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Court of Appeals No. 46921-5-I

WASHINGTON STATE SUPREME COURT

BY C. J. MERRITT

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STACEY ZELLMER, individually and as  
Co-Personal Representative of the Estate of Ashley Cay McLellan,  
and BRUCE McLELLAN, individually and as Co-Personal  
Representative of the Estate of Ashley Cay McLellan,

Petitioner/Appellant,

vs.

JOEL ZELLMER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY  
The Honorable Brian Gain, Judge

ANSWER TO PETITION FOR REVIEW

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ORIGINAL



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## I. Identity of Respondent

Respondent Joel Zellmer, defendant below, asks this Court to decline to accept discretionary review of the Court of Appeals decision.

## II. Response to Petitioners' Issues Presented for Review

1. This Court should not grant review to consider abolishing the parental immunity doctrine because (1) petitioners point to no relevant social changes since this Court last reviewed and reaffirmed it in 1986, (2) Washington cases on the doctrine and its exceptions are consistent with a single rationale of protecting parental discretion, and (3) the public policy merits of the doctrine involve interests best weighed by the legislature.

2. This Court should not grant review to decide whether immunity applies because the family unit existed at the time of the accident.

3. This Court should not grant review to decide whether to deny parental immunity to stepparents who stand *in loco parentis* to and are financially responsible for their stepchildren.

4. This Court should not grant review to decide whether, under the facts of this particular case, Joel Zellmer was acting *in loco parentis* to his stepdaughter, Ashley because at the time of the accident Joel Zellmer was responsible for supervising her in his own home and he and Ashley were living together.

### **III. Statement of the Case**

#### **A. Parent-Child Relationship between Joel Zellmer and Ashley**

Joel and Stacy Zellmer were married in September 2003. CP 26. After the wedding, Stacey Zellmer and her three-year-old daughter, Ashley McLellan, permanently moved into Joel Zellmer's home in Kent, Washington. CP 27.

Joel Zellmer and his stepdaughter Ashley had a close familial relationship. CP 93. Joel Zellmer cared for Ashley as if she was his own biological daughter. CP 16, 27, 93. Joel Zellmer provided for Ashley financially and emotionally. CP 16, 27, 93. Ashley had her own room in the Zellmer household and Joel Zellmer often fed her meals, arranged her doctor's appointments, attended to Ashley's eyewear needs, and made regular payments for her daycare services. CP 27, 103.

Joel Zellmer considered Ashley as one of his own children and introduced her to people as his daughter. CP 103. Joel Zellmer spent more time with Ashley than her natural father, Bruce McLellan, who was frequently away on business in the Philippines. CP 16, 27, 93. Joel Zellmer frequently supervised and took care of Ashley when she was not in daycare and while Stacey Zellmer was at work. CP 25, 105.

#### **B. Facts Surrounding Accident**

On December 3, 2003, Ashley was not feeling well and stayed at home. CP 71. Prior to leaving for work that very same afternoon, Stacey Zellmer asked Joel to supervise Ashley. CP 72. Stacey Zellmer then left for work and left Ashley under Joel's supervision.

At approximately 5:00 p.m., Joel Zellmer moved Ashley to her bedroom and set up a movie for Ashley to watch. CP 27. Also around this time, Joel Zellmer's eight-year-old son Dakota returned from school. At approximately 5:30 p.m., Joel Zellmer checked on Ashley and personally observed Ashley watching her movie in her room. CP 27. Soon thereafter, Joel and Dakota went downstairs to build a fire and Joel Zellmer subsequently told Dakota to get Ashley from her room. CP 27.

Dakota, however, was unable to locate Ashley and he told his father that the back sliding door was open. CP 27. When Dakota informed Joel Zellmer that he could not find Ashley, but had seen that the back sliding door was open, Joel Zellmer immediately ran out the back sliding door looking for Ashley. CP 27. Joel found Ashley in the backyard pool and immediately brought her back inside and told Dakota to call 911 while he performed CPR. CP 17, 27. The paramedics arrived quickly and continued CPR, but Ashley died two days later. CP 17.

