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No. 22811-8-III

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

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PARDNER WYNN

Appellant

v.

JOLENE EARIN and JOHN DOE EARIN,  
as Husband and Wife and Their Marital Community  
Respondent

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APPEAL FROM THE SUPERIOR COURT  
FOR SPOKANE COUNTY

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THE HONORABLE KATHLEEN M. O'CONNOR, Trial Judge

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REPLY BRIEF OF APPELLANT

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**Mary Schultz & Associates, P.S.**  
Mary Schultz  
Attorney for Appellant  
818 West Riverside Ave., Suite 810  
Spokane, WA 99201  
(509) 458-2750

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## I. INTRODUCTION TO REPLY

This appeal centers on directed verdicts against Defendant/Respondent Jolene Earin (Earin) for her wrongful disclosure of confidential medical information in violation of the Health Care Information Access and Disclosure Act. RCW 70.02, *et seq.* Yet at the very outset of Earin's Response, her "Counter-Statement of Case" (*Resp. Br. at 2*) suggests, contrary to fact, that there was no confidential information at stake because Plaintiff/Petitioner Pardner Wynn (Wynn) "waived any privilege that might have run in [his] favor." In fact, there was no finding of waiver in this case, and the trial court expressly ruled that Earin was prohibited from arguing waiver of privilege. *CP 904-05.*

Another of Earin's purported statements of fact is not fact at all. Earin states, contrary to fact, that the trial court "acting as trier of fact, determined as a factual matter, that Wynn did not prove any damages resulting from the statutory claims." *Resp. at 7.* The order to which Earin refers this Court (*CP 1072-74*) does not support her statement. It does not because that is not what happened. In fact, the Court reserved for itself the determination of actual damages and then did not make that determination at all. *CP 1081, para.12.*

Crucial to an accurate portrayal of this case is that Wynn prevailed on every claim the jury considered, and the claims that were dismissed or

immunized should not have been, based on their independent validity as triable claims and as components of a continuum of statutory violations and negligence. Compounding the trial court's error was its bifurcation of damages in the attorney fee award, which created a sharply unjust result given the public policy and public interest at stake in this claim for wrongful disclosure of confidential medical information. Wynn replies to Earin's individual responses as follows.

## II. ARGUMENT

### A. Claim Immunity

Earin agrees that Washington's absolute witness immunity rule stems from the role of the witness in the proceeding and that its goal is to encourage full disclosure (*Resp. Br. at 9*). These are the very reasons the rule was misapplied in this case.

As a witness in this case, Earin assumed an improper role; she therefore is not entitled to the immunity awarded witnesses whose role in the proceeding is proper. The witness immunity rule protects the proper role of a witness to provide complete and candid testimony. It makes no sense – and violates enacted law as well – to protect testimony that should not be heard in the first place.

The authority upon which Earin relies demonstrates that immunity was not proper in this case. Earin focuses on the language in *Bruce v.*

*Bryne–Stephen & Assoc.*, 113 Wn.2d 123, 776 P.2d 666 (1989) describing the judicial policy supporting the witness immunity rule: to encourage “frank and objective testimony” “regardless of how the witness comes to court.” Yet Earin refuses to acknowledge the critical difference between the *Bruce* Court’s urging “frank and objective testimony” when the testimony is *properly before the court* and the trial court’s application of the same rule in this case where Earin’s testimony was *expressly prohibited by the legislature*.

Failure to make the distinction leads to at least two absurd results: 1) the Court would reward medical professionals who violate the Health Care Information and Disclosure Act because the Court exempts those violators from the consequences of their illegal disclosures; and 2) the Court would abandon its responsibility to implement the legislative prohibition against disclosure of confidential medical information by ignoring the statutory mandate, and by instead protecting the prohibited disclosures pursuant to its own judicially created policy.

