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NO. 96928-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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BRETT HAMILTON,

Plaintiff/Appellant,

vs.

KITSAP COUNTY,

Defendant/Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KITSAP COUNTY

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KITSAP COUNTY'S ANSWER TO PETITION TO REVIEW

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## I. INTRODUCTION

Acceptance of review is an unnecessary and wasteful use of judicial and other public resources. Contrary to Hamilton's contention that this case involves an issue of substantial public interest, Hamilton's pursuit of his claims is a refusal to accept the law of the case, the facts, and the lack of evidence supporting his claims.

*Petitioner's Issue No. 1*<sup>1</sup> is an acknowledgement that his claim, that the collective bargaining agreement was violated, is grounded in contract. However, this claim is barred by the doctrine of claim preclusion, as it was adjudicated and dismissed by a federal court.

In addition, the process for addressing an alleged breach of contract was through grievance arbitration. Because grievance arbitration was not pursued, judicial remedies for breach of contract are barred.

Instead, Hamilton recasts his claim as a tort: negligent supervision. As breach of contract is the sole basis for his negligent supervision claim and there was no breach of contract, then there was no negligent supervision. But this effort fails as well, for his tort claim is barred by the statute of limitations.

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<sup>1</sup> Petition for Review, p. 3.

*Petitioner's Issue No. 2<sup>2</sup>* continues Hamilton's effort by contending this Court should grant review because "substantial" evidence supports his retaliation claim. No causal link exists between alleged protected activity and termination of his employment. Hamilton's alleged protected activity occurred more than a year prior to his termination and 59 other corrections officers were engaged in similar protected activity with no adverse action.

Hamilton was discharged for legitimate, non-pretexual reasons. He violated his oath as a corrections officer to uphold the law and never betray public trust by committing the crimes of telephone harassment and making false statements to a police officer, and for making false statements to a court and during his employer's administrative investigation.

## **II. ANSWER TO PETITIONER'S ISSUE STATEMENT**

### **A. Issue No. 1.**

Did the trial court and court of appeals correctly dismiss Hamilton's negligent supervision claim because his supervisors acted within the scope of their employment when they reported his criminal conduct to law enforcement and did not inform him of the criminal investigation prior to his questioning by police?

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<sup>2</sup> Petition for Review, p. 3.

**B. Issue No. 2.**

Did the trial court and court of appeals correctly dismiss Hamilton's retaliation claim because his untruthful statements to a police officer and to a court during a protection order hearing were legitimate nondiscriminatory reasons for terminating Hamilton's employment and Hamilton provided no evidence that these reasons were mere pretext for a retaliatory motive?

**III. ANSWER TO PETITIONER'S STATEMENT OF THE CASE**

**A. Procedural History.**

Hamilton filed his complaint against the County in March 2016 (present lawsuit), alleging (1) negligent supervision, (2) negligent infliction of emotional distress, and (3) retaliatory discharge. CP 3-10.

At the time he filed the present lawsuit, Hamilton had another lawsuit pending against the County in the United States District Court for the Western District of Washington (prior lawsuit). CP 89, 131. In the prior lawsuit, Hamilton asserted substantive due process and breach of contract claims. CP 139-144. The claims asserted in the prior lawsuit arose from the same facts as in the present lawsuit. CP 132-137. Hamilton's claims in the prior lawsuit were summarily dismissed. CP 139-145.

In the present lawsuit, the trial court granted the County's motion for summary judgment on the negligent supervision and negligent infliction of emotional distress claims and denied Hamilton's motion for



reconsideration. CP 11-33, 382-385, 402-403. The trial court then granted the County's motion for summary judgment on Hamilton's retaliation claims, and denied Hamilton's motion for reconsideration. CP 405-419, 540-541, 547-548.

Hamilton appealed. The Court of Appeals affirmed the trial court in all respects. *Hamilton v. Kitsap County*, No. 50570-3-II, *unpublished* (January 3, 2019).