Stacy Zellmer and Bruce McLellan sued Joel Zellmer, primarily alleging negligent supervision and breach of an implied contract. CP 3. Joel Zellmer filed a motion for summary judgment requesting dismissal of the appellants' complaint with prejudice. CP 15, 93. Joel Zellmer's summary judgment motion was based upon Washington's parental immunity doctrine which prohibits civil suits brought by children against their parents for negligence. CP 15, 93. The Court of Appeals affirmed the judgment in favor of Joel Zellmer. Zellmer v. Zellmer, \_\_\_\_ Wn. App. \_\_\_\_, 133 P.3d 948, 951 (2006).

Petitioners have attempted to introduce evidence attacking Joel Zellmer's character for the purpose of showing either that the Marriage between Joel and Stacy Zellmer and the parental relationship between Joel Zellmer and Ashley were of low quality. In addition, plaintiffs attempted to introduce evidence that they could show something more than ordinary negligence on Joel Zellmer's part. The Court of Appeals found all of this evidence unpersuasive, irrelevant, or based on inadmissible hearsay. Zellmer, 133 P.3d at 954, n.27, n.28, n.36.

#### **IV. Summary of Argument**

Discretionary review is not appropriate under RAP 13.4(b)(4) because no issue of substantial public interest is presented.

This Court should not grant review to decide whether to abolish the parental immunity doctrine because nothing has changed since this Court last considered and reaffirmed the doctrine in 1986. In addition, the policy considerations motivating other courts to abolish the doctrine, including the availability of insurance coverage, do not apply in Washington because this Court upheld the validity of the family exclusion in homeowners policies. Because the doctrine is now entangled with related insurance issues, the legislature is in a better position to consider abolition of the rule.

In addition, this Court should not grant review to decide whether parental immunity applies to wrongful death claims. The law is settled on this question and there is no reason for excluding wrongful death claims

because the rationale for the immunity is designed to protect parents from litigation over their supervisory decisions.

Furthermore, this court should refuse to review the Court of Appeal's holding that parental immunity applies to custodial stepparents. Custodial stepparents are liable for supporting stepchildren in Washington and have the same, if not greater, need for parental discretion. Petitioners offer no good reason for disparate treatment of stepparents for this Court to consider.

Finally, the narrow issue of whether Joel Zellmer stood *in loco parentis* to his stepdaughter at the time of her accident is not a matter of substantial public interest and therefore should not be reviewed. In any event, the Court of Appeals was clearly correct in holding that a custodial stepparent married to the primary custodial natural parent will stand *in loco parentis* absent unusual facts compelling a contrary conclusion. Closer factual review would merely invite the kind of litigation the immunity was designed to protect parents from in the first place.

## V. Argument

### A. This Court Should Not Grant Review to Consider Abolishing the Parental Immunity Doctrine.

Parental immunity protects parents from liability for injuries to their children based on negligent supervision. This Court reaffirmed the immunity doctrine in a trio of cases decided in 1986. Jenkins v. Snohomish Cy. Public Util. Dist. 1, 105 Wn.2d 99, 713 P.2d 79 (1986) (upholding parental immunity doctrine and explaining its rationale and

limitations); Talarico v. Foremost Insurance Co., 105 Wn.2d 114, 712 P.2d 294 (1986) (“In order for the conduct of parents in supervising their child to be actionable in tort, such conduct must rise to the level of willful and wanton misconduct; if it does not, then the doctrine of parental immunity precludes liability.”); Baughn by Baughn v. Honda Motor Co., 105 Wn.2d 118, 712 P.2d 293 (1986) (“We have recently reaffirmed the vitality of the doctrine of parental immunity with respect to assertions of negligent supervision,” citing Jenkins, supra.).

