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STATE OF WASHINGTON
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No. 94559-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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MICHAEL GILMORE, a single man,

Petitioner,

v.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation,

Respondent.

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# ANSWER TO BRIEFS OF AMICUS CURIAE

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SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Victoria E. Ainsworth
WSBA No. 49677

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondent
Jefferson Transit

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## I. INTRODUCTION

While espousing the outdated and imprudent "reasonable man" standard for review of evidentiary decisions, which "focuses on the reasonableness of the decisionmaker" rather than "examining the reasons for the decision," *see Coggle v. Snow,* 56 Wn. App. 499, 506, 784 P.2d 554 (1990), plaintiff's amici ask this Court to remove from the trial court any discretion to admit collateral source or biomechanical expert evidence, contrary to this Court's decisions in *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 953 P.2d 800 (1998) and *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014). This Court should instead affirm the Court of Appeals, which applied the correct standard on review in reversing evidentiary decisions that the trial court's expressed reasoning did not support under *Johnson* and *Johnston-Forbes*. This Court should also affirm the Court of Appeals and recognize, as the Risk Pool amici argue, that plaintiff's closing argument improperly asked the jury to award punitive damages against Jefferson Transit *because* it was "the government," contrary to RCW 4.96.010; defense objection during closing could only have exacerbated the effect of counsel's flagrant misconduct.

## II. ARGUMENT

### A. The trial court committed an error of law under ER 703 by excluding Tencer's expert testimony because it was based on "facts that are not going be in evidence."

#### 1. The trial court failed to address the *Johnston-Forbes* factors governing admissibility of biomechanical evidence under ER 702.

As the Court of Appeals properly recognized, the trial court erroneously applied the applicable law in excluding the testimony of biomechanical expert Tencer, which was critical to the defense. (Op. 16-18) The trial court concluded that Tencer's opinions lacked a "reasonable or justified" "aura of authority" solely *because* Tencer relied on "facts that are not going to be in evidence" in reaching his conclusions. (RP 39) But under ER 703, neither Tencer's opinions nor inferences needed to be based on facts in evidence. The Court of Appeals correctly recognized that the trial court abused its discretion by excluding Tencer based upon an improper application of ER 703 that was plainly stated on the record. (Op. 17)

This Court in *Johnston-Forbes*, 181 Wn.2d 346, 352, ¶ 10, 333 P.3d 388 (2014) reviewed the standard that trial courts must apply to determine the admissibility of expert testimony: "Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and

(3) the testimony would be helpful to the trier of fact." While "trial courts are afforded wide discretion" in applying this test, *Johnston-Forbes*, 181 Wn.2d at 352, ¶ 10, they have no discretion to apply a different standard in performing this gatekeeping function. *See Johnston-Forbes*, 181 Wn.2d at 358, ¶ 25 (Yu, J., concurring) (trial court must "scrutinize" the proffered testimony "concerning the admissibility of an expert in every given case"); *Frausto v. Yakima HMA, LLC,* 188 Wn.2d 227, 239, ¶ 25, 393 P.3d 776 (2017) ("[t]he trial court acts as a gatekeeper").

In this case, the trial court addressed none of the factors required by *Johnston-Forbes* before excluding Tencer's testimony. The trial court did not determine whether Tencer was qualified (he was, as this Court recognized in *Johnston-Forbes,* 181 Wn.2d at 356, ¶ 18), whether Tencer relied on generally accepted theories (which plaintiff did not seriously challenge, just as in *Johnston-Forbes,* 181 Wn.2d at 356, ¶ 19), or whether Tencer's testimony would be helpful to the jury. Noting that the trial court did not "elaborate on [its] finding" that Tencer's testimony would be "confusing" or "misleading," the Court of Appeals correctly recognized that Tencer's testimony was in fact neither, and was critical to the defense

"[b]ecause a disputed issue existed as to the cause and nature and extent of Gilmore's injury." (Op. 17)

