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Supreme Court No.: 93076-7

Court of Appeals State of Washington Division I - No.: 73964-6-I

Pierce County Superior Court No: 11-2-14979-5

DILLION SMELSER and DERRICK SMELSER,

Petitioners,

vs.

JEANNE PAUL and RONALD SMELSER,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

The Law Offices of Ben F. Barcus & Associates, PLLC
Paul A. Lindenmuth – WSBA #15817
Of Attorneys for Plaintiff
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444/Facsimile: (253)752-1035
paul@benbarcus.com
ben@benbarcus.com
tiffany@benbarcus.com

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I. LEGAL DISCUSSION

A. **Public Policy Does Not Support the Recognition of a Cause of Action for Negligent Parental Supervision.**

On April 16, 1998 Dillion Smelser, age 5, and his younger brother Derrick, age 2, were residing at their father Ronald Smelser's rental home in Orting, Washington. Immediately prior to the accident which forms the predicate of this case Derrick and Dillion were playing within a large open field which surrounded the rental house in an area well away from a highway which borders the property. (RP 1306). No reasonable parent, given the location of these children, vis-a-vis the highway would have believed that the children were in harm's way, nor could a reasonable person anticipate what was about to transpire.

On that date, Ronald Smelser received a visit from his then-girlfriend, Jeanne Paul. (RP 1309-10). Ms. Paul at the time owned a "lifted" Ford Bronco which she had driven to the property that day. Prior to her departing the property, by way of a long driveway which intersected the property, near the rental home, the young children had moved into the driveway and would have been openly visible playing in a mud puddle. (RP 1306). From the location where Ms. Paul's Bronco had been parked, to the site of the accident, there is a 100 percent unobstructed view. Nevertheless, inexplicably Ms. Paul, as she was exiting the property,

plowed over Derrick dragging him underneath the Bronco in full sight of his older brother Dillion.

There is nothing within the record developed below which in any way suggested that Ronald Smelser had any information to alert him that his children were in harm's way, or any inkling that he had to anticipate Ms. Paul's rather blatant negligent driving. As with anybody else Mr. Smelser, even as a parent, had the right to assume that Ms. Paul would not act negligently unless he had information available to the contrary. See WPI 70.06 and WPI 12.07 (right to assume others will exercise ordinary care). In slightly different contexts, it has be recognized that similar facts, as a matter of law, are insufficient to establish negligence. *Cox c. Hugo*, 52, Wn.2d 815, 820, 329 P.2d 467 (1958); *Carey v. Reese*, 56 Wn. App. 18, 26, 781 P.2d 904 (1989).

Under the fact pattern of this case, it is extremely questionable that Ronald Smelser did anything wrong let alone breached an actionable duty. The elements of a claim of negligence are well known. They are (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. See *Degel v. Majestic Mobil Manner, Inc.* 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The threshold determination of whether the defendant owes a duty **to the plaintiff** is a question of law. See, *Tincani v. Inland Empire Zoological Soc.* 124 Wn.2d 121, 128, 875

P.2d 621 (1994). In *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 450, 243 P.3d 521 (2010) this court provided the following with respect to whether or not a duty should be recognized:

To decide if the law imposes a duty of care, and to determine the duty's measure and scope, we weigh considerations of 'logic, commonsense, justice, policy, and precedent.' The concept of duty is a reflection of all those considerations of public policy which leads the law to conclude that a plaintiff's interests are entitled to legal protection against the defendant's conduct. Using our judgment, we balance the interests at stake. (Citations omitted).

As discussed below, the exact same policy considerations which would justify the court in refusing to recognize a generalized duty of supervision flowing from a parent to a child also could be used to justify the grant of parental "immunity". Frankly whether or not there is an absence of duty, or an "immunity," is a matter of arbitrary characterization. The impact on the child's ability to bring a claim against a parent essentially would be the same.

As acknowledged in *Zellmer*, at page 157, other courts have found that there is no cause of action for negligent supervision, even following an abrogation of parental immunity. See *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974), *Pedigo v. Rowley*, 610 P.2d 560 (Idaho 1980). See also, Restatement (Second) of Torts § 895G(2) (1979) (Abrogation of parental immunity does not per se make lack of parental supervision a tort).

