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COURT OF APPEALS  
STATE OF WASHINGTON  
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CASE NO. 322777-III

COURT OF APPEALS, STATE OF WASHINGTON,  
DIVISION III

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MARGARETA KILGORE, a single woman,

Respondent,

vs.

SHRINERS HOSPITALS FOR CHILDREN, a Colorado corporation,

Appellant,

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APPELLANT'S BRIEF

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James M. Kalamon, WSBA # 7922  
Dale A. De Felice, WSBA #21373  
PAINE HAMBLEN LLP  
717 West Sprague Avenue, Suite 1200  
Spokane, Washington 99201  
Telephone: (509) 455-6000  
Facsimile: (509) 838-0007  
Attorneys for Appellant  
Shriners Hospitals for Children

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## **I. INTRODUCTION**

This appeal concerns the Spokane County Superior Court's granting of Plaintiff Margreta Kiglore's ("Kilgore") Motion for Partial Summary Judgment against Defendant Shriners Hospitals for Children ("Shriners") dismissing Shriners' counterclaim for indemnity. Shriners' counterclaim for indemnity seeks reimbursement of \$212,183.76 in liquidated damages and interest paid by Shriners to its employees, because of the wrongful timecard editing practices of Kilgore. These damages are associated with back wages Shriners paid its third-party employees.<sup>1</sup> Kilgore was terminated for those wrongful timecard edits.

The trial court ruled on summary judgment that in the entire spectrum of possible causes of action that there is "no cognizable legal claim" that Shriners could bring against Kilgore. The trial court further stated that there is "no substantive legal basis" for Shriners' counterclaim. Finally, the trial court held that Shriners' counterclaim was one for contribution under the Washington State Tort Claims Act, and was thus, barred by R.C.W. § 4.22.050's one-year statute of limitations for actions

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<sup>1</sup> In total, Shriners' paid \$383,298.76 to its third-party employees (\$171,115.00 in back wages owed and \$212,183.76 in liquidated damages and interest). Shriners seeks indemnity only for the liquidated damages and interest portion caused by the wrongful timecard editing practices of Kilgore, not reimbursement for the back wages it owed and paid to its employees.

seeking contribution for the discharge of tort liability based on comparative fault.

The trial court's ruling was in error. Under Washington law, Shriners can maintain a common law indemnity cause of action against Kilgore for damages paid to its third-party employees because of the wrongful acts of Kilgore, based on an implied contractual relationship between Shriners and Kilgore, as employer and employee. Moreover, Shriners' counterclaim is a common law cause of action for indemnity not contribution, and was thus, subject to R.C.W. § 4.16.080(3)'s three-year statute of limitations, rendering its counterclaim timely.

Therefore, Shriners respectfully requests that the trial court's order granting Plaintiff Kilgore's Motion for Partial Summary Judgment against Defendant Shriners on its counterclaim for indemnity be reversed and the case be remanded back to the trial court for further proceedings.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred in granting Plaintiff Kilgore's Motion for Partial Summary Judgment against Defendant Shriners on its counterclaim for indemnity in finding that there is no cognizable legal claim that Shriners could bring against Kilgore for liquidated damages and interest suffered associated with back wage payments made to Shriners' third-party employees based on unlawful timecard edits made by Kilgore.

2. The trial court further erred in granting Plaintiff Kilgore's Motion for Partial Summary Judgment against Defendant Shriners on its counterclaim for indemnity in finding Shriners' counterclaim is barred by the one-year statute of limitations set forth in R.C.W. § 4.22.050 for actions seeking contribution for the discharge of tort liability based on comparative fault.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether under Washington law, Shriners, as the employer, can maintain a common law indemnity cause of action against Kilgore for damages paid to its third-party employees because of the wrongful timecard edits made by Kilgore, its former employee, based on an implied contractual relationship between Shriners and Kilgore, as employer and employee.

