

75021-6

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ORIGINAL

No. 75021-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

HEIDI MORGAN, an individual,

Appellant,

vs.

MICHAEL B. HEBERT and JANE DOE HEBERT, husband and wife and
the marital community composed thereof; WILLIAM HEBERT and
MARIA HEBERT, husband and wife and the marital community
composed thereof,

Respondents.

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BRIEF OF RESPONDENTS WILLIAM HEBERT AND MARIA
HEBERT

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TABLE OF CONTENTS

I. Introduction..... 1

II. Counterstatement of the Issues..... 2

III. Restatement of the Case..... 2

IV. Corrections of Factual Misstatements in Appellant’s Brief..... 7

V. Legal Argument..... 9

 A. The Standard of Review is *De Novo*..... 9

 B. The Summary Judgement Standard..... 10

 C. Dismissal of Morgan’s Negligent Entrustment and Family Car Doctrine Claims is not in Dispute..... 10

 D. Dismissal of Morgan’s Agency Claim was Appropriate as the Heberts Exercised No Control Over Michael’s Actions and Any Statement Towards Recaption of the Car was Privileged..... 11

 1. There is no proximate causation as to owners of a vehicle from an accident caused by a person taking the vehicle without permission..... 12

 2. Even if not hearsay, any statement to ‘[g]et the car home,’ was absolutely privileged under the law of recaption..... 15

 3. There was no master-servant relationship between the Heberts and Michael..... 17

 E. The Court Should Affirm the Denial of Morgan’s Motion for Summary Judgment..... 25

 1. Morgan’s motion for summary judgment was not properly before the trial court..... 25

2. Even though untimely, on the merits Morgan’s motion for summary judgment was properly denied.....	30
F. Morgan’s Requested Relief is Improper Given the Procedural Posture of the Case.....	32
VI. Conclusion.....	33

TABLE OF AUTHORITIES

CASES

Washington State Cases

Agnew v. Lacey Co-Ply
33 Wn. App. 283, 654 P.2d 712 (1982), *rev. denied*,
99 Wn.2d 1006 (1983)..... 33

Baxter v. Morningside
10 Wn. App. 893, 521 P.2d 946 (1974)..... 23-24, 30

Bradley v. S. L. Savidge
13 Wn.2d 28, 123 P.2d 780 (1942)..... 32

Cascade Manor Assocs. v. Witherspoon
69 Wn. App. 923, 850 P.2d 1380 (1983)..... 11

Cox v. Malcolm
60 Wn. App. 894, 808 P.2d 758 (1991), *rev. denied*,
117 Wn.2d 1014 (1991)..... 10

Estate of Bunch v. McGraw Residential Ctr.
174 Wn.2d 425, 275 P.3d 1119 (2012)..... 16

Foote v. Grant
55 Wn.2d 797, 350 P.2d 870 (1960)..... 32

Green v. A.P.C.
136 Wn.2d 87, 900 P.2d 912 (1998)..... 9

Hager v. Lenzi
152 Wash. 611, 278 P. 673 (1929)..... 12-13

Halvorsen v. Ferguson
46 Wn. App. 708, 735 P.2d 675 (1986), *rev. denied*,
108 Wn.2d 1008 (1987)..... 9-10

/

<i>Hash v. Children's Orthopedic Hosp. & Med. Ctr.</i> 49 Wn. App. 130, 741 P.2d 507 (1987), <i>aff'd</i> , 110 Wn.2d 912 (1988).....	9
<i>Holz v. Burlington N. R. Co.</i> 58 Wn. App. 704, 794 P.2d 1034 (1990).....	16-17
<i>Impecoven v. Dep't of Revenue</i> 120 Wn.2d 357, 841 P.2d 752 (1992).....	29-30
<i>In re: Estate of Shinaul M.</i> 96 Wn. App. 765, 980 P.2d 800 (1999).....	11
<i>Jackson v. Standard Oil Co.</i> 8 Wn. App. 83, 505 P.2d 139 (1972).....	20, 24
<i>Keuhn v. White</i> 24 Wn. App. 274, 600 P.2d 679 (1979).....	19
<i>Kim v. Budget Rent A Car Sys.</i> 143 Wn.2d 190, 15 P.3d 1283 (2001).....	12-14
<i>Kroshus v. Koury</i> 30 Wn. App. 258, 633 P.2d 909 (1981).....	19-20
<i>Lindon Commodities v. Bambino Bean Co.</i> 57 Wn. App. 813, 790 P.2d 228 (1990).....	33
<i>Massy v. Tube Art Display, Inc.</i> 15 Wn. App. 782, 552 P.2d 1387 (1970).....	20
<i>McClarty v. Totem Elec.</i> 119 Wn. App. 453, 81 P.3d 901 (2003), <i>reversed on</i> <i>other grounds</i> , 157 Wn.2d 214 (2006).....	11
<i>McClellan v. St. Regis Paper Co.</i> 6 Wn. App. 727, 496 P.2d 571 (1972), <i>rev. denied</i> , 81 Wn.2d 1003 (1972).....	18-22

<i>Michak v. Transnation Title Ins. Co.</i> 148 Wn.2d 788, 64 P.3d 22 (2003).....	9
<i>Mills v. Park</i> 67 Wn.2d 717, 409 P.2d 646 (1966).....	16-17
<i>O'Brien v. Hafer</i> 122 Wn. App. 279, 93 P.3d 930 (2004).....	23-24
<i>Pagarigan v. Phillips Petroleum Co.</i> 16 Wn. App. 34, 552 P.2d 1065 (1976).....	18, 24
<i>Poutre v. Saunders</i> 19 Wn.2d 561, 143 P.2d 554 (1943).....	18
<i>Rubenser v. Felice</i> 58 Wn.2d 862, 365 P.2d 320 (1961).....	27-28
<i>Tolson v. Allstate Ins. Co.</i> 108 Wn. App. 495, 32 P.3d 289 (2001).....	33
<i>Turngren v. King Cnty.</i> 104 Wn.2d 293, 705 P.2d 258 (1985).....	10
<i>Unruh v. Cacchiotti</i> 172 Wn.2d 98, 257 P.3d 631 (2001).....	23
<i>Wash. Ass'n of Child Care Agencies v. Thompson</i> 34 Wn. App. 225, 660 P.2d 1124 (1983).....	26-27

