

No. 36566-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

Dmitriy S. Chernichenko,

Appellant,

vs.

James M. Caraher,

Respondent.

**BRIEF OF APPELLANT
DMITRIY S. CHERNICHENKO**

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SECTION 1. ASSIGNMENTS OF ERROR

1. The trial judge erred when he admitted into evidence, plaintiff's summary of documents under ER 1006, through a non-treating physician, when the original documents were not even admitted into evidence, over defense counsel's objections based on hearsay and lack of foundation.
2. The trial judge erred when he admitted into evidence, testimony regarding the BAC test results of defendant over defense counsel's objection based on lack of foundation.
3. The trial judge erred when he granted plaintiff's counsel's motion in limine regarding evidence of cocaine and marijuana present in the plaintiff at the time of the accident, plaintiff's prior drug abuse history, and plaintiff driving while his license was suspended.

SECTION 2. ISSUES ON APPEAL

Did plaintiff meet the requirements under ER 1006 to admit a summary of documents through a non-treating physician, when the original documents were not even admitted into evidence and objected to based on hearsay and lack of foundation?

Was the BAC test results of the defendant not admissible because the trooper's testimony did not have proper foundation?

Was evidence of cocaine and marijuana present in the plaintiff at the time of the accident, plaintiff's prior drug abuse history, and plaintiff driving while his license was suspended relevant evidence?

SECTION 3. STATEMENT OF THE CASE

This appeal arises from a personal injury case of a car accident that occurred on December 14, 2003, in the city of Tacoma around 10:30 p.m. at night. The defendant was driving his vehicle southbound on Ruston Way and the plaintiff at the same time was driving a 2000 Yamaha motorcycle. The defendant did not see the plaintiff due to the plaintiff not wearing reflective gear and the taillights not working on the motorcycle, and inadvertently rear-ended the plaintiff.

The plaintiff was also driving at the time with a suspended license without the qualifications to drive a motorcycle, and the motorcycle involved had a stolen license plate. The plaintiff was taken to the emergency room, where he acted violently towards the hospital staff, and his mother very concerned about his drug use and wanted him checked into drug rehabilitation. The emergency room report took a urine sample

of the plaintiff which had evidence that the plaintiff had multiple narcotics in his system at the time of the accident. The plaintiff sustained soft tissue injuries as a result of the accident.

The defendant was taken from the accident scene and arrested on suspicion of driving under the influence, which was subsequently dropped in his criminal case and plead to vehicular assault.

The case was heard before Judge Culpepper, in Pierce County Superior Court in June of 2007. On a motion for a directed verdict by the plaintiff, the trial judge ruled that the defendant was negligent based on the evidence of the BAC, which proved that the defendant was driving over the legal limit and under the influence, thereby, leaving only issue of damages to the jury, which subsequently awarded the plaintiff \$516,000.00 dollars in damages.

The plaintiff's admissibility of medical reports, bills, BAC results and presence of narcotics in plaintiff at the time of the accident were the main issues between the two parties.

3.1 Plaintiff's summary of documents were not admissible because it did not meet the requirements of ER 1006; was hearsay and lacked foundation.

Plaintiff's counsel called as an expert witness, Dr. Richard Johnson whom was a non-treating physician of the plaintiff whom reviewed the

plaintiff's medical records and bills. RP 34. Defense counsel objected to Dr. Johnson's testimony to admit documents into evidence which were submitted by plaintiff's counsel under ER 904. RP 34. The judge excused the jurors to hear the arguments from both counsels as to the admissibility of such documents. RP 34-58. Plaintiff's counsel submitted a brief explaining that Dr. Johnson is entitled to express an opinion regarding the causation, and reasonableness and necessity for the cost of treatment to the plaintiff, pursuant to ER 703, 705, and 805 as an exception to hearsay rule. RP 37-43. Furthermore, that the documents Dr. Johnson was going to testify reviewing were submitted under ER 904 and that he was not attempting to introduce all the documents, but rather "some documents" in the form of a "summary." RP 40. Defense counsel objected on the basis of hearsay and lack of foundation. RP 40. This discussion went on back on forth with both counsels giving generally the same arguments. RP 40-44.

After hearing that plaintiff's counsel's intent is to have Dr. Johnson testify solely to the treatment and reasonableness and cost of the treatment, the trial judge then asked plaintiff's counsel; "How are you going to get in the bills?" RP 44. Plaintiff's counsel answered: "The bills have been submitted under 903, and they've -they're summarized in the

medical reports.” RP 44. To which defense counsel timely objected to all the bills and records submitted in plaintiff’s 904 and clarified that his objection was based not on authentication, but foundation and hearsay. RP 44-45. Plaintiff’s counsel then submitted a brief on submission of a summary. RP 47. The court even clarified the issue to plaintiff’s counsel when he asked: “So the documents that he’s basing his opinion on aren’t yet admitted as evidence and you’re going to try to get in a summary of documents that aren’t admitted as evidence?” RP 47. Furthermore, the trial judge asked: “How is anybody able to cross-examine the author of these reports? Its not Dr. Johnson; it’s somebody that’s not here?” RP 49. Plaintiff’s counsel response was that the testimony and documents were admissible under 903, 904 and that; “It’s done all the time. I’ve done it in every case I’ve worked on.” The judge and two counsels then went over the issue of ER 904 which again was stated that defense counsel timely objected to the documents; that authentication was not an issue, but rather the introduction of documents through a non-treating physician. RP 50-53.

The trial judge then asked plaintiff’s counsel what document counsel is going to submit through Dr. Johnson, which plaintiff’s counsel offered as Exhibit 31, which was a summary of the bills. RP 53. Defense

counsel objected to the summary on the grounds of hearsay. RP 55.

