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STATE OF WASHINGTON

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No. 46161-7-II

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

STEPHEN NOEL, Individually and as Personal Representative of the
Estate of NATHANIEL NOEL

Appellants,

v.

FRANCISCAN HEALTH SYSTEM, et al.;

Respondents.

APPELLANT'S REPLY BRIEF

THADDEUS P. MARTIN, ATTORNEY AT LAW

Thaddeus P. Martin, WSBA # 28175
Attorney for Appellant

4928 109th St. SW
Lakewood, WA 98499
(253) 682-3420

ORIGINAL

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INTRODUCTION TO REPLY

A. The Issues Raised Within Appellant's Opening Brief Are Properly Before the Court.

Respondents assertion, beginning at Page 20 of its opening brief, that appellant failed to properly preserve error with respect to the Trial Court's rulings on motions in limine (which resulted in the inability to establish young Nathaniel's cause of death, an essential element to plaintiff's case) are meritless, CR 50(a), under the heading of

"Judgment as a Matter of Law", provides that, "If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim ... that cannot under controlling law be maintained without a favorable finding on that issue."

As Professor *Tegland* discusses in 4 WAPRAC CR 50 (6th ed.) (2015), as the rule is currently worded, while normally such motions are made after plaintiff rests his case in chief, the language of CR 50(a)(1) is now to the contrary and allows for such a motion "any time before submission of a case to the jury" and any time after plaintiff has been fully heard with respect to the relevant issue. Here, it was the defense who

asked that the Court dismiss the case after its ruling on motions in limine which substantially limited Dr. Coleman's testimony. (RP 3/25/14 Page 15). Defense counsel did not specify as to what rule under which it was seeking dismissal, though CR 50, clearly would be the best "fit".

However, it is also noted that a Trial Court clearly has the authority to dismiss under summary judgment standards, a case following a plaintiff's opening statement, because it serves to prevent an unnecessary expenditure of time and money for both the litigants and the court. See *Kohn v. Georgia-Pacific Corp.* 69 Wn.App. 709, 715, 850 P.2d 517 (1993). Stated another way, when a Trial Court dismisses a case prior to the taking of testimony, the appeal should be treated in the same manner as an appeal from an order granting summary judgment. See *State v. Ralph Williams' Northwest Chrysler, Plymouth, Inc.* 82 Wn.2d 265, 269, 510 P.2d 233 (1973).

Further, the respondents' contention that appellant, in order to preserve error, had to put on an "offer of proof", under ER 103, lacks merit (see RB Page 21). There is nothing in ER 103 which precludes the provision of a written offer of proof and the Trial Court's decision followed extensive argument on the defenses' motions in limine. In this case, appellant's counsel, by way of declaration, provided a full and complete copy of Dr. Coleman's declaration, which had previously been

submitted in opposition to respondents' motion for summary judgment, as well as, a full and complete copy of Dr. Coleman's deposition. (CP 2414-2465). Within this submission, Dr. Coleman's proffered expert opinions were clearly set forth, as well as, the basis for them. It is respectfully suggested that nothing more is required.¹

It is noted that although the Trial Court's exclusion of cause of death testimony was fatal, given the nature of the "failure to report" claim which will be discussed in detail below, there was simply no requirement in order to support **that claim**, expert medical testimony relating to the standard of care applicable to physicians. As explained in *Beggs v. DSHS* 171 Wn.2d 69, 79, 247 P.3d 421 (2011), as such claim is predicated upon a implied tort remedy to RCW 26.44.030, there is no requirement that in order to bring such a claim, a claim that it must be brought pursuant to RCW 7.70.010, the healthcare negligence statute. Generally, outside of the professional malpractice arena, expert testimony is not required in order to establish the standard of care. See *Petersen v. State*, 100 Wn.2d 421, 437, 671 P.2d 230 (1983). Once the applicable standard of care is established, expert testimony is not required to prove the breach of such a

¹ As suggested above since summary judgment standards are applicable the Court should subject the trial court's dismissal determination to a *de novo* review. In addition the above-referenced declaration of counsel was clearly brought to the trial court's attention thus is something which can be considered by the appellate court. See, *Mithoug v. Apollo Radio of Spokane* 128 Wn.2d 460, 463, 909 P.2d 291 (1996).

standard. *Id.* citing to *Douglas v. Vussabarger* 73 Wn.2d 476, 438 P.2d 829 (1968).