Federal Court Cases

<i>Bulchis v. City of Edmonds</i> 671 F. Supp. 1270 (W.D. Wash. 1987).....	26, 28-29
<i>McAllister v. Driever</i> 318 F.2d 513 (4th Cir. 1963).....	12-13

/

Other State Court Cases

Avis Rent A Car Sys., Inc. v. Super. Ct.
12 Cal. App. 4th 221, 15 Cal. Rptr. 2d (1993)..... 12-13

Beckham v. Exxon Corp.
539 S.W.2d 217 (Tx. Civ. App. 1976)..... 20

Childers v. Franklin
197 N.E.2d 148, 46 Ill. App. 344 (1964)..... 12-13

Devellis v. Lucci
697 N.Y.S.2d 337, 266 A.D.2d 180 (App. Div. 1999)..... 14

George v. Briesing
477 P.2d 983, 206 Kan. 221 (1970)..... 12-13

Giant Food v. Mitchell
640 A.2d 1134, 334 Md. 633 (1994)..... 15

Hanfield v. Gracen
567 P.2d 546, 279 Ore. 303 (1997)..... 15-16

Michael & Phillip, Inc. v. Sierra
776 So. 2d 184 (Fla. App. 2000)..... 12-13

Permenter v. Milner Chevrolet Co.
91 So.2d 243, 229 Miss. 385 (1956)..... 12-13

Stanko v. Zilien
179 N.E.2d 436, 33 Ill. App. 364 (1961)..... 12-13

STATE COURT RULES

CR 56..... 25

RAP 9.12..... 11

FEDERAL COURT RULES

W.D. Wash. L.C.R. 7..... 28

TREATISES AND TEXTS

16 DAVID K. DEWOLF & KELLER W. ALLEN,
WASH. PRAC. § 14.26 (4th ed. 2015)..... 16

FOWLER V. HARPER, FLEMING JAMES JR. &
OSCAR S. GRAY, THE LAW OF TORTS
§ 3.16 (2d ed. 1986)..... 16

RESTATEMENT (FIRST) TORTS § 871(b)..... 16

RESTATEMENT (SECOND) AGENCY § 221..... 24

RESTATEMENT (SECOND) AGENCY § 225..... 24

RESTATEMENT (SECOND) AGENCY § 250..... 18, 21

RESTATEMENT (SECOND) TORTS § 83..... 15

RESTATEMENT (SECOND) TORTS § 104..... 16

RESTATEMENT (SECOND) TORTS § 111 (1965)..... 15

WARREN A. SEAVEY & WILLIAM L. PROSSER,
TORTS § 69 (3d ed. 1964)..... 22

I. INTRODUCTION

This case arises from an auto accident involving Heidi Morgan and Michael B. Hebert (hereinafter “Michael”), son of Appellees William and Maria Hebert (hereinafter “Michael,” “Maria,” or collectively “The Heberts”).¹ Michael did not live at the home, entering without permission and taking a vehicle owned by the Heberts, taking the keys from where they hung. The Heberts, upon discovering the missing vehicle, asked for return of what belonged to them. Over the course of several days, Michael did not return the vehicle. Only when finally returning the vehicle to its rightful owner did this accident occur.

Morgan brought suit against both Michael, as well as the Heberts. She alleged the negligent entrustment and the family car doctrine, in an attempt to impute liability to the Heberts. After much discovery, including depositions of the Heberts and Michael, the Heberts moved for summary judgment. In response, Morgan conceded the facts did not establish the family car doctrine or negligent entrustment. However, she asserted a generalized theory of agency, claiming in her allegation Michael was acting on behalf of the Heberts in returning the vehicle that belonged to them and

¹ The first name is used for Michael Hebert, and William and Maria Hebert, where appropriate, in order to provide clarity and is in no way intended to construe informality or disrespect. Where William and Maria Hebert together are referred to as the Heberts.

which he had taken without permission. Morgan also cross-moved for summary judgment, despite not following the mandates of CR 56 for noting such motions.

On reply, Appellees argued that the actions of one taking a chattel without permission cannot create an agency; that any statement to return the taken chattel does not create agency; and that the Heberts did not have a right to exercise control over how Michael behaved with the vehicle.

The Court granted summary judgment on all claims against the Heberts. This appeal followed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Should the Court affirm the trial court's decision granting summary judgment to the Heberts when Morgan failed to establish a genuine issue as to any material fact that might establish agency? **YES.**

2. Should the Court affirm the trial court's denial of summary judgment as to Morgan when she (1) failed to comply with the civil rules; and (2) failed to present evidence sufficient to establish there was no genuine issue of material fact as to her remaining claim? **YES.**

III. RESTATEMENT OF THE CASE

William and Maria Hebert are the parents of Michael Hebert. (CP 177, 203, 222). Sometime in 2012, Michael moved out of William and Maria's

house and has never lived at the house since. (CP 182, 184, 203).

Michael Hebert did not have keys to his parents' house. (CP 186, 211). The locks had recently been changed since Michael moved out, due to William and Maria losing the keys to their prior locks. (CP 187).

On Friday, May 23, 2014, Maria, William, and some family that was staying with the Heberts left on an all-day outing. (CP 189-90). They all piled into the relatives' Suburban, leaving William's Infinity and Maria's Camaro in the carport. (CP 190). Maria's mother, who is disabled and lived in the downstairs portion of the house, stayed home. (CP 185, 190). When the Heberts returned around 7:00 PM, they noticed the Infinity was missing. (CP 190, 217). William immediately suspected Michael took it, and Michael's grandmother confirmed she heard him upstairs in the house earlier. (CP 191, 218).

The Infinity was special to William. (CP 221). William's father had gifted the Infinity to William in approximately January or February 2014. (CP 220). Approximately one month before the accident, William's father passed away. (CP 221). The Infinity was one of the last things William received from his father. Id.

