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Washington State Supreme Court  
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**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

**NO. 91270-0**

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CLAIRE C. WOODWARD,  
a single individual,

Appellant,

v.

AVA A. TAYLOR and "JOHN DOE" TAYLOR,  
wife and husband, and THOMAS G. KIRKNESS  
and "JANE DOE" KIRKNESS, husband and wife,

Respondents.

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**PETITIONER'S SUPPLEMENTAL BRIEF**  
(From Court of Appeals, Division One, No. 70949-6-I)

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TABLE OF CONTENTS

I. The Court of Appeals Did Not Follow the Proper Methodology in Deciding this Conflict of Laws Issue.... 1

II. It is Inappropriate to Decide any Choice of Law Questions against the Plaintiff in this Case on a CR 12(b)(6) Motion When the Record is Completely Devoid of Facts..... 4

III. For Conflict of Laws Questions in Tort Cases in Washington, Courts Use the Most Significant Relationship Test, Not *Lex Loci Delicti* to Decide Which State’s Law Will Apply to an Issue ..... 7

IV. CONCLUSION..... 17

## TABLE OF AUTHORITIES

### Cases

<i>Freestone Capital Partner, LP v. MKA Real Estate Opportunity Fund I, LLC</i> , 155 Wn.App. 643, 664, 230 P.3d 625 (2010) .....	1
<i>FutureSelect Portfolio Management Inc. v Tremont Group Holdings, Inc.</i> , 180 Wn.2d 954, 966, 331 P.3d 29 (2014) n.12 (2014) .....	4, 6, 7, 15, 16
<i>FutureSelect Portfolio Management Inc. v Tremont Group Holdings, Inc.</i> , 175 Wn.App. 840, 309 P.3d 555 (2013) .....	4, 5
<i>Johnson v. Spider Staging Corp.</i> , 87 Wn.2d 577, 580-81, 555 P.2d 997 (1976).....	7, 9, 10, 11, 12, 13, 14
<i>Southwell v. Widing Transp., Inc.</i> , 101 Wn.2d 200, 204, 676 P.2d 477 (1984) .....	4, 15
<i>Syrovoy v. Alpine Res., Inc.</i> , 122 Wn.2d 544, 548 n.3, 859 P.2d 51 (1993).....	10
<i>Williams v. Leone &amp; Keeble, Inc.</i> , 171 Wn.2d 726, 735-736 n. 6, 254 P.3d 818 (2011) ...	7, 9, 10, 12
<i>Williams v. Leone &amp; Keeble</i> , 170 Wn.App. 696, 285 P.3d 906 (2012) .....	9
170 Wn.App. at 704-08 (some citations omitted).....	14
<i>Zanaida-Garcia v. Recovery Sys. Tech., Inc.</i> , 128 Wn.App. 256, 260, 115 P.3d 1017 (2005) .....	11

**Statutes**

RCW 4.18.020(1)(a) ..... 18  
RCW 21.20.430 ..... 5

**Restatement**

Restatement (Second) of  
    Conflict of Laws § 6 (1971) ..... 7, 11, 13, 14  
Restatement (Second) of  
    Conflict of Laws § 145 (1971) ..... 7, 9, 10, 11, 13, 16  
Restatement § 146 ..... 9, 10, 12, 13

**Other**

Washington State Securities Act (WSSA), chapter 21.20 RCW    5  
New York’s Martin Act, N.Y.  
    Gen. Bus. Law art. 23-A, §§ 352-359                            5

**I. The Court of Appeals Did Not Follow the Proper Methodology in Deciding this Conflict of Laws Issue.**

If there is no actual conflict of laws, the Court does not even engage in a conflicts analysis, and the law of the forum – Washington law – applies:

When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis. If the result for a particular issue is different under the law of the two states, there is a “real” conflict. Where the laws or interests of the concerned states do not conflict, the situation presents a “false” conflict and the presumptive local law is applied.

*Freestone Capital Partner, LP v. MKA Real Estate Opportunity*

*Fund I, LLC*, 155 Wn.App. 643, 664, 230 P.3d 625 (2010)

(quotation marks and citations omitted). If the supposed difference in the competing laws does not make a difference in the outcome for an issue, there is no conflict and Washington law applies. As demonstrated in Ms. Woodward’s briefing, as pled by Ms. Woodward, and certainly within reasonable hypotheticals available to Ms. Woodward on a CR 12(b)(6) motion, there is no conflict between Washington and Idaho laws in this case. Washington law applies.

