

No. 75209-0-1

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

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CARLOS GUTIERREZ

Plaintiff/Respondent,

v.

ICICLE SEAFOODS, INC.

Defendant/Appellant.

Appeal from King County Superior Court  
No. 15-2-06480-1 SEA

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**REPLY BRIEF OF APPELLANT  
ICICLE SEAFOODS, INC.**

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DIVISION I  
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## I. INTRODUCTION

In the procedural posture of this case at the time Respondent Gutierrez filed his CR 41(a)(1)(B) motion, he was not entitled to voluntary dismissal without prejudice. In arguing to the contrary, his Brief of Respondent (“Opposition”) misconstrues and misapplies the pertinent precedent. The Court should reverse the trial court’s grant of CR 41 dismissal without prejudice and remand for determination of Icicle’s pending motion for summary judgment on the merits. Even if the CR 41 dismissal is affirmed, the Court should remand to the trial court for amendment of the May 12, 2016 Order to (1) clarify Gutierrez’ full abandonment—and trial court dismissal—of all aspects of his seaman’s benefits claims, (2) dismiss Gutierrez’ economic loss claims with prejudice, and (3) allow Icicle to file a CR 37(c) motion for the trial court’s consideration.

## II. Respondent Was Not Entitled to a CR 41(a)(1)(B) Voluntary Dismissal.<sup>1</sup>

Respondent mischaracterizes precedential case law and fails to provide any substantive rebuttal to Icicle’s arguments for reversal of the trial court’s grant of a CR 41(a)(1)(B) voluntary dismissal. Specifically, Gutierrez contends that that a CR 41(a)(1)(B) motion filed at any time

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<sup>1</sup> Respondent agrees that the primary question of whether the trial court properly dismissed the matter on Respondent’s motion for voluntary dismissal is subject to *de novo* review. *Opposition* at p.7, fn.4 (citing *Calvert*, 177 Wn. App. at 471).

before oral argument on a motion for summary judgment motion commences—without regard to any other factors—entitles the movant to the voluntary dismissal requested. His position is unsupported by law or fact.

Respondent places great weight on the *Beritich* Court’s citation to the voluntary non-suit statute found at RCW 4.56.120 in reaching the conclusion that once the trial court has issued a post-hearing verbal decision on a motion for summary judgment that the motion for summary judgment has been submitted for purposes of foreclosing entitlement to a voluntary dismissal. *Opposition* at p. 9, 10 at fn. 8, & 12 at fn.12. This emphasis on the voluntary non-suit statute is entirely misplaced. The *Beritich* Court was charged with reconciling three then-existing directives: RCW 4.56.120, Rule of Pleading Practice and Procedure 41.08W, and Civil Rule 56. In doing so, the *Beritich* Court noted that RCW 4.56.120 was not the operative provision for consideration in light of the fact that no trial had taken place, that the statute contained no reference to summary judgment, and that it was enacted many years prior to Civil Rule 56. *Beritich*, 69 Wn.2d at 458. Moreover, to the extent analogizing RCW 4.56.120 to the case at hand, *Beritich* spoke specifically to the facts presented—a motion for non-suit following the issuance of an oral decision on a motion for summary judgment—and no further. *See id.* at 459; *Paulson*, 10 Wn. App. at 55-56 (“the court in *Beritich* failed to make

clear the earliest point in the summary judgment procedure at which the right to a voluntary nonsuit is lost”). Additionally, the *Beritich* opinion pre-dated the enactment of Civil Rule 41 in 1967, which superseded all procedural statutes (e.g., RCW 4.56.120) with which it conflicted. CR 81(b). Accordingly, interpretation of CR 41 as limited, constrained or defined by RCW 4.56.120 would be improper.

