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**A. ASSIGNMENTS OF ERROR**

The trial court erred as follows:

1. In granting relief to plaintiff in the absence of any evidence in support of the relief requested and granted.
2. In entering the *Findings of Fact, Conclusions of Law, and Judgment* on December 15, 2005 (CP 52 – 54).
3. In reciting at CP 53 lines 6 -7 that “The court examined the parties and witnesses present, considered the evidence \* \* \* .”
4. In making the following *Findings of Fact* on December 15, 2005:
  - I. Plaintiff has and still does hold title or represent the holder of title to lands and premises described in the complaint. (CP 53 lines 10 – 11)
  - II. Defendant(s) now occupy the premises and are now in actual possession of said premises. (CP 53 lines 12 – 14)
  - III. The Defendant(s) are now in default of RCW 61.24.060.(s) (sic) and RCW 59.18. (CP 53 lines 14 – 15)
  - IV. The Plaintiff(s) purchased said property at Trustee’s Sale on: September 23, 2005. (CP 53 lines 16 – 18)
5. In entering the following *Conclusions of Law*:
  - I. Judgment should be entered in favor of Plaintiff(s) and against Defendant(s) for unpaid rents, costs and attorneys’ fees, and issuance of a Writ of Restitution. (CP 53 lines 23 – 24)
6. In entering *Judgment* in favor of plaintiff(s) against the defendant(s) as follows (CP 54):

I.

The Clerk of the Court shall issue forthwith a Writ of Restitution immediately forthwith, returnable ten (1) days after its

issuance, directing the Sheriff to remove the Defendant(s) and all others from the property and to restore possession of the property of the property described as 19616 5<sup>TH</sup> STREET EAST, BONNEY LAKE, WA 98390, in PIERCE County, Washington, provided that if return is not possible within ten (10) days, the return on the writ shall be automatically extended for a second ten (10) days period. The Writ shall also authorize the Sheriff to break and enter as necessary.

II.

There is no substantial issue of Material fact of the right of Plaintiff(s) to be granted other relief as prayed for in the complaint and provided for by statute (sic).

III.

Defendant(s) is/are guilty of unlawful detainer and the tenancy of the Defendant(s) in the premises is hereby terminated.

IV.

Plaintiff(s) is awarded judgment against Defendant(s) as set forth in Judgment Summary above. These sums shall accrue interest at twelve percent (12%) per annum until paid.

7. In entering the following monetary Judgment for plaintiff(s) against the defendant(s) as set forth in the judgment summary (CP 52):

Attorney's Fees .....	\$400.00
Costs .....	\$314.00

8. In entering the *Order Enforcing Writ of Restitution* on December 22, 2005 which is titled ORDER STAYING WRIT ISSUED DECEMBER 15, 2005, which provides (CP 145)

“The undersigned court, having reviewed the files and pleadings in this matter now ORDERS that:

“Defendant’s motion is denied.”

9. In denying defendant's Motion for Revision and in entering the following ORDER ON REVISION on January 13, 2006:

"Plaintiff does have right of possession as a bona fide purchaser. 59.12 is operative statute in case. Plaintiff has color of title. Court was proper in issuing Writ. Plaintiff to post \$5,000 bond under 59.12.090 and Defendant may post \$7,500 (Seventy five hundred) bond before seeking a stay. Defendant will file a petition within 30 days. Attorney fees are not granted and complaint amended to indicate 59.12 and exclude 59.18. There is no existing stay on this ~~case~~ writ from 12-23-2005."

Signed by Judge John R. Hickman

10. In entering the following order on January 31, 2006 (CP 164 – 166):

"This matter having come on by the Plaintiff's ORDER ENFORCING WRIT OF RESTITUTION and the court having reviewing (sic) the files and heard argument of the parties, it is hereby

"ORDERED that the writ which expired January 4, 2006 shall be reissued on January 31, 2006, and enforcement of the writ shall proceed."

