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Court of Appeals  
Division III  
State of Washington

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

No.: 328554

**JOSHUA DRIGGS, a single man,**

Plaintiffs/Respondents,

vs.

**ANDREW T.G. HOWLETT, M.D. and JANE DOE HOWLETT, and  
their marital community; PROVIDENCE PHYSICIAN SERVICES  
CO. aka Providence Orthopedic Specialties, a Washington  
Corporation,**

Defendants/Appellants.

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BRIEF OF APPELLANTS

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## **I. ASSIGNMENTS OF ERROR**

- A. The trial court abused its discretion in awarding sanctions against Dr. Howlett in connection with the scheduling of Dr. Howlett's continuation deposition. The issue pertaining to this assignment of error is whether, under the circumstances, the sanctions order was based on untenable grounds and/or untenable reasons.**
- B. The trial court abused its discretion in awarding sanctions against Dr. Howlett for alleged violations of the CR 35 Stipulations concerning the CR 35 examinations of Mr. Driggs by Dr. Vandebelt and Dr. Rolfe. The issue pertaining to this assignment of error is whether, under the circumstance, the sanctions order was based on untenable grounds and/or untenable reasons.**
- C. The trial court abused its discretion in awarding sanctions against Dr. Howlett for the late, inadvertent disclosure of his private, hand-written surgery journal. The issue pertaining to this assignment of error is whether the sanctions, under the circumstance, the sanctions order was based on untenable grounds and/or untenable reasons.**

## **II. STATEMENT OF CASE**

### **A. General Nature of Case and Identity of Parties**

This is a medical malpractice case. The Appellants, and Defendants below, are Spokane orthopedic surgeon Andrew Howlett, M.D., et ux, and his practice group, Providence Physician Services, Inc. (hereinafter referred to collectively as "Dr. Howlett"). The Respondent, and Plaintiff below, is Joshua Driggs (hereinafter referred to as "Mr. Driggs").

**B. Underlying Medical Procedure, Plaintiff Claims, and Jury Verdict in Favor of Dr. Howlett**

The case arises from a surgery performed by Dr. Howlett on Mr. Driggs' right lower extremity on March 9, 2009. Generally, Mr. Driggs claims that Dr. Howlett, when he removed fixation hardware from Mr. Driggs' right ankle during the surgery, violated the standard of care by not installing an intramedullary rod or other stabilization. Mr. Driggs contended this resulted in a postoperative insufficiency fracture which in turn caused increased pain, limited mobility, deformity of the ankle, arthritic changes, loss of motion, significant limb, misalignment, etc. (*Plaintiff's Complaint, p. 5.*)

Dr. Howlett denied the standard of care required him to install an intramedullary rod. He also denied that Mr. Driggs suffered a postoperative insufficiency fracture as a result of the absence of an intramedullary rod.

On June 24, 2014, (after a three week jury trial) the jury returned a verdict in favor of Dr. Howlett.

**C. Discovery Process and Subject Sanctions Orders**

Discovery was adversarial and contentious, with both sides, at various times, seeking protective orders and sanctions. The court ultimately sanctioned Dr. Howlett in connection with three discrete

events/circumstances: (1) The scheduling of Dr. Howlett's continuation deposition; (2) the alleged violation of stipulations regarding CR 35 examinations by defense experts Russell Vandenbelt, M.D., and Bruce Rolfe, M.D.; and (3) Dr. Howlett's inadvertent nondisclosure, until trial, of a private handwritten journal he kept, independent of his office records and the hospital chart, listing his surgeries. The court assessed sanctions against Dr. Howlett with respect to each of these events/circumstances. Dr. Howlett appeals those orders. (CP 589-672.)

**D. Facts Underlying Specific Sanction Orders**

**1. Facts Re: Scheduling of Dr. Howlett's Continuation Deposition and Trial Court's Sanctions Order**

This case was filed on January 17, 2012. (CP 4.) The Case Schedule Order required Mr. Driggs to disclose lay and expert witnesses on or before November 9, 2012. (CP 5.) On November 16, 2012, a week after the deadline, Mr. Driggs provided a lay and expert witness disclosure and conclusory interrogatory answers attributing standard of care opinions to two disclosed experts, Dr. Mendez and Dr. Padrta. (CP 5.)