## **B. Summary of Substantive Facts<sup>3</sup>**

### **1. Hamilton's Employment**

From 2002 to March 2013, Hamilton was employed in the Kitsap County Sheriff's Office (KCSO) as a corrections officer. CP 39. Corrections officers carry out day-to-day operations in the County jail, receiving inmates into custody, enforcing rules, restraining inmates when necessary, overseeing food services and the disbursement of medications, escorting and transporting inmates, testifying in court proceedings, and composing and preparing written incident reports of problems or situations that occur. The essential functions of a corrections officer include honest and ethical conduct, effective decision making, the exercise of good

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<sup>3</sup> Only essential facts needed for consideration of the Petition for Review are presented here, and no waiver of any defenses asserted in the County's Response Brief filed with the Court of Appeals is intended.

judgment under stressful conditions, and representing the County in a positive and trustworthy manner. CP 39, 46-49, 51-52, 54.

## **2. Hamilton's Harassing Text Messages**

In April 2012, Hamilton prepared an incident report that inmate Aaron Caseria was manipulating Telmate, the inmate phone and video system, to obtain free video chats with his wife Ashley Caseria. CP 40, 61. Hamilton admits he was never asked to conduct any follow-up or further investigation of inmate use of Telmate. CP 40-41, 97-98, 126-127.

Hamilton continued to watch video visits between Aaron and Ashley Caseria. CP 99. Using his son's cell phone, Hamilton began sending text messages to a phone used by Ashley Caseria. CP 100-102. Ms. Caseria and Hamilton exchanged messages, such as from Hamilton, "I love you hon" and "I love you so much ash plss call me babe," and in response from Ms. Caseria, "This is Ashley. Who is this?" CP 155; 162.

Hamilton learned that inmate Aaron Caseria had requested furlough to attend the funeral of Ashley Caseria's mother. CP 103-105. *The day after Ashley Caseria's mother died*, Hamilton impersonating Ashley Caseria's deceased mother texted: "Never forget how much I love u ash everthing will be ok I will keep you safe im here for u even in death see u soon." Hamilton received the following responses from Ms. Caseria and her father respectively, "Who is this?" and "Hey you have been texting my

daughter Ashley don't know who you are but I will find out come clean or stop calling." Hamilton responded, "I'm sorry Ash I leave you alone for now no worry I wish all good for you always." CP 162.

Hamilton shared his text messages with several corrections officers. CP 106-107. Lieutenant Elton learned of Hamilton's conduct and informed Chief Newlin who instructed her to report it to the Port Orchard Police Department (POPD). CP 41; CP 34-35.

### **3. Criminal Investigation and Charges**

POPD Detective E.J. Martin initiated a criminal investigation into Hamilton's conduct. CP 153-154. On June 16, 2012, Detective Martin visited Hamilton at his home and displayed his badge. CP 108. Hamilton followed Detective Martin to Martin's POPD-issued vehicle. CP 163. Inside the vehicle, Detective Martin interviewed Hamilton regarding the text messages. CP 163-164. Hamilton denied knowing Ashley Caseria, denied sending the text messages, and denied telling his fellow officers he sent the text messages. CP 154; CP 163-167.

Three days after the interview, Hamilton visited Detective Martin with a prepared statement admitting to sending the text messages to Ms. Caseria. CP 154-155; 158-160; CP 167-169. In the statement, Hamilton asserted for the first time he sent the text messages because he was investigating inmate use of the Telmate system. CP 158-160.

Detective Martin prepared a Statement of Probable Cause that Hamilton lied and withheld information. Detective Martin concluded Hamilton fabricated that he was conducting an investigation when he sent the text messages. CP 171-172. Hamilton was charged with telephone harassment and false statement to a public servant but avoided trial by entering into a pre-trial diversion agreement. CP 113-115.

In addition, Asley Caseria sought and obtained an anti-harassment order against Hamilton. CP 66. Hamilton appeared at a hearing on the anti-harassment order, during which he told the court he sent the text messages as part of his investigation but admitted he had not notified any of his supervisors about his investigation. Id.; CP 118. The court found Hamilton's conduct warranted an anti-harassment order. CP 122-123.

