



CO., INC.; PIONEER AMERICAS, LLC, as successor-in-interest to Hooker Chemical Company; RAYONIER, INC.; RILEY POWER, INC., a/k/a RILEY STOKER CORP., f/k/a BABCOCK BORSIG POWER, INC., f/k/a D.B. RILEY, INC.; SEQUOIA VENTURES, INC., formerly known as and as successor-in-interest to BECHTEL CORPORATION, BECHTEL, INC., BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.; SIMPSON TIMBER COMPANY; TODD PACIFIC SHIPYARDS CORPORATION, individually and as successor-in-interest to TODD SHIPYARDS CORPORATION; TODD SHIPYARDS CORPORATION, individually and as successor-in-interest to TODD PACIFIC SHIPYARDS CORPORATION; TRANE U.S., INC., f/k/a AMERICAN STANDARD, INC., individually and as parent and alter ego of AMERICAN BOILER CORP., WESTINGHOUSE AIR BRAKE COMPANY and KEWANEE BOILER COMPANY, a division of AMERICAN RADIATOR & STANDARD SANITARY COMPANY; TRICO CONTRACTING, INC.; UNION CARBIDE CORPORATION; WEYERHAEUSER COMPANY; ZURN INDUSTRIES LLC; GOULDS PUMPS (IPG), INC.; FLETCHER CONSTRUCTION COMPANY NORTH AMERICA; and PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY,

Defendants.

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BRIEF OF RESPONDENT  
LOCKHEED SHIPBUILDING COMPANY

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**A. INTRODUCTION AND SUMMARY OF ARGUMENT**

This is the second appeal to reach this Court stemming from the lawsuit filed by the appellants, Marjorie and Daniel Arnold (“the Arnolds”), against Lockheed Shipbuilding Company (“Lockheed Shipbuilding”). The lawsuit sought damages allegedly caused by decedent Reuben Arnold’s work as a professional asbestos insulator, including intermittent work at Lockheed Shipbuilding’s shipyard in Seattle in the 1960s. The Arnolds claim that Reuben was exposed to asbestos dust on the job and that he took that dust home on his clothing and exposed his son, Daniel, to it as well.<sup>1</sup>

The first appeal, which is still pending, arose from the trial court’s dismissal of the Arnolds’ claims against Lockheed Shipbuilding on summary judgment. Because Reuben was working for an independent contractor during his brief stints at the Lockheed Shipbuilding shipyard, the trial court ruled that Lockheed Shipbuilding did not owe him or his family a duty of care to protect them against asbestos exposure. This question of common law duty is the focus of the first appeal and is not at issue here.

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<sup>1</sup> In the interest of clarity and brevity, Reuben and Daniel Arnold are occasionally referred to herein by their first names. No disrespect is intended.

What is at issue here is the trial court's denial of the Arnolds' subsequent motion to vacate the summary judgment. In this motion the Arnolds claimed to have "newly discovered evidence," in the form of contracts between Lockheed Shipbuilding and the federal government to build naval ships in the 1960s. Although the Arnolds have failed to show that Reuben or Daniel ever worked on military ships, they claim that these contracts should somehow affect the trial court's determination that there was no common law duty, because the contracts might have incorporated certain regulatory duties under the federal Walsh-Healey Public Contracts Act.

At the outset, these documents do not qualify as "newly discovered," within the contemplation of CR 60(b)(3), because they were available to the Arnolds all along upon request. *See Vance v. Offices of Thurston County Com'rs*, 117 Wn. App. 660, 671-72, 71 P.3d 680 (2003). Lockheed Shipbuilding promptly and willingly produced them when the Arnolds' attorneys asked for them in another, unrelated case. The Arnolds have not explained why they supposedly could not have made this same request before the summary judgment hearing, which occurred the week trial was scheduled to begin.

At any rate, the documents at issue have no relevance to the present case. To vacate the summary judgment the Arnolds bear the burden of showing that the supposedly “new” documents would have changed the trial court’s decision on the dispositive motion. *See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). The trial court correctly denied the motion to vacate because the proffered documents would not have affected the determination that Lockheed Shipbuilding owed no duty to the Arnolds.

First, Walsh-Healey cannot serve as the basis for the Arnolds’ cause of action because it provides no private right of action. *See Koren v. Martin Marietta Service, Inc.*, 997 F. Supp. 196, 214 n. 22 (D. P.R. 1998). The Arnolds have not identified a single Washington case in which a federal statute for which there is no private right of action was held to *impose* a duty in tort for purposes of a state law negligence claim.

Second, while the Arnolds argue that hypothetical violations of Walsh-Healey’s regulations would be evidence of negligence, they bear the burden of showing both that the Arnolds were within the class of persons the regulations were intended to protect and that the harm they suffered was of the kind the regulations were intended to prevent. *See Estate of Kelly v. Falin*, 127 Wn.2d 31, 38 n. 2, 896 P.2d 1245 (1995)

(citing RESTATEMENT (SECOND) OF TORTS § 286 (1965)). Because there is no evidence that Reuben Arnold ever worked on a ship at Lockheed Shipbuilding that was subject to Walsh-Healey, he was not among the class of persons that the regulations were intended to protect. As for Daniel Arnold, as a family member at home, he is even further removed from the protected class, and his injuries were not of the protected type.

Finally, the Arnolds' entire argument is misguided because the breach of a statute is evidence *not* of the *existence* of a common law duty, but rather of a *breach* of a duty. This Court has thus held that evidence of a statutory violation cannot be used to take the question of negligence to a jury, absent a corresponding common law duty. *See Estate of Templeton v. Daffern*, 98 Wn. App. 677, 683, 990 P.2d 968 (2000). Because the trial court dismissed this claim for lack of evidence that Lockheed Shipbuilding *owed* a duty, while the proffered documents are directed only at breach, the Arnolds' purportedly "new" evidence is inapposite.