Here, as discussed below, the standard of care is that set forth within RCW 26.44.030, which, based on its language, should be construed as having an objective negligence standard.

However, the fact that appellant presented expert testimony in addition to significant facts, warranted the submission of not only a medical negligence claim against Dr. Cowan, to the jury, but also a claim pursuant to RCW 26.44.030, for his failure to report child abuse. See, generally, *Chen v. City of Seattle* 153 Wn.App. 809, 910, 223 P.3d 1230 (2009) ("An expert opinion on an ultimate issue of fact is sufficient to defeat a motion for summary judgment.").

REPLY ARGUMENT

A. A Parent Has a Claim Under the Terms of RCW 26.44.030 Which is Actionable Under the Terms of RCW 4.24.010.

It is respondent's position that a claim pursuant to RCW 26.44.030, only can be brought under the "survival statutes", i.e., RCW 4.20.046 or RCW 4.20.060 is a patently erroneous proposition. Simply because a survival statute was at issue in the seminal *Beggs v. DSHS*, 171 Wn.2d 69, 247 P.3d 421 (2011) case, does not mean that such claims only can be brought under the terms of the survival statute when, unfortunately, the

unreported abuse ultimately results in a minor child's death. Clearly under the terms of RCW 4.24.010, plaintiff, Stephen Noel, as Nathaniel's father, has a claim due to the negligent actions which contributed to his minor child's death. It is not a close question.

Even if such a statutory remedy did not exist for the injury or the death of a child, there is no question that a parent individually would be entitled to bring a claim under RCW 26.44.030, when a failure to report results in an injury to his child.

RCW 26.44.030 requires designated professionals "with reasonable cause to believe that a child suffers abuse or neglect," to report the suspected abuse to DSHS or the proper law enforcement agency. In *Beggs, supra*, our Supreme Court recognized there is an implied cause of action against the mandatory reporter who fails to report suspected abuse. RCW 26.44.030(1)(a) defines "abuse or neglect" in its relevant part, as "sexual abuse, sexual exploitation, or injury of a child by a person under circumstances which causes harm to the child's health, welfare or safety."

In *Beggs*, our Supreme Court recognized that when a mandatory reporter fails to report child abuse, there is, implied to our cause of action based on the language set forth within RCW 26.44.030. In reaching such conclusion, the Supreme Court relied on its previous decision in the case of *Tyner v. DSHS*, 141 Wn.2d 68, 80, 1 P.3d 1148 (2000). In *Tyner*, the

court found that RCW 26.44.050 could be a basis for an implied remedy **in favor of the parents who were injured by a negligent investigation of a report of suspected abuse.** The Court can take note that the statute at issue in *Tyner*, RCW 26.44.050, is part of the exact same statutory scheme.

In both *Tyner* and *Beggs*, the court looked to the test for implied statutory remedies set forth within *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). Under the *Bennett* test, in order to determine whether or not an implied cause of action should be provided from a statute, which does not have an express tort remedy. The following questions must be asked.

First whether the plaintiff is within the class whose especial benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

In *Tyner*, the court looked to RCW 26.44.010 in order to aid in determination of legislative intent and who was intended to be "especially" benefitted by the statute. RCW 26.44.010 provides in part, "The State of Washington Legislature finds and declares that the bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention in the life of the parent, custodian or guardian ..."

