No 48186-3 II consolidated with
(No. 48311-4-II, 48326-2-II, and 48273-6-II)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTOPHER COOK, KEVIN EVANS, JOSEPH JONES AND CHRISTOPHER ROBINSON,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

RESPONSE BRIEF OF RESPONDENTS EVANS, JONES AND ROBINSON

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I. INTRODUCTION

Evans, Jones and Robinson (Requesters) asked for phone logs pursuant to the Public Records Act (PRA).[1] The Department of Corrections's (Department) policy on phone logs at the time of the requests stated the phone logs were not public records unless they had been used for an agency purpose. The Department rejected the requests without a full explanation and a reasonable search to see if they had been used for such a purpose. The Trial Court found the Department acted in bad faith and ordered the Department to pay each appellee penalties of $25 per day.

II. RESTATEMENT OF FACTS

The Department developed a policy on how employees would handle requests for phone logs. It stated that phone records were not public records unless these records had been used for agency purposes. Evans, CP 36; Jones, CP 40; and Robinson, CP 224. In its responses to Requesters's phone log requests, the Department stated without a search that they were not public records. Evans, CP 47; Jones, CP 51; and Robinson, CP 34. The Department provided Requesters the records after the lawsuits were filed. Evans, CP 49; Jones, CP 53-54; and Robinson, CP 237-38.

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[1]While it is preferred to refer to a party by name, because of the consolidation the three parties represented by counsel, Evans, Jones and Robinson will be referred to by the designee Requesters. RAP 10.4(e).

In its show cause motions and its response to Robinson's summary judgment motion, no evidence was presented by the Department to show that it had conducted a reasonable search for the records. Instead, the Department conceded the requested records were public records and should have been produced. Evans, CP 14; Jones, CP 17; and Robinson, CP 196. It argued that it was a reasonable mistake and as such, it should not be required to pay penalties. Evans, CP 16-18; Jones, CP 10-11; and Robinson, CP 201-02. After making this argument, the trial court issued letter opinions granting the Requesters penalties. Evans, CP 241-49; Jones, CP 514-25; and Robinson, CP 309-18.

In these opinions, the trial court accepted the concession of the Department and then addressed the issue of bad faith and the Department's argument. It accepted that the newbrief setting forth policy, although wrong, was objectively reasonable. Evans, CP 244-47; Jones, CP 520-23; and Robinson, CP 313-16. However, the trial court found that because the Department failed to "perform any search of its own records or take any steps to determine whether the records . . . came within the exception set forth in its own policy," bad faith was established and penalties were due. Evans, CP 247-49; Jones, CP 523-24; and Robinson, CP 316-18. It granted the Requesters penalties of $25 per day. Evans, CP 249; Jones, CP 524-25; and Robinson, CP 318.

After the Department's arguments were rejected by the Trial Court and penalties were granted, the Department filed its motions for reconsideration. In its motions, the Department relied on additional evidence to argue that the records were not public records because it did not use them. Evans, CP 260-84; Jones, CP 415-44; and Robinson, CP 328-57. It then argued that if there are no responsive records, then RCW 42.56.565(1) does not permit penalties. The Trial Court denied the reconsideration motions. Evans, CP 293; Jones, CP 302-03; and Robinson, CP 374.

III. ARGUMENT

The Requesters will first show that the evidence presented with the motions for reconsideration should not be considered because the Trial Court's show cause and summary judgment decisions were supported by the evidence before it at the time. They will then show that even if the motions for reconsideration should be considered, the evidence provided is insufficient or based on hearsay and should be rejected. The Department's arguments should also be rejected based on judicial estoppel. The Requesters then show that the decision awarding penalties was reasonable and supported by the facts and law. Then they argue that because the failure to search is a separate violation of the PRA their penalty awards must be upheld. They finally show they are entitled to reasonable attorney fees and costs if they prevail.

A. THE STANDARD OF REVIEW OF A SUMMARY JUDGMENT MOTION SUPPORTED SOLELY BY AFFIDAVITS IS *DE NOVO*.

Appellate Courts review agency actions under the PRA de novo when the sole evidence is documentary. *Lindeman v. Kelso School Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). Appellate courts "stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) ("PAWS"). Appellate courts are not bound by a trial court's factual findings regarding an agency's PRA violations.

A trial court's penalty determination based on grouping is reviewed for an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 439, 98 P.3d 463 (2004). The trial court's determination of an appropriate per-day penalty is also reviewed under an abuse of discretion. *Id.*, at 431. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *ACLU v. Blain School Dist. No. 503*, 95 Wn. App. 106, 111, 975 P.2d 536 (1999).

