SUPREME COURT NO.
COURT OF APPEALS NO. 70395-1-I 90369-7

SUPREME COURT

STATE OF WASHINGTON

DONNA GARCIA, a Washington resident; CONCEPCION GARCIA, an individual; PATRICIA JANE LIEKAM, as the Administrator of the Estate of Tiairra Garcia, a deceased person,

Petitioners,

vs.

THE CITY OF PASCO, a Washington municipal corporation

Respondent.

RESPONSE TO PETITION FOR REVIEW BY SUPREME COURT

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I. INTRODUCTION

This Honorable Court's decision in **Robb v City of Seattle**, 176 Wn.2d 427 (2013) and **Washburn v City of Federal Way**, 178 Wn.2d 732 (2013) are neither inconsistent nor contradictory to the decision rendered by Division I below. Accordingly, discretionary review should be denied.

II. RESPONSE TO ASSIGNMENT OF ERROR

Petitioner's assignment of error mistakenly submits two points that are not supported by the record facts. First, there is no evidence or basis to conclude the officer had any knowledge that an injured/dead person was dragged into the back of a residence. Along these lines, there is no evidence or basis to conclude the officer should have reasonably known that his presence would have caused persons 'reporting' such observations from rendering aid. Likewise, there are no facts to support anyone else was prepared to render aid in the event officer's failed to do so. Lastly and most importantly, there is no evidence or facts to suggest Ms. Garcia was capable of receiving aid by the time an officer arrived.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

This suit arises from a highly unusual and inconceivable set of circumstances. On June 22, 2008, Tiairra Garcia was killed by a gun shot wound after a night out with friends, Marnicus Lockhard and Ashone Hollinquest. Rather than seeking emergency medical attention, the intoxicated Lockhard and Hollinquest waited until Garcia was dead, placed her body in a duffel bag, and ultimately disposed of her remains in the wilderness of Mt. Rainier National Park.

As a result of the facts surrounding Tiairra Garcia's death, plaintiffs Donna Garcia, Concepcion Garcia, and the Estate of Tiairra Garcia (collectively "Garcia") assert claims against four defendants. The Garcia family sues Marnicus Lockhard and Ashone Hollinquest for the negligent use of a firearm and intentional infliction of emotional distress. The family sues Joey's 1983, where Hollinquest and Lockhard drank alcohol, for negligent training, supervision, and retention of employees and for over-serving liquor. Finally, the Garcia family sues the City of Pasco for negligent performance of police duties.

The City of Pasco moved for summary judgment, on the ground that the public duty doctrine denies liability as a matter of law. In response, Garcia contended the special relationship and the rescue doctrine exceptions to the public duty doctrine apply to preclude summary judgment. The superior court granted summary judgment and Garcia appealed advancing a new argument.

In the appeal, Garcia abandoned the special relationship exception argument claiming only the rescue doctrine applied. For the first time, Garcia asserted that the Restatement (Second) of Torts §302B created a duty of care by the police officers. Garcia further argued that **Robb v Seattle**, 176 Wn.2d 427 (2013), changed existing jurisprudence by finding officers owed a duty based on the Restatement. Ultimately, Division I disagreed with Garcia and affirmed the superior court.

B. FACTUAL SUMMARY.

Donna Garcia sues the City of Pasco for the death of her daughter, Tiairra Garcia, who was killed by an accidental gunshot wound while on the town with her drinking friends, Marnicus Lockhard and Ashone Hollinquest. CP 413-20. After the gunshot, Tiairra Garcia sat dead or dying in the passenger seat of a van driven by Marnicus Lockhard. Donna

Garcia claims Pasco is liable for the death of her daughter because of calls to 911 reporting that the van struck parked vehicles and a call from a neighbor to 1911 Parkview Street reporting the movement of a body from the van to the house. CP 419.

