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NO. 554735

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

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,

Appellants,

Vs.

JOEL ZELLMER,

Respondent.

FILED
APR 11 2006
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JULIA M. HARRIS

APPEAL FROM KING COUNTY SUPERIOR COURT
Judge Brian Gain

REPLY OF APPELLANTS

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TABLE OF CONTENTS

I. NATURE OF THE CASE 1

II. ARGUMENT..... 1

A. The respondent’s assertions as to how the trial court resolved an evidentiary issue are incorrect and cannot be relied upon. 1

1. The respondent failed to cross appeal 2

B. The rationale supporting the respondent’s position that parental immunity should apply does not exist in this case and, therefore, parental immunity does not apply 3

C. Because there was no *in loco parentis* relationship between child and stepparent at the time this wrongful death lawsuit was filed, parental immunity does not apply to the respondent .. 5

D. There is a genuine issue of material fact as to whether or not Joel Zellmer stood *in loco parentis* to Ashley and, therefore, summary judgment was improper 6

1. Parental immunity should not be expanded to stepparents 6

2. The respondent did not have an *in loco parentis* issue with Ashley 7

3. In determining whether a genuine issue of material fact exists, the standard of review is *de novo* 8

4. The facts establish no *in loco parentis* relationship ever existed. 9

| | | |
|-------------|--|-----------|
| E. | The conduct engaged in by Joel Zellmer that resulted in the death of 3-year old Ashley McLellan was “willful and wanton” and, therefore, parental immunity does not apply | 11 |
| F. | The respondent was not engaged in a “core parental function” when Ashley drowned and, therefore, parental immunity does not apply. . . . | 14 |
| G. | The Doctrine of Parental Immunity should be abolished in Washington | 14 |
| III. | CONCLUSION | 15 |

TABLE OF AUTHORITIES

Washington Cases

| | |
|---|----------|
| <i>Blanchette v. Spokane County Fire Protection Dist. No. 1</i> , 67 Wn. App. 499 (1992) | 9 |
| <i>Borst v. Borst</i> , 41 Wn.2d 642 (1952) | 5, 6, 14 |
| <i>Enter Leasing, Inc. v. City of Tacoma</i> , 139 Wn.2d 546, 551, 988 P.2d 961 (1999) | 8, 9 |
| <i>Fell v. Spokane Transit Auth.</i> , 128 Wn.2d 618, 625, 911 P.2d 1319 (1996) | 8 |
| <i>Hizey v. Carpenter</i> , 119 Wn.2d 251 (1992) | 2 |
| <i>Hoffman v. Tracy</i> , 67 Wn.2d 31 (1965) | 5, 6, 14 |
| <i>In Re. Montell</i> , 54 Wn. App. 708, 712, 775 P.2d 976 (1989) | 8 |
| <i>Jenkins v. Snohomish County Pub. Utility Dist. No 1</i> , 105 Wn.2d 99, 105-106 (1986) | 11, 12 |
| <i>Livingston v. Everett</i> , 50 Wn. App. 655, 751 P.2d 1199 (1988) | 7 |
| <i>McNeil v. Powers</i> , 123 Wn. App. 577 (2004). | 9 |
| <i>Merrick v. Sutterlin</i> , 93 Wn.2d 411, 413-414 (1980). | 4, 7 |
| <i>Reid v. Pierce County</i> , 136 Wn.2d 195, 201, 961 P.2d 333 (1998) | 9 |
| <i>Roller v. Roller</i> , 37 Wn. 242, 79 P.2d 788 (1905) | 3, 4 |
| <i>Sisler v. Seberger</i> , 23 Wn. App. 612, 596 P. 2d 1362 (1979). | 6 |
| <i>Smoke v. City of Seattle</i> , 79 Wn. App. 412, 421-422 (1995). | 2 |
| <i>Sun Mountain Productions, Inc. v. Pierre</i> , 84 Wn. App. 608 (1997). | 2 |

Other Cases

C.M.L. v. Republic Services, Inc., 800 N.E.2d 200 (Ind. App. 2003) 7

Morris v. Brooks, 186 Ga. App. 177,179, 366 S.E. 2d 777 (1988) 5

Rayburn v. Moore, 241 So.2d 675, 676 (Miss. 1970). 7

Warren v. Warren, 336 Md. 618, 629, 650 A.2d 252 (1994). 7, 8

Xaphes v. Mossey, 224 F. Supp. 578, 579 (D.C. Vt. 1963) 7

I. NATURE OF THE CASE

The appellants dispute the description of facts contained in the respondent's brief, and refer this court to the statement of facts contained in the Appellants' Brief p. 4-8.