Respondent next claims that *Paulson* “simply held that the matter is submitted to the Court when a hearing begins” and that *Paulson* did not “hinge” on the fact that a summary judgment response had not been filed. *Opposition* at p. 10. Respondent’s characterization fails to acknowledge the express language of the *Paulson* decision which “concluded that a plaintiff has a right to a voluntary dismissal when the motion to dismiss is filed in lieu of filing responding affidavits to a motion for summary judgment.” *Greenlaw*, 64 Wn. App. at 502 (emphasis added).

Specifically, in *Paulson* this Court found CR 41 voluntary dismissal appropriate because “plaintiff had not yet served opposing affidavits so, in contrast to the situation in *Beritich*, the motions had not been submitted to the court for determination when plaintiff’s motion for voluntary dismissal was made.” *Paulson*, 10 Wn. App. at 57. Moreover, this Court found that the filing of a summary judgment motion and scheduling oral argument did not constitute submission of the motion for consideration where “no hearing ha[d] begun and the court ha[d] not otherwise exercised its

discretion in the matter.” *Id.* at 57. Accordingly, *Paulson* identified two benchmarks for determining summary judgment “submission” relative to filing of a CR 41(a)(1)(B) motion: (1) whether the plaintiff had filed an opposition to the motion for summary judgment prior to seeking CR 41 relief; and (2) whether the court had “otherwise exercised its discretion in the matter.” In this instance, the Respondent undisputedly filed a complete, comprehensive and unqualified opposition to the motion for summary judgment and the trial court had undisputedly “exercised its discretion in the matter” before his CR 41 motion was filed. *See Appellant’s Brief* at p. 14. These distinctions extinguished Respondent’s entitlement to CR 41(a)(1)(B) dismissal.

Respondent also claims that this matter is indistinguishable from *Greenlaw v. Renn. Opposition* at p. 11. In so asserting, Respondent fails to address the numerous distinctions between the matters identified in *Icicle’s* opening brief – including, but not limited to, the Court’s recognition that the procedural posture of *Greenlaw* was essentially identical to that in *Paulson*. *See Appellant’s Brief* at p. 16. As such, the same distinctions that exist relative to *Paulson* and direct a different result are likewise applicable in respect to *Greenlaw*.

Respondent fails to substantively address the additional considerations raised by Appellant. *Appellant’s Brief* at pp. 17-21. Rather, Respondent illogically and repetitively claims that a plaintiff cannot tender

a legal position for decision on a motion for summary judgment until factual and legal arguments are presented at oral argument. *Opposition* at pp.12-13. Respondent at the same time concedes that oral arguments are not evidence, *id.* at p.13 fn.13 and that he was not entitled to “submit further briefing or declarations” on the motion for summary judgment at the time he filed his CR 41 motion. *Id.* at p.11. He does not dispute Icicle’s numerous legal authorities establishing the limited and/or inconsistent availability of oral argument on summary judgment motions outside of King County, nor the inappropriateness of hinging “submittal” of a summary judgment motion for CR 41 purposes on the inconsistent availability of a non-evidentiary and non-determinative summary judgment feature. *See Appellant’s Brief* at p.19-21; *Opposition* at p. 12, fn. 11. Indeed, Respondent’s argument fails to appreciate the undisputable reality that his summary judgment opposition contained the entirety of the factual record evidence and legal argument he was entitled to present in the summary judgment process. *See Appellant’s Brief* at p. 17-18 (and authorities cited therein). As such, in filing his comprehensive and unqualified opposition, Gutierrez unequivocally submitted the matter for the trial court’s determination on Icicle’s affirmative claims for summary judgment and foreclosed his entitlement to a CR 41(a)(1)(B) voluntary dismissal.

