

No. 43989-1-II

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

SUNHEE LEE, Appellant

vs.

SUK HUI BONBRAKE, Respondent

RESPONSE BRIEF

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INTRODUCTION AND PROCEDURAL HISTORY

COMES NOW the Respondent, Suk Hui Bonbrake, by and through her attorney of record, Sarah E. Hovland of the Redford Law Firm, and requests that this Court AFFIRM the Superior Court of Thurston County's entry of a Domestic Violence Protection Order (DVPO), and all other subsequent rulings in the Domestic Violence Protection Order Action (DVPA).

Although the nature of the relationship between Mr. Walter Lee and these parties is irrelevant to this proceeding, Ms. Lee spends a significant amount of time in her opening brief alleging the importance of this relationship, so it will be addressed briefly here. Ms. Sunhee Lee married Dr. Walter Lee in 1982. They have been estranged since 2007, when she voluntarily left the marital home, subsequently moving to Colorado. At no point during the marriage did Ms. Lee allege that she was the victim of abuse, nor file any civil claim as such. In 2012, she moved back into the home of Dr. Lee, where he was living with Ms. Suk Bonbrake. Ms. Lee was well aware that Ms. Bonbrake was living in the home, along with Dr. Lee's mother.

Early in the morning on February 3, 2012, Ms. Bonbrake was attacked by Ms. Lee in the kitchen of the home. The attack lasted several

minutes, wherein Ms. Lee punched Ms. Bonbrake, kicked her, pulled out clumps of her hair, and banged her head against the floor repeatedly to the point that Ms. Bonbrake lost consciousness. Ms. Lee locked herself in a shed and called the police, reporting that she was being threatened by her husband and his girlfriend. When the police arrived, Ms. Bonbrake was taken to the hospital and Ms. Lee was arrested and charged with Assault in the Fourth Degree. The charge was later changed to Assault in the Second Degree/Domestic Violence. The police noted that Ms. Lee was the primary aggressor in the altercation. Police Report page 4, CP 7.

Ms. Bonbrake filed a petition for an order of protection on February 21, 2012, and a temporary order of protection was granted on the same date. Both Ms. Lee and Ms. Bonbrake retained counsel. The hearing on the order of protection was delayed several times with the agreement of Ms. Bonbrake's counsel, due to Ms. Lee's request for time to find an attorney, and the ongoing criminal case related to the February 3rd incident.

A hearing was held on the matter on May 30, 2012. Ms. Lee was represented by counsel, Ms. Kimberly Reddish. Ms. Bonbrake was represented by Ms. Catherine Becker. During the hearing, Ms. Bonbrake presented testimony and evidence to corroborate the above facts. Mr. Lee was present and waiting in the hall, but was not called to testify as Ms.

Lee chose not to present any evidence or testify. Following are pertinent excerpts from the transcript of the proceeding:

MS. RENDISH: You honor I can say as her counsel for the record she speaks English quite well.

VRP 5/30/12 at 1:7-8, *see also* CP 29.

COURT: And I noted that criminal charges had been filed and we continued this a number of times?

MS. RENDISH: Yes. I will not be presenting her any kind of testimony in light of the criminal charges. I am prepared to move forward in terms of the petition.

COURT: Okay. And did you have any witnesses to present?

MS. RENDISH: No.

COURT: Do you have any documents you wish the court to consider that you haven't already presented to this court?

MS. RENDISH: No.

VRP 5/30/12 at 2: 5-17, *see also* CP 29.

Counsel for Mrs. Lee was given the opportunity to cross-examine Ms. Bonbrake, and did so. Mrs. Lee chose not to testify, and her counsel rested after presentation of Ms. Bonbrake's case. The Court then concluded:

COURT: The testimony and the documents presented to the court establish that there is a family or household member relationship. The two individuals were roommates for a period of time in the home of Ms. Lee ... With respect to the physical harm the testimony of Suk Bonrake clearly established that she experienced physical harm at the hands of Sunhee Lee ... In this case the testimony is un-refuted, the police reports are clear ... The statutes allow individuals to seek safety in different ways and it does not prohibit Ms. Bonbrake from having her own case against

Ms. Lee. The state's case may or may not go forward. The standard of beyond a reasonable doubt may or may not be established. The court makes no conclusions about that. But here today the standard is a preponderance of the evidence and Ms. Bonbrake has met that standard.

