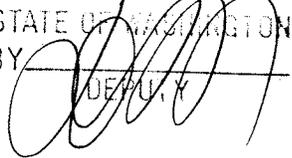


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
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No. 38742-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KIMBERLY A. COGGER, a single woman in her individual capacity

Respondent,

v.

SANDERS S. BLAKENEY, M.D. and "JANE DOE" BLAKENEY

Appellants.

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

I. RESTATEMENT OF THE CASE - 1 -

II. ARGUMENT - 2 -

A. MS. COGGER COMPLIED WITH RCW 7.70.100 AND PROVIDED HER NOTICE OF INTENT TO SUE DR. BLAKENEY. - 2 -

 1. The plain language of the statute does not require personal service. - 3 -

 2. The corollary statute of RCW 4.96 does not require personal service. - 4 -

 3. When the legislature requires personal service, it spells that out..... - 5 -

 4. RCW 7.70.100 has been amended to clarify that personal service was never required..... - 6 -

 5. RCW 7.70.100 is unconstitutional. - 8 -

B. THE EVIDENCE WAS OVERWHELMING THAT DR. BLAKENEY ACTED NEGLIGENTLY AND THAT HIS NEGLIGENCE CAUSED MS. COGGER’S INJURIES. - 9 -

 1. Dr. Blakeney failed to raise this argument at the trial court level and may not raise it for the first time on appeal..... - 9 -

 2. There was substantial evidence that Dr. Blakeney failed to properly repair the laceration, failed to properly recognize the post-surgical infection, and that his failures caused Ms. Cogger’s injuries. - 10 -

 3. The jury could have, based upon the evidence, found that Dr. Blakeney indeed properly repaired the laceration, misidentified the location of the laceration, but because he removed the foley catheter earlier than a reasonably prudent physician would have, the repair failed causing Ms. Cogger’s injuries. - 11 -

 4. A second, independent basis upon which the jury could have based their finding was that Dr. Blakeney

lacerated the bladder, never properly repaired it, never properly discovered that his repair was insufficient, and that these failures caused Ms. Cogger's injuries.....- 13 -

C. DR. BLAKENEY OPENED THE DOOR TO HAVING IMPEACHMENT TESTIMONY INTRODUCED REGARDING HIS TREATMENT OF PRIOR PATIENTS..... - 15 -

III. CONCLUSION.....- 18 -

TABLE OF AUTHORITIES

STATE CASES

<i>Armantrout v. Carlson</i> , 214 P.3d 914 (2009)	3
<i>Brown v. Spokane County Fire Prot. Dist. No. 1</i> , 100 Wn.2d 188, 668 P.2d 571 (1983)	17
<i>City of Seattle v. Eze</i> , 45 Wn. App. 744, 727 P.2d 262 (1986)	8
<i>Clapp v. Olympic View Pub. Co., L.L.C.</i> , 137 Wn. App. 470, 154 P.3d 230 (2007)	9
<i>Elder v. Cisco Const. Co.</i> , 52 Wn.2d 241, 324 P.2d 1082 (1958)	10
<i>Nghiem v. State</i> , 73 Wn. App. 405, 869 P.2d 1086 (1994)	17
<i>Olpinski v. Clement</i> , 73 Wn.2d 944, 442 P.2d 260 (1968)	9
<i>Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.</i> , 96 Wn.2d 939, 640 P.2d 1051 (1982)	10
<i>Sepich v. Dep't of Labor & Indus.</i> , 75 Wn.2d 312, 450 P.2d 940 (1969)	15
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997)	17
<i>State v. Coe</i> , 109 Wn.2d 832, 750 P.2d 208 (1988)	16
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992)	8
<i>State v. White</i> , 74 Wn.2d 386, 444 P.2d 661 (1968)	15

STATUTES

RCW 4.28.080	5, 6
RCW 4.92.100	4
RCW 4.92.110	4
RCW 4.96.010	4
RCW 4.96.020	4, 5
RCW 7.70.100	3, 5, 6, 8

FEDERAL CASES

<i>Karlan v. City of Cincinnati</i> , 416 U.S. 924, 924, 94 S. Ct. 1922, 40 L. Ed. 2d 280 (1974)	8
---	---

MISCELLANEOUS

BLACK'S LAW DICTIONARY (9th ed. 2009)	3, 4
ESHB 1553, Laws of 2009, ch. 433	5
SB 5910, Laws of 2007, ch. 119	7

COURT RULES

ER 404(b)15
RAP 2.5 9, 15

TREATISES

Edward W. Cleary, MCCORMICK ON EVIDENCE (2d ed. 1972)16

I. RESTATEMENT OF THE CASE

Dr. Blakeney performed a total abdominal hysterectomy on Ms. Cogger. During that procedure, Blakeney accidentally lacerated Ms. Cogger's bladder. Ms. Cogger never claimed that the initial laceration by Blakeney fell below the standard of care.