Based on such language, the court in *Tyner* found that a parent was amongst the class of individuals intended to be benefitted by the procedural safeguards set forth within RCW 26.44.050 and had an available implied cause of action for negligent investigation.

In *Beggs*, the court similarly looked at *Bennett*. As *Beggs* is based on a duty to report set forth within RCW 26.44.030, which is part of the same statutory scheme at issue in *Tyner*, it would make no sense and would be absurd not to look to RCW 26.44.010 in order to determine whether or not a parent was and/or is amongst the class of individuals intended to be benefitted by the implied statutory remedy recognized in *Beggs*. See also, *Ducote v. DSHS* 167 Wn.2d 967, 222 P.3d 785 (2009). (Only a parent and not stepparents fall within the class of individuals protected by an implied cause of action for negligent investigation under RCW 26.44.050). As recognized in *Tyner* at Page 80 "... the legislature emphasized interests of a child and parents are closely linked. RCW 26.44.010. Thus, by recognizing the deep importance of the parent/child relationship, the legislature intended a remedy for both the parent and child if that interest is invaded."

Additionally, by permitting a claim pursuant to RCW 26.44.030 by a parent whose child is a victim of unreported abuse, would be consistent with the underlying purpose of the statutory scheme and the requirements

of RCW 26.44.030. As in *Tyner*, "the existence of some tort liability will encourage [mandatory reporters] to avoid negligence conduct and leave open the possibility that those injured by [mandatory reporters] negligence can recover." *Id.* at 81 citing to *Babcock v. State* 116 Wn.2d 596, 622, 809 P.2d 1143 (1991). "Accountability through tort liability ... may be the only way of assuring a certain standard performance by government entities." *Bender v. City of Seattle* 99 Wn.2d 582, 590, 664 P.2d 492 (1983).

The defense's position that a parent does not have a remedy under *Beggs*, and RCW 26.44.030, unless they can establish financial dependency upon, on a deceased infant, is specious and would undermine the purposes of the above-referenced statute. Frankly it defies common sense.

Under the statute, Dr. Cowan was obligated to report abuse to the appropriate law enforcement agency and/or DSHS if he "has reasonable cause to believe that a child has suffered abuse or neglect". According to the statute, "reasonable cause" means a person "witnesses or receives a credible written or oral report alleging abuse, including sexual conduct or neglect of a child". See RCW 26.44.030(1)(b)(iii).

Here, according to plaintiff's expert Dr. Coleman, Defendant Cowan, on March 7, 2008 had information he was being provided,

including what should have been readily observable, sufficient to inform a reasonably prudent practitioner that there was reasonable cause to believe that the child had suffered abuse or neglect. (CP 2459-2460).

As the term "reasonable" was utilized by the legislature, it is respectfully submitted that there is no reason to believe that the legislature intended anything other than a "reasonable person" negligence standard to apply. See *Kappelman v. Lutz* 167 Wn.2d 110, 217 P.3d 286 (2009), (even a person acting in response to an emergency, they are held to a reasonable person standard of care).

Such a standard is an "objective" standard. To interpret the standard as being a "subjective" standard, as was argued by the respondents before the Trial Court, would eviscerate statutory purposes and as now conceded by respondents would be inconsistent with the current language of RCW 26.44.030(1)(b)(iii). To require a mandatory reporting physician to actually witness the abuse as it occurs, as suggested by the defense in order to be subject to liability, is simply preposterous. All that should be required is that he "witness" sufficient information which provides him a "reasonable" cause to suspect abuse, and nothing more. It is noted that below, the respondents relied on the California case of *Landeros v. Flood* 551 P.2d 389 (Cali. 1976) for the proposition that there had to be "subjective suspicion of abuse." That aspect of the

Landeros case is no longer good law, even in the State of California. See *People v. Davis* 126 Cal.App.4th 1416, 1426-27 (2005).

In *People v. Davis*, the court looked at similar statutory language and interpreted it to mean that the legislature intended that mandatory reporters must act if the facts known to the reporter, would give rise to an objectively reasonable suspicion that abuse has occurred.