Amici Chan's claim that Tencer's evidence would amount to medical testimony on causation (Chan 10) ignores that that "[a]n opinion 'that the maximum possible force in this accident was not enough to injure a person' is not a medical opinion"; "it includes no opinion about the injured person's 'symptoms or possible diagnosis from those symptoms.'" *L.M. by & through Dussault v. Hamilton*, 200 Wn. App. 535, 557, ¶ 74, 402 P.3d 870 (2017). Here, defendant sought to introduce Tencer's testimony "relat[ing] to the severity of the impact" and "describing the severity of the forces in the collision" (CP 365, 367); Tencer expressly disavowed any intention of testifying as to medical causation. (CP 365: "My testimony is not medical"; "My opinion does not imply that Plaintiff suffered no injury"; CP 366: "I am not a medical doctor"; CP 367: "I have not stated that Plaintiff was or was not injured")

The defense was entitled to consideration of the helpfulness of this testimony on the forces involved in the collision to enable "the jurors to make a more informed decision" on whether it was sufficient to cause the plaintiff's claimed injury, regardless whether the evidence was based on "facts that are not going to be in evidence." (Op. 17-18)

*See City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1053 (9th Cir.) (reversing exclusion of expert's testimony; "[f]acts casting doubt on the credibility of an expert witness and contested facts regarding the strength of a particular scientific method are questions reserved for the fact finder."), *cert. denied*, 135 S. Ct. 870 (2014). The defense should not have had to hope that the jury would "figure out" from photographs of the vehicles that this was not the "catastrophic collision" that plaintiff claimed in his statements to the medical experts who did testify to causation. (Op. 17; *see* RP 37)

Amici WSAJF contends that the Court of Appeals may have misinterpreted the trial court's statements in concluding the court excluded Tencer under an erroneous application of ER 703. (WSAJF 10-11) But WSAJF's argument proves too much, demonstrating why a trial court must perform its gatekeeping function and articulate its reasoning for excluding expert testimony on the record. A "natural requirement of the gatekeeper function is the creation of a sufficiently developed record in order to allow a determination of whether the [trial] court properly applied the relevant law." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir.) (internal quotation marks and quoted source omitted) (considering admission of expert testimony under FRE 702), *cert denied*, 540 U.S. 1003 (2003). Where, as here, the trial

court "did not elaborate on [its] finding[s]" (Op. 17), the reviewing court is incapable of ensuring that the trial court properly performed its gatekeeping function in determining the admissibility of expert testimony. When a trial court fails to do so, and the record "contains only the court's conclusion" with "no analysis," the court has "abdicated its gatekeeping duty" and necessarily abused its discretion by failing to apply the correct legal test. *Zimmerman v. Powell*, 268 Neb. 422, 435, 684 N.W.2d 1, 12 (2004) (applying ER 702).

### 2. Neither ER 403 nor the imaginary "*Stedman* factors" are alternative grounds for exclusion of Tencer's testimony.

WSAJF relies on *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994) to argue that this Court should affirm the trial court's exclusion of Tencer on alternative grounds, under ER 403. (WSAJF 12) But the superior court relied upon ER 403 in allowing plaintiff's former treating physician to testify as an expert witness for the defense in *Carson,* 123 Wn.2d at 211. In this case, the trial court never mentioned, cited to, or otherwise expressed any reliance on ER 403 as the legal basis for its decision. This Court should reject WSAJF's interpretation of *Carson* (WSAJF Br. 11-12), which would essentially allow the appellate court to arrogate to itself the discretionary decision whether evidence should be admitted, on a ground unexpressed in the

record, rather than review the trial court's exercise of its discretion in making an evidentiary decision.

Nor should this Court adopt (and apply for the first time on review) a separate test for admissibility of biomechanical expert testimony predicated on the "standards articulated by *Stedman v. Cooper*," 172 Wn. App. 9, 292 P.3d 764 (2012), as proposed by plaintiffs' expert amici Chan. (Chan 5, 13) The plaintiff did not rely on any purported "*Stedman* factors" in seeking exclusion of Tencer's testimony. Nor did *Stedman* create such a separate test.

Consistent with *Johnston-Forbes* and ER 702, Division One held that "expert witness testimony must be relevant and helpful to the trier of fact" and based on "an adequate foundation" in *Stedman,* 172 Wn. App. at 16, ¶ 16. Division One did not identify "six factors that can be considered by the trial court in exercising its discretion." (Chan 3) Nor would the *Stedman* Court have had reason to do so: contrary to the argument made by Chan here, the appellant in *Stedman* never argued that the trial court had applied the incorrect legal standard. Rather, examining a Colorado case, *Schultz v. Wells*, 13 P.3d 846, 849 (Colo. App. 2000), Division One merely noted that the "appellate court [in *Schultz*] concluded *the trial court* had identified appropriate

factors to review the likelihood that the evidence would mislead the jury." *Stedman*, 172 Wn. App. at 20, ¶ 23 (emphasis added).