Instead, contrary to Blakeney's assertion on this appeal, he did not properly test his repair. Contrary to Blakeney's assertion on this appeal, he did not properly repair the initial tear. Despite Ms. Cogger's repeated calls and visits to Blakeney, he refused to perform any diagnostic testing despite the fact that Ms. Cogger was exhibiting the classic signs of an infection.

At trial, Blakeney attempted to blame Ms. Cogger for her condition. Blakeney was caught time after time showing that he was lying to the jury.

After a full trial in this matter, the jury awarded Ms. Cogger for the damages that she had to endure because of Blakeney's malpractice. That award should not be reversed.

II. ARGUMENT

A. MS. COGGER COMPLIED WITH RCW 7.70.100 AND PROVIDED HER NOTICE OF INTENT TO SUE DR. BLAKENEY.

Dr. Blakeney contends here, as he did at the trial court, that he never received a copy of the notice of intent to sue. However, that assertion is belied by the record.

Ms. Brickey, an employee of C & A Investigations, Inc., submitted a declaration at the trial court declaring, under penalty of perjury, that on August 3, 2006, she went to Dr. Blakeney's medical office to serve him with the Notice of Intent to Sue. As she explained:

At Dr. Sanders S. Blakeney's office, I presented myself and spoke to Ms. Barbara Walker. Ms. Barbara Walker explained to me that she was Dr. Blakeney's secretary and receptionist. I advised her that I had legal papers to serve Dr. Blakeney. I allowed Ms. Walker to review them. Ms. Walker explained that Dr. Blakeney could not present himself to me because he was with a patient. Ms. Walker represented to me that she had previously accepted legal documents for Dr. Blakeney on his behalf in the past. Based upon Ms. Walker's representations, I presented and served Ms. Walker with the Notice of Intent to Commence Medical Negligence Action.

CP 101. Dr. Blakeney's secretary/receptionist never submitted any statement denying the above.

The issue before this Court is whether the above constituted providing notice to Dr. Blakeney that a lawsuit was going to be commenced against him.

1. The plain language of the statute does not require personal service.

When interpreting a statute an appellate court will look first to the plain language. *Armantrout v. Carlson*, 214 P.3d 914, 917 (2009).

The “notice of claim” requirement stated the following in relevant part:

No action based upon a health care provider’s professional negligence may be commenced unless the defendant has been given at least ninety days’ notice of the intention to commence the action. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice.

RCW 7.70.100(1). The term “notice” means “(1) Legal notification required by law or agreement, or imparted by operation of law as a result of some fact; (2) The condition of being so notified, whether or not actual awareness exists.” BLACK’S LAW DICTIONARY 1164 (9th ed. 2009). And, the term “service” means “(1) The formal delivery of a writ, summons, or other legal process; (2) The formal delivery of some other legal notice, such as a pleading.” *Id.* at 1491.

Nothing in the plain language of the statute requires “actual notice” to or “personal service” on the defendant as alleged by Dr. Blakeney. Those terms are defined separately and distinctly and Dr. Blakeney cannot direct this Court to the location of these terms in the notice of claim statute.¹

2. The corollary statute of RCW 4.96 does not require personal service.

Contrary to Dr. Blakeney’s assertions and the cases he relies on, other notice claim statutes do not require “personal service.”

Claims against the State of Washington (see RCW 4.92.100 and 4.92.110) and claims against cities and counties (see RCW 4.96.010 and 4.96.020) contain similar language to that of the notice of claim for medical malpractice actions:

No action shall be commenced against any local governmental entity for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.

¹ BLACK’S LAW DICTIONARY (9th ed. 2009) provides the following definitions:

Actual Notice. See Notice. Notice given directly to, or received personally by, a party.

Actual Service. See personal service (1) under Service (2).

Personal service. Actual delivery of the notice or process to the person to whom it is directed.

RCW 4.96.020(4). On July 26, 2009, the Legislature clarified the statute as it did with RCW 7.70.100, to reflect the following in relevant part:

A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office.

