STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

Dick and Jo Ann Lang Appellants, v. Washington State Department of Social and Health Services, Child Protective Services, Respondent.	Case No.: 37687-3-II Thurston County Superior Court No. 07-2-00901-6

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

REPLY BRIEF OF APPELLANT

DICK AND JO ANN LANG

Kevin L. Johnson, Attorney at Law
2405 Evergreen Park Drive, Suite A-1
Olympia, Washington 98502
Attorney for Appellant

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER ISSUES PERTAINING TO ASSIGNMENT

OF ERRORS.....1,2

III. REPAY ARGUMENTS.....2

A. The Appellants filed its Petition with the Superior court of Thurston County and did not file with the Office of Administrative Hearings.....2,3

B. Substantial evidence does not support the trial courts decision to Affirm the Agency Action.....3,4

C. The letter from the Ombudsman should be admitted because it is consistent with the conduct of the Department.....7,9

1. The Facts in the Schermer Decision does apply to the Langs' Case.....8,9

2. The Department deprived the Langs of an interest protected by Due Process and unconstitutional.....12

3. The Langs never had a chance in February 2001 to correct the findings and to correct any inaccuracies in the Department's record and without that chance it was beyond Departments' statutory authority.....14

4. The Langs were never provided an opportunity to correct the record.....15

5. The Department did not act within it statutory authority.....16

6. The Judges decision was arbitrary and capricious. 17

7. The Langs were substantially prejudiced.....18

IV. CONCLUSION.....19

TABLE OF AUTHORTIES

Cases

In Re Interests of J.F., 109 Wn.App 718, 722, 37 P.3d 1277 (2001).....2

Braam v. es rel. Braam, 150 Wn.2d 689, 710 81 P.3d 851 (2003).....7.

Re Dependency of Schermer, 161 Wn.2d 927,169 P.3d 452.....9,11,12

Valmote v. Bane, 18 F.3d 992, 996, (2nd Cir. 1994).....12, 14

Dickson v. Chevrefils, 552 A.2d 89, 96 (1988....12,13

Pierce Cy. Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 658 P.2d 648 (1983).....17

Humphries v. City of Los Angeles,.....12

In Re Pers restraint of Cook, 114 Wash 2d 812, 792. P.2d 506 (1990).....18

Statutes

RCW 13.34.030 (1).....4

RCW 26.44.030.....8

RCW 26.44.100.....9

RCW 26.44.125.....7, 17

RCW 26.44.050.....16,17

RCW 74.13.350..... 11

RCW 13.50.010(9).....15

RCW 13.34.....15

RCW 13.50.010(6).....16

RCW 43.06A.060.....7

RCW 43.06A.080.....7

Other Authorities

WAC 388-14-009 and 011.....4,5
WAC 388-15-132(3)(e).....13
DCFS Manual 26.33, A(1992).....13

I. INTRODUCTION

This case involves the publication of Appellant's names in the Children's Administration Information Management System (hereinafter CAMIS) for a finding of alleged abandonment of Appellant's adopted son Jordon on February 23, 2001 without notice to Appellants or opportunity to be heard on the allegations. In the August 2000 dependency hearing the department never pled abandonment. DSHS (Department) determined that Appellants abused and neglected their adopted son Jordon on May 9, 2000 when Appellants refused to pick up Jordon at the hospital at 2:00 a.m. after Jordon became violent and was taken into custody by the Vancouver Police for assault and destruction of property. Appellants were not given notice of any investigation regarding abuse and neglect under RCW 26.44.100 or for abandonment until September 6, 2006.

II. COUNTER ISSUES PRETAINING TO THE ASSIGNMENTS OF ERROR

1. Whether there is sufficient evidence in the record to support a finding that the Appellants did not abandoned Jordon Lang.

2. Whether the Agency action was unconstitutional and outside its statutory authority of the agency and was arbitrary and capricious.

3. Whether there was sufficient evidence to support the finding that the Petitioners violated the Appellant's due process rights.

4. Whether there is sufficient evidence to show that the Appellant met its burden of proving the invalidity of the agency action.

III. REPLY ARGUMENTS

A. The Appellants filed its Petition with the Superior court of Thurston County and did not file with the Office of Administrative Hearings.