Unfortunately due to the operation of RCW 4.22.070, depending on characterization, the potential result and impacts upon the injured child can be dramatically different. On the one hand if the policy considerations which result in the non-liability of a parent to a child are characterized as creating an "immunity," than arguably there is a potential for parental actions to be subject to a fault allocation under RCW 4.22.070, even though doing so would undermine the very policy rationales which justified the determination that a parent should not be liable to their children for lack of supervision.

Additionally such an approach would be contrary to the fundamental and basic notion that innocent victims of torts, particularly victims of automobile accidents should receive full and complete compensation for the injuries they have suffered. *Thiringer v. American Motor Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978). As stated in different context, the right of an individual to be compensated for their personal injuries is not only a "substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical wellbeing and ability to continue to live a decent life." *Hunter v. North Mason High School*, 85 Wn.2d 810, 811, 539 P.2d 845 (1975). None of the policy justifications for the non-liability of a parent, when they are engaging in fundamental acts of supervision, justify permitting the

utilization of "parental immunity" by a third-party tortfeasor for the purpose of reducing **their** exposure to tort liability.

The rationale for a "parental immunity," or the refusal to recognize a duty of supervision owed by a parent to a child, have been many and have changed over the years. See *Zellmer v. Zellmer* 164 Wn.2d 147, 155, 188 P.3d 497 (2008). According to *Zellmer* the primary existing rationale for parental non-liability is that such liability has a potential of unduly interfering with a parent/child relationship and that it serves to protect against undue judicial interference in the parenting function. *Id.* at 159. As noted in *Zellmer* the purpose of such non-liability, which has been called an "immunity," "is to provide sufficient breathing space for making discretionary decisions, by preventing judicial second guessing of such decisions through the medium of a tort action." *Id.* at 160, citing to *Petersen v. State* 100 Wn.2d 421, 433-34, 671 P.2d 230 (1983). As stated in *Zellmer* at 158-159, quoting *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 105, 713 P.2d 79 (1986):

Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted. Parents should not routinely have to defend their childrearing practices when 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. (Citations omitted).

Such principles which recognize the non-tortious nature of a parent's exercise of reasonable discretion in raising their children has been long recognized to provide that the law does not demand that children be maintained under constant surveillance or strict supervision, see *Zikely v. Zikely*, 98 A.D. 815, 470 N.Y.S. 33 (N.Y. App. 1983) (Almost all children's accidents can be prevented by strict parental surveillance of the child, but the law cannot and should not require strict parental supervision).

As stated in *Gabel v. Koba*, 1 Wn. App. 684, 688, 463 P.2d 237 (1969);

While it is true that his parents or guardians are charged with the duty of looking out for him, it is obviously neither customary nor practicable for them to follow him around with a keeper, or chain him to a bedpost.

It was further stated in *Cox v. Hugo*, 52 Wn. 2d 815, 820, 329 P.2d 467 (1958) that:

There is no evidence of contributory negligence by Deborah's parents, unless we are prepared to hold that parents with 5-year-old children, who let them go out of the house to play and do not keep them under constant surveillance during the period they are outside of the house, are negligent in the care of their children. We are not prepared to so hold. The law imposes no such impractical standard. Parents are not required to restrain their children with indoors at their peril. (Citation omitted).

Further public policy supports the notion that a cause of action for negligent supervision should not be recognized, particularly if it can lead

to a fault allegation under RCW4.22.070 because, occurred here, if a parent could be subject to liability for negligent supervision, inevitably it would allow judges and juries to supplant their own views of the parenting and apply them to a parent who may have an entirely different parenting philosophy.

Indeed the improper submission of parental negligence to a jury, who is at the same time is considering a child's claim for damages, has been viewed as so patently prejudicial as to warrant a grant of a full new trial. See *Cox v. Hugo* 52 Wn.2d at 821, See also, 6. A.L.R. 4th 1066 § 2(b) (1981) (Issues regarding parental negligence are likely to be confusing to a jury).