When a statute is ambiguously written, it is the obligation of the Court to construe in a manner which best serves its legislative intent. See *Doe v. Corporation of President of Church of Jesus Christ of Latter Day Saints* 141 Wn.App. 407, 424, 167 P.3d 1193 (2007).

As discussed in *Doe* at 425, the purpose of the mandatory reporting statute evidences a clear legislative intent that the prevention of child abuse is "the highest priority, and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take action." See *C.J.C. v. Corp. of Catholic Bishops* 138 Wn.2d 699, 726, 985 P.2d 262 (1999).

It is also noted that RCW 26.44.056(3) which provides for a good faith immunity when making abuse reports, is further indicative of a legislative intent that the mandatory reporters be required to act when they have sufficient information before them to create a reasonable suspicion of

child abuse. See generally *Miles v. CPS* 102 Wn.App. 142, 156, 6 P.3d 112 (2000). (Discussing civil immunity for "good faith" reporting).

The construction of the above-referenced statute, in the manner suggested by the respondents, would utterly eviscerate statutory purposes.

Dr. Coleman, a highly trained emergency room physician, in his declaration, in great detail, he outlined what was there to be observed by Dr. Cowan and Franciscan staff. (CP 2460-2464). Not only did Dr. Cowan violate the standard of care applicable to emergency room physicians, but also miserably failed as a mandatory reporter. Plaintiffs, failure to report claim, never should have been dismissed.

B. Mr. Noel Submitted Sufficient Evidence of His Non-Economic Damages, Which Are Available Under RCW 4.24.010.

As emphasized at Page 28 through 29 of Appellant's opening brief, in response to respondent's motion for summary judgment, the plaintiff submitted a declaration outlining, in detail, how he has suffered as a byproduct of the death of his son. (CP 1704-1706). At most, defendant's arguments that Mr. Noel did not suffer any non-economic damages as a byproduct of the death of his son, goes to the amount of damages but not the fact that damages occurred.

Under RCW 4.24.010, Mr. Noel was entitled to place before the jury a request for compensation for the "loss of love and companionship"

of his child and "the destruction of the parent-child relationship". See *Wooldridge v. Woolett* 96 Wn.2d 659, 638 P.2d 566 (1981). A parent is also entitled to seek compensation for items such as parental grief, mental anguish and suffering caused by the wrongful death of a child. See *Wilson v. Lund*, 81 Wn.2d 91, 491 P.2d 1287 (1971). Although, as pointed out by respondent, RCW 4.24.010 does not, per se, create a cause of action; it is the statutory vehicle in which plaintiffs routinely pursue claims when their children have been a victim of wrongs, such as negligence and/or the breach of an implied statutory standard of care whether predicated on the common law or implied statutory remedy. The trial court's dismissal of plaintiff's general damages claims, particularly under summary judgment standards, is inexplicable and frankly inexcusable.²

C. The Trial Court Erred By Inappropriately Limiting Plaintiff's Proffered Expert Testimony.

Generally expert testimony is liberally admitted if it is helpful to the jury to understand matters generally outside the competency of an ordinary layperson. See, *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011); see also, *Reese v. Stroh*, 128 Wn.2d

² There is no requirement that plaintiff present expert testimony establishing such damages. See *Bunch v. King County Dept. of Youth Services* 155 Wn.2d 165, 181, 116 P.3d 381 (2005) (Expert testimony not required and a plaintiff's own testimony is sufficient to establish matters such as "anguish" and "distress", citing to *Nord v. Shoreline Savings Assn.*, 116 Wn.2d 477, 487, 805 P.2d 800 (1991).

300, 305, 907 P.2d 282 (1995). While it is generally true in making a determination as to what expert testimony will be presented, is a matter vested in the discretion of the Trial Court, such determinations should not be given unfettered and unbridled discretion. See, *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014), (suggesting that if the basis for the exclusion of such testimony is not "fairly debatable", than an abuse of discretion can be found).