RCW 4.96.020(2) (as reflected in ESHB 1553, Laws of 2009, ch. 433 §1(2)). Thus, the Legislature clarified its intent to reflect that the statute does not require personal service. Again, nothing in the plain language of the statute requires "actual notice" or "personal service" as alleged by Dr. Blakeney.

3. When the legislature requires personal service, it spells that out.

Dr. Blakeney is attempting to write into former RCW 7.70.100 the requirement that the Notice of Intent to Sue be served personally as would be required when serving a summons and complaint to commence a lawsuit. However, the Legislature did not use those terms of art. In contrast, the Legislature, when it intended to require personal service, spells out those requirements.

In RCW 4.28.080, the legislature uses the term, "personal service" thus demonstrating that it differentiates between "personal

service” and service otherwise. It repeatedly emphasized when a person must actually receive the papers themselves as opposed to another accepting on their behalf by using the term “personally” to modify the person being served. *See* RCW 4.28.080(11) (“to such minor personally”) and RCW 4.28.080(15) (“to the defendant personally”).

Here, the Legislature did not use the term “personally.” Instead, it stated that the defendant must be given ninety days’ notice and if the notice is served, then the statute of limitations is extended. Dr. Blakeney cannot overcome the fact that the Legislature knows when it uses the term “personal service” that such a term is a term of art that requires that the defendant themselves actually be given a copy of the document. No such requirement exists here.

4. RCW 7.70.100 has been amended to clarify that personal service was never required.

Since the jury returned its verdict, the Legislature amended and clarified the prefiling notice of intent to sue. Significantly, the language Dr. Blakeney relies on remains unchanged, but the Legislature expressly clarified its intent in unambiguous terms as follows:

(1) No action based upon a health care provider’s professional negligence may be commenced unless the defendant has been given at least ninety days’ notice of the intention to commence the action. The

notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the ((service of)) date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

SB 5910, Laws of 2007, ch. 119 § 1(1). The operative term here is “given.” Dr. Blakeney distorts the statute alleging that notice be “given to” the defendant in an attempt to create personal service.² However, the Legislature made clear that notice is to be “given by” mail. The

² Appellant’s Br. at 8.

Legislature clarified its intent on the method of service of the notice of intent to sue—and, it does not require actual or personal service.

5. Former RCW 7.70.100, as applied to this case, is unconstitutional.

The void for vagueness doctrine is a “due process concept implementing principles of fair warning and nondiscriminatory enforcement.” *City of Seattle v. Eze*, 45 Wn. App. 744, 748, 727 P.2d 262 (1986) (quoting *Karlan v. City of Cincinnati*, 416 U.S. 924, 94 S. Ct. 1922, 40 L. Ed. 2d 280 (1974)), *aff’d*, 111 Wn.2d 22 (1988). The appellate court will evaluate a vagueness challenge by examining the statute as applied to the particular facts of the case. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

As argued above, RCW 7.70.100 requires only that the defendant be given notice of the intention to commence an action. The question here, as applied to Ms. Cogger, is whether a finding by this Court that her notice to Dr. Blakeney did not comply with the procedural requirements of the statute violates her constitutional requirements of notice and due process. The lack of any specific definitions or procedures for providing notice, other than the notice be served, failed to give Ms. Cogger adequate notice of the procedures required. To be sure, the Legislature amended and clarified the procedures at issue in this case such that Ms. Cogger’s service of

notice on Dr. Blakeney complies with the statutory procedure. To reverse the trial court, void the judgment, and forever dismiss Ms. Cogger's claim would be a fundamental violation of her due process rights and an elemental betrayal of fairness.

B. THE EVIDENCE WAS OVERWHELMING THAT DR. BLAKENEY ACTED NEGLIGENTLY AND THAT HIS NEGLIGENCE CAUSED MS. COGGER'S INJURIES.

1. Dr. Blakeney failed to raise this argument at the trial court level and may not raise it for the first time on appeal.

Generally, an appellate court will not consider arguments a party first makes on appeal. *Clapp v. Olympic View Pub. Co., L.L.C.*, 137 Wn. App. 470, 476, 154 P.3d 230 (2007) (citing RAP 2.5(a)). The failure of a party to challenge in any way the sufficiency of the other party's evidence may be grounds for invited error. *Olpinski v. Clement*, 73 Wn.2d 944, 950, 442 P.2d 260 (1968). Dr. Blakeney is contending for the first time that there was insufficient evidence that his negligence caused Ms. Cogger's injuries. However, he never raised that issue at trial and should be precluded from doing so here for the first time on appeal.

