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No. 95251-5

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

MICHAEL MURRAY, Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

#15-2-00566-1

**PETITIONER MICHAEL MURRAY'S
SUPPLEMENTAL BRIEF**

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TABLE OF CONTENTS

INTRODUCTION 1

I. ISSUE ON REVIEW AND SCOPE OF THIS SUPPLEMENTAL BRIEF 2

II. STATEMENT OF FACTS 3

ARGUMENT 7

III. THE HTCC STATUTE VIOLATES THE DELEGATION DOCTRINE. 7

A. A Line-Item Veto Inadvertently Created The Improper Delegation 7

B. The Statute Lacks Adequate Procedural Safeguards 9

C. The Constitutional Writ of Certiorari Does Not Save The Flawed Statute. 13

D. Recent Amendments To HTCC Regulations Concede The Statute’s Flaws. 16

IV. MR. MURRAY DESERVES AN AWARD OF ATTORNEYS’ FEES ON APPEAL. 18

CONCLUSION 18

TABLE OF AUTHORITIES

Washington Supreme Court

<u>Barry & Barry, Inc. v. State Dep't of Motor Vehicles</u> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	9,14
<u>Birkliid v. Boeing Co.</u> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	9
<u>Brown v. Vail</u> , 169 Wn.2d 318, 237 P.3d 263 (2010).....	12
<u>City of Auburn v. King County</u> , 114 Wn.2d 447, 788 P.2d 534 (1990).....	15
<u>City of Seattle v. Holifield</u> , 170 Wn.2d 230, 240 P.3d 1162 (2010).....	15
<u>Matter of Powell</u> , 92 Wn.2d 882, 602 P.2d 711 (1979).....	10
<u>Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland</u> , 138 Wn.2d 9, 978 P.2d 481 (1999).....	10
<u>Nw. Gillnetters Ass'n v. Sandison</u> , 95 Wn.2d 638, 628 P.2d 800 (1981).....	11
<u>State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dep't of Transp.</u> , 142 Wn.2d 328, 12 P.3d 134 (2000).....	12
<u>State v. Simmons</u> , 152 Wn.2d 450, 98 P.3d 789 (2004).....	11
<u>Street v. Weyerhaeuser Co.</u> , 189 Wn.2d 187, 208, 399 P.3d 1156 (2017).....	18
<u>United Chiropractors of Washington, Inc. v. State</u> , 90 Wn.2d 1, 578 P.2d 38 (1978).....	10
<u>Willoughby v. Dep't of Labor and Indus.</u> , 147 Wn.2d 725, 57 P.3d 611 (2002).....	12

Washington State Court of Appeals

<u>Doan v. State Dep't of Labor & Indus.</u> , 143 Wn. App. 596, 178 P.3d 1074 (2008)	18
<u>Murray v. Dep't of Labor & Indus.</u> , 1 Wn. App. 2d 1, 403 P.3d 949 (2017).....	6, 8, 13
<u>Rogers v. Dept. of Labor and Indus.</u> , 151 Wn. App. 174, 210 P.3d 355 (2009)	1

Other Authorities

<u>American Mfrs. Mut. Ins. Co. v. Sullivan</u> , 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999).....	14
House Journal, 59th Leg., Reg. Sess., at 1587 (2006)	8
Laws of 2006, ch. 307	7
<u>Touby v. United States</u> , 500 U.S. 160, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991)	1
Wash. St. Reg. 16-18-23 (August 26, 2016).....	17

Codes and Regulations

RCW 7.16.040.....	15
RCW 51.04.010	9
RCW 51.52.110	6
RCW 51.52.130.....	18
RCW 70.14.090	17
RCW 70.14.110.....	9

RCW 70.14.120	7
WAC 182-44-040.....	17
WAC 182-55-041.....	18

INTRODUCTION

[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds.