The standard of review for a motion for reconsideration depends on whether or not it challenges an issue of fact or law. Motions challenging rulings based on evidence are reviewed for an abuse of discretion. *Allyn v. Boe*, 87 Wn. App. 722, 729, 943 P.2d 364 (1997) (citing *Kramer v. J.I. Case*

Mfg. Co., 62 Wn. App. 544, 561, 815 P.2d 798 (1991)). However challenges to an order based upon legal rulings have no element of discretion present. *Id.* (citing *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989)).

B. THIS COURT SHOULD NOT CONSIDER ANY EVIDENCE PRESENTED IN THE DEPARTMENT'S MOTIONS FOR RECONSIDERATION BECAUSE THE TRIAL COURT'S DECISION WAS PROPERLY BASED ON THE EVIDENCE BEFORE IT.

The Department provided evidence in its motions for reconsideration that it claimed showed that at the time of the request the records had not been accessed for any investigative or disciplinary purpose. Before examining this argument this Court must first determine whether or not it can consider this evidence in the first place. These motions were allegedly brought pursuant to CR 59(a)(7) and CR 59(a)(9). The Requesters argue that these rules do not apply because the Department introduced old and stale evidence to support its argument in violation of CR 59(a)(4) and it cannot introduce such evidence after the case has been decided. *See Holaday v. Merceri*, 49 Wn. App. 321, 742 P.2d 127 (1987).

In *Holaday*, the former husband tried to introduce evidence after the trial pursuant to CR 59(a)(4), (7) and (9). Each was rejected in turn. CR 59(a)(4) was rejected because the evidence was available at trial thus he did not exercise due diligence. *Id.* at 329-30. The argument made pursuant to CR

59(a)(7) was rejected because a "court must base its decision on the evidence it already heard at trial." *Id* at 330 (citing *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 44 Wn. App. 32, 42, 721 P.2d 18 (1986)). Finally, after considering and rejecting the arguments pursuant to CR 59(a)(4) and (7) the *Holaday* Court easily rejected the argument for substantial justice because the original evidence before the trial court supported its ruling. It made the point that "[a] new trial is rarely granted on the sole basis that substantial justice has not been done." *Id.* (citing *Larson v. Georgia Pacific Corp.*, 11 Wn. App. 557, 562, 524 P.2d 251 (1974)).

In its motions below in this case, the Department cited to CR 59(a)(7) and (9) once during its introduction into its argument. Evans, CP251; Jones, CP 407; and Robinson, CP 320. In support of its motion, the Department presented evidence that it could have and should have presented during its original show cause motions and response. Evans requested all phone calls from his Inmate Personal Identification Number (IPIN) between May 1, 2011 and August 1, 2014. Evans, CP 45. Jones requested all phone calls from Tobey's IPIN between January 1, 2014 and March 1, 2014. Jones, CP 49. Robinson requested all phone calls from his IPIN between January 1, 2012 and May 5, 2014. Robinson, CP 33. All litigation took place in 2015, the year after the end date of all the requests. Any evidence to support an argument of

the Department regarding the existence or otherwise of public records due to their use by the agency clearly existed before each lawsuit was filed in 2015.

CR 59(a)(4) permits a party to ask for reconsideration for newly discovered evidence. However, the evidence must be material "which the party could not with reasonable diligence have discovered and produced at the trial." *Id.* The Department chose not to bring a motion pursuant to CR (a)(4) because it knew the evidence it presented in its reconsideration motions were old and stale. Instead it tried to rely on CR 59(a)(7) and 59(a)(9) – unsuccessfully.

CR 59(a)(7) states that grounds for reconsideration may be granted when "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." There was no evidence presented to the trial court in any of Appellee's cases at the time of the Trial Court's consideration of the merits of these cases below to support the assertion that the individual appellee's phone records had not been accessed during the period of each request. Such evidence was only presented in the reconsideration motions and absolutely no evidence was presented before the reconsideration motions showing that Department employees conducted a search for the records. The *Holaday* Court expressly forbad a trial court from considering such evidence. Furthermore, the Trial Court's rulings were supposed by the evidence.

The Department provided no explanation as to how the trial courts's ruling were contrary to law as required by CR 59(a)(7) based on the evidence previously considered by the Trial Court and instead relied on the new evidence attached to the motions to make the entirely new argument that because none of the records had been used by the Department, there were no responsive public records. Because the Department did not argue that the Trial Court made an error of law based on the evidence before it issued its opinion, any argument based on CR 59(a)(7) using any of the new evidence must be rejected.

