

67339-4

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No. 67339-4-1

COURT OF APPEALS,  
DIVISION 1  
OF THE STATE OF WASHINGTON

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STEVEN RAYMOND, Appellant,

v.

DAVID LEE CRAIG, JR. and GEORGIANNA CRAIG, and the marital  
community comprised thereof, Respondents.

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BRIEF OF APPELLANT

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Lee S. Thomas  
Attorney for Appellant  
8407 S. 259<sup>th</sup> St., Ste. 101  
Kent, WA 98030  
(253) 852-5615

ORIGINAL

TABLE OF CONTENTS

A. Assignment of Error ..... 1

Assignment of Error

No. 1 ..... 1

Issues Pertaining to Assignment of Error

No. 1 ..... 1

No. 2 ..... 1

No. 3 ..... 1

No. 4 ..... 1

B. Statement of the Case ..... 2

C. Summary of Argument ..... 8

D. Argument ..... 9

I. THE CRAIGS OWED A DUTY TO THE PUBLIC TO SAFELY STORE AND SECURE THEIR FIREARM ..... 12

a. Washington, along with other state courts, have held that gun owners owe the public a duty ..... 13

b. The Washington legislature has made policy statements regarding the need to protect the public from gun violence ..... 16

II. A REASONABLE TRIER OF FACT COULD FIND IT FORESEEABLE THAT DAVID JAY WOULD USE THE CRAIGS’ FIREARM TO INJURE SOMEONE ..... 22

III. THE CRAIGS' AFFIRMATIVE ACTS EXPOSED THE PUBLIC TO A RECOGNIZABLE HIGH DEGREE OF HARM ..... 25

- a. Loaded firearms involve a high degree risk of harm ..... 27
- b. A reasonable person would take these risks into account ..... 28
- c. The Craigs' affirmative acts created or exposed Mr. Raymond to the high degree risk of harm. 28

IV. THE CRAIGS NEGLIGENTLY ENTRUSTED THEIR FIREARM TO DAVID JAY ..... 30

E. Conclusion ..... 33

## TABLE OF AUTHORITIES

### A. Table of Cases

#### Washington Cases

<i>Beers v. Ross</i> , 137 Wn. App. 566, 570, 154 P.3d 277 (2007) .....	10
<i>Berglund v. Spokane County</i> , 4 Wn.2d 309, 103 P.2d 355 (1940) .....	23
<i>Bernethy v. Walt Failor's, Inc.</i> , 97 Wn.2d 929, 653 P.2d 280 (1982) .....	18, 22, 24, 30, 31
<i>Cameron v. Downs</i> , 32 Wn. App. 875, 650 P.2d 260 (1982) .....	31
<i>Cary v. Allstate Ins. Co.</i> , 130 Wn.2d 335, 922 P.2d 1335 (1996) .....	17
<i>Davis v. Baugh Indus. Contractors, Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007) .....	9
<i>Demelash v. Ross Stores, Inc.</i> , 105 Wn. App. 508, 20 P.3d 447 (2001) .....	10
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998) .....	9, 10
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985) .....	12
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999) .....	11
<i>Hickle v. Whitney Farms, Inc.</i> , 148 Wn.2d 911, 64 P.3d 1244 (2003) .....	30, 31, 32
<i>Hough v. Ballard</i> , 108 Wn. App. 272, 279, 31 P.3d 6 (2001) .....	11
<i>Johnson v. State</i> , 77 Wn. App. 934, 894 P.2d 1366 (1995) .....	24

<i>Lords v. N. Auto. Corp.</i> , 75 Wn. App. 589, 881 P.2d 256 (1994) .....	12
<i>McGrane v. Cline</i> , 94 Wn. App. 925, 973 P.2d 1092 (1999) .....	14, 15, 22, 25
<i>McLeod v. Grant County School Dist. No. 128</i> , 42 Wn.2d 316, 255 P.2d 360 (1953) .....	22, 23, 24
<i>Mejia v. Erwin</i> , 45 Wn. App. 700, 726 P.2d 1032 (1986) .....	31
<i>Mitchell v. Churches</i> , 119 Wash. 547, 206 P. 6 (1922) .....	31
<i>Parrilla v. King County</i> , 138 Wn. App. 427, 157 P.3d 879 (2007) .....	24, 26, 28, 29
<i>Pedroza v. Bryant</i> , 101 Wn.2d 226, 677 P.2d 166 (1984) .....	11
<i>Rikstad v. Holmberg</i> , 76 Wn.2d 265, 456 P.2d 355 (1969) .....	22
<i>Robb v. City of Seattle</i> , 159 Wn. App. 133, 245 P.3d 242 (2010), <i>order amended</i> January 14, 2011, <i>review granted</i> , 257 P.3d 664 (June 8, 2011) .....	25, 26, 28, 29
<i>Shook v. Bristow</i> , 41 Wn.2d 623, 626, 250 P.2d 946 (1952) .....	11
<i>Smith v. Acme Paving Co.</i> , 16 Wn. App. 389, 558 P.2d 811 (1976) .....	10
<i>Smith v. Nealey</i> , 162 Wash. 160, 298 P. 345 (1931) .....	13, 14, 27
<i>Snyder v. Med. Serv. Corp.</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001) .....	12
<b>Other Cases</b>	
<i>Estate of Heck v. Stoffer</i> , 786 N.E.2d 265 (Ind. 2003) .....	15, 18, 19, 20
<i>Estate of Strever v. Cline</i> , 278 Mont. 165, 924 P.2d 666 (1996) .....	16, 21

<i>Kuhns v. Brugger</i> , 390 Pa. 331, 135 A.2d 395 (1957) .....	16
<i>Long v. Turk</i> , 265 Kan. 855, 962 P.2d 1093 (1998) ..	16, 18, 20, 21
<i>Palmisano v. Ehrig</i> , 171 N.J. Super. 310, 408 A.2d 1083 (1979) .....	16
<i>Sullivan v. Creed</i> , 2 British Ruling Cases 139 (1903) .....	13