The trial judge then made his ruling stating: "I will allow Dr. Johnson's testimony. He can tell us what he reviewed, what he's done, what his opinion is following that review, and I'll allow, with some authentication, admission of Exhibit 31. That's the one that give me some concern, but." RP 57. Plaintiff counsel then interrupts stating that the document has been stipulated in regards to authenticity. RP 57. The trial judge then states: "Yeah. With proper foundation through Dr. Johnson, I'll allow 31." RP 58. This summary was then admitted into evidence as a basis for damages incurred by the Plaintiff.

3.2 The BAC results of the Defendant were not admissible based on lack of foundation.

At the time of the accident, Washington State Trooper Johnny Alexander was called to the scene in order investigate suspicion of Driving Under the Influence (DUI) by the defendant. After the trooper's initial investigation, the Defendant was arrested for DUI and was transported to the Tacoma Police Department for further investigation. RP 17. Trooper Alexander then read the Defendant his rights and administered a BAC test on the Defendant. RP 18. Trooper Alexander was then called as a witness for the plaintiff during trial on June 5, 2007.

During the trooper's testimony, plaintiff's counsel asked the trooper:

“And what do you do in order to determine that the breathalyzer is properly warmed up and all the technical things that have been done to assure the accuracy of the breathalyzer?” RP 18.

Defense counsel's objected to this question stating: “Objection your Honor. There is no foundation for that. Trooper is not an expert in BAC.”

RP 19. The trial judge overruled the objection and the trooper was then allowed to continue his testimony regarding the BAC . RP 19-26.

3.3 Evidence of cocaine and marijuana present in the plaintiff at the time of the accident, plaintiff's prior drug abuse history, and plaintiff driving while his license was suspended was relevant in establishing defendant's claim of contributory negligence.

The trial judge at the motions in limine hearing on May 18, 2007 ruled that defense counsel could not mention that plaintiff was under the influence of narcotics unless defense counsel found evidence to support his claim. RP 4-5. Defense counsel found in the emergency room report submitted by the plaintiff as a exhibit stating: “The patient has a history of drug abuse and had multiple drugs onboard at the time of being admitted to the hospital after motorcycle accident.” RP 5-7. Furthermore, plaintiff's exhibits stated: “Spoke with patient's mother. They are very concerned about patient's drug usage,”...“Would like to have him admitted into drug rehab.” RP 11. Moreover, that evidence of cocaine,

marijuana and other opiates were diagnosed when the report read: "Cocaine metabolite diagnosed, opiates diagnosed, and amantadine diagnosed." RP 11. This diagnosis was based on a urine drug test of the plaintiff just two to three hours after the collision. RP 11. After, going over the above evidence, the trial court still excluded the evidence as speculation. RP 14-15.

Defense counsel then raised the issue about plaintiff driving with a suspended license as evidence of contributory negligence. RP 15. Plaintiff's counsel even states on the record that: "Well, I understand that's why he had it suspended, is because he was driving a motorcycle without the proper qualification." RP 16. The trial judge agreed that the plaintiff did not have a proper license (RP 16), but also upheld his motion in limine to prohibit defense counsel from mentioning plaintiff was driving while his license was suspended based on grounds of speculation. RP 17.

All of the evidence which the trial court excluded was crucial to the defendant's claim that the plaintiff was contributory negligent.

This appeal has followed.

SECTION 4. ARGUMENT

The Defendant asks the court to construe the objections made by defense counsel in determining the three above issues which were raised during trial, and determine whether the trial judge erred in overruling defense counsel's objections, and if so, whether the judge's rulings constituted reversible error in order to set the case for a new trial.

4.1. The Trial Judge Erred Admitting Plaintiff's Summary of Medical Bills because the Original Documents had not been Admitted and were not Admissible based on Hearsay and Foundation, which does not Meet the Requirements of ER 1006.

Based on the above facts, this is clearly erroneous. The plaintiff's basis for admitting certain documents through a non-treating physician was that he had submitted the original documents to the court under ER 904, which the defense counsel timely objected to all the documents based on hearsay and foundation and not authentication. RP 44-45. Plaintiff then further argues that under ER 703, 705, 805, and 903, that a non-treating expert is allowed to talk about the causation and reasonableness and necessity of the medical bills incurred. RP 37-57. The parties all agree that there is no issue regarding authenticity of the documents, but rather the admissibility. The plaintiff then clarifies that he wishes admit only one document through the non-treating physician, specifically Exhibit 31, which is a summary of the medical bills, under ER 1006,

which was objected to by defense counsel. RP 46. This concerns the trial enough to warrant him asking the plaintiff's counsel:

“So the documents that he's basing his opinion on aren't yet admitted as evidence and you're going to try to get in a summary of documents that aren't admitted as evidence?” RP 47. Furthermore, the trial judge asked: “How is anybody able to cross-examine the author of these reports? Its not Dr. Johnson; it's somebody that's not here?” RP 49.

Plaintiff's counsel then argues that this is done all the time and that he does this in every case based on ER 1006. RP 49. The trial judge then agrees on the basis of authenticity and with proper foundation through the non-treating physician to allow the summary over defendant's counsel's objections, which was clearly erroneous.

ER 1006 states:

“The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.” Appx. 1.