The Department also argued that substantial justice required in CR 59(a)(9) was not done. However, it failed to show why this rarely granted exception should be given in this case. It failed to show how substantial justice was not done in light of the evidence it has previously put before the Trial Court before the reconsideration motion. Because the Department could not argue that the Trial Court's ruling was not well founded on the evidence befoire it, any argument based on CR 59(a)(9) must be rejected.

C. THE ALLEGED PROOF THAT THE PHONE CALLS IN QUESTION WERE NOT USED BY THE AGENCY IS INSUFFICIENT AND HEARSAY.

Assuming, arguendo, this Court considers the evidence provided with the reconsideration motions, it must also consider whether or not the evidence provided clearly establishes that no records met the requirement of

Newsbrief 13-01 that the calls were used by the Department. In support of this motion, the Department provided a declarations of Katie Neva.[2] Evans, CP 265-67; Jones, CP 420-24; and Robinson, CP 333-37. Neva's declarations fail on several grounds: (1) they are factually insufficient to support the Department's argument; and (2) they are replete with a hearsay offered for the truth.

In her declarations, she states that she is an administrative assistance in the Department's Special Investigations Services Unit in Olympia. Evans, CP 265; Jones, CP420; and Robinson, CP 333. She states that she conducted a search as to whether or not the phone logs had ever been pulled for use in an investigation. *Id.* She never stated the extent of the search or who exactly she made inquires to. She provided no information on what records she reviewed. Before phone logs are in the Department's possession, they are on Global Tel Link's (GTL) servers. GTL can generate a report of all calls associated with an inmate's IPIN. Evans, CP 28; Jones, CP 32; and Robinson, CP 215. She never contacted GTL who maintains these records to ask what records had been requested. All she stated is that she contacted some Department's facilities and she found no evidence of usage. Evans, CP 265-

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[2]While this brief has been filed on behalf of Evans, Jones and Robinson, the Requesters would also note that an almost identical declaration by Katie Neva was filed in Cook's case. Cook, CP 171-72.

67; Jones, CP 420-24; and Robinson, CP 333-37. The Department has not provided sworn statements by any individual performing any search of GTL records stating whether or not the Appellee's phone logs had been requested. For the reasons cited above, the Department has failed to establish that the phone records were not requested for use and this Court should not rely on any evidence produced in the Department's motions for reconsideration.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the ... hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Neva's declarations meets the hearsay definition because it relies on statements of others in the Department's facilities in making her assessment. Evans, CP 265-67; Jones, CP 420-24; and Robinson, CP 333-37. These statements were introduced for the truth of the matter asserted. Hearsay is not authorized unless permitted by court or evidentiary rules or by statute. ER 802; *see e.g.* ER 803. No such rule or statute excepts exists and the declarations of Neva describing the search for records must not be considered by this Court.

D. THIS COURT SHOULD APPLY JUDICIAL ESTOPPEL TO FORECLOSE THE DEPARTMENT FROM ARGUING THE RECORDS SOUGHT WERE NOT PUBLIC RECORDS.

When faced with this phone log litigation, the Department conceded the phone logs were public records and produced them to the Requesters. Evans, CP 14; Jones, CP 17-18; and Robinson, CP 197. It then argued

penalties should not be awarded because at the time of the requests it reasonably believed the phone logs did not contain information relating to the "conduct of government or the performance of any governmental or proprietary function ..." Evans, CP 17; Jones, CP 20; and Robinson, CP 201; RCW 42.56.010(3). It also argued it reasonably believed at the time of the requests it did not "prepare, own, use or maintain inmate phone logs." In its reconsideration motions, it now argues there was no usage therefore the phone logs are not public records. It then goes on to argue because no responsive records exist, no penalties must be awarded. Judicial estoppel prohibits the Department from taking this new position.

Judicial estoppel precludes a party from taking two inconsistent positions.

> The doctrine serves three purposes:(1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time.

Skinner v. Holgate, Wn. App. 840, 848, 173 P.3d 300 (2007). Although not absolutely controlling, courts generally consider three factors when examining the application of judicial estoppel:

> (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party successfully persuaded a court to accept the party's earlier position but then creates the perception that the court was misled when it adopts a later, inconsistent position; and (3) whether the party

> would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. (citing *New Hampshire v. Maine*, 532 U.S. 968, 750, 121 S.Ct. 1808, 139 L.Ed.2d 968 (2001)).

Here, the Department initially took the position that the logs were public records and that penalties should not be awarded because its position in denying the records was legally and factually reasonable.[3] Now, the Department is arguing that the records are not public records and penalties should not be awarded because of the lack of causation. These two positions are clearly inconsistent with each other. The Trial Court accepted the Department's position when it made its penalty determination. By now changing its position 180 degrees, the perception must be that the Department misled the lower court. And, of course, it poses a detriment on the Requesters if not estopped.