### **B. Statutes**

Indiana Code § 35-47-2-7 .....	19
Kansas Statutes Annotated 21-4203(a)(1) .....	20
Kansas Statutes Annotated 21-4204a .....	20
RCW 9.41.040 .....	18
RCW 9.41.040(2)(a)(i) .....	18
RCW 9.41.040(2)(a)(iii) .....	18
RCW 9.41.080 .....	17, 18

### **C. Other Authorities**

Blacks Law Dictionary 1058 (7th ed.1999) .....	30
Court Rule 56(c) .....	10
H.B. 2319, 53 <sup>rd</sup> Leg., 1 <sup>st</sup> Spec. Sess. (Wash. 1994) .....	17, 21
Restatement (Second) of Torts § 302 B comment e ..	25, 26, 27, 30
Restatement (Second) of Torts § 390 .....	30, 31

**A. ASSIGNMENT OF ERROR**

**Assignment of Error**

1. The trial court erred in granting Respondents' Motion for Summary Judgment. CP at 323-24.

**Issues Pertaining to Assignment of Error**

1. Whether gun owners in Washington State owe a duty to the public to safely store and secure their firearms?

2. Whether it is foreseeable that an injury may occur when an unsecured loaded firearm is left with a known felon with a history of drug abuse, erratic behavior, misdemeanor crimes, and emotional problems?

3. Whether it was an affirmative act, giving rise to a duty to protect foreseeable victims of crime, when Respondents left their unsecured loaded firearm with a known felon with a history of drug abuse, erratic behavior, misdemeanor crimes, and emotional problems?

4. Whether Respondents negligently entrusted their unsecured loaded firearm with a known felon with a history of drug abuse, erratic behavior, misdemeanor crimes, and emotional problems when they left the weapon with him while they were on vacation?

## **B. STATEMENT OF THE CASE**

### **Procedural History**

On June 17, 2010, Appellant, Steven Raymond, filed suit against Respondents, David Lee and Georgianna Craig. CP at 1-4. Mr. Raymond alleged that the Craigs were liable for injuries he sustained when he was shot with their shotgun in their home by their son. *Id.*

On June 3, 2011, the trial court heard arguments on the Craigs' Motion for Summary Judgment. CP at 323-24; Verbatim Report of Proceedings ("VRP") at 1. The trial court granted summary judgment and entered an order dismissing the case. VRP at 44-46; CP at 323-24. On June 30, 2011, Mr. Raymond appealed the trial court's order to the Court of Appeals, Division I. CP at 325-29.

### **Statement of the Facts**

David Lee and Georgianna Craig kept a shotgun in their unlocked bedroom closet.<sup>1</sup> CP at 207. This weapon was used by the Craigs' adult son, David Jay Craig, to shoot Steven Raymond on September 19, 2009, while they were out of town.<sup>2</sup>

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<sup>1</sup> For simplicity sake, Appellant will refer to David Lee Craig as "David Lee" and will refer to his son, David Jay Craig, as "David Jay."

<sup>2</sup> This is undisputed.

The Craigs stored the gun loaded. CP at 228. Additional rounds were kept in the house.<sup>3</sup> The gun was unlocked and ready for immediate use.<sup>4</sup> The gun was stored just feet away from an unlocked and unsecured rifle which was also kept in the closet. CP at 244. Both of these firearms were accessible to anyone in the home. CP at 207.

David Jay lived in the home and was permitted to stay in the Craigs' bedroom in order to have easy access to the shotgun when the Craigs went out of town on September 12, 2009.<sup>5</sup> David Jay also knew

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<sup>3</sup> CP at 243-246, in the property list it is noted that two live rounds and one spent shell were recovered from the shotgun along with one spent shell found on the floor in the master bathroom; *See also* CP at 232, photo of shotgun shell located in the downstairs storage room.

<sup>4</sup> Although disputed by Respondents, there is ample evidence to suggest that the gun was unlocked. *See* CP at 206 & 208 (David Lee acknowledges that he does not remember if the shotgun was locked). *See also* CP at 203-04 (David Lee specifically states that he would have used the trigger lock and not the cable lock). *See also* CP at 212, photo of lock and cable. *See also* CP at 204 (David Lee states that the key was buried in his dresser drawer). *See also* CP at 229-30 (David Jay states that it was the cable lock that was on the gun, but later indicated that he had no idea which lock was on the gun). *See also* CP at 227-28 (David Jay says that he found the key to the lock on top of a bookshelf in another room). *See also* CP at 233 (the lock and cable were found by police neatly stored in David Lee's dresser drawer). All of this can reasonably infer that there was no lock on the gun.

Importantly, there is no logical way that the gun was stored loaded and with a lock. A trigger lock is placed in the trigger area of a shotgun and cannot be installed on a loaded gun because it would cause the gun to discharge. As this is an appeal of a summary judgment, this Court should assume these reasonable inferences as asserted by Appellant.

<sup>5</sup> Although disputed, there is evidence that the Craigs purposefully left the gun with David Jay. *See* CP at 207-08 where this exchange took place at David Lee's deposition:

Q: If you weren't going to tell David that it was up there when you left for vacation why didn't you disarm it and put it away?

A: Oh, well, we had been broke into in January. There was still burglaries going on. He was laid up with a bad knee in bed. What if this happened again? He's, you know, laying in bed. He can't defend himself.

Q: Right. But you didn't tell him it was there anyway.

the gun was unlocked and loaded when his parents left; in fact, David Jay is the one who loaded the gun months earlier. CP at 255-56 (bottom of pg. 255 to top of pg. 256).