VRP 5/30/12 at 23-24, *see also* CP 29.

An order of protection lasting one year was entered. CP 25.

A motion for revision was filed by Ms. Lee's attorney and a hearing was held on July 25, 2012. CP 26. After a full hearing, the Court denied Ms. Lee's motion for revision. Specifically, it found that Ms. Bonbrake's testimony was consistent throughout the proceedings. CP 44. This is despite her limited English capabilities and her suffering from partial hearing loss. The original ruling was not disturbed; the order of protection was upheld, as well as the award for attorney fees stemming from the May 30th hearing. CP 44. No further award of fees was made at that time. CP 44.

Ms. Lee then filed three motions; a motion to terminate the DVPO (CP 52), a motion to vacate the DVPO (CP 50), and a motion for a new trial under Civil Rule 59 (CP 47), all to be heard on the same date. Counsel for Ms. Lee appeared telephonically. The Court denied all three motions, finding that the Order of Protection had only been entered three months ago, that this was the second time in approximately two months since entry that this matter had been brought back to Court by Ms. Lee,

and that nothing in the record indicated that it would be appropriate to grant any of her motions. CP 57 at 2:5-14.

An order was entered on September 6, 2012, that reflected the court's denial of the motions and the award of reasonable attorney fees. At no point during the time both counsel had been directed by the court on the record to appear for presentation of orders stemming from Ms. Lee's three motions, did her counsel appear, either telephonically or in person.

LEGAL ANALYSIS AND ARGUMENT

- I. The Trial Court Properly Found That The Parties Were "Household Members" Under The Standard Set Forth in RCW 26.50.010, Therefore The Court Had Authority To Enter a Domestic Violence Protection Order And Did So Properly.

The Appellate Court may refuse to review a claim of error not raised at the trial court level. RAP 2.5. Here, Ms. Lee asserts that the error is one concerning the trial court's authority to act, based upon the interpretation of the definition of "family or household member" under RCW 26.50.010, and therefore her failure to raise this as an error in any of her previous filings and motions to the court is excusable. *See* Appellant's Opening Brief. However, it is clear that the relevant statute, RCW 26.50, is unambiguous and clearly gives the trial court authority to act in this

case. Ms. Lee's assignment of error is untimely brought at the appellate court level, and as such should be dismissed.

After a bench trial, the standard of review is whether or not substantial evidence supports the findings of the trial court and the conclusions of law. *Hegwine v. Longview Fibre Co. Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In Re. Estate of Jones*, 152 Wn.2d 1, 8, 100 P.3d 805 (2004). Here, there is more than enough evidence to support the trial court's conclusions.

Statutory interpretation is a question of law that is reviewed *de novo*. See, e.g., *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wash.2d 599, 607, 998 P.2d 884 (2000). See also *State v. Keller*, 143 Wash.2d 267, 276, 19 P.3d 1030 (2001). In interpreting statutory provisions the primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute. *State v. Watson*, 146 Wash.2d 947, 954, 51 P.3d 66 (2002). One must first look to the plain language of the statute to determine intent and meaning. *Id.* An unambiguous statute is not subject to judicial construction. *Kilian v. Atkinson*, 147 Wash.2d 16, 20, 50 P.3d 638 (2002). A statute is not

ambiguous simply because different interpretations are theoretically conceivable. *Id.* at 20-21, 50 P.3d 638.