#### **4. KCSO's Administrative Investigation**

When an employee's conduct is subject to both criminal and administrative investigations, KCSO postpones its administrative investigation until the criminal investigation is substantially completed. CP 147-148. The reason behind this practice is to avoid interfering with or compromising the criminal investigation. CP 148.

After Detective Martin concluded his criminal investigation, Hamilton was notified of an administrative investigation. CP 148; CP 152. The notice was made in accordance Appendix D of Hamilton's collective

bargaining agreement (CBA), which outlines the rights afforded in administrative investigations that may lead to disciplinary action. Id.; CP 519-523. The relevant portions of Appendix D read:

**It is essential that public confidence be maintained in the ability of the employer to investigate and properly adjudicate complaints against its employees. Additionally, the employer has the right and the responsibility to seek out and discipline those whose inappropriate conduct impairs the effective operation of the employer. The rights of the employee, the employer, as well as those of the public, must be protected. In criminal matters, an employee shall be afforded those constitutional rights available to any citizen. In administrative matters in which an employee will be interviewed concerning an act, which, if proven, could reasonably result in disciplinary action involving a loss of pay against him or her, she/he will be afforded the safeguards set forth in this Appendix.**

... Whenever the employer decides to initiate an investigation that may lead to disciplinary action involving a loss of pay, the employer shall promptly provide the employee notice of the investigation...

The employee will be informed in writing not less than forty-eight (48) hours prior to conducting an investigatory interview, that the employee is a subject in an inquiry that may lead to disciplinary action that involves a potential loss of pay...

CP 519 (emphasis added).

The rights set forth in Appendix D apply only to investigations of administrative, not criminal matters. KCSO did not initiate its administrative investigation until Hamilton's criminal case was resolved through the pre-trial diversion agreement. CP 148; CP 41-42.

## **5. Hamilton's Termination**

Chief Newlin issued a letter to Hamilton outlining the results of the administrative investigation and his preliminary determination that Hamilton's employment should be terminated. CP 42. A pre-termination hearing was attended by Chief Newlin, Hamilton, Hamilton's Guild representative, and the Guild's attorney. *Id.* Following the hearing, Chief Newlin directed a follow-up investigation into allegations made by Hamilton that he did not know Detective Martin was a law enforcement officer when he gave false statements. *Id.* The follow-up investigation verified that Detective Martin's interview with Hamilton took place in a POPD-issued vehicle containing police equipment that would have been visible to Hamilton. CP 69-74.

A second pre-termination hearing was attended by Hamilton, his Guild representative, and his Guild's attorney. CP 43. Chief Newlin found that: no corroborating evidence suggested Hamilton was investigating inmates' use of Telmate when he sent the harassing text messages to Ms. Caseria, Hamilton had been untruthful to a police detective, Hamilton was untruthful when he claimed he did not know E.J. Martin was a law enforcement officer, and Hamilton was untruthful while under oath in Ms. Caseria's anti-harassment proceedings. CP 42-43; CP 77-81. Hamilton was discharged on March 26, 2013. CP 43; CP 76-87.

## **6. The 2011 “Emergency Injunction[s]”**

Despite overwhelming evidence of egregious misconduct, Hamilton alleges he was terminated because in 2011 he prepared two documents titled “Emergency Injunction[s]” which address inadequate staffing in the jail. CP 8; CP 553-565.

Hamilton claims he prepared these “injunctions” in the fall of 2011 for presentation at a sergeant’s meeting. CP 443-445. The typed language of the two “injunctions” are identical and each contain the signatures of thirty corrections officers. *Id.* The “injunctions,” which are not court orders and appear to have no legal force or effect, petition KCSO to “amend the current procedure.” CP 476-479.

Although Hamilton, *along with 59 other corrections officers*, signed one of the “injunctions,” neither document mentions his name or indicates he authored them. CP 476-479. No evidence suggests that when Hamilton was terminated, Chief Newlin was aware Hamilton prepared them. When questioned about the “injunctions” Chief Newlin testified:

Q: Did you become aware of any safety-related concerns being raised by Officer Hamilton or any other officer under your employ?