It makes no difference at all what the different maximum speed limits are in Washington and Idaho. As briefed, this is not a

case alleging “speeding.” This is a case alleging negligence against defendant driver, Ava Taylor, for driving too fast for dark, snowy, icy road conditions. As demonstrated in Ms. Woodward’s briefing, both Washington and Idaho law require that, when confronted by adverse weather or road conditions, the driver must slow down to a reasonable safe speed. The answer to the question whether Idaho law mandates a driver response to adverse weather or road condition different than does Washington law is “no.” Therefore, Washington law applies.

As has been demonstrated, there has been no discovery in this case: we do not know anything about how Ms. Taylor was driving when she hit the ice, lost control of the car, flipped the car and injured Ms. Woodward. As briefed, it does not matter what the posted speed limit was. The speed at which Ms. Taylor initially set her cruise control does not matter. Among the facts that do matter is how Ms. Taylor responded to the dark, snowy, icy conditions of which she had notice, what measures she took in light of those conditions, and how fast, for the conditions, she was going when she hit the icy patch on which she lost control of the car. Speed only has relevance to the weather and road conditions; it has no

relevance to the posted speed limit. There has been no discovery, so the record provides no answers to these questions.

As briefed by Ms. Taylor, Washington and Idaho's differing comparative/contributory fault/negligence statutes do not present a true conflict in this litigation. As pled, and certainly hypothetically, there is no conflict of laws regarding Washington's and Idaho's comparative and contributory fault or negligence laws: as a sleeping, seat-belted passenger riding in the rear seat at the time Ms. Taylor lost control of the car, Ms. Woodward's percentage of fault was zero. The answer to the key question whether the supposedly conflicting laws change the outcome of any issue in this case is, again, "no." Idaho and Washington law do not conflict. Again as noted, no discovery has been accomplished, so no facts can be placed before the Court. Again, the only answer on a CR 12(b)(6) inquiry is that Ms. Woodward could prove she has no fault, and certainly less than 50% fault for her injuries. As no conflict is shown to exist, there is no reason for the Court to engage in a conflict of laws analysis. Washington law is presumed to apply.

As briefed, Ms. Woodward has not pled negligence per se. Ms. Taylor has certainly not pled negligence per se. Negligence per se is not an issue in this case and has no bearing on the

outcome of this case. Negligence per se is not an issue for conflict of laws analysis. Washington law has been pled and presumptively applies.

**II. It is Inappropriate to Decide any Choice of Law Questions against the Plaintiff in this Case on a CR 12(b)(6) Motion When the Record is Completely Devoid of Facts.**

If the Supreme Court believes that a true conflict of laws has been demonstrated to exist at this juncture, it is important to always keep in mind that the trial court decided these choice of law issues and dismissed plaintiff's case pursuant to defendant's CR 12(b)(6) motion on the pleadings. As the Washington Supreme Court recently noted, a choice of law analysis "does not lend itself readily to disposition on a CR 12(b)(6) motion."

It is important to remember that for choice of law questions "the ultimate outcome, in any given case, depends upon the underlying facts of that case." *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984). This requires a subjective analysis of objective factors. *Id.* Though we hesitate to articulate any categorical rules, such an analysis does not lend itself readily to disposition on a CR 12(b)(6) motion.

*FutureSelect Portfolio Management Inc. v Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 966, 331 P.3d 29 (2014) n. 12. In *FutureSelect*, Washington investment company, FutureSelect, and

others (plaintiffs), that lost money with an investment firm that invested the companies' funds, in Bernie Madoff's fraudulent securities investment scheme sought damages from the investment firm, its corporate parent companies, and two auditors (defendants), on claims for violations of the Washington State Securities Act (WSSA), chapter 21.20 RCW, negligence, and negligent misrepresentation. The WSSA provides for a private right of action. RCW 21.20.430. Defendants asserted that New York's Martin Act, N.Y. Gen. Bus. Law art. 23-A, §§ 352-359, which does not allow a private right of action, supplied the applicable law and made a CR 12(b)(6) motion, among other things to dismiss the plaintiffs' case based on the applicability of New York's Martin Act to this case filed in Washington.

The trial court granted the defendants' motion for failure to state a claim on which relief could be granted, in pertinent part deciding that New York's Martin Act applied and the Martin Act does not provide for a private right of action. The plaintiffs appealed, *FutureSelect*, 175 Wn.App. 840, 309 P.3d 555, and the Court of Appeals reversed, in pertinent part holding that Washington had the most significant relationship to the state securities act claims, negligent misrepresentation claims, and

agency claims. The defendants petitioned the Washington Supreme Court for review.

