5(b).	12
Civil Rule 5(b)(2)(B)	12
Civil Rule 12(h)(3);	14

I. INTRODUCTION

Mrs. Billie Echo Getschmann Skyles passed in ignominy on September 26, 2015. The anguish she experienced during the last few months of her life went by silently and almost unwitnessed, like rain falling on the mountains. Yet, as Mrs. Skyles made manifest in her Assignment (CP 727-728) to the Banks (Mr. Kirk Banks and former Ms. Jennifer Wilson), she made a point to seek the help of the Banks, Counsel, and even the Washington Court system to hold accountable those who sought to cheat her (a vulnerable senior citizen) out of her family's legacy. The Hopkins' Default Judgment equates to taking about $250,000 from Mrs. Skyles. The Hopkins' Response seeks to defend the Default Judgment by shaded facts, citation to parsed legal authority, and flat out misstatements of law and fact.

II. FACTUAL ACCOUNTABILITY

The Hopkins have resisted efforts to vacate their Default Judgment by challenging or trying to distort the narrative at four key points: (1) Wagner's effort to serve the lawsuit; (2) the Commissioner's response to Wagner's service effort; (3) the genesis of the idea to assess Mrs. Skyles; and (4) Ms. Swanlund's Certification of Mailing for service of the Hopkins' Default Motion.

WAGNER'S SERVICE EFFORT

Mr. Richard Wagner has three, sworn signed statements in this

matter. Each statement is different and moves the narrative of Wagner's actions further away from facts necessary to find a proper service of process. Wagner's first statement stated:

> I am not a party to this action.
>
> On Thursday, December 18, 2014 at approximately 3:30pm, I served a copy of the following documents upon a woman known to me to be Billie E. Getschmann Skyles, at the address of 41816 May Creek Rd, Gold Bar, WA 98251.

This first statement gives the impression that Wagner served Skyles by personal service at her Property. Wagner made his second statement on a Superior Court self-help form. In this statement, Wagner states:

> ***I Declare:***
>
> On December 18, 2014, about 3;30pm I was to serve documents for Mr. & Mrs. Hopkins. I served documents on Kirk Lewis Banks (the farm hand) at 41816 May Creek Road, Gold Bar, WA 98251. I did not serve Billie Echo Skyles-Getschmann. I was not given clear directions and was confused about the service process.

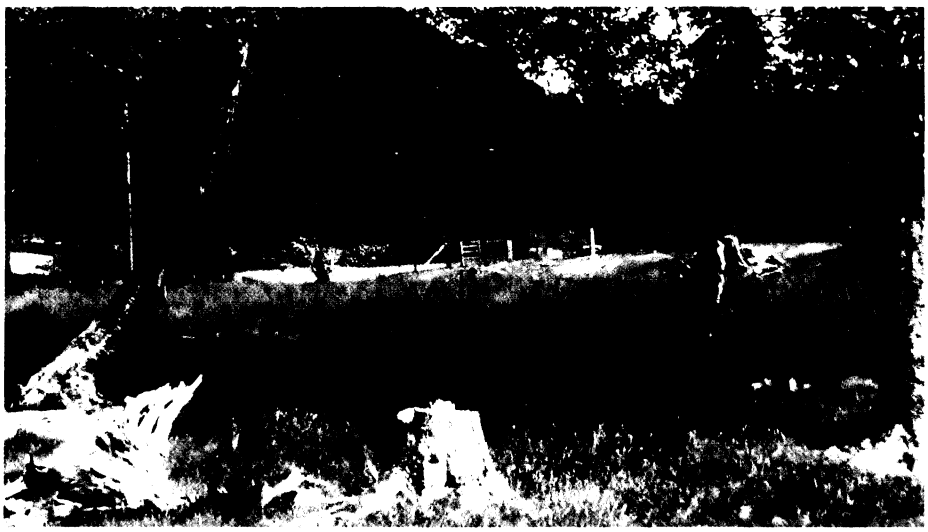
This second statement flatly states that Wagner served Mr. Banks, the farm hand, and that he did not serve Mrs. Skyles. This statement would have been factually fatal to the Hopkins' Default Judgment. In response to this statement, the Hopkins' lawyers worked with Wagner to craft a third statement. Wagner's third statement built on the second statement in an effort to get to the terra firma of service of process on Mrs. Skyles. In this third statement, Wagner states:

> To be clear, On [sic] December 18, 2014 [sic] at approximately 3:30 pm, I served a copy of the following documents upon a woman known to me to be Billie E. Getschmann Skyles at the address of 41816 May Creek Rd., Gold Bar, WA 98251. The documents were physically handed to Kirk Banks in the presence of Billie E. Getschmann who was sitting in a chair a few feet beyond my reach but who acknowledged my presence.