On September 12, 2009, when the Craigs left David Jay with easy access to the unlocked and loaded shotgun, the Craigs knew their son had a criminal record that included two felony convictions (one as a minor), a domestic violence conviction (involving an assault on David Lee at the family home), controlled substance convictions (VUCSA), and a conviction for aggravated driving while intoxicated.<sup>6</sup> They knew that he struggled with depression, anxiety, a sense of worthlessness, alcoholism, and drug abuse. CP at 217, 220-21, & 277.

When they left David Jay with easy access to an unlocked and loaded shotgun, the Craigs also knew that David Jay had a history of erratic behavior while they were away from home. CP at 277.

Specifically, when being questioned by an investigating officer, David Lee

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A: No, I know, but if he – I don't know. If he did get to searching around or something. I don't know. I just –

*See also* CP at 277 (top of page where David Lee admits that David Jay would stay in their bedroom while they were away because of the prior break in and the fact that the loaded shotgun was in the room). Again, as an appeal from summary judgment, this Court should accept the reasonable inferences from this evidence.

<sup>6</sup> The Craigs admit prior knowledge in their Motion for Summary Judgment, pg. 9-10. CP at 18-19. *See also* CP at 210-11 (David Jay's criminal history). Plaintiff contends that Defendants knew, or should have known, about all of these offenses before leaving David Jay home with the shotgun.

stated that on one occasion, in a drunken state, David Jay had cut up the family furniture with a knife. *Id.* He had also broken a lattice fence and had been yelling in the streets. *Id.* Although the timing of this event is not clear, the fact that this information was volunteered by David Lee to the investigating officer supports the fact that David Lee was well aware of David Jay's unpredictable and potentially violent behavior.

When they left David Jay with easy access to an unlocked and loaded shotgun, the Craigs also knew that even as a child they had concerns about his behavior problems. CP at 218. David Jay later dropped out of Kentwood High School. CP at 219. In his senior year, David Jay ran away from home with a friend to California. *Id.* Indeed, in an attempt to assist in David Jay's criminal defense against charges stemming from this shooting, the Craigs wrote letters at the direction of his defense attorney that stressed his emotional and behavior problems. CP at 220-21.

Mrs. Craig was asked at her deposition whether anything she was saying was inconsistent with the letters she had drafted for David Jay's criminal attorney. *Id.* Mrs. Craig admitted that the letters were written in an attempt to secure a psychological evaluation. *Id.* These letters apparently contained references to David Jay suffering from paranoia and hearing voices. *Id.* Mrs. Craig tried to clarify that these statements were

provided to her by David Jay's criminal defense attorney, but the fact of the matter is that it is unclear how much the Craigs really knew and were concerned about David Jay's mental health. This is a material fact in this case, and in considering summary judgment, this evidence supports a reasonable inference that the Craigs had concerns about David Jay suffering from paranoia and hearing voices. So much so that they fought, successfully, to have him evaluated as part of his criminal defense.

This evidence paints the picture of a son with early struggles in school ultimately leading to dropping out, who had a felony as a minor, who ran away from home, who struggled with drugs, who committed domestic violence against his father, who was convicted of a felony as an adult, who continued to have ongoing emotional and behavior problems, and who has had a history of erratic and occasionally violent behavior.

Despite this history, and despite their knowledge, the Craigs left David Jay at home with easy access to an unlocked and loaded shotgun. The result of this decision was the shooting of Mr. Raymond in the back of his right leg.

On September 19, 2009, Mr. Raymond was invited into the Craig home by David Jay. CP at 106. At some point, David Jay went into the master bedroom. CP at 111. Mr. Raymond was in the hallway outside the master bedroom door. *Id.* Mr. Raymond then observed David Jay pick up

a shotgun. *Id.* Mr. Raymond noticed at that point that David Jay had a strange look in his face. *Id.* David Jay started calling Mr. Raymond, “Chris.” *Id.* He then threatened that Mr. Raymond would never leave the house. *Id.* Mr. Raymond was afraid he would be shot, so he tried to run but could not locate the door before he heard a loud boom. CP at 112. David Jay had fired a shot; just barely missing Mr. Raymond. *Id.* Afraid he would be shot in the back if he tried to escape; Mr. Raymond was able to discretely dial 9-1-1 and kept the phone in his pocket while he faced David Jay. CP at 113.

When he finally saw an opportunity, Mr. Raymond charged David Jay and the two struggled for the gun. CP at 114. Mr. Raymond realized that he was outmatched and so he tried to make a run for it. *Id.* David Jay then shot Mr. Raymond in the back of the leg. CP at 115. The Kent Police found probable cause that David Jay had committed the crimes of 1<sup>st</sup> Degree Assault and Unlawful Possession of a Firearm (due to his prior felonies). CP at 280-282. He pled guilty to 1<sup>st</sup> Degree Assault and was sentenced to 120 months in prison. CP at 288-99.

### C. SUMMARY OF ARGUMENT

A firearm owner has a duty to prevent harm from the discharge of their weapon, as recognized in Washington as early as 1931 in the case of *Smith v. Nealey*. Because firearms have the potential to inflict indiscriminate harm from great distances, firearm owners owe this duty to all members of the public. In *McGrane*, however, this Court declined to recognize a duty to the particular victim in that case because, with no notice of a potential theft or unauthorized access to the gun, the gun was unlawfully taken from their bedroom and later used to commit murder in Iowa. Yet, in *McGrane*, this Court acknowledged that its ruling may have been different under a different set of facts. The present case presents facts that are not so attenuated as in *McGrane* and strongly support the finding of a duty.

Moreover, in this case, summary judgment was inappropriate because there are material issues of fact regarding the foreseeability of the resultant harm. There is enough evidence to support a finding that the Craigs should have foreseen the possibility that David Jay would have used the shotgun to injure another.