On June 22, 2008, Tiairra Garcia, along with Marnicus Lockhard and Ashone Hollinquest, locomoted in a borrowed van to Joey's 1983, a restaurant/tavern in Pasco. CP 174, 415. Marnicus "Pooh" Lockhard and Tiairra Garcia were dating, although Lockhard had a live-in girlfriend nicknamed Granny. CP 171-3. Because she was underage, Tiairra Garcia remained in the van while the two men entered the bar. CP 183, 5. Inside the tavern, Lockhard and Hollinquest exhibited signs of impairment from drugs and/or alcohol. CP 415. Nevertheless, Joey's 1983 served the two gentlemen alcoholic beverages over the course of 1 to 1.5 hours. CP 415. Joey's 1983 later removed Lockhart and Hollinquest from the premises after Lockhart assaulted another patron. CP 185, 6, 415.

After leaving Joey's 1983, Tiairra Garcia drove the two men to another liquid establishment, Panda Woks. CP 186, 415. After Garcia parked the vehicle, Marnicus Lockhard reached for a pistol in Ashone Hollinquest's possession. CP 187, 415. As the two men exchanged the

weapon, the gun mistakenly discharged and struck Garcia[1]. CP 415. Garcia leaned her head back and started gurgling noises. CP 195.

With Garcia in the driver's seat and Marnicus Lockhard in the passenger seat, Lockhard drove the vehicle to Granny's house, 1911 Parkview, Pasco. CP 172, 196, 415. While in route, the van struck a parked car. CP 202, 415. Witnesses to the collision phoned 911 dispatch to report their observations. CP 415. Ashone Hollinquest wanted Marnicus Lockhard to drive the van to the hospital, but Lockhard went a different direction. CP 203. Lockhard stated that they cannot go to the hospital, but Hollinquest said: "Man, we got to go to the hospital, 'cause she might be dead." CP 203. By then, Tiairra Garcia was not moving, gurgling nor showing signs of life. CP 203. At the directions of Marnicus Lockhard, Hollinquest tossed the gun out the car. CP 203, 4.

Upon arriving at Granny's home, Lockhard parked the vehicle in the backyard and the two gents toted Garcia's corpse into the residence. CP 208, 210, 416. One of the men dropped his side of Tiairra Garcia's body. CP 314. Once inside Ashone Hollinquest "kinda heard" Garcia "making like she was trying to breath." CP 211. Hollinquest tried to give

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[1] People don't kill. Guns do.

Tiairra Garcia CPR. CP 212.

As Lockhard stopped the car at the residence destination, John Gorton, a neighbor to Granny's home, also called 911. CP 129-30. Gorton was half asleep, CP 331. The verbatim transcript of the 911 call from Gorton follows:

> *911 Operator*: 911.
>
> *John Gorton*: Yeah, I live across the street from 1611 Parkview[2] and there's something going on over there. There's smoke coming out from a van on the north side of the house.
>
> *911 Operator*: Okay, and what's the address there?
>
> *John Gorton*: 1611 Parkview.
>
> *911 Operator*: 1611 Parkview.
>
> *John Gorton*: Yeah, and there's been a little - ah - I think it's like a Chevy Luv or small pickup - Chevy S10 - that's driven by like seven -
>
> *911 Operator*: And is that the address of the house?

2

[3] Gorton gave an incorrect address.

John Gorton: Yes. It's driven by like seven or eight times.

911 Operator: Where's the smoke coming from?

John Gorton: It's coming from the north side of the house. I don't know if - it look likes it's outside of the house.

911 Operator: Okay, and do you see any flames?

John Gorton: No. No flames. Just smoke. They pulled somebody out of a van in the back of the house and drugged them to the back of the house.

911 Operator: So do you know if it's a car or it's the house or -?

John Gorton: I - don't know. The smoke is - smoke is gone now.

911 Operator: So the smoke is gone?

John Gorton: Yeah. There's - there's something going on over there. You need to get somebody over here.

911 Operator: Okay. And do you think it's a fire or -?

John Gorton: No. It's not a fire. There's been something going on all weekend over here. There was a huge domestic fight yest - last night.

Voice in background: Yep. Cop car's already there.

John Gorton: Okay. Police are here now.

911 Operator: Okay. The police are there now.

John Gorton: Yeah.