2. Whether under Washington law, common law causes of action for indemnity are subject to R.C.W. § 4.16.080(3)'s three-year statute of limitations, as implied contracts not in writing

### **IV. STATEMENT OF THE CASE**

#### **A. Background of the Lawsuit**

In this matter, Plaintiff Kilgore, former Director of Fiscal Services for Shriners, alleges that she was wrongfully terminated in violation of Shriners' policies governing discipline and retaliation. (CP 3-8) Shriners

contends that Kilgore was appropriately terminated for her wrongful timecard editing practices that resulted in Shriners' paying \$383,298.76 in back wages (\$171,115.00 in wages owed and \$212,183.76 in liquidated damages and interest) to its third-party employees on November 18, 2010.<sup>2</sup> (CP 9-15, 132-134, 144-147, 425) Accordingly, on December 29, 2011, Shriners asserted a counterclaim for indemnity against Kilgore for damages suffered as a result of making those third-party wage payments. (CP 12-14, 425)

**B. Court's Ruling Dismissing Shriners' Counterclaim for Indemnity**

On September 18, 2013, Kilgore filed a Motion for Partial Summary Judgment against Shriners' counterclaim for indemnity that was granted by the trial court. (CP 183-184) The trial court concluded that Shriners had no "substantive grounds" to support its indemnity claim against Kilgore, and that Shriners' counterclaim was one for contribution under the Washington State Tort Claims Act, and was thus, barred by R.C.W. § 4.22.050's one-year statute of limitations for actions seeking contribution for the discharge of tort liability based on comparative fault. (CP 450-452)

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<sup>2</sup> As stated above, Shriners seeks indemnity only for the \$212,183.76 liquidated damages and interest portion caused by the wrongful timecard editing practices of Kilgore, not reimbursement for the back wages it owed and paid to its employees.

On October 25, 2013, Shriners' filed a Motion for Reconsideration with regard to that ruling. (CP 413-415) Shriners' submitted that the trial court's decision was in error because Shriners' counterclaim was for common law indemnity, not contribution. (CP 416-427, 434-438) As an indemnity cause of action, Shriners' counterclaim was subject to R.C.W. § 4.16.080's three-year statute of limitations governing implied contracts not in writing, rendering its counterclaim timely. (CP 416-427, 434-438) On January 14, 2014, the trial court denied Shriners' Motion for Reconsideration and entered an Order ruling that:

1. There is no substantive legal basis for Defendant's Counterclaim alleging that Plaintiff is liable to Defendant for wage payments made to Shriners' employees based on payroll timecard edits; therefore, there is no cognizable legal claim that Defendant may bring against Plaintiff.
2. Defendant's claim against plaintiff for the wage payments paid to Shriners employees is barred by the one-year statute of limitations set forth in RCW 4.22.050.

(CP 453-455)

**C. Shriners' Counterclaim is Appealed**

On January 31, 2014, Shriners filed a Motion for CR 54(b) Certification of the Order Dismissing Defendant's Counterclaim and for a Stay. (CP 456-459, 463-465) The Motion contended that the Order Denying Defendant's Motion for Reconsideration involves a controlling

question of law as to which there is substantial ground for a difference of opinion, that immediate review of the order may materially advance the ultimate termination of the litigation, and that there was no just reason for delay. (CP 456-459, 463-465)

On February 7, 2014, the trial court granted Shriners' Motion for CR 54(b) Certification and entered an Order Granting Defendant's Motion for CR 54(b) Certification of the Order Dismissing Defendant's Counterclaims and for a Stay ("Order re: CR 54(b) Certification").<sup>3</sup> (CP 470-474) The Order re: CR 54(b) Certification certified Shriners' to appeal, as a matter of right, the dismissal of its counterclaim for indemnity, and included findings of fact that state, in pertinent part:

[t]he decision of this Order involves a controlling question of law as to which there is substantial ground for a difference of opinion, that immediate review of the Order may materially advance the ultimate termination of the litigation, and that there is no just reason for delay.