Division One did not adopt those factors; the Court simply found *Schultz* persuasive in "explain[ing] why a trial court *may* regard such an opinion as more likely to be misleading than helpful." *Stedman*, 172 Wn. App. at 20-21, ¶ 25 (emphasis added). The *Stedman* Court then concluded that, where the issue before the jury was "the degree to which these particular plaintiffs were injured in this particular automobile accident," the trial court had not erred in excluding Tencer's testimony. 172 Wn. App. at 18-19, ¶ 21, 21, ¶ 25. In reaching its holding, Division One expressly recognized "that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." *Stedman*, 172 Wn. App. at 18, ¶ 20.

The plaintiff here did not seek exclusion of Tencer's testimony under ER 702 for failing to satisfy the "*Stedman* factors." (*See* CP 47-56) Rather, the plaintiff sought to exclude Tencer's testimony by attempting to distinguish this case from *Johnston-Forbes*, where Tencer's testimony was admitted, claiming that "unlike the *Johnston-Forbes* case, causation with regard to the fact of injury in this case is not in question by either side." (CP 48-49) But as the Court of Appeals

correctly recognized, the causation and nature of plaintiff's injury *was* at issue here. (*See* Op. 17-18; Reply Br. 9 n.4)

*Stedman* merely applied the well-established ER 702 standard governing the admissibility of expert testimony; it is notable only in that the superior court in that case actually articulated on the record a proper understanding of the law governing its decision whether to allow or exclude expert testimony. Neither *Stedman* nor ER 403 are an independent basis for exclusion of evidence here based on this Court's independent assessment of the decision whether Tencer's testimony should have been admitted.

### 3. This Court should follow the majority of other jurisdictions and not adopt an absolute ban on biomechanical testimony.

Finally, after fabricating six imaginary "*Stedman* factors," amici Chan inconsistently asks this Court to adopt an absolute ban on biomechanical expert testimony. (Chan 6-9) This Court could as readily prohibit the testimony of experts such as Chan. This Court instead should continue to follow the majority approach in other jurisdictions and decline to impose a blanket ban on biomechanical testimony.

Most jurisdictions have adopted "a middle ground which recognizes that a properly qualified mechanical expert may express an

opinion as to how forces act on the human body during a collision and the type of injuries that can be sustained from those sources." *Nabors Well Servs., Ltd. v. Romero*, 508 S.W.3d 512, 532-33 (Tex. App. 2016) (surveying cases). These courts "have ruled consistently" with *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 305 (6th Cir. 1997), *cert. denied*, 522 U.S. 817 (1998), in which the Sixth Circuit held that a biomechanical engineer was "qualified to render an opinion that made use of his discipline's general principles, describe[] the forces generated in the . . . rear-end collision, and sp[eak] in general about the types of injuries those forces would generate." *See Berner v. Carnival Corp.*, 632 F. Supp. 2d 1208, 1212 (2009) (surveying cases). Washington should continue to follow this majority rule that a "non-medical expert like a biomechanical engineer may be qualified to give certain opinions but not others." *L.M. by & through Dussault,* 200 Wn. App. at 557, ¶ 74.

Relying on a declaration in an unrelated case by the attorney submitting the Chan amici brief (CP 65, 72), Chan attacks Tencer's approach as unreliable for "fail[ing] to account for differences in circumstance." (Chan 9) But regardless of his analysis in the (unpublished) superior court case championed by Chan, in this case Tencer did "account for differences," testifying by declaration that he

used "the weights of the vehicles" involved in this particular collision, "the speed of the [transit bus] based on its level of damage," and plaintiff's "age, weight, and height" in his calculations. (CP 366)

In particular, Chan's claim that Tencer's testimony "can never be relevant" because Tencer "does not even attempt to quantify the forces required to cause injury to an individual" is apparently based on the perplexing assertion that "[t]here is *no* daily activity that results in *any* degree of injury in even 1 in 1,000 times." (Chan 10, 13) (emphasis added) Any individual who has lived to middle age knows that is simply not true. Chan's specific objections to Tencer's methods would go to the weight of his testimony, not its admissibility, and certainly do not warrant a complete ban on all biomechanical evidence.