The state argued that the Langs filed numerous records that were not part of the agency record and that were not in existence or were not available when the Department investigated the abandonment allegation. In response, the records are part of the court file and if the Department would have investigated the abandonment allegation this information would have been known. Some records were in existence in 2000 and more in 2006. CP 155 through 175. It was the agency that chose not to make the documents part of the administrative record. As the court can see, the letters and affidavits were written in response to the allegation from the Department, showing all that Langs (Appellants) had to go through with Jordon.

The department argued that unchallenged findings by as superior court are considered verities on appeal RAP 10.3(g) *In Re the Interest of J.F,*. 109 Wn. App. 718,722, 37 P.3d 1227 (2001).

Verities mean a quality or state of being truthful. Webster's Dictionary. We are not arguing that the facts are untrue, just incomplete. Appellants are arguing that the state misconstrued the facts as it was more than one episode of abusive behavior toward the Lang family and the court did not take time to analyze the file thoroughly before it came to its decision.

B. **Substantial evidence does not support the Trial courts' decision to Affirm the Agency Action**

The Department argues that the record does supports the findings of fact on abandonment. In response, the Appellants argues that the Respondent is incorrect. Here, the evidence in the record shows that on more than one occasion the Langs requested visitation with Jordon. CP 307, CP 315. The Langs visited Jordon for a short period of time because that was all that was allowed. CP 310. It was not that the Langs did not want Jordon to not return home, the Langs wanted the Department to help them to get the care necessary for Jordon. CP 67. Furthermore, the Department never pled abandonment in its dependency petition and the findings of the Trial Court ignored the findings of the Clark County Commissioner who, in the dependency hearing on August 10, 2000, in dicta did not consider abandonment because it was not pled. CP 184-187.

"Abandoned" means when the child's parent guardian or other custodian has expressed, either by statement or conduct, intent to forgo for an extended period of time parental rights or responsibilities despite an ability to exercise such rights and responsibilities. RCW 13.34.030(1) Under the Washington Administrative Code, (WAC) to find abandonment the court has to find that the parent or guardian who is responsible for the care, education, or support for the child:

1) Deserts the child in any manner with intent to abandon the child;
2) Leaves the child without the means or ability to obtain one or more of the basic necessities of life such as food, water, shelter, clothing, hygiene, and medically necessary health care;
3) Foregoes for an extended period of time parental rights, functions. WAC 388-14-09 & 011.

Mrs. Lang did not the desert Jordon and substantial evidence in the record does not support that the Langs expressed intent to forgo for an extended period of time its parental rights or responsibilities. With Jordon's escalating violent behavior toward others CP 40, 41, CP 167-175, like the Ostertags before them, CP 42, 63, and the school CP 124-126, Mrs. Lang realized that DSHS would never give them the help for Jordon unless Mrs. Lang signed him into care to get him help CP 41. The statement made by Ms. Lang "that Jordon could never come home again" was taken out of context. It was an emotional response to DSHS and was made by Mrs. Lang she could get Jordon the help he needed, not with the intent to "abandon him."

Under the WAC a parent deserts a child in any manner with intent to abandon the child. WAC 388-14-09-11 (1). Visitation issues are not synonymous with abandonment. Here, the record shows that the Langs on May 17, 2000 tried to contact Ms. Hamersley regarding visitation. CP 307. The Langs were in contact with DSHS to arrange visitation and care for Jordon on June 12, 2000. CP 310. Just because Mrs. Lang did not pick Jordon up one night from the hospital at 2 a.m. in the morning does not mean that Jordon was abandoned. CP 209. Here, the record shows that Jordon was a danger to himself and to others. CP 180 and the drugs that were prescribed to sedate him for the evening had not helped before and Ms. Land did not believe that the drugs would help that night. CP 59, CP 178. The Langs provided medical supplies such as his mobility scooter CP 308. The Langs requested visitation and counsel CP 309 and inquired about the mark under his right eye. CP 310. Despite DSHS's resistance, the Langs even presided over his funeral in 2006. CP 140. (In fact this incident has not been investigated) There is substantial evidence in the record that shows the Langs had contact and visitation with Jordon, albeit at many times unofficial, CP 314-315 until his death in 2006. CP 140. There is substantial evidence in the record that show that the Langs never deserted Jordon with the intent to abandon their son.