Wagner's third statement is most notable for what it fails to state: (1) fails to state that service occurred in <u>any</u> residence; (2) fails to state that Mrs. Skyles resides at the service location; (3) fails to provide any evidence that Mr. Banks, the farm hand, resided at the service location; (4) fails to provide any evidence that Skyles was uncooperative or evasive; and (5) even fails to provide any evidence that Skyles acknowledged that Wagner was there to effectuate service of a lawsuit on her. Recall that Banks, Skyles, and Wagner had lived on the Skyles' 20 acres property for years and that Wagner had been Skyles' tenant and helper over the years such that his mere presence would be significant of nothing more than dinner time for the two men at Bank's trailer on the back of the Property.

From the Banks' perspective, it is significant that Wagner's third statement and Ms. Harrison's statement both fail to mention any effort to cross-over the numerous "goat fences" that crossed the Skyles' goat ranch. Goats (which can climb trees) and predators, like coyotes and various cats, have to be kept out. Skyles' goat fence is pictured below—and this same

picture was presented to the trial court below. CP 113. A goat fence is specifically made to be too high to jump and too weak to support weight climbing over the fence to keep the goats in and the predators out.



Yet both Wagner and Harrison were silent in their statements on any effort to cross the numerous goat fences. Mrs. Skyles told the Court in her Declaration that she understood that Wagner had served the lawsuit papers (in an envelope) on her farm hand, Mr. Banks, while he stood at a fence line. CP 878 at Declaration Paragraph 10, lnn 2-7. The failure of any of the Hopkins' service witnesses to mention the fence crossings suggests facts more consistent with Skyles' understanding to the facts than any of the shifting narratives urged by the Hopkins.

TRIAL COURT'S RESPONSE TO WAGNER'S THREE STATEMENTS

Snohomish County Commissioner Jacalyn D. Brudvik was also troubled by Wagner's shifting statements. Pages 10-11 lnn 25-22 of the September 1, 2015 Verbatim Report of Proceedings.

> It's unfortunate that the individual that did the serving did not represent correctly in the first return of service. Pro Tem Waggoner went ahead and did a default based upon the information that says, "I served a copy of the following documents upon a woman known to me as Billie E. Gertschmann [sic] Skyles at the address, and that this was done under the penalty of perjury under the laws of the state of Washington." And there's a second declaration. "I served Mr. Banks." That one's called into question, saying, well, that's not my signature. Then there's a third declaration. "I served Mr. Banks, but it was in the presence of Respondent."
>
> I'm not calling into question at all how the order of default got entered because based upon the information that was given to us at the time, that seemed to be correct because it was what? Under penalty of perjury under the laws of the state of Washington. But, that has changed over time.
>
> The Court is going to find that the order of default should be vacated, and the order of default judgment will be vacated based upon the lack of personal service. If you'd do an order to that effect. Thank you both.
>
> [Off the record discussion.]

Commissioner Brudvik picked up on the essential finding that Wagner's statements went from serving Mrs. Skyles to serving Mr. Banks in the presence of Mrs. Skyles.

THE REASON TO ASSESS MRS. SKYLES

The *reason* to assess Mrs. Skyles' fitness for the underlying transaction represents a fork in the narrative of this lawsuit. The facts and testimony provide two, distinctly different narratives which are so different that they may not both be true at the same time—each narrative precludes the other. On January 5, 2016, the Gourley Law Firm created the narrative that they assessed Mrs. Skyles after Chicago Title Company advised Snohomish Escrow to obtain a doctor's certificate of competence. On April 2, 2014 (almost 18 months earlier), Mr. Carleton Foss Knappe (WSBA # 5697) and both Hopkins created a different, competing narrative that had Mrs. Skyles assessed because the title company (Chicago Title Company) raised an issue about whether the purchase price was adequate for excise tax reporting purposes based on the true value of the Property and as a result the title company wanted an statement from an attorney and not a doctor that Mrs. Skyles was competent and knowingly was selling her Property at such a low price.

CARLETON FOSS KNAPPE
MARY WALTER-FEUTNER

(360) 568-5
Fax (360) 568-8

April 2, 2014

Georgia Hopkins
36518 146th St. SE
Sultan, WA 98294

Via Facsimile (360) 793-9709

Re: Billie Getschman

Dear Georgia.