**B. COUNTER-STATEMENT OF THE ISSUE**

A party seeking to vacate a judgment based on newly discovered evidence must prove that the evidence could not have been discovered sooner and that it would have changed the underlying result. The Arnolds offered documents which were irrelevant to the issues on summary

judgment and which were available to them all along. Did the trial court act within its discretion when it denied the Arnolds' motion to vacate the summary judgment?

**C. STATEMENT OF THE CASE**

**1. Relevant Background Facts**

Before it closed its doors in roughly 1989, Lockheed Shipbuilding constructed vessels at its shipyard on Harbor Island in Seattle. CP1 593; CP2 147-48.<sup>2</sup> In large part, the military ships built at this facility included both military and civilian vessels. CP2 157. Some ships were built for the United States federal government, and some of these were subject to the contractual terms of the federal Walsh-Healey Public Contracts Act. CP2 164-65. Reuben Arnold never worked on any military ships at Lockheed Shipbuilding.

The Arnolds claim that Reuben Arnold was exposed to asbestos in many different products at various locations for over thirty years. *See* CP1 7, 203-08. He became a member of the Asbestos Workers Union in 1959 and retired in 1987. CP1 209. This appeal arises from a small portion of

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<sup>2</sup> As the Arnolds have noted, there are two appeals pending in this case. The present briefing relates to Cause No. 40015-4. The other appeal is Cause No. 39055-8. For consistency, Lockheed Shipbuilding will follow the Arnolds' convention and refer to the clerk's papers from the prior appeal (39055-8) as "CP1" and the clerk's papers from this appeal (40015-4) as "CP2."

that lengthy career, when he occasionally performed work at the Lockheed Shipbuilding shipyard in the 1960s. *See* CP1 3596.

Reuben testified that he worked at the Lockheed Shipbuilding shipyard for “close to a year” from 1962 to 1963. CP2 50. His task was to install insulation on three “Alaska ferries,” all of which were built for civilian purposes. CP2 345-46. He performed this work as an employee of an independent contractor named E.J. Bartells. CP1 234; CP2 345.

Reuben also indicated that he performed some brief work at the Lockheed Shipbuilding shipyard for a “[v]ery, very short” time in 1969. CP2 347-48. At the time, he was working for another independent contractor called Unicor. CP2 347-48. Reuben never identified any particular vessel that he worked on during that stint, or even a general type of vessel. *See* CP2 347-48.

Daniel Arnold is Reuben and Marjorie Arnold’s son. CP1 3577. The Arnolds contend that Daniel came into contact with asbestos through dust brought home on Reuben’s work clothes. CP1 3694. They also claim that Daniel worked with asbestos at the Lockheed Shipbuilding shipyard in 1979, while employed as a materials handler for E.J. Bartells. CP1 233. Throughout this brief work, he wore a respirator and full-body protective clothing. CP1 3708-13.

2. **Procedural History**

a. **Discovery**

The Arnolds served two sets of discovery requests on Lockheed Shipbuilding, with a total of nine requests for production. CP2 290-91, 319-38. None of these requested production of documents related to contracts with the federal government. Nor did they request documents relating to the construction of any particular vessel or type of vessel. *See* CP2 319-38.

Because Lockheed Shipbuilding was in business for many decades and has now been defunct for over twenty years, responding to the Arnolds' requests required it to cull through a warehouse containing approximately 13,000 boxes with literally millions of documents. CP2 289; RP 5. Lockheed Shipbuilding provided the Arnolds with a Master Inventory List of the thousands of boxes in its warehouse. It also offered to give the Arnolds' attorneys direct access to all the documents. CP2 289, 301-04.

Rather than review Lockheed Shipbuilding's documents directly, the Arnolds chose to have Lockheed Shipbuilding review the warehouse storage boxes for responsive documents. Lockheed Shipbuilding set about reviewing the thousands of boxes and copying responsive documents for

the Arnolds. Before the case was dismissed on summary judgment, Lockheed Shipbuilding had prepared 878 boxes of documents for the Arnolds' review. CP2 290, 306.

Among the documents produced to the Arnolds was a "NOTICE TO EMPLOYEES WORKING ON GOVERNMENT CONTRACTS." This document, dated 1965, indicated that work performed under federal government contracts may be "subject to the provisions of the Walsh-Healey Public Contracts Act." CP 291, 340-41.

Throughout the discovery process, Lockheed Shipbuilding responded promptly to the Arnolds' specific requests regarding boxes identified in the Master Inventory List. CP2 313-17. Three attorneys for Lockheed Shipbuilding made two separate trips from California to the East Coast to review and retrieve responsive documents — once just before Christmas and then during an ice storm in January. These requests related to employee medical files and workers' compensation claims. Neither mentioned contracts with the federal government. CP2 290.

b. Summary Judgment

On December 26, 2008, Lockheed Shipbuilding moved for summary judgment, demonstrating that it could not be held liable to the Arnolds because it owed no duty to the employees of an independent

contractor on its premises. CP1 166-74. Although the motion was scheduled for consideration on January 23, 2009, the hearing date was moved to February 9, 2009, giving the Arnolds fifteen extra days to respond. CP1 161, 3290. The hearing occurred just two days before the scheduled trial date. CP1 69.

In their voluminous response to the summary judgment motion, the Arnolds raised several theories of liability against Lockheed Shipbuilding. CP1 383-400. They argued, for example, that Lockheed Shipbuilding owed a duty to the Arnolds under the theory that it retained control over Reuben's work. CP1 386-89. They also argued that Lockheed Shipbuilding owed Reuben a duty as a business invitee. CP1 389-91.

In addition to these theories, which were consistent with the principles articulated in the Arnolds' complaint (CP1 9), the response also raised new theories of liability. The Arnolds argued, for example, that Lockheed Shipbuilding functioned as a general contractor and that the *Stute*<sup>3</sup> doctrine should therefore apply. CP1 383-86. And they argued, for the first time, that regulations under the federal Walsh-Healey Public

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<sup>3</sup> *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990).

Contracts Act could furnish the basis for a common law negligence claim. CP1 391-400.