Under the second prong Jordon was not left without the means or ability to obtain the basic necessities of life on May 9, 2000. CP 283. Jordon was in the hospital. CP 204, CP 49. He had food, water, shelter clothing, hygiene, and medically necessary health care for the period of time that he was at South West Washington Medical Center (SWWMC). This was perhaps the safest place at the time for Jordon under the circumstances. The recommendation was to refer him to Columbia River Mental Health. CP 50. After he left SWWMC Jordon was further cared for in foster care where he had the basic necessities of life. CP 63, 66. The Langs requested an out of home placement and the Commissioner indicated that the Langs have a right to do that. CP 67. On June 27, 2000 Ms. Langs discussed plans with the social worker for her son in regard to if she was seeking guardianship. CP 64. The Langs indicated that they were agreeable to a guardianship. CP 64. These facts do not show that the Langs left Jordon without the ability to obtain the basic necessities of life or had the intent to abandon Jordon, or forgone their parental responsibilities. To care for a son under difficult circumstances means making difficult choices between the safety of the family and at the same time care for your son. Here, Jordon was in the hospital and after that went to foster care. In every phase of events that occurred after May 9, 2000 to his death in 2006, the Langs were acting like parents who could not handle their son's

escalating violent behavior but tried to do everything to make sure that he was taken care of. That is a parental responsibility. This evidence does not show that the Langs abandon Jordon without the basic necessities of life.

C. The letter from the Ombudsman should be admitted because it is consistent with the conduct of the Department.

The State next argued that the evidence from the Ombudsman was not properly admitted. It cited *Braam v. es rel. Braam*, 150 Wn.2d 689, 710 81 P.3d 851 (2003). In *Braam* court admitted, over the State's objection, the annual report of the Office of the Family and Children's Services Ombudsman. The Department argued that admittance was precluded by statute, and use of the report for the truth of anonymous facts presented was hearsay. The Court agreed that the ombudsman's report should have been excluded. *Id.* Here, the Langs are not admitting an annual report. The Ombudsman's letter was admitted by the court to show that the Department did not follow the rules and procedure as set out in the Department Policy and Statutes. The State did not object to the admission of this evidence, therefore it waived.

RCW 43.06A.060. RCW 43.06A.080 has four exclusions. It allows the Ombudsman to report crimes, threats of imminent serious harm, general information regarding the operation of the

Ombudsman's office, and failures of those required to report child abuse under RCW 26.44.030. Here, the Ombudsmen's letter involved the investigation into the department's alleged investigation of alleged child abuse and neglect allegations that is, according to the Department, "a form of abandonment" and indicated that there was imminent serious harm to Jordon. *Respondent's Brief at pg. 30.* Therefore, the letter meets the criteria of one of the exemptions under the statute cited by the Department. The letter was specifically written to Dick and Jo Ann Lang which indicates a carful review an investigation was conducted, unlike the Department's alleged investigative review of abandonment, and determined that the DCFS' failure to send a letter notifying the Langs of the finding of abandonment was a clear violation of law and policy. CP 103. DSHS admitted that it failed to notify the Langs of the abandonment allegation from year 2000 and 2001. Under RCW 26.44, the Ombudsman was correct, and the Department does not refute this or object because the record shows that the Department failed to notify the Langs in February 2001 about its abandonment determination. The evidence was properly admitted because of the exemption and it was consistent with the department's position.

1. **The <u>Facts</u> in the Schermer Decision does apply to the Langs' Case.**

The Respondent argues that the Langs are attempting to rely on the Supreme Court's Decision to *In Re Dependency of Schermer, 161, Wn.2d 927, 169 P.3d 452* to support their claim that the Department's finding of abandonment was wrong. *Brief of Respondent at 22-26.* In *Schermer*, the parents stated that they could not safely supervise their son and they were *unwilling* to allow him back in the home, primarily because their fear that he would carry out his treats to kill his parents and two younger siblings and/or commit sex offenses *Id. at 454.* (Emphasis mine) After the parents' testimony in the *Schemer* case the State amended its petition to include an additional allegation of abandonment. *Id at 456.* Here, the department never pled abandonment or amended its petition to include abandonment, and the record also supports that given the level and consistency of Jordon's violent behavior, the Langs could not parent him anymore. CP 63, CP 316. As indicated by Ms. Lang, it was not their desire to leave Jordon but under the circumstances the Langs were not able to control Jordon's violent outbursts. CP 70.