Because of this, as soon as William received the Infinity, he was adamantly clear that Michael was, under no circumstances, to drive it:

Q. To your knowledge, had Michael ever driven the Infinity before this situation?

A. No.

Q. Tell us whether you believe that Michael had been specifically informed he was not to ever drive the Infinity?

A. Right when I inherited it.

Q. And tell me a little more about that.

A. Well, he didn't have a license for one thing, and I never let him drive my car.

Q. And did you make that clear to him? That's what I'm trying to find out.

A. Very.

Q. Can you think of any factors that could have made Michael believe that he had permission to drive the Infinity?

...

A. Not really. Me and Mike didn't get along real [SIC] well, so we hardly ever seen [SIC] each other.

(CP 219).

Q. And did you ever give Michael permission to drive the Infinity?

A. No.

Q. And he didn't have permission to drive it in May of 2014?

A. Absolutely not.

Q. Why were you angry when you found out that he took it?

A. Because it was inherited – one of the last things I would get from my father. And it was just – it was special to me.

(CP 221).

Q. Is there any way, under any circumstances, that you're aware of where Michael could have had a belief that he had your permission or your husband's permission to take the Infinity?

A. No.

(CP 194-95).

Prior to taking the Infinity, Michael had never stolen anything from William or Maria. (CP 188). Michael had never driven the Infinity at any time prior. (CP 212).

When William Hebert discovered their car missing, he immediately called Michael. (CP 218). Michael told them he had just gone to the store. (CP 192). Michael was told, “[g]et the car home.” (CP 191). William Hebert demanded Michael return the car he had taken without permission. (CP 221). When the car was not returned, William and Maria continued to call and text Michael, which went ignored. (CP 191-92). They searched the neighborhood for the vehicle, but were unable to locate it. (CP 192). Michael did not return the car and, at just after 10:00 AM the third day of

him having the car, on May 26, 2014, he collided with Plaintiff. (CP 224).

Plaintiff filed the instant cause of action on May 12, 2015. (See CP 247-51). She alleged negligent entrustment, family car doctrine, and that at all times material, Michael was acting on behalf of William and Maria Hebert. (CP 249-50). The Heberts moved for summary judgment. (CP 157-169). In response, Morgan abandoned her theories of negligent entrustment and family car doctrine. (CP 126). She instead relied solely on a claim of general agency. Id. Morgan then cross-moved for summary judgment within his reply brief. (CP 125).

On reply, the Heberts argued (1) Morgan's summary judgment was not property before the Court pursuant to CR 56; (2) there was no proximate cause as to the Heberts; (3) the sole statement to "[g]et the car home" was a privileged action under the law of replevin; and (4) there was no control over Michael's action with which to establish agency. (CP 11-23).

The trial court summarily dismissed the Heberts. (CP 9-10). Morgan proceeded to arbitration, obtaining judgment against Michael. (CP 7-8).

Michael's use of the vehicle was completely non-permissive. The Hebert's had no control over Michael, and no agency was established.

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IV. CORRECTION OF FACTUAL MISSTATEMENTS IN APPELLANT'S BRIEF

Morgan's brief contains several factual assertions which do not match the record. For ease of correction, they are listed in order.

- At 3, Morgan cites CP 184 for the proposition Michael was a frequent visitor and stayed overnight. The record shows he would come to the home and stay the occasional night. CP 184. Maria Hebert believed this was once every 7-10 days. (CP 185). Michael Hebert believes this was once every 2 months. (CP 209).
- At 3, Morgan cites CP 224 for the proposition the state issued identification lists his parents' address. However, the document is a police report, and thus hearsay. Nor does this document identify where the information was obtained or when the identification was issued. (CP 224).
- At 3, Morgan cites CP 187 for the proposition Maria Hebert believed her home to be Michael's legal address. However, she stated only that he used it as such, not that it was. (CP 187).
- At 3-4, Morgan cites CP 186 for the proposition the Heberts

intentionally gave Michael access by leaving the house unlocked. The record only states they left the home unlocked during the day.

- At 4, Morgan cites CP 191 for the proposition the Heberts told Michael to “return the car immediately.” Morgan’s own trial court response brief points out this is not what was said. (CP 129, l.l. 12-20). Maria Hebert remembers her husband telling Michael to “[g]et the car home.” (CP 191).
- At 4, Morgan cites CP 191-92 for the proposition the Heberts texted Michael “the same message multiple times.” The record referred to does not discuss the content of any further text messages. (CP 191-92).
- At 4-5, Morgan cites CP 191-92 for the proposition the Hebert’s told Michael to return the car repeatedly, after which Michael responded he would bring it. In actuality, he initially said “okay”, then ignored them for several days. (CP 191-92).
- At 14 and 19, Morgan cites CP 146 for the proposition the Heberts did not view Michael’s taking of the car as stealing. However, the portion of the record cited completely ignores

that the question asked whether Michael had stolen anything previously, not whether they considered this taking theft. (CP 146).

V. LEGAL ARGUMENT

A. The Standard of Review is *De Novo*.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving parties (here, Respondents Maria and William Hebert) are entitled to summary judgment as a matter of law, and if there is any genuine issue of material fact requiring a trial. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); Green v. A.P.C., 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Unsupported conclusory statements alone are insufficient to prove the existence or nonexistence of issues of fact. Hash v. Children’s Orthopedic Hosp. & Med. Ctr., 49 Wn. App. 130, 741 P.2d 584 (1987), aff’d, 110 Wn.2d 912, 757 P.2d 507 (1988).

Likewise, a nonmoving party (here, Morgan) attempting to resist a summary judgment “may not rely on speculation, argumentative assertions that unresolved factual matters remain;” rather “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” Halvorsen v.

Ferguson, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), rev. denied, 108 Wn.2d 1008 (1987).

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Summary Judgment Standard.

The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. Cox v. Malcolm, 60 Wn. App. 894, 897, 808 P.2d 758, rev. denied 117 Wn.2d 1014 (1991). Summary judgment is proper where, after considering the evidence and all reasonable inferences therefrom, reasonable persons could reach but one conclusion. Turngren v. King Cnty., 104 Wn.2d 293, 705 P.2d 258 (1985).