On February 7, 2013, Mr. Driggs' counsel served and filed an Amended Disclosure which purported to remove or strike Dr. Padrta as a plaintiff's expert. (CP 5.) Then, in February, 2013, Mr. Driggs sought, without the consent of defense counsel or leave of the court, to identify a

new expert witness, Dr. Steven Graboff, of Huntington Beach, California.

*Id.*

By agreement of counsel, Dr. Howlett was made available for a discovery deposition on Friday, May 3, 2013. (CP 5.) Earlier, defense counsel had informed Mr. Driggs' counsel that the deposition of Dr. Howlett would have to conclude before defense counsel's 4:30 p.m. meeting. (CP 6.)

The deposition of Dr. Howlett lasted in excess of four hours, and covered virtually every interaction Dr. Howlett had with Mr. Driggs. (CP 6.) At the deposition, Mr. Driggs' counsel had with him a report issued by his expert, Dr. Graboff, which had not been disclosed to Dr. Howlett or defense counsel. *Id.* Every topic contained in Dr. Graboff's report was covered with Dr. Howlett during the four-plus hour deposition. *Id.* At the conclusion of the deposition, defense counsel informed Mr. Driggs' counsel that the defense would not agree to a continuation deposition of Dr. Howlett. (CP 134, CP 52.)

On June 11, 2013, Mr. Driggs' counsel unilaterally issued a subpoena and notice, setting the continuation deposition of Dr. Howlett for August 12, 2013, at 2:00 p.m. (CP 6.) There was no communication between Mr. Driggs' counsel and defense about the availability of Dr. Howlett or defense counsel on that date.

On August 6, 2013, defense counsel filed a motion for protective order, asking that Dr. Howlett's continuation deposition not be had, or that, in the alternative, the court impose a limitation on the duration of any renewed deposition. (CP 123-25.) Defense counsel also asked for the appointment of a Discovery Master. (Id.) The hearing on Defendants' motion for a protective order was noted for August 16, 2013. (CP 137.)

On August 9, 2013, Mr. Driggs, on shortened time, filed a motion to strike Defendant's motion for protective order. (CP 130-31.) Mr. Driggs argued that Defendant's motion was untimely filed on August 6, 2013, with a hearing date of August 16, 2013, that Defendants filed no motion to shorten time, that the motion for protective order was six days prior to the unilaterally scheduled deposition of Dr. Howlett, and that Defendants had unilaterally cancelled the deposition. (CP 127.)

In opposition to Mr. Driggs' motion to strike, defense counsel submitted affidavits explaining that Defendant's motion was brought on shortened time because the trial judge was unavailable to hear the matter due to a vacation at the end of July and early August. (CP 183.) Accordingly, defense counsel sent a letter to Mr. Driggs's counsel explaining the predicament and indicating that the protective order motion would be heard on August 16, 2013. (Id.) Defense counsel also pointed out that Mr. Driggs' counsel had been aware that any effort to reschedule

the deposition of Dr. Howlett would be met with a motion for protective order. (Id.)

Dr. Howlett's position was that the motion to strike Defendant's motion for protective order should be denied because the Plaintiff had had ample time to prepare for the hearing in question, had actually filed a response, and knew the motion would be made. In addition, Defendants, albeit after the fact, filed a motion to shorten time in order to satisfy CR 6(d). (CP 190.)

In his briefing to the Court, Dr. Howlett pointed out that the purpose of a protective order is to insulate a party from annoyance, embarrassment, oppression or undue burden or expense, that Dr. Howlett is a busy trauma surgeon, that he blocked out an entire afternoon of his schedule to participate in the first deposition, that he prepared for the deposition, that Mr. Driggs's counsel initially asked for three hours to conduct the deposition and was given four and a half, and that Mr. Driggs, nevertheless, sought to continue Dr. Howlett's deposition. (CP 186-187.)