Further, the *Bruce* Court’s statement that the immunity rule applies “regardless of how the witness comes to court” established only that the rule applies to witnesses retained as experts, as well as those before the court as fact witnesses. *See Bruce*, 113 Wn.2d at 128-29. The court did not intend, as Earin suggests, to extend the rule to witnesses who, like Earin in this case,

offer testimony prohibited by statute. To the contrary, the *Bruce* Court emphasized that witness immunity requires “compelling public policy justification for its existence.” *Id.* at 137. That justification is missing in this case. Here, the compelling public policy at stake is protection from disclosure of confidential medical information – an interest sufficient to compel the legislature to enact specific laws preventing such disclosure and to authorize penalties for violation of those laws.

Furthermore, no Washington court has interpreted the reasoning in *Bruce* as Earin does; that is, to permit witness immunity for health care professionals beyond the preparation for and delivery of testimony at trial. This is because the underlying rationale for witness immunity does not support granting immunity for medical treatment information that is unrelated to preparation for or participation in litigation. Here, unlike in any other reported case in this jurisdiction permitting immunity, Earin’s testimony arose from her confidential treatment of Wynn before litigation – treatment provided separate and apart from the proceedings in which she later disclosed the confidential information.

Similarly, Earin relies on *Bruce* and *Gustafson v. Mazer*, 113 Wn. App. 770, 54 P.3d 743 (2002), for the proposition that witness immunity extends beyond statements made in judicial proceedings to include acts and communication that help make up the basis of that testimony. Here

again, however, by asking this Court to extend that proposition to the facts in this case, Earin asks this Court to construe *Bruce* and *Gustafson* as no other court has.

As noted in the Opening Brief, in *Bruce*, the plaintiff had hired an engineer for the purpose of estimating and providing expert testimony regarding costs associated with the plaintiff's property. 113 Wn.2d at 124. The plaintiff later sued the engineer for negligence because the actual costs were twice the amount the expert witness testified to at trial. *Id.* at 124-25. The court held that the witness was immune from civil liability for any action done as part of his judicial function as a testifying expert witness. *Id.* at 125.

Likewise, in *Gustafson*, the guardian *ad litem* in a custody dispute hired a psychologist to conduct a psychological evaluation of a child and her parents to be used in custody proceedings. *Gustafson*, 113 Wn. App. at 772. The psychologist had no connection with either parent or child prior to the custody dispute. *Id.* She prepared the evaluation solely in connection with the dissolution litigation. *Id.* at 772-73. The court held that the psychologist was immune for her report because her testimony, similar to the testimony in *Bruce*, was "part of the long, complex evaluation process that culminated in her testimony at the custody hearings and trial." *Id.* at 772.

Thus, the witness immunity in *Bruce* and *Gustafson* is plainly distinguishable from the immunity in the present case, because the *Bruce* and *Gustafson* witnesses prepared records and information in contemplation of litigation and testimony at trial, whereas here, Earin's information was gathered not in preparation for trial, but in the course of her treatment and evaluation of Wynn at a time when the litigation was not yet contemplated. Thus, unlike the expert testimony in *Bruce* and *Gustafson*, which was prepared in contemplation of litigation, Earin's medical records were originally prepared only for the purposes of Wynn's medical treatment and diagnosis, and are directly protected by statute from disclosure. Accordingly, she is not entitled to witness immunity for disclosing this information because witness immunity does not exist for violating the law in testifying.

In sum, Earin asks the Court to adopt a policy as illogical as it is illegal: She argues that, although it is wrong to offer to disclose confidential medical information, once that offer is made, the court should encourage full and frank disclosure, and once the court has so accommodated the disclosure of confidential medical information, the initial offer of disclosure is also justified. The Court should reject Earin's invitation to absurdity. Instead, this Court should adhere to existing law and policy by reversing the trial court's decision to grant Earin immunity for voluntarily disclosing

confidential medical information she acquired during her independent medical treatment and diagnosis of Wynn.

**B. Improper Removal Of Wynn's Amended Claim For Earin's Noncompliance With the Medical Records Subpoena**

Earin acknowledges that the court permitted Wynn to amend his claims to include an RCW 70.02.060 violation for failing to comply with the subpoena for his medical records (*Resp. Br. at 24*). Earin does not argue that the amended claim was deficient in any manner, and it was not. Nor does Earin argue that Wynn was not entitled to bring the amended claim, which he was. Earin asserts nonetheless that the court's refusal to submit this claim to the jury was not error. Earin does not, because she cannot, cite any authority for the assertion that a valid claim properly brought can be withheld from the jury based on the whim of the court.

