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No. 92897-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Custody of:

LMS,

FAUALUGA SIUFANUA AND BILLIE SIUFANUA,

Petitioners,

and

TONY SAMOA FUGA and

LISA LYNETT SIUFANUA,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT (RAP 13.7(d))

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ORIGINAL

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II. INTRODUCTION

This case involves a Trial Court and Court of Appeals decision to dismiss the maternal Grandparents' non parental custody petition and allow a biological father to be the primary parent of his daughter. On November 14, 2014 the trial court denied a finding of adequate cause and dismissed the maternal Grandparents' non parental custody action pursuant to RCW 26.10.030. The trial court specifically found that the father, Tony Fuga, was a fit parent and that there would be no actual harm to his daughter's growth and development to allow her to primarily reside with her father. The maternal Grandparents appealed the dismissal of their RCW 26.10 Non Parental Custody Petition.

In an unpublished opinion, on February 8, 2016, the Court of Appeals Division I affirmed the trial court's dismissal of the maternal Grandparents' third party custody petition based on a lack of adequate cause. The Court of Appeals determined that the maternal Grandparents' petition and affidavits did not evidence an extreme or extraordinary circumstance and that the child had no special need that her father could not meet, thus failing the actual detriment and adequate cause standard.

The Court of Appeals also concluded that the father's absence from the child's life did not overcome his fundamental right to custody as protected by the Fourteenth Amendment.

TABLE OF AUTHORITIES

CASES

<u>In re Marriage of Allen</u> , 28 Wn.App. 637, 645, 626 P.2d 16 (1981).....	13, 14, 15
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III. SUPPLEMENTAL STATEMENT OF THE CASE

Tony Fuga (hereinafter, "Tony") and Lisa Siufanua (hereinafter, "Lisa") were involved in an intimate relationship beginning in 2004. LMS was born to Tony and Lisa in December of 2005. (CP 198.) For the first approximately three years of LMS's life, the parties resided together at Lisa's parents', Billie Siufanua and Faualuga Siufanua (hereinafter, "Grandparents") residence. Both Tony and Lisa provided parenting functions for their daughter. (CP 247). After approximately three years, Tony and Lisa separated, but Tony continued to spent time with LMS and supported her by providing Lisa with cash, clothing and diapers. (CP 199).

Eventually, Tony moved from Washington to California to enhance his employment opportunities. (CP 203). He met his current wife, Vaelua, in San Diego where they were married. Tony and Vaelua are both employed at the San Diego Naval Base. (CP 203). They have two children of their marriage, ages 4 and 5. (CP 203).

Tony and Vaelua attended and graduated from IT Technical school and have their certification in computers. (CP 203). Their five year old son attends kindergarten at O'Farrell Elementary School and is very interested in sports and gaming. (CP 204). Tony's 4 year old son also attends O'Farrell Pre School and likes to watch action movies and play games. (CP 204). Tony's family is very active including attending

programs through their church where Vaelua's father is a pastor. (CP 234). Tony and his wife research where local family activities are scheduled at at no or low cost and attend those functions with their children. (CP 204).

Tony and his wife, Vaelua have a loving relationship. (CP 204). According to Vaelua, Tony has never shown any violent tendencies towards her or anyone else. (CP 234). Tony has great relationships with his co-workers and the parties' extended family on both sides. (CP 234). Vaelua keeps Tony grounded and is very supportive of him. (CP 204). They listen to music and attend church together. (CP 204). Vaelua's dream is to be a school teacher and her parents live close by and are very supportive of their family. (CP 204). Vaelua has a natural and genuine love for children. (CP 204). Tony and Vaelua have been active at the children's school and have attended field trips with them as parent chaperones. (CP 204-05). They enjoy those times immensely watching their children learn and succeed in school. (CP 205). Tony and Vaelua work opposite shifts so they can balance their time together and a parent is always with their children. (CP 234).

Tony lives a very peaceful life with his wife and children. (CP 199, 233). Neither Tony nor his wife drink alcohol or are interested in any

activities that do not involve their children. (CP 205, 234). Tony and Vaelua live a very child centered life.