Regarding issues of foundation in connection with a ER 1006, submission, *Washington Practice Series, Courtroom Handbook on Washington Evidence, 2005, Chapter 5 on page 482*, further discusses: “Assuming the foundation requirements of Rule 1006 have been satisfied,

a summary is admissible as substantive evidence *despite the best evidence rule and the hearsay rule.*”

The *Handbook* discusses in further detail of how ER 1006 Foundation requirements are met by stating: “Before invoking the rule, the proponent of the summary must show:

- (a) That the original writings, recordings, or photographs are voluminous;
- (b) That the original materials cannot be conveniently examined in court;
- (c) That the original materials are authentic and that the summary is accurate;
- (d) That the original materials would be admissible if offered as evidence; and
- (e) That the originals, or duplicates, have been made available for examination and copying by other parties, at a reasonable time and place.”

5 K. Tegland, *Wash.Prac. Evidence*, at 483 (2005).

A 2004 case in the United States Court of Federal Claims issued a similar ruling of the requirements before offering a summary under ER 1006. In *ADF Fund v. United States*, 61 Fed. Cl. 540, 546 (2004), the court ruled that: “a proponent of a summary of evidence must properly authenticate it by satisfying four requirements:

First, the summarized writings must be so voluminous so as to be unable to be conveniently examined in Court. Second, the underlying evidence must itself be admissible. Third, the original or copies of the summarized writings must be made

available to the opposing party. And fourth, the proposed summary (or chart calculation) must accurately summarize (or reflect) the underlying documents(s) and only the underlying documents(s).”

61 Fed Cl. at 546.

The same court applied these four requirements in a motion in limine hearing in a case named, *PR Contractors, Inc. v. United States*, 76 Fed. Cl. 621 (2007), and found that the Plaintiff’s summary could not meet these specific requirements and, therefore, failed to establish the claim admissible as a summary. *Id.* The court stated:

“In the instant case, PR has not met these authentication requirements. Mr. Hearth testified that he no back-up documents that support Exhibit Four, other than those attached to the Exhibit. Plaintiff has not tendered the documents underlying claim and has not established that they are too voluminous to be examined in court. Nor has Plaintiff established what the evidence underlying the claim is or whether it is admissible.” Appx. 2.

The court further stated that:

“*In Conoco Inc. v. Doe*, 99 F.3d 387, 393 (Fed. Cir. 1996), the Federal Circuit recognized that Rule 1006 permits the introduction of summaries of documents, but only if the records from which the summaries were prepared are admissible and are made available to the opposing party for examination or copying.” Appx. 2.

Moreover, in a Washington state case, the court ruled a summary is not

admissible because the original materials themselves were hearsay and not within the exception to the hearsay rule. *Pollack v. Pollack*, 7 Wn.App. 394, 499 P.2d 231 (1972).

Applying these requirements and rulings to the instant case, the trial judge erred admitting Plaintiff's summary into evidence. First, the Plaintiff did even establish that the original writings, recordings, or photographs are voluminous. The doctor in his testimony stated that he was handed a binder to review, which contained, medical bill summaries, medical records primarily from the treating physician, police reports and a declaration. RP 34-35. This was a single binder that was never admitted into evidence and was objected to by defense counsel.

Second, plaintiff's summary was that of medical bills submitted in plaintiff's ER 904 that were objected too based on hearsay and foundation and never admitted into court. RP 47. Based on this factor alone, plaintiff's counsel failed to meet the requirements of ER 1006, because the summary must be from originals or copies that were admissible in the first place, which is not the situation in this case. Plaintiff submitted the medical records under ER 904, but these records were objected to by defense counsel and never admitted by the court into evidence. RP 47. Therefore, the trial judge improperly admitted plaintiff's summary into

evidence.

4.2 The Trial Judge erred Allowing the Trooper to Testify Regarding the BAC results of the Defendant because of Lack of Foundation.

During the direct examination of the trooper, plaintiff's counsel asked the trooper:

"And what do you do in order to determine that the breathalyzer is properly warmed up and all of the technical things that have to be done to assure that accuracy of the breathalyzer?" RP 18. To which, defense counsel objected to stating: "Objection, Your Honor. There is no foundation for that. Trooper is not an expert in BAC." RP 19.

The trial judge then overruled the objection and plaintiff's counsel asked what the trooper did to assure the accuracy of the breathalyzer test.
RP 19.

The following testimony then went as follows:

MR. CARAHER

Q What did you do?

A Contact the machine. I make sure that the time indicated on the machine is within tolerance of my watch and the clock that's located in the office. I also make sure that the tube, there's a tube on the back of the machine, I make sure that's warm to the touch. I also make sure that - there's a jar with a solution in it. I also make sure that the temperature is properly registering on the thermometer, which is also on the jar.

Q I'm afraid to ask, but are we still using ampules?

You can tell how long it's been since I tried a case

A Yes, we are.

Q How do you assure the ampule is not contaminated?

A Okay. You'll have to give me more.

Q Is it unopened? Is the ampule unopened when you start the test?

A Are you referring to the solution?

Q Yes.

A Well the solution, if I'm understanding you correctly, its in the jar and it's closed. I'm not sure if that's what you --

Q Well, back in 1971 they had --

MR. OVSIPYAN: Objection, Your Honor. Relevancy.

THE COURT: Well, sustained. 19 -- this is 2003.

MR. CARAHER: Well, that's the only reference point I have, Your Honor. I was trying to explain, describe to him -- I'll withdraw the question. RP 19-20.

After this line of testimony, there was no further discussion regarding the BAC machine or its chemical solutions. RP 20-28.