A: Not being raised by Officer Hamilton, but I knew that the guild, from time to time, would meet me, both in labor-management meeting, and they would bring that topic up almost every year in negotiations with the County, in Collective Bargaining Agreement negotiations, their perception of the fact that conditions may not have been safe for their officers.

But that's a norm in the world of corrections. It's not unusual in our world.

CP 482-483.

According to a declaration provided by the then-Guild president, there was a Guild meeting in 2011 to discuss the "Emergency Injunction." Chief Newlin was not present at the meeting and the Guild president admits she never directly provided Chief Newlin with a copy of the "injunctions."

CP 498-499.

While Chief Newlin might have known about the "injunctions," there is no evidence he knew Hamilton had any role in preparing them. CP 482-483. Hamilton has provided no evidence disputing Chief Newlin's lack of knowledge that Hamilton prepared the "injunctions."

#### **IV. AUTHORITIES AND ARGUMENT**

##### **A. Negligent Supervision Claim Properly Dismissed**

Hamilton's negligent supervision claim was properly dismissed--it is really a breach of contract claim, precluded by a prior judgment, no evidence supports the claim, and it is barred by the statute of limitations.

##### **1. Negligent Supervision Barred by Claim Preclusion**

Dismissal of Hamilton's claim for negligent supervision is proper because it is barred by the doctrine of claim preclusion. Claim preclusion prohibits the re-litigation of claims previously litigated, or could have been



litigated, in a prior action. *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 239-40, 118 P.3d 392 (2005); *citing Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

While Hamilton has labeled his claim “negligent supervision,” it is actually a breach of contract claim—he claims the County violated Appendix D of the CBA when Chief Newlin and Lieutenant Elton allowed or “directed” the criminal investigation without giving Hamilton prior notice. Thus, Hamilton has plead a breach of contract claim, not a negligence claim. Hamilton cannot proceed in tort for a breach of contract unless there is an independent breach of a tort law duty of care. *Eastwood v. Horse Harbor Found. Inc.*, 170 Wn. 2d 380, 393-394, 241 P.3d 1256 (2010). Hamilton has failed to identify or articulate any such breach.

Hamilton’s breach of contract claim was previously adjudicated. The U.S. District Court of Western Washington rejected Hamilton’s contract claim because he failed to exhaust administrative remedies. CP 131-45. Hamilton is precluded from attempting to re-litigate this failed breach of contract claim by disguising it as a tort.

## **2. Factual Assertions Are Unsupported and Incorrect**

No evidence supports Hamilton’s negligent supervision claim. As Hamilton concedes, he must provide evidence to support the following elements: (1) an employee acted outside the scope of his or her employment;

(2) that employee presented a risk of harm to him or others; (3) Kitsap County knew, or in the exercise of reasonable care should have known, that the employee posed a risk of harm; and (4) the County's failure to supervise was the proximate cause of the injury. *Niece v. Bellevue Group Home*, 131 Wn.2d 39, 48- 51,929 P.2d 420 (1997).

Hamilton's argument is that Lieutenant Elton and Chief Newlin acted beyond the scope of employment because they intentionally violated Appendix D by failing to give him advance notice of Detective Martin's criminal investigation. Appendix D requires advance notice only of administrative, not criminal investigations. CP 519.

Hamilton asserts Chief Newlin and Lieutenant Elton directed POPD's criminal investigation, and he was entitled to prior notice under Appendix D. But reporting, communicating, and cooperating with criminal investigations of conduct occurring in the workplace are not beyond the scope of employment for a corrections or law enforcement officer. In addition, POPD is a department of the City of Port Orchard, a separate, independent municipality. POPD Detective E.J. Martin did not conduct the investigation on KCSO's behalf and KCSO had no authority over his investigation. CP 34-35, 147-148; CP 154. Hamilton has offered no evidence to suggest Lieutenant Elton or Chief Newlin acted outside the

scope of their employment when they reported his conduct to POPD and did not notify him that he was the subject of a criminal investigation.