You contacted me indicating that you have a pending real estate matter with Billie Getschman. You also indicated that the title company has raised an issue as to whether the purchase price is adequate for excise tax reporting purposes based on the true value of the property and has asked for a statement from an attorney (not a doctor) representing that Ms. Get chman is competent and therefore knowingly has entered into an agreement for the sale of 10 acres of her property at perhaps a lower than fair-market value.

You further indicated that you have retained the services of Greg Gourley and have also been working with Snohomish Escrow. You related that Mr. Gourley represents you (and I assume your husband) and will not provide such an independent statement. You requested that I meet with Ms. Getschman and come to a determination of competency and provide a statement of my findings.

I indicated to you that I had performed work for you and your husband a number of years ago and would have a conflict of interest. I will need a release from you and your husband to provide for representation of Ms. Getschman. I am asking for your consent to provide independent representation for Ms. Getschman with the understanding that the advice that I give to her and the results of our meeting may or may not produce the kind of attorney's statement that apparently is needed by the title company and/or Snohomish County for title insurance and excise tax purposes.

CP 870. Both Hopkins signed this letter without changes or comments. Based on the highlighted language above, the Knappe narrative is also consistent with the Declaration testimony of Ms. Jennifer Wilson (Mrs. Banks) in that she testified that she was asked to take Mrs. Skyles to Snohomish Escrow to be assessed by Mr. Gourley—only to be turned away once she reached the office. Paragraph 8 on CP 836.

The significance of the competing narratives regarding the assessment of Mrs. Skyles is that the Knappe narrative was created before there was any dispute between the parties by a non-involved lawyer and court officer and the two opposing parties. Also, the Knappe narrative is consistent with the testimony of Mrs. Banks. The rub is that the Knappe narrative necessarily means that the Gourley Law Firm knew there was a concern about Skyles' competency and knew that the purchase price was far too low for the Property's true value. The Gourley Law Firm failed to disclose these concerns to the Court as required by the Rules of Professional Conduct and when Skyles pointed out this failure to the Court (before she passed), the Gourley Law Firm narrative, which exculpated the firm for not bringing these issues to the Court's attention, arose for the first time in early 2016.

The narratives could not be more different. The Knappe narrative arose before there was any dispute between the parties from a written statement signed by a Court Officer and both Mark and Georgia Hopkins that evidences knowledge by the Gourley Law Firm about the low purchase price and the desire to assess Skyles' competency for the transaction. The Gourley Law Firm narrative arises after the firm's failure to disclose the two main concerns about Skyles and the transaction price to the Court was

brought to the Court's attention by Skyles. The Gourley Law Firm narrative is incompatible with the Knappe narrative, but it does tend to exculpate the Gourley Law Firm from any violation of the disclosure rules of the Rules of Professional Conduct.

The concern for the Banks is that the Hopkins have not limited themselves to shading just the facts of this dispute, but that the Hopkins have also tried to shade the applicable law.

HOPKINS DISTORT OR SHADE KEY LEGAL AUTHORITY

The Hopkins' Response is riddled with both subtle and gross misstatements of law that all tilt in their favor. A prime example is the Hopkins' misstatement and then material reliance on the misstatement of ***Sheldon v. Fettig***, 129 Wash.2d 501, 607, 919 P.2d 1209 (1996) at P. 10 of the ***Response***. The Hopkins wrongly cite Sheldon as follows:

> In years past, construction of service of process statutes was one of "strict construction."[43] In *Sheldon*, an En Banc decision of the Supreme Court of Washington, the Court determined a more liberal construction should be applied "in order to effectuate the purpose of the statute while adhering to its spirit and intent."[44] After citing several other decisions from the State of Washington, the *Sheldon* Court noted that many sister states apply a similar liberal construction standard when actual notice is received.[45]

Pages 10-11 of Hopkins' ***Response***. Under the Hopkins' cite to the ***Sheldon*** decision, Washington Courts now apply a liberal construction to all aspects of Washington's service of process statute—RCW 4.28.080. However, in reality, the correct citation to the ***Sheldon*** decision is as follows:

> In interpreting ***substitute service*** of process statutes, strict construction was once the guiding principle of statutory construction. *See Muncie v. Westcraft Corp., 58 Wn.2d 36, 38, 360 P.2d 744 (1961)*. However, more recently we have applied liberal construction to ***substitute service*** of process statutes in order to effectuate the purpose of the statute while adhering to its spirit and intent. (Emphasis Added)

Sheldon v. Fettig, 129 Wash. 2d 601, 607, 919 P.2d 1209 (1996). Hence the applicable scope of the ***Sheldon*** decision is far narrower than urged by the Hopkins. And, this type of intentional incorrect citation to legal authority raises real questions about the integrity of the Hopkins' presentation analysis.