While Tony's family life is nice, he always missed his daughter LMS, and wished every day of his life that she was also a part of his happiness. (CP 205). Not a day would go by that he would not think about his daughter LMS and how empty his heart was without her being a greater part of his life. (CP 205).

Over the years that Tony moved to California, he continued to support LMS. (CP 203). Specifically, even after Tony moved from Lisa's parents' residence, he remained in contact with Lisa and LMS and made sure he supported LMS with money for diapers, food and anything she needed. (CP 206). Once Tony moved to San Diego and was employed, he paid child support to Lisa for the benefit of LMS through the state of Washington Division of Child Support. (CP 206-207). When Tony changed employers, he called the DCS to notify them of his new employment. (CP 206-207).

Tony's mother and step-father, Ty Tufono and Chris Chaussee, were also in a close and supportive relationship with Lisa and LMS. (CP 207). Tony's parents would pick LMS up at the McDonalds in Federal way on the weekends and keep her from Friday to Sundays on an every other weekend basis. (CP 207). Tony's parents continued to help Lisa

with LMS in addition to helping Lisa move away from her parents' residence and get a place of her own with LMS. (CP 207). Lisa moved into an apartment with LMS with a friend who had two young children. (CP 249). Tony's parents circulated a Christmas card in 2009 with a picture of them and LMS. (CP 249). Lisa lived with LMS and her boyfriend in their own apartment in Federal Way after moving from Des Moines. (CP 249). This included Tony's parents helping Lisa with money for rent, clothing and food for her and LMS on a weekly basis. (CP 207).

Eventually, Lisa stopped communicating with Tony and his parents regarding LMS. (CP 249). Tony's mother went to the apartment that Lisa was residing with LMS but discovered that Lisa had been evicted. (CP 207). Tony's mother also went to a residence in Burien that she used to pick LMS up from but the family who resided there indicated they had not seen Lisa nor LMS for months. (CP 207). Lisa's phone number was disconnected and the cell phone numbers for Lisa's parents no longer worked. (CP 208).

In July of 2012, Lisa brought LMS to San Diego for vacation. (CP 208). Lisa brought LMS to Tony's grandmother's house. (CP 208). When Tony arrived at his grandmother's house to see LMS, she ran and leaped into his arms hugging him and crying, "Daddy, Daddy" telling Tony that she missed him. (CP 234-35). LMS never left Tony's side

during the entire visit. (CP 235). She clung to Tony and asked him numerous questions such as, "what's your favorite color Daddy?" and "What's your favorite foods?". (CP 235). Vaelua noticed how much LMS looked like her oldest son, Jordon. (CP 235). She also noticed during this visit how much love there was from LMS to Tony and from Tony to LMS. (CP 235). After Lisa left with LMS, a few moments later, LMS called Tony on his phone just so she could hear his voice again. (CP 235). Tony promised that he would see her again soon and that she could call him anytime. (CP 235).

Tony and his wife had a good talk with Lisa and they all exchanged phone numbers. (CP 208). Tony told Lisa to let him know if there was ever anything that she needed for LMS to please call. Lisa said okay. The very next day, Tony tried to call Lisa on the phone number that she provided but the number was disconnected. (CP 208). Tony was unable to contact her or find either Lisa or LMS. (CP 208).

Tony denies a history of acts of domestic violence towards Lisa or anyone else as alleged by the Grandparents. The incident that resulted in his arrest occurred in April of 2005, before LMS was born. (CP 198). Tony and Lisa got into a verbally loud argument at the airport. (CP 198). Although the police report makes clear that Lisa explained to the security guards that Tony had not physically assaulted her in any way, he was

arrested and charged with 4th degree assault. (CP 198). Tony agreed to domestic violence behavioral therapy and on November 21, 2006, the case was dismissed. (CP 199). Lisa and Tony continued to live together after this incident for over three years with LMS. (CP 199). Tony did not have any further criminal charges in either Washington or California. (CP 199).