The foundational requirements for admissibility of breath test results were first established in *State v. Baker*, 56 Wn.2d 846, 852, 355 P.2d 806 (1960). In order to satisfy its initial burden to establish foundation, the prosecution must show that (1) the machine was properly checked and in proper working order at the time of the test; (2) the chemicals used were of the correct kind and proportion; (3) the subject had nothing in his mouth at the time of the test; and (4) the test was given by a qualified operator and in the proper manner. *Id.* at 852. Compliance with approved breath test procedures is a condition precedent to admission of the test results. *Id.* at 852. Once the foundational requirements are established and the test results are admitted, a defendant may then attack the test results in a particular case by introducing evidence refuting the accuracy and reliability of the test reading. *State v. Straka*, 116 Wn.2d 859, 875, 810 P.2d 888 (1991).

In the instant case, defendant concedes through testimony that the trooper checked the defendant's mouth and is certified to administer the breath test. However, based on the testimony of the trooper, plaintiff failed to meet the foundation requirements because he failed to meet the first two requirements showing that: (1) the machine was properly checked and in proper working order at the time of the test; (2) the chemicals used

were of the correct kind and proportion. *Id.*

Regarding the first requirement, the trooper stated that he only contacted the machine and checked its time and made sure the tube in the back of the machine was warm. RP 19. There is no further discussion on whether or not the machine is even in working order or if that checking the machine's time and the tube's warmth was protocol to make sure the machine was properly checked. RP 19-20.

Regarding the second requirement, the trooper discussed very vaguely that there is a jar with a solution in it that is "ampule" and whether the jar is opened or not. RP 20. After that, there is no further discussion on the subject. RP 20. Plaintiff's counsel and the trooper never discussed what correct chemicals were used on the machine and the necessary proportion needed for the machine. RP 20.

Based on this testimony, the plaintiff failed to meet the foundation requirements for admissibility of breath test results which the trial judge improperly erred in allowing into evidence.

Later during trial, on a motion for a directed verdict by the plaintiff, the trial judge ruled that the defendant was negligent based on the evidence of the BAC, which proved that the defendant was driving

over the legal limit and under the influence, thereby, leaving only issue of damages to the jury. Even though the original DUI charge in the defendant's criminal case was dropped and the defendant plead to vehicular assault. RP 16.

4.3 Trial Judge Erred Excluding Evidence of Cocaine and Marijuana Present in the Plaintiff at the Time of the Accident, Plaintiff's Prior History of Drug Abuse, and Plaintiff Driving While His License was Suspended which was Relevant in Establishing Defendant's Claim of Contributory Negligence.

Defendant's counsel wanted to submit evidence of cocaine and marijuana present in the plaintiff at the time of the accident in order to support his claim that the plaintiff was contributory negligent. The trial judge at the motions in limine hearing on May 18, 2007 ruled that defendant's counsel could not mention that Plaintiff was under the influence of narcotics unless defendant's counsel found evidence to support his claim. RP 4-5. Defendant's counsel found in the emergency room report submitted by the plaintiff's counsel as an exhibit stating: "The patient has a history of drug abuse and had multiple drugs onboard at the time of being admitted to the hospital after motorcycle accident." RP 5-7. Furthermore, plaintiff's exhibits stated: "Spoke with patient's mother. They are very concerned about patient's drug usage,"... "Would like to have him admitted into drug rehab." RP 11. Moreover, that evidence of

cocaine, marijuana and other opiates were diagnosed when the report read: "Cocaine metabolite diagnosed, opiates diagnosed, and amantadine diagnosed." RP 11 These diagnosis was based on a urine drug test of the plaintiff just two to three hours after the collision. RP 11. After, going over the above evidence, the trial court still excluded the evidence as speculation. RP 14-15.

Washington Rule ER 402 states:

"All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible." Appx. 3.

In the instant case, it was improper for the trial judge to exclude evidence of multiple drugs present in the plaintiff at the time of the accident since Defendant was asserting as a defense, that the plaintiff was contributory negligent.

RCW 5.40.06 states:

"it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard

for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under *RCW 46.61.502*, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by *RCW 46.61.502* shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.” Appx. 4.

RCW 46.61.502 states:

“(1) A person is guilty of driving under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood made under *RCW 46.61.506*; or

(b) While the person is under the influence of or affected by intoxication liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.” Appx. 5.

Here in this case, the evidence was relevant to establish defendant’s defense of contributory negligence. *RCW 5.40.06* supports this. The plaintiff’s own emergency records which was submitted by his counsel shows that the plaintiff had presence of multiple narcotics in his system at the time of the accident, which included cocaine and other opiates. RP 4, 5, 11. This evidence is further supported by plaintiff’s own records that his mother was very concerned about plaintiff’s drug usage and wanted

him admitted into drug rehab. RP 11. Moreover, plaintiff's emergency report shows that he was exhibiting violent and aggressive behavior and that he assaulted the hospital staff and demanded drugs. RP 8. All of this is relevant evidence showing that the plaintiff was under the influence of drugs while driving his motorcycle which was evidence that the plaintiff was contributory negligence.

Defendant's counsel was also denied to show evidence that the plaintiff was driving with a suspended license as evidence of contributory negligence. RP 15. Plaintiff's counsel even states on the record that: "Well, I understand that's why he had it suspended, is because he was driving a motorcycle without the proper qualification." RP 16. The trial judge agreed that the plaintiff did not have a proper license (RP 16), but also upheld his motion in limine to prohibit defense counsel from mentioning Plaintiff was driving while his was license suspended based on grounds of speculation. RP 17. Plaintiff's counsel is also his father and admitted that plaintiff's license was suspended because the plaintiff drives motorcycles without the "proper qualification." This is relevant evidence that is not speculation, which shows that the plaintiff was not even qualified to drive a motorcycle, which he did at the time of the accident. This together with the fact that there was evidence of multiple narcotics in

the plaintiff's system at the time of the accident, supported by his past history of drug use is relevant evidence to show that the plaintiff was contributory at-fault in this accident.