Petitioners point to no social changes since 1986 that would warrant reconsidering these precedents. Instead, Petitioners attack the long-abandoned 1905 seminal case on the doctrine holding that child’s lawsuit against her father for rape was precluded by “the interest that society has in preserving harmony in the domestic relations.” Roller v. Roller, 37 Wash. 242, 243, 79 P. 788 (1905) (overruled to the extent that Roller holds parents immune from injuries due to willful or wanton misconduct. Borst v. Borst, 41 Wn.2d 642, 658, 251 P.2d 149 (1952)). The “domestic harmony” rationale, and immunity for intentional torts, no longer apply in Washington and the doctrine now exists only to protect parents’ discretionary supervisory decisions. Borst, 41 Wn.2d at 656-8.

More recently, this Court upheld the validity of the modern rationale supporting parental immunity, adopting the New Jersey high court’s reasoning:

The New Jersey Supreme Court has recently expressed well the reasoning relevant to a continuation of the parental immunity doctrine in parental negligence cases absent

willful or wanton parental misconduct. . . .

The Foldi court observed that there are certain areas of activities within the family sphere involving parental discipline, care and control that should remain free of judicial activity. "Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted." Foldi, 93 N.J. at 545, 461 A.2d at 1152. Parents should not routinely have to defend their child rearing practices where their behavior does not rise to the level of wanton misconduct. There is no correct formula for how much supervision a child should receive at a given age. "What may be perfectly safe to entrust to one five year-old may be utterly dangerous in the hands of another child of the same age." Foldi, 93 N.J. at 546, 461 A.2d at 1152.

Jenkins, 105 Wn.2d at 105. While the petitioners are right to say that "[s]ocietal attitudes clearly have changed since the Roller decision," the law has also changed and the holding in Roller is long overruled. This Court does not need to grant review to shovel more dirt on the Roller decision's grave.

The real issue is whether this Court should revisit the limited immunity for negligent supervision claims it upheld in 1986. Petitioners' primary attack on the doctrine is that it has led to inconsistent results. But the superficial "inconsistency" they point to amounts to no more than showing that sometimes a child can sue a parent and sometimes she cannot. The simple answer is that because the rationale for immunity is limited to protecting a sphere of discretionary parenting decisions, immunity does not apply to all child-against-parent tort lawsuits. For

example, parents have no special discretion in how they operate a motor vehicle and hence are not immune from suit if they happen to injure their child in the course of negligent driving. Jenkins, 105 Wn.2d at 106; Merrick v. Sutterlin, 93 Wn.2d 411, 416, 610 P.2d 891 (1980).

Similarly, willful or wanton misconduct will place the parent outside the doctrine's protection. Jenkins, 105 Wn.2d at 106. Also, if the parent injures the child outside the context of his parental duties, the rationale for the immunity no longer applies. Borst, 41 Wn.2d at 642 (father not acting in parental capacity when driving truck in the course of his business).

Contrary to the petitioners' attempt to portray parental immunity a outdated doctrine riddled with confusing and contradictory exceptions,<sup>1</sup> this Court's rulings are consistent with one another and with the modern rationale for the doctrine.

In addition to being internally consistent, this Court's parental immunity doctrine makes sense. This Court grants immunity to people in analogous supervisory roles who would otherwise be exposed to the harsh glare of hindsight and disproportionate liability. For example, the "business judgment rule" operates in a highly analogous manner in the corporate context:

Under the "business judgment rule,"  
corporate management is immunized from  
liability in a corporate transaction where

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<sup>1</sup> See Petition for Review at 7-9.

(1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.

Scott v. Trans-System, Inc., 148 Wn.2d 701, 709, 64 P.3d 1 (2003). Why should parent's decision on how closely to supervise a child receive less protection than a corporate manager's decision on whether a merger is a good idea?