It should be noted, however, that Tony described an incident where appellant, Faualuga Siufanua, assaulted Tony in 2008 when Tony was living with Lisa at her parents' residence. (CP 208). Tony described an incident where, Mr. Siufanua, punched Tony in the face when he brought some of Tony's belongings over to Tony's cousin's place after Lisa and Tony separated. (CP 208). In fact, appellant, Faualuga Siufanua, threatened to kill Tony or have him killed if he came around Lisa or LMS. (CP 248). This was very frightening to Tony as he was young, confused about life and he feared for his safety because appellant, Faualuga Siufanua is described as a big man with a bad temper. (CP 248). For Tony, contacting Lisa or LMS at Lisa's parents' house was out of the question due to Lisa's father's threats, which Tony believed he was capable of following through. (CP 248).

Tony lost contact with Lisa when she moved without leaving a forwarding address. (CP 199). Tony and his parents were not able to contact Lisa or LMS either. (CP 199). The claim by the Grandparents that

LMS has always lived with them at their residence is false. LMS lived with Lisa in different locations after Tony and Lisa separated which has been shown by Tony's parents picking up LMS at Lisa's residence, separate and apart from the Grandparents' house. (CP 207). Tony never abandoned LMS, he just did not know how to find or get into contact with LMS after Lisa repeatedly cut off contact. (CP 199).

While LMS was in the care of Lisa's parents, she was not performing well in school. (CP 250). As of March 10, 2014, LMS had been absent 17 days and tardy 19 days. (CP 278).

There were specific letters written by the principal of LMS's school expressing the concern that LMS had been absent and tardy on so many occasions and that it was seriously impacting LMS's learning. (CP 279).

Tony expressed concern that LMS was having excessive absences and tardies and that this was having a detrimental impact on her education. (CP 250). Tony indicated he would be able to make sure LMS was arriving to school on time and that she would be ready to learn. (CP 250).

Tony also expressed concern that LMS was being left alone unsupervised by adults when Lisa's parents were caring for LMS due to their employment, which required them to work in the evenings. (CP 251). Also, Tony advised the trial court that there were numerous other children

living in Lisa's parents' residence who arguably have serious emotional issues, similar to Lisa's emotional issues. (CP 251).

Procedural History

On September 5, 2012, a Judgment and Order Determining Parentage was entered with the Court confirming that Tony is LMS's biological father. (CP 215). In the Order, Lisa was determined to be LMS's primary parent and reserved the issue of Tony's residential time to a future determination. (CP 216-17).

On October 8, 2014, after discovering that Lisa was incarcerated and was suspected of using illegal drugs, Tony filed a Petition to Modify the Order Determining Parentage, specifically asking the Court to find adequate cause to modify the Order and designate him as LMS's primary parent. (CP 198).

On October 24, 2015, with full knowledge of Tony's Petition for Modification of Parenting Plan and his counsel of record, Appellant Grandparents filed a Non Parental Custody Petition and Obtained an Ex-parte Restraining Order preventing Tony from having contact with his daughter. (CP 198). The Ex-parte Restraining Order did not provide a mechanism for Tony to see his daughter, even in a supervised capacity. (CP 227-30).

On October 30, 2014, Tony filed a Response to the Grandparents' Petition specifically denying that (1) he was not a suitable custodian of his daughter, (2) he had abandoned his daughter; and (3) that he had engaged in a history of acts of domestic violence or assault. (CP 19). Tony also specifically advised in his Response that LMS had lived with Lisa apart from the Grandparents, addressing their false contention that LMS had "been living with the petitioner's for her entire life". (CP 20). Tony specifically requested that the Court dismiss the Petition for Non Parental Custody and that custody of LMS be awarded to him. (CP 20). He further asked the Court to enter a restraining order against the Grandparents from disturbing his peace. (CP 20).

Also on October 30, 2014, Tony filed a Motion to Dismiss the Non Parental Custody proceeding based on the fact that there was no adequate cause to proceed with the action. (CP 189-96). In his declaration in support of the motion, Tony specifically described the care and support that he had provided to LMS. (CP 199). He advised the court regarding why he was a fit parent and it would be in LMS's best interests for the Court to place his daughter in his custody. (CP 197-200).