--- Touby v. United States, 500 U.S. 160, 170, 111 S. Ct. 1752, 1758, 114 L. Ed. 2d 219 (1991) (Marshall, J., concurring)

Petitioner Michael Murray asks this Court for what the Industrial Insurance Act guarantees: proper and necessary medical care. On October 24, 2014, Mr. Murray underwent arthroscopic surgery to repair femoral acetabular impingement (FAI) in his right hip. Because Respondent Department of Labor and Industries refused to cover the procedure, he paid for it himself and it successfully addressed his pain and lack of mobility. By any measure, it was proper and necessary care.

An injured worker normally can qualify for reimbursement by proving that surgery was successful. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 184, 210 P.3d 355 (2009) (“determination that surgical treatment was medically proper and necessary may be based on '20–20 hindsight' provided from findings of the surgery itself”). Here, however, the Department refused to consider Mr. Murray’s diagnosis and proscribed treatment – either before or after surgery. The Health Technology Clinical Committee (HTCC), a little-

known group within the State Health Care Authority, had decided that FAI surgery was unproven and not cost-effective. The HTCC unilaterally, and without subsequent agency or judicial review, barred any State program from paying for the procedure.

This Court should rule the HTCC's edict is unenforceable for three reasons. First, as the result of the Governor's line-item veto, the HTCC statute improperly delegated legislative authority to the Committee without adequate procedural safeguards and judicial review. Second, the Health Care Authority tacitly acknowledges the statutory defects in recent amendments to HTCC regulations. Third, the Court of Appeals erred by ruling that the flawed HTCC decision bound the Department at all levels of review.

Mr. Murray respectfully requests this Court to reverse the Court of Appeals, remand his case to the Department for a hearing on the merits of his claim, and award reasonable attorneys' fees on appeal.

I. ISSUES ON REVIEW AND SCOPE OF THIS SUPPLEMENTAL BRIEF.

Mr. Murray's Petition for Review identified three issues for the Court's review:

- The HTCC statute violates the constitutional delegation doctrine;

- The flawed HTCC decision denied Mr. Murray's right to individual review and proper and necessary medical care; and
- The Department and lower courts improperly construed the HTCC decision as binding.

This supplemental brief focuses on the first issue -- how the HTCC statute violates the delegation doctrine. The Court will find briefing on the second issue, Mr. Murray's right to proper and necessary medical care and his due process right to an individualized determination, in Appellant's Opening Brief at 13-23, filed October 10, 2016, and Appellant's Reply at 15-19, filed January 30, 2017. Briefing on the third issue, improper statutory construction, is in Appellant's Opening Brief at 25-27.

Mr. Murray asks the Court to consider all issues and briefing to decide this case.

II. STATEMENT OF FACTS.

Michael Murray worked for Brock's Interior Supply, a carpet company in Poulsbo, Washington. On August 24, 2009, he severely injured his hips at work, leading to this claim for workers' compensation. (AR 30). Dr. James Bruckner, a Board Certified Orthopedic Surgeon, diagnosed Mr. Murray with labral tears to his right hip and CAM femoroacetabular impingement (FAI). (AR 60).

The Department accepted Mr. Murray's industrial insurance claim and the diagnosed injury to his right hip. (AR 30-32).

During the next four years, Mr. Murray pursued conservative treatment for his injured right hip, but his condition worsened. (AR 60). Throughout this he was unable to work. In 2013, Mr. Murray sought treatment with Dr. James Bruckner at Proliance Orthopaedics & Sports Medicine in Bellevue, Washington. (AR 60-61). Dr. Bruckner prescribed FAI surgery to repair the labral tears and CAM impingement in his hip. (AR 60).

As Dr. Bruckner described,

[t]he surgical procedures for this condition are Arthroscopic Osteoplasty of the Acetabulum and/or Femoral Neck Osteoplasty for treatment of Femoral Acetabular Impingement, Arthroscopic Labral Resection and/or Arthroscopic Synovectomy of the hip joint....

There is no other surgery the Department covers that will address the worker's hip condition.

(AR 60) (emphasis added).

The sole alternative to surgery – doing nothing – condemned Mr. Murray to increasing pain and deterioration until he qualified for a total hip replacement.