The Hopkins also incorrectly cite ***GR 13*** and ***RCW 9A.72.085*** as not mandating the use of the phrase "under penalty of perjury," at Page 24 of the ***Response***:

This is sufficient because neither GR 13 nor RCW § 9A.72.085 mandate using the phrase "under penalty of perjury." Moreover, this

In fact, both ***GR 13*** and ***RCW 9A.72.085*** require the use of the words "under

penalty of perjury. The below annotated text from RCW 9A.72.085 and General Rule 13 demonstrate the Hopkins' callous disregard for this Court and for the adjudicative process.

RCW 9A.72.085

Unsworn statements, certification—Standards for subscribing to an unsworn statement.

(1) Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

(a) Recites that it is certified or declared by the person to be true under penalty of perjury;

(b) Is subscribed by the person;

(c) States the date and place of its execution; and

(d) States that it is so certified or declared under the laws of the state of Washington.

(2) The certification or declaration may be in substantially the following form:

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":

....

(Date and Place) (Signature)

RULE 13

USE OF UNSWORN STATEMENT IN LIEU OF AFFIDAVIT

(a) Unsworn Statement Permitted. Except as provided in section

(b) whenever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.72.085. The certification or declaration may be in substantially the following form:

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

_____ _____

(Date and Place) (Signature)

The Hopkins continue on their efforts to rewrite the applicable law and facts of this dispute by attempting to rewrite Civil Rule 5 itself:

> Although CR 5(b)(2)(A), which describes how service by mail is to be accomplished, is mandatory because it incorporates the term shall; CR 5(b)(2)(B) is permissive because it incorporates the term may.[99] It provides that proof of service by mail "**may** be by written acknowledgement of service, **by affidavit of service of the person who mailed the papers** or by certificate of an attorney." (Emphasis added.) Moreover, whenever a matter is required or may be permitted

Hopkins ***Response*** at Pages 23-24. In truth, Civil Rule 5 provides:

> (2) Service by Mail.
>
> (A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day.
>
> (B) Proof of service by mail. Proof of service of all papers permitted to be mailed **may** be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. The certificate of an attorney may be in form substantially as follows:

(Highlight added)

The Hopkins amazingly urge this Court to read the above highlighted word "may" in a manner that voids the requirement of a "proof of service" when service occurs by mail. In essence, the Hopkins are asking this Court to adopt a rule for reading rules and statutes in a manner that may void out other provisions of the same rule or statute—which rule would be a new, seismic change to Washington law. The Hopkins urge such a new, unique read of Civil Rule 5 instead of the more obvious, literate read of the above

highlighted word "may" as signaling to the reader that the following methods of proof of service are illustrative and not exclusive.

These examples of shaded facts and law are not exclusive. Unfortunately, they are only representative. This type of conduct is consistent with the Hopkins' approach to Mrs. Skyles, the underlying transaction, and to the Banks: namely that the Hopkins alone are entitled to define the facts and law. This approach by the Hopkins simply steamrolled Mrs. Skyles, and rendered her an unimportant person.

THE TWO FACTS KEY TO THIS APPEAL

This Appeal turns on the Hopkins' failure to serve Mrs. Skyles as required by RCW 4.28.080 (16) and on their failure comply with Civil Rule 5 in their efforts to serve the Motion for Default on Mrs. Skyles. The facts of this latter failure are beyond dispute. Ms. Tracy Swanlund, a legal assistant of The Gourley Law Group, signed the Certificate of Service by Mail *without* making the certification subject to the laws of perjury of the State of Washington. CP 789.

CERTIFICATE OF SERVICE BY MAIL:
I hereby certify that a copy of this document and all documents listed on page 3 have been mailed to the attorneys/parties listed on page 3, postage prepaid on the:

Date (mm/dd/yyyy): 1-13-15

Tracy Swanlund
(Signature)

Tracy Swanlund
(Printed name)

The facts related the Hopkins service of process on Mrs. Skyles have been addressed above as those facts set out in Mr. Wagner's three declarations, which were aptly summarized by Snohomish County Superior Court Commissioner Jacalyn D. Brudvik.

