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DIVISION II

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STATE OF WASHINGTON

BY _____
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No. 73407-5-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

BUSINESS FINANCE CORP., a Washington corporation,

Respondent,

vs.

VICTORIA KNOLL, et al.

and

JERRY V. KNOLL, individually, and the MARITAL COMMUNITY OF
JERRY V. AND JANE DOE KNOLL; and KNOLL GREENWATER
LLC, a Washington limited liability company;

Appellants.

APPELLANTS' REPLY BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

ORIGINAL

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I. INTRODUCTION/SUMMARY

Business Finance argues that Jerry lacked all authority as a personal representative because his probate attorney did not file a one-page document appointing an in-state resident and this allowed the other co-personal representative *carte blanche* to act without further order of the court. This is wrong for two reasons.

First, it renders superfluous the second sentence of RCW 11.28.250, which expressly provides when a personal representative's powers cease: only upon revocation of his letters. *Id.* The statute does not provide, as Business Finance would have it, that a personal representative's power ceases immediately upon the happening of an event that may later prove as grounds for revocation of the letters.

Second, the probate court specifically found Jerry *was* qualified despite the infirmity that Business Finance argues is so critical. Business Finance's issue is with the probate court, not Jerry. And even if Jerry Knoll's appointment were legal error, the probate court never removed him. Only then would his powers cease. RCW 11.28.250. Until then, he was a valid co-trustee in the estate, and his joinder was required in all transactions, including the transaction that is the subject of this appeal.

Business Finance relies on a handful of other probate code provisions that speak to the probate court's authority to appoint a personal representative under various circumstances, but these statutes do not speak to when a personal representative's powers cease.

Business Finance also reads words into RCW 11.36.010 that do not exist. Non-residents who do not appoint an in-state agent are not listed among the class of persons who are “not qualified to act as personal representatives.” *Id.* And again, the probate court found Jerry was qualified. (Ex. 112.)

The case is also time-barred under both the six-year and three-year statutes of limitation. Business Finance had the burden of demonstrating Craig or Victoria Knoll acknowledged the debt with clear and unequivocal intent to extend the statute of limitations. There was no testimony of who paid the money, or with what intent. And Business Finance’s own records demonstrate it was not Victoria who paid.

Even if the statute of limitations had tolled, and even if Craig were the sole personal representative with full and exclusive powers over the estate, the trial court still erred because the Greenwater deed of trust only covers Craig and Victoria’s interest in the Greenwater properties, whatever that interest was. Business Finance’s interpretation of the Greenwater deed of trust is based on words in Craig Knoll’s signature block, naming him individually and as a personal representative. As in *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 700, 952 P.2d 590 (1998), this was *descriptio personae*. The Greenwater deed states it was Craig and Victoria pledging “their” interest—and Craig and Victoria were the guarantors. (Ex. 213, 214, 239.) Moreover, Business Finance and Craig and Jerry Knoll knew how to bind the estate—as they

did with a Snohomish County deed of trust signed just three days prior to the Greenwater deed of trust. That deed expressly names the estate as a grantor. (Ex. 226.)

Finally, if there were an unwritten intent beyond the words in the Greenwater deed of trust, this would venture into the oral realm—and the three year statute of limitations applies.

For all these reasons the trial court erred.

II. ARGUMENT/AUTHORITY

A. Jerry had full authority to act as co-personal representative of his mother’s estate because he was never removed.

Business Finance invites this Court to parlay a missing one-page “appointment of resident agent” into jurisdictional error that voids all actions taken in the probate over a decade’s time. This ignores RCW 11.28.250, which expressly provides that a personal representative’s power does not cease until his or her letters are revoked. Jerry’s authority as a co-personal representative never ceased because the probate court never revoked his letters.

RCW 11.28.250 provides, in pertinent part:

Whenever the court has reason to believe that any personal representative ... is incompetent to act, or is permanently removed from the state, ... it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once cease, and it shall be the duty of the court to

immediately appoint some other personal representative, as in this title provided.

Id. (emphasis added).