On September 9, 2013, the trial court issued an order denying Dr. Howlett's motion to strike, denying Defendant's motion for a protective order in part and granting it in part, permitting Dr. Howlett's continued deposition, and assessing sanctions. (CP 193-194.) Specifically, the court ordered Dr. Howlett's continued deposition to be set by

September 15, 2013, that the deposition be conducted by October 1, 2013, and that Plaintiff be afforded three hours to conduct the continuing deposition. (CP 194.) The Court, in its order, found there was “just cause” to assess sanctions against the Dr. Howlett “pursuant to CR 26,” and the order awarded Mr. Driggs reasonable attorney’s fees in connection with his counsel’s efforts to respond to Defendant’s motion for a protective order which were to be determined by the court upon Plaintiff’s proof of the same. (CP 194.)

On September 15, 2014, over seven months after trial, the court issued an order assessing sanctions against Dr. Howlett in the amount of \$1,050 for the September 2013 “untimely protection order hearing and the cancellation of Dr. Howlett’s deposition.” (CP 553-54.)

Dr. Howlett filed a Motion for Reconsideration of the Court’s order on Defendants’ Motion for Protective Order, etc., arguing no grounds existed for the assessment of sanctions against Defendants. (CP 195.) In its opinion denying the Motion for Reconsideration, the Court found that the Dr. Howlett’s request for a protective order was “not well grounded in fact,” and “not made in good faith,” and that sanctions were warranted under CR 26(g). (CP 208.) The Court further found that Dr. Howlett’s “last minute” motion for protection order did not meet the

requirements of CR 26(g) and “caused unnecessary delay and an increase in costs to the Plaintiff by having to respond to the motion.” (CP 209.)

## **2. Facts Re: CR 35 Examination Stipulations**

On March 1, 2013, the parties agreed Mr. Driggs would submit to a CR 35 examination by Russell Vandenberg, M.D. (CP 1-3.) On June 18, 2013, Mr. Driggs’ counsel’s office emailed defense counsel a copy of a CR 35 stipulation Mr. Driggs’ counsel was requesting before Mr. Driggs would attend the IME. (CP 275.) Defense counsel revised the proposed CR 35 stipulation to remove terms and conditions which were duplicative, contrary to CR 35, or otherwise unnecessary. (CP 275.) Defense counsel sent the revised CR 35 stipulation to Plaintiff’s counsel on July 3, 2013.

*Id.* Paragraph 9 of the revised CR 35 stipulation stated:

If the plaintiff is going to be asked to complete any forms, those forms shall be delivered to the plaintiff’s attorney not less than five (5) days before the examination. The plaintiff shall deliver the appropriately completed forms to the examiner at or before the time of the examination.

(CP 289.) Mr. Driggs’ counsel agreed to the revised stipulation and sent an email to defense counsel stating, “This looks good. Please sign it and I will sign. Let’s go ahead as scheduled. We will likely be videotaping the exam.” (CP 292.)

Dr. Vandenberg performed his CR 35 psychiatric evaluation on July 19, 2013. (CP 265.) Part of Dr. Vandenberg’s evaluation included

administration of the MMPI-2, (CP 266) a standard psychological/psychiatric test. The MMPI-2 is not a “take home” test (CP 266) and must be administered in a clinical setting by a trained professional. *Id.* Allowing someone to take the test away from the office would cast doubt upon the test-taker’s answers and destroy the integrity of the test. *Id.*

The MPPI-2 is not the type of standard form routinely used when a new patient comes to a health care provider’s office, such as intake forms containing such information as the patient’s name, address, insurance, and emergency contact information. (CP 266.) A patient is sometimes allowed to complete such forms away from the office to save time. *Id.* Indeed, on occasion health care providers email those forms to a patient in advance of an appointment. (CP 266-67.) But the MMPI-2 would never be sent to a patient in advance of an appointment to be completed away from the office. *Id.*