C. Dismissal of Morgan's Negligent Entrustment and Family Car Doctrine Claims is not in Dispute.

In Morgan's response brief to the Heberts' motion for summary judgment, Morgan conceded she could not satisfy the elements of negligent entrustment or of the family car doctrine:

Points of agreement. Having now obtained the testimony of all three defendants, plaintiff agrees that on this record not all of the elements of "family car doctrine" or the "negligent entrustment" doctrine are supported by substantial evidence. Plaintiff agrees that those two of plaintiff's liability theories against William Hebert and Maria Hebert ("the Heberts") should be removed from the case.

(CP 126). An appellate court may not consider arguments which were conceded at the trial court level. See RAP 9.12; McClarty v. Totem Elec., 119 Wn. App. 453, 461, 81 P.3d 901 (2003) (concession of argument at the trial court does not preserve issue for appellate review), reversed on other grounds, 157 Wn.2d 214 (2006); see also In re Estate of Shinaul M., 96 Wn. App. 765, 770, 980 P.2d 800 (1999); Cascade Manor Assocs. v. Witherspoon, 69 Wn. App. 923, 930 n.8, 850 P.2d 1380 (1993).

As the theories of negligent entrustment and family car doctrine were abandoned by Morgan, the Court may not consider these theories on appeal.

D. Dismissal of Morgan’s Agency Claim was Appropriate as the Hebert’s Exercised No Control over Michael’s Actions and Any Statement to “[g]et the car home” was Privileged.

Morgan conceded in her response on summary judgment only one issue remained to adjudicate her claim, that of agency:

Points of disagreement. However, the court should deny the Heberts’ motion for summary judgment of [SIC] dismissal of plaintiff’s *action* against them because the Heberts’ motion does not address plaintiff’s liability theory of agency set forth in paragraph 2.3 of Plaintiff’s Complaint for Damages, as follows:

2.3 At all times material here in [SIC], Michael B. Heber was acting for and on behalf of himself and Jane Doe Hebert and their marital community, and on behalf of William Hebert and Maria Hebert.

(CP 126). Morgan bases her argument solely on what was claimed to be express permission to drive the car, which is based on the hearsay statement to “[g]et the car home.” (CP 127, l.l. 18-20; CP 129; CP 191).

This single statement does not create agency between Michael Hebert and his parents, William and Maria Hebert. There is no liability for accidents caused by a person taking a vehicle without permission. Second, the statement of “[g]et the car home” is not only hearsay, but it is absolutely privileged under the law of recaption. Finally, the statement, even if not hearsay, does not evoke the control necessitated by agency law so as to import vicarious liability. Because there was no agency and because recaption was privilege, this Court should affirm the trial court.

1. There is no proximate causation as to the owners of a vehicle from an accident caused by a person taking the car without their permission.

Where, as here, a vehicle is taken from the owners without their permission, they are not responsible for a later accident involving that vehicle. This is because the owner of the vehicle, as a matter of law, is not a proximate cause of the accident. Kim v. Budget Rent A Car Sys., 143 Wn.2d 190, 15 P.3d 1283 (2001); Hager v. Lenzi, 152 Wash. 611; 278 P. 673 (1929); see also McAllister v. Driever, 318 F.2d 513 (4th Cir. 1963) (truck moved into dangerous position by unauthorized person cut off any

negligence of the owner of the truck); George v. Briesing, 477 P.2d 983, 206 Kan. 221 (1970) (car accident caused by thief could not be caused by negligence of the owners of the car lot from which the car was stolen); Michael & Phillip, Inc. v. Sierra, 776 So. 2d 184 (Fla. App. 2000) (keys left on gym key board did not create zone of risk as to third persons injured by thief who stole car keys from board); Avis Rent A Car Sys., Inc. v. Super. Ct., 12 Cal. App. 4th 221, 15 Cal. Rptr. 2d 711 (1993) (no duty to protect plaintiffs by controlling the conduct of thieves); Childers v. Franklin, 197 N.E.2d 148, 46 Ill. App. 344 (1964) (accident occurring days after theft could not be proximately caused by negligence of the owners related to the theft itself); Stanko v. Zilien, 179 N.E.2d 436, 33 Ill. App. 364 (1961) (car accident caused by thief after stealing vehicle from car lot cut off proximate cause); Permenter v. Milner Chevrolet Co., 91 So.2d 243, 229 Miss. 385 (1956) (car accident caused by thief after stealing vehicle from a car lot cut off proximate cause).

For example, in Kim v. Budget Rent A Car Sys., 143 Wn.2d 190, 15 P.3d 1283 (2001), a thief stole a minivan from a Budget Rent A Car lot after finding the keys in the vehicle. Id. at 194. The thief then took the vehicle home and went to sleep. Id. The next day, he smoked marijuana and drank alcohol. Id. After he hit a telephone pole, the thief fled from police and ran

a stop sign, causing injury to the plaintiffs. Id.

The Court found there was *no duty owed* on behalf of Budget Rent A Car as to the plaintiffs. Id. at 196. The court then analyzed whether, if there were a duty, whether the later collision was proximately caused by the actions of Budget and found that it was not:

Young went home, went to sleep, and then became intoxicated and smoked marijuana after stealing Budget's minivan. . . . At a minimum, the remoteness in time between the criminal act and the injury is dispositive to the question of legal cause in this case. . . . One who fails to remove the keys from his or her vehicle should not be "answerable in perpetuity for the criminal acts of others."

Id. at 204-205 (quoting Devellis v. Lucci, 697 N.Y.S. 2d 337, 339, 266 A.D.2d 180 (App. Div. 1999)).

Similar to Budget, there is no liability to the Heberts in Michael taking their vehicle without permission. Michael was told specifically he could not drive the vehicle. The accident occurred several days after the theft, and days after Michael refused to return the vehicle. The remoteness in time from the taking of the vehicle, and from any admissible evidence as to any post-taking actions from the Heberts, cuts off proximate causation. Summary judgment was appropriate and should be affirmed.

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2. Even if not hearsay, any statement to '[g]et the car home,' was absolutely privileged as recaption.