This condition will go on for years due to inability to proceed with surgical treatment. Eventually, patient will develop end stage osteoarthritis, which ultimately

occurs if this condition is not treated surgically, and require a total hip replacement in the future.

(AR 60).

Mr. Murray requested authorization from the Department for FAI surgery, but on October 30, 2013, the Department refused. (AR 21). In its order, the Department relied only on the HTCC's determination that FAI surgery is not covered under any circumstances. (AR 21). No record exists of the Department reviewing Mr. Murray's medical condition, applying the relevant regulations, or consulting with a medical professional on the requested surgery.

On July 2, 2014, the Department affirmed its October 30, 2013 order, again without individual review. (AR 25). Mr. Murray timely appealed the Department's decision to the Board of Industrial Appeals.

Although it is not a "participating agency" under the HTCC statute, the Board considered itself bound by the Committee's decision. (AR 19). On February 13, 2015, five and a half years after Mr. Murray's workplace injury, the Board affirmed the Department's denial of medical treatment. (AR 19). It did not hold a hearing or address whether the FAI surgery was necessary and proper care for

Mr. Murray. Instead, it concluded summarily that “the decisions of the HTCC may not be overruled by the Board.” (AR 19).

Mr. Murray did not postpone surgery for the Department’s authorization. On October 20, 2014, he had arthroscopic FAI surgery, and two weeks later was recovering as expected.

The right hip reveals the incisions have healed very nicely. No signs of infection. No increased warmth, erythema, or discharge. *He is ambulating with a normal heel-to-toe gait with no assistive device.* He is sitting comfortably with his hips flexed at 90 degrees.

(AR 67) (emphasis added). The surgery was a success, and rather than suffer from continuing deterioration and osteoarthritis, Mr. Murray is walking and sitting without pain.

Mr. Murray appealed the Board’s decision to the Kitsap County Superior Court for a de novo trial under RCW 51.52.110. (Notice of Appeal; CP 1). He did not receive his trial, however. On March 29, 2016, Judge Kevin Hull granted summary judgment to the Department. (Summary Judgment Order at 2; CP 124). He appealed to the Court of Appeals, Division II – the third level of review. The court also denied him the opportunity to prove his claim. Murray v. Dep’t of Labor & Indus., 1 Wn. App. 2d 1, 403 P.3d 949 (2017).

None of these reviewing bodies looked at medical evidence in Mr. Murray's case, relying instead on the HTCC's unilateral decision that the State will not pay for FAI surgery.

ARGUMENT

III. THE HTCC STATUTE VIOLATES THE DELEGATION DOCTRINE.

A. A Line-Item Veto Inadvertently Created The Improper Delegation.

In his Petition for Review, Mr. Murray describes the origin of the HTCC as part of the State Health Care Authority. (Petition for Review at 12). The Legislature's bill creating the HTCC expressly provided for judicial review of its decisions. "The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the health technology clinical committee..." Laws of 2006, ch. 307 § 6. This appeal process was in addition to those preserved under participating agencies' statutes and regulations.

Nothing in chapter 307, Laws of 2006 diminishes an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program. Appeals shall be governed by state and federal law applicable to participating agency decisions.

RCW 70.14.120(4).

Governor Christine Gregoire signed the HTCC statute, but vetoed the appeal provision in section 6, finding it *duplicative*.

I am, however, vetoing Section 6 of this bill, which establishes an additional appeals process for patients, providers, and other stakeholders who disagree with the coverage determinations of the [HTCC]. The health care provider expertise on the clinical committee and the use of an evidence-based practice center should lend sufficient confidence in the quality of decisions made. Where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process.

House Journal, 59th Leg., Reg. Sess., at 1587 (2006).

Without intending to, the Governor's veto eliminated an injured worker's right to appeal whether medical treatment is proper and necessary. The Court of Appeals concluded that the HTCC statute foreclosed any review of its coverage decision, and as a consequence, any individual review of Mr. Murray's claim.