Mr. Driggs, on November 1, 2013, moved to exclude Dr. Vandenberg on multiple grounds, including Dr. Vandenberg’s having administered the MMPI-2, allegedly in violation of that aspect of the parties’ CR 35 stipulation regarding “forms.” (CP 211.) Mr. Driggs did not request monetary sanctions. *Id.* Rather, the only sanction sought was exclusion of Dr. Vandenberg’s testimony. *Id.*

On December 20, 2013, the Discovery Master, The Honorable Richard Shroeder (ret.), denied Plaintiff's motion to exclude the opinions of defense expert Russell Vandenberg, M.D. (CP 344-45.) The order stated that, "All matters relating to the content of the testimony and use of any test results including the MMPI are reserved for the trial court." (CP 345.)

On December 20, 2013, Mr. Driggs requested review of the Discovery Master's decision on Mr. Driggs' motion to exclude the testing of Dr. Vandenberg. (CP 346.) Again, Mr. Driggs did not request monetary sanctions. Rather, the only sanction discussed in Mr. Driggs' request was the sanction of exclusion of Dr. Vandenberg's testimony. (CP 346-369.)

On May 1, 2014, over four months after the trial, the court issued its opinion on the Plaintiff's Request for Review. (CP 484-491.) With respect to the Dr. Vandenberg stipulation, the court found there was a violation of the stipulation regarding Dr. Vandenberg's CR 35 examination, apparently accepting Mr. Driggs' argument that the MMPI, a standard psychological test, was a "form" within the meaning of paragraph 9 of the stipulation. (CP 486, 489.) And although Mr. Driggs never sought monetary sanctions before trial, the court found monetary sanctions were appropriate under CR 26(g), and that the "violations of the stipulated agreements, in the court's view, warrant a higher sanction based on the unambiguous language and the clear disregard to follow these agreements.

For each of these violations, the court will award \$1,500 (total \$3,000 for two violations) . . .". (CP 491.)

**3. Facts Re: Stipulation for CR 35 Exam by Dr. Rolfe**

The parties also stipulated to a CR 35 examination by Dr. Rolfe, an orthopedic surgeon. (CP 340-343.) Paragraph 9 of the stipulation stated:

The examiner shall not have new x-rays or imaging studies done without prior written notice to plaintiff's counsel of the x-rays intended to be taken.

(CP 342.) A confirmed copy of the stipulation was sent to Dr. Rolfe by defense counsel on October 2, 2013, in advance of the examination.

(CP 335, 339.) Even though a copy of the stipulation was sent to Dr. Rolfe, unbeknownst to defense counsel, and without defense counsel's knowledge or consent, Dr. Rolfe, as part of his examination, took x-rays. (CP 520.)

On December 20, 2013, Plaintiff's counsel raised, for the first time, the issue of Dr. Rolfe having taken x-rays during his examination. (CP 350.) This was in connection with Plaintiff's request that the trial court review the Discovery Master's decision on Mr. Driggs' motion to exclude the testimony of Russell Vandenbelt, M.D., and the MMPI-2. (CP 346-369.)

In its May 1, 2014, order, the trial court also imposed sanctions on Defendants for Dr. Rolfe's performing x-rays contrary to the CR 35 stipulation. (CP 491.)

**4. Facts Re: Inadvertent Nondisclosure of Dr. Howlett's Surgical Journal**

On November 12, 2013, Plaintiff's counsel deposed Kallie Hawells, an employee of Providence Orthopedics. (CP 457.) Ms. Hawells had been designated as a representative of Providence Orthopedics, and was asked to respond to questions regard Dr. Howlett's surgery schedule on the day he operated on Mr. Driggs. *Id.* Ms. Hawells, after reviewing documents, testified that Dr. Howlett had eight (8) surgeries on the date in question. *Id.*

During the course of trial, Dr. Howlett testified he had a private journal of surgeries he has performed throughout his career which he keeps separate and apart from the medical records. The journal listed a total of nine (9) surgeries having taken place on March 9, 2009. (CP 457.)