To recover on a negligent supervision claim, Hamilton must also provide evidence to suggest Lieutenant Elton and/or Chief Newlin posed a risk of harm to him and KCSO knew or should have known about the risk. Hamilton has failed to present any evidence to support these required elements. *See Smith v. Sacred Heart Med. Ctr.*, 144 Wn.App. 537, 184 P.3d 646 (2008) (sexual abuse); *Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 151 P.3d 201 (2006) (murder); *Betty Y v. Al-Hellou*, 98 Wn.App. 146, 988 P.2d 1031 (1999) (sexual assault). Washington courts have dismissed negligent supervision claims brought in the context of an adverse employment action when the plaintiff was unable to show that that a coworker presented a risk of harm to other employees. *Briggs v. Nova Servs.*, 135 Wn.App. 955, 147 P.3d 616 (2006).

The only harm or injuries claimed by Hamilton are a violation of Appendix D and his termination. With regard to the former, there is no evidence of a violation of Appendix D. With regard to the latter, evidence reveals it was Hamilton's own conduct which led to his termination.

Hamilton's theory supposedly is that if he had been given advance notice of Detective Martin's criminal investigation, as he claims was required under Appendix D, he would not have lied to a police detective

and supposedly would not have been terminated. The “termination” injuries of which Hamilton is claiming were caused by his own conduct.

There is no evidence of allegedly wrongful conduct by Chief Newlin or Lieutenant Elton. Hamilton’s claim was properly dismissed because he failed to present any evidence to suggest deficient supervision was the proximate cause of his alleged harms.

Additionally, as the language in Appendix D was a negotiated term of the CBA covering Hamilton’s employment, and Appendix D does not require prior notice of a criminal investigation, additional supervision would not have prevented the allegedly intentional conduct of failing to give prior notice of the criminal investigation. This is especially true where the criminal investigation, of which Hamilton claims he was entitled to advance notice, was conducted and directed by POPD, an independent law enforcement agency, and not KCSO.

### **3. Negligent Supervision Claim is Time-barred.**

Although the Court of Appeals did not reach this issue, Hamilton’s negligent supervision claim is time barred. Under RCW 4.16.080(2) an action for personal injury must be commenced within three years. The factual basis for Hamilton’s negligent supervision claim is that he did not receive advance notice of the criminal investigation or interview conducted by Detective E.J. Martin. The interview occurred on June 16, 2012. CP 6;

CP 108. Accordingly, the statute of limitations ran on or about June 16, 2015. Hamilton did not file the present lawsuit until March 26, 2016. His claim for negligent supervision is time barred.

**B. Retaliation Claim was Properly Dismissed**

Hamilton’s retaliation claim was properly dismissed because even assuming that Hamilton set forth a prima facie case by meeting each of the three elements for retaliatory discharge, the County prevails “because it put forth a legitimate nondiscriminatory reason for terminating Hamilton, and Hamilton put forth no evidence that the County’s reason is mere pretext for a retaliatory motive.” *Hamilton v. Kitsap County*, No. 50570-3-II at \*7 (Wash. Ct. App. Jan. 3, 2019); citing *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 743, 332 P.3d 1006 (2014).

**1. Elements of Employment Retaliation**

To establish a prima facie case for retaliation, Hamilton must show (1) he engaged in statutorily protected activity, (2) he suffered an adverse employment action, and (3) a causal link between Hamilton’s protected activity and the adverse action. *Cornwall v. Microsoft Corporation*, 192 Wn.2d 403, 411-412, 430 P.2d 229 (2018) citing *Currier v. Northland Servs., Inc.*, 182 Wn. App. at 742.

## **2. No Causal Link Between “Injunction” and Termination.**

Hamilton must prove causation by showing that retaliation was a “substantial factor” in his termination. *Cornwall v. Microsoft Corporation*, 192 Wn.2d at 412; *citing Allison v. Housing Auth.*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991)). Hamilton may rely on the following facts to show this: (1) he took a protected action, (2) the County had knowledge of the action, and (3) Hamilton was subjected to an adverse employment action. *Cornwell v. Microsoft Corp.*, 192 Wn.2d at 413; *citing Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991).