Also without support is Earin's argument that Wynn suffered no prejudice from the exclusion of his valid claim for Earin's noncompliance with the subpoena compelling production of his medical file. Earin attempts to justify the exclusion of the amended claim based on the success of Wynn's other claims. However, when granting Wynn leave to amend his claims, the court did not determine that the amended claim was but a duplicate claim for which there could be no recovery if Wynn prevailed on related or similar claims.

The amended claim was valid, or the court would not have granted Wynn leave to bring it. Wynn was entitled to have the jury consider that claim, along with his other claims. Earin's RCW 70.02.060 failure to comply with the subpoena requirements represented an additional violation of the standard of care, and it comprised a link in the continuum-of-negligence, course-of-treatment theory Wynn was entitled to present to the jury. Therefore, the amended claim was improperly excluded, and this Court should remand the claim for proper jury consideration.

**C. The Court's Reservation of – and Failure To Decide -- Actual Damages, and the Resulting Prejudice**

Despite the plain language of the statute, Earin argues that the determination of actual damages was properly reserved for the court. And once again, Earin asserts that even if there was error, Wynn was not prejudiced.

As explained in Wynn's opening brief, it was error for the court to reserve the actual-damages determination for itself, when the statute does not include that determination as one of the expressly identified functions of the court, as it does the awarding of attorneys' fees and all other expenses. *Opening Br. at 26.*

Moreover, Earin misses the point. Even if the damage determination was properly reserved, Earin ignores the plain fact that the court never

thereafter determined the damages. Thus, as a result of the reservation, actual damages were not and have never been determined – despite the fact that Wynn prevailed on every claim submitted to the jury. If ever there was prejudice to a plaintiff it would be here, where the plaintiff prevailed on all liability issues (even though the court dismantled the plaintiff’s continuum theory of the case by immunizing some claims and dividing others) yet was not awarded any actual damages because the court, having reserved the determination of damages for itself, failed to make a determination of actual damages at all!

This Court should reverse and remand for a proper determination of actual damages on the existing claims and on the claims which also should have been addressed but were improperly excluded from the jury.

**D. Juror dismissal**

Earin fails to address the law governing juror dismissal in her hope that broad judicial discretion is the sole basis for dismissing a juror. It is not. Earin cites one criminal case, *State v. Jordan*, 103 Wn. App. 221, 11 P.3d 866 (2000), and concludes that the court in this case was bound by “the *Jordan* test,” consisting of “whether the record establishes that the juror engaged in misconduct.” *See Resp. Br. at 30-31*. Even then, Earin fails to suggest any juror misconduct in the present case. Earin merely states that the court in this case “created a substantial and compelling record, thereby

satisfying the *Jorden* test.”

Wynn was severely prejudiced by the improper dismissal of the juror in this case. For this reason, Wynn addressed in considerable detail and analysis (*Opening Br. at 26-37*) the vast body of statutory and case law established to guide courts in determining when juror dismissal is permitted after jury selection in civil cases. That authority demonstrates the strict standards prohibiting summary dismissal of a juror, in the absence of actual or implied bias, and with no challenge for cause. Measured against those strict standards, the juror dismissal in this case was error. Accordingly, this Court should remand for retrial of damages.

**E. Inconsistent Verdict**

Earin completely ignores that the jury’s special damage verdict was inconsistent with the jury’s general damage verdict and a companion special damage verdict. Earin urges the court to affirm the verdict simply because “[t]he jury’s verdict indicated it did not believe Mr. Wynn’s testimony,” and that conclusion was “well within their province and ability based on all of the evidence presented at trial.” *Resp. Br. at 37*.

Notwithstanding Earin’s failure to recognize the inconsistency, the verdicts cannot be reconciled:

One cannot have necessary lost medical expense from a year of psychological intervention to address emotional distress without having underlying emotional distress. The

jury's award of \$0 non-economic damages, *CP 934*, was thus inconsistent both with its general verdict which identified Wynn as being damaged by Earin's acts, *CP 933, q. 3*, and likewise inconsistent with its companion special verdict form, which awarded over a year of psychological treatment for his emotional damage. *CP 934, economic damage*. The specific award of \$0 for the emotional damage is thus inconsistent as a matter of law with the more general and specific awards of full damages.