The handwritten journal was brought to the court's attention by defense counsel just prior to counsel putting Dr. Howlett back on the witness stand. (CP 488.) Defense counsel explained that he learned of the existence of the journal just prior to bringing it to the court's attention. *Id.* Mr. Driggs' counsel objected and requested the court preclude any

testimony Dr. Howlett would relate to the jury from his journal as the journal was not produced during discovery. *Id.*

After a hearing outside the presence of the jury, the court allowed Dr. Howlett to refer to his journal during his testimony, but only after Mr. Driggs' counsel was provided a copy and an opportunity to review the information. (CP 488.)

Mr. Driggs requested sanctions in connection with the late disclosure of Dr. Howlett's journal. Ultimately, in passing on the sanction request, the court concluded it could not find Providence had any knowledge of Dr. Howlett's handwritten journal. The court also found it was clear from Dr. Howlett's trial testimony that he made the journal for personal reasons, and kept it at home in a safe and not at the hospital or as part of the official medical records. (CP 489.)

Nevertheless, the trial court found that Dr. Howlett's not disclosing or turning over a copy of his handwritten journal was a discovery violation. (CP 489.) The court imposed sanctions of \$1,000 against Dr. Howlett. (CP 491.)

### **III. ARGUMENT AND AUTHORITIES**

#### **A. Standard of Review**

Whether to award sanctions for a discovery violation is a matter of trial court discretion, and the trial court's determination will not be

disturbed on appeal absent a clear abuse of discretion. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 1115 (2006). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re: Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

**B. Sanctions Under CR 26(g)**

CR 26(g) requires discovery responses to be signed by the attorney of record for the party, certifying that “to the best of his knowledge, information and belief formed after reasonable inquiry, [the response] is:

- (1) Consistent with the [rules of discovery] and warranted by existing law;
- (2) [Is] not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
- (3) [Is not] unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

...

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

In determining whether an attorney has complied with CR 26(g), the court should “consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request.” *Washington State Physicians Insurance Exchange and Association v. Fisons Corp.*, 122 Wn.2d 299, 343, 858 P.2d 1054 (1993). In determining whether to award sanctions, a party’s conduct must be “measured against the spirit and purpose of the rules.” *Fisons, supra*, at 345.

In *Fisons*, the court identified “certain principles” to “guide the trial court’s consideration of sanctions.” *Id.* at 355. First, the “least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed.” *Id.* The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should also “ensure that the wrongdoer does not profit from the wrong.” *Id.* The

wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions. *Id.*

The purpose of a sanctions orders "are to deter, to punish, to compensate and to educate." 122 Wn.2d at 356. Where compensation to litigants is appropriate, "then sanctions should include a compensation award. However, the sanctions rules are not "fee shifting" rules. *Id.*

A trial court may deny a motion for sanctions where there is no prejudice emitting from an alleged violation of CR 26(g). *Perry v. Costco Wholesale Inc.*, 122 Wn. App. 783, 806, 98 P.3d 1264 (2004).

**C. Argument Re: Scheduling of Dr. Howlett's Continuation Deposition**

At the conclusion of Dr. Howlett's first deposition, defense counsel informed Plaintiff's counsel that the defense would not agree to the rescheduling of Dr. Howlett's deposition. Thus, the Plaintiff, at that point, was aware the defense would seek a protective order with respect to any effort to reschedule Dr. Howlett's deposition. Plaintiff's counsel, with that knowledge, unilaterally scheduled the continuation deposition of Dr. Howlett, without inquiring about the availability of Dr. Howlett or defense counsel. Defense counsel then moved for a protective order, only noting the Motion for Hearing on Shortened Time because of trial court unavailability due to a vacation. The court then denied the motion in part,

but granted it in part with respect to the duration of the deposition. Nevertheless, the court sanctioned Dr. Howlett. Under these circumstances, the trial court's sanctions order was manifestly unreasonable, and based on untenable grounds and/or reasons. The trial court was critical of defense counsel for waiting too long to file the motion for protective order. But there is certainly nothing in the court rules that requires a motion for protective order to be brought at a certain time in relation to the discovery method or device at issue.