The trial court rejected all these theories and dismissed the entire claim against Lockheed Shipbuilding on summary judgment. CP1 2803-04. In its oral decision, the court ruled that the Arnolds had failed to show that Lockheed Shipbuilding owed Reuben Arnold a duty through any common law or statutory theory of liability. CP1 3298. The court also dismissed Daniel Arnold's claim for "second-hand" exposure to asbestos dust brought home on Reuben's work clothes, explaining:

If there was no duty to Reuben Arnold, I don't think that there is any duty to Daniel. It's essentially a derivative claim in my mind.

CP1 3298. As for Daniel's alleged "direct" exposure to asbestos in 1979, the court dismissed this aspect of the claim for lack of causation evidence. CP1 3298.

The summary judgment dismissal of the Arnolds' claim is the subject of a separate appeal currently pending before this Court. That prior appeal has been fully briefed and presented at oral argument, though the Court has not yet released its decision. That appeal focused on the trial court's determination that Lockheed Shipbuilding owed no duty to the Arnolds. *See* Cause No. 39055-8.

c. The Fischer Case

In January of 2009, shortly before the *Arnold* summary judgment, the same attorneys representing the Arnolds filed a complaint against Lockheed Shipbuilding in the Pierce County Superior Court case entitled *Fischer v. Saberhagen Holdings, Inc. et al.* CP2 294. The plaintiff in that case, Jacob Fischer, claimed exposure to asbestos while performing work on U.S. Navy vessels. CP2 288-89.

Because Fischer alleged asbestos exposure exclusively on vessels built for, and under the direction of, the federal government, Lockheed Shipbuilding removed the case to the U.S. District Court for the Western District of Washington. CP2 288-91. In challenging Lockheed Shipbuilding's assertion of Federal Officer Jurisdiction, plaintiff's counsel conducted a limited corporate representative deposition per Federal Rule 30(b)(6). CP2 145-67. To facilitate this deposition, Lockheed Shipbuilding produced a set of documents supporting its jurisdictional claim. CP2 45-46.

These documents included the federal contracts for the construction of naval vessels that Fischer explicitly implicated in his claims, including the *USS Ramsey* and the *USS Goldsborough*. CP2 45-46, 289. The Walsh-Healey Public Contracts Act is referenced in the

general provisions of these contracts. *See* CP 289. The general provisions state, in relevant part:

If this contract is for the manufacture or furnishing of materials, supplies, articles or equipment in an amount which exceeds or may exceed \$10,000 and is ***otherwise subject to*** the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder....

CP 138-39 (emphasis added).

Peter Balch, Lockheed Shipbuilding's 30(b)(6) representative, testified that Walsh-Healey would have applied to a limited number of naval ships:

Q. ... Did the Walsh-Healy Act apply to the construction of those vessels?

A. Let me be real clear in my answer. As I think I stated earlier, the clause is referenced in the general provisions which are incorporated into the contract.

The actual clause in the general provisions says that if the contract is — for supply is over \$10,000, which this contract is, ***and is otherwise subject to*** the Walsh-Healy Public Contract Act, then all of the representations and stipulations required by the Act and regulations are incorporated by reference, okay.

So, with that caveat, we have the first part of that requirement that the contract is over \$10,000 met. ***If the contract is otherwise subject to the Walsh-Healy Act as the second requirement, then yes, Lockheed Shipbuilding or Puget Sound Bridge***

***and Dry Dock would have complied with the Walsh-Healy Act.***

Q. Okay. And in terms of answering the second requirement, is that something you can do today? ***Can you tell me whether it's otherwise subject to the Walsh-Healy Act or not?***

A. No, sir. ***I do not know that*** for a fact as I sit here.

CP2 164-65 (emphasis added).

In short, Balch testified that Walsh-Healey would apply to the construction of a vessel for the federal government if: (1) Walsh-Healey was incorporated by reference into the contract; (2) the contract value was greater than \$10,000; and (3) the contract was “otherwise subject to” Walsh-Healey. The Arnolds have never presented any evidence that any of the ships Reuben Arnold allegedly worked on were built pursuant to such a contract, or any contract with the U.S. Navy.

d. The CR 60 Motion

After receiving the federal contracts implicated in the *Fischer* litigation, the Arnolds’ attorneys filed their motion for relief from judgment, which is the subject of this appeal. CP2 1-14. They claimed these documents show that Lockheed Shipbuilding is somehow “subject to” Walsh-Healey and that this somehow means Lockheed Shipbuilding owed the Arnolds a duty of care. CP2 1. The Arnolds argued further that

these documents should be considered after the fact as “newly discovered evidence” under CR 60(b)(3). CP2 13.

Although the Arnolds peppered their motion with baseless insinuations about Lockheed Shipbuilding’s conduct during discovery, their attorney backed away from these accusations during oral argument:

First of all, we’re not claiming in this situation that there was — that there was a deliberate misconduct or some kind of discovery violation on the part of Lockheed.

RP 4-5. Rather, the Arnolds contended that this was a situation where, through no fault of either party, earlier discovery of the documents in question was not possible. RP 6.

Once again, the trial court denied the Arnolds’ motion:

I think when you were here the last time, you indicated you thought you had a pretty tough row to hoe, and I’m going to deny the motion.

RP 13. This appeal followed, pursuant to RAP 7.2(e).

**D. ARGUMENT**

**1. Standard of Review**

“A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should be overturned on appeal only if it plainly appears that it has abused that discretion.” *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978)

(citing *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975)). The trial court properly exercises its discretion unless its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 117 (2002) (quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)).

The Civil Rules authorize a trial court to vacate a judgment or order on the basis of “newly discovered evidence” which the moving party, “by due diligence,” could not have discovered before the deadline for a motion for reconsideration. CR 60(b)(3). The trial court may grant such a motion with respect to a summary judgment only if the following five elements are met:

- (1) The evidence will probably change the underlying result;
- (2) It was discovered since the summary judgment;
- (3) It could not have been discovered before the summary judgment by the exercise of due diligence;
- (4) It is material; and
- (5) It is not merely cumulative or impeaching.