(CP 473)

The trial court stayed the underlying litigation during the pendency of this appeal. On February 12, 2014, Shriners' timely filed a Notice of

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<sup>3</sup> Spokane County Superior Court Judge Eitzen signed the Order Denying Defendant's Motion for Reconsideration. (CP 453-455) Following the Superior Court's usual case rotation schedule, Judge Eitzen's caseload was then transferred to Superior Court Judge Price who signed the Order re: CR 54(b) Certification. (CP 470-474)

Appeal regarding dismissal of its counterclaim for indemnity. (CP 475-479)

## V. ARGUMENT

### A. Standard of Review

The appropriate standard of review of an order granting summary judgment is *de novo*, engaging in the same inquiry as the trial court. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). The facts, and all reasonable inferences drawn from the facts, are to be construed in the light most favorable to the nonmoving party. Elcon Constr., Inc. v. Eastern Washington Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012). All questions of law are reviewed *de novo*. Sherman v. State, 128 Wn.2d 164, 183, 905 P.2d 355 (1995); see also McDevitt v. Harbor View Medical Center, 179 Wn.2d 59, 64, 316 P.3d 469 (2013); Rice v. Dow Chem. Co., 124 Wn.2d 205, 208, 875 P.2d 1213 (1994).

### B. The Trial Court Erred In Granting Summary Judgment Against Shriners on its Counterclaim, As Shriners Has a Common Law Right of Indemnity for Damages Paid to its Third-Party Employees Because of the Wrongful Timecard Edits Made By Its Former Employee, Kilgore

Whether Shriners, as the employer, can maintain a common law indemnity cause of action for damages paid to its third-party employees because of the wrongful timecard edits made by Kilgore, as its former employee, is an issue of law, subject to *de novo* review. Sherman, 128

Wn.2d at 183; see also McDevitt, 179 Wn.2d at 64; Rice, 124 Wn.2d at 208.

The trial court dismissed Shriners' counterclaim for indemnity against Kilgore. (CP 450-455) In doing so, the trial court ruled, in pertinent part, that Shriners had “no substantive legal basis for Defendant's Counterclaim alleging that Plaintiff is liable to Defendant for wage payments made to Shriners' employees based on payroll timecard edits; therefore, there is no cognizable legal claim that Defendant may bring against Plaintiff.” (CP 453-455) Thus, the trial court made a legal determination that in the entire spectrum of possible causes of action there is no cognizable legal claim that Shriners could assert against Kilgore.<sup>4</sup> That ruling is patently incorrect.

**Shriners has a common law right to indemnity stemming from an implied contractual relationship between Shriners and Kilgore, as employer and employee.**

Under Washington law, an employer may bring an indemnity action against the employee for damages paid to a third-party because of the wrongful acts of that employee based on an implied contractual relationship between the employer and employee. See e.g., Glover v.

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<sup>4</sup> Notably, the trial court did not make any factual findings as to the merits of Shriners' counterclaim. (CP 450-455)

Richardson & Elmer Co., 64 Wn. 403, 409-10, 116 P. 861 (1911) (employee is liable to the employer for damages which the employer is compelled to pay to a third-party because of the wrongful acts of that employee); Gaffner v. Johnson, 39 Wn. 437, 438-39, 81 P. 859 (1905) (employee was liable to employer in an indemnity cause of action for damages paid to a third-party because of the wrongful acts of that employee); Globe Indem. Co. v. Capital Ins. & Sur. Co., 352 F.2d 236, 238 (9th Cir. 1965); 110 A.L.R. 831 (2011) (nationwide compilation of cases demonstrating majority rule).

Washington law permitting an indemnity cause of action by the employer against its employee because of the wrongful acts of that employee is consistent with the majority rule in other jurisdictions. See e.g., Roe v. Bryant & Johnston Co., 193 F.Supp. 804, 807 (E.D. Mich. 1961) (“a principal has a right to indemnity from the agent for whose wrongful conduct he has become liable”); D’Aquila Bros. Contracting Co. v. Hartford Acc. & Indem. Co., 22 Misc.2d 733, 737, 193 N.Y.S.2d 502 (N.Y. Sup. 1959) (“[w]here a master has been held liable for the fault of a servant, the servant is under an obligation to reimburse the master”); Williams v. City of Baton Rouge, 200 So.2d 420, 427 (La. Ct. App. 1st Cir. 1967) (employer has a right of indemnity against his employee for any sum the employer is obligated to pay an injured third-party because of