*Opening Br. at 37-41.*

Earin's reliance on *Gestson v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (Div. II 2003), is not instructive. In *Gestson*, the jury awarded the plaintiff damages for the cost of her emergency room visit following a car accident, but did not award general damages for injuries she sustained in the accident. *Id.* at 618. The obvious distinction between *Gestson* and the present case is that here, the jury attributed Wynn's economic damages to his emotional distress, yet did not compensate Wynn for that emotional distress, whereas the jury in *Gestson* did not attribute the emergency room costs to the other, uncompensated general damages the plaintiff claimed.

Because the jury in the present case attributed its award of economic damages to Wynn's emotional distress, its failure to award damages for that economic distress is inconsistent with its verdict. This inconsistency represents unfairness and cannot be ignored. The jury's verdicts must be reconciled. Therefore, the court's denial of the Motion for Judgment

Notwithstanding the Verdict should be reversed. Wynn is entitled to a new trial on the value of his emotional damages.

**F. Statutory Attorney Fees**

Earin argues that the trial court did not err in awarding minimal fees for Wynn's prevailing at trial. In support of this, she first asserts that the trial court only "assumed" Wynn to be the prevailing party, but in fact he was not. (*Response Br. at 40*). This is improper. Earin made this argument to the trial court, which correctly concluded otherwise. *CP 1074, 1080, para. 5*. The only claims on which Wynn did not prevail were those the court did not allow to go to the jury. But moreover, had Wynn not been the prevailing party, Earin would have needed to appeal the court's award of fees in its entirety. The relevant fee statute only allows fees to the prevailing party. RCW 70.02.170(2). Earin did not appeal this trial court determination of prevailing party status and cannot therefore complain of it on appeal. RAP 2.4(a)(1); *Hawthorne Square Condominium Assoc.*, 124 Wn. App. 1035, 2004 WL 2850001 (2004).

Earin then argues that the amount of recovery is a relevant consideration on appeal in determining the reasonableness of fees. The trial court, however, did not reduce fees due to the size of the verdict. It affirmatively recognized that statutory fees for public policy claims are not to be reduced because monetary damages are low. *CP 1074* ("While the

court is mindful of the public policy issues underlying RCW 70.02 and the need to calculate a fee that is fair and compensatory for the work involved, regardless of the monetary outcome; . . .”). *CP 1080, para. 7*. Again, Earin did not file a cross appeal to contest this decision.<sup>1</sup> Her attempt to raise it now is also improper.

Earin ultimately does address *Brand v. Dept. of Labor & Ind.*, 139 Wn.2d 659, 670, 989 P.2d 1111 (1999), in which the Washington Supreme Court reversed an order reducing fees through segregation of *claims* is a statutory cause of action. *Brand* addressed a scenario where full fees were awarded for trial processes, but where the court had reduced the fee award by segregating proven claims from those not proven. *Id.* at 669-674.

Here, however, Earin avoids the issue. In this case, the trial court did not award fees for prevailing through trial on *any* statutory claim, even those proven. Here, fees were awarded only as to “*discovery regarding theft of medical records*” and “*analyzing them*” in the context of a statutory violation. *CP 1080, para 7*. This fee segregation is beyond claim segregation. This is a fee award for one limited piece of discovery and some

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<sup>1</sup> It was understood by all parties that with this sort of claim i.e. unauthorized record disclosure, the biggest damage would be attorney fees. *CP 1147*. It was understood that the largest damage would be fees to confirm the violation. *CP 1150*. The court thus indicated that it would make the determination. *CP 1150*. The instructions themselves reflect the contentiousness with which this matter was addressed. Not only did the Defendant deny liability, whether statutory or negligent, but litigated nearly every word in the operative statutes. *See CP 1067, 1068, 1070, 1074-1075*. Ultimately the court provided jury instructions addressing these defenses, *RP 923, 924, 925, 927*, and ended up directing a verdict on such. *RP 928*. Reduction of fees was thus improper.

trial preparation. Earin has no response to this unprecedented and unjust result.