Generally under ER 702, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact. *Id.* In determining admissibility of expert testimony, courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases. See, *Miller v. Likins*, 109 Wn.App. 140, 148, 34 P.3d 835 (2001); *State v. King County*, 175 Wn.App. 630, 638, 307 P.3d 765 (2013).

Here, Dr. Coleman is a physician licensed to practice medicine in the State of Washington and has significant experience in the area of emergency medicine (CP 2469-2472). As stated by Professional *Tegland* in 5B WAPRAC § 702.9 (5th ed. 2014), "Ordinary physician who has a degree of M.D. will be considered qualified to express an opinion on any sort of medical question including questions in areas in which a physician

is not a specialist." See, *Leaverton v. Cascade Surgical Partners, PLLC*, 161 Wn.App. 512, 517, 248 P.3d 136 (2011), citing to *Hill v. Sacred Heart Med. Ctr.*, 143 Wn.App. 438, 177 P.3d 152 (2008). As stated in *Eng v. Klein*, 127 Wn.App. 171, 110 P.3d 844 (2005), "so long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, ordinarily he or she will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist."

In this case, the alleged medical negligence and failure as a mandatory reporter occurred in an emergency room and was perpetrated by an emergency room physician. Thus, Dr. Coleman's expertise are more than adequate and are "on point" with respect to Dr. Cowan's actions.

Simply because Dr. Coleman consulted with two colleagues, who are pathologists, does not and did not undermine his qualifications to provide standard of care and causation opinions in this case. The Court can take note that physicians routinely consult with one another in performing their regular work and Dr. Coleman's purpose in performing such consultations was to verify information that he had already found within relevant medical literature.

In this case, the Trial Court primarily erred by misapplying ER 703. As is evident from the face of this rule, Dr. Coleman was fully entitled to rely on a wide variety of information in formulating his opinions, including hearsay. Indeed, the admission of medical testimony has been upheld by Washington Appellate Courts, even though such opinions are often not based upon personal knowledge, but rather a wide variety of other materials and data.

For example, in *Cooley v. Peacehealth*, 177 Wn.App. 717, 312 P.3d 989 (2013), the Appellate Court rejected a contention that an expert's data was flawed because his opinion was based on part from information obtained from a website and data gathered from the expert's treatment of his own patients. The Court can take note that forensic medical professionals often rely upon medical records and other information in formulating their opinions. See generally, *Hill v. Sacred Heart Med. Ctr.*, *supra*; *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn.App. 279, 284 P.3d 749 (2012), (testimony permitted regarding negligence and causation as well as nature and extent of injury).

Our Supreme Court has previously allowed an expert to testify based not only upon medical records, but also criminal history information compiled by others. In, re: *Young*, 112 Wn.2d 1, 857 P.2d 989 (1993), (permitting such opinions and rejecting the contention that the opinion

were inadmissible because they were based upon "hearsay"). See also, *State v. Ecklund*, 30 Wn.App. 313, 633 P.2d 933 (1981) (opinion based on lab report).

With respect to the particular facts of this case, it is noted that there is nothing inappropriate with respect to Dr. Coleman's reliance upon criminal records generated as a byproduct of the prosecution of Nathaniel's mother, who perpetrated the fatal abuse. As noted above, the Supreme Court in the *Young* case was not particularly troubled by the use of criminal records in that case. Such records **are not** "hearsay" because they are "business records" under the terms of RCW 5.45.020, and are a matter upon which the Court can take judicial notice. See, *State v. Scriver*, 20 Wn.App. 388, 399, 580 P.2d 265 (1978). (permitting judicial notice of its own criminal court records).

Further, such records are also admissible into evidence in "all cases in this state" under the terms of RCW 5.44.010.³ See also, *Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979), (court records have a high degree of trustworthiness). See also, FRE 803(o).

Arguably such statements would be admissible under the terms of ER 804 as statements against penal interests.

³ There is no issue with respect to authentication before the Trial Court. Had such an issue been raised, naturally, it would have taken very little effort for appellant's counsel to travel to the clerk's office in order to receive an appropriately notarized copy.

It was reversible error for the Trial Court to exclude Dr. Coleman's causation opinions which went to the very heart of the issue as to whether or not the defendant's actions were a "proximate cause" of young Nathaniel's death. As correctly pointed out by respondent at Page 27 of their brief, it was and is incumbent for a party seeking damages for a physical injury, to establish through medical testimony, a causal linkage between the negligence and/or other misconduct and the injury. See, *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007), citing to *Ugolini v. State Marine Lines*, 71 Wn.2d 404, 407, 429 P.2d 213 (1967), (party must establish on a more probable than not or more likely than not basis that the actions of the defendant caused or contributed to the physical injury).

Without providing Dr. Coleman the ability to provide such testimony, Appellant was literally left in the position of not being able to establish the cause of Nathaniel's death or that it even was a byproduct of abuse.

It is noted that frankly this is not a case where it was necessary for the Appellant to establish the asserted claims by showing, through expert testimony, that CPS or the police would have taken any specific course of action had a proper report of abuse been made. See, *Petersen v. State*, *supra*. Nevertheless, as an ER physician, Dr. Coleman was well qualified to render an opinion as to what a reasonably prudent ER physician would

have done in order to conform their actions to the applicable standard of care. According to Dr. Coleman's declaration, that would have included Dr. Cowan taking his own affirmative actions which could have substantially changed the result.

Typically it is a jury question as to whether or not a failure to act was a proximate cause of the end result. See, *Joyce v. State*, 155 Wn.2d 306, 310, 119 P.3d 825 (2005); *Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002); *Taggart v. State*, 118 Wn.2d 195, 227-28, 822 P.2d 243 (1992).

In order to establish "cause and fact", all that it is incumbent upon the plaintiff is to establish through either direct or circumstantial evidence that "but for" the defendant's actions, the plaintiff would not have been injured. See, *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 610, 257 P.3d 532 (2010). It is respectfully suggested that under the facts of this case, a properly instructed jury could very easily conclude that "but for" the respondent's failings Nathaniel would still be alive today.

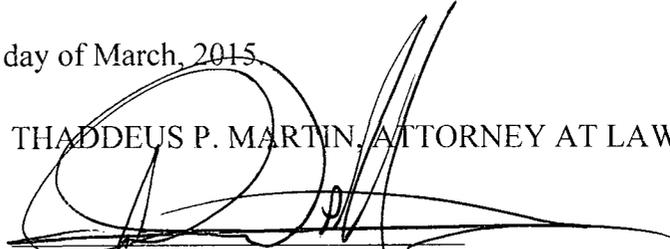
CONCLUSION

For the reasons stated above, it is respectfully requested that the Appellate Court reverse the determinations of the Trial Court and send this

case back for a preliminary new trial on **all the issues presented by this case.**

Dated this 26 day of March, 2015.

THADDEUS P. MARTIN, ATTORNEY AT LAW


Thaddeus P. Martin, WSBA #28175

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE FOREGOING DOCUMENT ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Court of Appeals, Division II
950 Broadway, Ste 300
Tacoma, WA 98402

Via filing hand delivery.

AND:

Michelle M. Garzon
Timothy L. Ashcraft
Fain Anderson, et al.
1301 "A" Street, Suite 900
Tacoma, WA 98402

Christopher H. Anderson
Karen R. Griffith
Fain Anderson VanDerhoef
701 5th Ave, Ste 4650
Seattle, WA 98104

[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the parties at their last known email address, on the date set forth below followed by regular legal messenger.

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

Executed at Tacoma, Washington on the 26th day of March, 2015.


Kara Denny, Legal Assistant