Finally, reconsidering parent-child immunity would be unwise at this time. This Court and the legislature may have relied on the parental immunity doctrine in making other decisions. For example, this Court has upheld the validity of a "family exclusion" in a homeowners liability policy, State Farm General Ins. Co. v. Emerson, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984); see also Talarico, 105 Wn.2d at 116 (holding lawsuit against parent for negligent supervision barred by parental immunity and not covered by homeowners policy), even though this Court previously held that the same exclusion violates public policy when it is part of an auto policy. Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wn.2d 203, 643 P.2d 441 (1982). If this Court abrogates parental immunity, parents would be exposed to potentially uninsured tort liability for ordinary negligence claims. Indeed, the courts cited by petitioners that abrogated immunity have done so on the assumption that liability

insurance would be available.<sup>2</sup> The legislature is in the best position to weigh and balance both the tort policy and insurance implications of the parental immunity doctrine and decide whether any abrogation of the doctrine should be accompanied by insurance regulation.

**B. There Is No Reason to Hold that Parental Immunity Is Inapplicable When the Child Is Deceased or When the Family Unit Breaks Up After an Accident.**

Because the policy justification for the parental immunity doctrine is to prevent second-guessing parents' supervisory actions, there is no

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<sup>2</sup> Gibson v. Gibson, 3 Cal. 3d 914, 922 (1971) (“[W]e feel that we cannot overlook the widespread prevalence of liability insurance and its practical effect on intra-family suits. Although it is obvious that insurance does not create liability where none otherwise exists . . . it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity. . . . We can no longer consider child-parent actions on the outmoded assumption that parents may be required to pay damages to their children.”); Falco v. Pados, 444 Pa. 372, 380, 282 A.2d 351 (1971) (“In a time of almost universal liability insurance, such unexpected hardship or ruin [injuries caused by immune tortfeasor parents] is needlessly inflicted by the immunity doctrine.”); Elam v. Elam, 275 S.C. 132, 136, 268 S.E.2d 109 (1980) (“[T]his Court is not blind to the existence of universal automobile liability insurance. An injured daughter suing her automobile driver father, is, in reality, a daughter suing her father’s insurer.”); Kirchner v. Crystal, 15 Ohio St. 3d 326, 329, 474 N.E.2d 275 (1984) (“Although it is obvious that insurance does not create liability where none otherwise exists . . . it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity.”); Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967) (“If there is insurance there is small possibility that parental discipline will be undermined, or that the peace of the family will be shattered by allowance of the action.”); Glaskox v. Glaskox, 614 So.2d 906, 911 (Miss.1992) (“Moreover, domestic peace and harmony may be more threatened by denying the cause of action than by permitting one, especially where there is insurance.”).

basis for holding that the doctrine's applicability is affected by what happens after the allegedly negligent parental conduct takes place. The child's death or a subsequent family breakup would be relevant only under the outmoded "family harmony" rationale. But even under the "family harmony" rationale, family breakups would be encouraged if a breakup was all that stood between an aggrieved family member and his tort lawsuit.

Finally, review is not justified by any inconsistency between the Court of Appeals' decision in this case and Division Three's ruling in Sisler v. Seeberger, 23 Wn. App. 612, 596 P.2d 1362 (1979). In Sisler, a mother and one of her children died in a car accident caused by the mother's negligence. The court allowed a negligence action to proceed against the mother reasoning that:

Here, the parent is dead and the relationship is thus severed. As a result, there is no parental authority or familial tranquility to be preserved. Therefore, we do not believe that the immunity doctrine was designed to apply to this situation. This is particularly so where, as in the instant case, All of the parent's minor children are parties to the action and no single one of them can deplete the mother's entire estate to the detriment of the remaining children.

Sisler, 23 Wn. App. at 614-615. Sisler is inapposite because it is based on the outdated "family tranquility" rationale and not the rationale based on protection of parental discretion later adopted by this Court in Jenkins and Merrick, supra. In any event, the modern immunity would not apply under the facts in Sisler because liability was based on negligent driving,

not on negligent child supervision or parenting. Indeed, following this Court's decisions on parental immunity in 1986, Division Three upheld parental immunity for negligent supervision even though the child died.