II. ARGUMENT

A. **The respondent's assertions as to how the trial court resolved an evidentiary issue are incorrect and cannot be relied upon.**

The respondent, in his briefing, incorrectly advises this court that various portions of the summary judgment declarations submitted by appellants at the trial court level should not be considered because the trial court found them to be hearsay. See e.g. Respondent's Brief, p. 4, 5, 6, 9. That statement is factually incorrect.

At the trial court level the respondent asked the court to strike portions from several of the various declarations provided to the trial court by the appellants. The respondent subsequently presented the trial court with an Order on Summary Judgment wherein his proposed exclusions were noted in the Order. Following a hearing, the trial court specifically struck from the respondent's Order, each section of the Order which would have ratified the respondent's position on the alleged hearsay. See CP 1-2, Order Granting Summary Judgment, attached herein as Exhibit 1. After striking out the language proposed by the respondent, the trial court

initialed each strikethrough. *Id.* In short, the trial court considered and rejected each of the respondent's arguments that specific portions of the appellants' declarations were inadmissible as hearsay. Accordingly, it is improper for the respondent to characterize evidence as inadmissible when the trial court's ruling was that the evidence was not inadmissible.

1. The respondent failed to cross appeal: Further, the respondent did not file any cross-appeal or assign error to the trial court's denial of their request that certain statements contained in the declarations proffered by the appellants at summary judgment be excluded. See *Smoke v. City of Seattle*, 79 Wn. App. 412, 421-422 (1995) (a judgment is composed of distinct parts, each requiring cross-appeal, if the respondent successful on one part, seeks reversal of some other part...).

Because the respondent did not cross-appeal the court's denial of their assertion regarding alleged hearsay, it is improper for the respondent to raise the issue for the first time now.

Although the respondent did not cross-appeal the trial court ruling, had the respondent cross-appealed, determinations on the admissibility of evidence relating to summary judgment are generally matters within the trial court's discretion, limiting review to an abuse of discretion. *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608 (1997); see also, *Hizey v. Carpenter*, 119 Wn.2d 251 (1992).

Even if the respondent had cross-appealed, he has not established that the trial court abused its discretion in the rulings the trial court made on the admissibility of evidence presented at summary judgment.

Rather than cross-appeal, the respondent simply refers to various items of evidence as “inadmissible.” The respondent’s assertion is contrary to what the trial court actually ruled. See CP 1-2, Order on Summary Judgment. Accordingly, the conclusions reached by the trial court on what evidence was admissible at summary judgment should be reviewed here.¹

B. The rationale supporting the respondent’s position that parental immunity should apply does not exist in this case and, therefore, parental immunity does not apply.

The doctrine of parental immunity developed in response to the perception that allowing a child to pursue redress against a parent for injuries that the parent caused the child would disrupt harmony within the family unit. See, *Roller v. Roller*, 37 Wn. 242, 79 P.2d 788 (1905). In *Roller*, the court prohibited a child from proceeding with a lawsuit against

¹ Respondent’s allegations that the appellants “engaged in a pattern of exaggeration” and in “attempts to impugn Joel Zellmer’s character”, Respondent Brief, p. 7, and that appellants “distorted the facts and resorted to personal attacks and exaggerations”, Respondent’s Brief, p.4, are improper argument and will not be responded to. Admittedly, the facts cast Mr. Zellmer in an unkind light but, as this court can see from the content of the half dozen under oath declarations appellants presented at summary judgment, the facts of this case are the facts of this case.

her father, who had been convicted of the raping her, because the lawsuit would disrupt family tranquility. See, *Roller*, 37 Wn. at 243.