the employee's actions); McClish v. Niagara Mach. and Tool Works, 266 F.Supp. 987, 989-90 (S.D. Ind. 1967) (an employer liable under doctrine of respondent superior for acts of his employee, is allowed to recover from the employee for his or her acts); Hamm v. Thompson, 143 Colo. 298, 301, 353 P.2d 73 (1960) (employer who pays for injuries or damage to a third-party resulting from his employee's actions has a right of indemnification for the amount paid); Biel, Inc. v. Kirsch, 130 Ind.App. 46, 53-54, 153 N.E.2d 140 (Div. II 1958) (employee has a common law right of indemnity against its employer for damages paid because of the employee's actions); Embree v. Gormley, 49 Ill. App.2d 85, 91, 199 N.E.2d 250 (2d Dist. 1964); Kabatchnick v. Hanover-Elm Bldg. Corp., 331 Mass. 366, 369, 119 N.E.2d 169 (1954).

Contrary to the trial court's ruling, Shriners' counterclaim is not a negligence claim. (CP 450-455) Shriners is not seeking contribution for comparative fault, but rather contractual indemnification against Kilgore based on the common law right to indemnity stemming from an implied contractual relationship between Shriners and Kilgore, as employer and employee. Shriners was responsible for paying its third-party employees unpaid wages (and liquidated damages and interest) pursuant to state and federal law under the doctrine of *respondeat superior* because of Kilgore's wrongful timecard editing practices. Accordingly, Shriners has a common

law right of indemnity to recover the liquidated damages and interest portion of those payments caused by Kilgore's actions.

The Washington State Supreme Court in Central Wash. Refrigeration v. Barbee, 133 Wn.2d 509, 513, 946 P.2d 760 (1997), explained the right of indemnity as follows:

Indemnity in its most basic sense means reimbursement and may lie when one party discharges a liability which another should rightfully have assumed. (Indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the entire loss.) (Citations omitted).

In Central Wash. Refrigeration, the Washington State Supreme Court went on to explain that indemnity causes of action are independent and separate from the underlying wrong and are governed by a separate statute of limitations. Id. at 513; see also Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp., 8 Cal.4<sup>th</sup> 100, 876 P.2d 1062 (1994) (cited by Central Wash. Refrigeration for the proposition that for "procedural purposes, such as the statute of limitations, an indemnity claim is an independent action"). Indemnity causes of action are based in contract and survived the adoption of the Washington State Tort Reform Act, in general, and specifically, R.C.W. § 4.22.040. Toste v. Durham & Bates Agencies, Inc., 116 Wn.App. 516, 520, 67 P.3d 506 (Div. II 2003).

Indemnity causes of action arise when one party incurs a “liability the other party should discharge by virtue of the nature of the relationship between the two parties.” Central Wash. Refrigeration, 133 Wn.2d at 513; see also Urban Development, Inc. v. Evergreen Bldg. Products, LLC, 114 Wn.App. 639, 644, 59 P.3d 112 (Div. I 2002). The nature of that relationship gives rise to an implied contractual relationship outside of the Washington State Tort Reform Act which, as discussed below, the Washington State Supreme Court noted is subject to R.C.W. § 4.16.080(3)'s three-year statute of limitations, as implied contracts not in writing. Id. at 517-18 FN 14.

The nature of the relationship here is that of Shriners as the employer and Kilgore as the employee. There exists longstanding common law precedent granting employers an implied right of indemnity against the employee for damages paid to a third-party because of the wrongful acts of that employee; here, Kilgore’s unlawful violation of both federal and state law. See, e.g., Glover, 64 Wn. at 409-410; Gaffner, 39 Wn. at 438-439; Globe Indem. Co., 352 F.2d at 238; 110 A.L.R. 831; Roe, 193 F.Supp. at 807; D'Aquilla Bros. Contracting Co., 22 Misc.2d at 737; Williams, 200 So.2d at 427; McClish, 266 F.Supp. at 989-90; Hamm, 143 Colo. at 301; Biel, Inc., 130 Ind.App. at 53-54; Embree, 49 Ill. App.2d at 91; Kabatchnick, 331 Mass. at 369.