### B. A plaintiff claiming general damages predicated on financial stress may open the door to collateral source evidence.

#### 1. This Court recognized in *Johnson* that collateral source evidence is sometimes admissible.

Plaintiff's amici rely on *Boeke v. International Paint Co. (California), Inc.*, 27 Wn. App. 611, 618, 620 P.2d 103 (1980), *rev. denied*, 95 Wn.2d 1004 (1981), which stated "that the rule of strict exclusion represents the better view," to argue that Division Two erred in finding that a party may open the door to collateral source evidence.

(WSAJF 13-15; L&I 9-10) But this Court recognized in *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 953 P.2d 800 (1998) – 18 years after *Boeke* – that "there may be a role for trial court discretion" in admitting collateral source evidence "in some cases." (WSAJF at 15-16; WSLC at 4-5; L&I at 14, 16) Indeed, this Court expressly stated in *Johnson* that "a claimant may offer evidence of collateral benefits and, thus, open the door for the defendant's use of such evidence." 134 Wn.2d at 802.

The Department attempts to distinguish *Johnson* on the basis that it involved receipt of collateral source benefits in a worker's compensation proceeding, as opposed to a third-party action. (L&I 14-15) The Department claims that because this Court said it "is unambiguous that an employees' receipt of benefits is inadmissible in a third party action," *Entila v. Cook*, 187 Wn.2d 480, 489, ¶ 15, 386 P.3d 1099 (2017), "the analysis from *Johnson* does not apply here." (L&I 14-15) But here, unlike in *Entila,* the plaintiff abandoned any claim for special damages on the eve of trial, preventing the Department from intervening to protect its statutory right to subrogation under RCW 51.24.030(2). The prohibition against the admission of evidence "that the injured worker or beneficiary is entitled to compensation under this title" applies only "in any third

party action *under this chapter*." RCW 51.24.100 (emphasis added). When, as here, a plaintiff abandons his obligation to pursue L&I's subrogation right to special damages under RCW ch. 51.24, the statute's prohibition against admission of that evidence by its terms is inapplicable.

Plaintiff's amici claim that admission of collateral source evidence under *any* circumstances would "render the statute ineffectual," allowing a third-party tortfeasor to escape liability, precluding the Department's ability to recover adequate damages or otherwise force the injured worker to reimburse the Department from any recovery, and unnecessarily complicating trials with expert testimony regarding reimbursement formulas and calculation of benefits. (*See, e.g.*, L&I 7-8, 11; WSLC 2, 8, 10-16; WSAJF 18) But none of these underlying policy concerns is at risk where, as here, the plaintiff seeks only general damages. Because the Department is not entitled to reimbursement from a pain and suffering award under *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010) (App. Br. 35; Reply Br. 14-16), a plaintiff seeking only such general damages has already thwarted RCW 51.24.100's "crucial" purpose of allowing the Department to recover from the plaintiff. (L&I 2, 16) And because the plaintiff in such a case is not required to repay the

Department, the third-party defendant similarly does not escape liability at the expense of an injured worker. Recognizing that the door can be opened to collateral source evidence under these circumstances thus will not ignite amici's apocalyptic "parade of horribles" ending in the evisceration of the collateral source rule.

### 2. This Court should adopt the Department's alternative rule for admission of collateral source evidence.

The Department in fact recognizes that because the plaintiff here "claim[ed] general damages only, Gilmore effectively removed this case from the considerations of RCW 51.24.100 and the third party statute in general." (L&I 16) As a result, this "third-party case [is] indistinguishable from a typical civil case and, consistent with *Johnson*, the plaintiff may open the door to evidence of industrial insurance compensation." (L&I 16) The Department's primary position that *Johnson* is inapplicable even here, where a plaintiff seeks only general damages, is illogical and inconsistent with its concession that the plaintiff removed this case from the third-party statutory framework and made it "indistinguishable" from *Johnson* and a typical civil case. (L&I at 14, 16) This Court should instead adopt the Department's alternative rule that where a party circumvents the statutory scheme of RCW ch. 51.24 by seeking only general damages,