Signed: David H. Johnson, Comm'r

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

May a trial court grant substantive relief to a plaintiff in an unlawful detainer action under the following circumstances:

- (a) Plaintiff filed and duly served a complaint for unlawful detainer under Chapter 59.12 RCW;
- (b) The complaint is signed solely by the plaintiff's lawyer;
- (c) The complaint is not verified;

- (d) There is no evidence or reason to believe that the plaintiff's lawyer who signed the complaint has personal knowledge of any of the facts or events underlying the allegations of the complaint;
- (e) The defendant answered the complaint in writing as directed by the summons;
- (f) An order to show cause directed the defendant to appear and show cause why the relief requested by plaintiff should not be granted;
- (g) The defendant appeared in person with counsel at the scheduled date and time for the show cause hearing;
- (h) At the show cause hearing the plaintiff offered no evidence whatsoever in support of the allegations and relief requested by the unverified complaint;
- (i) At the show cause hearing the court did not swear in or orally examine any witness or party; and
- (j) At the show cause hearing the court granted plaintiff the relief requested.

**C. STATEMENT OF THE CASE**

On November 12, 2005, plaintiff served defendant with an EVICTION SUMMONS (CP 1 – 3) and a COMPLAINT FOR UNLAWFUL DETAINER (CP 4 – 10). The summons and the complaint are signed by plaintiff's attorney who has no personal knowledge of any of the allegations of the complaint. (see CP 11)

Defendant's NOTICE OF APPEARANCE was faxed to plaintiff on November 21, 2005. (CP 12 – 13)

Plaintiff filed and served a MOTION FOR ORDER TO SHOW CAUSE (CP 14), an ORDER TO SHOW CAUSE (CP 15), and a NOTE FOR COMMISSIONER'S CALENDAR (CP 16) on November 23, 2005, setting the show cause hearing for 1:30 p.m. on December 15, 2005.

The ORDER TO SHOW CAUSE requires the defendant to appear in court at 1:30 p.m. on December 15<sup>th</sup>, 2005, in Room 260 of the Pierce County Courthouse and "show cause":

“ \* \* \* why this court should not issue a Writ of restitution restoring to Plaintiff possession of the premises described in the Complaint.”

and states that

“Upon the failure of Defendant(s) to appear on the date and time specified, this court will order the sheriff to remove the Defendant(s) from the premises and grant all other relief requested in Plaintiff's complaint.”

(CP 15)

On December 15, 2005, Defendant filed a detailed ANSWER TO COMPLAINT FOR UNLAWFUL DETAINER (CP 19 - 40) and the DECLARATION OF MARCUS JAYMES BOGUSLAWSKI (CP 41 - 51), served the answer and declaration on the plaintiff, and provided a copy to the commissioner at the hearing at 1:30 p.m. in Room 260 of the Pierce County Courthouse.

Plaintiff's counsel made factual assertions at the show cause hearing but offered no testimony of any witness, no documents as exhibits, and no

declarations or affidavits in support of the relief requested. Plaintiff's case consisted solely of the allegations of the complaint and the oral statements of its counsel. (VRP 12/15/2005)

The following colloquy occurred between defendant's counsel and the court at the show cause hearing:

MR. KAH        "\* \* \* the issue on the unlawful detainer  
                  action is the right to possession.

THE COURT:    Okay. So he is the lawful owner at this point.  
                  If you have - - ."

MR. KAH:       And -- and - - and -- and we are entitled to re-  
                  -- to answer and establish defenses that go  
                  specifically to the right of possession. And  
                  that's what we have done.

THE COURT:    Okay. Well, I'm not - - I don't find them to  
                  be a sufficient basis to deny the request for the  
                  writ at this time, so I'm going to sign this.

MR. KAH:       And there are factual issues here, Your Honor,  
                  which - -

\* \* \* \*

MR. KAH:       \* \* \* But under the deed of - - under the  
                  Unlawful Detainer Law - -

THE COURT: No. I'm signing the order.

MR. KAH: - - my client has a right to a jury trial on  
factual issues, and she's requesting an  
evidentiary hearing and a jury trial.

THE COURT: I'm rejecting. I'm signing the order for writ.