*See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003) (citing *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127

(1987)). “Failure to satisfy any one of these five factors is a ground for denial of the motion.” *Id.* (quoting *Holaday*, 49 Wn. App. at 330)

Here, the trial court’s decision must be affirmed because the Arnolds cannot satisfy all five elements. In fact, they can satisfy only one, at the most — that the purported evidence was discovered after the summary judgment. They cannot show that these documents would have changed the result on summary judgment because, as a matter of law, contracts relating to projects with which Reuben Arnold was not involved, pursuant to a statute that provides no private right of action, in a claim filed after the abolition of negligence per se, cannot form the basis for liability. Further, these documents could have been discovered earlier with reasonable diligence, when they were at all times available upon request. Finally, because these documents show nothing more than that some unrelated aspects of Lockheed Shipbuilding’s operations may have been subject to Walsh-Healey, a point that has never been disputed, they are not material here and are, at best, merely cumulative.

**2. The Arnolds’ Proffered Documents Are Not “Newly Discovered” Because They Were Available To The Arnolds Before The Summary Judgment**

This appeal must fail because the subject documents do not qualify as “newly discovered,” where the Arnolds could have discovered them

earlier with more diligent discovery efforts. The Arnolds bear the burden of proving that they could not have discovered the evidence in time for the summary judgment proceedings “by the exercise of due diligence.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). “It is not enough to state that there was diligence. Diligence is a fact and not a conclusion, and to show it, circumstances must be set forth that the court, rather than the party, can say that there was diligence.” *Peoples v. City of Puyallup*, 142 Wash. 247, 248, 252 P. 685 (1927) (quoting *State v. O’Brien*, 66 Wash. 219, 119 P. 609 (1911)).

a. The subject documents were available to the Arnolds upon request

When a party obtains documents upon request from the opposing party and fails to explain why he could not have made that request earlier, he has failed to show reasonable diligence. *See Vance v. Offices of Thurston County Com’rs*, 117 Wn. App. 660, 671-72, 71 P.3d 680 (2003). In *Vance*, for example, the plaintiff sued Thurston County for failure to comply with the Public Disclosure Act (“PDA”). Upon a show cause hearing, the trial court ruled that the County had not violated the PDA. *Id.* at 665. The plaintiff then obtained additional documents from the County, via the PDA, which he submitted with a motion for relief from the trial

court's decision per CR 60(b)(3). *Id.* at 665-66. The trial court denied the motion, and this Court affirmed. *Id.* at 671-72. Noting that the plaintiff could have requested these documents when he made the initial requests which were the subject of the lawsuit, the Court held that the plaintiff had not explained why he couldn't have requested the documents before the show cause hearing. *Id.* at 671.

The case at bar is analogous. The Arnolds admit that Lockheed Shipbuilding produced massive quantities of documents in response to their nine requests for production. RP 5. These requests did not seek federal contracts. Nor do any of them ask for documents mentioning the Walsh-Healey Act. And none mentions specific ships by name. *See* CP2 322-23, 332-33.

The Arnolds knew that Lockheed Shipbuilding had thirteen thousand boxes containing millions of documents. CP2 289. Certainly, the sheer volume of documents favors specific requests. Indeed, when the Arnolds made specific requests for workers' compensation claims and employee medical files, Lockheed Shipbuilding endeavored to quickly produce responsive documents. *See* CP2 290. And, when the Arnolds' attorneys informally sought documents relating to specific ships in

*Fischer*, Lockheed Shipbuilding promptly produced the documents which are the subject of this appeal. CP2 51.

Like the plaintiff in *Vance*, the Arnolds have not explained why they supposedly couldn't have made such a request before their case was dismissed. Having failed to offer a satisfactory explanation on this crucial point, the Arnolds cannot legitimately argue that these documents were "newly discovered" within the ambit of CR 60(b)(3). For this reason alone, the trial court's decision must be affirmed.

b. The information in question was either produced to the Arnolds or available from the public record

The Arnolds offer the documents in question to show that Lockheed Shipbuilding had some federal contracts that may have been subject to Walsh-Healey. Before the summary judgment, however, Lockheed Shipbuilding produced documents which indicated this same fact. *See* CP 340. And the precise contractual language was a matter of public record. *See* CP 291. As a general rule, matters available from public records will not be considered newly discovered. *In re Hammer's Estate*, 145 Wash. 322, 260 P.532 (1927). So the Arnolds could have discovered this information earlier, had they exercised reasonable

diligence, even without specifically requesting it from Lockheed Shipbuilding.

**3. The Proffered Documents Could Not Have Avoided The Summary Judgment**

In any event, the Arnolds' Walsh-Healey arguments are irrelevant to this case. In seeking relief under CR 60(b)(3), the Arnolds bear the burden of proving that "newly discovered evidence" probably would have changed the underlying result. *Go2Net*, 115 Wn. App. at 88. The trial court's decision must be affirmed because the Arnolds' supposedly "new" documents would not have changed the result of Lockheed Shipbuilding's summary judgment motion; i.e., they do not change the fact that the Arnolds fail to show that Lockheed Shipbuilding owed them any duty.

At most, these documents support one narrow proposition: that Lockheed Shipbuilding may have made certain contractual promises to the federal government, relating to a limited type of contract for certain ships unrelated to the Arnolds. The Arnolds fail to provide any authority whatsoever for the proposition that a contractual undertaking can somehow impose duties in tort on operations that are not subject to the contract. Nor do they offer any authority for the notion that they can bring a tort claim based on a statute for which there is no private right of action.