In construing this statute, this Court must give meaning to all of the language used such that no portion is rendered meaningless or superfluous. *State v. Becker*, 59 Wn. App. 848, 854, 801 P.2d 1015 (1990). If Business Finance were correct, that Jerry's had no power as a personal representative, it would render superfluous the portion of RCW 11.28.250 that provides when a personal representative's powers cease.

Moreover, the probate court appointed Jerry as co-personal representative of his mother's estate in 1998 and specifically found Jerry was qualified to act:

4. Craig T. Knoll and Jerry V. Knoll are hereby qualified and willing to act as personal representative.

(Ex. 112) (emphasis added); (*see also* Ex. 219) (Letters Testamentary naming both "CRAIG T. KNOLL AND JERRY V. KNOLL" as the "named Executor(s)") (emphasis added).

The probate court did not revoke Jerry's letters testamentary. Having been appointed, and never removed, his powers did not cease.

Business Finance may argue that while removal is sufficient, so is "disqualification" and that Jerry was "disqualified." Again, Jerry's powers cease upon revocation of his letters. RCW 11.28.250.

Also, Business Finance (and the trial court) adopted their own meaning of "qualified" that is not in the probate code. Jerry was not

disqualified under RCW 11.36.010. Only the following persons are “not qualified”:

Corporations, limited liability companies, limited liability partnerships, minors, persons of unsound mind, or persons who have been convicted of (a) any felony or (b) any crime involving moral turpitude.

Id. The statute does not exclude non-residents. To hold that Jerry was not qualified adds language to the statute. *See Id.*

The resident agent requirement in RCW 11.36.010 is a condition of appointment. It speaks to service of papers upon an estate representative, not his ability or aptitude. And Jerry’s status as a non-resident is a non-issue because there existed an in-state resident upon whom “service of all papers” could be made. That was Craig, the other co-personal representative. (*See Ex. 219.*)

Furthermore, there is no allegation that Business Finance tried to serve papers on the estate, or anyone else for that matter, was damaged in any way, or that Jerry did anything wrong in his capacity as a personal representative.

Business Finance also misreads RCW 11.28.040. This statute merely draws a distinction between the authority of an executor and an administrator; the former being named in a will, the latter being labeled an “administrator” (because he/she is not named as an “executor” in a will). This statute provides that if the named personal representative (the operative word being “the”) is absent or will not serve, then letters of administration with will annexed may be issued to another person. But if

the will provides for a co-personal representative, that person may serve as an “executor” rather than an “administrator with will annexed” (and thus be issued letters testamentary rather than letters of administration with will annexed). This statute does not say, however, that any of these people may serve without first being appointed by the court in an order.

Business Finance also misreads RCW 11.28.050. This statute, titled “Powers of remaining executors on removal of associate” provides:

When any of the executors name shall not qualify or having qualified shall become disqualified or be removed, the remaining executor or executors shall have the authority to perform every act and discharge every trust required by the will, and their acts shall be effectual for every purpose.

Id.

Jerry was “qualified” as that terms is used in the probate code. The probate court specifically found this. (Ex. 112.) And Jerry was never removed. As RCW 11.28.250 provides, Jerry’s powers as a co-personal representative do not cease until he is removed. *Id.*

Business Finance would have the appointment of a personal representative be self-executing, i.e. that a court order would not be required if one personal representative were to withdraw or cease. This is contrary to RCW 11.28.010, which requires an order:

After the entry of an order admitting a will to probate and appointing a personal representative, or personal representatives, letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act, or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, letters of administration with the will annexed shall be granted to the person to whom

administration would have been granted if there had been no will.

Id.

If it were true Jerry were “disqualified,” then new letters testamentary should have issued “to the other persons appointed therein,” i.e. Craig. *Id.* The letters testamentary stated that “CRAIG KNOLL AND JERRY KNOLL” were “authorized to execute said will according to law.” (Ex. 219.) (emphasis added). Even when a personal representative’s name changes, the probate court requires new letters testamentary. *See, e.g.*, King County Superior Court Local Rule (LCR) 98.04(g) (requiring new order be obtained if a personal representative’s name changes); *see also* Pierce County Local Rule (PCLSPR) 94.04(e).