Even if no duty existed under a general theory of negligence and failure to secure their firearm, the Craigs owed a duty to Mr. Raymond based on their own affirmative actions which placed the public in a high

degree risk of harm. Under Restatement (Second) Torts § 302 B comment e, a person may be liable for the acts of another where their own affirmative acts placed the victim at risk. As in the cases of *Parrilla* and *Robb*, the affirmative act of leaving a dangerous instrumentality within easy reach of David Jay created a duty on their part to protect others from the discharge of their shotgun. A reasonable trier of fact could find for Mr. Raymond under the facts of this case. As such, summary judgment was inappropriate.

Finally, material issues of fact exist as to whether the Craigs negligently entrusted their shotgun to David Jay when they left him at home with the gun in order for him to defend himself in the event of a burglary. By entrusting the weapon to their son, the Craigs had a duty to guard against his misuse of the weapon. A reasonable trier of fact could find for Mr. Raymond on a claim of negligent entrustment and summary judgment was inappropriate.

#### **D. ARGUMENT**

The standard of review on appeal is de novo. “Trial court rulings in conjunction with a motion for summary judgment are reviewed de novo.” *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Using a de novo standard here is consistent with

requirements that the appellate court (1) conducts the same inquiry as a trial court and (2) views all evidence and inferences in the light most favorable to the nonmoving party. *Folsom*, 135 Wn.2d at 663.

Summary judgment should be granted sparingly and only after considering all the evidence. “Washington law favors resolution of cases on their merits.” *Beers v. Ross*, 137 Wn. App. 566, 570, 154 P.3d 277 (2007) (citation omitted). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Court Rule (“CR”) 56(c). A motion for summary judgment may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 521, 20 P.3d 447 (2001). All reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party. *Id.* The trial court has no discretion; if there is any justifiable evidence supporting a verdict in favor of the nonmoving party, the question is for the jury. *Id.* Accordingly, courts must exercise “caution lest worthwhile causes perish short of a determination of their true merit.” *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392, 558 P.2d 811 (1976). The summary judgment granted in

this case was inappropriate and unsupported and deprived Mr. Raymond of his right to a trial on the merits.

Here, Mr. Raymond's claims sound in negligence. Negligence is established where there is: 1) a duty owed to the complaining party; 2) a breach of that duty; 3) a resulting injury; and 4) a proximate cause between the claimed breach and resulting injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Generally, whether there has been negligence or comparative negligence is a jury question, unless the facts are such that all reasonable persons must draw the same conclusion from them, in which event the question is one of law for the courts. *Hough v. Ballard*, 108 Wn. App. 272, 279, 31 P.3d 6 (2001) (citing *Shook v. Bristow*, 41 Wn.2d 623, 626, 250 P.2d 946 (1952)). Here, the trial court granted summary judgment, despite the general rule that negligence is an issue for the jury, on the basis that the Craigs did not owe a duty to Mr. Raymond.

The existence of a duty is a question of law, while breach and proximate cause are generally questions of fact for the jury. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). In the case before the Court, the issue of breach and proximate cause are issues for the jury and the Craigs do not dispute that Mr. Raymond was injured. Indeed, the Craigs did not address those elements in their brief or arguments

below, nor were those elements considered by the trial court. Thus, the issue for summary judgment in this case is the existence of a duty. Mr. Raymond advances three arguments in support of his contention that Defendants owed him a duty. First, the Craigs owed a duty to the general public to prevent harm from the discharge of their firearm. Second, the Craigs' affirmative acts exposed the public to a recognizable high degree of risk of harm. Third, the Craigs negligently entrusted their firearm to David Jay.

**I. THE CRAIGS OWED A DUTY TO THE PUBLIC TO SAFELY STORE AND SECURE THEIR FIREARM**

The existence of a duty is a question of law and depends on mixed considerations of "logic, common sense, justice, policy, and precedent." *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994) (quoting *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985))). Based on the facts of this case, viewed in the light most favorable to Mr. Raymond, logic, common sense, justice, policy, and precedent support the existence of the Craigs' duty to the general public to prevent harm from the discharge of their firearm.

**a. Washington, along with other state courts, have held that gun owners owe the public a duty**

Washington courts have long held that “anyone who is the possessor of a dangerous instrument has a duty to the public, or at least to such members of the public as are reasonably likely to be injured by its misuse.” *Smith v. Nealey*, 162 Wash. 160, 166, 298 P. 345 (1931) (quoting *Sullivan v. Creed*, 2 British Ruling Cases (1903)). In *Sullivan* the owner of a firearm left his loaded gun inside a fence on his land. *Id.* The owner’s son saw the weapon on his way home from church and picked it up. *Id.* Not knowing that the gun was loaded, he accidentally fired a shot that injured his companion. *Id.* The *Sullivan* court reversed a directed verdict for the owner and held that the gun owner owed a duty to all members of the public, or at least to those foreseeably injured by its misuse. *Id.*

Relying on the holding in *Sullivan*, the Court in *Smith v. Nealy* held that a duty existed between a gun owner and the Plaintiff who was the owner’s son’s friend. In *Smith*, the gun owner, Harvey Nealy, had placed a loaded gun in the back seat of his car in anticipation of an upcoming hunting trip. *Smith*, 162 Wash. at 161. Harvey then directed his thirteen year old son to drive the car to a point about one mile south of town. *Id.* While driving, Harvey’s son witnessed a fire back in the town and drove

to a house that was on fire. *Id.* When Marybelle Smith, Harvey's son's fourteen year old friend, exited the house she got into the back of the car. *Id.* When Harvey's son put the car in motion the car "gave a quick lurch thereby throwing the girl backward and in some way tossed her feet into the air, at which time the gun was discharged, with the result that her left foot was partially shot off and she was severely injured." *Id.* The *Smith* court held that a duty existed between Harvey and Marybelle Smith under the facts of that case. *Id.* at 166-167.