SECTION 5. CONCLUSION

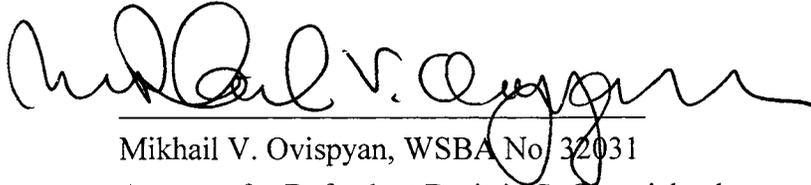
It is clear the trial judge erred admitting plaintiff's summary of medical bills because the original documents had not been admitted and were not admissible based on hearsay and foundation, which does not meet the requirements of ER 1006. This was reversible error since this was the only document that was admitted to the jury which the non-treating expert was allowed to discuss the medical expenses incurred by the plaintiff.

Furthermore, the trial judge erred allowing the trooper to testify regarding the BAC results of the defendant because of lack of foundation. This was also reversible error because later during trial, on a motion for a directed verdict by the plaintiff, the trial judge ruled that the defendant was negligent based on the evidence of the BAC, which proved that the defendant was driving over the legal limit and under the influence, thereby, leaving only the issue of damages to the jury. Even though the original DUI charge was dropped and the defendant plead to vehicular assault in his criminal case.

Moreover, the trial judge erred excluding evidence of multiple narcotics present in the plaintiff at the time of the accident, plaintiff's prior drug history and plaintiff driving while his license was suspended which was relevant in establishing defendant's claim of contributory negligence. This was reversible error because the defendant had evidence and a basis under Washington law to show that the plaintiff was contributory negligent.

Accordingly, the Defendant respectfully asks this court to: (1) set aside plaintiff's judgment and costs; (2) set this matter for a new trial; (3) grant the defendant's objections to exclude the plaintiff's summary of medical bills under Exhibit 31; (4) exclude the troopers testimony regarding the BAC; (5) include evidence of multiple narcotics present in the plaintiff at the time of the accident; (6) include evidence of plaintiff's prior drug history; (7) include evidence of plaintiff driving while his license was suspended; and award the defendant attorneys fees in bringing forth this appeal.

Dated this 30 day of November, 2007.



Mikhail V. Ovispyan, WSBA No. 32031
Attorney for Defendant Dmitriy S. Chernichenko

APPENDIX

APPENDIX 1

RULE ER 1006
SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

APPENDIX 2

In the United States Court of Federal Claims

No. 03-30C
(Filed January 20, 2006)

PR CONTRACTORS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Contract Disputes Act, 41 U.S.C. §
601 et seq.; Motion In Limine; FED.
R. EVID. 1006.

**ORDER AND MEMORANDUM OPINION
DENYING DEFENDANT'S MOTION IN LIMINE**

Plaintiff PR Contractors, Inc. (PR) seeks an equitable adjustment of its contract for the enlargement of the Wax Lake levee in St. Mary County, Louisiana, to compensate it for increased labor, trucking and fill costs. Pending before the Court is Defendant's motion in limine seeking to exclude three exhibits and the testimony of Lin B. Heath, a consultant who prepared the claim. The challenged exhibits are the claim which underlies this action, as well as two memoranda recommending settlement of the claim prepared by Domingo Elguezabal, a former government employee. Because the challenged exhibits and testimony are best evaluated in the context of a trial after Plaintiff has attempted to lay a foundation for their admissibility, the motion in limine is denied.

Discussion

A motion in limine is a preliminary motion that serves a gatekeeping function and permits the trial judge to eliminate from further consideration evidentiary submissions that clearly would be inadmissible for any purpose. Jonasson v. Lutheran Child & Family Servs., 115 F.3d 436, 440 (7th Cir. 1997); see also Luce v. United States, 469 U.S. 38, 41 n.4 (1984).¹ Because of the preliminary

¹ In limine is, by definition, "[o]n or at the threshold; at the very beginning; preliminarily." Luce v. United States, 469 U.S. 38, 40 n.2 (1984)(internal citation omitted); see also United States v. Van Putten, 2005 U.S. Dist. LEXIS 4009 (S.D.N.Y. Mar. 15, 2005).

nature of such motions, “[r]ulings on motions in limine . . . are subject to change as the case unfolds.” Ultra-Precision Mfg. v. Ford Motor Co., 338 F.3d 1353, 1359 (Fed. Cir. 2003). Thus, while [“t]he prudent use of the in limine motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered . . . [s]ome evidentiary submissions [] cannot be evaluated accurately or sufficiently by the trial judge in such a procedural environment. Jonasson, 115 F.3d at 440.

Exhibit 4, Claim for Equitable Adjustment dated April 16, 2001 drafted by Lin B. Heath

This exhibit consists of a cover letter signed by Plaintiff’s president, Cedric Patin, seeking an equitable adjustment from the U.S. Army Corps of Engineers (COE) in the amount of \$865,156. The letter contains a certification that the claim is accurate and made in good faith. Appended to this letter is a 57-page “Statement of Claim” which includes a discussion of the five components of the claim and data. The claim summary outlines the five elements of the claims as follows:

I.	Labor Wage Rate Variances:	\$ 145,172
II.	Increased Trucking Costs:	\$ 168,074
III.	Material Shrinkage Factor:	\$ 394,344
IV.	Final Quantity Under-run:	\$ 43,660
V.	Additional Fill Due to Settlement:	<u>\$ 113,906</u>
	TOTAL AMOUNT OF CLAIM:	\$ 865,156

Defendant’s Appendix (DA) 11.