911 Operator: Okay. What's your name?

John Gorton: John Gorton.

911 Operator: John Gorton. And did you guys call already?

John Gorton: No. We didn't.

911 Operator: Okay. Thank you.

John Gorton: Uh huh.

911 Operator: Bye. Bye.

CP 129-30.

As noted by John Gorton in his 911 call, a Pasco police officer came to 1911 Parkview as Gorton spoke on the phone. CP 130. The officer first spoke with a man who had followed the van. CP 317. The officer looked around the home and then knocked on the door. CP 317. Granny answered the door and acted like she knew nothing. CP 317, 8. Officers had no knowledge of Gorton's report concerning a 'somebody pulled from the van or drugged to the back of the house.' The 911 dispatch call center is an entity of Franklin County with no legal relationship to Pasco. Without having any further information regarding someone with injuries, Pasco officers had no basis or probable cause to search Granny's home or the van.

IV. ARGUMENT OF LAW

A. THE PUBLIC DUTY DOCTRINE RELIEVES THE CITY FROM ANY LIABILITY AS A MATTER OF LAW.

The Garcia family's claims against the City of Pasco for alleged failures in police work raise the specter of the familiar public duty doctrine. Washington has long abolished sovereign immunity. RCW 4.92.090. Nevertheless, the legislature's abolition of sovereign immunity did not affect the public duty doctrine. See **Chambers-Castanes v King**

County, 100 Wn.2d 275, 288, 669 P.2d 451 (1983). Under the public duty doctrine, a public official's duty to the general public cannot be a source of liability unless the "duty breached was owed to the injured person as an individual." **Babcock v. Mason County Fire District**, 144 Wn.2d 774, 785, 30 P.2d 1261 (2001). Stated differently, "a duty to all is a duty to no one." **Taylor v. Stevens County**, 111 Wn.2d 159, 163, 759 P.2d 447 (1988); **J & B Development Co. v. King County,** 100 Wn.2d 299, 303, 669 P.2d 468 (1983). The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. **Babcock v Mason County Fire Dist. No. 6**, 144 Wn.2d 774, 784 (2001). The public duty doctrine is a 'focusing tool' that courts use to determine whether a public entity owes a duty to a 'nebulous public' or to a particular individual, such as Tiairra Garcia. **Taylor v Stevens County**, 111 Wn.2d 159, 166 (1988).

In numerous suits based upon the conduct of law enforcement agents, courts have summarily dismissed claims on the ground of the public duty doctrine, because the relationship of police officer to a citizen

is too general to create an actionable duty. Courts generally agree that responding to a citizen's call for assistance is basic to police work and not special to a particular individual. **Torres v. City of Anacortes,** 97 Wn. App. 64, 74, 981 P.2d 891 (1999); **Adams v. City of Fremont,** 68 Cal.App.4th 243, 279, 80 Cal.Rptr. 196 (1998). Accordingly, courts frequently deny recovery for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all. **Torres v. City of Anacortes,** 97 Wn. App. 64, 74, 981 P.2d 891 (1999); **Dever v. Fowler,** 63 Wn.App. 35, 45, 816 P.2d 1237 (1991); **Williams v. State,** 34 Cal.3d 18, 25, 664 P.2d 137 (1983).

B. THE VOLUNTARY RESCUE EXCEPTION IS INAPPLICABLE.

Donna Garcia contends the "voluntary rescue" exception rescues her suit from defeat. This rescue exception applies only when a governmental entity or its agent (1) undertakes a duty to aid or warn a person in danger; (2) fails to exercise reasonable care; and (3) offers to render aid, and as a result of the offer of aid, either the person to whom the aid is to be rendered, or another acting on that person's behalf, relies on

this governmental offer and consequently refrains from acting on the victim's behalf. **Vergeson v. Kitsap County**, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008). For this exception, the offer to assist must be a "gratuitous" offer. **Babcock v. Mason County Fire Dist. No. 6,** 101 Wn.App. 677, 685, 5 P.3d 750 (2000), aff'd on other grounds, 144 Wn.2d 774, 30 P.3d 1261 (2001).