The Washington Supreme Court affirmed the Court of Appeals' decision that the WSSA applied. In making that determination the Court made the observation quoted above, indicating its disfavor of granting CR 12(b)(6) motions on choice of law issues, which motions, by their nature, do not present facts outside of the pleadings, such as those that would be found in the development of the case through discovery.

As emphasized again and again in plaintiff's briefing in the case now before the Court, the trial court dismissed plaintiff's case on a CR 12(b)(6) motion – a motion in which all allegations in the complaint must be taken as true and in which any and every reasonable hypothetical that could result in the application of Washington law must be drawn in plaintiff's favor.

As the Supreme Court recognized in *FutureSelect*, choice of law questions are considered individually, each depending on its underlying facts; there being no discovery and no facts developed through discovery to date, "such an analysis does not lend itself readily to disposition on a CR 12(b)(6) motion." 180 Wn.2d at 966, n.12 *supra*.

**III. For Conflict of Laws Questions in Tort Cases in Washington, Courts Use the Most Significant Relationship Test, Not *Lex Loci Delicti* to Decide Which State's Law Will Apply to an Issue.**

Time and again lately the Washington Supreme Court has reiterated that to settle choice of law questions in tort and other cases once a true conflict of laws is found, the “most significant relationship” test is used, not *lex loci delicti*.

Our authorities hold that the location of the injury is not necessarily determinative. Instead, Washington adheres to the “most significant relationship” test, as developed by the *Restatement (Second) of Conflict of Laws* § 6 (1971), in a choice of law analysis. . . .

*Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 735-736 n.6, 254 P.3d 818 (2011).

To Settle choice of law questions, Washington uses the most significant relationship test as articulated by *Restatement (Second) of Conflict of Laws* § 145 (1971).

*FutureSelect v. Tremont Holdings, supra*, 180 Wn.2d at 967, citing *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580-81, 555 P.2d 997 (1976).

If, and only if, the Court finds a true conflict, the Court must weigh the nature and quality of the competing states to the contacts listed in *Restatement* § 145. As previously briefed, overwhelmingly Washington has the most significant relationship to the parties to,

and the negligence issues pled, in this case: this was a one-car rollover traffic accident not involving injury to any other drivers/passengers who were strangers to the Washington parties, it did not involve injury to residents of other states and did not involve damage to any property other than the car owned, occupied, and driven by the Washington resident parties; all parties are Washington residents; the occupants of the car were all friends whose relationship was centered in Washington; the trip began in Washington and the parties were returning to their Washington homes when the rollover occurred; the car was owned by a Washington resident, and registered, maintained, garaged, and insured in Washington; the car was loaned to the group by its owner, a Washington resident, who was the father of one of the women going on the trip; the car's owner knew at the time he loaned the car to his daughter and her friends that the speedometer was defective; to the extent that the defective speedometer was a causal factor in defendant Ava Taylor's driving too fast for conditions, the conduct causing the injury also occurred in Washington. The parties have no contact and no relationship at all with Idaho, except that the group happened to be passing through Idaho when the accident happened. Ms. Woodward believes that

(1) because no conflict of laws exists, Washington law applies to this case and (2) if the Court finds a true conflict of laws, Washington law applies because Washington has by far the most significant contacts with and relationship to the parties and issues in this case pursuant to § 145.

However, should the Court find a true conflict and should the Court find that the contacts in § 145 are balanced according to their relative importance with respect to the negligence issues, there is an additional step the Washington Supreme Court has directed in determining conflict of laws issues in personal injury cases. If the § 145 contacts are balanced in a personal injury case, the next step is to perform a states' interest analysis in accordance with *Restatement* § 146 supplemented with the policy considerations discussed in *Johnson v. Spider Staging Corp.*, *supra*, 87 Wn.2d at pages 580 and 583. *Williams v. Leone & Keeble, Inc.*, *supra*, 171 Wn.2d at 735-36 n.6.

Precedent for the application of *Restatement* §146 and the relevant policy considerations discussed in *Johnson v. Spider Staging Corp.* at 87 Wn.2d at pages 580 and 583 is found in *Williams v. Leone & Keeble*, 170 Wn. App. 696, 285 P.3d 906 (2012), where, on remand from the Supreme Court, the Court of

Appeals analyzed Washington and Idaho's competing interests in a personal injury claim.

As a preliminary matter, true conflicts of law and a balance of *Restatement* § 145 contacts had already been, in effect, found by the Washington Supreme Court in the *Williams* case, as it remanded the case to the Court of Appeals with instructions to proceed with a *Restatement* § 146 states' interest analysis, as tempered by the cited *Johnson* policy considerations. The Court of Appeals set forth the methodology of its states' interest analysis:

¶ 13 In choice-of-law questions, Washington has rejected the law of the place of injury, *lex loci delicti*, in favor of the most significant relationship rule for tort and contract choice-of-law problems. *Johnson*, 87 Wn.2d at 580.