Finally, Respondent claims that the “mandatory” nature of CR 41(a)(1)(B) essentially trumps the considerable and extraordinary time, effort, and resources<sup>2</sup> expended by Icicle in preparing the matter for trial—regardless of considerations of fairness, equity, or due process. *Compare Appellant’s Brief* at pp. 22-25, *with Opposition* at p. 13-14. Respondent’s position ignores entirely the mandate of Civil Rule 1 requiring construction of Civil Rule 41 in a manner that secures “just, speedy and inexpensive determination” of the action, as applied to the advanced posture of the case at the time the CR 41 motion was filed. Respondent likewise claims that available case law analyzing the prejudice to the nonmovant in determining entitlement to a CR 41 dismissal, *Farmers Ins. Exh. v. Dietz*, 121 Wn. App. at 106-07, would “only be potentially relevant had Icicle challenged the trial court’s decision to grant a voluntary dismissal *without prejudice*.” *Opposition* at p. 14, fn.13. This position is nonsensical, as *Farmers* makes no such distinction or limitation on its applicability and moreover, Icicle is challenging the trial court’s grant of a Civil Rule 41 dismissal, without prejudice, of Icicle’s claims. Moreover, considerations of fairness, equity and due process are squarely implicated

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<sup>2</sup> To this end, the May 12, 2016 Order allows, and Icicle will pursue, all remedies available to it under CR 41(d) in the event Respondent is allowed by way of the outcome of this appeal to refile his claims against Appellant. Indeed, although the matter is currently pending on appeal, Respondent has nonetheless decided to refile his claims against Appellant without regard to the restrictions on the trial court when a matter is pending review under Rule of Appellate Procedure 7.2. *See Complaint* (No. 16-2-23216-7SEA) filed 9/26/16 (Appendix).

by Respondent's re-filing of his claims against Appellant on September 26, 2016<sup>3</sup>—before this appeal was even fully briefed, let alone resolved and requiring Icicle to unnecessarily expend even more resources—illustrating the manifest injustice in allowing the CR 41(a)(1)(B) dismissal after Respondent's unqualified summary judgment submission.

**III. Even if the CR 41(a)(1)(B) Dismissal is Affirmed, the May 12, 2016 Order Should Be Remanded for Amendment to the Terms of Dismissal.**

**A. Respondent's Opposition Brief Illustrates the Need for Clarification Regarding the Scope of the Claims Dismissed with Prejudice.**

The trial court dismissed with prejudice all claims pertaining to Icicle's payment and administration of seaman's benefits with the sole exception of failure to "provide cure" onboard the vessel P/V R.M. THORSTENSON. Respondent concedes that the dismissal with prejudice of his "failure to pay maintenance and cure" claims encompasses claims as to the sufficiency of seaman's benefits paid and claims for damages of any kind in regard to administration or payment of seaman's benefits. *Opposition* at p.16. The claims conceded in response to the motion for summary judgment, and dismissed with prejudice under the umbrella of "failure to pay maintenance and cure," were broader than those Respondent is willing to now admit—as evidenced by the summary judgment pleadings.

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<sup>3</sup> See *Complaint filed 9/26/16 and Case Schedule* (Cause No. 16-2-23216-7 SEA) (Appendix).

Icicle's motion for summary judgment sought determination, as a matter of law, of all claims and damages associated with Gutierrez' receipt of seaman's benefits. This included:

- Sufficiency and timeliness of unearned wages paid;<sup>4</sup>
- Sufficiency and timeliness of maintenance paid (including maintenance rate);<sup>5</sup>
- Sufficiency and timeliness of cure paid;<sup>6</sup>
- Duration of benefits paid, including that Gutierrez had achieved maximum medical improvement on October 16, 2014;<sup>7</sup> and
- Claims for damages of any kind (compensatory, punitive or exemplary) in regard to administration or payment of seaman's benefits following Gutierrez' departure from the RMT.<sup>8</sup>

Gutierrez, in opposition to the motion, provided no evidence or argument opposing Icicle's assertions and indeed stated that withdrawal and

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<sup>4</sup> *Motion for Summary Judgment* at p.14-15 & fn.67 (CP 1624-25)

<sup>5</sup> *Id.* at p. 14-15 & fn. 68 (CP 1624-25).