Appellants attempt to create an agency relationship out of a hearsay statement to Michael Hebert to “[g]et the car home.” This does not create an agency relationship. Actions taken in recaption² of chattel are privileged and do not create agency:

An act which is privileged for the purpose of recaption of a chattel subjects the actor to liability to a third person for any harm unintentionally done to him ***only if the actor realizes or should realize that his act creates an unreasonable risk of harm.***

RESTATEMENT (SECOND) TORTS § 111 (1965); see also, id. at § 83; Giant Food v. Mitchell, 640 A.2d 1134, 334 Md. 633 (1994) (citing § 111) (Foreseeability that shoplifter might run when attempting recaption of goods does not create foreseeability that accident would occur and shoplifter would run into another customer. “Most fleeing shoplifters would seek to avoid collisions because they would only impede flight.”); Hanfield v. Gracen, 567 P.2d 546, 279 Ore. 303 (1997) (citing § 111) (owner who discharged birdshot and hit plaintiff while attempting to stop suspected shoplifter privileged in his actions).

Indeed, the law of recaption actually requires such a statement be made

² Sources have utilized recapture and recaption interchangeably to describe the re-taking of chattel from a tortfeasor. For purpose of this brief, Respondents utilize “recaption”.

prior to a physical attempt at recaption. “A demand for possession, unless it reasonably appears useless, should be made before force is used to recapture the chattel.” 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASH. PRAC. § 14.26 (4th. ed. 2015) (citing RESTATEMENT (SECOND) TORTS § 104); see also, FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, THE LAW OF TORTS at §3.16 (2d ed. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 104); RESTATE (FIRST) OF TORTS § 871(b) (1939)).

The law of recaption would lead to absurd results if the actual physical taking by force would not result in liability to the owner of chattel, but the lesser act of demanding the chattel’s return, which is required prior to the physical recaption of the chattel, had no similar protection. The law would penalize the lesser action. The Court has a duty to avoid absurd results in interpretation of the law. Estate of Bunch v. McGraw Residential Ctr., 174 Wn.2d 425, 433, 275 P.3d 1119 (2012).

In the present case, there is no admissible evidence the Heberts knew Michael did or did not have his license, despite their inklings. However, this does not create an issue of foreseeability that an accident would occur. Even if the Heberts knew Michael did not have a license, not having a license does not amount to knowledge that a person is a bad driver. See Mills v. Park, 67 Wn.2d 717, 720-21, 409 P.2d 646 (1966) (Evidence of having a

valid driver's license is irrelevant unless there is evidence *in the record* to show a causal relation between the defendant's failure to have a valid driver's license and his asserted acts of negligence); see also, Holz v. Burlington N. R. Co., 58 Wn. App. 704, 794 P.2d 1034 (1990) (evidence of lack of motorcycle endorsement properly excluded where no evidence that accident would not have happened to one with a valid motorcycle endorsement). At summary judgment, there was no evidence presented the Heberts knew Michael was a bad driver. He had only been in one accident several years prior, (CP 161), and there was no evidence he had driven while under the influence of any substance.

There is no evidence in the record that any statement to “[g]et the car home” would create any reasonable foreseeability of an accident. The Heberts had an absolute right to recaption of their vehicle, and that right mandated they first demand recaption, which is absolutely privileged.

3. There was no master-servant relationship between the Heberts and Michael.

In response to the Heberts' Motion for Summary Judgment, Morgan argued the hearsay statement to “[g]et the car home,” created a master-servant relationship. (CP 130-32).

In order for the alleged principal (here, the Heberts) to be liable for physical harm caused by the alleged agent (here Michael Hebert), a master-

servant servant based on control relationship must exist:

A principal employing another to achieve a result but not controlling or having the right to control the details of his physical movements is not responsible for incidental negligence while such person is conducting the authorized transaction. . . . In their movements and their control of physical forces, they are in the relation of independent contractors to the principle. *It is only when to the relation of principal and agent there is added the right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person whose service the act is done becomes subject to liability for the physical conduct of the actor.*

RESTATEMENT (SECOND) AGENCY § 250 at Cmt. a (emphasis added).

“There is no inference that because a principal has authorized an act to be done which would be non-tortious if done carefully, he is liable for the act of a non-servant if the latter was negligent in his performance.” *Id.* at Cmt. b. Washington courts have adopted § 250 of the Restatement, imposing vicarious liability “only where one engaging another to achieve a result *controls or has the right to control the latter’s physical movements.*” *Pagarigan v. Phillips Petroleum Co.*, 16 Wn. App. 34, 37, 552 P.2d 1065 (1976) (quoting *Poutre v. Saunders*, 19 Wn.2d 561, 565, 143 P.2d 554 (1943)); *McClellan v. St. Regis Paper Co.*, 6 Wn. App. 727, 732, 496 P.2d 571 (1972) (“Vicarious tort liability arises only where one engaging another to achieve a result *controls or has the right to control the latter’s physical movements.*”) (citing § 250), rev. denied, 81 Wn.2d 1003 (1972).

A similar situation to the case at hand was addressed in Kroshus v. Koury, 30 Wn. App. 258, 633 P.2d 909 (1981). In Kroshus, a Defendant was on her way to make a bank deposit for her husband's Texaco station when she was in an accident with the plaintiff. Id. at 259. Plaintiff brought suit against Texaco, alleging the driver was an agent of Texaco, as Texaco franchise training recommended nightly deposit of funds. Id. Unlike this case, Texaco also maintained general control over various aspects of the operation, including keeping title to the gasoline storage tank. Id. at 261. However, because Texaco did not have a right of control over how deposits were delivered, the court found no master-servant relationship existed and granted summary judgment to Texaco on the issue of vicarious liability:

We read these cases as instances where the oil company is vicariously liable because of its **right to control the particular activity that caused the injury**. Texaco argues that regardless of its right to control the activities of the dealer at the service station, it is not vicariously liable here because it had no right to control the dealer's banking activities, employment decisions or driving procedures. This argument would have no merit if Koury were a salaried employee furthering Texaco's business because the "right of control" is implicit and not discussed in such clear cases. See Kuehn v. White, 24 Wn. App. 274, 600 P.2d 679 (1979). Here, however, Koury was in business for himself, and the nature of the relationship **was not that of a wage earning servant and a wage paying master**. The parties had a lessor-lessee and vendor-vendee relationship that Texaco could terminate only upon default by Koury. While the contracts gave Texaco considerable control over some of the details of Koury's business, we cannot classify Koury as either an

independent contractor or servant for all purposes. *Under these circumstances, the imposition of vicarious liability is not possible without facts that establish or permit an inference that Texaco had a right to control the particular activities from which the actionable negligence flowed.* Jackson v. Standard Oil Co., 8 Wn. App. 83, 505 P.2d 139 (1972)], *supra*. Anticipating the facts of this case, the court in Jackson at pages 94-95 mentioned the possibility of *not imposing vicarious liability if the dealer's negligent driving is not subject to the alleged master's control.*

...
In this case, Texaco did not have a right to choose Koury's bank and did not have a right to control the means of depositing receipts, the selection of Ms. Koury as the bookkeeper, *or her driving habits. There is no evidence or reasonable inference that Texaco has a right to control the activities that caused the injury, and without that crucial factor, there can be no vicarious liability.* Massey v. Tube Art Display, Inc., 15 Wn. App. 782, 551 P.2d 1387 (1970)], *supra*; see Beckham v. Exxon Corp., 539 S.W.2d 217 (Tx. Civ. App. 1976).

Kroshus, 30 Wn. App. at 265-66 (emphasis added).

Similarly, McLean v. St. Regis Paper Co., 6 Wn. App. 727, 496 P.2d 571 (1972), dealt with the level of control needed to impose vicarious liability when a vehicle was directed to be driven to a particular location. In McLean, a company directed a potential employee to attend a pre-employment physical. *Id.* at 728. On the way to the pre-employment physical, the potential employee was involved in an accident, injuring the plaintiff. *Id.*

Plaintiff contended the potential employer, St. Regis Paper Co., was

vicariously liable for the tortfeasor through an agency theory:

Plaintiffs concede on appeal that the issue of whether or not Roland was an employee of St. Regis at the time of the accident was a question of fact for the jury. **They contend, however, that whether or not Roland was an employee of St. Regis, he was an agent for the latter as a matter of law for the express purpose of obtaining an employment physical and returning to St. Regis with the results.** If this were true, it is contended St. Regis would necessarily be liable for the damage amount under the doctrine of respondeat superior. These contentions raise the central issue of this appeal. What is the vicarious tort liability of a principal for the negligent physical acts of a nonservant agent?

Id. at 729 (emphasis added).

The court of appeals looked to § 250 of the RESTATEMENT (SECOND) OF AGENCY and determined vicarious liability did not attach in this situation, lest the entire doctrine of non-liability for independent contractors be abrogated:

The comments following this and subsequent sections of the Restatement of Agency make it clear that vicarious liability of a principal for the negligent acts of any agent or servant is dependent upon whether the principal controls or has the right to control the details of the physical movements of the agent while such person is conducting the authorized transaction. See RESTATEMENT (SECOND) OF AGENCY § 250, comment a (1958).

In accord with this general principle are two eminent legal scholars, namely, Warren A. Seavey, and William L. Prosser. In W. PROSSER, TORTS § 69, at 479 (3d ed. 1964) the rule is stated and rationalized as follows:

Since an agent who is not a servant is not subject to any right of control by his employer over the details of his physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which he may commit.

(Footnote omitted.) If the rule were otherwise, then in many true agency situations unwarranted vicarious tort liability would attach; for example, the client would be responsible for the negligent physical conduct of his attorney; or the factor, the broker, the independent contractor salesman, or the architect -- all who are agents in the broad, generic sense could impose liability on their respective clients for negligent physical acts wholly beyond the client's ability to control.

Id. at 729-30.

The court of appeals expressly acknowledged the beneficial nature of the transaction, that the potential employee was under no obligation to go to the location, and was free to choose his own route and to not return if he so chose. Id. at 733. It ultimately found that, absent some right of control over the actions of the tortfeasor, no liability could be imposed:

The law, to this time at least, has limited the extent of vicarious tort liability to those who have some ability to control its consequences. No jurisdiction has taken the step plaintiffs ask us to take, and we are not persuaded that it would be wise to do so.

Id. at 734.

In the present case, the Heberts had no right to control the action of their adult son, Michael. If they had, he would not have taken the car. If they had,

he would have returned the vehicle immediately upon being notified. They had no control over his route. Michael remained free to disregard the Heberts, which he had already done for days. Imposing liability for matters outside their control would be contrary to the tort law principles.

Morgan has argued several Washington cases regarding agency. The cases cited are not inapposite. O'Brien v. Hafer, 122 Wn. App. 279, 93 P.3d 930 (2004), involved a tortfeasor who was told where the keys to a vehicle were and was instructed to use said vehicle to pick up the owner of the vehicle. Id. at 282. The court found particularly instructive a case imputing master-servant relationship to those acting as a chauffeur. Id. at 286-87. In the present case, the sole purpose was recaption, which does not create such a relationship. Likewise, Unruh v. Cacchiotti, 172 Wn.2d 98, 114, 257 P.3d 631 (2011), dealt with whether a principal was bound by the acts of an insurance adjuster working on his behalf to resolve a claim. (Ct. of Appeals Br. by Respondent's Counsel).

Appellants also cite Baxter v. Morningside, 10 Wn. App. 893, 899, 521 P.2d 946 (1974), for the contention a principal is liable for all torts of the agent. Appellant's Br. at 10. However, the Baxter court made no such contention. Rather, the Baxter court analyzed whether one who undertakes a task for another and "*consents to its being performed under his direction*

or control,” could still be a servant, despite volunteer status. Id. at 896-97 (citing RESTATEMENT (SECOND) AGENCY §§ 221, 225). The Court focused on the mutual agreement of the parties as to the *manner* of performance.