[N]either the Board nor the courts could make an individualized determination regarding whether a treatment was proper and necessary... RCW 70.14.120(3) is an absolute proscription against state health care coverage for health technologies the HTCC deems are not covered.

Murray v. Dep't of Labor & Indus., 1 Wn. App. 2d 1, 403 P.3d 949, 954 (2017) (following Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 627, 285 P.3d 187 (2012)).

One 11-person committee has sole, unreviewable authority to deny State coverage for any medical procedure it deems unproven or too expensive. RCW 70.14.110(2)(a) (“safety, efficacy, and cost-effectiveness”). This is a fundamental violation of the delegation doctrine.

B. The Statute Lacks Adequate Procedural Safeguards.

The Legislature created Industrial Insurance as a grand bargain between workers and employers, guaranteeing injured workers “sure and certain relief.” RCW 51.04.010; Birklid v. Boeing Co., 127 Wn.2d 853, 870, 904 P.2d 278 (1995). Defining the Act’s coverage and benefits is a legislative act, directly affecting the terms of the bargain. To delegate this authority to an agency, the Legislature must provide adequate procedural safeguards to protect against unreasonable decisions.

[T]he delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that Procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.

Barry & Barry, Inc. v. State Dep’t of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). As the Barry court emphasized, the

delegation doctrine retains its purpose “of protecting against unnecessary and uncontrolled discretionary power.” Barry, 81 Wn.2d at 161.

Since Barry, this Court has invalidated at least three agency decisions made without adequate safeguards. United Chiropractors of Washington, Inc. v. State, 90 Wn.2d 1, 3, 578 P.2d 38 (1978) (“procedural safeguards...inadequate to control arbitrary administrative action and abuse of discretion in licensing and disciplining of chiropractors”); Matter of Powell, 92 Wn.2d 882, 893, 602 P.2d 711 (1979) (“we deem the procedural safeguards available in this case to be inadequate”); Nat’l Elec. Contractors Ass’n, Cascade Chapter v. Riveland, 138 Wn.2d 9, 23, 978 P.2d 481 (1999) (“procedural safeguards do not exist to prevent administrative abuse in DOC’s exercise of its supposed statutory authority ‘to remove statutory and other restrictions’ in the development of inmate work programs”).

As important, this Court in upholding delegation has underscored the need for meaningful agency or judicial review. First, the Court upheld Department of Corrections’ regulations *because* they provided for subsequent review.

The DOC's rule making process provided for public scrutiny and judicial review. Thus, we hold that RCW 9.94.070 provides adequate procedural safeguards against arbitrary administrative action and abuse of discretion and does not unconstitutionally delegate legislative authority to the DOC.

State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). Judicial review is more than a procedural nicety. It is essential to holding agencies accountable to their statutory guidance. Nw. Gillnetters Ass'n v. Sandison, 95 Wn.2d 638, 647, 628 P.2d 800 (1981) (“judicial review has been held to constitute a sufficient procedural safeguard”).

Second, internal agency procedures, although important, are not sufficient on their own. An entity outside the agency must have the power to review and reverse decisions. Speaking to the Department of Transportation’s delegated authority to set tolls, this Court described the *external* limits on the Department’s authority.

Because each of these steps is subject to approval, and more importantly the disapproval, adequate procedural safeguards are in place to protect against arbitrary administrative action and any administrative abuse of discretionary power. Moreover, toll payers would also have the ability to obtain review of toll setting as an agency action under the APA. RCW 34.05.010(3). The standard of review would be whether the action was unconstitutional, outside the statutory authority of the agency or the authority conferred by a provision of law, arbitrary or capricious, or taken by persons who were not properly constituted

as agency officials lawfully entitled to take such action. RCW 34.05.570(4). This is an additional safeguard to keep the delegated power in check.

State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dep't of Transp., 142 Wn.2d 328, 337–38, 12 P.3d 134 (2000) (“here there is legislative and public participation”).

Third, the level of procedural safeguards reflects the interests at stake. At the apex are the liberty interests of a criminal defendant.