¶ 14 The case here initially arose out of cross motions for summary judgment. The material facts were undisputed, and the trial court ruled, as a matter of law, that Idaho law applied. We engage in the same inquiry as the trial court. *Syrov v. Alpine Res., Inc.*, 122 Wn.2d 544, 548 n.3, 859 P.2d 51 (1993). Issues of law are reviewed *de novo*.

¶ 15 To resolve this case, we first look at the analysis set forth in *Johnson* and the instructions given to us by the Supreme Court.

¶ 16 1. *Johnson v. Spider Staging Corp.* In *Johnson*, Washington rejected the *lex loci delicti* rule and adopted the "most significant relationship" rule for choice-of-law questions sounding in tort. *Johnson*, 87 Wn.2d at 580. "Under this approach, the rights and liabilities of the parties are determined by the local law of the state which, with respect to that issue, has the most significant relationship to

the occurrence and the parties.” *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 260, 115 P.3d 1017 (2005).

¶ 17 In *Johnson*, a Kansas resident died after a fall in Kansas from a scaffold manufactured by a Washington corporation. Ms. Johnson sued the Washington Corporation for wrongful death. *Johnson*, 87 Wn.2d at 578. The issue arose as to whether to apply Kansas law or Washington law on wrongful death damages.

¶ 18 In reaching its decision that Washington law applied, the court established a two-part step for determining contract and tort choice-of-law problems. The court stated that it was in accord with *Restatement* section 6, which developed this approach, and with section 145, which sets out the general principles to apply. *Id.* at 580. First, a court must evaluate the contacts with each potentially interested state. *Id.* at 580-81.

¶ 19 The *Johnson* court noted that *Restatement* section 145 sets out the general principles that apply to a tort choice-of-law problem:

(1) The rights and liabilities of the parties with respect to an issue in tort *are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.*

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

¶ 20 When the contacts are evenly balanced, the second part of the analysis is performed. This step requires the evaluation of the interests and public policies of the involved states to determine which state has the greater interest in the determination of the particular issue. *Id.* at 582

¶ 21 . . . Applying a review of the contacts and applying a states' interest analysis, the court determined that Washington had a legitimate interest in the application of its full compensation policy, while Kansas had no interest in applying its wrongful death limitation on nonresidents being sued in their own state. *Id.* at 583-84.

¶ 22 2. Supreme Court's Instructions. On remand, the Supreme Court gave specific instruction to this court. In its instructions, the Supreme Court directed this court to apply *Restatement* section 146 (not section 145, which was applied in *Johnson*) and the "policy considerations" contained at pages 580 and 583 of *Johnson*. *Williams*, 171 Wn.2d at 735 n.6. The Supreme Court did not instruct this court to examine the factors set forth in step one of *Johnson*.

¶ 23 So, we must first apply *Restatement* section 146, which states:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to *the particular issue*, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.  
(Emphasis added)

¶ 24 Under *Restatement* section 6, which is also referred to in section 145 and *Johnson*, the “choice-of-law principles” are:

(1) A Court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

¶ 25 In addition to instructing this court to give application to section 146, the Supreme Court also directed this court to

give application of the policy concerns discussed in *Johnson* on pages 580 and 583. *Id.*

¶ 26 On page 580 in *Johnson*, the court explains that it has rejected the lex loci delicti choice-of-law rule that would have required the court to apply the law of the place of the wrong. The court goes on to explain that it has adopted the most significant relationship rule for contract and tort choice-of-law problems. The court then states that it is in accord with *Restatement* section 6, which developed this approach. The court also stated that section 145 sets out the general principles to apply to a choice-of-law problem. *Johnson*, 87 Wn.2d at 580-81.

¶ 27 The Supreme Court also asks this court to examine the policy consideration discussed in *Johnson* at page 583. This part of *Johnson* explains that a state's decision to limit wrongful death damages is primarily local. In other words, the state in question enacted the damage limitation to protect its own residents. *Id.* at 582. The *Johnson* court then concluded that Washington's policy of full compensation applied where all of the defendants were Washington residents because Kansas had no interest in applying its limitation of damages to the nonresident defendants. In short, "[w]hen one of two states related to a case has a legitimate interest in the application of its law and the other state has no such interest, clearly the interested state's law should apply." [*Johnson*, at 583].

*Williams*, 170 Wn.App. at 704-08 (some citations omitted).