In citing to Baxter, O’Brien, and Pagarian³, Appellants, whether through intentional or unintentional omission, do not include the full test. Prominently missing from the test, developed in Jackson v. Std. Oil. Co., 8 Wn. App. 83, 93, 505 P.2d 139 (1972) (cited in Paragrian) is “the amount of control actually exercised”: “The relationship of the parties, as amplified by the operating manual, the nature of the undertaking itself, and *the amount of control actually exercised in performance of the undertaking*, are the determinative factors.” Id. (emphasis added).

As has been noted, supra, not only did the Heberts have no right to exercise control over their son’s actions, they also exercised no such control. As there was no such control exercised, the granting of summary judgment in favor of the Heberts was proper, and this Court should affirm.

E. The Court Should Affirm the Denial of Morgan’s Motion for Summary Judgment.

As noted, supra, summary judgment is appropriate only when there are no material issues of fact and judgment as a matter of law is appropriate.

³ Pagarian v. Phillips Petroleum Co., 16 Wn. App. 34, 38, 552 P.2d 1065 (1976).

Because Morgan's motion for summary judgment was untimely, and because Morgan cannot establish agency as a matter of law, the denial of Morgan's motion for summary judgment was proper.

1. Morgan's motion for summary judgment was not properly before the court.

CR 56 governs time requirements for motions for summary judgment:

Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing.

CR 56(c). Nothing within the rule provides for an expedited motion for summary judgment on the basis of cross motions. The motion by Morgan, filed in a response brief, was untimely and should not be considered by this Court.

In the present case, the Heberts properly noted and filed their motion for summary judgment on September 25, 2015, noting the hearing for Friday, October 23, 2015. (CP 157). Excluding the day of service pursuant to CR 6, the Heberts' motion was filed with the required 28 days' notice in advance of the hearing date. Morgan's motion for summary judgment, however, was filed and served October 12, 2015. (CP 125, 134). Morgan's motion for summary judgment was only provided 11 days in advance of the hearing date. The motion was not timely pursuant to CR 56.

In support of its untimely filing, Morgan cited to two cases in her brief: Wash. Ass'n of Child Care Agencies v. Thompson, 34 Wn. App. 225, 235, 660 P.2d 1124 (1983), and Bulchis. v. City of Edmonds, 671 F. Supp. 1270, 1271 (W.D. Wash. 1987). However, both cases dealt with outcomes that, by their nature, were binary. Any finding on summary judgment, one way or the other, necessarily decided the case.

As a threshold matter, Wash. Ass'n of Child Care Agencies (hereinafter “WACCA”), did not deal with an untimely cross motion for summary judgment. 34 Wn. App. at 235. Rather, WACCA involved plaintiffs who were granted summary judgment as to the issue of whether the State’s actions violated the federal or state constitutions, under equal protection and privileges and immunities. Id. at 230. The State appealed, claiming its actions were indeed constitutionally valid:

The issue presented is whether DSHS’s child care agency rates for fiscal 1979, structured on standards of service which differed from those of prior years, violates the equal protection clause of fourteenth amendment in the United States Constitution or the privileges and immunities clause of article 1, section 12 of the Washington State Constitution when a component of the 1979 rate is an allocation of funds designated for inflationary purposes which varies percentagewise from the prior rates of the respective agencies.

We conclude that the allocation of the appropriated funds by DSHS was not in violation of the constitutional provisions and reverse.

Id. at 226. As the sole basis of plaintiffs' claims was a solely legal question, whether the rate structure violated the constitutional provisions, there was nothing further to decide at the trial court level, and the court of appeals directed dismissal as a matter of law:

The trial court having erred in granting summary judgment to the plaintiffs, the judgment below must be reversed. A reversal would result in a remand for further proceedings. As noted above, we determined that the case was subject to disposition by summary judgment. Thus even though the State and DSHS did not move for summary judgment or dismissal, we believe that they as non-moving parties are entitled to summary judgment of dismissal.

Id. at 234.

In support of its decision to enter summary judgment in favor of the State and DSHS, the court of appeals relied upon Rubenser v. Felice, 58 Wn.2d 862, 365 P.2d 320 (1961). In Rubenser, this Court was also tasked with a solely legal question which led only to binary outcomes:

The sole issue in this case is whether, under the laws of this state, a testator may leave a remainder over after a life estate to the heirs of the person holding the life estate.

Id. at 862. If the Rule in Shelley's Case continued to operate as the law of Washington, the title in the estate merged and created a fee simple in the estate. Id. If the Rule in Shelley's Case was determined to no longer be the law in Washington State, the estate in fee would remain with the heirs, and

the person holding the life estate would be limited to what they were granted. Id. There existed only two possible outcomes.

The other case cited by Morgan in her summary judgment, Bulchis, supra, is likewise inapposite. As a threshold matter, Bulchis did not deal with Washington Court Rule 56, but with the local rules for the Federal District Court at the Western District of Washington:

(k) Cross Motions

Parties anticipating filing cross motions are encouraged to agree on a briefing schedule and to submit it to the court for approval through a stipulation and proposed order. The court may order parties filing cross motions for summary judgment to combine their memoranda and forego reply briefs in exchange for an enlarged response brief.

A party filing a cross motion must note it in accordance with the local rules. Even if the motion and cross motion are noted for different days, the court will typically consider them together.

W.D. Wash. L.R. 7(k). Bulchis, likewise, involved a binary issue: whether the city had properly applied its conditional zoning rules. Because the strictly legal issue was dispositive based on a closed set of facts related to the conditional use permit process, summary judgment was necessitated one way or the other on the narrow legal issue. The court specifically took no position on factual issues:

Thus, this Court concluded that as Chapter 20.05.010 was applied in this instance, it did not provide for the reasonable

accommodation of amateur radio communication. In doing so, the Court takes no position as to the technical adequacy of Bulchis' application. Nor does the Court take any position as to what conditions the City might reasonably impose in accommodating the needs of amateur radio operators.

THEREFORE, defendant's motion for summary judgment is DENIED, and plaintiff's motion is GRANTED to the extent that the process by which the City denied his application for a conditional use permit is declared invalid.

Bulchis, 671 F. Supp. at 1274-75. The court explicitly noted it was only able to decide the issue because the issue was binary: "[B]ecause the issues in either summary judgment motion are the same, the Court's decision is dispositive on this case."