Similar to the reasoning in *Roller*, the respondent here argues that if the appellants' wrongful death claim were "allowed to go to trial, the ensuing display of disagreement and accusation will only further damage the already tenuous relationships that exist in this case". Resp. Br. p. 27. The respondent ignores the fact that the parties in this case are now divorced. See *Zellmer v. Zellmer*, 04-3-12165-9 KNT. The decedent's mother filed divorce *before* the appellants' wrongful death action was filed. CP 70. The divorce is final. The parties' obligations and contacts are regulated by a decree issued as part of their divorce proceeding.

Here, the respondent is in essence asking the court to expand parental immunity to prohibit appellants from seeking redress for injury to a child so that "harmony within the family unit" will be preserved, even though the child at issue is deceased and divorce has dissolved the family unit. As our Supreme Court noted when re-evaluating the *Roller* court's basis for refusing to allow the civil action in that case to proceed, such a position is "unreal". See, *Merrick v. Sutterlin*, 93 Wn.2d 411, 413, 610 P.2d 891 (1980).

The law is clear. When the reasons justifying application of parental immunity no longer exist, "the mantle of immunity disappears"

and immunity should not apply. See *Borst v. Borst*, 41 Wn.2d 642, 657, (1952); accord, *Hoffman v. Tracy*, 67 Wn.2d 31, 37 (1965). Here, the reasons justifying application of parental immunity no longer exist. Immunity should not apply to the respondent.

C. Because there was no *in loco parentis* relationship between child and stepparent at the time this wrongful death lawsuit was filed, parental immunity does not apply to the respondent.

The respondent, in his briefing, did not dispute that the determination of whether an *in loco parentis* relationship exists for purposes of parental immunity is made “at the time the action is filed and thereafter.” *Morris v. Brooks*, 186 Ga. App. 177,179, 366 S.E. 2d 777 (1988) (“Where there is a change in status in the relationship between the parties in the interval between the tortuous act and the filing of the action, the time of filing governs. The object of preserving family harmony does not control where there is no family status at the time of filing of the action”).

It is irrefutable that, at the time the wrongful death action in this case was filed, there was no *in loco parentis* relationship between Mr.

Zellmer and Ashley McLellan. The decedent's mother had already filed for divorce². Further, Ashley died before the action was filed.

The respondent did not stand *in loco parentis* to the decedent at the time the wrongful death action in this case was filed. Accordingly, parental immunity cannot be granted to Joel Zellmer.

D. There is a genuine issue of material fact as to whether or not Joel Zellmer stood *in loco parentis* to Ashley and, therefore, summary judgment was improper.

1. Parental immunity should not be expanded to stepparents:

Both the appellants and respondent acknowledge that the issue of whether or not parental immunity should be expanded to include stepparents has not previously been decided in Washington. Nonetheless, Washington has consistently limited, not expanded, those circumstances under which parental immunity will apply. See e.g. *Borst v. Borst*, 41 Wn.2d 642 (1952) (parental immunity does not apply if injury results when parent engaged in course of his or her employment); *Hoffman v. Tracy*, 67 Wn.2d 31 (1965) (parental immunity does not apply if abdication of parental responsibility resulted in injury to child); *Sisler v. Seberger*, 23 Wn. App. 612, 596 P.2d 1362 (1979) (cessation of family unit terminates parental

² Divorce proceedings between the parties have concluded, and they are legally divorced. Zellmer v. Zellmer, 04-3-12165-9 KNT.

immunity); *Merrick v. Sutterlin*, 93 Wn.2d 411, 413-414 (1980) (parental immunity does not apply in automobile negligence cases); *Livingston v. Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988) (parental immunity not applicable if parent's conduct was willful and wanton).

Further, the trend nationally has been to allow children the right to proceed with actions to secure redress against a stepparent for injury caused by that stepparent. See e.g., *Warren v. Warren*, 336 Md. 618, 629, 650 A.2d 252 (1994) (“We also decline to extend parent-child immunity to protect stepparents, regardless of whether they stand *in loco parentis* to the injured child”). *C.M.L. v. Republic Services, Inc.*, 800 N.E.2d 200 (Ind. App. 2003) (“For the reasons stated herein, we decline to extend parental immunity doctrine to apply to stepparents”); *Rayburn v. Moore*, 241 So.2d 675, 676 (Miss. 1970) (refusing to extend parent-child immunity to stepparents); *Xaphes v. Mossey*, 224 F. Supp. 578, 579 (D.C. Vt. 1963) (no parental immunity for stepparent in negligence claim regardless of whether stepparent was *in loco parentis*).