Business Finance cites Mitchell and Mitchell, 26B Washington Practice § 3.32 at p. 156 for the proposition that if one co-personal representative does not qualify, the other may qualify. (Resp. Br. at p. 32.) Certainly the other *may* qualify, but not without the probate court’s imprimatur. *See* RCW 11.28.010.

Finally, if the order appointing Jerry were void, as Business Finance contends, then the whole order is void, and Craig was also unqualified and his pledge of estate property remains invalid.

Regarding *In re Borman’s Estate*, 50 Wn.2d 791, 314 P.2d 617 (1957) and *In re Gordon’s Estate*, 52 Wn.2d 470, 326 P.2d 340 (1958), these two cases are inapt. These cases both involve undue influence and testamentary capacity challenges *in the estate proceeding*. They recognize

that in 1957 and 1958, a national bank was not qualified to act as a personal representative. That is no surprise; corporations are among those who are not qualified under RCW 11.36.010.

B. Business Finance may not appeal the probate court's finding that Jerry was qualified.

Business Finance seeks undo or escape the probate court's finding that Jerry was "qualified" as a personal representative. At all times Business Finance knew about Lorna Knoll's estate, knew the co-personal representative identities, and even where they lived. (*Compare, e.g.*, Exs. 103 and 226; *see also* RP 94.) Business Finance could have challenged Jerry's authority in the probate under Rule 60(b). *See* RCW 11.96A.030(5) (broadly defining "party" for purposes of Washington's Trust and Estate Dispute Resolution Act). Business Finance took Jerry's signature as a co-personal representative on a deed of trust covering Snohomish County real property—just three days prior to receiving the Greenwater deed of trust. (Exs. 103, 226.) Now, however, with the circumstances different, Business Finance seeks to avoid what it once accepted—Jerry's authority as a co-personal representative.

Unless the error goes to the court's very jurisdiction, Business Finance may not collaterally attack it. *See, e.g., Anderson v. Anderson*, 52 Wn.2d 757, 761, 328 P.2d 888 (1958); *see also State v. Petersen*, 16 Wn. App. 77, 79, 553 P.2d 1110 (1976) (stating, "[a] collateral attack may be maintained only against a final order or judgment which is absolutely

void, not merely erroneous or voidable, and then only on the basis of fraud going to the very jurisdiction of the court.”).

Even if the King County Superior Court lacked jurisdiction to appoint Jerry because of a ministerial omission, that is insufficient. This Court, in *City of Seattle v. May*, 171 Wn.2d 847, 852 – 53, 256 P.3d 1161, (2011) set a high bar for collateral attacks:

In *Mead School District*, the court acknowledged that “[t]echnically, the [issuing] court lacked jurisdiction.” *Id.* at 281, 534 P.2d 561. The court went on, however, to find that the collateral bar rule precluded a challenge to that order. *Id.* at 284, 534 P.2d 561. For an order to be void, the court must lack the power to issue the type of order. *Id.* Provided that such power exists, any error in issuing an order may not be collaterally attacked. In sum, May can challenge the validity of the underlying domestic violence protection order only insofar as he can show that the order is absolutely void; the collateral bar rule precludes him from arguing that the order is merely erroneous.

May's order is not void. The superior court possessed jurisdiction “to issue the type of order,” *id.*, that is, to issue a permanent domestic violence protection order. RCW 26.50.020(5) creates such jurisdiction. Any defects within the order simply go to whether the order was “merely erroneous, however flagrant” and cannot be collaterally attacked. *State ex rel. Ewing v. Morris*, 120 Wash. 146, 158, 207 P. 18 (1922); *see Noah*, 103 Wn. App. at 47, 9 P.3d 858 (“A court does not lose jurisdiction by interpreting the law erroneously.”). May contends that his order is invalid because the issuing court allegedly failed to find that May was likely to resume acts of domestic violence. This assertion of factual inadequacy does not go to the court's jurisdiction to issue a permanent domestic violence protection order, and, accordingly, the collateral bar rule precludes May's challenge.