Shriners was required to compensate its employees under both federal and state law for unpaid wages (and liquidated damages and interest) resulting from Kilgore's unlawful timecard editing practices. Specifically, Shriners' counterclaim is based on Kilgore's actions which were in violation of state and federal statutes – unpaid wages under R.C.W. § 49.48.030, the Washington Minimum Wage Act, R.C.W. § 49.46 et seq., and the Fair Labor Standards Act, 29 U.S.C. § 206 (minimum wage) and 29 U.S.C. § 207 (overtime). An employer that violates these provisions is liable to the affected employees in the amount of the unpaid minimum wages, or unpaid overtime compensation, and an additional, equal amount as liquidated damages. 29 U.S.C. § 216(b).

Based on the long line of cases identified above, Shriners' has a common law right of indemnity against Kilgore for the value of the liquidated damages and interest portion of the third-party payments, and thus, Shriners' counterclaim for indemnity is a cognizable claim. The trial court's ruling that Shriners has "no cognizable legal claim" that it could bring against Kilgore, is therefore, in error and should be reversed. (CP 453-455)

C. **The Trial Court's Decision Was in Error, as Shriners' Counterclaim is a Common Law Cause of Action for Indemnity Not Contribution, And Was Thus, Subject to R.C.W. § 4.16.080(3)'s Three-Year Statute of Limitations, Rendering its Counterclaim Timely**

Issues of law are subject to *de novo* review. Sherman, 128 Wn.2d at 183; see also McDevitt, 179 Wn.2d at 64; Rice, 124 Wn.2d at 208. Whether a statute of limitations period applies to bar a cause of action is a question of law, subject to *de novo* review. Bennett v. Computer Task Group, Inc., 112 Wn.App. 102, 106, 47 P.3d 594 (Div. I 2002); see also Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 263, 840 P.2d 860 (1992) (whether the statute of limitations bars a claim is a legal question); Rekhter v. State, Dept. of Social and Health Services, 180 Wn.2d 102, 150 FN 15, 323 P.3d 1036 (2014) (whether statute of limitations applies is a question of law that the appellate court reviews *de novo*). Under Washington law, if “there is uncertainty as to which statute of limitations governs, the longer statute should be applied.” Universal Underwriters Ins. Co. v. Security Ind., Inc., 391 F.Supp. 326, 328 (W.D. Wash. 1974).

Here, the trial court held Shriners' counterclaim was one for contribution under the Washington State Tort Claims Act, and was thus, barred by R.C.W. § 4.22.050's one-year statute of limitations for actions seeking contribution for the discharge of tort liability based on comparative fault. (CP 450-455) The trial court's decision was error, as

Shriners' counterclaim is a common law cause of action for indemnity not contribution, and was thus, subject to R.C.W. § 4.16.080(3)'s three-year statute of limitations, rendering its counterclaim timely.

In that regard, the Washington State Tort Reform Act, in general, and the one-year statute of limitations set forth in R.C.W. § 4.22.050, in particular, has no application to Shriners' counterclaim for indemnification against Kilgore. Shriners' counterclaim for indemnification arises from contract and survived the adoption of the Washington State Tort Reform Act, and specifically, R.C.W. § 4.22.040. Toste, 116 Wn.App. at 520.

Thus, Washington courts, including the Washington State Supreme Court in Central Wash. Refrigeration, have recognized that indemnity causes of action are subject to R.C.W. § 4.16.080(3)'s three-year statute of limitations, as implied contracts not in writing. Universal Underwriters Ins. Co., 391 F.Supp. at 328 (indemnity action brought by insurer of third-party defendant in previous lawsuit, to recover attorney fees and costs in defending said lawsuit, against former third-party plaintiff, is governed by the three-year statute of limitations period for implied contracts not in writing); see also Central Wash. Refrigeration, 133 Wn.2d at 518 FN14 (noting that the court in Universal Underwriters held that a three-year statute of limitations applies to indemnification actions).