2. The respondent did not have an *in loco parentis* issue with Ashley: Even if this court were to expand application of parental immunity to stepparents, and even if the court disregarded the law defining when an *in loco parentis* relationship is determined, summary judgment was improper in this case because a genuine issue of material

fact existed as to whether Mr. Zellmer stood *in loco parentis* to Ashley³. See e.g. *Warren v. Warren*, 336 Md. 618, fn. 3, 650 A.2d 252 (1994) (no court in any state has extended parental immunity to a stepparent without finding an *in loco parentis* relationship).

As noted by respondent in his brief at page 14, the determination of whether an *in loco parentis* relationship is established requires a factual determination and turns primarily on a determination of intent. See, *In Re. Montell*, 54 Wn. App. 708, 712, 775 P.2d 976 (1989).

3. In determining whether a genuine issue of material fact exists the standard of review is *de novo*: The respondent asserts that “there is no material issue of fact” as to whether the respondent stood *in loco parentis* to Ashley. See e.g. Respondent’s Brief, p. 15. The standard of review for summary judgment is *de novo*. *Enter Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999) (citing *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 625, 911 P.2d 1319 (1996)). Further, because this appeal is from summary judgment, this court should consider all facts submitted and all inferences from them in light most favorable to

³ Although the respondent asserts that the trial court found that Joel Zellmer stood *in loco parentis* to Ashley, Respondent’s Brief p. 13, that assertion is incorrect. In fact, the trial court simply declared that such a finding was unnecessary because “either there is a legal doctrine of parental immunity or [there is] not. Either it applies or it doesn’t apply”. RP 4. The trial court did question whether or not parental immunity was still a viable concept in Washington. RP 2.

the appellants as the non-moving party when making its determination on the *in loco parentis* issue. *McNeil v. Powers*, 123 Wn. App. 577 (2004); *Enter Leasing Inc. v. City of Tacoma*, 139 Wn.2d at 551 (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)); *Blanchette v. Spokane County Fire Protection Dist. No. 1*. 67 Wn. App. 499 (1992).

4. The facts establish no *in loco parentis* relationship ever existed: Here, the appellants provided declarations from six different people who commented on Mr. Zellmer's relationship with Ashley. Through those witnesses, the appellant established that, during his 88-day marriage to Ashley's mother, Mr. Zellmer was never employed and did not provide financial support for Ashley; she was supported financially by her mother and biological father, Bruce McLellan. CP 68, CP 71. Mr. Zellmer did not attend to Ashley's everyday needs such as her eyewear. CP. 71. Mr. Zellmer did not, and was not, active in "standard" parental roles such as disciplining Ashley. CP 71. Ashley was uncomfortable around Mr. Zellmer and he intimidated her. CP 71. Ashley did not refer to Mr. Zellmer as though he were her parent. CP 70. Ashley herself had stated that Mr. Zellmer had pushed her down some stairs. CP 82 and Exhibit to Declaration of Bruce McLellan, CP 62-64. One witness states that Mr. Zellmer referred to 3-year old Ashley as a "little bitch". CP 66. Although Ashley survived in a coma for two days before she passed, Mr.

Zellmer learned of her death only the day after she'd passed when her grandfather contacted him in an effort to secure some of Ashley's belongings. CP.61. One can only assume that Mr. Zellmer was unaware that Ashley passed the previous day because he was not sufficiently concerned for Ashley that he was checking on her status. In addition, when talking to a former girlfriend months after Ashley's death, he never even mentioned that she had died. CP 58-59. Clearly, Mr. Zellmer did not view Ashley as a parent would view their own child.

In opposition to the facts described above in the under oath declarations from several different people, Mr. Zellmer relies only on his own statement wherein he describes a relationship with Ashley that no one else apparently witnessed. Respondent's Brief p. 15. For example, the respondent asserts he introduced Ashley to people as his daughter. *Id.* If even that simple assertion was accurate, couldn't the respondent be expected to have provided an under oath statement from at least one person, even a family member, who could corroborate the respondent's depiction of his relationship with Ashley? Perhaps in recognition that a material question of fact exists as to whether an *in loco parentis* relationship ever existed, let alone whether it existed when the wrongful death suit was filed, the respondent in his brief begins discussion of the issue by referring to those cases that stand for the proposition that, under

certain circumstances, summary judgment can be sustained on appeal even if it was granted on improper grounds. See Respondent's Brief, p. 14.