The causal connections asserted by Hamilton are his termination and the two “Injunction[s]” that he prepared regarding safety related issues in the Kitsap County jail.<sup>4</sup> Hamilton asserts there is an issue of fact as to whether Chief Newlin knew of Hamilton’s creation of the “injunctions” which precludes dismissal. No evidence exists that Chief Newlin knew about Hamilton’s role in creating the “injunctions.”

Hamilton prepared the “injunctions” around September or October of 2011 at the direction of his former Guild President, Terry Cousins. Hamilton gave the “injunctions” to Ms. Cousins but does not know what happened to them after that. Ms. Cousins testified she provided the

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<sup>4</sup> Hamilton failed to establish that he engaged in statutorily protected activity, however, Kitsap County did not seek dismissal on this ground.

“injunctions” to Sergeant Dick so that he could bring them to the next sergeant’s meeting. Ms. Cousins testified that she never directly provided Chief Newlin with a copy of the “Emergency Injunction[s].” While Ms. Cousins stated she had a discussion with Chief Newlin in 2011 about the staffing issue that was the subject of the “injunctions,” she does not allege she ever told Chief Newlin about the origin or creation of the “injunctions.” Chief Newlin denied any such knowledge under oath at his deposition. Accordingly, no evidence supports Hamilton’s assertion Chief Newlin knew of Hamilton’s role in the “injunctions.” Hamilton cannot establish a prima facie case of retaliation and his claim for retaliatory discharge fails.

No evidence infers Hamilton’s creation of the “injunctions” in 2011 were a factor in his 2013 termination. A significant passing of time between an employee’s conduct and an employer’s adverse action can preclude an inference of causal connection. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862-863, 991 P.2d 1182 (2000) (holding that the passage of 15 months was too long to suggest the required causal nexus). Here, 15 months between Hamilton’s preparation of the “injunctions” and his termination is too long to raise an inference of retaliatory motive.

No causal link between Hamilton’s alleged protected activity and his discharge exists. The court of appeals properly affirmed dismissal of Hamilton’s retaliation claim.

### **3. No Evidence of Pretext to Support Retaliation Claim.**

Hamilton has failed to establish a prima facie case of retaliation and cannot provide evidence to suggest the stated reasons for his termination are pretextual.

Examples of how to prove an employer's articulated reasons were pretextual include that the employer's explanation has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision, it was not a motivating factor in employment decisions for other employees in the same circumstances, or presenting sufficient evidence that discrimination was a substantially motivating factor in the employment decision. *Scrivener v. Clark College*, 181 Wn.2d 439, 446, 334 P.3d 541 (2014); *citing Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 738–39, 904 P.2d 793 (1995).

Hamilton places emphasis on his positive performance reviews and work history prior to his termination, but they are irrelevant. Years of positive performance evaluations do not immunize an employee from discipline for egregious misconduct.

Hamilton violated law, KCSO policy, civil service rules, and his oath of office. Criminal charges were filed against Hamilton arising from his misconduct and he entered into a pre-trial diversion agreement regarding those criminal charges. Hamilton has admitted on numerous occasions he



was untruthful to Detective Martin. Hamilton has no evidence that the legitimate reasons for his termination were pretextual. His discharge occurred after a thorough administrative investigation involving two separate pre-termination hearings.


No evidence exists to establish a causal connection between Hamilton's preparation of the "Emergency Injunction[s]" in 2011 and his termination in 2013. His retaliation claim fails as a matter of law.

#### V. CONCLUSION

For the reasons explained above, the Court should deny Hamilton's Petition for Review.

Respectfully submitted this 23<sup>rd</sup> day of April, 2019.

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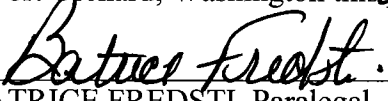
CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

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Law Office of Rodney R. Moody	<input checked="" type="checkbox"/>	Via Email
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SIGNED in Port Orchard, Washington this 23 day of April, 2019.

  
\_\_\_\_\_  
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