The court then signed the FINDINGS OF FACT, CONCLUSIONS OF  
LAW; JUDGMENT dated December 15, 2005. (CP 52 - 54)

On December 22, 2005, defendant filed a MOTION FOR REVISION (CP  
61 - 138), a MEMORANDUM RE STANDARD OF REVIEW ON REVISION  
OF COMMISSIONER'S RULING (CP 58 - 60), and a MOTION FOR STAY  
OF WRIT PENDING REVISION HEARING & TRIAL; DECLARATION IN  
SUPPORT THEREOF. (CP 56 - 57)

An ORDER staying the writ of restitution was entered on December 22,  
2005. (CP 139)

An ORDER denying stay of the writ of restitution was entered on  
December 23, 2005. (CP 145; VRP December 23, 2005)

Plaintiff replied to Defendant's Motion for Revision on January 13, 2005.  
(CP 146 - 148)

The revision hearing was held on January 13, 2006, upon the record  
without presentation of evidence. (VRP January 13, 2006). The court entered the  
following order:

“Plaintiff does have right of possession as a bona fide purchaser. 59.12 is operative statute in case. Plaintiff has color of title. Court was proper in issuing Writ. Plaintiff to post \$5,000 bond under 59.12.090 and Defendant may post \$7,500 (Seventy five hundred) bond before seeking a stay. Defendant will file a petition within 30 days. Attorney fees are not granted and complaint amended to indicate 59.12 and exclude 59.18. There is no existing stay on this ~~case~~ writ from 12-23-2005.”

Signed by Judge John R. Hickman

An *Order Enforcing Writ of Restitution* was entered January 31, 2006, providing for reissuance of the Writ of Restitution that had expired on January 4, 2006. (CP 164). An AMENDED WRIT OF RESTITUTION was issued on February 1, 2006. (CP 168)

A STIPULATION AND ORDER CLARIFYING ORDER ENTERED ON REVISION ON JANUARY 13, 2006, was entered February 8, 2006, deleting the judgment for attorney fees and costs that had been entered on December 15, 2005. (CP 169 – 172)

Defendant appealed on February 13, 2006. (CP 173 – 182)

**D. ARGUMENT & AUTHORITY (Applicable to all assignments of error)**

This Unlawful Detainer came before the court on Thursday, December 15, 2005, upon plaintiff's unverified complaint unsupported by any declaration, affidavit, or testimony of any witness. This Unlawful Detainer is under chapter 59.12 RCW. Chapters 59.16 and 59.18 do not apply to this case.

The *Summons* directed defendant to serve a written response or notice of appearance by November 21, 2005. She complied.

Plaintiff then caused an *Order to Show Cause* to issue on November 23, 2005, which directs the defendant to appear at 1:30 p.m. on December 15, 2005, in room 260 of the Pierce County Courthouse and show cause why a Writ of Restitution should not issue.

The *Order to Show Cause* further states that:

“Upon the failure of the Defendant(s) to appear on the date and time specified, this court will order the sheriff to remove the Defendant(s) from the premises and grant all other relief requested in Plaintiff’s complaint.”

It should be observed that nothing in chapter 59.12 RCW authorizes proceedings on an *Order to Show Cause* which, on its face, purports to shift the burden of proof to the defendant. Proceeding in that manner is contrary to court rule, statute, and due process.

RCW 59.12.121 regarding *Pleading by defendant* provides that:

“On or before the day fixed for his appearance the defendant may appear and answer or demur.”

Defendant served and filed her answer, affirmative defenses, and a supporting declaration before the time of hearing on December 15, 2005, as directed by the *Order to Show Cause* and as provided by RCW 59.12.121.

The trial court denied defendant her right to a trial of the issues between the parties.

RCW 59.12.130 provides that issues of fact must be tried by a jury unless jury is waived:

“Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.”

This means that the defendant is entitled to trial of all issues of fact. Trial is to be by a jury unless jury is waived.

CR 38 defines “trial” as follows:

“A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.”

and provides that:

“The right of trial by jury as declared by article 1, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate.”

Defendant has not waived jury trial. No case schedule has been issued for this matter. See PCLR 38(b). Defendant has not waived trial of any issue of fact.

The plaintiff has not replied to defendant’s answer and affirmative defenses. Defendant’s answer raises factual and legal issues that go to the heart of the matter, i.e. the plaintiff’s allegation that he/it has the right to possession of the defendant’s homestead real property.

Under chapter 59.12 RCW, when a defendant appears and answers on the day set for her first appearance, the matter must be set for trial of the factual and

legal issues. The factual issues will be tried by jury unless jury is waived, in which case the factual issues will be tried by the court.