In *McGrane*, a more recent firearms case, the owners of a firearm left their sixteen year old daughter at home while they were gone for the weekend. *McGrane v. Cline*, 94 Wn. App. 925, 927, 973 P.2d 1092 (1999). They also left an unsecured firearm in their master bedroom. *Id.* There is no indication that their daughter knew the location of the gun, or that it was loaded. *Id.* There had been no history of break-ins at the house, nor did their daughter have any emotional or behavior problems, drug abuse, criminal history, nor did she show any erratic behavior while the parents had been away on prior occasions. *Id.* While the owners of the firearm were away, their daughter invited some friends over, two of whom were young men. *Id.* When the owners returned home they found the gun, ammunition, and jewelry missing. *Id.* The gun was later used to

kill Cara McGrane during a robbery at a restaurant in Des Moines, Iowa. *Id.* at 926-927.

The *McGrane* court drafted a narrow ruling and held that the court would not “impose potential liability upon firearm owners based *solely* upon factors of ownership, theft, and subsequent criminal use of a firearm.” *Id.* at 928-929 (emphasis added). In the same decision, however, the Court appeared to leave the question of duty open under different factual circumstances, noting that “the issues involved in [*McGrane*] implicate a narrow range of issues. [ . . . ] This case does not involve accidental injury to children nor does it involve facts which arguably might alert a reasonable firearm owner that unauthorized entry and theft were likely or even reasonably foreseeable occurrences.” *Id.* at 929. As such, the *McGrane* decision likely represents the outer limits of when the Court will not find duty. However, the facts in the case at hand are not so attenuated. In this case the gun owners left their son, who was a convicted felon and had a history of poor decision making, with easy access to a loaded gun.

Other states have also acknowledged that a firearm owner owes a duty to the general public to prevent harm from the misuse of their firearm. *See Estate of Heck v. Stoffer*, 786 N.E.2d 265 (Ind. 2003) (holding that statute prohibiting the transfer of firearms to felons

supported the imposition of a duty to the public on firearm owners who failed to secure a firearm from their felonious adult son); *Long v. Turk*, 265 Kan. 855, 855, 962 P.2d 1093 (1998) (legislative policy behind statutes outlawing the transfer of firearms to minors support holding that owner owes a duty to the public to store a handgun in a safe and prudent manner); *Estate of Strever v. Cline*, 278 Mont. 165, 174-175, 924 P.2d 666 (1996) (holding as a matter of law that owner of firearm has a duty to the general public to use and to store the firearm in a safe and prudent manner taking into consideration the type of firearm, whether it is loaded or unloaded, whether the ammunition is in close proximity or easily attainable, and the location and circumstances of its use and storage); *Palmisano v. Ehrig*, 171 N.J. Super. 310, 313, 408 A.2d 1083 (1979) (holding that firearm owners have a duty to take such steps as will protect an innocent person from the expectable action of other persons); *Kuhns v. Brugger*, 390 Pa. 331, 344, 135 A.2d 395 (1957) (holding that duty imposed on owners of firearms extends to all persons who might suffer harm or injury from its discharge).

**b. The Washington legislature has made policy statements regarding the need to protect the public from gun violence**

Public policy strongly supports the imposition of a duty on firearm owners to use reasonable efforts to protect against the misuse of their

firearm. Public policy is generally determined by the Legislature and established through statutory provisions. *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 340, 922 P.2d 1335 (1996). The proper starting place for determining public policy, then, is applicable legislation. *Id.* In 1994, the legislature made an unequivocal policy statement regarding the need to protect the public from gun violence. H.B. 2319, 53<sup>rd</sup> Leg., 1<sup>st</sup> Spec. Sess. (Wash. 1994). The intent, as outlined by the legislature, follows:

The legislature finds that the increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions.

...

The legislature finds that violence is abhorrent to the aims of a free society and that it cannot be tolerated. State efforts at reducing violence must include changes in criminal penalties, *reducing the unlawful use of and access to firearms*, increasing educational efforts to encourage nonviolent means for resolving conflicts, and allowing communities to design their prevention efforts.

Addressing the problems of violence requires the concerted effort of all communities and all parts of state and local government. It is the immediate purpose of chapter . . . , Laws of 1994 (this act) to: (1) *Prevent acts of violence by encouraging change in social norms and individual behaviors that have been shown to increase the risk of violence; [ . . . ]*.

*Id.* at § 101 (emphasis added).

With the enactment of this bill, the legislature amended RCW 9.41.080 making it a Class C Felony to deliver a firearm to any person

whom he or she has reasonable cause to believe is ineligible under RCW 9.41.040 to possess a firearm. RCW 9.41.040(2)(a)(i) makes it unlawful for anyone convicted of a felony to possess a firearm.<sup>7</sup> In this case, David Jay had two prior felonies, one as a juvenile and one as an adult, both of which the Craigs were aware of before they left for vacation on September 12, 2009.

Citing a prior enactment of RCW 9.41.080, the Supreme Court recognized that the statute, “at a minimum, reflects a strong public policy in our state that certain people should not be provided with dangerous weapons.” *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 934, 653 P.2d 280 (1982). Mr. Raymond is not making a claim for tort liability for the Craigs’ violation of RCW 9.41.080. Mr. Raymond is asserting that the public policy behind RCW 9.41.080 strongly supports the imposition of a duty to all firearm owners in Washington State to guard against its access or misuse by known felons. Two other states’ Supreme Courts, in Indiana and Kansas, have squarely addressed this policy foundation for the imposition of a duty on firearm owners. *See Estate of Heck*, 786 N.E.2d 265; *Long*, 265 Kan. 855.