Simply put, the legislature cannot delegate wholesale its obligation to declare public policy within a legislative process containing important procedural safeguards. ...When reviewing whether authority has been properly delegated to an agency to promulgate rules subjecting individuals to criminal sanctions, we have focused on the *safeguard* requirement. This requirement is satisfied where rules are promulgated pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW, and include an appeal process before the agency, or judicial review is available, and the procedural safeguards normally available to a criminal defendant remain.

Brown v. Vail, 169 Wn.2d 318, 331, 237 P.3d 263 (2010).

Mr. Murray’s vested right to proper and necessary medical care deserves similar respect and protection. Willoughby v. Dep’t of Labor and Indus., 147 Wn.2d 725, 733, 57 P.3d 611 (2002) (“all workers who suffer an industrial injury covered by the Industrial Insurance Act, Title 51 RCW, have a vested interest in disability payments upon determination of an industrial injury”).

As described in the earlier briefing, the HTCC statute supplanted the Department's rigorous rule-making procedures under the APA. (Petition for Review at 10-12; Appellant's Reply at 15-17). It substituted the unilateral decision of an 11-member committee with no possibility of agency or judicial review, and, no right to an individualized determination. This was not the Legislature's intent.

C. The Constitutional Writ of Certiorari Does Not Save The Flawed Statute.

Admitting that the lack of judicial review is a problem, the Department argues that the constitutional writ of certiorari provides adequate procedural safeguards. The Court of Appeals accepted this fix.

The constitutional writ of certiorari provides a procedure for a court to review the HTCC's actions for legality and to specifically review whether the HTCC's actions are arbitrary or capricious. That is all that is required by Barry & Barry. Barry & Barry, 81 Wn.2d at 159, 500 P.2d 540.

Murray v. Dep't of Labor & Indus., 1 Wn. App. 2d. 1, 403 P.3d 949, 952 (2017).

If this were correct it would have profound consequences for the balance of legislative, executive, and judicial power. First, because every delegation of legislative power is subject to constitutional review, adequate procedural safeguards would exist in

every case. As long as the Legislature provided an agency general guidelines, satisfying the first factor in Barry & Barry, a writ of certiorari would always fulfill the second factor, rendering it unnecessary. The Court would have to overrule Barry & Barry, and would ultimately have to reverse the opinions that invalidated legislative delegation for lacking adequate procedural safeguards.

Second, it would undermine the value of substantive judicial review. The modern administrative state relies on appellate review to hold agencies accountable to their legislative guidelines and to the people they regulate. Under the Court of Appeals' ruling, both the APA and substantive judicial review would be luxuries, not necessities. The Legislature could delegate nearly all its authority to administrative agencies, subject only to minimal judicial review under a writ of certiorari.

Third, a writ of certiorari offers no help to Mr. Murray or the Department. When an agency makes a mass coverage determination – depriving hundreds or thousands of claimants any individual consideration – a second set of eyes at minimum should review the merits of the decision. “[D]ue process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical care.” American Mfrs. Mut.

Ins. Co. v. Sullivan, 526 U.S. 40, 62, 119 S. Ct. 977, 991, 143 L. Ed. 2d 130 (1999) (Ginsberg, J., concurring). Divesting injured workers of rehabilitative care, here, surgery that has saved Mr. Murray years of debilitating pain, costs employees, employers and the Department more time loss, medical expenses, and disability pay. A decision this far-reaching requires more than a Committee hearing and vote.

This Court has approved delegation subject to the statutory writ of review, but the circumstances illustrate why it does not cure the HTCC statute's flaws. In City of Auburn v. King County, 114 Wn.2d 447, 788 P.2d 534 (1990), the Supreme Court upheld arbitration of King County's claim that Auburn must reimburse it for providing health services. Arbitration reached the merits of the dispute, which a court could then review under RCW 7.16.040, the statutory writ of review. "The writ can be granted if the board of arbitration exceeds its jurisdiction, acts illegally, proceeds in violation of the common law, or conducts erroneous or void proceedings." City of Auburn, 114 Wn.2d at 452. A statutory writ of review allows a court to reverse for obvious or probable errors of law. City of Seattle v. Holifield, 170 Wn.2d 230, 244, 240 P.3d 1162 (2010) ("purpose served by a writ of review is sufficiently similar to that served by

interlocutory review”). This is greater procedural protection than review under a constitutional writ.