On November 7, 2014, the Grandparents filed their response to Tony's motion. In their response, the Grandparents did not identify any special need of the child either physical or psychological that they were

concerned about if Tony were to be granted custody. (CP 52-57). They only made allegations against Tony and described generally the care they provided for LMS. (CP 54-56). The Grandparents did not describe whatsoever any specific detriment or actual harm that would occur to LMS if the Court were to grant custody to Tony. (CP 52-57).

On November 14, 2014, a Pro Tem Court Commissioner determined that the Grandparents did not meet their burden of proof to show that Tony was either an unfit parent or that placing LMS with him would cause actual harm to her growth and development should LMS be placed in his custody. (CP 58-61).

After the Court denied adequate cause, the Grandparents filed a Motion for Revision which was heard by the Honorable Suzanne R. Parisien. (CP 174-175). Judge Parisien denied the motion for revision, also finding that the Grandparents had not met their burden of proof to show that either Tony was unfit or that placement of LMS with him would cause actual harm to her growth and development. (CP 169-170).

IV. ARGUMENT

- A. Pursuant to the holding in *Custody of B.M.H.*, 179 Wn.2d 237 (2013), the Court should affirm the Trial Court and Court of Appeals decisions dismissing the maternal Grandparents' third party custody case for a lack of Adequate Cause.

In the Grandparents' third party custody petition, they did not allege any extraordinary circumstances evidencing detriment to LMS's growth and development if custody were granted to Tony. "The requisite showing required of the non parent is substantial, and a nonparent will generally be able to meet this test only in extraordinary circumstances". Custody of Shields, 157 Wn.2d 126, 145 (2006). While the Grandparents made allegations that Tony was not fit, they only cited a domestic violence claim that occurred more 10 years ago (and prior to the child's birth) along with a contention that Tony's absence deemed him unfit to care for his daughter. They alleged that LMS was bonded to them and it would be detrimental to not have contact with them if custody were awarded to Tony. Those allegations are similar to the allegations made by the non parent in Custody of B.M.H., *supra*, which were rejected by this Court.

In B.M.H., *supra*, a former step-father who had parented B.M.H. for his entire life petitioned the court for non parental custody. B.M.H.'s biological father had died 6 months prior to B.H.M.'s birth. The former step-father was present at B.H.M.'s birth, and even cut B.M.H.'s umbilical cord. The former step-father was actively involved in B.M.H.'s life and the parties even changed B.M.H.'s last name from the biological father's last name to the last name of the former step-parent. The only reason that he did not formally adopt B.M.H. was because of the effect it might have

on the survivor benefits that B.M.H. receives by virtue of his biological father's death.

In 2001, the parties divorced but the former step-father continued to have residential time with B.M.H. for years until 2010 when the mother planned to move with B.M.H. 50 miles away. Out of concern of the proposed move and the impact that would have on his seeing B.M.H., the former step-father filed a non parental custody petition indicating that he had parented B.M.H.'s for his entire life and that removing him from B.M.H.'s life would cause detriment to his growth and development. Id. at 233. In dismissing the former step-father's non parental custody petition, this Court held:

But here, without more extraordinary facts bearing on B.M.H.'s welfare, the prerequisites for a nonparental custody action have not been met. The concern that Ms. Holt might interfere with Mr. Holt and B.M.H.'s relationship is insufficient to show actual detriment under *Shields* and to meet the burden of production for adequate cause under *E.A.T.W.* [footnote omitted]. Although the importance of preserving fundamental psychological relationships and family units was part of the court's analysis in *Allen* and *Stell*, there were more extreme and unusual circumstances that contributed to the finding of actual detriment. In each case, the child had significant special needs that would not be met if the child were in the custody of the parent. Continuity of psychological relationships and family units was particularly important where a child had these special needs. Here, additional circumstances have not been alleged. This court has consistently held that the interests of parents yield to state interests only where "parental actions or decisions seriously conflict with the physical or mental health of the child." *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d

108 (1980) (citing *Parham*, 442 U.S. at 603). Other facts in the affidavits point to Ms. Holt's dating patterns and her decision to move to Castle Rock. These are not the kind of substantial and extraordinary circumstances that justify state intervention with parental rights. We reverse the Court of Appeals and dismiss the nonparental custody petition without prejudice.