And they fail to even mention this Court's opinion in *Templeton*, a controlling case that the Court would have to overrule before accepting the Arnolds' other flawed premises. See *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 990 P.2d 968 (2000).

a. Walsh-Healey applies only to certain federal contracts and provides no private right of action

The Walsh-Healey Act is a federal statutory scheme which was enacted as an effort to improve wages and working conditions of laborers hired to fulfill federal government contracts. It reflects Congress's concerns that government hiring practices were rewarding contractors who underpaid their employees:

PRIOR to the passage of the Walsh-Healey Public Contracts Act, the Federal Government discouraged the improvement of labor standards in work on its supply contracts by a statutory requirement that such contracts be awarded to the lowest responsible bidder. To make an attractive offer, eager bidders drove down labor costs; employers who disdained such practices frequently could not qualify. Embarrassed by the fact that it was encouraging wage "chiseling" on public contracts, Congress provided in the Walsh-Healey Act that Government supply contracts should contain a stipulation by the contractor that all persons employed in the performance of the contract would be paid not less than the prevailing minimum wage.

Note - *Validity of Prevailing Minimum Wage Determination Under the Public Contracts Act*, Yale L. J. 548, 548 (1940) (footnotes omitted).

As the U.S. Supreme Court explained in an early opinion:

This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment.

*Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128, 60 S.Ct. 869 (1940).

Under the plain language of the Act, its purpose and intent were "to insure that persons employed by government contractors would be paid not less than the minimum wages as determined by the Secretary of Labor."

*United States v. Continental Casualty Co.*, 85 F. Supp. 573, 574 (E.D. Penn. 1949).

Because the Act's focus was on reforming the way the government selects its contractors, it was not intended to create rights for workers. See *United States v. Lovknit Mfg. Co.*, 189 F.2d 454, 456 (5th Cir. 1951); *Alabama Mills v. Mitchell*, 159 F.Supp. 637, 639 (D. D.C. 1958). "The Walsh-Healey Act is intended *to regulate governmental conduct* in entering into contract. It is a self-imposed restraint, a matter of *internal housekeeping*." *United States v. Warsaw Elevator Co.*, 213 F.2d 517, 518 (2nd Cir. 1954) (emphasis added).

***The Act does not represent an exercise by Congress of regulatory power over private business or employment. In***

this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it.

*Lukens Steel*, 310 U.S. at 128-29 (footnote omitted; emphasis added).

Accordingly, the only entity with the right to enforce the Act's provisions is the Secretary of Labor. *See* 41 U.S.C. § 38. "Congress submitted the administration of the Act to the judgment of the Secretary of Labor, *not to the judgment of the courts.*" *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507, 63 S.Ct. 339 (1943) (emphasis added). The Act does *not* provide a private right of action. *See Lovknit Mfg.*, 189 F.2d at 457 (5<sup>th</sup> Cir. 1951); *Todd v. Roane-Anderson Co.*, 35 Tenn. App. 687, 700 (1952); *Koren v. Martin Marietta Service, Inc.*, 997 F. Supp. 196, 214 n. 22 (D. P.R. 1998); *Greenstein v. Pam Am. Airways*, 185 Misc. 429, 57 N.Y.S.2d 178, 179 (1945).

- b. Because Walsh-Healey provides no private right of action, it cannot form the basis of a tort claim

It would be truly anomalous to allow the Arnolds to base a state negligence action on a statute for which there is no private right of action. *See Interstate Production Credit Ass'n v. MacHugh*, 61 Wn. App. 403, 409, 810 P.2d 535 (1991) (citing *Sierra-Bay Fed. Land Bank Ass'n v.*

*Superior Court*, 227 Cal.App.3d 318, 277 Cal.Rptr. 753 (1991)). As a California court explained in response to a similar claim:

Plaintiff's assertion is *unique and anomalous*. It presents a type of situation *rarely encountered*, and generally restricted to choice of law questions. In short, plaintiff points to the laws of two jurisdictions, neither one of which recognizes a statutory cause of action in these circumstances. He takes a portion of the law of one jurisdiction and *attempts to engraft it onto the law of the other, and thus to create a cause of action which neither jurisdiction would otherwise recognize*.

*Sierra-Bay*, 227 Cal.App.3d at 331 (emphasis added).

Not surprisingly, given the anomalous nature of the cause of action they propose, the Arnolds have been able to cite to only two cases — one from Louisiana and another from Missouri — supposedly in support of the notion that Walsh-Healey can form the basis of a duty to a third party. *See* Brief of Appellants at 11 (citing *Zimko v. American Cyanamid*, 905 So.2d 465 (La. App. 2005); *Goede v. Aerojet General Corp.*, 143 S.W.3d 14 (Mo. App. 2004)). But even having dredged up two cases from far-flung jurisdictions, the Arnolds have failed to provide any relevant authority.

In *Zimko*, the plaintiff claimed second-hand asbestos exposure from his father's employment at American Cyanamid. *Zimko*, 905 So.2d at 471. The Louisiana Court of Appeals recognized that its holding was novel and that there was a lack of controlling cases on point. *Id.* at 482.

But it held that American Cyanamid owed “the general duty to act reasonably in view of the foreseeable risks of danger to household members of its *employees* resulting from exposure to asbestos fibers carried home on its *employee’s* clothing, person, or personal effects.” *Id.* at 483 (emphasis added).

*Zimko* is inapposite primarily because the plaintiff’s father was an American Cyanamid *employee*, and the court *presumed* a duty based on this relationship. Here, the issue is whether a premises owner owes a duty to the employees of an independent contractor. The Arnolds fail to offer any authority for the proposition that such a duty can be presumed.

Further, Walsh-Healey played no part in — was not even mentioned in — *Zimko’s* analysis of the applicable duty. The Arnolds misstate the holding when they claim Walsh-Healey “established the duty” and “confirmed foreseeability in the duty analysis.” This is *not* what *Zimko* said. Walsh-Healey is mentioned only in the Court’s paraphrase of the two sides’ arguments (i.e. the defendant claimed Walsh-Healey was insufficient evidence of duty, and the plaintiff argued that Walsh-Healey showed foreseeability). *See Zimko*, 905 So.2d at 481-82. But when the court analyzed the duty owed, it simply started from the premise that an employer owes a duty to its employees and concluded that, in the context

of asbestos, this duty extended to members of the employee's household, without reference to Walsh-Healey. *See id.* at 482-83.