At defendant's first appearance on Thursday, December 15, 2005, the plaintiff presented no evidence whatsoever in support of its request for relief. Plaintiff's counsel spoke but did not testify.

Had counsel offered herself as a witness to be sworn and testify, her testimony would have been incompetent as hearsay, not based on personal knowledge, and may have been ethically improper under applicable RPC s. No witnesses were offered. No declarations or affidavits were submitted. No evidentiary exhibits were offered or admitted into the record.

Although a purported trustee's deed is attached to the plaintiff's complaint, the complaint is unverified and the deed was not identified, authenticated, or offered as an exhibit through the testimony of any competent witness. Defendant's answer and affirmative defenses controvert the authenticity and validity of the purported trustee's deed. The legal and factual issues have merit.

RCW 59.12.120 allows entry of judgment by default when the defendant does not appear on the day appointed:

"If on the date appointed in the summons the defendant does not appear or answer, the court shall render judgment in favor of the plaintiff as prayed for in the complaint."

In this case, defendant appeared and answered on the day appointed, but the commissioner none-the-less entered judgment against defendant *as if* by default despite her appearance and answer as directed by the summons and the order to show cause.

RCW 59.12.140 provides that when the defendant has appeared and answered the complaint there will be a trial at which the plaintiff will present proof, i.e. evidence, that he/it is entitled to possession of the property.

The *Findings of Fact, Conclusions of Law, Judgment* that was entered at the hearing on December 15, 2005, is without any basis in the record. As already noted above, and as shown by the record, plaintiff presented no competent evidence whatsoever on December 15, 2005:

The writ of restitution ordered on December 15 should have been quashed rather than merely stayed pending trial. The judgment entered December 15 orders issuance of a writ returnable within ten days. But since the December 15 *Findings of Fact, Conclusions of Law, and Judgment* were entered improperly and should have been vacated, the writ should have been stayed or quashed.

Even if, for the sake of argument, plaintiff had shown grounds for issuance of a *pre-trial* writ of restitution (which he/it did not), RCW 59.12.090 provides that the plaintiff shall post a bond before a pre-trial writ of restitution may issue:

“before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such sum as

the court or judge may order, with sufficient surety to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.”

RCW 59.12.090 requires that the bond be posted “*before any writ shall issue prior to judgment*”. No judgment may properly issue unless the defendant is in default for failure to appear and answer or, after trial of the factual issues, the court enters judgment for the plaintiff. Here, although the defendant had appeared and answered and there had as yet been no trial, the trial court entered judgment in plaintiff’s favor and ordered issuance of a writ of restitution without the posting of a bond.

Plaintiff proceeded in this case on the basis of an *Order to Show Cause*. Nothing in chapter 59.12 RCW authorizes or directs that the proceedings be on the basis of an *Order to Show Cause*. Show cause proceedings are prescribed for unlawful detainer proceedings brought under chapter 59.18 RCW where, in order to obtain a writ of restitution the landlord must apply to the court for an order directing the tenant to appear and show cause why a writ should not issue restoring the landlord to possession of the property.

RCW 59.18.380 provides that at the time of the show cause hearing “[t]he court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer.” Here, the trial court failed to examine any witness orally

but, instead, made its decision merely on the basis of plaintiff's unverified complaint and the oral unsworn assertions of plaintiff's counsel.

In the recent case of Housing Authority v. Pleasant, 12 Wn.App. 382, 109 P.3<sup>rd</sup> 422 (2005), the court addressed the defendant's procedural due process rights in an unlawful detainer proceeding under chapter 59.18 RCW (but remember, the instant case is under Chapter 59.12 RCW which has no similar provision). The plaintiff, in the instant case, appears to have confused the procedure under chapter 59.12 with that under chapter 59.18. The commissioner appears to have applied the procedure of chapter 59.18 to this chapter 59.12 case.