Even if this were to be an actual claim segregation, the court's reduction would be improper. As in *Brand*, fee awards under statutory public policy matters do not hinge on overall recovery. *Id.* at 669. Degree of overall recovery is inconsequential. *Id.* The court in *Brand* found its holding to be consistent with the purposes behind RCW 51.52.130 awarding full attorney fees to workers whose success on appeal before the superior or appellate court will ensure adequate representation for injured workers." *Id.* at 669 – 674.

Despite Earin's argument to the contrary, the *Brand* reasoning applies here as well. RCW 70.02.170 does not base prevailing party fees on a showing of any degree of damage. To the contrary, under RCW 70.02.170, fees are based *purely* on demonstrating a violation of the Act. Thus, whether or not Earin ultimately lost Wynn's records, and caused more damage, the violations alone, found both by Earin's acts of releasing information to a GAL without authorization and by her act of improper record retention, provided for Wynn to be redressed his fees and costs for having to go to trial to demonstrate such.

Further, policy concerns overwhelmingly mitigate in favor of such a theory. Damage for records loss, even without a surrounding divorce action,

is elusive. There is normally little in the way of emotive component. No possibility of any reasonable contingency exists to motivate private enforcement through private counsel. *See CP 982-983, paras. 15-19* (Declaration of Plaintiff's counsel as to undesirability of the case). Thus, no private party would have reason to exercise this legislative right of relief at all, even if they are wronged, because they would be harmed financially from the pursuit of violations if they were not fully compensated for fees and costs.

Further, the idea of bringing such a matter against a medical malpractice carrier with million-dollar coverage carries with it all of the attendant aggressive defenses of such coverage. *See, e.g., CP 983, para. 18; 984, para. 22; 986-988 paras. 24-31.* Pursuing such a case is beyond the means of most persons wronged, even if the violations are a matter so evident as to be subject to a directed verdict even as to negligence.

As evidenced here, throughout a five-volume record, this unrepentant Defendant at no time acknowledged *any* violation of statute or negligence. She instead concocted defense theories designed to increase litigation costs to force settlement, refusing to comply with discovery requests, refusing to appear at depositions, ignoring subpoenas served on her to compel her to appear (*CP 1097-1101*), disputing show cause orders that were properly issued (*CP 1096-1150, 1160-1162, 1190-1193, 1181-1182*), litigating and

forcing bizarre interpretations of every word of the relevant statute on which supplemental instructions were required (*see e.g. CP 808, 888-898*), at least one proposed interpretation of which survived until the trial court directed a verdict, and then directed the jury otherwise (*CP 928, para. 2*), arguing for such things as “waiver” of privileges (*CP 904-905*), claiming that the law required the “clarification” of the phrase “health care provider” for the Defendant counselor to understand her duties under the act, but then noting, after all of this, that she wouldn’t change her conduct anyway.<sup>2</sup> In closing, defense counsel proclaimed that Earin would do the same thing all over again if asked, because, impliedly, violating the law was the right thing to do if children were involved. She equated following the law as being offensive under “considerations of humanity.”<sup>3</sup>

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<sup>2</sup> The findings made by the court, stated defense counsel, “provided needed clarification to this area of law,” *RP 1224*, as if the statutes are not clear on their face, and the defendant simply refused to follow their plain language. Defense argued that the court’s clarification “certainly helped Ms. Earin in terms of the way she will comport her conduct in the future, and it certainly provided some clarification with respect to the issues that you need to decide in this case.” *RP 1224*. Fees were available to Wynn for having demonstrated these violations whether or not Earin ultimately lost his records. That loss simply caused more damage.