*Estate of Heck*, is on point with the case at hand. In *Heck*, the adult son of the Defendants (Raymond and Patricia Stoffer) used their gun

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<sup>7</sup> RCW 9.41.040(2)(a)(iii) makes it unlawful for a minor to possess a firearm.

to murder a police officer. *Estate of Heck*, 786 N.E.2d at 266-267. The officer had no prior connection to the Stoffer family. *Id.* at 268. The Defendants' adult son, Timothy Stoffer, was a drug-addicted felon who they gave unrestricted access to their home where they kept a handgun. *Id.* Timothy took that handgun and used it to murder Officer Eryk Heck in order to avoid apprehension. *Id.* at 267. The Indiana Supreme Court overruled the trial court's grant of summary judgment to Defendants and found that the Defendants could be held liable for the death of Officer Heck. *Id.* at 271.

The Supreme Court in *Heck* found that the state legislature's actions supported a public policy recognizing a duty of care in that case. *Id.* at 270. In addition to the number of statutes regulating the sale, use, and possession of a firearm, the Court found it particularly important that the legislature enacted a statute outlawing the transfer of a handgun to a minor, felon, drug user, alcohol abuser or mentally incompetent person. *Id.* (citing Indiana Code § 35-47-2-7).

The legislature has deemed the safety risk associated with the possession of handguns by these individuals as too high. Implicit in this prohibition is the recognition that a degree of responsibility is associated with handgun ownership.

...

Based upon the significant number of gun related crimes and the ease of securing a firearm in the home, we find that public policy favors the safe storage of firearms.

*Id.*

Similarly, the Supreme Court of Kansas overturned the summary judgment ruling in favor of Defendants where a minor had taken the gun from his father's safe and used it to commit murder. *Long*, 265 Kan. 855. In *Long*, the seventeen year old son of the gun owner had taken the gun from his father's safe. *Id.* at 857. The son placed the gun in his car and went for a drive. *Id.* at 856. While driving, he encountered a van and for some reason a shouting match ensued. *Id.* He then pulled out his father's gun and shot and killed a passenger in the van. *Id.* at 856-857.

Although there is no indication that any prior relationship existed between the victim and the gun owner, the Supreme Court held that the owner could be held liable. *Id.* at 864. They found that a duty existed based on the legislative policy supporting a Kansas statute which outlawed the transfer of guns to minors. *Id.* at 863 (citing Kansas Statutes Annotated ("K.S.A.") K.S.A. 21-4203(a)(1) & K.S.A. 21-4204a). The Court held that the "legislative policy behind [these statutes] supports our holding that [Defendant] owes the public a duty to store his .357 Magnum in a safe and prudent manner, taking into consideration the type of

handgun, where the ammunition is located, and the circumstances of the gun's use." *Id* at 864 (citing *Estate of Strever*, 278 Mont. 165).

With the facts and reasonable inferences drawn in favor of Mr. Raymond in this case, public policy supports the existence of a duty. The Craigs owned a shotgun which they kept loaded and unlocked while they were out of town. David Jay had unrestricted access to the gun, and the Craigs knew he would be staying in the same room as the gun. David Jay had a criminal history which included two felonies. Those felonies placed him in the category of persons deemed unsafe by the legislature to possess a firearm. His parents were aware of his felonies when they left town. Moreover, his parents were aware of his drug and alcohol problems and his erratic behavior while they had been away on a previous occasion. Under these facts, the Craigs owed a duty to the general public to exercise reasonable care in the storage of their firearm. This duty is in line with the public policy outline by the Legislature to "encourag[e] change in social norms and individual behaviors that have been shown to increase the risk of violence." H.B. 2319 § 101, 53<sup>rd</sup> Leg., 1<sup>st</sup> Spec. Sess. (Wash. 1994).

The facts here certainly support the existence of a duty in a case which does not involve an intervening theft of the firearm, where the gun owners knew or should have known that it was dangerous to leave the

loaded and unlocked gun with their son, and where there is a nexus between the situs of the negligently stored firearm and the injury.

**II. A REASONABLE TRIER OF FACT COULD FIND IT FORESEEABLE THAT DAVID JAY WOULD USE THE CRAIGS' FIREARM TO INJURE SOMEONE**

Mr. Raymond argues that a duty of care is owed by all gun owners to the public to safely store and secure their firearm. However, as outlined in *McGrane*, this duty is not limitless. Rather, duty extends to foreseeable harms. Under the analysis above, once it is determined that a legal duty exists, it is generally the jury's function to decide the foreseeable range of danger, thus limiting the scope of that duty. *Bernethy*, 97 Wn.2d at 933. In other words, given the existence of a duty, the scope of that duty under the particular circumstances of the case is for the jury. *Id.* In this case, Mr. Raymond and David Jay's encounter was unusual. However, David Jay harming someone when given access to a loaded shotgun was foreseeable.

As established by the Supreme Court, "[i]t is not, however, the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant." *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). In *McLeod v. Grant*

*County School Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953),

the Supreme Court said:

Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.

(citing *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355

(1940)).

The primary risk associated with a loaded weapon is that someone will be shot. Importantly, this risk will almost always be associated with some kind of unlawful act by an incompetent person be it a minor, felon, or other. Here, the field of danger, or ambit of the hazard, involved an injury caused by the discharge of the shotgun. This is exactly what happened; Mr. Raymond was shot with the shotgun in the Craigs' home. This is precisely the kind of injury that the public is in danger of suffering from the negligent storage of the Craigs' shotgun and the injury actually occurred in the home where the gun was kept. Thus, foreseeability considerations also support a duty in this case.

A criminal act may be considered foreseeable if the actual harm fell within a general field of danger which should have been anticipated. The court may determine a criminal act is unforeseeable as a matter of law only if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability. Otherwise,

the foreseeability of the criminal act is a question for the trier of fact.