**D. Alleged Violation of CR 35 Stipulations**

With respect to Dr. Vandenberg's CR 35 exam/evaluation, the trial court sanctioned Dr. Howlett because, in the trial court's opinion, the MMPI-2 was a "form" within the meaning of paragraph 9 of the stipulation. That was an unreasonable reading of the stipulation. Reading paragraph 9 in conjunction with other portions of the stipulation leads to the conclusion that the word "forms," as contemplated in paragraph 9, relates to patient information forms typically completed by a patient in the waiting room or even in advance of an appointment. The term cannot be reasonably interpreted to include standardized psychological testing such as the MMPI-2. If the term included standard psychological tests, then the absurd result would be that the defense was obligated to provide Mr. Driggs and his counsel with a copy of the MMPI-2 in advance of

Mr. Driggs' CR 35 examination, so the "form" could be completed by Mr. Driggs and his counsel before the exam.

Dr. Howlett did not violate the CR 35 stipulation with respect to "forms" by virtue of Dr. Vandebelt administering the MMPI-2. Accordingly, the trial court's conclusion, and resulting sanction against Dr. Howlett, was manifestly unreasonable, and/or based on untenable grounds and reasons.

With respect to the examination by Dr. Rolfe, there was, admittedly, a violation of the stipulation when Dr. Rolfe took x-rays. But there was absolutely no wrongdoing on the part of Dr. Howlett in connection with that violation. Dr. Howlett and his counsel did everything they could be reasonably expected to do in connection with the stipulation for Dr. Rolfe's examination. They sent a copy of the CR 35 stipulation to Dr. Rolfe's office and expected him to comply with it. Dr. Rolfe's taking x-rays in violation of the stipulation is not a "wrong" the trial court should have imputed to Dr. Howlett. And certainly Mr. Driggs was not prejudiced in any way by the breach of the stipulation. Under all of the circumstances, the trial court's sanctions order for violation of the CR 35 stipulation with respect to Dr. Rolfe was manifestly unreasonable and based on untenable grounds/reasons.

**E. Inadvertent Nondisclosure of Dr. Howlett's Private, Handwritten Surgery Journal**

Dr. Howlett's private handwritten surgery journal was kept at his home in a safe. Its existence was not revealed to defense counsel until Dr. Howlett was on the witness stand at trial. The journal was never a part of the hospital or medical records. The defense cannot be faulted for not learning about the journal during the course of discovery. There was absolutely no prejudice to Mr. Driggs by the late disclosure of the journal. Indeed, arguably Mr. Driggs' case was enhanced by the disclosure of the journal because one of his arguments was that Dr. Howlett, because of his heavy surgery load, made a mistake the day he operated on Mr. Driggs. Based on the medical records, Providence indicated in responses to discovery that Dr. Howlett performed eight surgeries on March 9, 2009. The journal revealed that he, in fact, performed nine.

Because of the nature of the information sought, and the circumstances surrounding the disclosure of the handwritten journal, Dr. Howlett should not have been faulted for not identifying or providing a copy of the journal earlier. Sometimes matters are simply missed during discovery, and this was one of those times, with no fault or wrongdoing on the part of the defense, and no prejudice to Plaintiff. Accordingly, the trial

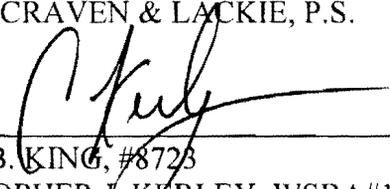
court's sanctions order was manifestly unreasonable and based on untenable grounds/reasons.

#### IV. CONCLUSION

Based on the foregoing argument and authorities, Dr. Howlett respectfully requests that the trial court's sanctions orders against him be reversed.

DATED this 17th day of February, 2015.

EVANS, CRAVEN & LACKIE, P.S.

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**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 17<sup>th</sup> day of February, 2015, the foregoing was delivered to the following persons in the manner indicated:

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(Date/Place)

Jan Hartzell