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DIVISION II

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STATE OF WASHINGTON

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

KRISTINE BRUMFIELD, et. al.,

Appellants,

v.

PAUL TRAUSE, Commissioner, BRUCE DEMPSEY, Deputy Assistant
Commissioner, DEPARTMENT OF EMPLOYMENT SECURITY of the
State of Washington, and the STATE WASHINGTON,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Plaintiff, Ms. Kristine Brumfield, appeals the CR 56 Summary Judgment dismissal of her employment-related claims against the Washington State Employment Security Department (ESD) and the denial of her Motion to Strike evidence presented with the Defendants' Motion for Summary Judgment. The Plaintiff alleged RCW 42.40 Whistleblower Retaliation and common law claims of wrongful termination and invasion of privacy. The Thurston County Superior Court found that the Plaintiff could not demonstrate a prima facie case to substantiate these claims and dismissed the matter in its entirety. In all respects, the decision of the Superior Court is proper and should be affirmed.

The Plaintiff resigned from ESD on August 28, 2009. Her resignation was voluntary, made in writing and signed by the Plaintiff. She further signed a written settlement agreement that outlined what she would receive in return for her voluntary resignation and cooperation in securing ESD property. There is no dispute that Ms. Brumfield had legal counsel prior to signing these written resignations and had union representation throughout the entirety of the events of August 28, 2009.

So long as Ms. Brumfield's resignation was voluntary, summary judgment must be granted to the Defendants in two of the three claims. The resignation eliminates any argument of retaliation, because retaliation

requires adverse action by an employer, and resignation is an action taken by the employee. The Plaintiff's resignation ended ESD's disciplinary process. The only other adverse action alleged involves Ms. Brumfield's assignment to home pending the disciplinary process. The Plaintiff spent only two days on paid home assignment, and was specifically informed that the home assignment was a precautionary step to permit the investigation of allegations made against her. Further, by law, a wrongful termination does not include a voluntary resignation. These claims were properly dismissed and should be affirmed.

The third claim, invasion of privacy, rests on undisputed facts that simply do not permit a finding that a question of material fact remains. It is clear, based upon the Plaintiff's own version of the facts and all of the evidence that was available for the trial court to examine, that the Plaintiff invited ESD and union officials into her home. Conversely, the Plaintiff offers no evidence, testimony or facts, beyond her simple assertion, to support her argument that a genuine invasion occurred. This claim, also, was properly dismissed and that dismissal should be affirmed.

II. RESTATEMENT OF ISSUES

- A. Did the Plaintiff's voluntary resignation foreclose a cause of action of whistleblower retaliation?**

- B. Did the Plaintiff's voluntary resignation foreclose a cause of action for wrongful termination?**
- C. Did the Plaintiff give consent to entry of her home through her undisputed words, actions, and contractual agreement?**

III. COUNTERSTATEMENT OF FACTS

The Plaintiff, Kristine Brumfield, was employed by the Washington State Employment Security Department between 1998 and her resignation on September 1, 2009. In April 2009 Ms. Brumfield was part of a Reduction in Force, and was laid off from her position as a Program Assistant for the Work Opportunity Tax Credit (WOTC) Program. As an employee unionized with the Washington Federation of State Employees (WFSE), Ms. Brumfield was given a layoff option to demote to an Office Assistant 3 with WOTC. In June 2009 Ms. Brumfield was hired off the layoff list into the Work Source Training Academy (Training Academy) Program of ESD. She resumed working at her previous salary, as a Program Assistant, and worked in that position until her resignation. CP 106, 109.

Ms. Brumfield resigned on August 28, 2009 with an effective date of September 1, 2009. CP 62. The resignation was the result of Ms. Brumfield being offered a choice between resignation and the initiation of the disciplinary process outlined by the Collective Bargaining Agreement between ESD and Ms. Brumfield's union, the WFSE. CP 110. After

consulting with both a union representative and an attorney, Ms. Brumfield resigned. CP 26-28, 62, 111.

The potential initiation of the disciplinary process was a result of an investigation of ongoing issues with Ms. Brumfield's performance, which led to ESD discovering that Ms. Brumfield had removed highly confidential documents from ESD without authorization. CP 52-55. Ms. Brumfield's performance began to become an issue after her transfer to the Training Academy Program in June of 2009. Prior to that point, while some performance issues were noted, none caused her supervisors to contemplate an investigation. CP 102-06, 238-39. The move to the Training Academy led to a number of performance issues, however, including Ms. Brumfield's failure to properly discharge work duties and sending a series of disputatious and unprofessional emails to her supervisors. CP 52.

In late July, 2009 Ms. Brumfield received a negative written evaluation from Brian Roper relating to work she had done for WOTC. CP 16-17. On July 27, 2009, in response to this evaluation, Ms. Brumfield sent an email to Roper, her current supervisor Pat Seigler, and two other ESD supervisors objecting to Roper's evaluation of her work with WOTC. CP 17-18. In the email, Ms. Brumfield asked whether the poor evaluation was because she "did a whistleblower on the money WOTC was wasting

on a contractor who wasn't doing there [sic] job". CP 236. Ms. Brumfield confirms that this email was the first notification that she gave ESD that she had filed a whistleblower complaint. CP 12-14, 16-17.¹ There is no evidence in the record that ESD was ever aware of any actual investigation of Ms. Brumfield's allegations. There is also no evidence of an Auditor's investigation having gone forward, much less of anything substantiating the allegations made by the Plaintiff.² CP 68-69.

In August of 2009 the ongoing performance issues that Ms. Brumfield was having at the Training Academy³ led ESD to check on the Plaintiff's email and internet usage. CP 53-54. On August 7, 2009 it was found that on January 18, 2009, while still at WOTC, Ms. Brumfield had emailed a privileged and highly confidential database of 60,000 names and social security numbers (known as the "Access 97 database" because of the Microsoft program in which the database was managed) to her home email address. CP 54. Mr. Roper, Ms. Brumfield's supervisor at the point that she worked on the Access 97 database, has stated that he gave no permission to remove the database to the Plaintiff, or to anyone who had

¹ Bruce Dempsey, who would make the determination to initiate disciplinary action against Ms. Brumfield approximately one month later, was forwarded this email shortly after it was sent by Ms. Brumfield on July 27. CP 236.

² The only evidence in the record actually suggests that the complaint was not pursued because Ms. Brumfield required the auditor's office to assure her of confidentiality and protection under the whistleblower statute. CP 68-69. This request took place in late September, 2009, well after her August 28, 2009 resignation and months after her revealing her alleged whistleblower status on July 27, 2009.

³ Listed at CP 53-54.

no reason to work from home and lacked proper home security systems. CP 105-06. Ms. Brumfield acknowledges that she sent the database without approval or the foreknowledge of Mr. Roper or any other ESD supervisors. CP 24-25.

On August 19, 2009, ESD discovered that, among many other non-work related sites, Ms. Brumfield had accessed a Google document sharing website from her work computer. CP 54-55. Based on these discoveries, ESD Deputy Commissioner Bruce Dempsey determined it was necessary to move forward with a disciplinary process. CP 109-10.

On August 28, 2009, Ms. Brumfield was confronted by Mr. Dempsey with the evidence that ESD had gathered. CP 110. The meeting occurred at the ESD office in Olympia. Mr. Dempsey and Ms. Brumfield were joined at the meeting by a member of ESD Human Resources, Michelle Castenedo, as well as Judy Devoe, a WFSE union representative.⁴ Mr. Dempsey explained the evidence that ESD had uncovered regarding the Access 97 database and the seriousness of the potential breach of security. CP 111.

Ms. Brumfield was issued a pre-disciplinary letter in accordance with her WFSE collective bargaining rights and given notice that she was to be placed on paid home assignment pending a disciplinary decision. CP

⁴ The union is not a party to this lawsuit.

52-55, 332-33. The pre-disciplinary notice informed Ms. Brumfield that ESD was considering taking formal disciplinary action against her for misuse of state resources and failure to meet performance expectations. CP 52-55. She was notified that she had the right to respond to the allegations, which were outlined in the letter, and that her response was required by close of business on September 2, 2009. *Id.* A pre-disciplinary meeting was scheduled for 8:00 a.m. on September 3, 2009. *Id.* Ms. Brumfield was then offered an opportunity to resign prior to ESD moving forward with the disciplinary process. CP 111.

In addition to having WFSE representation present throughout the meeting with Mr. Dempsey, Ms. Brumfield was provided an opportunity to speak by phone and in private with an attorney.⁵ CP 26-28, 111. Having been represented by her union and consulted with an attorney, Ms. Brumfield then signed a resignation letter and a settlement agreement. CP 111-112.

The first document Ms. Brumfield signed was the letter of resignation. CP 62. It was addressed “To Whom It May Concern” and read, “I resign my position at the Employment Security Department as of 5:00 p.m. August 28, 2009.” The date of “August 28, 2009” was crossed

⁵ Ms. Brumfield cannot recall who, specifically, the attorney she called was, but she is clear that she did speak by phone, in private, to an attorney, prior to signing the agreements, and that the attorney advised her. CP 28.

out by Ms. Brumfield and she handwrote “September 1, 2009” on the document.⁶ *Id.* The Plaintiff does not dispute having signed this letter.

The second document signed by the Plaintiff on August 28, 2009, was the settlement agreement, which provided that in consideration for Ms. Brumfield’s resignation, her return of the Access 97 database, and assurances that the database had not been disseminated, ESD would not investigate, not take disciplinary action, not contact any law enforcement agency, and not oppose a claim for unemployment benefits. CP 297. The Plaintiff also does not dispute having signed this document. Had Ms. Brumfield rejected the offer to resign, she would have faced a pre-disciplinary meeting and would have had the opportunity to respond to the allegations.⁷ CP 55, 112.

At some point prior to her resignation, Ms. Brumfield had contacted the State Auditor’s office and filed a complaint.⁸ The complaint

⁶ There is evidence in the record that change in date to September 1 was intended to ensure that Ms. Brumfield had health care through the end of the month. CP 287.

⁷ A third document, a formal settlement agreement between the parties, was executed on September 1, 2009. CP 310-11. Ms. Brumfield did not sign this document, but it was signed on her behalf by her union representative, Judy Devoe. *Id.* Even without her signature, given her August 28, 2009 signatures on the previous resignation letter, CP 62, and the initial settlement agreement, CP 297, the absence of a signature on this document does not alter the voluntary nature of her resignation or demonstrate a lack of consent to enter her home. Because of this, the lack of her personal signature on this document is not relevant to the claims before the court.

⁸ In her complaint for damages, Ms. Brumfield identifies the complaint as having been made in June of 2009, while in her deposition testimony, she claims she filed two complaints, one in February of 2009 and one in March 2009. CP 9-10, 77. Taken in the best light, this contradictory testimony indicates that the record does not allow the

was explicitly not a whistleblower complaint, but rather a “hotline referral,” which, unlike a whistleblower complaint, confers no anonymity to the referrer. CP 10, 57, 68-70. The referral alleged that ESD was improperly paying a contractor to perform work on the Access 97 database. CP 57. Ms. Brumfield repeated rumors she had allegedly heard of “kickbacks” for the governmental work and overspending of tax money. CP 11, 57. ESD was unaware of Ms. Brumfield’s report until she described herself as a whistleblower, without further context, in the July 27, 2009 email to Roper and Seigler. CP 12-13, 236.

Once Ms. Brumfield’s resignation was signed, ESD turned to the pressing issue of retrieving the database. CP 112. The factual evidence regarding that retrieval is not materially disputed: Ms. Brumfield was confronted with the pre-disciplinary letter, she consulted with her union representative, CP 26-28, and a lawyer, CP 27-28, and then she signed an agreement that specifically permitted access to her computer in consideration for specific concessions from ESD. CP 29, 297. Ms. Brumfield and the others in the meeting then collectively went to the parking lot. CP 32-33. The Plaintiff drove her car, with Judy Devoe, the WFSE union representative riding in the Plaintiff’s car. CP 33. ESD

court to find, precisely, when the complaint was made, only that it occurred after having taken the Access 97 database and prior to her announcing that she was a whistleblower on July 27, 2009.

officials followed in another car. CP 32-35. When they arrived at Ms. Brumfield's home both the ESD officials and the union representative were allowed entry into Ms. Brumfield's home. CP 35-36. Ms. Brumfield then signed into her computer and allowed an ESD employee access to her computer. *Id.* The ESD employee deleted all copies of the database, which was, by Ms. Brumfield's admission, on her home computer. CP 37. Then all of Ms. Brumfield's guests left. *Id.*

On September 2, 2009, the Plaintiff attempted to rescind her resignation by certified letter. CP 45-46, 314, 318. The letter was not actually received by ESD until around September 10th, at which time Mr. Dempsey rejected the Plaintiff's request to rescind the resignation. CP 312-13.

IV. PROCEDURAL POSTURE

The Plaintiff filed suit in this matter on September 7, 2012. CP 75. The matter was filed on behalf of Ms. Brumfield through a bankruptcy trustee. *Id.* The bankruptcy court closed the bankruptcy on September 10, 2013, and on July 3, 2014 Mr. Budsberg, the trustee, affirmed to the court that he had been discharged from all responsibilities in the matter.

The Plaintiff was initially represented by counsel, Michael Hanbey, until Mr. Hanbey's withdrawal on February 22, 2013. Ms. Brumfield then represented herself pro se until July 7, 2014, at which

point she retained attorney Nicholas Power. Mr. Power withdrew effective July 31, 2014. Since that point, Ms. Brumfield has represented the matter pro se and without trustee.

On April 4, 2014 the Defendants served and filed a Motion for Summary Judgment requesting dismissal of all claims pursuant to CR 56. The Plaintiff responded and filed a Motion to Strike relating to evidence submitted with the Defendants' motion. Following multiple continuances on motion of the Plaintiff, the matter was heard on August 22, 2014. Judge Carol Murphy granted the Defendants' motion. CP 346-47. This appeal, filed pro se, followed.

V. LAW AND ARGUMENT

When reviewing the denial of summary judgment, the appellate court conducts the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the non-moving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). Review of a summary judgment decision is made de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Under

these standards, the trial court's order granting summary judgment was appropriate in all respects.

A. Trial Court Properly Granted Defendants' CR 56 Motion For Summary Judgment On Claim of Whistleblower Retaliation Because The Plaintiff Cannot Meet The Prima Facie Standard

The trial court properly found that summary judgment was appropriate for the Plaintiff's Whistleblower Retaliation claim. To establish whistleblower retaliation requires a Plaintiff to engage in a statutorily protected activity, through filing a whistleblower complaint, followed by the employer taking an adverse employment action against the employee because of the filing of the complaint. *See* RCW 42.40.050(1)(a), RCW 49.60.210, *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002).

1. Plaintiff Did Not Establish Herself To Be a Whistleblower

There is no dispute that the Plaintiff did not file a Whistleblower complaint, but rather filed a "Hotline Complaint" through the State Auditor's Office. CP 9-11. The primary difference in the two is the absence of anonymity provided to complainants through the hotline system. As a result, the key component to a whistleblower complaint -- the attempt to shield one's identity from employers while revealing frauds or corruptions -- never existed in the present complaint. This is

presumably the reason why the State Auditor explicitly told Ms. Brumfield that she was not a whistleblower. CP 10, 68-70.

In essence, the Plaintiff asks for a conferral of whistleblower status in a situation where she not only failed to file an actual whistleblower complaint, but in a situation where she affirmatively filed a complaint which conferred none of the protections associated with a whistleblower. While the filing of a hotline complaint is a protected activity which cannot be met with retaliation pursuant to RCW 49.60.210, the Plaintiff cannot demonstrate whistleblower retaliation under RCW 42.40. The Plaintiff's whistleblower retaliation claim fails if the Plaintiff was not a whistleblower and was not entitled to protections under Chapter 42.40 RCW. The claim should be dismissed.

2. The Plaintiff Suffered No Adverse Employment Action

Although the Whistleblower statute provides a lengthy and non-exclusive list of potentially retaliatory acts, RCW 42.40.050(1)(b), the Plaintiff identifies only her placement on home assignment and her subsequent separation as retaliatory. Appellant's Brief at 22. Because investigation of potential wrongdoing is not, inherently, retaliatory, *see Connick v. Myers*, 461 U.S. 138, 151, 103 S. Ct. 1684 (1983), and resignation is distinct from termination, no adverse action exists here.

a. Home Assignment Is Not An Adverse Employment Action

The first adverse action identified by the Plaintiff was her placement on home assignment pending the conclusion of the disciplinary process. Appellant's Brief at 22, CP 332-33. Setting aside the fact that Ms. Brumfield spent but two days on home assignment before her resignation took effect, and that the home assignment was paid, the mere direction to place an employee on home assignment is clearly within the legal authority of an employer. The Plaintiff's argument that *Connick* is distinguishable is not substantiated by the cases she cites. The line of cases she identifies actually make clear that an actionable adverse employment action must involve a tangible act by the employer, such as a termination, demotion, or reduction in pay. As one of the cases cited by the Plaintiff states, "'(a)n actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or a termination of job responsibilities,' such as reducing an employee's workload or pay." *Tyner v. State*, 137 Wn. App. 535, 565, 154 P.3d 920 (2007) quoting *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004). Temporary reassignment during investigation is clearly within the power of an employer, regardless of whether a

whistleblower complaint or other assertion of first amendment rights has already been made. *Kirby* at 465.

Even were the Plaintiff able to show the mere act of home assignment to be adverse, the Defendants would still be entitled to summary judgment. Where a plaintiff asserts a prima facie retaliation case, the employer is then allowed to provide evidence of a legitimate, non-discriminatory reason for the adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.2d 440 (2001). The whistleblower statute appears to somewhat limit the legitimate, non-discriminatory reasons available to an employer to a series of documented personnel problems, a single, egregious act to rebut the presumption of retaliation, or that the actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor.⁹ RCW 42.40.050(2).

⁹ The applicability of the *McDonnell Douglas* burden shifting scheme to Chapter 42.40 RCW whistleblower retaliation cases has not been determined in a published case. There is no analytical difference, however, if *McDonnell Douglas* or RCW 42.40.050(2) alone, or a synthesis of the two, is applied in this case. Both require an employee to establish a prima facie case and then provide an opportunity to the employer to respond that there was a legitimate, non-retaliatory reason for the adverse employment action. The only differences are the arguable limitations in the statute of legitimate, non-discriminatory circumstances for adverse action and whether the employee could further respond that the reason provided by the employer was pretext to permit a retaliatory action, as pretext is not an element in RCW 42.40.050(2). Since the Plaintiff makes no argument that the home assignment was pretextual beyond its proximity to the revelation that Ms. Brumfield was a whistleblower, and does not offer any evidence that the home

Even assuming this interpretation of the whistleblower retaliation law, ESD easily demonstrates a series of documented issues, a single egregious issue led to the home assignment and reasons for home assignment unrelated to the whistleblower complaint. CP 52-55, 332-33. The Plaintiff does not rebut the legitimacy of home assignment beyond its timing, and she offers no response to the right of the employer to control the work environment to allow for a full and accurate investigation of allegations. Appellant's Brief at 19-22. Home assignment in anticipation of disciplinary hearings where serious allegations of malfeasance and misappropriation of State property have been made against an employee is clearly legitimate, non-discriminatory and devoid of pretextual intent. To argue otherwise is the logical equivalent of legally forcing a bank to continue to assign a bank teller to the teller window after they have been accused of stealing from the till. The Plaintiff's assignment to home was neither adverse nor retaliatory.

b. The Plaintiff's Resignation Thwarts a Retaliation Claim Based on Termination

The second adverse act alleged by Ms. Brumfield is her separation from employment. The Plaintiff repeatedly refers to this as the "involuntary termination" of her employment. Appellant's Brief at 7-10.

assignment, itself, would somehow have adversely affected her employment, the summary judgment is appropriate under both *McDonnell Douglas* and Chapter 42.40 RCW.

There are no facts that support the Plaintiff's stance that she was terminated. Instead, there are undisputed facts, evidence and testimony that verify that the Plaintiff, having been advised by legal and union counsel, knowingly, voluntarily and in writing resigned her position with ESD. CP 26-32, 62.

It is further undisputed that in exchange for her resignation, along with her cooperation in the recovery of the Access 97 database, the Plaintiff received several concessions from ESD. CP 297. This consisted of ESD not contacting law enforcement regarding the conversion of ESD's property, not opposing Ms. Brumfield's application for unemployment benefits, providing neutral references to future employers and, sealing the information regarding her misuse of the Access 97 database. *Id.* In addition, the resignation itself led to the cessation of the investigation and waiving any disciplinary actions against Ms. Brumfield. CP 110. Finally, the shift of resignation date from August 28 to September 1 permitted the Plaintiff to receive medical benefits until the end of September. CP 287. In contractual terms, the Plaintiff received consideration in exchange for her resignation and cooperation. *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007)(citing *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256, 257 (1891)).

A resignation is presumed voluntary, and the employee has the burden of introducing evidence to rebut that presumption. *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035 (1996). Even a resignation given to avoid an explicit threat of termination is a voluntary expression of an employee's free will unless the employee can demonstrate that the employer knew or believed that the threatened termination could not be substantiated. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 396, 928 P.2d 1108 (1996). The Plaintiff was indisputably told on August 28, 2009 that the disciplinary process was to begin and that if the allegations were established as true, she could be terminated from employment. CP 110-11. There is no evidence that ESD specifically threatened termination, nor could ESD make such a threat in the first place, as a unionized employee cannot be summarily terminated. CP 110.

The Whistleblower Statute itself contemplates that a whistleblower complaint cannot be used as a shield against any cognizable discipline. RCW 42.40.050(2). The statute allows discipline, even following a whistleblower complaint, where a preponderance of evidence shows documented personnel problems or a single egregious event, or where the agency can justify the action by reasons unrelated to the employees whistleblower status. *Id.* The undisputed facts show both documented personnel problems, in the form of ongoing performance issues and

unprofessional behavior, and a single, egregious act, in the form of having taken a highly confidential, highly valuable ESD document without authorization. Thus, even if the home assignment or notice of intent to discipline were deemed to constitute an adverse employment action, ESD was fully within its rights under the whistleblower statute to take action.

Finally, the very act of resignation ended ESD's disciplinary process. Consequently, argument that the Plaintiff was "terminated" is speculative. Speculation, even if set forth in affidavits or declarations, is not competent evidence in response to a motion for summary judgment. *Chen v. State of Washington*, 86 Wn. App. 183, 191, 937 P.2d 612 (1997). Simply put, ESD never was forced to make an employment decision on the Plaintiff because of her resignation. Not only was the decision on discipline still yet to be made on August 28, 2009, the Plaintiff's opportunity to respond to the allegations was still several days in the future at the point that she resigned.¹⁰ CP 55. The outcome of this hypothetical disciplinary process is unknowable and is therefore the very definition of speculation. In fact, the pre-disciplinary letter is quite clear

¹⁰ Pursuant to the WFSE CBA, the Plaintiff was encouraged to respond in writing to the allegations made in the pre-disciplinary letter, and that response was due by 5:00 p.m. on September 2, 2009, four days after the resignation letter was signed and the day after the effective date of resignation identified in the Plaintiff's letter of resignation. CP 52-55, 62. Furthermore, the Plaintiff was scheduled for a pre-disciplinary meeting on September 3, 2009 at 8:00 a.m. The Plaintiff was specifically permitted union representation at that meeting. *Id.*

that the Plaintiff was encouraged to respond to the allegations and provided avenues to do so. CP 55. The letter further stated explicitly that ESD would take into account any responsive materials and “will make no final decision about what, if any, disciplinary action(s) to recommend until [the Plaintiff had] the opportunity to respond.” *Id.* The Plaintiff offers no evidence or testimony that a final decision had in fact been made, much less that the decision was to terminate the Plaintiff.

Without such evidence, the Plaintiff lacks an adverse action in her separation from employment with ESD. A retaliation claim does not meet the prima facie standard without an adverse employment action. The Plaintiff’s retaliation claim was properly dismissed and the trial court’s order should be affirmed.

3. Plaintiff’s Attempt to Rescind Her Resignation Was Untimely

The Plaintiff attempts to argue a question of fact exists regarding the voluntariness of her resignation as a result of her attempt to rescind the resignation. CP 314, Appellant’s Brief 14-17. In the case cited by the Plaintiff, *Micone v. Town of Steilacoom Civil Service Comm’n*, 44 Wn. App. 636, 722 P.2d 1369 (1986), the appellate court found that an attempt to rescind could generate a question of fact. *Id.* at 642. This case is not applicable to the Plaintiff’s situation.

As discussed, *supra*, a resignation is presumed voluntary, and the employee has the burden of introducing evidence to rebut that presumption. *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035 (1996). The assumed voluntariness of a resignation can be vitiated by an attempt to withdraw the resignation. *Micone* at 642 citing *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574 (1983). Under *Scharf*, however, the attempt must come before the effective date of the resignation. *Id.* (citing *Cunningham v. United States*, 423 F.2d 1379, 1384-85, 191 Ct.Cl. 471 (Ct.Cl. 1970)). The Plaintiff acknowledged under oath that she did not send the letter attempting to rescind her resignation until September 2, 2009, the day after her resignation was effective. CP 45-46. Because there is no dispute that the Plaintiff's attempt to rescind came after the effective date of her resignation on September 1, 2009, the holding of *Micone* does not apply here and the attempt to rescind has no bearing on voluntariness.

B. Trial Court Properly Granted Defendants' CR 56 Motion For Summary Judgment On Claim of Wrongful Termination Because The Plaintiff Cannot Meet The Prima Facie Standard

An employment relationship that is not governed by a definite contract is generally terminable at will. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) created a narrow exception to this general rule, a common law action for "wrongful discharge in violation of

public policy”. *Thompson*, 102 Wn.2d at 231-32. Where a clear mandate of public policy exists, the court will not sanction a discharge.

This cause of action is limited to discharges. In *White v. State of Washington*, 131 Wn.2d 1, 19, 929 P.2d 396 (1997), the Washington Supreme Court was invited to expand this right for a state employee who alleged that she was transferred in retaliation for reporting suspected patient abuse. The court declined to expand wrongful discharge to transfers or any non-discharge related employment action. As stated in *White*, “(s)ubjecting each disciplinary decision of an employer to the scrutiny of the judiciary would not strike the proper balance between the employer’s right to run his business as he sees fit and the employee’s right to job security. This is particularly true in instances like this one where an employee’s rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes.”¹¹ *White*, 131 Wn.2d at 20 (internal citations omitted). Accordingly here, because Ms. Brumfield was not discharged by ESD, she lacks a cause of action in wrongful termination in violation of public policy. This claim must be dismissed.

¹¹ As indicated by the *White* decision, “[B]y recognizing a cause of action for employer actions short of an actual discharge, the court would be opening a floodgate to frivolous litigation and substantially interfering with an employer’s discretion to make personnel decisions.” *White*, 131 Wn.2d at 19.

Ms. Brumfield argues that her resignation amounted to termination because she was under duress and she identifies several circumstances in which she alleges she stated resistance to ESD's offer to resign.¹² Appellant's Brief at 15-16. If a resignation is made under duress, a plaintiff can argue that she was constructively discharged. See *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035, 1039 (1996). Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable, thereby forcing the employee to resign.¹³ *Id.* "The inquiry is 'whether the working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" *Id.* (citations omitted).

Duress compelling resignation is not measured by a plaintiff's subjective perception, however, but rather by whether, objectively, there is evidence that the employer threatened to terminate the employee without good cause to do so. *Id.* at 398-99. See also *Christie v. United States*, 518 F.2d 584, 587-88 (Ct.Cl. 1975), *Barrett v. Weyerhaeuser Co. Severance*

¹² Ultimately, these statements are not competent evidence that would permit the denial of summary judgment as they are purely and entirely self-serving assertions of facts at issue. See *Chen v. State of Washington*, 86 Wn. App. 183, 191, 937 P.2d 612 (1997). These assertions would have evidentiary value if somehow corroborated, but they are not.

¹³ Whether working conditions are "intolerable" is typically a jury question, but absent evidence of aggravating circumstances or a continuous pattern of discrimination, the trial court may find that constructive discharge claim fails as a matter of law. *Sneed*, 80 Wn. App. at 850. There is no evidence of aggravating circumstances or a continuous pattern of discrimination in this case.

Pay Plan, 40 Wn. App. 630, 638, 700 P.2d 338 (1985). There is no legitimate argument that ESD would have lacked good cause to terminate Ms. Brumfield had the disciplinary process had been allowed to run to its conclusion.¹⁴ CP 52-55. Absent evidence that her resignation was the byproduct of a deception by ESD regarding the seriousness of the allegations and potential discipline presented in the notice of intent to discipline, the Plaintiff cannot demonstrate the requisite duress to establish constructive discharge. CR 56 summary judgment was appropriate and the decision of the trial court should be affirmed.

C. Trial Court Properly Granted Defendants' CR 56 Motion For Summary Judgment On Claim of Invasion of Privacy

Invasion of Privacy is a common law tort recognized by the State of Washington. *Reid v. Pierce County*, 136 Wn.2d 195, 206, 961 P.2d 333 (1998). To establish a claim of invasion of privacy, a plaintiff must show an intentional and deliberate intrusion into her solitude, seclusion or private affairs. *Reid v. Pierce County*, 136 Wn.2d 195, 206 (1998), *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 505-06, 844 P.2d 403 (1993). Consent or permission to enter property can be provided by a possessor of property's conduct, omissions, through local

¹⁴ Indeed, as discussed above, the Plaintiff lacks evidence that she was threatened with termination at all: The only evidence supporting her contention of a threat comes from her own testimony. Regardless, even taking the facts in the light most favorable to the Plaintiff, she cannot establish that a threat, if made, was not based on a good cause belief by ESD of the potential outcome of discipline.

customs, and through oral or written consent. *See eg, Singleton v. Jackson*, 85 Wn. App. 835, 839-40, 935 P.2d 644 (1997) adopting *Restatement (Second) of Torts* § 330, cmt. c and §332, cmt. b (1965). Consent can be expressed by actions other than words. *Singleton* at 840.

The undisputed facts presented to the court do not support Ms. Brumfield's claim of invasion of privacy. Whether Ms. Brumfield was pleased at the ESD employees' arrival at her home or later regretted their entry is irrelevant. At the time of entry, ESD employees had been expressly permitted to enter by Ms. Brumfield through word, deed, and document. Based on these undisputed facts the Plaintiff cannot show that there are any remaining issues of material fact.

1. No Genuine Issues Of Material Fact Exist Supporting An Invasion of Privacy Cause of Action

A series of undisputed facts prevent an argument that Ms. Brumfield suffered an invasion of privacy on August 28, 2009. Foremost of these is the signed agreement allowing ESD access to her computer. CP 297. This document explicitly grants ESD "access to her home computer file." *Id.* The Plaintiff signed this document. *Id.* She acknowledges that prior to signing the document ESD permitted her to consult with an attorney in private. CP 27-28. Throughout the entirety of

the meeting in which the document was discussed, the Plaintiff was represented by her union. CP 26-28.

In addition to this document, the Plaintiff's own sworn deposition testimony confirms she consented to the ESD employees' entry. She confirms she led ESD employees to her home. CP 34-35. She confirms that her union representative was not only present in this procession, but that the Plaintiff in fact gave that union representative a ride in her car. CP 33. She confirms she opened her front door and permitted the ESD employees and her union representative into her home. CP 35-36. She confirms she escorted an ESD IT employee to her home computer, turned it on, signed in, and allowed that ESD IT employee to work on her computer. CP 36-37. At no point during the 30 minutes that the ESD and WFSE employees were in Ms. Brumfield's home did she contact her lawyer, police or any other authorities.¹⁵ CP 36. Factually, there is no genuine dispute that would permit a finder of fact to find an invasion of privacy.

¹⁵ The Plaintiff did call police to report the "invasion" eventually, on October 22, 2009, 54 days after the event. CP 341. Even in that police report, however, there is no actual report of invasion of privacy, but rather "suspicious circumstances" connected to concerns over her and her child's safety. *Id.* The report does mention the August 28 event – albeit without mentioning the date it occurred – in stating that "(ESD) scared her and made her let them into her home." Even this statement, cited as after-the-fact proof of her objection to the entry, tacitly acknowledges that ESD entered with the Plaintiff's permission, albeit by "scaring" her.

2. The Parol Evidence Rule Does Not Apply To This Matter

The parol evidence rule states that “parol or extrinsic evidence is not admissible to add to, subtract from, vary or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud or mistake.” *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990)(quoting *Buyken v. Ertner*, 33 Wn.2d 334, 341, 205 P.2d 628 (1949)).

Ms. Brumfield alleges that the terms of the August 28, 2009, agreement with ESD, which granted ESD “access to her home computer file” (CP 297), did not include specific authority to enter her home, and thus ESD lacked contractual right when they went into Ms. Brumfield’s house. Appellant’s Brief at 22-23, CP 297. This is a misinterpretation of both the contract and the parol evidence rule. It is also inconsequential to the case, as the elimination of contractual privilege to enter the Plaintiff’s home would not relieve her from the remainder of the undisputed facts that indicate that she gave consent for ESD officials to enter her home.

The Plaintiff incorrectly presumes that entry into her home was an inconsistent addition to the contract formulated by the parties, which violated the parol evidence rule Appellant’s Brief at 22-24. The entry into the Plaintiff’s home did not violate the rule. Rather, going to the

computer and conducting an examination to reach the files described in the contract is a clearly implied element of the contract. CP 297.

The parol evidence rule does not take the rigid and unrealistic position that a contract can contain no implied terms. This kind of legal hyperformalism was eradicated in 1917 by Justice Cardozo. *See Wood v. Duff-Gordon*, 222 N.Y. 88, 89 (1917) (“The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed. If that is so, there is a contract.” (internal citations omitted)). The Plaintiff, thus, unrealistically demands that the August 28, 2009 contract not only had to identify the desired object of examination (the home computer file), but also that it would specify that ESD would be going into the Plaintiff’s home and using her computer as a necessary predicate to examination of the file in her home.

This stance also fails to account for the facts. The parties to the contract all gathered and immediately left the signing of the contract to go to the parking lot, drive in caravan to the Plaintiff’s home and be invited into the Plaintiff’s home. CP 34-37. This is not evidence of contradictory parol evidence terms but rather evidence of the agreed-upon execution to the terms of the contract agreed upon on August 28, 2009.

Finally, the evidence surrounding the events of August 28, 2009, can stand independently from the contract. This evidence denies a finding of invasion of privacy, even without turning to the signed contract. In all events, the decision of the trial court was proper and the CR 56 decision should be affirmed.

D. Plaintiff's Motion To Strike Was Properly Denied

In her response to summary judgment, the Plaintiff filed a Motion to Strike evidence and testimony provided in support of the Defendants' Motion for Summary Judgment. The motion was considered and not granted. CP 346-47. Review of a denied motion to strike that was included with a motion for summary judgment is de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Denial of the motion clearly did not materially alter the underlying decision on the merits of the Defendants' Motion for Summary Judgment. Reversal of the Motion to Strike would not affect the basic issues that demanded dismissal of the Plaintiff's claims, as the dismissal of the Plaintiff's claims can be accomplished entirely through the Plaintiff's admissions and statements under oath. Nonetheless, the Motion to Strike was properly denied.

1. Dempsey Hearsay Issues

Ms. Brumfield objects to the use of statements from her final supervisor, Pat Siegler, that were recounted by Bruce Dempsey in his declaration. Appellant's Brief at 24-29; See CP 109-110. Any statements regarding Ms. Brumfield's specific employment issues while working at the Work Source Training Academy are not offered for the truth of the matter asserted, but rather to explain the inclusion of the employment issues in the pre-disciplinary letter. CP 52-55. *See Domingo v. Boeing Employees' Credit Union*, 124 Wn .App. 71, 79, 98 P.3d 1222 (2004). The factual truth of these issues that arose between the Plaintiff's June 2009 reassignment until August 28, 2009 is not relevant to this case given the fact that the Plaintiff voluntarily resigned before ESD was made to make a disciplinary decision.

If Ms. Brumfield's resignation were to be deemed involuntary for purposes of retaliation, however, and ESD was required to justify her "termination," the recited facts would still be relevant as evidence demonstrating a pattern of employment performance issues justifying action by the employer under RCW 42.40.050(2). ER 803(a)(3), *Domingo* at 79 fn 13. *See also Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 787 fn 12, 138 P.3d 144 (2012), *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, 86-87, 272 P.3d 865 (2012)

2. Roper Hearsay Issues

Again, the Plaintiff objects to statements in declarations that are not offered for the truth of the matter asserted. These statements regard the functionality of the Access 97 database. See CP 102-106. The truth of the functionality or non-functionality of the database is irrelevant to the Plaintiff's claims because whether Ms. Brumfield accurately believed there was an issue with the database is irrelevant to the legal question of whether retaliation and wrongful termination occurred. It is the fact that Ms. Brumfield removed the database without permission—regardless of its functionality--that justifies her employer launching an investigation and notifying her of the possibility of discipline.

3. Citation To Legal Authorities

The response to the Plaintiff's Interrogatory 9, which requested all legal bases relied upon to support any defense against the claims of the Plaintiff, was admittedly incomplete.¹⁶ CP 161. The Plaintiff offers no citation to any legal authority that would justify any alteration of the Motion for Summary Judgment for a faulty response to this interrogatory.

¹⁶ The response made to this interrogatory stated that, without waiving objections for work product, the Defendants' answer was that the Plaintiff's claims were not justifiable under RCW 49.60. CP 161. The reference to RCW 49.60 alone is admittedly error, as RCW 42.40 should also have been included in response to this interrogatory. The Plaintiff argues that the reference to the WLAD is incorrect, but the relevant portion of RCW 42.40.050(1)(a) specifically provides an individual who can be classified as a whistleblower is entitled to "remedies provided under chapter 49.60 RCW." Regardless, the Plaintiff can show neither prejudice nor surprise in the failure to cite RCW 42.40 in interrogatories.

There is no evidence of prejudice based upon this error, and even if there were, the length of time that elapsed between the State's filing of its Motion for Summary judgment, on April 4, 2014, and the ultimate date which the motion was argued, August 22, 2014, provided ample time for the Plaintiff to ascertain the legal basis for the State's opposition to her claims. There is no evidence that the Plaintiff was unaware that the Defendants denied their ability to establish a case under the whistleblower statute.

4. Citation to Affirmative Defense Evidence Allegedly Undisclosed

The Plaintiff complains that the court failed to strike evidence from the defendant's Motion for Summary Judgment that had not been provided in response to Plaintiff's interrogatory 20. Appellant's Brief at 35-44. Discovery issues were addressed through a Motion for Sanctions filed by the Plaintiff on March 26, 2014, and denied by the trial court on April 25, 2014.¹⁷ The Plaintiff concedes that this motion was denied.¹⁸ Appellant's Brief at 40. Even if she were permitted to resurrect the argument under

¹⁷ The pleadings and order for the Motion for Sanctions and the trial court's subsequent denial of the Plaintiff's Motion for Reconsideration are not part of the record before the court on appeal.

¹⁸ An appeal of a motion to compel discovery can only be reversed for abuse of discretion. *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006).

different grounds for the purpose of the denied Motion to Strike, the Plaintiff's stance is entirely unreasonable.

The interrogatory which this matter pertained to is overbroad and burdensome on its face,¹⁹ and the objection on those grounds is entirely justified pursuant to the case cited by the Defendants, *Weber v. Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705 (1967). The State fulfilled its responsive duty to such an overwhelmingly broad question by objecting and then stating the general basis of the State's defense. CP 172-73. The court found this response was proper in the Plaintiff's previous Motion for Sanctions as well as in the Motion to Reconsider the Motion for Sanctions, neither of which are part of the record provided to the court.

The basic issue that existed then – and continues to exist now – with the Plaintiff's motion was the fact that it presumed a required disclosure of facts and evidence far beyond a reasonable response. The Plaintiff apparently felt that any fact that wasn't disclosed in the

¹⁹ "INTERROGATORY NO. 20: State with specificity each and every fact upon which you rely to support each and every Affirmative Defense as they appear listed in your Answer to Complaint. ANSWER: Objection. This interrogatory is overly broad and unduly burdensome in its request for each and every fact, which supports the affirmative defenses. *Weber v. Biddle*, 72 Wn.2d 22, 431 P.2d 705 (1967). This question also calls for the mental impressions and legal theories of defense counsel. This information is work product and not discoverable. Furthermore, this kind of open-ended interrogatory is a trap for Defendants because its can easily produce claims that the Defendants did not completely respond to the interrogatory. As such, this is unduly burdensome.

Without waiving any objections, Plaintiff, after having an opportunity to consult with her union representative and her attorney, voluntarily allowed Employment Security Department employees into her home to remove the Access Database. Plaintiff also voluntarily resigned her position with Employment Security." CP 172-73

interrogatory, no matter how minute, was a violation of CR 33. The court felt otherwise, in no small part because of the Plaintiff's failure to seek discovery in any form beyond the initial interrogatories. Ms. Brumfield took not one deposition, made no requests for admission, and propounded no supplemental interrogatories or requests for production. The Plaintiff bears responsibility to investigate her case and the Motion to Strike was properly denied.

5. Citation to Evidence In Support of Defense Against Retaliation Claim Not Disclosed in Discovery

The Plaintiff complains that the court failed to strike evidence from the defendant's Motion for Summary Judgment that had not been provided in response to Plaintiff's Interrogatory 18.²⁰ Appellant's Brief at 44-45.

²⁰ **INTERROGATORY NO. 18. (Retaliation):**

Please describe in detail each and every incident on which you rely in support of your defenses to Plaintiff's allegation that the Defendants engages in acts of retaliation against her for filing a whistleblower complaint. For each incident, please identify:

- a. The names of person involved;
- b. The position of each person;
- c. The date, time and place of each incident;
- d. The nature of each person's involvement;
- e. The names and addresses of any witnesses to each incident and the substance of the witness's knowledge; and
- f. How each incident relates to your claims of retaliation.

ANSWER: Objection. This interrogatory is overly broad and unduly burdensome in its request for each and every "incident" which supports the affirmative defense. *Weber v. Biddle*, 72 Wn.2d 22, 431 P.2d 705 (1967). This question also calls for the mental impressions and legal theories of defense counsel. This information is work product and not discoverable. Furthermore, this kind of open-ended interrogatory is a trap for Defendants because its can easily produce claims that the Defendants did not completely respond to the interrogatory. As such, this is unduly burdensome.

Without waiving any objections, Defendants do not believe Plaintiff was retaliated against." CP 170-71.

As with the demand to strike evidence regarding affirmative defenses, the Plaintiff complains of being surprised or misled regarding discovery, but, again, the Plaintiff chose to do no affirmative discovery beyond propounding a single set of interrogatories. The issue was raised and properly denied in a Motion for Sanctions and was again denied in the Plaintiff's Motion to Strike.

This discovery request was unrealistically broad and burdensome, which led to objection under *Weber v. Biddle*. The answer provided following those objections was, simply, that the Plaintiff was not retaliated against. CP 171. This remains the best answer to that interrogatory. The Plaintiff, apparently based on a misapprehension of the burden of proof in this matter, argues that the Defendants should have to articulate the reasons that they did not retaliate. *Milligan* at 638 (An employee must establish a prima facie case of retaliation). In other words, Plaintiff demands the Defendants prove their innocence and do so in writing, as part of discovery. The burden of proof for the claims lies with the Plaintiff, however, and if there was no retaliation at all then that is the only answer that need be provided.

6. Spoliation

The Plaintiff claims that general files and voicemails were destroyed, but does not identify their content or their relevance.

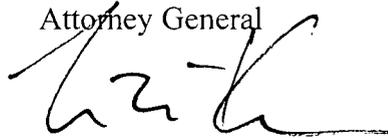
Appellant's Brief at 45-48. Even if there were acts of spoliation, the Plaintiff has not offered any evidence that the mere act of destroying the alleged documents would alter any material fact in this case. In fact, these alleged documents could not change the undisputed facts before the court: Ms. Brumfield took the ESD database without permission, and when confronted with that fact, Ms. Brumfield resigned and signed a written agreement allowing ESD to secure the database. These facts, standing alone, justify the trial court's grant of CR 56 relief to the Defendants.

VI. CONCLUSION

The Thurston County Superior Court properly granted summary judgment in favor of the Defendants in this matter. Ms. Brumfield resigned her position voluntarily and invited ESD employees into her home to secure a database which she had improperly taken. The trial court's CR 56 order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of April, 2015.

ROBERT W. FERGUSON
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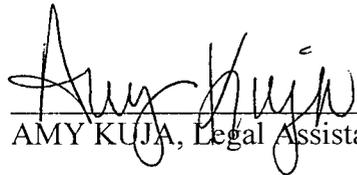
PROOF OF SERVICE

I certify that I served a copy of the *Brief of Respondent* on appellant's counsel of record on the date below via e-mail, US Mail, and Legal Messenger service with guaranteed delivery by Thursday, April 23, 2015, as follows:

Kristine J. Brumfield
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kristi-is@comcast.net

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

DATED this 23rd day of April, 2015, at Tacoma, WA.



AMY KUJA, Legal Assistant

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NO. 46653-8-II

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

KRISTINE BRUMFIELD, et. al.,

Appellants,

v.

PAUL TRAUSE, Commissioner,
BRUCE DEMPSEY, Deputy Assistant
Commissioner, DEPARTMENT OF
EMPLOYMENT SECURITY of the
State of Washington, and the STATE
WASHINGTON,

Respondents

AMENDED
CERTIFICATE OF
SERVICE

I, Natasha Cepeda, declare under penalty of perjury under the laws of the State of Washington that that on April 23, 2015 the undersigned caused to be served in the manner indicated below a copy of:

1. Brief of Respondent and Amended Certificate of Service via email U.S. mail, and ABC Legal Messenger to the appellant acting pro se:

Kristine Brumfield

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

DATED this 23rd day of April, 2015 in Tacoma, Washington.

/s/ *Natasha Cepeda*

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