171 Wn.2d at 852 – 53 (underlines added; italics emphases in orig.).

Because the King County Superior Court had jurisdiction over the probate, its order appointing Jerry, even if it were error, may not be attacked.

Business Finance argues it was not a party to the probate, and thus it may challenge the order. As a creditor, Business Finance is a “party” under RCW 11.96A, *et seq.* and could have sought to remove Jerry if it were concerned. RCW 11.96A.030(5) (defining “party” in a TEDRA case). Business Finance certainly had time. It filed the case in 2010, but was questioning Jerry’s authority as far back as June 2003. (CP 591.) For strategic reasons, Business Finance opted to stay on the sidelines. (*See, e.g.* RP 94.) (Business Finance’s bankruptcy attorney, Jeffrey Parker, testifying):

Q. You can see that he was appointed by the court.

A. Yes, but I think there’s a legal difference between being appointed and actually qualifying.

Q. But you didn’t seek to remove him, did you?

A. I didn’t see any need to remove somebody who’s not qualified, but to answer your question and not be argumentative with you, counsel, no, I did not.

Id. (*See also* CP 591.)

And Business Finance is incorrect that its status as a stranger to the probate allows it to now collaterally attack the probate court’s order:

One who was a witness in an action, fully acquainted with its character and object and interested in its results, is estopped by the judgment as fully as if he had been a party. *Bacon v. Gardner*, 38 Wash.2d 299, 229 P.2d 523 (1951); *Youngquist v. Thomas*, 196 Wash. 444, 83 P.2d 337 (1938); *Briggs v. Madison*, 195 Wash. 612, 82 P.2d 113 (1938); *Howard v. Mortensen*, 144 Wash. 661, 258 P. 853 (1927);

American Bonding Co. v. Loeb, 47 Wash. 447, 92 P. 282 (1907); *Shoemake v. Finlayson*, 22 Wash. 12, 60 P. 50 (1900). At the dissolution trial, Archie testified as a witness for Ron, knowing that both Ron and Gwynne sought title to the house. He was, therefore, interested in the trial's results and aware of its object. The Hacklers made no attempt to intervene in the litigation pursuant to CR 24(b)(2), even in the face of Ron's testimony that he and Gwynne owned the house. Under these circumstances, we hold that the Hacklers are estopped to assert title to the house by the quit claim deed.

Hackler v. Hackler, 37 Wn. App. 791, 795, 683 P.2d 241 (1984); *Garcia v. Wilson*, 63 Wn. App. 516, 520, 820 P.2d 964 (1991) (stating, “*Hackler* squarely holds that under proper circumstances collateral estoppel may be applied to a nonparty.”).

Business Finance also argues this issue was not raised at the trial level. That is incorrect. It was raised. *See, e.g.*, RP 119 – 120; *see also* CP 593 – 98 (brief on the issue); RP 94.

C. Authority that roams with residency promotes unstable land title and is against Washington public policy.

Business Finance argues against a straw man that does not exist. On page 34 of its brief: “[i]t would be a dangerous precedent if a person could go to Ex Parte, obtain an appointment through false pretenses, and then use their false pretenses as a basis to either freeze action by a validly appointed trustee, or years later, annul legitimate actions.” Distilled, Business Finance says it is dangerous if someone obtains a court order based on made-up facts. This is always dangerous, and trial courts are

well-positioned to make these determinations—much better than Business Finance years later.

However, there is no allegation that Jerry lied or obtained anything fraudulently. Jerry and Craig were represented in the probate by the same attorneys—Eric DeSmet, then Ken Berger. (Ex. 112.) They did not misrepresent anything and no evidence suggests otherwise. Business Finance’s “dangerous” situation does not exist here.

It is ironic Business Finance contends it better policy to allow anyone anytime to look behind a decades old probate for grounds to impeach its transactions. This case presents the very essence of why courts should not look behind old probate orders. Land titles would never be stable. Land title stability is a public policy consideration routinely endorsed by Washington courts. *See, e.g., Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

Probate courts are best positioned to review probate petitions and decide them on a case-by-case basis, not Business Finance’s bankruptcy attorney years later.