RCW 26.50.010(1) and (2) are not ambiguous. *Neilson ex. rel. v. Crump*, 201 P.3d 1089, 1091, 149 Wn. App. 111 (2009). Therefore, meaning is to be derived from the plain language of the statute. *Watson*, 146 Wash.2d at 954.

RCW 26.50.010(1) defines domestic violence as follows:

"Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

26.50.010(1). Further, "family or household members" is defined in pertinent part as follows:

(2) "Family or household members" means spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, *adult persons who are presently residing together or who have resided together in the past*, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 26.50.010(2) (emphasis added).

In the present case, the parties were residing in the same location, and on the same piece of property, at the very least. Ms. Lee stated herself to police that she was residing in the residence, telling officers that “[s]he has been staying at the Woodfield residence with the permission of Walter Lee. Sunhee told me she has a bed in the residence...” CP 7, Police Report page 4. Ms. Lee presented no evidence to contradict Ms. Bonbrake’s assertion that Ms. Lee had indeed been staying at the home since January 31, 2012. VRP 5/30/12, *see also* CP 29. Ms. Lee did not and has not contended that she was living or residing elsewhere.

Apparently Ms. Lee is now contending that she was sleeping in one of the outbuildings located on the small .19 acre property, and that because of this there can be no “family or household” relationship between the parties. Regardless of where Ms. Lee was resting her head at night, she was clearly using the interior of the home as her living quarters. She had free and open access to the home, able to come in and out whenever she chose. This home was also being used by Ms. Bonbrake. Ms. Lee attempts to liken the situation to a landlord or visitor to the home. Clearly this is not the case here. Ms. Lee was sleeping on the premises, had access to the house whenever she so chose, was accessing the main building, and was keeping her belongings at the residence. She does not

give any other explanation or location as to where she considered herself to be living other than the home on Woodfield Loop. Had it not been for her assault of Ms. Bonbrake on February 3, 2012, and the resulting removal of her person from the premises by the police, as well as the subsequent no-contact orders and civil protection orders, she would have continued to stay at the residence for an indefinite amount of time. If RCW 26.50 does not apply in this case, this would mean that Ms. Bonbrake would be left to continue to have to live with her attacker, without the ability to seek protection in the courts from the woman who assaulted her so badly in their home that she lost consciousness. Clearly it was not the intent of the legislature in creating RCW 26.50 to fabricate a loophole such as this.

Counsel for Ms. Lee points to *Nielson ex rel. v. Crump* as authority to vacate the DVPO in this case. However, the facts of that case are drastically different from the present situation. In *Nielson*, a mother attempted to obtain a DVPO on behalf of her minor daughter, who had been involved in a romantic relationship with the respondent. *Neilson ex. rel. Crump v. Blanchette*, 201 P.3d 1089 at 1091. The mother had never lived with the respondent, in fact neither had her fourteen year old daughter. Because the mother herself had not been a victim of domestic violence at the hands of Mr. Blanchette, and her daughter did not meet any

of the statutory requirements for the court given her age and the fact she had never lived with Mr. Blanchette, the Court reasoned that the parties did not fit within the scope of RCW 26.50. *Nielson ex rel.*, Wn. 2d at 118.

Clearly this is not the case here. Ms. Bonbrake was herself a victim of domestic violence at the hands of Ms. Lee. The parties lived together in the same home, sharing common areas and coming in and out of the house as they both pleased. Ms. Lee stated to the police that she had a bed in the residence, that she was staying at the residence, and it was clear that she was intending on continuing to stay at the residence. CP 7.

The fact that Ms. Lee had not resided at the residence for a long period of time frankly does not matter. The statute does not contain any provision setting out requirements for certain lengths of time that two individuals must live together to be considered “household members.” At the time Ms. Lee assaulted Ms. Bonbrake, she had been living at the Woodfield Loop home for at least 4 days. The statute does not contain any provision for how long the parties must reside together in order to be considered “household members.”