"consistent with *Johnson*, the plaintiff may open the door to evidence of industrial insurance compensation." (L&I 16)

This narrow exception to the collateral source rule is entirely consistent with the rule in other jurisdictions allowing a defendant to impeach a plaintiff's exaggerated or false claims of financial distress.[1] "When evidence on a certain issue is introduced by one party, and it appears likely the other party will be prejudiced unless they are permitted to introduce contradictory or explanatory evidence, that evidence should be admitted." *Erskine v. Duke's GMC, Inc.*, 413 N.E.2d 305, 308 (Ind. Ct. App. 1980). "[T]he failure of the trial court to allow a full explanation of the evidence admitted is tantamount to an abuse of discretion." *Erskine*, 413 N.E.2d at 308.

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[1] *See, e.g.*, *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 47 (Minn. 1997) (trial court properly allowed cross-examination on collateral source benefits where plaintiffs "communicated to the jury a false impression of their financial condition"; "The collateral source statute does not trump the Minnesota Rules of Evidence allowing impeachment."); *Younts v. Baldor Elec. Co., Inc.*, 310 Ark. 86, 89, 832 S.W.2d 832, 834 (1992) ("When a party testifies about his or her financial condition in a false or misleading manner, however, he or she opens the door for the introduction of evidence which might otherwise be inadmissible under the collateral source rule."); *Matheson v. Stilkenboom*, 251 Ga. App. 693, 696, 555 S.E.2d 73, 75 (2001) ("a party may be impeached with collateral source evidence if the impeached testimony relates to a material issue"; trial court properly allowed cross-examination on evidence of insurance after plaintiff testified that she delayed seeking medical treatment because she could not afford it); *Macias v. Ramos*, 917 S.W.2d 371, 375 (Tex. Ct. App. 1996) (plaintiff's testimony regarding inability to pay bills opened door to evidence of collateral benefits).

This exception to the collateral source rule is "also necessary to protect the full range of inquiry allowed by cross-examination, a fundamental part of the adversary system." *Lange v. Missouri Pacific R.R. Co.*, 703 F.2d 322, 324 (8th Cir. 1983). In affirming the admission of evidence of the plaintiff's worker's compensation benefits, *Lange* held that collateral source evidence "become[s] relevant when the plaintiff's direct testimony misleads the jury on some issue in the case and cross-examination of the plaintiff on evidence of collateral source payments is necessary to rebut the testimony." 703 F.2d at 324.

Indeed, without such an exception, a defendant may be left entirely unable to defend itself against the primary basis of the plaintiff's claims of pain and suffering. In ruling that the defense had a right to introduce collateral source evidence after the plaintiff opened the door in an analogous situation to the present case, the Third Circuit noted:

> [P]laintiff on direct examination brought into the case an additional, affirmative element by testifying that he had returned to work and had not visited [the doctor] again because he had fallen behind in the payment of his bills and wanted to catch up on them and support his family. Defendant was not required to leave this testimony unchallenged and had the right to ask plaintiff on cross-examination whether he had received financial assistance, as affecting the credibility of his assertion. To have forbidden such cross-examination

> would have conferred on plaintiff the unparalleled right to give testimony on direct examination with immunity from inquiry on cross-examination.

*Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968).

Something very similar happened here, with plaintiff claiming his financial situation prevented him from receiving medical care and was the source of his hedonic damages when defendant was prepared to prove plaintiff had in fact "received a lump sum of cash, . . . . immediately afterwards started his own plumbing business, . . . . [and] requested to be released to work as soon as he received the lump sum benefit, claiming that his injuries were resolved." (CP 361) On the strength solely of a supposed absolute ban on the admission of collateral source evidence, the defense was unfairly prohibited from challenging plaintiff's claims of psychic pain and financial suffering with this relevant evidence. This Court should instead adopt the Department's proposed alternative rule that a plaintiff who seeks only general damages may open the door to collateral source evidence.

### C. The Court of Appeals correctly recognized that plaintiff's call to the jury to "fight the government" with its verdict was incurably prejudicial.