In re Custody of B.M.H., 179 Wn.2d at 239.

While this Court stressed the importance of the continuity of psychological relationships and family units in B.M.H., *supra*, this Court also differentiated the allegations made by the non parent with the factual scenarios in Marriage of Allen, 28 Wn. App. 637 (1981) (child was deaf) and Custody of Stell, 56 Wn.App. 356 (1989) (child physically and sexually abused while in custody of parent) regarding the actual detriment standard. Specifically, in Stell and Allen, *supra*, this Court found that there were extreme and unusual circumstances that contributed to the finding of actual detriment. Those extreme and unusual circumstances included the child having a special need that could not be met if the court granted custody to the biological parent.

In this case, the Court of Appeals applied the ruling in B.M.H., *supra*, by determining whether any extreme or extraordinary circumstance existed regarding LMS. The Court of Appeals specifically noted that the Grandparents did not allege that LMS had a special need that Tony could not care for, distinguishing Allen and Stell. The Court of Appeals weighed

the fundamentally protected right of a biological parent to raise their child versus a claim of actual detriment based solely on the absence of that parent, without any other special need, to determine whether the actual detriment test enumerated in B.M.H., *supra* had been met. This court has consistently held that the interests of parents yield to state interests only where “parental actions or decisions seriously conflict with the physical or mental health of the child.” In re Welfare of Sumeey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) (citing Parham, 442 U.S. at 603). The Court of Appeals concluded that Tony’s absence from his daughter’s life, by itself, did not mean that Tony was unable to meet his daughter’s needs and that the Grandparents allegations against Tony did not meet the heightened standard and burden of proof necessary to meet the actual detriment prong.

While the Court of Appeals decision concluded the instant case is analogous to B.M.H., in that there were no allegations that LMS has a special need or evidence that Tony was not currently able to meet LMS’s needs, the Court of Appeals did not state that the actual detriment standard can *only* be met when a child has special needs. In fact, in the decision, the Court of Appeals specifically quotes and applies the proper legal standard as set forth in Marriage of Allen, 28 Wn.App. 637 (1981) as follows:

“Actual detriment has been defined as a middle ground, something greater than the comparative and balancing analyses of the best interests fo the child test, but less than a showing of unfitness”.

Id.

The Court of Appeals decision also states that “whether placement with a parent will result in actual detriment to a child’s growth and development is a highly fact-specific inquiry that must be determined on a case-by-case basis” citing B.M.H., *supra*.

B. The Grandparents did not meet the Adequate Cause threshold enumerated in RCW 26.10.032 and Custody of E.A.T.W., 168 Wn.2d 335 (2010) and their Petition for Non Parental Custody was properly dismissed.

Pursuant to RCW 26.10.032(1) a non biological party seeking a custody order must submit along with his or her motion an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and set forth facts supporting the requested order. RCW 26.10.032(2) provides that the trial court shall deny the motion and dismiss the action unless it finds that adequate cause for hearing the motion is established by the affidavits. Id. Adequate cause has been defined in a modification context as a showing sufficient to support a finding on each fact that the movant must prove to prevail. In re Custody of E.A.T.W., 168 Wn.2d 335, 347, 227 P.3d 1284 (2010). The Court applies a “heightened standard” when making a determination of

whether adequate cause has been established in a non parental custody action. In re Custody of B.M.H. 179 Wn.2d 224, 315 P.3d 470 (2013).

As a matter of policy, this court should affirm the Trial Court and Court of Appeals finding of an absence of adequate cause to proceed with a third party custody case as the Grandparents did not provide sufficient evidence in their affidavits and declarations to the Court that would support a finding that Tony was unfit *or* that LMS would suffer actual detriment to her growth and development if Tony were granted custody. The Grandparents allegations in their Petition did not rise to the level of extreme or extraordinary circumstances as required by B.M.H., *supra*. In fact, the Grandparents did not make any factual allegation whatsoever that LMS had a special need that Tony could not care for if he were awarded custody. This Court should reject the argument that Tony's absence from his daughter's life equated to his inability to care for her presently as the record clearly established that LMS knew Tony to be her father and Tony was a presently fit parent who was married and successfully raising two other children. The trial court specifically found that LMS has a relationship with Tony, knows him as her father, and recognizes him as such. Tony's fundamental right to custody of his daughter is protected by the Fourteenth Amendment despite his initial absence from her life.