Besides being irrelevant to the issues at bar, *Zimko* has also received uniformly negative treatment outside of Louisiana. *See, e.g., In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 479 Mich. 498, 740 N.W.2d 206, 214-15 (2007) (noting that *Zimko* is not persuasive because it relied, without independent analysis, on a New York case that was later reversed); *In re New York City Asbestos Litigation*, 5 N.Y.3d 486, 495-96, 806 N.Y.S.2d 146 (2005) (reversing the case on which *Zimko* relied); *Martin v. Cincinnati Gas and Elec. Co.*, 561 F.3d 439, 446 (6th Cir. 2009) (finding *Zimko* unpersuasive).

Also, another division of the Louisiana Court of Appeals has noted that *Zimko* was a 3-2 split decision and that, although the state supreme court denied review, the claims involving American Cyanamid were not included in the petition. *Thomas v. A.P. Green Industries, Inc.*, 933 So.2d 843, 870-71 (La. App. 2006) (Tobias, J. concurring). "Any person citing *Zimko* in the future should be wary of the problems of the majority's opinion in *Zimko* in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid." *Id.*

*Goede* is even further afield than *Zimko*. Plaintiff accurately describes *Goede* as holding that there was “no prejudice to missile producer in evidence and argument on Walsh-Healey in mesothelioma case.” Brief of Appellants at 12. On this description alone, the case is innocuous. The *Goede* jury found Aerojet liable on all claims, including negligence per se for violations of Walsh-Healey. *Goede*, 143 S.W.3d at 17. ***The trial court agreed with Aerojet that it had erred in instructing the jury on Walsh-Healey.*** *Id.* at 19. Rather than grant a new trial, however, it granted judgment notwithstanding the verdict on the negligence per se claim. *Id.* The Missouri Court of Appeals merely held that the improper Walsh-Healey instruction did not prejudice Aerojet on the remaining claims. *Id.* at 19-20. This fails to show whether Walsh-Healey can establish a duty of care and, in fact, suggests that it cannot.

In short, the Arnolds’ argument — that their “new” documents could have somehow changed the result on the summary judgment motion — would require a truly novel expansion of law. They have not been able to present a single case, decided in the seventy years since Walsh-Healey was enacted, premising a tort duty on this Act. And yet, they ask the Court to impose such a duty here. The Court should decline the invitation to create this new, idiosyncratic rule of law.

c. The Arnolds claims are not within Walsh-Healey's intent

The Arnolds attempt to evade the fact that Walsh-Healy provides no private right of action by claiming hypothetical violations of the Act are “evidence of negligence” per RCW 5.40.050. Under this argument, they still must meet the four-part test set forth in the Second Restatement of Torts. *See Estate of Kelly v. Falin*, 127 Wn.2d 31, 38 n. 2, 896 P.2d 1245 (1995) (citing *Hansen v. Friend*, 118 Wn.2d 476, 480-81, 824 P.2d 483 (1992)). The Restatement allows the Court to adopt a statutory duty as the standard of care only if the statute’s purpose is:

- (a) *to protect a class of persons which includes the one whose interest is invaded*, and
- (b) to protect the particular interest which is invaded, and
- (c) *to protect that interest against the kind of harm which has resulted*, and
- (d) to protect that interest against the particular hazard from which the harm results.

RESTATEMENT (SECOND) OF TORTS § 286 (1965) (emphasis added). The Arnolds cannot satisfy this test.

i. *Reuben Arnold's work on the Alaska ferries was not related to federal contracts*

When Reuben Arnold was installing insulation on the Alaska ferries, he was not among the class of persons that regulations relating to contracts for U.S. Navy ships were intended to protect. Although the

Arnolds have shown that the federal contracts for the *USS Ramsey* and the *USS Goldsborough* may have incorporated the Walsh-Healey Act by reference, this is irrelevant because there is no evidence that Reuben ever worked on those ships.

Logically, if Walsh-Healey is incorporated by reference into a contract, the Act would apply only to the work performed under that contract. The Arnolds admit these contracts suggest “that Lockheed was subject to Walsh-Healey *in federal government contracts...*” Brief of Appellants at 11 (emphasis added). In fact, Walsh-Healey’s safety and health provisions clarify this limitation:

That no part *of such contract* will be performed nor will any of the materials, supplies, articles, or equipment *to be manufactured or furnished under said contract* be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety *of employees engaged in the performance of said contract.*

41 U.S.C. § 35(d) (emphasis added). Further, a notice to employees working on government contracts issued by the U.S. Department of Labor in 1965 states that Walsh-Healey applies to employees actually “performing any of the government contract work.” CP 340.

Likewise, early commentaries regarding the Act's purpose repeatedly indicate that it was intended to protect workers laboring under the subject contracts. *See, e.g.,* Note - *The Determination of Prevailing Minimum Wages Under the Public Contracts Act*, 48 Yale L. J. 610, 610-11 (1939) ("to improve the conditions of employees engaged in fulfilling Government supply contracts"); Note - *Administrative Discretion Under Lowest Responsible Bidder Statutes*, 47 Yale L. J. 832, 832 (1938) ("to improve the remuneration and working conditions of laborers employed to fulfill government contracts").

As stated in the Report of the House Committee on the Judiciary on the Bill, "The object of the bill is to require persons having contracts with the government to conform to *certain labor conditions in the performance of the contracts* and thus to eliminate the practice under which the Government is compelled to deal with sweat shops."

*Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128, 60 S.Ct. 869 (1940) (quoting House Report No. 2946, 74th Cong., 2nd Sess.) (emphasis added).

The Arnolds do not even attempt to argue that Reuben performed any work under a contract that mentioned Walsh-Healey. According to his own testimony, Reuben Arnold's work on Lockheed Shipbuilding's premises involved three Alaska ferries. *See* CP2 344-46. The Arnolds

certainly have not argued, nor could they, that the Alaska ferries were built pursuant to federal contracts, let alone contracts subject to Walsh-Healey. Nor is there any evidence that Reuben Arnold worked on the *USS Goldsborough* or the *USS Ramsey* or any other ship built pursuant to a federal contract.