The Langs suffered the same fear as the *Schermers.* The Langs felt that they could no longer safely supervise Jordon because of his violent outbursts. CP 59, CP 62, CP 63, Here, like the facts in the *Schermers* case, the Langs made it clear that they did not want Jordon back in the home because they could not control is violent outbursts and there were other children in the home that they had to

protect. CP 63. Since 1996 Jordon's aggressive violent continued to worsen to the point that Jordon began assaulting people in Foster Homes, CP 42, 63, in the Lang's home and at school. CP 24, 26, CP 316. Also due to Dick Lang's medical condition it would be very difficult for him to restrain Jordon. CP 59, CP 316. On May 1, 2000 Ms. Ostertag called 911 and Jordon was taken to the Southwest Washington Medical Center (SWWMC) emergency room by the police. In that episode, Jordon threw a television set on the floor. CP 43. Ms. Ostertag refused to pick up Jordon at the hospital when he was ready to return to the Ostertag's home. CP 43. Nine days later Jordon became violent in the Langs home by striking Dick Lang and pulling down the curtains. CP 43, CP 59. Jordon even assaulted Holly Lang, his daughter. CP 167. Ms. Langs became fearful in the home and did not trust that Jordon would not to hit or harm or become aggressive with the other children. CP 49. Perhaps *Schemer* is not analogous on the procedural aspects of this case but the facts in *Schemer,* are like the facts in this case. Both made the same statements but out of fear of harm and future violent behavior, of their respective sons, not with intent to abandon their sons, but to keep everybody in the home safe.

There is substantial evidence in the record that shows that the Langs did not abandon Jordon. The Langs were trying to get Jordon the help he needed and the only way the Langs could get DSHS to

help is to threaten relinquishment of there parental rights and say he could not come home again. CP 74. DSHS refused to accept relinquishment from the Langs because finding an adoptive resourced to place Jordon will be difficult CP 74. Ms. Langs' threat of relinquishment was just a plea for help from the Langs like in *Schermer* who made it clear that their son could not come home again and established a prima facie case for a dependency. *Schemer* at 464. No where in the record does it show that the Langs relinquished their parental rights. Only a dependency filed and granted by the Clark County Superior court. CP 184, 187, 188. In fact the record shows that Ms. Lang was agreeable to a guardianship and foster care. CP 64.

The Legislature provided a separate statutory scheme which allows out-of-home placement for developmentally disabled children through voluntary agreements. RCW 74.13.350. CP 63, CP 67. Parents retain legal custody under such agreements, and any party to the agreement may terminate it at anytime. *Id.* Jordon ended up with the Nusbaum's in foster care. CP 74. This evidence shows that the Langs did not abandon Jordon as he was well taken care of by his foster parents and visited on occasion by the Langs. CP 74. There was substantial evidence in the record that shows that the Langs never intended to abandon their adopted son Jordon.

2. **The Department deprived the Langs of an interest protected by Due Process.**

The state argues that the evidence in this appeal does not indicate that the Langs were deprived of a protected interest. *Respondent's Brief at 21*. The State attempts to distinguish *Valmonte,* 18 F.3d at 1002 and *Humpries* at 554 F.3d at 1188 by arguing that the allegation of abandonment is true, and that ability to obtain employment was not actually affected, and finally the Langs were afforded an opportunity the challenge the findings and if successful have it removed from department files. In response, the Langs argue that the allegations of abandonment are not true. The Langs were not afforded the opportunity to challenge the findings in 2000, or 2001. In August of 2000, the Clark County Superior court agreed with the Langs. CP 188-203. Commissioner Wilkerson determined that the situation was not really an abandonment situation, but I supposed it is. CP 197. He went on in dicta to indicate that this case is not technically abandonment but the parents' behavior in this case has a lot of elements of abandonment. CP 198.

The Department next argues that Langs' ability to obtain employment was not affected. It is a denial of due process to place an employee of a state licensed child-care facility on a central register without first giving him prior notice of the intended action and the opportunity for a hearing to contest it. *Dickson v. Chevrefils*,

552 A.2d 89 96 (1988). Here, Appellant's name was published in CAMIS and placed on the register without a hearing before a decision maker. An alleged founded report for abandonment can place a person on the registry or in CAMIS without due process. It appears that CPS is using CAMIS like a central registry. This is unconstitutional because Langs had no notice or opportunity to contest the determination.