The District argues that the doctrine of parental immunity should not apply since in wrongful death cases the reason for the rule no longer exists. The District contends since the child is deceased, there is no longer a need to protect family tranquility, parental control and authority. We are not persuaded. As noted in Jenkins, at 104-05, there are additional policy reasons for granting parental immunity even in wrongful death cases. Since the underlying reasons for granting parental immunity are unaffected by the demise of a family member, the mere fact the cause of action is for wrongful death will not abrogate the parental immunity doctrine.

Chhuth v. George, 43 Wn. App. 640, 719 P.2d 562 (1986). The child's death is wholly irrelevant to the existence of immunity under the rationale articulated by this Court. Sisler and the decision of the Court of Appeals in this case are not in conflict within the meaning of RAP 13.4(b)(2). Instead, Sisler is no longer good law because its reasoning conflicts with subsequent decisions of this Court. Sisler is also factually distinguishable because the parent died in the same accident and the result could be justified by the notion that parents have little to fear from the prospect that they may be sued after their own death.

There is no need for this Court to review the Court of Appeals on this issue because its decision follows the rationales given by this Court in 1986 and its own holding Chhuth later that same year.

**C. There Is No Reason for this Court to Review the Court of Appeal's Holding that Parental Immunity Applies to Stepparents.**

The blending of stepparents and stepchildren into families is common in modern society. This Court has recently decided a case where the evidence showed a strong bond between a boy and his stepmother. In re Custody of C.W.S., \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, No. 75263-0 (Slip Op., 6/8/2006). Justice Bridge noted that biology is not the sole creator of familial bonds between parent (natural or step) and child. Id., Bridge, J., concurring (Slip Op.). See also Smith v. Stillwell, 137 Wn.2d 1, 36, 969 P.2d 21 (1998) (Talmadge, J., dissenting). Similarly, implicitly acknowledging that stepfamilies do exist and function just like natural families, the Court of Appeals confirmed that the immunity should apply to stepfamilies.

The Court of Appeals noted, “[i]t is difficult to see why a stepparent living with a child and performing parental duties does not require the same wide sphere of discretion as a legal parent. Indeed, the ‘freedom and willingness’ of a stepparent to provide for the child may be more in need of protection, given that a stepparent’s obligation to the child derives only from the circumstance of marriage.” Zellmer, 133 P.3d at 951. Clearly, stepparents may be at great risk from suit by a hostile natural parent following an accident and therefore are in greater need for immunity. As the Court of Appeals pointed out, the “majority of courts to address this question agree that the policies justifying parental immunity

apply equally to stepparents, so long as they stand *in loco parentis* to the child.” Id. at 951 (citing cases).

Cases following the minority rule deny stepparent immunity because the stepparent could not be liable for the child’s support in the state in question and therefore should not receive the corresponding parental immunity.<sup>3</sup> In Washington, the family support statute applies to custodial stepparents.<sup>4</sup> In re Marriage of Farrell, 67 Wn. App. 361, 366, 835 P.2d 267 (1992) (“custodial [stepfather], *in loco parentis* . . . had both a common law and statutory duty to support [stepdaughter] while she lived with him and her mother.”); Van Dyke v. Thompson, 95 Wn.2d 726, 730, 630 P.2d 420 (1981) (statute does not apply to a noncustodial stepparent).

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<sup>3</sup> Warren v. Warren, 336 Md. 618, 629, 650 A.2d 252 (1994) (“[T]he duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world. . . . No such duties are imposed upon stepparents by law.”); C.M.L. ex rel. Brabant v. Republic Services, Inc., 800 N.E.2d 200, 206 (Ind. App., 2003) (“[U]nder Indiana law, a stepparent has no legal obligation to support his stepchildren.”); Rayburn v. Moore, 241 So.2d 675, 676 (Miss. 1970) (“In the present case Lyle M. Moore stood *in loco parentis* to Carmen Hihn to the extent that he supported her and treated her the same as his own children, but he was not under a legal obligation to do so.”); Xaphes v. Mossey, 224 F. Supp. 578, 579 (D.C. Vt. 1963) (predicting that Vermont would not adopt parental immunity at all).

<sup>4</sup> RCW 26.16.205 reads: “The expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them, and they may be sued jointly or separately.”