There is an issue of material fact as to whether or not Mr. Zellmer had an *in loco parentis* relationship with Ashley. Accordingly, parental immunity cannot apply to Mr. Zellmer.

E. The conduct engaged in by Joel Zellmer that resulted in the death of 3-year old Ashley McLellan was “willful and wanton” and, therefore, parental immunity does not apply.

The respondent relies on *Jenkins v. Snohomish County Pub. Utility Dist. No 1*, 105 Wn.2d 99, 105-106 (1986) in support of his position that there was no material issue as to whether Mr. Zellmer's conduct should be considered as “willful or wanton”.

In discussing what constitutes “willful and wanton” conduct, the *Jenkins* court stated that,

It is sufficient that the actor ‘know’ or has reason to know, of circumstances which would bring home the realization to the ordinary reasonable person the highly dangerous character of his conduct.

Jenkins at 106.

Prior to Ashley's death, Mr. Zellmer knew of circumstances that would bring home the realization to an ordinary reasonable person that his conduct was highly dangerous.

Mr. Zellmer knew that on the day she drowned, 3-year old Ashley was at his home and he knew that she could not swim. CP 76. Unlike the parents in *Jenkins*, prior to Ashley's death Mr. Zellmer knew that his pool constituted a life threatening condition for children who could not swim, and he knew the uncovered pool was outside in his yard. See CP 72. Mr. Zellmer also knew that little children on his property who were not supervised could easily fall into his pool and that once they fell in, if not rescued, they would likely drown. CP 58. That very thing had happened to Mr. Zellmer several months before Ashley died. CP 58. Mr. Zellmer also knew, because he had been warned prior to Ashley's death, that leaving the pool without a fence and gate created an unsafe condition for children. CP 59.

Despite knowledge of each of those circumstances, Mr. Zellmer engaged in conduct that an ordinary person would recognize as highly dangerous. He did not take any steps to restrict access to his pool, and, while charged with supervising a young child who could not swim, he went to sleep. Mr. Zellmer's knowledge of the dangerous condition the pool posed for children, combined with his decision to simply take no precautionary steps to restrict a child from access to the pool, combined with his decision to go to sleep rather than to ensure that a child in his care would not access the pool and die, constitute willful and wanton conduct.

The respondent in his brief does not specifically argue that Mr. Zellmer's failure to fence and gate the pool and his sleeping rather than supervising a small child in the vicinity of the pool was not willful and wanton. Instead, the respondent incorrectly argues that the evidence establishing that conduct was deemed not admissible by the trial court. Respondent's Brief, p. 9. (Joel Zellmer is "not liable...because there are no admissible facts to support appellants' claim that Joel Zellmer's failure to supervise amounted to willful or wanton misconduct"; Respondent's Brief, p.19. "Appellants have presented no admissible evidence to support their claim that Joel Zellmer was sleeping" when Ashley died).

In fact, at summary judgment the trial court admitted the witness statements declaring before Ashley died, another child almost drowned after falling in the pool when Mr. Zellmer was supposed to be watching her, that he had been warned to fence and gate the pool in order to keep children out, and that he was asleep when Ashley drowned. See CP 1, Order on Summary Judgment, re: Declaration of Michelle Barnett, and see CP 58,59; and CP 1, Order on Summary Judgment re: Declaration of Shelley Ahlquist, and see CP 56.

Because there is an issue of material fact as to whether the conduct engaged in by Mr. Zellmer that resulted in Ashley's death was willful and wanton conduct, summary judgment was improper.

F. The respondent was not engaged in a “core parental function” when Ashley drowned and, therefore, parental immunity does not apply.

Contrary to the respondent’s assertions, Mr. Zellmer was not engaged in a “core parental function” when Ashley McLellan died. Mr. Zellmer was apparently sleeping. CP 72, CP 61, CP 56. Parental immunity applies when a parent is engaged in a core parental function. *Hoffman v. Tracy*, 67 Wn. 2d 31, (1965); *Borst v. Borst*, 41 Wn. 2d 642 (1952). Sleeping, as opposed to supervising a child but doing so in a negligent manner, is not a core parental function. Therefore, parental immunity should not apply in this case.