III. ANALYSIS

Default judgments are disfavored because the law prefers determination of controversies on their merits. ***Dlouhy v. Dlouhy***, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960). A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles. The overriding reason should be whether justice is being done. ***Id***. at 582.

A trial court's decision to vacate a judgment under CR 60 is reviewed for an abuse of discretion. ***Hwang v. McMahill***, 103 Wn. App. 945, 949, 15 P.3d 172 (2000), *review denied*, 144 Wn.2d 1011 (2001). Abuse of discretion is less likely to be found if the default judgment is set aside. ***Griggs v. Averbeck Realty, Inc***., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). The law for vacating void default judgments differs from other types of challenges to default judgments. ***See e.g., In re Marriage of Markowski***, 50 Wash. App. 633, 749 P.2d 754 (Div. III 1988). For instance, a party challenging a default judgment on grounds that the judgment is void for lack of jurisdiction, may raise that challenge at any time. CR 12(h)(3); ***Bour v. Johnson***, 80 App. 643, 910 P.2d 548 (Div.

II 1996).

In Washington, a judgment is void when it is taken without the required notice to a defendant because taking a judgment without proper notice to a defendant fails to accord the defendant the proper constitutionally mandated due process of law. ***Johnny Ware et al., v Al Phillips***, 77 Wn.2d 879, 883, 468 P.2d 444 (1970). Notice about a possible adverse judgment meets Constitutional muster when it apprises the party to whom it is directed that her person or property is in Jeopardy. ***Ware*** at 882. In fact, a Court has *no jurisdiction* in any case to proceed to judgment until notice is given to party subject to the Judgment. ***Ware*** at 882. Judgments taken without Court jurisdiction are void. ***See e.g., Schell v. Tri-State Irrig.***, 22 Wn. App. 788, 591 P.2d 1222 (Div. III 1979).

Here, under the facts and the above applicable law, Wagner's three declarations fail to evidence service of process on Skyles personally or by substitute service at her abode by virtue of service on her farm hand, Mr. Banks. Likewise, the Banks properly raise the defective mail service of the ***Motion for Default*** now because the fact of the defective ***Proof of Service*** was of record and raised a genuine issue regarding Mrs. Skyles' constitutional rights that, if upheld, would render void the Hopkins' ***Default Judgment***.

IV. CONCLUSION

The Banks simply urge this Court to give meaning to Justice Talmadge's words: We do not adopt the principle in service of process that "close is good enough," . . . (Emphasis Added.)

Salts v. Estes, 133 Wn.2d 160, 161, 943 P.2d 275 (1997). This Court of important people ought to look out for the rights and dignity of the unimportant by vacating the Default Judgment and remanding the matter for trial on the merits. This will keep the Hopkins from cheating Mrs. Skyles' legacy and keep them from trampling her memory. The Banks respectfully request this Court to vacate the Hopkins' Default Judgment, award the Banks attorney's fees under the authority cited in their Opening Brief, and to remand the matter for trial on the merits.

Date: August 10, 2016

Respectfully submitted,

VERA & ASSOCIATES, PLLC

By: _____

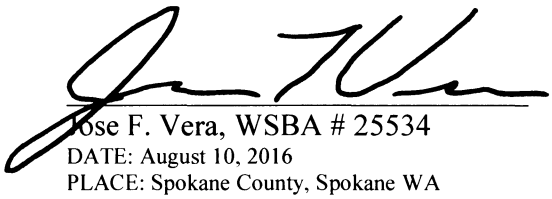
Jose F. Vera, WSBA #25534
Attorney for Appellant
VERA & ASSOCIATES. PLLC
200 W. Thomas St., Suite 420
Seattle, Washington 98119
(206) 217-9300

CERTIFICATE OF SERVICE

I, Jose F. Vera, hereby declare under penalty of perjury of the laws of Washington State, that on the dates listed below that I caused a true and correct copy of the documents listed below to be delivered to the below listed parties in the manner indicated.

MOTION ON THE MERITS

Gourley Law Group P.O. Box 1091/1002 Tenth Street Snohomish, Washington 98290 Date: August 10, 2016	☒ ☒ ☐ ☒	Cert. U.S. Mail, postage prepaid Hand Delivered Overnight Courier Email
Court of Appeals Clerks Office One Union Square 600 University Street Seattle, WA 98101-1176 Date: August 10, 2016	☐ ☐ ☒ ☒	E-filed via Court System Hand Delivered Cert. U.S. Mail, postage prepaid Email



Jose F. Vera, WSBA # 25534
DATE: August 10, 2016
PLACE: Spokane County, Spokane WA