In her brief in this appeal, Morgan cites one additional case, Impecoven v. Dep't of Revenue, 120 Wn.2d 357, 365, 841 P.2d 752 (1992). Likewise, Impecoven involved a binary resolution based solely on interpretation of law: whether certain downstream revenue was entitled to a deduction due to business and occupation taxes paid by others involved in the transaction. Id. at 359. The court analyzed the legislative intent to come to the answer, which was necessarily binary – either the downstream revenue was taxable under the law or it was not. Id. at 363-64. As reversal in favor of the State necessarily decided the only issue in the case, the Court ordered entry of judgment, rather than remand for needless proceedings. Id. at 365.

In the present case, if the Court reverses the trial court as to their being

no issue of material fact, there is no binary issue which would warrant summary judgment in Morgan's favor. A reversal in this matter would only mean the Court has found enough evidence to support a reasonable finder of fact's determination of agency, not that agency was established as a matter of law by the alleged facts.

2. even though untimely, on the merits Morgan's Motion for Summary Judgment was properly denied.

Should the Court reach the merits of Morgan's argument on her own summary judgment, the facts do not support summary judgment in favor of Morgan. Morgan's recitation of the facts misconstrues the import of the documents. See Br. of Appellant at 19.⁴

With regard to bullet 2, whether Michael chose to not update his address on his state issued identification cannot import liability to the Heberts. The actions of the purported agent alone cannot be used to establish an agency. There has to be agreement between the agent and the principal. See Baxter v. Morningside, 10 Wn. App. 893, 899, 521 P.2d 946 (1974), supra at 27. Further, this fact does not apply to establishing agency, and would only be applicable to Morgan's family car doctrine claim. As noted, supra, this claim has been abandoned.

⁴ For ease of reference, we refer to the bullet points at page 19 of Appellant's Brief as bullets 1-8.

With regard to bullet 3, the only evidence in the record is that Maria Hebert testified as to what she heard William Hebert say: “[g]et the car home.” No one provided instruction as to how that would occur. With regard to bullet 4, the only evidence in the record is Maria Hebert testifying that, during William Hebert’s conversation with Michael Hebert, Michael Hebert said “okay.” (CP 191). Michael Hebert, however, did not attempt to return the car for several days.

With regard to bullet 5, there is no evidence the Heberts knew the license was suspended, only that they suspected it might be. As noted, supra at 20, not only is this not evidence of agency, it is irrelevant to even the negligence of Michael Hebert. Further, Morgan has abandoned her theory of negligent entrustment.

With regard to bullet 6, as noted, supra at 11-12, CP 146 does not support the notion the Heberts did not consider Michael’s taking a theft. As noted, supra, Maria Hebert was asked whether Michael had previously stolen anything. This was not a question regarding the current theft. Further, it is not disputed by anyone in this matter that the taking was wrongful. Morgan in her own brief admits “he initially obtained the car without [the Heberts’] permission.” Br. of Appellant at 7.

Most telling is bullet 7. Michael Hebert admitted he was using the car

for his own purposes to help a friend move. (CP 191). Coming and going from a trip for one's own purpose does not create liability, nor does it create agency. See Bradley v. S. L. Savidge, 13 Wn.2d 28, 123 P.2d 780 (1942) (employee's return from side trip for employee's own purposes destroyed agency); Foote v. Grant, 55 Wn.2d 797, 350 P.2d 870 (1960) (negligence during trip for employee's own purpose destroyed agency under respondeat superior).

Finally, as discussed extensively, supra, the only evidence Morgan relies upon in support of bullet 8 is a hearsay statement to, “[g]et the car home,” with nothing further in support of claimed agency. This does not support a finding of agency in the context of a stolen vehicle, let alone summary judgment for Morgan on the issue.

F. Morgan's Requested Relief is Improper Given the Procedural Posture of the Case.

In its conclusion, Morgan requests this case be remanded for trial on the issue of both liability and damages. However, Morgan's case was placed into mandatory arbitration. (CP 257-59). The arbitration conclusively established Morgan's total damages in this matter. (CP 252). Morgan did not assign any error to the determination of the total amount of her damages. (Br. of Appellant at 2-3). The only remaining issue on remand, should the Court not affirm the trial court, is whether the hearsay statement establishes

liability, which would be before the arbitrator. See Tolson v. Allstate Ins. Co., 108 Wn. App. 495, 499, 32 P.3d 289 (2001); Lindon Commodities v. Bambino Bean Co., 57 Wn. App. 813, 816, 790 P.2d 228 (1990); Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 290-91, 654 P.2d 712 (1982), rev. denied, 99 Wn.2d 1006 (1983).

VI. CONCLUSION

This action stems from Michael Hebert's taking of his parents' vehicle without permission. The only support Appellant offers as to creation of agency is one inadmissible hearsay statement. Even if the statement were admissible, the Heberts were privileged under the law of recaption to try and get their vehicle back. Even if the statement were admissible, it certainly does not support granting of an untimely summary judgment in favor of Appellants. As such, Respondents respectfully request this Court affirm the summary judgment dismissal of the case against the Heberts. In addition, the Court should award Respondents their attorneys' fees and costs in defending this appeal.

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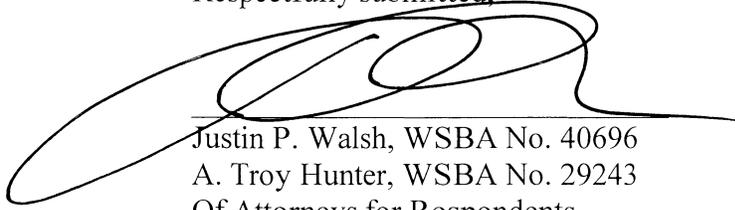
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DATED this 15th day of July, 2016.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

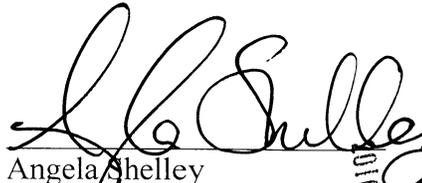
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 15th day of July, 2016, I caused to be served a true and correct copy of the foregoing via Legal Messenger and addressed to the following:

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