Finally, with respect to policy rationales for the non-recognition of a tort cause of action by a child against a parent for a lack of supervision, another is the parental impact it would have on an individual's willingness to engage in the parenting function at all. As noted in *Zellmer*, at 162, liability under such circumstances could wholly undermine a father or mother's willingness to provide for the needs, comforts and pleasures of their children. Citing *Borst v. Borst*, 41 Wn.2d 642, 646, 251 P.2d 149 (1952).

Frankly, it simply would be a perverse and absurd result for a child, who continues to be in the care of a parent, to have an ability to sue

that parent for negligent supervision when the end result would be, potentially, the shifting of control of the family wealth from the parent to a child, to the potential detriment of not only the parent, (who continues to engage in care of functions), but also any siblings.

The rationale which precludes a third party tortfeasor from seeking contribution from an “immune” parent are equally implicated when a tortfeasor seeks to have parental fault considered by way of apportionment. In both instance’s the child’s recovery will be effectively reduced, see *Pedigo v. Rowley*, 610 P.2d at 564-55.

This court need look no further than its opinion in *Talarico v. Foremost Ins. Co.* 105 Wn.2d 114, 712 P.2d 294 (1986), when determining if an “immune” parent can be allocated fault under RCW 4.22.070.

Talarico, was an insurance coverage case. It found that a claim by a child against a parent for negligent supervision, is the absence of willful or wanton conduct, “...stated no cause of action against the parents....” *Id.* at 117. Also in *Baughn v. Honda Motor Co. Ltd.* 105 Wn. 2d 118, 712 P.2d 293 (1986) this court found that a third party tortfeasor could not seek indemnification from an injured child’s parents, based on a negligent supervision theory, because no such case of action existed. The results should be no different when considering RCW 4.22.070.

The same rationale which would justify a grant of "parental immunity" also justify a determination that no duty exists on the part of parent to be non-negligent in the supervision of their own children. To recognize such a cause of action frankly would undermine the policy rationale which justifies the entirety of the "parental immunity doctrine".

Further, in the context of a claim brought by a child against a parent, the same policy rationales are undermined when potential parental negligence can be utilized as a damage reducing factor under the terms of RCW 4.22.070. The impact on the evidence presented at time of trial would be the same, and the entire rationale's underlying "parental immunity" i.e. the protection of the family, would be substantially undermined. Whether the issue is being raised as part of a claim by a child, or as part of a defense by a third-party tortfeasor, the issue of parental responsibility is inherently prejudicial, and as in this case simply invites a jury to second guess and/or to question the parenting skills of another. There is no "common standard" upon which parenting can be judged. *Pedigo v. Rowley*, 610 P.2d at 564.

This is particularly apparent by the result in this case. In this case there is no question that Ms. Paul was actively negligent when she ran over young Mr. Smelser. In marked contrast, at best, it can be said that Ronald Smelser had a momentary lapse and was inattentive as to the then

existing location of his children. Nevertheless the jury found Mr. Smelser to be 50 percent responsible for what transpired.

Given the prejudicial nature of submission of parental fault to a jury, it cannot be presumed that such an error was harmless, and as in *Cox*, it warrants the grant of a full new trial in this case with respect to all claims. See, also *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995) (discussing whether an error warrants the grant of a new trial).

B. RCW4.22.070 is Ambiguous and a Broad Interpretation of the Term Immune Leads to Strained and Absurd Consequences.

As discussed in Petitioner's, Petition for Review at pages 9 to 15, the use of the term "immune" within RCW4.22.070 creates an ambiguity within the statutory scheme. Unfortunately, this undefined term serves to create a statutory fault allocation scheme that in many instances, is simply unworkable.

According to the Court of Appeals, essentially anything which in any way could be characterized as an "immunity," would be included within this statutory term because "under the expressio unius est exclusio alterius canon of statutory construction, the expression of one term in a category implies the other items are excluded", (slip opinion Page 4 citing to *Landmark Dev., Inc. v. City of Roy* 138 Wn. 2d 561, 571, 980 P2d

1234(1999). If we assume that the Court of Appeals is correct, then the potential for absurd results becomes patently real.

While there certainly are instances where the application of an "immunity" would serve to block the liability of someone who is otherwise negligent, such instances frankly more often, on proper analysis, constitute the exception rather than the rule. For example in *Humes v. Fritz Companies* 125 Wn. App. 477, 105 P3d1000 (2005), clearly "but for" tribal sovereign immunity, a negligence claim could have been brought against the tribe at issue. The same is not true with respect to a determination that a governmental entity would be entitled to "discretionary" immunity.