G. The Doctrine of Parental Immunity should be abolished in Washington.

In their initial briefing, the appellant traced the history and changes of parental immunity as it has been applied in Washington. Appellants’ Br. p. 8-18. In renewing their request that this court abolish parental immunity in Washington, the appellants adopt the facts and argument previously made at pages 8-18 of their initial brief.

III. CONCLUSION

Even if parental immunity is not abolished, parental immunity does not apply in this case because there are disputed issues of material fact.

The parties are divorced, and the rationale justifying the imposition of parental immunity no longer exists.

Parental immunity does not apply because Mr. Zellmer is a stepparent and the requisite *in loco parentis* relationship did not exist in this case.

Further, the conduct engaged in by Mr. Zellmer that resulted in Ashley's death was willful and wanton, thereby prohibiting the application of parental immunity.

Finally, when Ashley drowned, Mr. Zellmer was not engaged in any core parental function.

For the reasons stated above, the summary judgment previously granted in this case should be reversed.

DATED this 1 day of October, 2005.


ERIC W. LINDELL WSBA# 18972
Attorney for Appellants

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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,)

Plaintiffs,)

NO. 04-2-12706-8KNT

vs.)

JOEL ZELLMER,)

Defendant.)

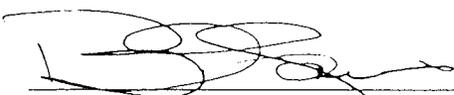
ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

THIS MATTER having come on duly before the undersigned Judge of the above-entitled Court on Motion of the defendant for Summary Judgment based upon the parental immunity doctrine, and the Court having considered, in addition to the defendant's Motion for Summary Judgment, the Declaration of Joel Zellmer, the plaintiffs' response to defendant's Motion for Summary Judgment, the Declaration of Shelley Ahlquist, ~~except paragraph 5, which is hearsay~~^{by}, the Declaration of Steve Ferguson, the Declaration of Michelle Barnett, ~~except the second sentence of paragraph 6 and the last sentence of paragraph 10, which are~~^{by} excluded from consideration as hearsay, the Declaration of Karen White, the

1 Declaration of Stacey Zellmer, ~~except paragraphs 12, 13 and 14, are excluded from~~
2 ~~consideration as hearsay~~, the Declaration of Bruce McLellan, ~~except the videotape~~
3 ~~is excluded as hearsay~~, and the Declaration of Joel Zellmer in reply to plaintiffs'
4 summary judgment response, and the Court having heard argument of counsel and
5 being fully advised in the premises, NOW, THEREFORE, it is hereby

6 ORDERED, ADJUDGED and DECREED, that defendant's Motion for
7 Summary Judgment of Dismissal, based on the parental immunity doctrine, is
8 hereby granted, and this case is dismissed with prejudice.

9 Done in Open Court this 17th day of December, 2004.

10 
11 _____
12 Honorable Brian Gain, Judge of the King
13 County Superior Court

14 Presented by:
15 MURRAY, DUNHAM & MURRAY

16
17 By 167 Dec. 1
18 Harold B. Field, WSBA #11020
19 Of Attorneys for Defendant

20 Approved as to Form and Notice
21 of Presentation Waived:
22 LINDELL LAW OFFICES, PLLC

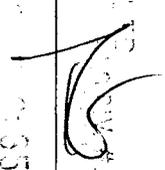
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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION I

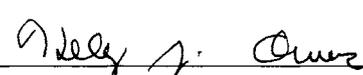
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|--|---------------------|
| STACEY ZELLMER, Individually and as Co-) | No. 554735 |
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| Ashley Cay McLellan; and BRUCE) | |
| McLELLAN, Individually and as Co-Personal) | |
| Representative of the Estate of Ashley Cay) | PROOF OF SERVICE OF |
| McLellan,) | REPLY OF APPELLANTS |
| Appellants,) | |
| v.) | |
| JOEL ZELLMER,) | |
| Respondent.) | |

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COURT



I, Holly J. Owens, certify that on the 3rd day of October 2005, I caused to be delivered, via ABC Legal Messenger, a copy of the Reply of Appellants in the above-referenced matter, upon the following:

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