The Langs were not afforded an opportunity to challenge the findings because six months after Clark County Commissioner Wilkinson determined that it was not technically abandonment, the Department published the Langs name in CAMIS for founded for abandonment. This was contrary to the Commissioner's decision. The department never notified the Langs about being placed in the CAMIS registry so the Langs never had an opportunity to defend against allegations and have the Department remove their names until 2006. In virtually every case of an incident potentially disqualifying a child care worker only a hearing close in time to the report itself can be a meaningful and reliable fact finding process. CPS requires investigations of child abuse and neglect be completed within 90 days precisely because delay promotes unreliable fact finding. WAC 388-15-132(3)(e), DCFS Manual 26.33, A(1992). Here, the Langs opportunity came six years after the alleged abandonment event took place. Certainly, this is beyond the 90 days

and any investigation done by DSHS now would be unreliable.

Simply put there is no legitimate reason why due process was not provided in this case. The CPS manual requires the alleged perpetrator to be interviewed and in most cases this is simple, inexpensive and essential to due process. Valmote v. Bane, 18 F.3d 992, 996, (2nd Cir. 1994). Here, the Langs were never interviewed. Certainly, it is unconstitutional to allow the publication of Appellants names in a founded CAMIS report under the circumstances of this case without first, at a minimum, interviewing Appellants. Additionally, the Department had an obligation to notify the Appellants of what they were accused of and the evidence against them and some reasonable opportunity prepare their defense. Here, the Department never notified or interviewed anyone or gave the Appellants the opportunity to contest any findings prior to their names being placed in CAMIS. In fact, the Department did not even inform the Appellants about the investigation or founded report. Appellants found out through a third party that there was a finding of abuse and neglect CP 287. There was no evidence in the record that suggests that the Langs abused or neglected Jordon.

3. **The Langs never had a chance in February 2001 to correct the findings and to correct any inaccuracies in the Department's record and without that chance it was beyond Departments' statutory authority.**

The Department argues that it notified the Langs of the finding of abandonment, and that abandonment is a form of child abuse and neglect. *Respondent's Brief pg. 26.* First, there was no evidence of child abuse or neglect. Additionally, abandonment is not an element of RCW 26.44.125. Therefore, it is beyond their authority to make abandonment an element of the statute. However, when the department completes an investigation of child abuse or neglect under Chapter 26.44 RCW the department shall notify the subject of the report of the department's investigative findings. CP 268. Here, the Department failed to notify Appellants that there was an investigation or findings written about an incident that occurred in May of 2000 until September 2006. CP 92, CP 94. It is Appellants' believe that there was no investigation. The agencies' failure to provide notice and opportunity to be heard in 2000, and finally supplied notice six years after the alleged incident did not afford the Langs and opportunity to correct any inaccuracies.

4. **The Langs were never provided an opportunity to correct the record.**

The Department argued that under RCW 13.50 010(3)(a) that "any information in records maintained by the DSHS related to a petition filed pursuant to Chapter RCW 13.34 RCW that is founded by the court to be false or inaccurate shall be corrected or expunged from such records by the agency. *Respondents' Brief pg. 28.* In response to the argument, how could the Langs have corrected the

inaccuracies when abandonment was not pled by the Department and the Langs did not know there was a founded report until approximately six years after the incident took place? An investigation, according to department policy are to be conducted within 90 of an event. *Supra.* Here, six years have gone by. The Langs had no knowledge of the investigation or information regarding RCW 13.50.010(6). And, if the department had a charge of abandonment certainly it would have plead it in the dependency hearing. Here, like in *Schemer*, *supra*, the Department did not plead abandonment. Therefore, the Langs could have not corrected any inaccuracies.

The department next argued that there was no one to care for Jordon and he had serious medical conditions. *Respondent's brief pg 30.* This is not accurate. Here, Jordon was in the hospital. While Jordon did have serious medical problems, the Langs did not have the ability to care for Jordon because of his escalating violent behavior. Furthermore, there were several people to care for Jordon once the dependency petition was entered. Here, the Department placed Jordon with the Nusbaums who cared for Jordon.