The delegation doctrine protects against transferring legislative power to agencies with no review or direct accountability for their actions. This case illustrates what happens when the Legislature violates the doctrine. A group of unelected, appointed professionals, with no apparent experience with workers compensation, have unilaterally withdrawn FAI surgery from consideration in any case. No agency or court may review, modify, or qualify this decision, and as a consequence, Mr. Murray had to choose between enduring the disintegration of his hip and paying for the surgery himself.

The HTCC made its decision with unconstitutional procedures and no meaningful accountability for its consequences. The decision to withdraw FAI surgery from consideration, regardless of individual circumstances or competent medical evidence, is therefore unenforceable.

D. Recent Amendments To HTCC Regulations Concede The Statute’s Flaws.

Even the Health Care Authority has trouble with the lack of judicial review over HTCC decisions. On September 26, 2016, the

Authority, which supervises the HTCC, added provisions for judicial review of its implementation of the Committee's decisions. Wash. St. Reg. 16-18-23 (August 26, 2016). The amendments were necessary to make up for the lack of judicial review. Unfortunately for Mr. Murray, they apply only to final coverage determinations made after August 1, 2016. WAC 182-44-040.

The Authority now considers its implementation of HTCC decisions reviewable under the APA.

The health care authority's implementation of a final coverage determination can be reviewed as other agency action under RCW 34.05.570(4). A petition for review must be filed in superior court and comply with all statutory requirements for judicial review of other agency action required in chapter 34.05 RCW [the Administrative Procedure Act].

WAC 182-44-040(4). It remains an open question whether this new regulation conflicts with the Legislature's decree that "neither the committee nor any advisory group is an agency for purposes of chapter 34.05 RCW." RCW 70.14.090(5).

The Authority also adopted a new regulation on judicial review.

Nothing in this chapter limits the superior court's inherent authority to review health technology clinical committee determinations to the extent of assuring the decisions are not arbitrary, capricious, or contrary to law.

WAC 182-55-041. But the constitutional writ of review does not allow Mr. Murray or any aggrieved party to challenge the merits of an HTCC decision. It is not the same as review for error under the APA.

IV. MR. MURRAY DESERVES AN AWARD OF ATTORNEYS' FEES ON APPEAL.

Under RCW 51.52.130, Mr. Murray is entitled to an award of reasonable attorneys' fees on appeal if this Court reverses. Street v. Weyerhaeuser Co., 189 Wn.2d 187, 208, 399 P.3d 1156 (2017). He respectfully requests an award of fees on appeal. Doan v. State Dep't of Labor & Indus., 143 Wn. App. 596, 607–08, 178 P.3d 1074 (2008).

CONCLUSION

Courts review agency decisions for a very good reason: no set of procedures or group of experts is perfect. The Health Technology Clinical Committee is no exception. Although the Legislature created the Committee with good intentions, the Governor's line item veto transformed it into a public actor with sweeping authority and no substantive judicial review. The consequences of approving this legislative delegation extends far beyond insurance coverage. It would fundamentally alter the

balance of power in State government, and overturn decades of judicial precedent.

Appellant Michael Murray respectfully requests the Court to reverse the Court of Appeals, remand his case to the Department for a hearing on the merits, and award him reasonable attorneys' fees on appeal.

DATED this 9 day of April, 2018.

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By 

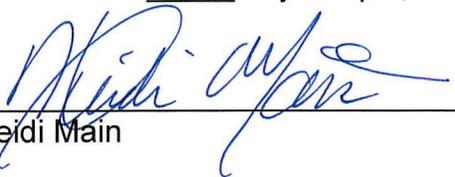
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Appellant Michael Murray's Supplemental Brief to :

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DATED this 6th day of April, 2018.



Heidi Main

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