The purposes of judicial estoppel are clearly met here. By rejecting the Department's argument, it ensures consistent rulings based on consistent legal positions and evidence. Finally, it avoids wasting the court's time. This Court should reject the Department's argument based on judicial estoppel.

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[3]Of course, this position was rejected by the Trial Court because the Department had admitted the records requested were public records.

E. THE TRIAL COURT'S DECISION AWARDING PENALTIES TO THE REQUESTERS WAS THE CORRECT DECISION.

The Department argues that the Trial Court erred when it awarded penalties to the Requesters pursuant to RCW 42.56.565(1). It bases this argument on the trial court's stating the policy was objectively reasonable, therefore its actions were objectively reasonable. However, it seems to forget that the policy cautioned its employees that records could be public records if used by the Department. It also uses the evidence provided in the reconsideration motion in support of its argument.

The Department also makes an unsupported argument that "[n]othing in the PRA clearly establishes an agency's obligation to check to see if records that are typically maintained by a third party contractor have been accessed for use by the agency." And yet, the case law does establish this very fact. *See Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999).

The exclusive possession of a responsive record by a private third party does not excuse an agency from liability for failing to produce that record if the agency "used" it and failed to disclose it. In *Concerned Ratepayers*, the Supreme Court held that,

> regardless of whether an agency ever possessed the requested information, an agency may have "used" the information within the meaning of the Act if the information was either: (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose.

Id. at 960. In *Concerned Ratepayers*, a private third party had the only available copy of a responsive record - a technical drawing of a turbine that the agency neither prepared, owned, nor retained. *Id.*, at 954. Critically, most, if not all of the technical specifications of the IPS 10380 turbine generator had been viewed and evaluated by engineers from the PUD at vendor Cogentrix's offices in North Carolina. *Id.*, at 956. The Supreme Court, notwithstanding the independent, non-governmental status of Cogentrix, held that the drawing was a responsive public record. *Id.*, at 962 (remanding the case to determine whether the PRA's "valuable formulae, designs, drawings, or research data" exemption applied). The same reasoning applies here.

The excuse that the Department reasonably believed the records did were not public records is not supported by the record. There is not one cite to the records supporting this claim. There are no declarations by the public records officers stating they did not search because they reasonably believed the records did not exist. The reason they did not search is that they believed they only needed to reject the claim, without more, which they did.

The Trial Court based its decision on the Department's admitted liability. It described the rules in the policy as a general rule and an exception.

It was the Department's failure to inform the Requesters of the exception which is the partial basis of the finding of bad faith. It was the failure to perform a search of its own records that was the basis of the finding of bad faith. It then cited to *Francis* and RCW 42.56.565(1) in support of its finding. There is insufficient legal grounds to overturn the Trial Court's findings.

F. AGENCIES MUST BE PENALIZED FOR THE FAILURE TO PERFORM A REASONABLE SEARCH AND THE TRIAL COURT HAS BROAD DISCRETION IN SETTING THE PENALTY.

An agency has a simple task to show that it is not liable under the PRA – conduct a reasonable search for requested documents. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011). The Public Records Act is "a strongly worded mandate for broad disclosure of public records." *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127 (1978). The PRA's over-arching mandate is that "agencies shall, upon request for identifiable public records, make them promptly available" to the requester. RCW 42.56.080. Public records must be made available unless they fall under a specific exemption. RCW 42.56.070(1). Agencies are required to provide the fullest assistance to requesters. RCW 42.56.100.

In response to a request wherein records exist, the documents are either "disclosed" or "not disclosed." *Sanders v. State*, 169 Wn.2d 827, 836,

240 P.3d 120 (2010). When records are not produced nor exemptions claimed forcing a requester to bring suit, the threshold issue is whether or not the records exist, not whether or not they are exempt pursuant to the PRA. Because the requester cannot independently search an agency's records, the initial focus is on the actions of the agency to determine if records exist. The silent withholding of records, with no identification or exemption citation is a clear and distinct PRA violation. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 269-71, 884 P.2d 592 (1994).