Labor Costs

Plaintiff’s claim for increased labor costs stems from its inability to fulfill its labor needs at the Davis-Bacon rates and the COE’s alleged assurances that it would adjust the contract to make up the difference. The claim contains a one-page “Labor Wage Rate Variance Summary,” which lists the rates paid by Plaintiff for various job categories, the Davis Bacon rates and the variance. DA 16. The claim also contains a 16-page chart entitled “Labor Wage Rate Analysis Detail” purporting to list individual employees of PR and their pay for specified weeks. DA 17-32. Finally, the claim contains “General Decision Number LA 960049,” Mar. 15, 1996, listing wage rates in specified counties in Louisiana (including St. Mary) for job categories in River, Harbor and Flood Control Projects. DA 33-35.

Trucking Costs

The increased trucking costs represent costs over and above the \$30 per hour trucking costs in Plaintiff’s proposal. Plaintiff claims that the COE assured it that if PR could not fulfill its trucking requirements at this rate, it would adjust the contract to cover the variance. PR’s actual trucking cost per hour was \$40. DA 12-13. The claim includes a one-page summary of PR’s actual truck rate per hour versus its claimed estimated truck rate per hour and the adjusted “truck unit cost” based upon

the quantities of uncompacted and semi-compacted soil hauled. DA 36. This is followed by a one-page "Subcontract Trucking Summary" which lists truck sources, number of trucks, hours and payments, and a page entitled "Diamond C & Subs" listing the same type of information. DA 37-38. The claim also includes a "Payment Application Summary" for Diamond C, a letter agreement that Melgrave, Inc. (Melgrave) would supply trucks to PR at \$40 per hour and four copies of checks issued by Melgrave. DA 39-45.

Shrinkage of Fill Material

PR claims that it is entitled to payment for the full quantity of fill it hauled, not the shrunken fill quantity "in place." DA 14. The claim contained a "material shrinkage" chart listing the difference in paid quantities and hauled quantities of fill. DA 45.

Final Quantity Under-run

Because the final approved and paid quantities for fill were less than 85 percent of the original estimated quantities, Plaintiff contends that the contract's "Variation in Estimated Quantity" provision entitles it to compensation for this under-run. DA 14-15. The claim contains a chart listing the final surveyed quantity versus the contract quantity for uncompacted and semi-compacted fill followed by a "Fill Cost Detail."² DA 46-50.

Additional Fee Due to Settlement

Plaintiff claims that it had to provide additional fill because settlement plates installed in the levee prior to the fill activity could not be located. Adjustments were made for the recovered plates, and Plaintiff seeks a similar adjustment for the lost plates. DA 15. The claim contains a chart showing the number of plates lost and recovered as well as the "average subsidence volume," fill quantity and unit prices followed by a six-page chart entitled "Settlement Computations." DA 52-58.

The Wholesale Exclusion of Exhibit 4 and Mr. Heath's Testimony Is Not Warranted at this Juncture

Defendant seeks to exclude Exhibit 4 on the grounds that the claim "is hearsay, contains expert opinions, purports to be an analysis of PR's damages and is not based upon first hand knowledge." Def.'s Motion in Limine at 2-3 (Def.'s Mot.). In support of this, Defendant argues that Mr. Heath, the consultant who prepared the claim, relied principally upon PR's owner, Mr. Patin, for the information in this exhibit. Defendant argues that Mr. Heath's trial testimony would be unreliable because at his deposition he had no backup documents, could not remember details about the exhibit, and admitted that the claim contained his own opinion. Defendant further submits that any testimony that may be proffered by Mr. Heath in support of Exhibit 4 will exceed the scope

² The Claim appended to Defendant's Motion in limine contains two copies of this same chart. DA 46 and 48.

of proper lay opinion testimony and lack first-hand knowledge. As such, the Government requests that the Court prohibit PR from presenting any testimony from Mr. Heath and from introducing Exhibit 4 at trial.

This is an action under the Contract Disputes Act (CDA) challenging a final decision of a contracting officer (CO). A final decision is a jurisdictional prerequisite to this action. See 41 U.S.C. § 605(a); see also England v. The Swanson Group, Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004) (For the court to have jurisdiction under the CDA, “there must be both a valid claim . . . and a contracting officer’s final decision on that claim.”). As such, the claim for equitable adjustment is properly part of the record as it is the claim upon which the CO rendered the decision at issue. See generally 41 U.S.C. § 609(a).³ At a minimum, the claim is admissible to show it was duly submitted to the contracting officer and acted upon, as required for this Court to have a jurisdiction under the Contract Disputes Act. 41 U.S.C. § 605(a).

Defendant raises several valid points about the weight to be given the content of the claim and the purpose for which the claim may be used. The Court will not accept unsubstantiated speculation as fact simply because it is contained within the four corners of the claim. A claim is precisely that--a request for relief that requires factual support and backup for the demands therein. In sum, the Court does not exclude the claim at this juncture, but will not accept statements in the claim as fact without further substantiation in the form of credible testimony or reliable documentation.

The same is true of the proposed testimony of Mr. Heath. Plaintiff is entitled to explain the basis of its claim and its theories as set forth by Mr. Heath in the claim itself.⁴ As the preparer of the

³ In CDA proceedings before the Boards of Contract Appeals, the claim is routinely included in the record as part of the Rule 4 file. See General Services Administration Board of Contract Appeals (GSBCA) Rule 104(a)(3) (“[T]he contracting officer shall file . . . the written claim or claims. . . and evidence of their certification.”); see also GSBCA Rule 104(f) (“All of the exhibits of the appeal file, except for those as to which an objection has been sustained, are part of the record upon which the Board will render its decision.”); Armed Services Board of Contract Appeals (ASBCA) Rule 4(a)(e) (“Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence.”).