Because the reason for the minority position on stepparent immunity does not apply to custodial stepparents in Washington, there is simply no argument for the minority position and nothing for this Court to review.

**D. This Court Should Not Review the Court of Appeals' Conclusion that Joel Zellmer Stood *In Loco Parentis* to Ashley.**

The Court of Appeals determined that when the stepparent is married to and lives with the primary custodial parent, the stepparent should be deemed *in loco parentis* for the purpose of the family immunity doctrine unless unusual facts show a contrary intent. As the Court of Appeals recognized, a highly fact-specific test would open the door to litigious finger-pointing over the quality of family life and rob the immunity doctrine of much of its benefit:

There may be rare circumstances in which residential arrangements are not determinative, because a stepparent stands *in loco parentis* to a child only if he or she has the subjective intent to assume the status of parent to the child. This is a highly factual inquiry, and may be neither simple nor predictable. In today's world of blended families and shared parenting, the question could generate litigation of precisely the kind the immunity doctrine seeks to prevent: putting hearsay and finger pointing on the main stage in circumstances where hindsight clouds rather than illuminates.

Zellmer, 133 P.3d at 952 (footnote omitted).

Whether Mr. Zellmer stood *in loco parentis* to Ashley under these particular facts is also not a question of "substantial public interest" under RAP 13.4(b)(4) because the facts of every case are unique and the Court

of Appeal's application of the law to the facts of this case, even if erroneous, is unlikely to affect other litigants. In any event, because Joel Zellmer was married to Ashley's natural mother, cared for her as a parent would, and lived in the same home with her, the Court of Appeal's determination was clearly correct.

Finally, petitioners contend that *in loco parentis* status should be determined at the time their tort lawsuit was filed instead of at the time the accident happened and conclude that since Ashley was dead at the time they brought suit, there was no *in loco parentis* status. Petitioners cite Morris v. Brooks, 186 Ga. App. 177, 178, 366 S.E.2d 777 (1988), for this proposition. But the Morris court recognized "preservation of family tranquility" as the policy rationale for the parental immunity doctrine and therefore held the doctrine inapplicable when the child was dead because "[t]he object of preserving family harmony does not control where there is no family status at the time of filing of the action." The Morris opinion is meaningless in Washington because Washington bases the immunity on the need to protect parental discretion and has long rejected the family harmony rationale.<sup>5</sup> The subsequent death of the child is therefore immaterial. Chhuth, 43 Wn. App. at 647. Again, this issue has no merit and does not warrant review by this Court.

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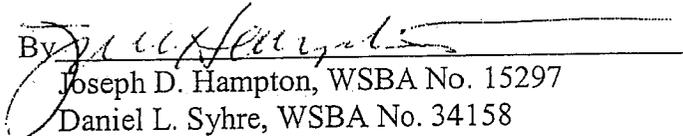
<sup>5</sup> See discussion in part B, supra.

## VI. Conclusion

Because this Court has considered and rejected an invitation to abolish parental immunity in the relatively recent past, and the remaining issues in the case are not sufficiently important or controversial to warrant review, Mr. Zellmer respectfully requests that this Court deny the Petition.

DATED this 28th day of June 2006.

BETTS, PATTERSON & MINES, P.S.

By 

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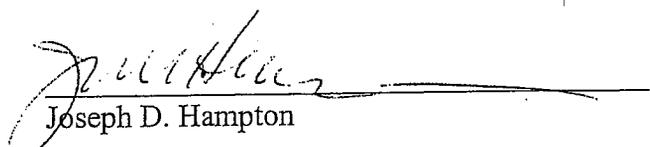
BY C. J. MERRITT

I am a citizen of the United States and a resident of ~~Kitsap County~~.  
I am over 18 years of age and not a party to this action. My business  
address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA  
98101-3927.

On the date indicated below, I caused the attached document to be  
served in by messenger upon:

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DATED this 28th day of June, 2006, at Seattle, Washington.

  
Joseph D. Hampton