<sup>6</sup> *Id.* at p. 14-16 & fns. 69-77 (CP 1624-26); *See also Complaint* (Cause No. 16-2-23216-7 SEA filed 9/26/16) (Appendix) at ¶ 17, ll. 9-10 (claiming damages for "medical and health-care related expenses, travel expenses, and other out-of-pocket expenses).

<sup>7</sup> *Motion for Summary Judgment* at p. 14-16 & fns. 69-77 (CP 1624-26); *see also Complaint* (Cause No. 16-2-23216-7 SEA filed 9/26/16) (Appendix) at ¶ 17, ll.11 (claiming Gutierrez will suffer damages, including medical expenses, into the future).

<sup>8</sup> *Id.* at p.24-25 & fns. 88-89 (CP 1634-35).

abandonment of his claims for “failure to pay maintenance and cure” made those portions of Icicle’s summary judgment claims unnecessary and irrelevant.<sup>9</sup> Accordingly, the May 12, 2016 Order should be amended to clarify Gutierrez’ abandonment, and the trial court’s dismissal with prejudice, of all aspects of his seaman’s benefit claims outlined above. Icicle respectfully requests remand for amendment of the terms to include with prejudice dismissal of the aforementioned claims that Gutierrez’ affirmatively conceded and abandoned.<sup>10</sup>

**B. Respondent’s Economic Loss Claims Must Be Dismissed with Prejudice.<sup>11</sup>**

First, Respondent claims there is a “significant difference” between withdrawing and conceding claims,<sup>12</sup> with claims pertaining to

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<sup>9</sup> *Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment* (Exhibit I to Declaration of David Bratz) at p.1, fn.1 (CP 1637) (stating withdrawal of claims for failure to pay maintenance and cure in response to Icicle’s assertion of entitlement to judgment as a matter of law that plaintiff had received all seaman’s benefits to which he was entitled—including unearned wages, maintenance, cure, achievement of MMI and benefit duration); *Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment* (Exhibit I to Declaration of David Bratz) at p.19, fn.12 (CP 1655) (“As plaintiff has withdrawn his claim for failure to *pay* maintenance and cure, defendant’s discussion concerning punitive damages relating to post-departure benefit administration is no longer relevant.”).

<sup>10</sup> Although the pleadings and record are clear and unequivocal, if in any way the “failure to pay maintenance and cure” language in the May 12, 2016 Order is interpreted or construed as *not* dismissing all aspects of the seaman’s benefit’s claims affirmatively abandoned by Gutierrez as set forth herein, Icicle respectfully asserts that the Court should remand the matter to the trial court for entry of an order that does so dismiss all of these claims with prejudice.

<sup>11</sup> Respondent agrees that a trial court’s decision on whether to dismiss a claim with or without prejudice is reviewed for abuse of discretion. Opposition at p. 14, fn.16 (*citing* CR 41(a)(4); *Escude*, 117 Wn. App. at 190).

maintenance and cure claims being the former and his economic loss claims the later, but offers not a scintilla of legal authority for this self-created, artificial, distinction let alone any basis for treating these claims differently in the context of whether these claims should have been dismissed with prejudice under CR 41. Respondent does not contest the trial court's dismissal, with prejudice, of the claims pertaining to payment of maintenance and cure benefits he abandoned in his May 2, 2016 response to Icicle's motion for summary judgment. *Opposition* at p. 15. On May 15, 2015, nearly a full year prior, Gutierrez under penalty of perjury repeatedly conceded in response to Icicle's discovery requests that he was not making any claim for economic damages. *See Plaintiff's Verified Responses to Interrogatories* (Exh. C to Bratz Declaration) No. 1 ("Plaintiff is not making a claim for lost wages . . . or impaired future earning capacity.") (CP 1585), No.14 (same) (CP 1586), No. 17 ("Plaintiff is not making a claim for impairment of future earning capacity.") (CP 1587). Respondent admits he abandoned his economic loss claims in response to these discovery requests. *See Opposition* at p. 16 & fn.18. Indeed, Respondent has now refiled his claims against Appellant (despite the pendency of this appeal) and is in fact seeking the very "economic damages" that he abandoned in the underlying litigation. *See Complaint* (Cause No. 16-2-23216-7 SEA filed 9/26/16) (Appendix) at ¶ 17, l.10.