As discussed in *Zellmer*, discretionary governmental immunity serves to provide breathing space for the making of discretionary decisions and provides a dividing line between potential liability exposing acts and acts of governance. Thus, for example, if the Court of Appeals position is adopted, in cases such as *Avellaneda v. State* 167 Wn. App. 474, 273 P3d477(2012) the at-fault driver in that case, could point to the State, (which was found to be entitled to discretionary immunity) as an "empty chair" under RCW4.22.070. As indicated in *Avellaneda*, 167 Wn. App. at 481, a grant of "discretionary immunity" is simply a recognize that the government has the right to engage in acts of governance without

exposing itself to tort liability. According to Respondent's position, because "discretionary immunity" was found, the State is "immune," under RCW4.22.070 and would be subject to a fault allocation

The same is true with respect to a potential grant of "qualified immunity" under Section 42 U.S.C. § 1983. The doctrine of qualified immunity under 42 U.S.C. § 1983 protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct.2727, 73L.Ed.2d396 (1982). When conducting a qualified immunity analysis a court ultimately does not have to reach the issue of whether or not a constitutional violation has ever occurred, but rather only has to determine that the law was not clearly established in order to grant such an immunity. See *Person v. Callahan* 555 U.S.223, 232, 129S.Ct.808, 172L.Ed.2d565 (2009). Thus a public official can be granted qualified immunity without there ever a determination, one way or another, as to whether or not they ever did anything wrong.

Thus, given the court of appeal's broad definition of "immune" arguably a government official entitled to the "qualified immunity" would be an "immune" entity under the terms of R.C.W.4.22.070. However, as in this case, despite such a "immune," status, "fault" should not be

allocated to the public official who is entitled to qualified immunity because there is no showing of any wrongdoing, i.e., "fault" as defined by R.C.W.4.22.015. The same analysis applies to "parental immunity."

Further Respondent's suggestion, at Pages 9 and 10 of her Answer to the Petition for Review, that under the terms of R.C.W.4.22.070, fault can be allocated to individuals with judicial or prosecutorial immunity is absurd. In reaching such a conclusion it appears that Respondent confuses the concept of who is "an entity" capable of fault with the question of whether or not "fault" exists as defined under the terms of R.C.W.4.22.015.

Further because absolute judicial or prosecutorial immunity is well established, it would be nearly impossible to know if a covered judicial or prosecutorial act would be negligent. The existence of immunity, as a practiced matter, precludes the development of law to determining if a duty exists "but for" such immunity.

Given such potential ambiguity within the statute it should be subject to a reasonable and sensible construction which includes the notion that a parent can not be allocated fault unless it has been established that they have breached an actionable duty.

In that regard, the children and the public policy in the State of Washington are still protected because, outside of the issue of "negligent

supervision," the parental immunity doctrine does not bar claims against parents who are, for example, are negligent in the operation of a motor vehicle, or who injures a child while engaging in a business activity. See *Woods v. H.O. Sports Co., Inc.* 183 Wn. App. 145, 150, 333P3d455 (2014). The same is true with respect to when a parent engages in willful or wanton, or intentionally wrongful conduct. *Id.* See also, *DeWolf and Allen, Parental Immunity*, 16 WAPRAC § 12:4 (4th Ed. 2015) (Parental immunity does not apply when parents breach a duty existing outside of the family relationship). In this case, none of these exceptions apply.

An additional exception of course would be a parent's liability for failing to supervise a child with known dangerous proclivities who injures a third party. See *Carey v. Reeve*, 56 Wn. App. 18, 781P2d904 (1989); *Barrett v. Pacheco* 62 Wn. App. 717, 815P2d834 (1991). Under such circumstances, the parent has not breached a duty owed to their own children, but rather breaches a duty owed to the world at large. See generally *Grivas v. Grivas* 113A.D.2d264 (N.Y.App. 1985) (Recognizing that parental liability to a third party for failure to supervise a known dangerous child is an exception to parental immunity or involves as an analytically different claim. See *Rios v. Smith* 744N.E.2d1156 (N.Y. 2001); *Nolechek v. Guesuale* 385N.E.2d1268 (N.Y. 1978). The fact an exception to parental immunity exists for claims by a third party against a

parent for negligence in supervising children with known dangerous proclivities, does not detract from the fact that it has never been recognized by the Washington appellate courts that there is a duty to refrain from negligent supervision owed by a parent to their own child.