⁴ Mr. Heath will not be permitted to testify as an expert, as this Court has ruled that Plaintiff did not comply with Rule 26(a)(2). See Order dated January 26, 2005 (granting Defendant’s Motion to Strike the “Statement of Claim” as Plaintiff’s expert report) (“[Mr. Heath’s] Statement of Claim is unsigned and does not comply with the expert report requirements set forth in Rule 26(a)(2) of the Rules of the Court of Federal Claims.”).

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claim, Mr. Heath is competent to testify as to how he went about preparing the claim. To the extent that Mr. Heath's testimony attempts to offer unsupported opinion, or lacks backup information and critical detail, those matters are best raised at trial when the Court can rule on appropriate objections in context. Defendant has not proffered sufficient cause at this juncture for the Court to determine that Mr. Heath's testimony would be so unreliable or speculative as to be inadmissible in its entirety. As such, Plaintiff may put on Mr. Heath's testimony, and Defendant may object as necessary during the course of the trial.

Plaintiff further asserts that the claim is admissible as a summary under Federal Rule of Evidence (FED. R. EVID.) 1006. The Rule provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The Court may order that they be produced in court.

FED. R. EVID. 1006.

As the COFC recently recognized in ADF Fund v. United States, 61 Fed. Cl. 540, 546 (2004), a proponent of a summary of evidence must properly authenticate it by satisfying four requirements:

First, the summarized writings must be so voluminous so as to be unable to be conveniently examined in Court. Second, the underlying evidence must itself be admissible. Third, the original or copies of the summarized writings must be made available to the opposing party. And fourth, the proposed summary (or chart calculation) must accurately summarize (or reflect) the underlying document(s) and only the underlying documents(s).

61 Fed. Cl. at 546.

In the instant case, PR has not met these authentication requirements. Mr. Heath testified that he had no back-up documents that support Exhibit Four, other than those attached to the Exhibit.⁵

⁵ Mr. Heath testified:

Q: [Are] there[] any pieces of paper anywhere that might support these calculations[?]

A: I do not have any, any as in none, I do not have any documents that act as work papers, supporting information, et cetera, that deal with the statement of claim or whatever else that I sent to NAICO. I do not have anything. However, I could not have done it without the information.

Plaintiff has not tendered the documents underlying the claim and has not established that they are too voluminous to be examined in court. Nor has the Plaintiff established what the evidence underlying the claim is or whether it is admissible. Plaintiff has not demonstrated that an original or copies of the summarized writings were made available to Defendant. In Conoco Inc. v. DOE, 99 F.3d 387, 393 (Fed. Cir. 1996), the Federal Circuit recognized that Rule 1006 permits the introduction of summaries of documents, but only if the records from which the summaries were prepared are admissible and are made available to the opposing party for examination or copying. See Jade Trading, LLC v. United States, 67 Fed. Cl. 608 (2005) (excluding summaries where voluminous underlying documents were not provided to Plaintiff sufficiently in advance of trial). Finally, there has been no showing that the proffered summary accurately reflects any underlying documents. As such, Plaintiff has not established that the claim is admissible as a summary.

Exhibits 8 & 9, Memoranda Recommending Settlement, Prepared by Mr. Elguezabel

Exhibits 8 and 9 are memoranda prepared by Domingo Elguezabel, a former COE employee, recommending settlement. Exhibit 8, entitled "Claim by PR Contractors" is dated October 5, 2001, and Exhibit 9 bearing the same title, is dated February 25, 2000. DA 59-66. Exhibit 8 purports to relate the background of the project and recount Mr. Patin's losses due to enumerated actions by the Government, as well as the underrun in embankment quantities. DA at 59. The memorandum also states that investigations into PR's allegations were made and that the author recommended that in the best interest of the Government "an attempt to arrive at a settlement with the contractor be made." DA 60. Exhibit 9 appears to be an earlier iteration of this memo containing the same entries and also recommends that settlement be attempted and that a settlement proposal be made. DA 63-66.

Mr. Elguezabel was employed as an engineer with COE in the New Orleans district from 1970 until he retired in February 2003. Deposition of Domingo J. Elguezabel (Oct. 6, 2004) at 7-8, DA 116 (Elguezabel Dep.). In December 1996, he became the area engineer for Lafayette, Louisiana where the Wax Lake Project was located. Elguezabel Dep. at 9-11, DA 116. Mr. Elguezabel drafted the memoranda at issue after the Wax Lake Project had been concluded. At the time he drafted the memoranda, Mr. Elguezabel held the position of Administrative Contracting Officer. Elguezabel Dep. at 154, DA 127.

Defendant seeks to exclude these memoranda, arguing they are "replete with hearsay, argumentative, not based upon first-hand knowledge and not prepared within the scope of Mr. Elguezabel's employment with COE." Def.'s Mot. at 6. Defendant points out that during his deposition, Mr. Elguezabel could not explain how he reached some of his calculations and testified as to matters about which he had no first-hand knowledge. For example, the Government cites Mr. Elguezabel's conclusion that Plaintiff's owner was "brow-beaten to accept lower unit prices in order to get a price lower than the Government estimate," while Mr. Elguezabel did not attend the negotiations. Ex. 8 at 3, DA 61. Questions of foundation, competency, relevancy and potential

Deposition of Lin B. Heath (Apr. 12, 2005) at 70, DA 85 (Heath Dep.).

prejudice may be better resolved at trial. Knowles Elecs., LLC v. Microtronic U. S., Inc., 2000 U.S. Dist. LEXIS 5754 (N.D. Ill. 2000); see also Van Putten, 2005 U.S. Dist. LEXIS 4009.