It is equally well established in Washington that the employer's indemnity cause of action accrues when the employer is compelled to pay the third-party, rendering Shriners' counterclaim for indemnity timely. See, e.g., Gaffner, 39 Wn. at 438-39 (“[n]o cause of action accrued to the master as against the servant until the master was compelled to pay the party injured by the act of the servant”); see also Universal Underwriters Ins. Co., 391 F.Supp. at 328 (“[u]nder Washington law, the statute of limitations begins to run on a claim for indemnity either from the time of payment or the entry of judgment for which indemnification is sought”); Central Wash. Refrigeration, 133 Wn.2d at 517 (“[i]t is settled law that indemnity actions accrue when the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party. The statute of limitations on the indemnity action therefore begins to run at that point”).

Because Shriners has a cognizable legal claim for indemnity (not a tort based claim) and this is not a contribution action under the Washington State Tort Claims Act, the trial court erred by applying R.C.W. § 4.22.050's one-year statute of limitations for actions seeking contribution for the discharge of tort liability based on comparative fault. Rather, Shriners' counterclaim for indemnity was subject to R.C.W. § 4.16.080's three-year statute of limitations.

Shriners' paid \$383,298.76 (\$171,115.00 in wages owed and \$212,183.76 in liquidated damages and interest) to its third-party employees on November 18, 2010. (CP 9-15, 132-134, 144-147, 425) On December 29, 2011, Shriners' asserted a counterclaim for indemnity against Kilgore for the liquidated damages and interest portion of that payment suffered as a result of Kilgore's actions. (CP 12-14, 425). Thus, Shriners' counterclaim for indemnity is timely within R.C.W. § 4.16.080's three-year statute of limitations.

## **VI. CONCLUSION**

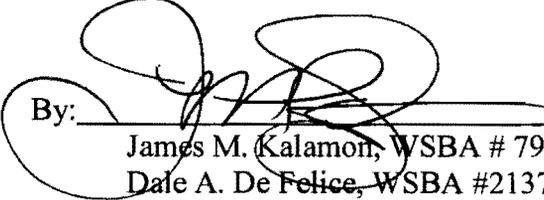
For the reasons set forth above, Shriners, as the employer, has a common law indemnity cause of action against Kilgore for damages paid to its third-party employees because of the wrongful timecard edits made by Kilgore, as its former employee. Because Shriners' counterclaim is for indemnity not contribution, it is subject to R.C.W. § 4.16.080(3)'s three-year statute of limitations, rendering its counterclaim timely. Thus, Shriners respectfully requests that the trial court's order granting Plaintiff Kilgore's Motion for Partial Summary Judgment against Defendant Shriners on its counterclaim for indemnity be reversed and the case be remanded back to the trial court for further proceedings.

**VII. COSTS AND FEES ON APPEAL**

Should the trial court's order granting Plaintiff Kilgore's Motion for Partial Summary Judgment be reversed on appeal, Shriners respectfully requests an award of costs and statutory attorney fees to it as the prevailing party pursuant to RAP 14.

RESPECTFULLY SUBMITTED this 29th day of January, 2015.

**PAINE HAMBLEN LLP**

By: 

James M. Kalamon, WSBA # 7922

Dale A. De Felice, WSBA #21373

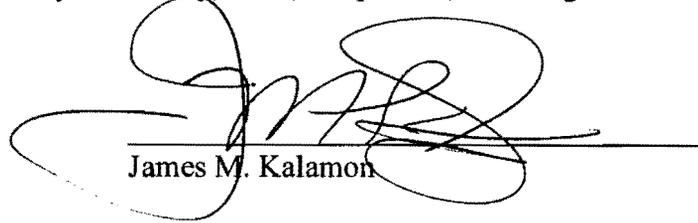
Attorneys for Appellant Shriners Hospitals  
for Children

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of January, 2015, I caused to be served a true and correct copy of the foregoing, APPELLANT'S BRIEF, by Hand Delivery and addressed to the following:

Paul J. Burns  
Attorney at Law  
One Rock Pointe  
1212 N. Washington, Suite 116  
Spokane, WA 99201

Dated this 29th day of January, 2015, at Spokane, Washington.



James M. Kalamon

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