C. RCW4.22.070 Should be Found Void Due To Vagueness.

Under the terms of RAP 2.5(a), an appellate court can consider issues affecting a constitutional rights for the first time on appeal. It has been recognized when a statute fails to define words alleged to be unconstitutionally vague the reviewing court may “look to existing law, owner or usage and the general purpose of the statute to determine whether the statute meetings constitutional requirements of clarity”. See *State v. Hunt*, Wn.App. 795, 801, 880 P.2d. 96 (1994). A statute is void for vagueness if it is framed in terms so vague that person of common intelligence must necessarily guess at its meaning and differ as to its application. *Potelco v. Department of Labor and Industries*, 191 Wn.App. 9, 28, 361 P.3d 767 (2015). A statute may overcome a vagueness objection if it is clear what the statute as a whole prohibits. See *Seven Gables v. MGM/UA Entertainment Co.*, 106 Wn 2d 1, 6, 721 P.2d 1 (1986). The fact that a statute requires interpretation does not make it void for vagueness. *Id.*

Given the lack of definition of the term "immune" in RCW 4.22.070 the statute, fails to reasonably inform a person of common intelligence as to what is intended, and individuals can reasonably differ as to its application. As indicated above the term "immune" has no set definition and given the absence of such a definition it is potentially subject to arbitrary interpretation and application. There is no reading of the subject statute which does not potentially result in absurd or strained consequences. See generally *In Re: Custody of Smith* 137 Wn.2d 1, 8, 969 P. 2d, 21 (1998) Frank (court should construe statutory language so as to result in absurd or strained consequences). A statute can be found unconstitutionally vague when "exaction of obedience to a rule or standard... was so vague and indefinite as to really be no rule or standard at all..." *A.B. Small Co. v. American Sugar Refining Co.* 272 U.S. 233, 239 (1925).

The use of the word "immune" in RCW 4.22.070 without providing some semblance of a definition, results in a statute which essentially provides no standard at all. The term "immune" has no set meaning, resulting in a statute which fails to provide "fair notice" or adequate standards. *City of Spokane v. Fischer*, 110 Wn.2d 541, 754 P.2d 1241 (1988).

As such, RCW 4.22.070 should be in whole or in part found to be unconstitutionally vague and struck down.

D. A Third Party Tortfeasor Defendant Lacks Standing To Raise A Parent's "Parental Immunity" As A Defense.

In this case the defendant raised Mr. Smelser's liability as a potential empty chair affirmative defense under RCW 4.22.070. Consistent with CR12(i), Mr. Smelser was specifically named as a non-party at fault within the defendant's Answer.

Generally any defense based on immunity is an affirmative defense which must be specifically pled and proved by the party claiming it. Under the terms of CR8(c) an affirmative defense within the meaning of the rule is "any other matter constituting avoidance or affirmative defense." Under Washington law all forms of immunity have been treated as affirmative defenses. See, e.g., *Evans v. Thompson* 124 Wn. 2d. 435, 879 P. 2d. 938 (1994) (co-employee immunity); *Foxworthy v. Puyallup Tribe* 141 Wn.App. 221, 169 P. 3d. 53 (2007) (Tribal sovereign immunity is an affirmative defense subject to waiver).

In this case, despite the fact that Ronald Smelser was joined as a party and defaulted, the Court nevertheless gave defendant Paul the benefit of his "parental immunity," when it failed to enter the verdict in this matter jointly and severally. Such actions on the part of the trial court,

assuming the parental immunity can be a damage reducing factor under RCW 4.22.070, was an error.