Even if the instant case were a chapter 59.18 landlord-tenant case, the defendant would none-the-less have been entitled to a trial of the factual issues and no judgment or writ could properly be issued in the absence of competent evidence. Significantly, the court in Housing Authority v. Pleasant, supra, stated and held as follows (emphasis in bold added by appellant):

**“Once an unlawful detainer action is commenced and the defendant does not concede the right to possession, the defendant has the right to have the issue determined.** Kessler, 3 Wn. App. at 126-27 . A tenant's relinquishment of the property does not necessarily mean the right to possession is undisputed. Sullivan v. Purvis, 90 Wn. App. 456, 459, 966 P.2d 912 (1998).”

\* \* \* \*

“At any time during an unlawful detainer proceeding the landlord may apply to the court for a pendente lite writ of restitution. RCW 59.18.370 . {126 Wn. App. 391} In order to obtain such a writ of restitution the landlord must apply to the court for an order directing the tenant to **appear and show**

cause why a writ should not issue restoring the landlord to possession of the property. Id. **At the time of the show cause hearing "[t]he court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer."** RCW 59.18.380 (emphasis added). "[I]f it shall appear that the [landlord] has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution." Id. **"The court shall also enter an order directing the parties to proceed to trial on the complaint and answer in the usual manner."** Id. (emphasis added). The court may also at that time address {109 P.3d 427} other relief requested by the landlord together with the tenant's defenses and set-off claims as relates to that relief. Id.

\* \* \* \*

**"The burden is upon the plaintiff in an unlawful detainer action to prove, by a preponderance of the evidence, the right to possession. Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958). A show cause hearing in an unlawful detainer action is a summary proceeding. Carlstrom v. Hanline, 98 Wn. App. 780, 788, 990 P.2d 986 (2000). In summary proceedings, the rules of evidence still apply; inadmissible evidence may not be considered. Unger v. Cauchon, 118 Wn. App. 165, 177 n.34, 73 P.3d 1005 (2003) (citing Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986)). At oral argument, the Housing Authority argued that because Ms. Pleasant admitted to criminal conduct in her affidavit, it needed no more proof. However, because there is no competent evidence regarding a lease at all, the Housing Authority cannot prove a violation under one. Further, a writ of restitution cannot issue without competent evidence to prove substantial compliance with the statutory notice requirements. Marsh-McLennan Bldg., Inc. v. Clapp, 96 Wn. App. 636, 641-42, 980 P.2d 311 (1999). For instance, proof of service of the notice under the unlawful detainer statutes requires an affidavit. Id. at 640-41 (citing RCW 59.12.040 and CR 4(g)). There is no affidavit here.**

**"Moreover, if the pleadings in an unlawful detainer action disclose a material issue of fact, the issue must be resolved at trial. RCW 59.12.130 ; Meadow Park Garden**

Assoc. v. Canley, 54 Wn. App. 371, 372, 773 P.2d 875 (1989) . Specifically, when a tenant challenges her landlord's allegations that she was in material noncompliance with her lease terms, she is entitled to a trial. Meadow Park, 54 Wn. App. at 372 . That is precisely the contention made by Ms. Pleasant.

\* \* \* \*

**“Whether or not the court issues a pendente lite writ at the show cause hearing, the court is required to enter an order directing the matter to proceed to trial. RCW 59.18.380 . See also RCW 59.12.130 (providing that all factual issues in unlawful detainer actions must be determined by a jury unless one is waived). RCW 59.18.410 also requires the entry of a final judgment following trial. The court did not set a trial in this case, nor was a final judgment entered.**

\* \* \* \*

“The pendente lite writ of restitution was issued on incompetent evidence and without examination of the parties and witnesses as required by statute. Ms. Pleasant was wrongfully denied a trial. We therefore reverse and remand for trial.”

(emphasis in bold in the above extracts supplied)

As in *Housing Authority v. Pleasant*, 12 Wn.App 382, 109 P.3<sup>rd</sup> 422 (2005), there was no competent evidence presented at the show cause hearing in the instant case. The court improperly shifted the burden of proof from the plaintiff who, in this case, presented no evidence whatsoever, to the defendant.

**E. CONCLUSION**

The relief that the court awarded plaintiff at the hearing on December 15, 2005, was granted without an evidentiary basis for that relief.

The Findings of Fact, Conclusions of Law, and Judgment entered December 15, 2005, should not have been entered and should be vacated.

The writ of restitution should not have been granted and should be vacated.

Possession of the property should be restored to defendant.