5. **The Department acted outside its statutory authority.**

The Department argues that it has broad statutory authority when it receives a report that a child is in imminent risk of physical or emotional harm and has specific statutory authority under RCW

26.44.050 to investigate allegations of abuse and neglect and make findings on the basis of its investigations. In Response, there was no finding of abuse and neglect. Second, abandonment is not an element of abuse or neglect despite the State's attempt to make is one. Third, the Department did not plead abandonment in the dependency hearing. Forth Commissioner Wilkinson determined that the situation was not abandonment and the state knew this in August 2000. The department is bound to follow court orders. Here, the department is trying to apply a statute that does not apply. It is questionable whether they investigated the incident because if they did it had an obligation to notify the Langs. If the department found abandonment it certainly would have made it part of its pleadings in the dependency hearing and it did not. Therefore, the department acted beyond its statutory authority when it decided that the Langs abandoned Jordon despite the ruling by the Clark County Commissioner. CP 188-208 who did not find abandonment.

6. **The Judges decision was arbitrary and capricious.**

This action by the trial court was a willful and unreasoning action in disregard of the facts and circumstances of the case. *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 658 P.2d 648 (1983). Here, the agency did not conduct a complete investigation of the incident. It also did not plead abandonment and ignored the findings in the dependency hearing. Therefore, the Departments'

conclusions that the Langs abandoned their son was erroneous and not supported by the record and was arbitrary and capricious.

7. **The Langs were substantially prejudiced.**

Substantial Prejudice is a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Cook,* 114 Wash.2d 802, 812, 792 P.2d 506 (1990); Here, the Langs were not given an opportunity to mount any defense in 2000 or 2001 and were not contacted by the Department in its alleged investigation. Now Langs are unable to engage in their chosen profession, such as volunteering or to engage in normal life activities like all other life activities without this "stigma" of abuse and neglect hanging over their heads. The Department argues that there is absolutely no evidence in the record indicated that the inclusion of a finding of abandonment has had such an effect. *Respondent Brief, pg 34.* As mentioned earlier it is the "stigma" that attaches to the Langs if it is founded to neglect children and an abuser of children that is a violation of the Lang's liberty interest. Simply put there is substantial evidence in the record that shows the Langs did not abandon Jordon, and the record also reflects that the Langs certainly did not abuse or neglect Jordon. Here, the Langs had to confront the abuse and neglect issue and abandonment issue six years after the event took place certainly substantially prejudiced the Langs' because during that six years as they were foreclosed of

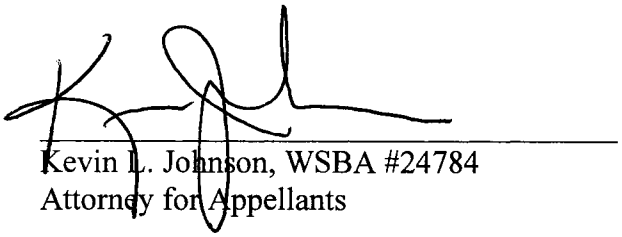
any potential employment and volunteer opportunities. In addition to the above, the Langs are "stigmatized" by this finding because they are no longer able to adopt as indicated in the *Department's brief Pg. 35* after this information was released by the agency and the agency decided not to allow them to adopt. The Langs may not have the opportunity to adopt a child, but the findings foreclosed them from engaging in their chosen profession in the child care industry.

IV. CONCLUSION

For the foregoing reasons, the Appellants respectfully request the Appellant court to reverse the trial courts findings and remand this case for further proceedings.

RESPECFULLY SUBMITTED this 24th day of June 2009

Respectfully submitted,



Kevin L. Johnson, WSBA #24784
Attorney for Appellants

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BY_____
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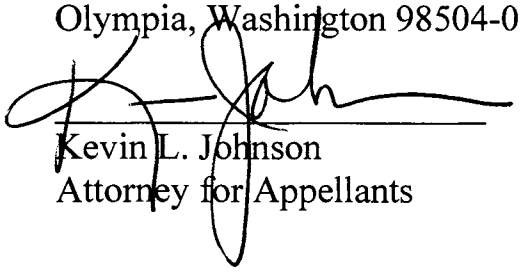
Proof of Service

On June 24th, 2009. I mailed postage prepaid a complete and true copy of Appellant's the Reply Brief to The court of Appeals Division II at 950 Broadway, Suite 300, Tacoma, Washington 98402-4454.

And served personally Carrie L. Hoon
Office of Attorney General
7141 Clean Water Drive SW
PO Box 40124-0124
Olympia, Washington 98504-0124



Kevin L. Johnson
Attorney for Appellants