D. Substantial evidence did not support a finding that Victoria paid anything, and even so, Business Finance did not meet its high burden of showing a “clear and unequivocal intention” of Victoria Knoll to keep the debt alive.

At most, Business Finance presented facts that a property sold somewhere and proceeds from the sale went to Business Finance, and

according to Business Finance's ledger, the payment hailed from "Knoll Lumber." This is far from "clear and unequivocal intention" of Craig and/or Victoria to keep the debt alive—which is required in order for the statute of limitations to toll.

The "obligors" on the guaranty were Victoria and Craig Knoll. There were two separate promissory notes. (Exs. 213, 214, 239; CP 2.) There was also a principal obligation, and at least two other debtors, Knoll Lumber and Hardware Co. and "Knoll Properties," which paid on a Knoll Lumber debt. (*See* Ex. 239) (including Knoll Properties check signed by Craig).

The trial court erred when it found Victoria voluntarily paid the debt. There was no testimony or documents showing this. In fact, the only evidence of who paid shows it was Knoll Lumber (or perhaps a Knoll Lumber property).

Business Finance asks the Court to ignore the lack of testimony about *who* paid the \$32,825 and just assume it was Victoria. (Resp. Br. at p. 27.) This is not the substantial evidence standard and it does not satisfy Business Finance's high burden of showing "a clear and unequivocal intention on the part of the obligor to keep alive the debt." *See Berteloot v. Remillard*, 130 Wash. 587, 591, 228 P. 690 (1924) (citation omitted) (emphasis added).

Business Finance concedes there is no testimony of *who* paid the \$32,825. Instead it asks for an inference based on "facts" that are not in

the record. It says on page 27 of its brief, “the only properties being sold were Victoria’s.” (Resp. Br. at p. 27.) This fact is not in the record, and says nothing about whether it was voluntary by *Victoria*, voluntary by a bankruptcy trustee, or voluntary by another creditor, or what property sold. *See Berteloot*, 130 Wash. at 591. And again, Business Finance’s own records state it was *Knoll Lumber* that paid, not *Victoria*. (RP 78 – 79, 85; Ex. 111.)

Moreover, if property were sold out of bankruptcy by a trustee or by a creditor, or by tax foreclosure, it is not necessarily a voluntary payment:

The case of *Berteloot v. Remillard, supra*, announced the rule that where property is turned over to third parties [like a bankruptcy trustee] to be applied upon an indebtedness, such payments made by the persons to whom the property was delivered do not toll the statute of limitations unless the agreement clearly indicates that it was the intention of the debtor that the transferee should act as his agent with power to revive the whole debt; in other words, that it must clearly appear that the payment is a voluntary partial payment. We are of the opinion that it does not appear in this case that it was the clear and unequivocal intention of appellants to empower respondent to revive the whole debt, or to set the statute of limitations in motion anew, but that the only purpose of the agreement between appellants and Barto & Co. as to the application of the proceeds from the certificate was to instruct Barto & Co. as to how the collateral should be handled; in other words, the application of the payments in 1943 by Barto & Co. did not constitute a voluntary payment by appellants at that time, under circumstances showing an intentional reacknowledgment of the whole debt as of the date of payment.

Easton v. Bigley, 28 Wn.2d 674, 682 – 83, 183 P.2d 780 (1947) (emphasis added, brackets added).

Business Finance points to a Knoll Lumber entity being “defunct” or in bankruptcy, asking for an inference that left the only possibility being Victoria. These averments are “[d]etached and fragmentary statements, susceptible of different interpretations, [and thus] not sufficient to remove the bar of the statute.” *Stockdale v. Horlacher*, 189 Wash. 264, 267, 64 P.2d 1015 (1937) (citation omitted, brackets added).

There was not substantial evidence for the trial court to find Victoria paid anything. And, even if the trial court’s finding were upheld, Business Finance did not meet the burden of demonstrating the “clear and unequivocal intent” required to extend the six-year statute of limitations.