2. There was substantial evidence that Dr. Blakeney failed to properly repair the laceration, failed to properly recognize the post-surgical infection, and that his failures caused Ms. Cogger's injuries.

Courts will rarely overturn a jury's verdict and then only when it is clear that there was no substantial evidence upon which the jury could have rested its verdict. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 640 P.2d 1051 (1982).

After verdict and judgment for plaintiff, plaintiff's version of disputed facts is accepted. *Elder v. Cisco Const. Co.*, 52 Wn.2d 241, 245, 324 P.2d 1082 (1958). The following facts, as much as Dr. Blakeney attempted to dispute them at trial, and apparently is trying to dispute them on appeal, could not be disputed and demonstrated that he failed to properly treat Ms. Cogger.

- Dr. Blakeney performed the surgery on August 5, 2003.
- He lacerated the bladder.
- He removed the catheter three and a half days later.
- Dr. Blakeney did not clamp the catheter when he performed his dye test to check the integrity of the bladder repair.
- Eleven days later, on August 16, 2003, Ms. Cogger went to the St.

Francis E.R., was seen by Dr. Ward, and he discovered that Ms. Cogger had a hole in her bladder that was between 8 to 10 cm – in other words, four to five finger breadths wide.³

3. The jury could have, based upon the evidence, found that Dr. Blakeney indeed properly repaired the laceration, misidentified the location of the laceration, but because he removed the foley catheter earlier than a reasonably prudent physician would have, the repair failed causing Ms. Cogger's injuries.

Dr. Ross, the expert retained by Ms. Cogger, addressed this scenario. He testified:

Q: Okay. Well, let me ask you about your opinions. In your opinion, did Dr. Blakeney's treatment of Ms. Cogger breach the standard of care expected of a reasonably prudent OB/GYN practicing in the state of Washington in 2003?

A: It appeared to me that getting into the – an inadvertent cystotomy is certainly something that can happen during surgery. And it sounded as though he met the standard of care in his repair, reading his OB notes. But I think that he breached standard when he took the Foley catheter out after really only about three and a half days following surgery, which would give the patient a much higher risk of possibly breaking that repair down.

Q: So again, just to make sure the record is clear, it is your opinion that he breached

³ CP 252-53 (Ward dep. at 17:14-18:9).

the standard of care by removing the Foley catheter when he did?

A: Yes.

Q: And instead, is it your opinion that he should have left it in longer?

A: Yes.

Q: And how much longer?

A: Routine standard of care, I think the majority of people would accept approximately two weeks.

Q: And is it your opinion that if he left it in two weeks, more likely than not, Ms. Cogger would not have had the subsequent complications regarding her bladder injury?

A: Yes. The bladder would have healed quite quickly. And within a two-week period, it's quite unusual for an appropriate repair to break down.

Q: So in other words, if he had left the Foley catheter in what would be dictated by the standard of care, which is two weeks, then, more likely than not, Ms. Cogger would not have suffered the subsequent complications that she did?

A: I think that is very likely.

CP 353-54 (Ross dep. at 8:6-9:17).

This testimony by itself is sufficient evidence of the breach of the standard of care by Dr. Blakeney and that the breach caused the resulting injuries to Ms. Cogger.

4. A second, independent basis upon which the jury could have based their finding was that Dr. Blakeney lacerated the bladder, never properly repaired it, never properly discovered that his repair was insufficient, and that these failures caused Ms. Cogger's injuries.

Dr. Ward testified that the defect he found on August 5, 2003 did not occur after the August 5, 2003 surgery—in other words, this was the defect that happened during Dr. Blakeney's surgery. CP 262 (Ward dep. at 27:1–9). Dr. Ward made opined that this defect was the one that existed on August 5:

Q: From your review of this operative note and your subsequent treatment of Ms. Cogger, in your opinion, did this defect exist on August 5, 2003?

...

A: Again, I'm hard-pressed to anticipate how the defect would have occurred later than August 5th.

Q: (By Mr. Mungia): So then the answer is "yes"?

A: Yes.

CP 263 (Ward dep. at 28:5-13).

Dr. Ward testified that if Dr. Blakeney had discovered the defect, and properly repaired it, Ms. Cogger would not have had her subsequent complications:

Q: Based upon what you know of this patient and based upon your training and your experience, the defect that you saw

on August 17th, in some shape or form, existed on August 5th, 2003; correct?

A: Yes.

Q: More likely than not, if the defect had been discovered at the time of the surgery on August 5, 2003, and properly repaired, then in fact this patient would not have suffered all of the subsequent complications that she had; is that correct?