Under Washington case law, the offer to assist is not gratuitous if an emergency service responds in the normal course of its operations to an emergency. **Babcock v. Mason County Fire Dist. No. 6,** 101 Wn.App. 677, 5 P.3d 750 (2000), (fire department). Otherwise, the exception would swallow the rule and most people, calling a municipality for emergency assistance, would file a suit if the emergency response did not arrive in time. The law does not desire a municipality to be the insurer of emergency protection. A municipality is not in the business of guaranteeing the protection of citizens.

The decision of **Babcock v. Mason County Fire Dist. No. 6,** 101 Wn.App. 677, 5 P.3d 750 (2000), affirmed on other grounds, 144 Wn.2d 774, 30 P.3d 1261 (2001) controls this case. The Babcocks brought suit against a fire district, for damages arising out of a fire in their mobile

home. The Babcocks argued the fire district could have prevented the fire from spreading to their garage and a tent trailer, if the district had engaged in timely firefighting tactics. The Superior Court dismissed the suit on summary judgment and the appeals court and the state Supreme Court affirmed. The Supreme Court held that the duty to fight fires is a duty to the community, and not a duty to specific persons or property. 144 Wn.2d at 792. Sound public policy precludes judicial processes from governing a fire scene. 144 Wn.2d at 792.

Before the Court of Appeals, the Babcocks argued that the rescue exception to the public duty doctrine applied. The Babcocks asserted that, if they had known the fire district's response would not be timely, they would have taken alternative steps to save their property. The Babcocks argued that they neglected taking steps themselves to rescue their property, because of assurances, from the fire district, that their property would be saved. The Court of Appeals noted that integral to the rescue exception is that the rescuer, including a state agent, **gratuitously** assumes the duty to warn the endangered parties of the danger and breaches this duty by failing to warn them. 101 Wn.App. at 685. The fire district did not gratuitously assume fighting the Babcocks' house fire. Rather, the district was

established for the very purpose of fighting fires and protecting the property of all citizens, including, but not limited to, the Babcocks.

The state Supreme Court did not address, in **Babcock v. Mason County Fire Dist. No. 6,** the applicability of the rescue exception. The high court let stand the Court of Appeals decision on the issue. Perhaps the Supreme Court did not address the rescue doctrine, because of the frivolous nature of Babcock's argument.

The job of the Pasco police and the 911 dispatch center is to respond to emergencies. Thus, the 911 operator's statement that police would be sent to the scene was part and parcel of her job. Neither the operator nor the city's agents gave any gratuitous promises of assistance. Thus, the rescue exception is inapplicable to the facts here.

C. AN OFFICER ARRIVING AT 1911 PARKVIEW DOES NOT CONSTITUTE AN AFFIRMATIVE ACT.

1. The **Washburn** case does not support an officer arrival as an affirmative act.

In her petition, Garcia argues that the 'act' giving rise to a duty was the officer arriving in response to the 911 call. However, Garcia confuses the facts and reasoning presented in **Washburn**, *supra*, with the

facts in the instant case. The two cases are inapposite. If law enforcement officers simply responding to a call were sufficient to create an affirmative act which imposes a legal duty to everyone and anyone, the rescue exception would swallow the public duty doctrine/rule entirely. Fortunately, a brief review of Washburn, supra, shows the authority is not helpful to Garcia.

In **Washburn**, 178 Wn.2d 732, a man and woman argued and the police were called. The man was told to take a walk while the woman was given advice from an officer encouraging her to seek a no-contact order against the man. Id. The woman decided to seek court-ordered protection against the man so she went to the King County Justice Center and met with a domestic violence advocate. Id. As a result the woman was successful in obtaining a temporary order of protection (anti-harassment order) prohibiting the man from contacting the woman, entering or being within 500 of her residence. Id.

The woman in **Washburn**, *supra*, requested law enforcement serve her anti-harassment order upon the man. The law enforcement information sheet submitted with her order specified that the man was her domestic partner and he had no knowledge of her order nor

that such order would force him from the home and that the man would likely react violently to the service of said order. Moreover, the man was not proficient in English such that an interpreter would be helpful. Id.