Thus, the Arnolds' claims have no bearing because Reuben was not among Lockheed Shipbuilding's "*employees engaged in the performance of said contract.*" 41 U.S.C. § 35(d) (emphasis added). Rather, he was an employee of an independent contractor hired to perform work that was completely unrelated to any Walsh-Healey contract. Because the Arnolds fail to produce any evidence that Walsh-Healey applied to Reuben's work on the Alaska ferries, he was not in the class of persons whom the Walsh-Healey regulations were intended to protect.

ii. *Daniel Arnold's "second-hand" exposures are not the kind of harm Walsh-Healey was intended to prevent*

The Arnolds allege that Daniel was exposed to asbestos, supposedly attributable to Lockheed Shipbuilding through a "second-hand" exposure to dust brought home on Reuben's clothing in the 1960s.<sup>4</sup>

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<sup>4</sup> The Arnolds have also alleged a "direct" exposure based on Daniel's work as an asbestos abatement worker, which included a brief stint at the Lockheed Shipbuilding

This aspect of the claim cannot meet the Restatement test because Walsh-Healey's workplace safety regulations were intended to avoid injuries to workers, not to family members off-site. Walsh-Healey "addressed only workplace safety and mandated that '*workers* shall not be exposed to concentrations of atmospheric contaminants hazardous to health.' It did not put employers on notice of the hazards of non-occupational exposure to asbestos." *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 462 (Tex. App. 2007).

In promulgating these regulations, the Secretary of Labor noted that "the most important consideration" was "the *safety and well-being of the worker* and the protection of his family *from want....*" CP2 60. (emphasis added). An additional consideration was "the cost of accidents in terms of *money and human resources*—a tragic *economic waste.*" *Id.* (emphasis added). These stated purposes do not contemplate the prevention of physical injury to family members at home.

To be sure, the regulations mention "protection of his family," a phrase that the Arnolds have highlighted in past arguments on this issue. What they fail to highlight, however, are the words that immediately

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shipyard in 1979. This claim was dismissed due to lack of causation evidence and is thus not implicated in this appeal.

follow: “from want.” *See* CP1 393. It is clear from the way this sentence is worded, mentioning the “safety and well-being of the worker” and then protection of the worker’s family “from want,” that the purpose is to protect the worker from injury and to protect his family from financial difficulties that flow from an injured worker’s incapacity.

This interpretation is emphasized by the next sentence, which addresses the “economic waste” caused by injuries which cost the employer “money and human resources.” In other words, the purposes of Walsh-Healey’s workplace safety regulations are threefold: (1) to protect the worker from injury; (2) to protect the worker’s family from financial hardship; and (3) to protect the worker’s employer from the costs associated with losing an employee to injury. Protecting off-site family members from physical injury does not fit.

The Arnolds mention certain requirements — the use of special protective clothing, shower facilities, and dressing rooms — and claim that these were intended to protect third parties against take-home exposures. But these measures can be explained just as easily as a means to prevent workers from exposing themselves to harmful substances after they leave the jobsite — an interpretation that is consistent with the regulations’ express purposes.

The only case the Arnolds have referenced to suggest that Walsh-Healey can impose a duty to third-parties off-site is *Zimko*. As explained above, *Zimko* is a widely discredited decision from a Louisiana appellate court, which does not even mention Walsh-Healey in explaining the source of the employer's supposed duty to family members. The Arnolds' argument overextends matters even further because Lockheed Shipbuilding was not Reuben's employer.

In short, the Arnolds cannot meet the Restatement's requirements for using Walsh-Healey as evidence of negligence with respect to Daniel Arnold's alleged second-hand exposure. As a family member of the employee of an independent contractor on a project not subject to Walsh-Healey, he was *not* within the class of persons the regulations were intended to protect. And his alleged physical injury from any take-home exposure was *not* the kind of harm the regulations were intended to prevent. Walsh-Healey, therefore, cannot supply evidence of negligence.

d. The Arnolds' argument is a negligence per se claim in disguise

Finally, even disregarding the foregoing insurmountable barriers, the Arnolds' claim is still barred in Washington by the Legislature's abolition of negligence per se. *See* RCW 5.40.050. The Arnolds attempt

to skirt this rule by arguing that a “statutory duty informed the common law duty of care.” Brief of Appellants at 12. But that is precisely the argument that this Court rejected in *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 683, 990 P.2d 968 (2000).

As in the case at bar, *Templeton* addressed the *existence* of a duty in tort. The issue was “whether a social host who does not furnish alcohol to a minor, but who permits the minor to consume on the host’s premises alcohol obtained elsewhere, owes to the minor a common law duty of care.” *Id.* at 679. It was undisputed that a statute prohibited this conduct and that the defendant social hosts had thus breached a *statutory* duty. *See id.* at 686 (citing RCW 66.44.270(1)). This Court, however, held that the negligence question could not go to the jury because the plaintiff had failed to show a *corresponding common law duty*. *See id.* at 686-87.

In so doing, Judge Morgan explained how RCW 5.40.050 changed the analysis of whether a tort duty exists:

RCW 5.40.050 did not change the Restatement’s four-part test for determining whether a statutory duty applies in a negligence case—RCW 5.40.050 *assumes* the existence of a statutory duty, as well as a breach of that duty—but it did change the *legal effect* of breaching a statutory duty that has been determined to apply. By stating that the breach of a statutory duty is not negligence, but only *evidence* of negligence, it provided, essentially, that ***a plaintiff must always show the existence and breach of the common law***

*duty of reasonable care, even though the plaintiff can show the existence and breach of an applicable statutory duty* as evidence of—i.e., as a factor indicating—a breach of the common law duty. Concomitantly, it abrogated the pre-1986 idea that a plaintiff could recover by showing *either* the applicability and breach of a statutory duty, *or* the existence and breach of the common law duty of reasonable care. In short, it made the breach of an applicable statutory duty admissible but not sufficient to prove negligence, and in that way abolished the doctrine of “negligence per se.”