*Johnson v. State*, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995) (citing *McLeod*, 42 Wn.2d at 321-23). David Jay's criminal conduct is simply a factor of the foreseeability analysis; it does not preclude a finding of foreseeability. Criminal conduct is not unforeseeable as a matter of law. *Bernethy*, 97 Wn.2d at 934. Thus, in keeping with the general rule that an individual has a duty to avoid reasonably foreseeable risks, if a third party's criminal conduct is reasonably foreseeable, an actor may have a duty to avoid actions that expose another to that misconduct. *Parrilla v. King County*, 138 Wn. App. 427, 437, 157 P.3d 879 (2007) (citing *Bernethy*, 97 Wn.2d at 934 (citing *McLeod*, 42 Wn.2d at 321)). Here, the Craigs left David Jay with the shotgun and then he used the weapon to shoot Mr. Raymond in the home where the shotgun was kept. This is not a case involving the theft of a gun by an unknown third party who then uses the gun to commit a crime in another state. Any use of the shotgun by David Jay would have necessarily been unlawful and to hold that an intervening criminal act precludes a finding of foreseeability would neuter any duty the Craigs had to keep the public safe.

Mr. Raymond argues that all gun owners in Washington owe a duty to the public to safely store and secure their firearms. This duty is

bound by policy and foreseeability principles, as in *McGrane*, but an intervening criminal act is merely one consideration in that analysis. This is because the field of danger involved with the negligent storage of a firearm will nearly always involve some kind of intervening unlawful act. However, the Craigs also had a duty under Restatement (Second) of Torts § 302 B comment e, based on their own affirmative acts and the extreme danger created when they left David Jay at home with the shotgun.

### **III. THE CRAIGS' AFFIRMATIVE ACTS EXPOSED THE PUBLIC TO A RECOGNIZABLE HIGH DEGREE OF HARM**

This Court has recently clarified that a duty to guard against the criminal conduct of a third party exists even where there is no special relationship between either the actor and the criminal third party, or between the actor and the victim of that criminal conduct. *Robb v. City of Seattle*, 159 Wn. App. 133, 245 P.3d 242 (2010), *order amended* January 14, 2011, *review granted*, 257 P.3d 664 (June 8, 2011). The Court in *Robb* based its holding on Restatement (Second) of Torts § 302 B comment e which recognizes that:

There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; *or where the actor's own*

*affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.*

*Robb*, 159 Wn. App. at 140 (quoting Restatement (Second) of Torts § 302 B cmt. e (1965)) (emphasis in original). The Court in *Robb* confirmed that § 302B comment e is recognized in Washington as a source of duty. *Id.* at 144. The *Robb* court also relied heavily on another recent Division I decision in *Parrilla*. In *Parrilla*, this Court explained that “criminal conduct is not unforeseeable as a matter of law.” *Parrilla*, 138 Wn. App. at 435-8 (citations omitted). The Court went on to explain that “if a third party's criminal conduct is reasonably foreseeable, an actor may have a duty to avoid actions that expose another to that misconduct. *Id.* Furthermore, “intervening criminal acts may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon.” *Id.* The rule articulated by § 302 B and adopted by the Court allows the imposition of a duty when the risk of harm is recognizable and when a reasonable person would have taken the risk into account. *Id.* Under the analysis outlined in *Robb* and *Parrilla*, based on Restatement § 302 B comment e, liability for the criminal conduct of another is supported where:

- (1) There is a recognizable high degree of risk of harm;

(2) The risk must be one that a reasonable person would take into account;

(3) The actor's own affirmative act has created or exposed the other to the high degree of risk of harm.

*See* Restatement (Second) of Torts § 302 B cmt. e.

Here, with all facts and inference taken in the light most favorable to the Mr. Raymond, all three elements are met.

**a. Loaded firearms involve a high degree risk of harm**

There is no higher risk involved than when dealing with a loaded firearm.

The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming into contact with them. The degree of care must be commensurate with the dangerous character of the article.”

*Smith*, 162 Wash. at 165. Without rehashing the facts of this case, a reasonable person could find that there was a high degree of risk of harm.

This was a shotgun kept loaded and unlocked that was left in the control of a felon who had shown a lifelong inability to make good decisions. A loaded gun requires the utmost care and caution because it can easily cause death and serious injury. Anything but the highest degree of care exposes the public to a high degree of risk of harm.

**b. A reasonable person would take these risks into account**

There were multiple risks associated with the Craigs' actions in this case. A reasonable gun owner would have taken these risks into account before leaving the unlocked and loaded gun at home when they left on vacation. Even the National Rifle Association ("NRA") cautions its members to always keep a gun unloaded until ready to use.<sup>8</sup> The risk of serious injury or death involved with a loaded gun simply requires that every potential risk be considered in its security and storage.

**c. The Craigs' affirmative acts created or exposed Mr. Raymond to the high degree of risk of harm**

The decision to leave dangerous instrumentalities within easy access to incompetent individuals is an affirmative act under Restatement §302 B comment e. See *Parrilla*, 138 Wn. App. 427; *Robb*, 159 Wn. App. 133. In *Parrilla*, the defendant bus driver evacuated his riders after a passenger began behaving strangely. However, the bus driver left the keys in the bus. The erratic passenger then drove the bus and injured the plaintiff. *Parrilla*, 138 Wn. App. at 430-31. It was later determined that the rider was under the influence of illicit drugs when the driver left the bus, but this fact was not known to the driver at the time. *Id.* In *Parrilla*, this Court overturned the trial Court's granting of Defendant's Motion to

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<sup>8</sup> See NRA Gun Safety Rules, [www.nrahq.org/education/guide.asp](http://www.nrahq.org/education/guide.asp)

Dismiss under CR 12(c), held that the bus driver's affirmative act of leaving the bus while the engine was running, and where the passenger was acting erratic, exposed the Plaintiff's to a recognizable high degree of risk of harm from misconduct by the rider, which a reasonable person would have taken into account. *Id.* at 433.