Defendant further argues that Exhibits 8 and 9 should be excluded because they do not fall within the business records exception to the hearsay rule. Defendant asserts that Mr. Elguezabal did not possess the authority to prepare the memoranda and that they were not kept in the course of regularly conducted business activity.

Plaintiff argues that because Mr. Elguezabal was employed by Defendant at the time he drafted the documents, the documents qualify as admissions of a party opponent under FED. R. EVID. 801(d)(2)(D). Pl.'s Resp. at 4. Defendant maintains Mr. Elguezabal did not have the appropriate authority to bind the government because Mr. Elguezabal's supervisors did not direct him to draft the memoranda and Mr. Elguezabal did not have the authority to modify the contract beyond \$100,000. Def.'s Reply at 4.

FED. R. EVID. 801(d)(2)(D) provides:

A statement is not hearsay if . . . the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

FED. R. EVID. 801(d)(2)(D). As the Court in Yankee Atomic Electric Co. v. United States, 2004 WL 2450874, at 9 (Fed. Cl. Sept. 17, 2004) (citation omitted) recognized, "Rule 801(d)(2)(D) declares statements of an agent or servant concerning a matter within the scope of his agency or employment to be defined not as hearsay if made during the existence of the relationship." Accordingly, once proper foundation for the statements is laid, "the statements are admissible if the declarant made them in his capacity as a government official on matters within the scope of his employment." See Globe Savings Bank v. United States, 61 Fed. Cl. 91, 96 (2004); see also Clark v. United States, 8 Cl. Ct. 649, 651 n.1 (1985) ("[S]tatements of United States government officials concerning a matter within the scope of their employment are not hearsay.").

To establish that Exhibits 8 and 9 are admissions of a party opponent, PR must demonstrate that Mr. Elguezabal drafted Exhibits 8 and 9 in his capacity as a government official and that they discuss matters within the scope of his employment. However, as the Court in Glendale Federal Bank, FSB v. United States, 39 Fed. Cl. 424 (1997) explained, a declarant whose statement falls within Rule 801(d)(2)(D) need not establish that his statement was "authorized" within the meaning of the rule [because] . . . an agent may make vicarious admissions for his principal whether or not he is specifically authorized to speak on that subject." The foundational elements for the requisite showing are best made at trial.

Conclusion

Defendant's motion in limine is **DENIED** without prejudice to the objections therein being raised at trial.

MARY ELLEN COSTER WILLIAMS
Judge

APPENDIX 3



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RULE ER 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT
EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

[Adopted effective April 2, 1979.]

Comment 402

[Deleted effective September 1, 2006.]

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APPENDIX 4

RCW 5.40.060

Defense to personal injury or wrongful death action — Intoxicating liquor or any drug.

(1) Except as provided in subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

(2) In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

[1994 c 275 § 30; 1987 c 212 § 1001; 1986 c 305 § 902.]

Notes:

Retroactive application -- 1994 c 275 § 30: "Section 30 of this act is remedial in nature and shall apply retroactively." [1994 c 275 § 31.]

Short title -- Effective date -- 1994 c 275: See notes following RCW 46.04.015.

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

APPENDIX 5

RCW 46.61.502

Driving under the influence.

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section.

(3) It is an affirmative defense to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(b) or (c) of this section.

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:
 (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or (b) the person has ever previously been convicted of vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), or vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b).

[2006 c 73 § 1; 1998 c 213 § 3; 1994 c 275 § 2; 1993 c 328 § 1; 1987 c 373 § 2; 1986 c 153 § 2; 1979 ex.s. c 176 § 1.]

Notes:

Rules of court: Bail in criminal traffic offense cases -- Mandatory appearance -- CrRLJ 3.2.

Effective date -- 2006 c 73: "This act takes effect July 1, 2007." [2006 c 73 § 19.]

Effective date -- 1998 c 213: See note following RCW 46.20.308.

Short title -- Effective date -- 1994 c 275: See notes following RCW 46.04.015.

Legislative finding, purpose -- 1987 c 373: "The legislature finds the existing statutes that establish the criteria for determining when a person is guilty of driving a motor vehicle under the influence of intoxicating liquor or drugs are constitutional and do not require any additional criteria to ensure their legality. The purpose of this act is to provide an additional method of defining the crime of driving while intoxicated. This act is not an acknowledgement that the existing breath alcohol standard is legally improper or invalid." [1987 c 373 § 1.]

Severability -- 1987 c 373: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1987 c 373 § 8.]

Severability -- 1979 ex.s. c 176: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 176 § 8.]

**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

<p>DMITRIY S. CHERNICHENKO, Petitioner, v. JAMES MATTHEW CARAHER, Respondent.</p>	<p>NO. 06 2 066931</p> <p>PROOF OF SERVICE</p>
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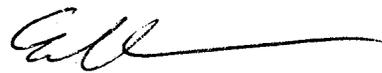
The undersigned certifies that on November 30, 2007, Appellant's Brief, was personally served on Respondent's counsel at the following address, pursuant to RAP 5.4:

Mr. James M. Caraher
Attorney at Law
4301 S. Pine St. Ste. 543
Tacoma, WA 98409

BY  ERICK DIVINAGRACIA
DATE 11/30/07
16301 NE 8th St., Ste. 281
Bellevue, WA 98008
(425) 643-8340

Sworn to under the penalty of perjury of the State of Washington.

DATED this 30 day of November, 2007, in Bellevue, Washington.



ERICK DIVINAGRACIA, WSBA #31073

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