E. To which promissory note did the \$32,825 payment apply?

As made clear in Business Finance’s Proof of Claim in the bankruptcy court, guarantors Craig and Victoria Knoll executed *two* promissory notes. (Ex. 239.) Business Finance did a poor job of keeping track of the amounts outstanding on each note, and sought to fix the claim amount. (*See, e.g.*, Exs. 107, 110.) While the total amount *claimed* was determined, there was never any writing stating that the two promissory notes were replaced or merged. Business Finance’s complaint alleges these two promissory notes as the basis for the debt. If so, at least one of the promissory notes is time-barred by the \$32,825 payment. But, if there were a new unwritten understanding that a new debt was formed, and these notes “merged” into one, i.e. some sort of novation, it is not in writing. In that case, the obligation sued upon is not two promissory notes,

but a nebulous obligation born from the bankruptcy court, necessarily proved with parol evidence, and subject to the three-year statute of limitations.

F. The Greenwater deed of trust's signature block is *descriptio personae* and does not override the deed's plain language, which does not include Lorna Knoll's estate as a grantor.

Business Finance's interpretation of the deed of trust is tortured, not Jerry's. First, Business Finance puts emphasis on how "their" must have several meanings, yet ignores that nowhere is the Lorna Knoll estate even mentioned, except in the signature block.

It is well established that descriptive language following a signature on a promissory note, such as the title or the name of an entity, does not prevent personal liability for the signer. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d at 700. There is a presumption that the words are merely descriptive and do not indicate representative capacity. *Id.* Where the face of the document does not indicate the signer's capacity, "a signature with additional descriptive language may create an ambiguity requiring judicial construction of the agreement to determine who is bound by its terms." *Id.* The burden of proof is on the party that seeks to rebut this presumption. *Id.* at 700 – 01 (quoting *Griffin v. Union Sav. & Trust Co.*, 86 Wash. 605, 610, 150 P. 1128 (1915)).

The deed of trust does not list the "Estate of Lorna Knoll" as a party or identify Craig as a personal representative. (Ex. 103.) The only

mention of the estate is in the signature block, which is “*descriptio personae*, that is, merely descriptive of the person executing the agreement.” *Wilson Court*, 134 Wn.2d at 700.

Business Finance relies heavily on the fact that estate-owned real property was included among the real property pledged (in addition to property Craig owned with his wife, Victoria). This can only be resolved by inferring that Craig intended to pledge his personal interest in estate property. To go further, and conclude it was intended the entire estate be pledged is contrary to the deed’s language where the “estate” is not a grantor, and the other co-personal representative did not sign the deed, and another deed executed just three days before, in Snohomish County, included the “estate” as a grantor, and Jerry signed that deed. (Ex. 226.)

Finally, it is reasonable that even if Victoria lacked a recorded interest against estate property or Craig’s property for that matter, it is not unreasonable nor surprising she join in the pledge. Any lender would demand such a pledge because of Washington’s strong community property regime.¹

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¹ Inherited property is generally treated as separate property unless there is a community property agreement exists between the spouses, in which case the spouse has an interest. *See, e.g., In re Estate of Brown*, 29 Wn.2d 20, 29, 185 P.2d 125 (1947) (discussing community property agreements); *see also*, RCW 26.26.120.

III. CONCLUSION

This court should reverse the trial court's judgment for any one (or more) of the following reasons:

First, the law of trustees, which applies to personal representatives, states that one co-personal representative may not bind the estate without the other's joinder and Jerry did not join in pledging the Greenwater properties.

Second, this case is time barred under the six-year statute of limitations because no substantial evidence exists for the finding that Victoria Knoll voluntarily paid anything.

Third, even if were a Victoria-owned property, there lacked evidence of the unequivocal intent to extend the debt.

Fourth, the deed of trust did not cover estate property; it covered Craig's property and the gymnastics required for any other conclusion involve extrinsic evidence—which brings this case under the three-year statute of limitations.

Respectfully submitted this 22nd day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury of the laws of the State of Washington, that on this day I caused to be served a true and correct copy of the foregoing Appellants' Brief by the method indicated below, and addressed to each of the following:

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DATED this 27th day of February, 2016, at Enumclaw, Washington.



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