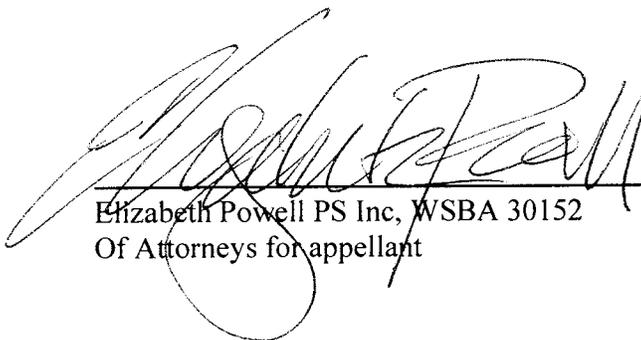
The case should be set for trial upon the question of the right of possession and the issues laid out by the pleadings.

Respectfully submitted,



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Helmut Kah, WSBA # 18541  
Of Attorneys for appellant



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Elizabeth Powell PS Inc, WSBA 30152  
Of Attorneys for appellant

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COURT OF APPEALS  
PIERCE COUNTY

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

**JEFF WALKER, et al.,**  
  
**Plaintiff/Respondents,**  
  
**v.**  
  
**MARGARETANN E. SALAZAR,**  
  
**Defendant/Appellant.**

**APPEAL NO. 34430-1-II**

[PIERCE COUNTY NO. 05-2-14034-3]

**CERTIFICATION OF SERVICE  
OF APPELLANT'S BRIEF**

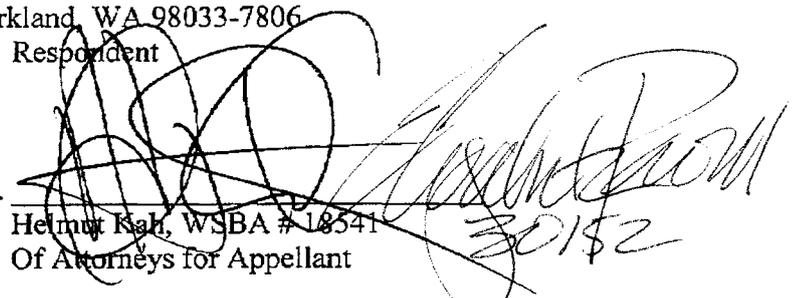
Helmut Kah certifies as follows:

On Wednesday, August 9, 2006, I served a true and complete copy of the appellant's *replacement* opening brief (which contains the added section titled *Issues Pertaining to Assignments of Error*) on the respondents by first class mail, postage prepaid, addressed to :

Jeff Walker  
P.O. Box 1521  
Puyallup, WA 98371-0215  
Respondent

Eastside Funding LLC  
3933 Lake Washington Blvd, Suite 100  
Kirkland, WA 98033-7806  
Respondent

DATED: August 9, 2006.

  
Helmut Kah, WSBA # 18541  
Of Attorneys for Appellant

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DIVISION II

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STATE OF WASHINGTON  
BY 

DEPUTY

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

**JEFF WALKER, et al.,**

**Plaintiff/Respondents,**

**v.**

**MARGARETANN E. SALAZAR,**

**Defendant/Appellant.**

**APPEAL NO. 34430-1-II**

[PIERCE COUNTY NO. 05-2-14034-3]

**CERTIFICATION OF SERVICE  
OF APPELLANT'S BRIEF**

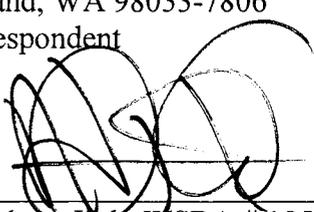
Helmut Kah certifies as follows:

On Wednesday, August 9, 2006, I served a true and complete copy of the appellant's *replacement* opening brief (which contains the added section titled *Issues Pertaining to Assignments of Error*) on the respondents by first class mail, postage prepaid, addressed to :

Jeff Walker  
P.O. Box 1521  
Puyallup, WA 98371-0215  
Respondent

Eastside Funding LLC  
3933 Lake Washington Blvd, Suite 100  
Kirkland, WA 98033-7806  
Respondent

DATED: August 9, 2006.

  
\_\_\_\_\_  
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