Consequently, the officer failed to read the file prior to service. The officer confirmed the man's identity, saw the woman inside, but only advised the man that he needed to appear in court before leaving. Id. The officer did not ensure the man vacated the premises. Hence, the 'protected' woman was left to explain that she had restrained the man and that he needed to vacate. Id. Ultimately, the man attacked the woman and she died. Id. Such facts are not remotely similar to Garcia's situation/death.

The reasoning set forth in the **Washburn** decision is also inapplicable to Garcia. The **Washburn** court focused on the legislative intent exception to the public duty doctrine. The exception allows a plaintiff to claim that a governmental entity owes him or her a legal duty where a legislative enactment "evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons". **Honcoop v State,** 111 Wn.2d 182, 188 (1988). The legislative intent exception recognizes that the legislature may impose legal duties on

persons or other entities by proscribing or mandating certain conduct. **Schooley v Pinch's Deli Market, Inc.**, 134 2d 474-75. In **Washburn**, the court held that Washington's legislature showed an intent to protect specific individuals in passing chapter 10.14. 178 Wn.2d at 755. In fact, the legislature explicitly stated "[t]he legislature finds that serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing . The legislature further finds that the prevention of such harassment is an important governmental objective." RCW 10.14.010. The **Washburn** court also found the statute evidenced a legislative intent to protect a particular class of persons, i.e. those suffering harassment at the hands of others. Accordingly, the High Court found the requirements of the legislative intent exception satisfied. Garcia doesn't argue the legislative intent exception but appears to cite the **Washburn** case, out of context, in effort to imply a law enforcement officer assumes a duty when 'arriving' to a residence. Indeed, a review of the **Washburn** opinion proves otherwise. Ultimately, the **Washburn** court found that the City of Federal Way owed the woman actionable legal duties relating to the service of the anti-harassment order.

2. The **Robb** case does not support an officer arrival as an affirmative act.

Procedurally and factually, the **Robb** case is more similar to Garcia than **Washburn** though **Robb** supports Pasco here. In **Robb**, infra, the Supreme Court reversed the Court of Appeal's decision upholding the trial court's denial of the City's summary judgment motion, remanding to the trial court with directions to dismiss. Id. Garcia's conclusion that officer arrival on the scene establishes a legal duty is also not furthered by **Robb**.

The issue in **Robb v City of Seattle,** 176 Wn.2d 427 (2013) was whether the police owe a duty to protect citizens from the criminal acts of a third party where the police failed to pick up bullets from the ground, near a Terry stop and one of the people detained but not arrested returned to the scene, picked up the bullets and later shot another person. The **Robb** court found relevant portions of the Restatement §302B comment *e* requires an affirmative act which creates or exposes another to a situation of peril. **Robb,** 176 Wn.2d at 435. Foreseeability alone is an insufficient basis for imposing a duty. Id.

The **Robb** court carefully analyzed the Restatement. Ultimately, the outcome of **Robb** was dictated by basic tort principles. 176 Wn.,2d at 439. In order to properly separate conduct giving rise to liability from other conduct, courts have maintained a firm line between misfeasance and nonfeasance. Id. To label the conduct in Robb as affirmative, danger-creating conduct would threaten the distinction, leading to an unpredictable and unprecedented expansion of §302B liability. Therefore, because law enforcement only failed to eliminate a situation of peril but did not increase the danger by an affirmative act, the officers omission in **Robb** was insufficient to impose liability. Id.

At the Court of Appeals, Division I oral argument hearing, the Honorable Judge Applewick specifically asked Garcia's counsel what the affirmative act was in the instant case. Counsel hesitantly admitted there was no affirmative act taken by the officer. Despite weak arguments now advanced as a 'last chance', there remains no affirmative steps or acts taken by the law enforcement officer here who was responding to a hit and run. Assuming arguendo that the communication from dispatch to the officer regarding 'somebody being dragged to the back of a residence' was conveyed, the officer still took no affirmative acts or steps which would

have increased danger to Garcia. Along these lines, the officer was without sufficient basis or probable cause to take additional steps (i.e. to search the home or van) as suggested by Garcia. Finally, under the most unfortunate circumstances, the evidence suggests that Ms. Garcia was already deceased by the time law enforcement arrived such that any steps/acts taken by the officer would not nor could have increased harm.