*Id.* at 683-84 (footnotes omitted; emphasis added).

*Templeton* controls this appeal.<sup>5</sup> Although their argument is weaker because they have failed to show that a statutory duty actually applied, the Arnolds are asking the Court to infer a common law duty based on the supposed existence of a statutory duty. As explained above, the trial court has already rejected various theories of common law duty in this case, some of which are the subject of another appeal. The Arnolds’ Walsh-Healey argument is a misguided attempt to make an “end run” around the requirement of a common law duty and ask the Court to impose a duty premised entirely on a statute. This is exactly what *Templeton* says they cannot do.

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<sup>5</sup> The Arnolds’ attorneys are aware of *Templeton*. Their trial counsel cited it in the CR 60 motion that underlies this appeal, and their appellate counsel cited it in their reply brief in the prior appeal in this same case (though they misstated the holding on both occasions). Given that *Templeton* is controlling and directly adverse to the Arnolds’ position in this appeal, it should have been disclosed in their opening brief. *See* RPC 3.3(a)(3).

It matters not that the alleged wrongful conduct predated RCW 5.40.050. The critical inquiry is when the case was filed. “The Legislature has abolished the common law doctrine of negligence per se for cases *filed* on or after August 1, 1986.” *Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992) (citing RCW 5.40.050) (emphasis added). *Accord. Fraser v. Beutel*, 56 Wn. App. 725, 739, 785 P.2d 470 (1990) (holding negligence per se not applicable to claim filed after August 1, 1986, for harms caused before August 1, 1986). The Arnolds filed this case in 2008, so negligence per se clearly does not apply.

The Arnolds rely on two cases for the asserted proposition that “federal workplace safety regulations can establish a duty of care.” Brief of Appellants at 12 (citing *Cresap v. Pacific Inland Navigation Co.*, 78 Wn.2d 563, 566-67, 478 P.2d 223 (1970); *Vogel v. Alaska S.S. Co.*, 69 Wn.2d 497, 501-02, 419 P.2d 141 (1969)). Again, neither case supports their position.

As an initial matter, *Cresap* and *Vogel* were decided under the now-defunct rule of negligence per se. For purposes of the Arnolds’ statutory duty arguments, they carry no weight in a case controlled by RCW 5.40.050.

Further, in citing *Cresap* and *Vogel*, the Arnolds confuse the concepts of duty and breach. In each of those cases, unlike the present case, there was no question that a duty *existed*. The defendants, ship owners in both cases, owed a duty of care to stevedores on board to provide a seaworthy vessel. *See Cresap*, 78 Wn.2d at 566-68; *Vogel*, 69 Wn.2d at 500. The federal regulations were invoked *not* to show the *existence* of this duty, but rather to show whether the duty was *breached*, i.e. whether the conditions complained of rendered the vessel unseaworthy. *Cresap*, 78 Wn.2d at 567; *Vogel*, 69 Wn.2d at 502. As *Vogel* explained, “*The owner’s duty does not stem from the regulation*, but the regulation may be shown just like other evidence to indicate that a certain practice is safe or unsafe.” *Id.* (quoting *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963)) (emphasis added).

*Cresap* and *Vogel* are thus entirely consistent with *Templeton’s* holding that “the existence and breach of an applicable statutory duty [may be shown] as evidence of—i.e., as *a factor indicating—a breach* of the common law duty.” *Templeton*, 98 Wn. App. at 684 (emphasis added). Here, the trial court did not dismiss the Arnolds’ claim based on a lack of evidence that the duty of care was *breached*. It dismissed the case because there was no evidence that Lockheed Shipbuilding *owed* the

Arnolds a duty of care. *See* CP1 3298. Under *Templeton*, the Arnolds' Walsh-Healey arguments are not relevant to this issue.

**4. The Proffered Evidence Is Cumulative**

The final two elements of a CR 60(b)(3) motion require the moving party to show that the new evidence is material and not merely cumulative or impeaching. *Go2Net*, 115 Wn. App. at 88. Once again, the Arnolds cannot make this showing.

To review, all these documents show is that certain projects, on which neither Reuben nor Daniel Arnold worked, may have been subject to Walsh-Healey. As explained above, this information utterly fails to alter the fact that Lockheed Shipbuilding owed no duty to the Arnolds for purposes of a negligence claim. It is thus immaterial.

Further, this information was contained in documents that Lockheed Shipbuilding produced to the Arnolds before the summary judgment hearing. The "Notice to Employees" document indicated that Lockheed Shipbuilding had federal contracts that may be subject to Walsh-Healey. *See* CP 340-41. There is still no evidence that Walsh-Healey applied to the Arnolds' claims, as employees of independent contractors on projects not subject to Walsh-Healey.

The Arnolds' additional documents — showing that Walsh-Healey may have applied to other ships that the Arnolds didn't work on — are merely cumulative. The Arnolds have thus failed to meet the five elements of a motion to vacate based on “newly discovered evidence.” The trial court correctly exercised its discretion when it denied the Arnolds' motion.

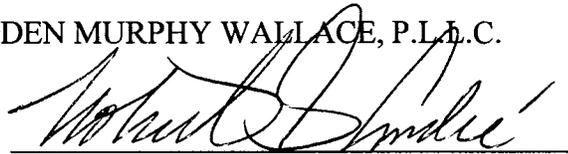
**E. CONCLUSION**

For all the foregoing reasons, the trial court's ruling should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of April, 2010.

OGDEN MURPHY WALLACE, P.L.L.C.

By



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STATE OF WASHINGTON

**DECLARATION OF SERVICE**

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

On April 14, 2010, I caused to be served upon counsel of record

at the addresses stated below, via the method(s) of service indicated

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DATED this 14<sup>th</sup> day of April, 2010, at Seattle, Washington.

\_\_\_\_\_  
s/ Robert G. André