Also, the argument that adequate cause hearing was held less than 20 days after the Summons and Petition were served should also be rejected by this Court as the Grandparents did not object or request a continuance of the hearing and proceeded assumedly because they were prepared to do so at the time.

C. The Grandparents allegations against Tony regarding unfitness and abandonment were insufficient for a finding of Adequate Cause pursuant to RCW 26.10.032.

The evidence in this case proved that Tony is a fit parent. Specifically, Tony described that he provided parenting functions for LMS during the period of time that he lived together with Lisa until he moved to California for the purposes of improving his employment situation. (CP 203). Tony's declarations to the Court describe his marriage to his current wife, Vaelua, as well as the love and care that he provides to his two children. (CP 203-05). This included involvement in their church and community. (CP 204-05). While the Grandparents attempted to prove that Tony was an unfit parent, the trial court found that after considering all of the evidence presented, that Tony was a fit parent and that it was in LMS's best interests to primarily reside with him rather than the Grandparents. (CP 61).

Contrary to the Grandparents' contention, Tony was not absent absent from LMS' entire remembered life. During the visit which

occurred in July of 2012, as soon as LMS saw Tony, she ran and leaped into his arms hugging him and crying, "Daddy, Daddy" telling Tony that she missed him. (CP 235). In fact, the evidence presented to the trial court showed that LMS never left Tony's side during the entire visit. (CP 235). She clung to Tony and asked him numerous questions such as, "what's your favorite color Daddy?" and "What's your favorite foods?". (CP 235).

The Grandparents also did not provide sufficient evidence to the trial court that Tony engaged in a history of acts of domestic violence that would rise to the level of restrictions against him in a parenting plan. While Tony was arrested in 2005 after an argument with Lisa ensued at the airport, this was prior to LMS's birth. (CP 198). Tony agreed to domestic violence behavioral therapy resulting in dismissal of the charge against him. (CP 199).

Further, Tony did not abandon LMS as claimed by the Grandparents. Tony moved to California for the purpose of bettering his employment and living situation. (CP 203). Tony was afraid of repercussions from Lisa's father, who during an altercation punched Tony in the face. (CP 248). Lisa's father also threatened to kill Tony or have him killed if he came around Lisa or LMS. (CP 248). Tony's attempts to reach LMS were also thwarted by Lisa who changed her phone number

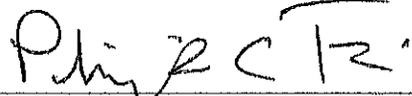
and kept LMS hidden from Tony's parents after they had established a relationship with LMS, and spent weekends with her when Lisa was residing with LMS away from her parents' residence. (CP 207-08). Also, the Grandparents never tried to contact Tony and advise him that they were primarily caring for LMS. Regardless, the record before this Court clearly indicates that Tony is currently willing and able to care for LMS full time.

V. CONCLUSION

In sum, Tony respectfully asks the Court to affirm the Trial Court and Court of Appeals decision to dismiss the Grandparents' third party custody matter.

Respectfully submitted this 29th day of July, 2016.

TSAI LAW COMPANY, PLLC



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PROOF OF SERVICE

Melissa Perez certifies as follows:

On July 29, 2016, I served upon the following a true and correct copy of this Answer to Petition for Review via Email, and Legal Messenger:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 29 day of July, 2016 at Seattle, WA.



Melissa Perez

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Dear Supreme Court Clerk,

Attached to this email is the Supplemental Brief of Tony Fuga in the above referenced matter. Please confirm receipt. Thank you for your kind attention to this email.

Very truly yours,

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Attached is a copy of the letter issued by the Clerk or Deputy Clerk on this date in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail. When filing documents by email with this Court, please use the main email address at supreme@courts.wa.gov

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