Any attempt to resolve this second step of the conflict of laws analysis presents the same problem that pervades the entire analysis. We are at a CR 12(b)(6) stage with nothing before the

Court but plaintiff's Complaint and defendants' Answers. Choice of law questions in any case are individualized and depend very heavily on consideration of the facts in each case. No discovery has been done in this case, and no record has been developed in this case. Just as the Supreme Court emphasized in *FutureSelect*:

Much like in *Southwell*, this case has “not presented this court with a record that is sufficiently developed to enable us to undertake the factual analysis necessary for proper resolution of the conflicts issue involved.”

*FutureSelect*, 180 Wn.2d at 969, quoting *Southwell v. Widing Transportation*, 101 Wn.2d 200, 205, 676 P.2d 477 (1984).

There being no record and this whole conflict of laws controversy having arisen from a CR 12(b)(6) motion, the only thing that courts can decide at this stage is whether the allegations in the Complaint, along with hypotheticals reasonably available to plaintiff are sufficient to withstand a CR 12(b)(6) challenge. To paraphrase the Supreme Court's *FutureSelect* ruling with regard to evaluation of the proper *Restatement* section prescribing the evaluation of contacts (180 Wn.2d at 969):

For purposes of reviewing dismissal under a CR 12(b)(6) motion, we look to the complaint and must conclude that Ms. Woodward “could show” that all of the contacts specified in

*Restatement* § 145, except for the place where the injury occurred, were in and with Washington.

Again, for purposes of the states' interest analysis, we have no record on which to tell at this point what the issues will be and how they should be framed. No discovery has been done in this case and there is no record of how fast Ava Taylor was driving at the time of the rollover, or what she did in response to the adverse driving conditions she encountered. What can be said at this point is that as the definition of "negligence" and the requirements for finding fault and liability are the same in Washington as they are in Idaho, Washington is as able to try this negligence case as Idaho and because both the plaintiff and the defendants are Washington residents, Washington's interest in assuring full compensation for its residents who become tort victims in regulating the driving practices of its residents, and Washington's interest in regulating the conduct of its residents toward one another is certainly greater than Idaho's in applying the same law to nonresidents of Idaho.

#### **IV. CONCLUSION**

The trial court's order granting defendants' motion on the pleadings dismissing injured plaintiff Claire Woodward's negligent

driving claim against defendant driver Ava Taylor and the Court of Appeals decision upholding that order on the basis that Idaho substantive negligence law, and therefore its 2-year statute of limitations, applied to plaintiff's negligent driving claim against the defendant driver, should be reversed.

In the setting of a motion on the pleadings:

Defendant driver demonstrated no actual conflicts of laws between Washington's and Idaho's negligence law pertaining to plaintiff's negligence claim against defendant driver; therefore Washington negligence law applied;

The "most significant relationship" test, not *lex loci delicti*, is used to determine which state has the most significant relationship to the parties and issues and therefore supplies the law under which the issues are to be tried;

In the case on appeal, where the plaintiff pled facts and demonstrated hypotheticals within those facts in which Washington has the predominant and prevailing relationship with the parties and with the negligence pled, Washington law applies to the issue of alleged negligence of the defendant Washington driver for driving too fast for prevailing weather and roadway conditions; and

Because Washington substantive negligence law applies, under RCW 4.18.020(1)(a), Washington's 3-year statute of limitations applies.

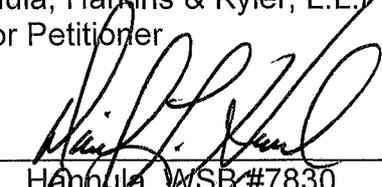
In the alternative, the Supreme Court should:

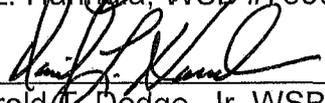
Reverse the Trial Court's Order and the Court of Appeals' decision on the grounds that the factual record before the courts is insufficient to decide the choice of law questions presented; and

Remand the case to the trial court so that the factual record may be developed through appropriate discovery.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of July 2015.

Rush, Hannula, Harkins & Kyler, L.L.P.  
Attorneys for Petitioner

By:   
Daniel L. Hannula, WSB #7830

and by:   
*For* Harold C. Dodge, Jr. WSB #15191

**Certificate of Service**

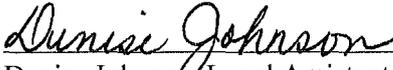
Pursuant to RAP 5.4(b), the undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July 31, 2015, I caused to be served with this Certificate of Service the following documents in the manner indicated:

**. PETITIONER'S SUPPLEMENTAL BRIEF**

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SIGNED this 31<sup>st</sup> day of July, 2015, at Tacoma, Washington.

  
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