<sup>3</sup> Defense counsel: “When this case is over, Jolene Earin is, obviously, going to have releases in her possession before she talks to anyone, and she is, obviously, leaving this courtroom much wiser than she walked in, but I will tell you something else, when an officer of the court and a child psychologist who is charged with probably the most solemn duty that I can imagine, deciding where kids are going to be raised, who is the custodial parent, . . . in the best interests of those children’s health and welfare and safety, you know what she is going to do? She is going to answer the questions truthfully. . . when Earin is contacted and when she is asked by someone who has this obligation from the court to find out about where these kids should leave (*sic*) and how often the other parents should see them, she is going to answer those questions truthfully

Even after directed verdicts were entered against her on her theories and claims,<sup>4</sup> and jury verdicts entered, Earin requested that her *own* fees be covered as the “prevailing party.” *CP 1505-1508*.

In sum, the forced enlightenment of one indignant and unrepentant health care provider for the benefit of society cost over \$100,000 of Wynn’s own resources. The defense itself spent \$50,000 claiming no violations occurred, then justifying defiance of the law.

Anything less than an award of full fees in this case results in the aggrieved patient being damaged again – first by the violation, then by the healthcare provider’s aggressive denial of the violation, and her aggressive defense against it, and, upon directed verdicts being entered against her, by her continued claim of justification and by then finding out, to his dismay, that the court would not – despite directing verdicts in his favor – allow him to recover what it cost him to reach a just result.

It was abuse of discretion for the trial court to arbitrarily reduce fees to allow for only some work performed pretrial. Accordingly, this

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and honestly and to the best of her ability, and she is not going to spin her responses and she is not going to temper her responses. She is going to act in the best interests of her patient, those children, and any suggestion that she should do any less than that is offensive under any consideration of public policy or any consideration of humanity.” *RP 1238 – 1239*.

<sup>4</sup> The instructions themselves reflect the contentiousness with which this matter was addressed. Not only did the Defendant deny liability whether statutory or negligent but litigated nearly every word in the operative statutes. *See CP 1067, 1068, 1070, 1074-1075*. Ultimately the court provided jury instructions addressing these defenses. *RP 923, 924, 925, 927*, and ended up directing a verdict on such. *RP 928*.

Court should reverse the trial court's award of partial fees and mandate an award to Wynn of all his attorney fees.

**G. Attorney Fees On Appeal**

After years of litigation, two weeks of highly contentious trial, and more than 100 pages of appellate argument so far, Earin asks this Court to deny Wynn's request for attorney fees on appeal because "his appeal presents no debatable issue." *Resp. Br.* at 48.

Pursuant to RAP 18.1(a), however, Wynn has a right to recover reasonable attorney fees and expenses on review because RCW 70.02.170 grants actual damages and fees to a party who demonstrates a violation of the Healthcare Information Act. Wynn has done so. He now seeks statutorily granted remedial relief for such violations, and he should also receive fees for the necessity of this appeal.

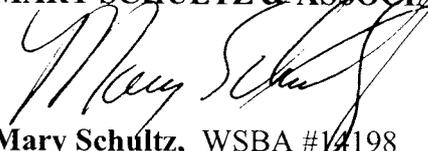
**III. CONCLUSION**

For the reasons presented here and in Wynn's opening brief, this Court should remand for retrial of non-economic damages, based upon *all* proper statutory and negligence claims, presented as a continuum which must be considered in that determination. Further, Wynn remains entitled to prevailing party fees from the first trial in a proper amount because he has already prevailed on demonstrating the violations of The Healthcare Information Act, and he is entitled to attorney fees for this appeal.

DATED this 1 day of April, 2005.

**Respectfully Submitted,**

**MARY SCHULTZ & ASSOCIATES, P.S.,**

A handwritten signature in cursive script, appearing to read "Mary Schultz".

**Mary Schultz, WSBA #14198**  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on the 1<sup>st</sup> day of April, 2005, she served a copy of the Reply Brief of Appellant to the person hereinafter named at the place of address stated below which is the last known address via hand delivery.

**Mr. James King  
Attorney for Respondent  
601 W. Main, Suite 1102  
Spokane, WA 99201**

  
\_\_\_\_\_  
**DELLA ROBERTS**

SUBSCRIBED AND SWORN to before me this 1<sup>st</sup> day of April, 2005.



  
\_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington, residing in  
Spokane. Commission Expires: 5/5/08