Taken as a whole, RCW 26.50.010 clearly applies to these parties, and the Court will not ‘add or subtract from the clear language of a statute... unless the addition or subtraction of language is imperatively required to make the statute rational’ *State v. Sullivan*, 143 Wash.2d 162,

175, 19 P.3d 1012 (citing *State v. Taylor*, 97 Wash.2d 724, 728, 649 P.2d 633 (1982)). The Court has consistently declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous. *Watson*, 51 P.3d 66 at 69.

Ms. Lee attempts to create a legal distinction where one does not exist by asserting that because Ms. Lee may have been sleeping in the shed, this negates any “family or household relationship.” First, Ms. Lee did not testify to this fact. Second, it is clear from the record that Ms. Lee considered herself a resident at the home, telling police she resided there and had a bed in the home. Police Report page 4, CP 7. Finally, even if Ms. Lee was not sleeping in the home at night, she was certainly staying and living on the property (which is .19 acres, located within the city of Olympia) and was using the common areas of the home at her will. Ms. Lee is asking this Court to insert into the unambiguous meaning of RCW 26.50.010 requirements for the length of time parties must reside together, and where exactly those parties must reside within a household. This would create an absurd consequence that clearly the Legislature did not intend in codifying protection for victims of abuse by members of their household.

II. The Trial Court Properly Awarded Fees Under RCW 26.50 And Did Not Abuse It’s Discretion In Doing So, Therefore The Award Of Attorney Fees Should Be Upheld.

An award of attorney fees is reviewed under the standard of abuse of discretion, recognizing the deference owed to the judicial officer who is in a better position than another to determine and decide the issues in question. *Wash. State Phys. Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 403, 110 S.Ct. 2447, 2459, 110 L.Ed. 2d 359 (1990). See also *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed. 2d 405 (1985). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhaeuser Co.*, 118 Wash.2d 306, 315, 822 P.2d 271 (1992), *Watson v. Maier*, 64 Wash. App. 889, 896, 827 P.2d 311, review denied, 120 Wash.2d 1015, 844 P.2d 436 (1992). “Whether attorneys’ fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys’ fees” *Wash. State Ins. Exch. & Ass'n.* 122 Wn.2d at 335, citing *Schmidt v. Cornerstone Invs. Inc.*, 115 Wash.2d 148, 169, 795 P.2d 1143 (1990).

At the May 30, 2012 hearing, the court entered an award of attorney fees pursuant to its authority to do so under RCW 26.50.160. In its award, the court exercised its discretion, stating:

I too am unclear as to why an hour of the court's time, an hour plus of the court's time was taken with a hearing where no defense was presented to the court... the defense appears to be that there is existing orders which of course the court cannot consider given the specific provisions that a petitioner may seek their own order and need not rely on the criminal process in order to seek safety. As such I'm going to find it's appropriate to grant fees for today's hearing only and limit it to that.. the hearing was not a necessary use of time given the case that was presented to the court.

VRP 5/30/12 at 25: 9-20, CP 29.

The trial court awarded Ms. Bonbrake an hour of attorney fees for her counsel's appearance, wherein Ms. Lee presented no evidence and no testimony. This award was clearly made with appropriate discretion, and within the purview of RCW 26.50.160.

Counsel for Ms. Lee appeared telephonically for her motions under CR 59 and motions to vacate and terminate the DVPO. The Court denied all three motions, finding that the Order of Protection had only been entered three months ago, that this was the second time in approximately two months since entry that this matter had been brought back to Court by Ms. Lee, and that nothing in the record indicated that it would be appropriate to grant any of her motions. CP 57 at 2:5-14. The Court stated that this was the "second time in the last couple of months that this matter basically had been argued all over again. I think it is appropriate for the Court to enter some fees. I will do so for reasonable fees that were

incurred with respect to preparing for this hearing today.” VRP 8/23/12 at 20: 9-15, CP 64). The court, while counsel for Ms. Lee was still on the line, set a date for presentation of orders:

COURT: So I am going to set this over for two weeks for presentation of orders. Counsel, you can prepare a fee affidavit and send it over to Mr. Bristol, and I will consider it at the presentation hearing. I am going to hang up now, Mr. Bristol” *Id.*

Counsel for Ms. Lee asked some questions of the Court, then said thank-you and hung up. VRP 5/30/12 at 20-21, CP 64. A hearing to present the court’s order was held two weeks later, on September 6, 2012. The case was called at the beginning of the calendar, however counsel for Ms. Lee was not present, chose not to appear, nor had he made any arrangements to appear telephonically. The Court noted:

COURT: I just want to have the record reflect that it is almost 2:30 [p.m.]. You [Counsel for Ms. Bonbrake] have been sitting here an hour. When we addressed the case last time on the 23rd, the Court set presentation for today. There have been no arrangements made by Mr. Bristol to appear telephonically. He did do that last time” VRP 9/6/12 at 22: 11-16, see also CP 69.

The Court considered the affidavit of fees provided by counsel for Ms. Bonbrake, and stated:

COURT: I am going to award fees in the amount of \$2000.00. That covers both of the hearing dates and your work in preparation” VRP 9/6/12 at 23:1-3.

An order was entered that reflected the Court's denial of the motions and the award of reasonable attorney fees. At no point during the time both counsel had been directed by the court on the record to appear for presentation of orders stemming from Ms. Lee's three motions, did her counsel appear, either telephonically or in person.

Ms. Lee filed a motion for reconsideration of the award of attorney fees, which was denied. In a letter written by the Court accompanying the order denying reconsideration, the Court noted:

While still on the record with both attorneys present (counsel for Respondent was allowed to participate telephonically) the undersigned set the matter over for two weeks for presentation on September 6, 2012. Counsel for Ms. Lee did not appear at the presentation hearing and, after approximately one hour, the Court reviewed the request for fees and granted it, in part... First, the undersigned will note that since March of this year, less than seven months ago, there have been five Court hearings in this matter... Contrary to Mr. Bristol's assertion of lack of notice however, the undersigned clearly stated on the record to Mr. Bristol that the hearing was being continued, by the Court, for presentation of orders and consideration of the amount of fees to award... both parties were on notice that the Court intended to enter orders, and award fees, on September 6 and both parties should have been prepared for that to happen... Given the history of this case, the ability to award fees under RCW 26.50, that amount (\$2000.00) was and remains reasonable.

Letter of Hon. Judge Hirsch 10/16/12, filed 10/18/12.

There was no abuse in discretion in this matter. Ms. Lee was afforded a meaningful opportunity to be heard by the Court. A hearing was set, by the Court and on the record, for presentation of orders of the Court's orders from the August 23rd hearing. The Court did not consider this a new motion but rather continued the August 23rd hearing to September 6th, under customary litigation and administrative practices of that Court. Both parties were put on actual notice that on September 6th, the Court would enter orders reflecting its ruling and consider an award of attorney fees. However, counsel for Ms. Lee chose not to appear for presentation. After waiting for an hour for counsel to appear, the Court entered an order awarding fees to Ms. Bonbrake. If counsel had an objection to the amount of fees, the opportunity to respond was at the September 6th hearing, where he could have voiced his objection on the record or asked the court for a continuance. Neither was done. The fact that counsel chose not to appear is not an irregularity in the proceeding, nor is it an abuse of discretion for a court to proceed with a presentation hearing when all parties were given notice of said hearing date and one party chose not to appear.

The argument that an award of fees is *per se* an abuse of discretion is untenable. The legislature has specifically authorized courts to award attorney fees under RCW 26.50.060:

(1) Upon notice and after hearing, the court may provide relief as follows:

(g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees...

RCW 26.50.060(1)(g).