V. CONCLUSION

Based on the foregoing reasons and the articulated opinion set forth by Division I, discretionary review should be denied.

DATED this 26th day of June, 2014.

Respectfully submitted,

LEAVY, SCHULTZ, DAVIS, CLARE & RUFF, P.S.
Attorneys for Respondent

By: _____
ANDREA J. CLARE, WSBA NO. 37889

CERTIFICATE OF SERVICE

I, Kristi L. Flyg, hereby certify that on the 26th day of June, 2014, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	Hand-delivered	
☐	First-Class Mail	JAMES P. WARE
☐	Overnight Mail	MDK LAW ASSOCIATES
☐	Facsimile	10900 NE 4th St. Ste 2030
☒	Email	Bellevue, WA 98004

Kristi Flyg

KRISTI FLYG
of Leavy, Schultz, Davis, Clare & Ruff, P.S.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, June 27, 2014 8:02 AM
To: 'Kristi Flyg'
Cc: james@mdklaw.com; Andrea Clare
Subject: RE: Garcia vs. City of Pasco

Rec'd 6-27-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kristi Flyg [mailto:kflyg@tricitylaw.com]
Sent: Thursday, June 26, 2014 5:15 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: james@mdklaw.com; Andrea Clare
Subject: Garcia vs. City of Pasco

Dear Clerk,

Attached for filing, please find response to petition for review by Supreme Court.

Thank you,

KRISTI FLYG
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OFFICE RECEPTIONIST, CLERK

From: Chandler, Desiree R.
Sent: Thursday, June 26, 2014 8:31 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: CREDIT MEMO FW: Invoice PR-10251 from Washington State Supreme Court
Attachments: Inv_PR10251_from_Washington_State_Supreme_Court_4364.pdf

Please issue a credit memo to PR-10251 for the AG's office in the amount of $2.00. I will bill the correct party.

Thank you.

From: Schlueter, Adrian (ATG) [mailto:AdrianS@ATG.WA.GOV]
Sent: Thursday, June 19, 2014 3:46 PM
To: Chandler, Desiree R.
Cc: Fraser, Betty (ATG)
Subject: FW: Invoice PR-10251 from Washington State Supreme Court

Good day,
I didn't find Sara O'Connor-Kriss listed as an Attorney General employee, so I checked the WSBA lawyer search and found that she is employed by the City of Seattle:

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Sara O'Connor-Kriss

WSBA Number:	41569
Admit Date:	07/23/2009
Member Status:	Active
Public/Mailing Address:	Seattle City Attorney's Office PO Box 94769 Seattle, WA 98124-4769 United States
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TDD:	
Email:	sara.oconnor-kriss@seattle.gov
Website:	

Please advise the best way to handle the $1.84 charge for the Gale v. City of Seattle, number 90296-8. My recommendation would be to short-pay the invoice by $2.00, the amount of the cost after tax.
Thank you for your help—let me know if you have any questions.

Adrian Schlueter
Attorney General Financial Services
(360) 753-2552 phone

-----Original Message-----
From: Chandler, Desiree R. [mailto:Desiree.Chandler@courts.wa.gov]
Sent: Tuesday, June 17, 2014 1:42 PM
To: ATG DL FIS General Accounting
Subject: Invoice PR-10251 from Washington State Supreme Court

Counsel:

Your invoice is attached. The case numbers are referenced in the invoice. Please remit payment at your earliest convenience.

Failure to timely pay invoices may result in the removal of a case from the motion calendar and/or possible sanctions.

Thank you.

Desireé Chandler
Coordinator-Attorney Discipline/Admissions Supreme Court Clerk's Office
(360) 357-2078
Desiree.Chandler@courts.wa.gov