Notably, none of plaintiff's amici make any effort to justify or defend the outrageous misconduct of plaintiff's counsel during closing

argument, accusing the defense and defense counsel of fraud (RP 978, 979, 981) and charging the jury to punish "the government" and hold it "accountable" because "the government murders innocent people," "gets away with it," and "tries to . . . blame it on the victim." (RP 1031-32)[2] The Risk Pool amici cogently articulate the consequence of such an argument when the defendant is a government entity that by statute can be liable in negligence only "to the same extent as if they were a private person." RCW 4.96.010(1). (Risk Pool Br. 2-4, 6) Far from complying with this statutory mandate, arguments such as plaintiff's in this case seek damages because the defendant is *not* "a private person," but "the government."

Such flagrant attempts to equate governmental defense of civil liability to tyrannical abuses of governmental power cannot be cured by objection at trial. Even (and especially) if sustained (by a judicial officer who is himself cloaked with governmental authority), such an objection could only feed into the plaintiff's argument that the jury must help him "fight the government," especially following a trial in which plaintiff treated every defense objection, no matter how justified, as "proof" of "the government's" "wealth," "power" (Supp. Br.

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[2] Nor, properly, do plaintiff's amici repeat the spurious claim that the defense somehow "had it coming" because it had accused plaintiff of fraud. (Supp. Br. 3) All of plaintiff's examples of these supposed accusations come from colloquy that did not take place in front of the jury.

7) and essential wickedness, curable only by a large jury verdict. Such misconduct cannot be explained, approved, or rewarded; the Court of Appeals correctly recognized that plaintiff's improper closing argument was incurably prejudicial to the defendant.

## III. CONCLUSION

This Court should affirm the Court of Appeals decision reversing and remanding for a new trial.

Dated this 18th day of December, 2017.

SMITH GOODFRIEND, P.S.

By:_____
Catherine W. Smith, WSBA No. 9542
Victoria E. Ainsworth, WSBA No. 49677
Attorneys for Respondent Jefferson Transit

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 18, 2017, I arranged for service of the foregoing Answer to Briefs of Amicus Curiae, to the Court and to the parties to this action as follows:

| | |
|---|---|
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| Sunshine M. Bradshaw<br>Premier Law Group, PLLC<br>1408 140th Pl NE<br>Bellevue WA 98007<br>Sunshine@premierlawgroup.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| Shari L. McMenamin<br>McMenamin & McMenamin<br>544 N Fifth Ave<br>Sequim, WA 98382<br>shari@mcmenaminlaw.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| David H. Heller<br>Heller Law Firm, PLLC<br>860 S.W. 143 Street<br>Seattle, WA 98166<br>david@heldar.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| Daniel E. Huntington<br>Richter-Wimberley PS<br>422 W. Riverside Ave., Suite 1300<br>Spokane, WA 99201<br>danhuntington@richter-wimberley.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| Valerie D. McOmie<br>Attorney at Law<br>4549 NW Aspen St.<br>Camas, WA 98607-8302<br>valeriemcomie@gmail.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |

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|---|---|
| Melissa White<br>Chair, WDTL Amicus Committee<br>333 108th Avenue NE<br>Bellevue, WA 98004<br>melwhite@expedia.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| Michael B. King<br>Jason W. Anderson<br>Carney Badley Spellman PS<br>701 5th Ave Ste 3600<br>Seattle WA 98104-7010<br>king@carneylaw.com<br>anderson@carneylaw.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| Thomas V. Vogliano<br>Attorney General's Office<br>800 5th Avenue, Suite 2000<br>Seattle, WA 98104-3188<br>thomas.vogliano@atg.wa.gov | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| Erin C. Sperger<br>Erin Sperger, PLLC<br>1617 Boylston Avenue<br>Seattle, WA 98122<br>erin@legalwellspring.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| J. William Ashbaugh<br>Hackett Beecher & Hart<br>1601 5th Avenue, Suite 2200<br>Seattle, WA 98101<br>washbaugh@hackettbeecher.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |
| Samuel John Elder<br>Law Office of Sam Elder PLLC<br>12716 NE 106th Ln<br>Kirkland, WA 98033-4652<br>Sam@SamElderLaw.com | ____ Facsimile<br>____ Messenger<br>____ U.S. Mail<br>✓ E-Mail |

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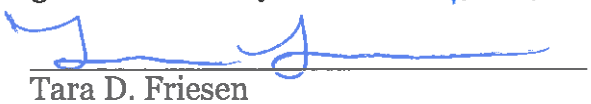

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- erin@legalwellspring.com
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