In *Sanders*, the Supreme Court ruled that the failure to explain claimed exemptions is an independent violation of the PRA because such a response is statutorily required to provide the requester the ability to determine whether the claimed exemption properly applies to the record in question. *Sanders*, 169 Wn.2d at 845-46. Just as the failure to adequately explain how an exemption justifies withholding a record is a violation of the PRA, so is the silent withholding of records without identification or claimed exemption. There is no question that the Department was liable for its failure to search for records – hence its liability. The issue is whether or not the remedy should be an aggravating factor or an independent cause of action.[4]

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[4]In *Sanders*, the Supreme Court briefly discussed how it will not address whether the PRA impliedly authorizes penalties for a brief explanation violation if the requester will otherwise have no remedy." *Id.* at

The *Sanders* court ruled that failure to fully explain would be treated as an aggravating factor when calculating penalties. *Id.* at 659-61. The situation here differs markedly from Sanders because when the violation for an agency's failure to provide an explanation justifying withholding a document pales in comparison to an agency silently withholding the document so the requester has no knowledge that the document exists. The failure to search opens up a pandora's box of potential violations because requesters often cannot determine whether the records exist at all, thus being unable or unwilling to bear the cost of litigation to uphold their rights.

An adequate search is compelled by the three duties imposed on an agency by the PRA – provide the fullest assistance and most timely possible response, identify and explain all responsive records withheld with specific statutory exemptions, and produce all nonexempt records. Because of the possibility of misuse by the agency, the failure to perform an adequate search is a separate and distinct violation fo the PRA and the agency must be penalized for this action.[5]

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861 fn. 20. This was because some records were withheld and thus penalties awarded. *Id.* Here, if one accepts the Department's argument that no records existed, then this Court is faced with the *Sanders* issue.

[5]In fact, a requester faced with an agency's failure to search should be awarded a much higher penalty then the run-of-the-mill violation.

In line with this argument is the separate remedy already established by this Court and implemented by the trial court. *See Francis v. Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). In Francis, the inmate brought an action after he discovered the Department of Corrections failed to provide responsive documents. *Id.* at 47. The Department admitted it failed to provide the documents. Evidence was presented that staff spent no more than 15 minutes searching for documents and no storage locations were searched. *Id.* at 50. Like here, the Department argued for no bad faith.

In discussing bad faith, this Court focused on various cases in the PRA context to support its position. *Id.* at 463 (citations omitted). It also looked at cases outside the PRA. *Id.* at 464 (citations omitted). Next on the agenda for the *Francis* Court was consideration of excerpts from the Restatement (*Second*) of Contracts § 205 cmt. d (1981), quoted in part in Black's Law Dictionary 159 (9th ed. 2009). Finally, federal Freedom of Information Act (FOIA) cases were examined for possible persuasive authority. As the *Francis* Court stated, "FOIA cases have no bearing on the meaning of bad faith in this appeal." *Id.* at 465. Having rejected the Department's argument, it looked at the statutory interpretation of RCW 42.56.565.

In rejecting the intentional bad act requirement, the *Francis* Court looked at the purpose of the PRA and the people's sovereignty. It also looked

at how it is interpreted for the requester to protect the public interest. *Id.* at 466. It concluded that Francis was entitled to his penalties

> To be more consistent with these sources of authority, we hold that failure to conduct a reasonable search for requested records also supports a finding of "bad faith" for purposes of awarding PRA penalties to incarcerated requestors.
>
> ...
>
> In addition to other species of bad faith, an agency will be liable, though, if it fails to carry out a record search consistently with its proper policies and within the broad canopy of reasonableness.

Id. at 467. Because a separate remedy has been established for the lack of a reasonable search when the documents exist, the Requesters are entitled to the penalty awarded by the trial court made pursuant to RCW 42.56.565(1). This award must stand because trial courts have broad discretion when calculating penalties. *Wade's Eastside Gun Shop, Inc. v. Dept. of Labor and Industries*, 2016 WL 1165441, pp. 2-4 (March 24, 2016).

G. THE REQUESTERS ARE ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS ON APPEAL.

If this Court reject's the Department's appeal of the penalties in these cases, the Requesters ask that reasonable attorneys fees and cost be granted. RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. The Washington Supreme Court has determined that under the PRA, an individual who prevails against the agency

is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). If they prevail, the Requesters asks this Court to grant reasonable attorney fees and costs on appeal and to remand the cases to the trial court determine those fees and costs.

IV. CONCLUSION

For the reasons stated above, Respondents Evans, Jones and Robinson ask this Court to reject the Department's appeal, grant reasonable attorney fees and costs, and remand it to the trial court for further proceedings.

Respectfully submitted this 15th day of June, 2016.

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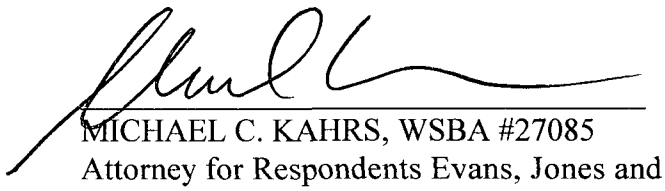

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on June 1, 2016 in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

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