In *Robb*, in affirming the denial of Defendant's Motion for Summary Judgment, this Court held that "it should not be surprising that tort liability can be imposed if officers take control of a situation [burglary stop] and then depart from it leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in possession of a shotgun." *Robb*, 159 Wn. App. at 147. The young man in *Robb*, Samson Berhe, later used the ammunition and shotgun to kill a random victim. *Robb*, 159 Wn. App. at 138. The Court found that "[a] jury could find that the affirmative acts of the officers in connection with the burglary stop created the risk of Berhe coming back for the shells and using them intentionally to harm someone, a risk that was recognizable and extremely high." *Id.* at 147.

Under the facts of this case, taken in the light most favorable to Mr. Raymond, the Craigs' actions fit squarely into the kind of affirmative acts recognized under *Parrilla* and *Robb*. In this case, the Craigs'

affirmative act was their decision to leave on vacation without disarming and locking up their shotgun.

A reasonable person could find that all elements under Restatement §302 B comment e have been met in this case. Therefore, summary judgment was not appropriate and the Craigs may be held liable for the reasonably foreseeable criminal conduct of their son.

#### **IV. THE CRAIGS NEGLIGENTLY ENTRUSTED THEIR FIREARM TO DAVID JAY**

Mr. Raymond's third theory in support of the Craigs' duty to him is based on the negligent entrustment of their firearm to David Jay. Negligent entrustment is a well-established common law doctrine in Washington. *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 925, 64 P.3d 1244 (2003). One who entrusts a dangerous instrumentality may be held liable for damages resulting from the use of that instrumentality when it is supplied or entrusted to someone who is incompetent. *Bernethy*, 97 Wn.2d at 933; Restatement (Second) of Torts § 390. Negligent Entrustment is defined as: "The act of leaving a dangerous article (such as a gun or car) with a person who the lender knows, or should know is likely to use it in an unreasonably risky manner." Blacks Law Dictionary 1058 (7th ed.1999).

Washington cases that have imposed a duty of care based on a theory of negligent entrustment have involved the owner's consent to relinquish control. See, e.g., *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922) (vehicle loaned to intoxicated person); *Cameron v. Downs*, 32 Wn. App. 875, 650 P.2d 260 (1982) (keys to vehicle loaned to incompetent driver). Negligent entrustment is based on the foreseeability of harm when one knew or should have known that the person to whom materials were entrusted was unable to safely handle the materials. See *Bernethy*, 97 Wn.2d at 933-34; *Mejia v. Erwin*, 45 Wn. App. 700, 704-05, 726 P.2d 1032 (1986); Restatement (Second) of Torts § 390. It is not an absolute defense that David Jay unlawfully handled the firearm. *Bernethy*, 97 Wn.2d at 933-34; see also *Hickle*, 148 Wn.2d at 925-26 (quotations and citations omitted). In *Bernethy*, the Court held that a gun seller could be held liable when he left a firearm and ammunition on the counter while attempting to complete a sale to an intoxicated person. *Bernethy*, 97 Wn.2d at 931-35. The intoxicated person stole the gun while the store owner's back was turned and used the weapon to commit murder. *Bernethy*, 97 Wn.2d at 933-34. In *Hickle*, the Court held that producers of industrial quantities of organic waste may be liable for injuries when they entrust the waste to another whom, in turn, illegally handle the waste. *Hickle*, 148 Wn.2d at 925-26. The *Hickle* court held that liable may be

found if the plaintiff could establish (1) that the producers entrusted wastes to another, (2) that the other was reckless or incompetent to safely handle the wastes, (3) that the producers knew or should have known of the other's recklessness or incompetence, (4) that other's recklessness or incompetence created an unreasonable risk of harm, and (5) that the plaintiff's injuries were proximately caused by the negligent entrustment of wastes to the other, then the producers are liable for his injuries under the theory of negligent entrustment. *Hickle*, 148 Wn.2d at 926.

With all facts and inferences taken in the light most favorable to Mr. Raymond, the facts here establish that (1) The Craigs entrusted the unlocked and loaded shotgun to David Jay when they left on vacation, (2) David Jay was reckless or incompetent to safely handle the firearm, (3) the Craigs knew or should have known of David Jay's recklessness or incompetence, (4) David Jay's recklessness or incompetence created an unreasonable risk of harm, and (5) Mr. Raymond's injuries were proximately caused by the negligent entrustment of the firearm to David Jay. Thus, the Craigs may be held liable for Mr. Raymond's injuries under the theory of negligent entrustment.

**E. CONCLUSION**

Appellant respectfully requests that the Court REVERSE the trial court's grant of summary judgment and REMAND this case for trial. Based on the facts of this case, the evidence relied upon, and the arguments outlined above, Respondents owed a duty to Appellant and there are material issues of fact remaining in this case making summary judgment inappropriate.

DATED this 28<sup>th</sup> day of October, 2011.

Law Offices of David L. Harpold



Lee S. Thomas

WSBA #40489

Attorney for Steven Raymond

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

STEVEN RAYMOND,

Appellant,

No. 67339-4-1

Vs.

**PROOF OF SERVICE**

DAVID LEE CRAIG, JR., and  
GEORGIANNA CRAIG, and the marital  
community comprised thereof,

Respondents.

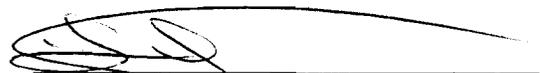
On October 28, 2011, I caused to be served upon counsel of record, at the address stated below, by legal messenger, a true and correct copy of the following documents:

**Appellant's Brief, Verbatim Report of Proceedings, Proof of Service**

Michelle A. Menely GORDON THOMAS HONEYWELL LLP One Union Square 600 University, Suite 2100 Seattle, WA 98101-4185 Attorneys for Defendants/Respondents	
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Kent, Washington, this 28th day of October, 2011.

  
LEE S. THOMAS, WSBA # 40482  
Attorney for Appellant