A: I believe so, yes.

CP 325-26 (Ward dep. at 90:25-91:10).

Once again, this testimony by itself provides a second, independent basis for a jury's verdict: Dr. Blakeney failed to discover the defect, failed to properly repair it, and his failures caused Ms. Cogger's damages.

Dr. Blakeney's theory of the case was that he properly identified and properly repaired the laceration, that his removal of the Foley catheter after three and a half days was proper, and that somehow Ms. Cogger's bladder developed a large hole in it sometime after the operation. This was directly at odds with Dr. Ward's testimony that the hole in Ms. Cogger's bladder did not occur after the surgery. The jury rejected Dr. Blakeney's theory of the case. This court should not overturn this factual determination.

C. DR. BLAKENEY OPENED THE DOOR TO HAVING IMPEACHMENT TESTIMONY INTRODUCED REGARDING HIS TREATMENT OF PRIOR PATIENTS.

It is well settled that objections to evidence cannot be raised for the first time on appeal. *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 319, 450 P.2d 940 (1969). This court should “refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a).

This claimed error can be dispensed of quickly. First, Dr. Blakeney failed to object to the admission of Dr. Ward’s testimony pursuant to ER 404(b). Nowhere, in the relevant parts of the verbatim report of proceedings (RP 482–90), did Dr. Blakeney make an objection that could even remotely come close to being recognized as grounded in ER 404(b).

Second, and equally as important, even assuming *arguendo* that this Court recognized an ER 404(b) objection, Ms. Cogger sought, and the trial court admitted, Dr. Ward’s testimony as impeachment evidence—not evidence of prior wrongs or acts. Rebuttal evidence is admissible to allow the plaintiff an opportunity to answer new material presented by the defense. *State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968). Rebuttal evidence does not simply reiterate evidence in chief, but instead consists of evidence offered in reply to new matters. *State v. Coe*, 109 Wn.2d 832, 847–48, 750 P.2d 208

(1988). On rebuttal, the plaintiff is confined to testimony which is directed to refuting the evidence of the defendant. Edward W. Cleary, MCCORMICK ON EVIDENCE, at 6 (2d ed. 1972). As Dr. Blakeney properly acknowledges, “Ms. Cogger renewed the request at the end of Dr. Blakeney’s testimony because Dr. Blakeney had ‘opened the door’ by testifying that he had just three abdominal hysterectomy bladder injuries during his career, and counsel wanted to impeach that testimony.”⁴ The trial court properly admitted the rebuttal testimony of Dr. Ward, and excluded those portions of the testimony that did not refute Dr. Blakeney’s testimony on the matter of Dr. Ward treating Dr. Blakeney’s patients. As the trial court stated,

That last question that is on the bottom there, there is now about a partner of his. That is not necessarily contradicting the doctor in any way; whereas, these others are talking about the doctor working even literally with Dr. Blakeney on at least one case. He has sort of suggest that he hasn’t done that with Dr. Ward. It may be that Dr. Ward has it wrong, but that is his testimony under oath.

RP 489. The trial court suggested that, after the introduction of the rebuttal testimony, Dr. Blakeney would have the opportunity to tell the jury that Dr. Ward was wrong and is mistaken. RP 488. As such, the

⁴ Appellant’s Br. at 21.

trial court properly admitted the testimony as rebuttal testimony to contradict and refute Dr. Blakeney's testimony.

Finally, an error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The improper admission of evidence is harmless if the evidence is of minor significance compared to the overall, overwhelming evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (citing *Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994)). According to Dr. Blakeney's perspective, Dr. Ward's rebuttal testimony "had little if any probative value," "had no material impact on her case," and was "minor" information.⁵ The overwhelming evidence, as stated above and as shown at trial, is of a magnitude greater than the minor and insignificant issue presented here that such error, if any, was harmless.

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⁵ Appellant's Br. at 23-24.

III. CONCLUSION

Respectfully submitted.

Dated this 23rd day of October 2009.

GORDON THOMAS HONEYWELL LLP

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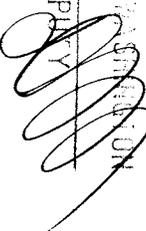
CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of October, 2009, she forwarded a true and correct copy of the BRIEF OF RESPONDENT for hand delivery to counsel of record via legal messenger service:

Timothy R. Gosselin
Gosselin Law Office
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Tacoma, WA 98402-1611

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Gina A. Mitchell

10/23/09
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY