

No. 48627-0-II

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

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DONALD RUTHERFORD, an individual and  
ROBERTA CRAWFORD, an individual,  
Appellants/Defendants,

v.

IBEW HEALTH & WELFARE TRUST OF SOUTHWEST  
WASHINGTON,  
Respondent/Plaintiff

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**APPELLANTS' REPLY BRIEF**

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## I. ARGUMENT

IBEW's Response fails to address the proper and requisite analysis to determine this case on appeal. This Court must determine whether IBEW pled a cause of action under 29 U.S.C. § 1132(a)(3) or a state common law fraud claim. In its Response, however, IBEW seemingly suggests it pled both causes of action,<sup>1</sup> and yet confoundingly agrees 29 U.S.C. § 1132 preempts the claim IBEW allegedly brought.<sup>2</sup> Here, it is clear that IBEW both intended to and actually brought a cause of action under 29 U.S.C. § 1132, thereby depriving the state court of jurisdiction. In the alternative, even if this Court determines IBEW brought a state law fraud claim, IBEW fails to demonstrate compliance with the heightened pleading requirements for fraud. This Court should reverse the trial court and dismiss for lack of jurisdiction.

### A. IBEW's preemption analysis considers the wrong preemption statute.

It is well-accepted that ERISA preemption is a matter of federal law. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 830,

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<sup>1</sup> Response at pg. 1 (“*In addition to the fraud claim*, IBEW... asserted *Appellants' actions caused such harm to the Plan as to give rise to a claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).*”) (emphasis added); *see also* Response at pg. 7 (“IBEW asserted a state law fraud claim against Appellants, which based on the ERISA status of the Plan, also gave rise to an ERISA § 502(a)(3) claim...”).

<sup>2</sup> Response at pg. 6 (“Appellants are correct to point out that federal courts maintain exclusive federal jurisdiction over ERISA § 502(a)(3) claims.”).

108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). On matters of federal law, Washington courts are bound by the decisions of the United States Supreme Court. *Home Ins. Co. of N.Y. v. N. Pac. Ry.*, 18 Wash.2d 798, 808, 140 P.2d 507 (1943). Decisions of the federal circuit courts are “entitled to great weight” but are not binding. *Id.*

In its response, IBEW conducts a preemption analysis pursuant to 29 U.S.C. § 1144(a). *See* Response at 6-10. However, because IBEW’s Complaint set forth a claim pursuant to 29 U.S.C. § 1132, 29 U.S.C. § 1132 and its preemption clause, also, and most directly, applies here. Under a 29 U.S.C. § 1132 analysis, the trial court lacked jurisdiction to adjudicate the claim alleged by IBEW.

IBEW admits the acts underlying the Complaint give rise to a claim under 29 U.S.C. § 1132. Response at 1 (“*In addition to the fraud claim, IBEW... asserted Appellants’ actions caused such harm to the Plan as to give rise to a claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).*”) (emphasis added); *see also* Response at 7 (“IBEW asserted a state law fraud claim against Appellants, which based on the ERISA status of the Plan, *also gave rise to an ERISA § 502(a)(3) claim...*”); Response at 10-11 (alleging 29 U.S.C. § 1132 affords IBEW the requested relief); Response at 12 (“Appellants err in stating that the only cause of action alleged in the Complaint is pursuant to ERISA, not a common law fraud

claim.”); Response at 13 (“As drafted, the Complaint clearly states a cause of action in fraud, and that secondarily, this fraud gives rise to a claim under ERISA.”); Response at 15 (“Under ERISA 502(g)(1), 29 U.S.C. § 1132(g)(1) reasonable attorney fees are available to either party...”).

To this end, IBEW’s Response reflects the language of the Complaint. The Complaint clearly alleged a cause of action pursuant to 29 U.S.C. § 1132. The Complaint states, “The above actions... give rise to a restitution claim under 29 U.S.C. § 1132(a)(3).” CP at 4 (emphasis added); *see also* CP at 2 (“This Court has jurisdiction under... 29 U.S.C. § 1132(a)(3).”).

Moreover, the record clearly reflects IBEW sought relief pursuant to ERISA, not a fraud claim. In its Motion for Default, IBEW’s supporting declaration reads:

Pursuant to ERISA, 29 USC § 1132(a)(3), Plaintiff is entitled to entry of judgment against each of the defendants... and attorney fees and costs... pursuant to ERISA § 502(g)(1).

CP at 33 (emphasis added).

However, IBEW wholly fails to address the scope of 29 U.S.C. § 1132(e)’s preemption. *But see* Response at 6 (“Appellants are correct to point out that federal courts maintain exclusive federal jurisdiction over ERISA § 502(a)(3) claims.”). Appellants noted in their opening brief, 29

U.S.C. § 1132(e) expressly preempts actions brought pursuant to 29 U.S.C. § 1132 generally. On the whole, IBEW admits (1) its claim arises pursuant to 29 U.S.C. § 1132 yet (2) fails to address 29 U.S.C. § 1132's specific preemption provision.<sup>3,4</sup>

To this end, the plain language of 29 U.S.C § 1132(1)(e) expressly states, "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter..." IBEW's complaint alleged jurisdiction and venue pursuant to 29 U.S.C. § 1132 and "a restitution claim under 29 US.C [sic] § 1132(a)(3)". CP at 2, 4. Accordingly, because IBEW sought relief pursuant to 29 U.S.C. § 1132, likewise, 29 U.S.C. § 1132(e)'s preemption clause applies. The trial court lacked subject matter jurisdiction to hear and decide IBEW's claim below.

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<sup>3</sup> For reference, 29 U.S.C. § 1132(1)(e) reads:

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

<sup>4</sup> At best, IBEW's Response reflects IBEW abandoned its argument that it brought the underlying action pursuant to ERISA. However, if IBEW abandoned its assertion that it brought an ERISA claim, it cannot simultaneously request fees pursuant to ERISA. [CITE]

**B. Authority cited by IBEW confirms IBEW could recover only pursuant to 29 U.S.C. § 1132 in federal court.**

In its Response, at numerous points, IBEW relies upon *Providence Health Plan v. McDowell*, 385 F.3d 1168 (9th Cir. 2004). However, ironically, *Providence Health Plan, supra*, confirms IBEW may only recover in federal court.

There, Providence filed a breach of contract claim against the McDowells. *Providence Health Plan*, 385 F.3d at 1171. According to Providence, the McDowells' insurance contract required the McDowells to remit funds to Providence for the benefits paid by Providence in the event the McDowells recovered from a third party. *Providence Health Plan*, 385 F.3d at 1171. The McDowells removed the contract action to federal court; Providence sought remand. *Providence Health Plan*, 385 F.3d at 1171.

The 9<sup>th</sup> Circuit began its reasoning with ERISA's general preemption provision, 29 U.S.C. § 1144(a). *Providence Health Plan*, 385 F.3d at 1171. The Court explained 29 U.S.C. § 1144(a) did not preclude recovery because "[a]djudication of [the] claim does not require... interpret[ation of] the plan." *Providence Health Plan*, 385 F.3d at 1172. Specifically, the Court noted "Providence has already paid ERISA benefits

on behalf of the McDowells, and they are not disputing the correctness of the benefits paid.” *Providence Health Plan*, 385 F.3d at 1172.

However, the Court’s analysis did not end there; instead it then considered whether Providence’s claim fell “within ERISA’s civil enforcement provision, 29 U.S.C. § 1132(a).” *Providence Health Plan*, 385 F.3d at 1172. The 9<sup>th</sup> Circuit noted, “Providence’s only vehicle for relief in addressing violations or seeking enforcement of a plan is § 1132(a)(3).” *Providence Health Plan*, 385 F.3d at 1172. The 9<sup>th</sup> Circuit reasoned 29 U.S.C. § 1132 did not preempt Providence’s claim because Providence sought legal, rather than equitable relief. *Providence Health Plan*, 385 F.3d at 1173. The court explained, 29 U.S.C. § 1132(a) “allows a fiduciary to seek only equitable relief for violation [sic] of the plan.” *Providence Health Plan*, 385 F.3d at 1173. Accordingly, the 9<sup>th</sup> Circuit remanded the claim back to the state court. *Providence Health Plan*, 385 F.3d at 1173.

The *Providence* Court’s reasoning confirms the Appellants analysis. As an initial matter, *Providence* suggests 29 U.S.C. § 1144 may preempt IBEW’s claim generally. Unlike in *Providence*, the dispute here concerns “the correctness of the benefits paid” which requires interpretation of the plan. The record reflects IBEW provides benefits to unwed parties. CP at 2 (stating IBEW provides benefits to spouses and

“domestic partners”); CP at 73 (letter adding Roberta Crawford on plan as “domestic partner”). Thus, unlike in *Providence, supra*, as plead, the state court must address, and interpret, the language of the plan. Preemption pursuant to 29 U.S.C. § 1144 likely applies.

Moreover, the *Providence* analysis reflects 29 U.S.C. § 1132 and its preemption provision operates independently from 29 U.S.C. § 1144. Thus, this Court must also conduct an analysis under 29 U.S.C. § 1132. As stated above, IBEW wholly ignores 29 U.S.C. § 1132(e), except to concede, “Appellants are correct to point out that federal courts maintain exclusive federal jurisdiction over ERISA § 502(a)(3) claims.” Response at 6.

Further, *Providence, supra*, confirms 29 U.S.C. § 1132 preempts IBEW’s claim now. As expressed in *Providence, supra*, 29 U.S.C. § 1132 preempts claims based in equity. IBEW, apparently, sought equitable relief. IBEW’s Complaint alleged the Appellants acts gave “rise to a restitution claim under 29 US.C. [sic] § 1132(a)(3). CP at 4. By citing 29 U.S.C. § 1132(a)(3), which applies to equitable claims, IBEW’s Complaint, on its face, seeks equitable relief. This further comports with the Complaint’s specific request for “restitution,” which sounds in equity. *See Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211-15, 122 S. Ct. 708, 714, 151 L. Ed. 2d 635 (2002) (explaining restitution

sounds in either equity or law based upon the relief requested). IBEW cannot now disavow the language of its Complaint and allege it seeks a legal remedy when it clearly sought equitable relief thereby triggering 29 U.S.C. § 1132's preemption.

**C. Even if IBEW did not plead a claim under 29 U.S.C. § 1132, IBEW's fraud claim cannot survive.**

IBEW's Response alleges its Complaint set forth a claim for common law fraud. However, IBEW's Response offers only a cursory analysis and fails to address salient defects. Namely, IBEW's Complaint (1) failed to set forth a common law claim for fraud and (2) further failed to plead fraud with the requisite specificity.

*1. The Response compounds the error of the Complaint by admitting the Complaint primarily set forth an ERISA claim.*

As a preliminary matter, IBEW's Response compounds the error in its Complaint. Pleadings must "give notice to the court and the opponent of the general nature of the claim asserted." *Evergreen Moneysource Mortgage Co. v. Shannon*, 167 Wn. App. 242, 255–56, 274 P.3d 375 (2012) (quotations omitted). "A complaint must state the nature of a plaintiff's claims and the legal theories upon which the claims rest." *Evergreen Moneysource Mortgage Co.*, 167 Wn. App. at 256.

The Response alleges, “As drafted, the Complaint clearly states a cause of action in fraud, and that secondarily, this fraud gives rise to a claim under ERISA.” Response at 13. However, the Complaint only sets forth a single cause of action or claim. CP at 4 (“The above actions of the Defendants rise to the level of fraud and/or serious wrongdoing and thus give rise to a restitution claim under 29 U.S.C [sic] § 1132(a)(3).”) (Emphasis added). Thus, the Response necessarily concedes IBEW failed to give fair notice it sought relief under a fraud theory. The Response admits “this fraud gives rise to a claim under ERISA.” Response at 13. The Appellants reasonably believed IBEW alleged a “claim under ERISA” as IBEW now admits, not a common law fraud claim. Stated differently, the Response admits the Complaint leaves the Appellants (and this Court) guessing whether “nature of the claim asserted” sounds under ERISA or fraud.<sup>5</sup>

Further, in its Response, IBEW completely fails to even attempt to reconcile its position with the doctrine of complete preemption. Namely, the established case law recognizes that ERISA includes comprehensive civil enforcement provisions governing employee benefit plans that

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<sup>5</sup> To this end, IBEW cannot argue the fraudulent activity gave rise to an ERISA claim. As explained above, if the “fraud gives rise to a claim under ERISA” then the theory violates 29 U.S.C. § 1132’s preemption. Response at 13. IBEW either alleged a fraud claim under state law, barred by CR 9(b), or an ERISA claim preempted by 29 U.S.C. § 1132.

completely preempt any state-law cause of action that "duplicates, supplements, or supplants" a remedy available under ERISA. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004); 29 U.S.C. § 1132(a). Thus, under complete preemption, a state-law civil complaint alleging a cause of action that *falls within the ambit of ERISA's civil enforcement provisions* is converted into a claim "stating a federal claim for purposes of the well-pleaded complaint rule" (emphasis added.) *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987); *Lone Star OB/GYN Assocs. v. Aetna Health, Inc.*, 579 F.3d 525, 529 (5th Cir. 2009).

A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2900, 77 L. Ed. 2d 490 (1983). In the present case, it is undeniable that in order to adjudicate IBEW's claim(s), whether under ERISA or the common law fraud, the court would have to refer to and interpret the plan. Indeed, IBEW's action, however stated, was an action to enforce the terms of the ERISA plan. Generally, state statutes that provide plans and participants with alternative mechanisms for enforcing ERISA obligations are preempted. *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 64, 322 P.3d 1207, 1212 (2014) citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144, 111 S.Ct. 478, 112

L.Ed.2d 474 (1990) (explaining that Congress intended for Section 502(a) of ERISA, 29 U.S.C. § 1132(a), to provide the “exclusive remedy for rights guaranteed under ERISA”). Similarly, in this case, although not concerning a statute, IBEW’s fraud claim, even if taken *in arguendo*, operates as an alternative enforcement mechanism which should be taken as preempted by ERISA’s express provisions governing enforcement.

In addition, IBEW cites *Kahn v. Salerno*, 90 Wn. App. 110, 951 P.2d 321 (1998) in support of its position. However, *Kahn* confirms IBEW failed to properly plead a claim for fraud. There, the plaintiff alleged fraud specifically and the *defendant* asserted preemption pursuant to ERISA. *Kahn*, 90 Wn. App. at 132. Thus, *Kahn*, *supra*, does not control now. Unlike IBEW, *Kahn* specifically pled fraud. Moreover, *Kahn* did not plead “fraud” and, like here, seek relief pursuant to ERISA.

2. *The Response fails to demonstrate the Complaint contains the requisite elements of Fraud.*

“CR 9(b) requires dismissal when a complaint fails to plead fraud with particularity.” *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 165, 744 P.2d 1032 (1987), *amended*, 109 Wn.2d 107, 750 P.2d 254 (1988). “The complaining party must plead both the elements and circumstances of fraudulent conduct.” *Haberman*, 109 Wn.2d at 165.

In Response, IBEW fails to address the defects with its Complaint. Notably, even in its Response, IBEW fails to identify any language in the Complaint alleging Roberta Crawford misrepresented an existing fact. Response at 12. Again, as with its Complaint, the Response alleges “Donald Rutherford enrolled himself and Roberta Crawford... alleging as if they were married.” Response at 12. The Response alleges Roberta Crawford “fraudulently induced IBEW to provide medical benefits.” Response at 12. But the Response fails to cite language in the Complaint alleging Ms. Crawford made an untrue representation. To the contrary, the Complaint and Response suggest only Mr. Rutherford affirmatively represented he and Ms. Crawford were married.

Moreover, the Response and Complaint wholly fail to address IBEW “had a right to rely” on Mr. Rutherford’s representation. *Baddely v. Seek*, 138 Wn. App. 338-339, 156 P.3d 959 (2007). The Response merely states “IBEW relied on the representations...” Response at 12. *See also* CP at 3 (stating only that “Plaintiff Trust Fund relied on Defendants’ fraudulent representations”).

Furthermore, the Response and Complaint fail to establish the materiality of the misrepresentation. *Baddely*, 138 Wn. App. at 338. The Response and Complaint both ignore the element of materiality in toto. To the contrary, the Complaint’s language suggests marriage is not a

prerequisite to coverage. The Complaint expressly states, “Plaintiff Trust Fund has established a medical benefit plan... for ... eligible employees, their legal spouses and children, their domestic partners and their domestic partner’s children.” CP at 2 (emphasis added).

**D. The Appellants timely and properly brought their CR 12 Motion to dismiss.**

IBEW alleges the Appellants waived any claim to CR 12 relief in error. IBEW’s argument fails for two reasons: (1) IBEW failed to raise this objection below and (2) the record reflects the Appellants filed their CR 12 motion immediately after the trial court vacated the default judgment.

*1. IBEW failed to argue waiver below and cannot argue the defense now on appeal.*

IBEW cannot argue waiver now. IBEW never argued this theory below. “Generally, an appellant may not raise for the first time on appeal an issue not argued below.” *State v. Scott*, 48 Wn. App. 561, 568, 739 P.2d 742 (1987), *aff’d*, 110 Wn.2d 682, 757 P.2d 492 (1988); *see also Cano-Garcia v. King Cty.*, 168 Wn. App. 223, 248, 277 P.3d 34 (2012). Accordingly, IBEW cannot now raise, for the first time on appeal, the issue of timeliness which IBEW did not raise before the trial court.

2. The Appellants timely filed their CR 12 motion to dismiss including on the basis of subject matter jurisdiction, which the Appellants cannot waive.

The Appellants brought their CR 12 motion timely under the plain language of the rule. Pursuant to CR 12(b), a party moves for 12(b) relief “before pleading if a further pleading is permitted.” Moreover, “The only practical difference between [a motion under CR 12(b) and CR 12(c)] is timing.” *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). “[A] CR 12(b)(6) motion is made after the complaint but before the answer; a CR 12(c) motion is made after the pleadings are closed.” *P.E. Sys., LLC*, 176 Wn.2d at 203.

CR 12(h)(3) allows a court to dismiss for lack of subject matter jurisdiction at any time. *Inland Foundry Co. v. Spokane Cty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123, 989 P.2d 102 (1999) (“A tribunal's lack of subject matter jurisdiction may be raised by a party or the court at any time in a legal proceeding.”); *In re Marriage of McDermott*, 175 Wn. App. 467, 479, 307 P.3d 717 (2013) (“subject matter jurisdiction is a defense that can never be waived”).

Here, the Appellants vacated IBEW’s judgment on June 19, 2015. CP at 139-40. After no action by either party, on January 13, 2016, the Appellants moved to dismiss prior to filing any answer. See CP at 178. Thus, the Appellants timely filed their Motion to Dismiss.

Even if, *arguendo*, the Appellants did not timely file their motion to dismiss, the trial court would consider the motion pursuant to CR 56. *See* CR 12(b) (converting CR 12(b)(6) motion as “motion... for summary judgment and disposed of as provided in rule 56”). The trial court could, and did, properly consider the defenses raised by the Appellants.

Moreover, the Appellants moved to dismiss IBEW’s Complaint for lack of subject matter jurisdiction. The Appellants cannot, as a matter of law, waive subject matter jurisdiction regardless of the procedural posture before the trial court. *Inland Foundry Co.*, 98 Wn. App. at 123; *McDermott*, 175 Wn. App. at 479.

IBEW did not allege untimeliness below; nevertheless, Appellants timely brought their CR 12 motion.

**E. The Response relies upon the fraud claim to assert jurisdiction; however, the trial court may not award fees under a fraud claim.**

Explained throughout, the Response argues the trial court held jurisdiction over the common law fraud claim. “Attorney fees may be recovered only when authorized by a private agreement of the parties, a statute, or a recognized ground of equity.” *Pennsylvania Life Ins. Co. v. Employment Sec. Dep’t*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). 29 U.S.C. § 1132(g)(1) only allows fees, “In any action under this subchapter...”.

Here, the Response repeatedly argues IBEW brought a common law fraud claim. *See, e.g.*, Response at 1 (“Trial Court... maintained jurisdiction to hear and adjudicate IBEW’s state law fraud claim”); Response at 2 (“ERISA § 502(a)(3) does not preempt IBEW’s state law fraud claim”); Response at 6 (“Appellant’s actions give rise to a common law fraud claim which is not preempted by ERISA”); Response at 7 (“IBEW asserted a state law fraud claim”). Thus, by the Response’s own admission, IBEW did not bring an “action under [29 U.S.C. § 1132].”

To this end, the unpublished case law cited by IBEW confirms this result. In *Mineo Corp. v. Rowe*, 2:07-CV-57-H, 2011 WL 841058, at \*1 (E.D.N.C. Mar. 4, 2011) (unpublished), the federal district court explained, “The facts alleged in plaintiffs’ complaint support a claim for relief under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. (“ERISA”).” *Mineo*, 2011 WL 841058, at \*1 (emphasis added). Likewise in *United Food & Commercial Workers Unions & Participating Employers Health & Welfare Fund v. Moore*, CIV.A. AW-12-00802, 2012 WL 1790015, at \*4 (D. Md. May 16, 2012) (unpublished), the federal district court explained, “A court may award attorneys’ fees in an ERISA action.” (Emphasis added). Thus, both cases cited by IBEW reflect IBEW may, at best, only recover fees in an ERISA

action. However, IBEW here consistently argues it sought recover pursuant to a common law fraud claim, not ERISA.

Moreover, IBEW presents no authority upon which a court may grant attorney fees pursuant to a state law fraud claim.

In sum, either IBEW brought an ERISA claim, thereby invoking 29 U.S.C. § 1132(g) allowing IBEW to recover fees. Or in the alternative, IBEW brought a common law fraud claim, which the Response argues, for which no authority exists to grant fees.

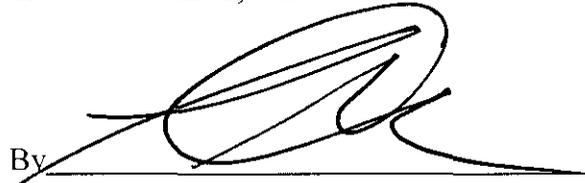
## II. CONCLUSION

*Appellants respectfully request this Court reverse the trial court for the reasons stated herein.*

DATED this 25<sup>th</sup> day of August, 2016.

Respectfully submitted,

SMITH ALLING, P.S.

By 

Chad E. Ahrens, WSBA #36149

Matthew C. Niemela, WSBA # 49610

Attorney for Appellants/Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 25<sup>th</sup> day of August, 2016, served a true and correct copy of the foregoing document, upon counsel of record via the methods noted below, properly addressed as follows:

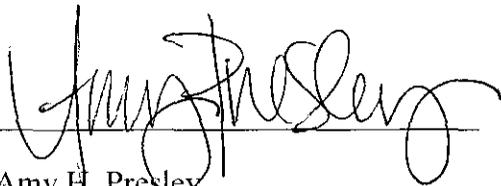
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25<sup>th</sup> day of August, 2016, at Tacoma, Washington.

  
\_\_\_\_\_  
Amy H. Presley