The case of *Romero v. West Valley School District*, 123 Wn. App. 385, 392, 98 P. 3d. 96 (2014), overruled on other grounds, *Barton v. State Department of Transportation*, 128 Wn. 2d. 1983, 208 P. 3d. 597 (2013), strongly suggested, without the deciding, that parental immunity can be subject to waiver. Here Ronald Smelser failed to file an Answer, thus did not affirmatively plead immunity as a defense as required by CR 8(c). As a result the defense should have deemed waived and should not have been considered by the trial court when reducing the verdict to a judgment. See *Farmers Ins. v. Miller*, 87 Wn. 2d. 70, 76, 549 P. 2d. 9 (1976).

Thus, as a matter of law, the Court, assuming that the issue was even proper before it, should have found that Ronald Smelser waived his parental immunity and as a result the verdict should have been entered jointly and severally.

Further, it is noted that given the fact that Mr. Smelser failed to assert "parental immunity" as a defense, co-defendant Paul should not have been permitted to claim the benefit of this otherwise highly personalized defense. The common law doctrine of "standing" prohibits a litigant from asserting another's legal rights. See *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn. 2d. 791, 802, 83 P.3d.

419 (2005). Such a doctrine precludes a party from asserting the legal rights of another, even if that party might otherwise gain a litigation advantage by doing so. See *Cassell v. Portelance*, N.D., 172 Wn. App. 156, 294 P. 3d. 1 (2012).

Further, comment "h" to Restatement (Second) of Torts §895G, which addresses "parental immunity," provides that parental immunity does not protect third parties who are also liable for the injuries to a child. Such a proposition is consistent with this Court's opinion in *Borst v. Borst*, 41 Wn.2d. 642, 251 P2d. 149 (1952), which found a parent could be held liable for an injury to a child when they are engaging in a business opposed to a parental function. The annotation to comment "h" notes that "the weight of authority is now heavily in support of this".

Ms. Paul should not have been allowed to assert and gain the benefit of Ronald Smelser's parental immunity – a defense which only a parent can possess.

Thus, trial court clearly erred in failing to enter the verdict in this matter jointly and severally based on the fact that Ronald Smelser was entitled to an immunity which he never asserted.

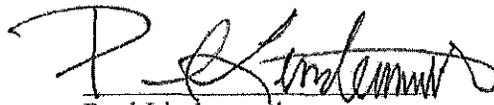
II. CONCLUSION

Petitioner's hereby, incorporate by reference their arguments relating to RCW 4.22.020, which is set forth at pages 14 to 15 of their Petition for Review.

There is no cognizable duty in tort owed to children requiring their parents refrain from negligent supervision. Absent a duty there can be no negligence. Absent negligence there is no "fault" as defined by RCW 4.22.015. Absent "fault" a person or entity cannot be allocated fault under RCW 4.22.070.

The erroneous inclusion of evidence and issues relating to parental responsibility in an injury case brought by one of the accused parent's own children is inherently prejudicial. The Petitioners, on reversal and remand should be provided a full new trial.

Dated this 5th day of October, 2016.



Paul Lindenmuth
Attorney for Petitioners
WSBA No. 15817
paul@benbarcus.com

DECLARATION OF SERVICE

I, Tiffany Dixon, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years and am not a party to this case.

On this 5th Day of October, 2016, I caused to be served and delivered to the attorney for the Respondents, a copy of PETITIONER'S SUPPLEMENTAL BRIEF, and caused those same documents to be filed with the Clerk of the above-captioned Court.

I Filed with the Supreme Court of the State of Washington, via email.

These documents were provided to Respondents' attorneys, via email and delivery via ABC Legal Messenger:

Sandra Bobrick
Sloan Bobrick, PS
4810 Pt. Fosdick Drive NW #83
Gig Harbor, WA 98335
sbobrick@sloanbobricklaw.com

Joanne Henry
Attorney at Law
4128 N. Mason Ave.
Tacoma, WA 98407-4934
Joannehenry1@outlook.com

DATED this 5th day of October, 2016, at Tacoma, Pierce County, Washington.



Tiffany Dixon, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC

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Attached for filing please find Petitioner's Supplemental Brief

Tiffany Dixon
Paralegal
Law Offices of Ben F. Barcus and Associates, PLLC
4303 Ruston Way
Tacoma, WA 98402
(253) 752-4444
tiffany@benbarcus.com

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