The Court noted specifically that given the number of times this matter had been brought back to court by Ms. Lee over a short period of time, and given the history of the case, it concluded that an award of fees in the amount of \$2000.00 pursuant to RCW 26.50 was reasonable. This conclusion was not based on untenable grounds, and was not manifestly unreasonable. Ms. Bonbrake has and continues to incur significant legal fees in defense of her protection order. She was entitled to fees under RCW 26.50.060, and the Court appropriately awarded reasonable attorney fees.

Ms. Lee keeps asserting that she was not able to testify at the May 30, 2012 hearing which resulted in a DVPO being issued. Petitioner's Brief page 13, see also Motion to Vacate DVPO, CP 50, Motion to Terminate DVPO, CP 52, Motion for New Trial, CP 47, Memo in Support

of Revision, CP 38. However, the initial matter had been set over several times with the agreement of counsel, in order for the criminal charges stemming from the assault to be dealt with. In fact, it was Ms. Lee's counsel that chose to go forward with the hearing on May 30, 2012, while the criminal charges were still active. VRP 5/30/12, 2:5-17, CP 29. Ms. Lee had an opportunity to continue the matter out again, as had been done on several occasions before, in order to have an opportunity to testify. Her attorney chose to proceed. A tactical decision of counsel not to present evidence or not have their client testify is not an irregularity in proceedings, did not result in a deprivation of constitutional liberties or rights, and is not a reason to overturn an award of fees. The trial court maintains broad discretion in awarding fees and has the authority granted by the legislature to do so under RCW 26.50.060. Here, both the trial court's award of fees for the May 30, 2012 hearing and the subsequent August 23, 2012 hearing stemming from Ms. Lee's denied motions are both appropriate and should be upheld.

III. Respondent Requests And Is Entitled To Fees Incurred As A Result of Appellant's Appeal, Pursuant To RCW 26.50 And Under RAP 18.1 and 14.2.

Attorney fees can be awarded when they are authorized by contract, statute, or are a recognized for equity. *In Re the Matter of Kourtney Scheib*, 160 Wash.App. 345, 249 P.3d 184, 188 (2011). If

attorney fees are recoverable at trial, then the prevailing party may recover fees on appeal. RAP 18.1, *see also* Landberg v. Carlson, 108 Wash.App. 749, 758, 33 P.3d 406 (2001).

Rule of Appellate Procedure 18.1 (RAP) provides in pertinent part;

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RAP 14.2 provides in pertinent part that a commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. RAP 14.2.

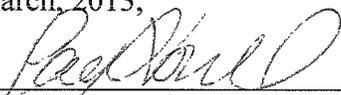
RCW 26.50.060 provides for the award of attorney fees under 26.50.060(1)(g). Ms. Bonbrake is entitled to fees, first under the purview of RCW 26.50.060, and such an award was made, first on May 30, 2012 and then again on September 6, 2012. CP 25 and 57. As a result of this appeal filed by Ms. Lee, Ms. Bonbrake continues to incur significant legal fees to defend her appropriately obtained Order of Protection. This matter has been in almost constant litigation since the action was first filed. As Ms. Bonbrake is statutorily entitled to fees under RCW 26.50.060, she is

subsequently entitled to fees for prevailing at the appellate level pursuant to RAP 14.2 and 18.1. Ms. Bonbrake requests that an award of fees be entered.

CONCLUSION

For the foregoing reasons, the decisions of the Superior Court of Thurston County issuing Ms. Bonbrake a Domestic Violence Protection Order, and all subsequent orders of the Superior Court should be affirmed. The awards of attorney fees pursuant to RCW 26.50, both for the May 30, 2012 hearing and the August 23, 2012 hearing should be affirmed. Ms. Bonbrake respectfully requests an award of fees pursuant to RAP 14.2 and 18.1, for reasonable attorneys fees she has incurred as a result of this appeal.

Respectfully submitted on this 25th day of March, 2013,



Sarah E. Hovland, WSBA #42609
Attorney for Suk Hui Bonbrake

REDFORD LAW FIRM

March 26, 2013 - 8:26 AM

Transmittal Letter

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