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<sup>12</sup> *Opposition* at p. 16, & fn. 18.

There is no legitimate, nor recognized, distinction between claims Respondent abandoned early in the litigation versus those he abandoned in his summary judgment opposition.<sup>13</sup>

Second, Respondent claims that as Icicle did not move for summary judgment on the long-ago abandoned claims as to economic losses, that those claims cannot be dismissed with prejudice. *Opposition* at p. 15 and *Reply Supporting Motion to Dismiss* at p. 4, n.2 (CP 1672).

There is no legal authority for assigning claims a different dismissal status based on whether they were abandoned in response to a motion for summary judgment or were abandoned more than a year prior to that response. Indeed, why would a party move for summary judgment on a claim that has been conclusively and long ago abandoned? Respondent provides no support for this artificial “distinction.”

Ultimately, in dismissing the later abandoned claims with prejudice (failure to pay maintenance and cure) and the earlier abandoned claims (past and future economic damages) without prejudice, the trial court did not provide any rationale for the distinction in treatment and in

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<sup>13</sup> Respondent’s citation to *Escude v. King County Public Hospital District* is inapposite. *Opposition* at p. 15-16. *Escude* confirmed appropriateness of a dismissal with prejudice of claims conceded in response to a motion for summary judgment, but there were no claims conceded or abandoned prior to the response for summary judgment and as such it did not and could not speak to the issue before the Court. Respondent also cites *Wachovia v. Kraft* in support of his argument, but provides no discussion or context as to its relevance—as the *Wachovia* case likewise did not address CR 41 dismissal of claims affirmatively and conclusively abandoned during the course of litigation. *See Opposition* at p. 16.

fact there is no articulated or tenable legal distinction between them. An arbitrary exercise of discretion is by definition manifestly unreasonable. Accordingly, it was an abuse of discretion for the trial court not to dismiss Respondent's economic loss claims with prejudice and the May 12, 2016 Order should be reversed and remanded for amendment in this respect.

**C. The Trial Court Abused Its Discretion in Denying Icicle the Opportunity to File a CR 37(c) Motion for the Court's Consideration.**

It is undisputed that:

- Respondent's Complaint asserted claims for maintenance and cure and damages associated with provision and payment of these benefits (compensatory damages, punitive damages, and Jones Act damages). *Complaint* at ¶¶ 5.7-5.9 (CP 4).
- In response to CR 36 requests for admission, Respondent denied he was paid the full amount of maintenance he was owed, denied that his medical bills (cure) on account of the illness were paid, denied that he was paid all unearned wages that he was owed, and denied that he had reached maximum medical improvement. *May 7, 2015 Verified Responses to Defendant's First Requests for Admission Nos. 2-3* (Exh. A to Bratz Decl.) at CP 1567-73; *October 30, 2015 Verified Responses to Defendant's Second Requests for Admission No. 10* (Exh. B to Bratz Decl.) at CP 1574-82.

- Icicle filed a Motion for Summary Judgment seeking judgment as a matter of law on all claims to which these requests for admission pertained, and providing evidence in support of this position. *Motion for Summary Judgment* at p. 14:10-17:3, 24:10-20 (CP 1624-27, 1634).
- On May 2, 2016, in response to the Motion for Summary Judgment, Respondent withdrew and abandoned all claims pertaining to his responses to the subject requests for admission and filed no evidence contradicting Appellant's entitlement to judgment as a matter of law. *Opposition to Motion for Summary Judgment* at p.1, fn.1 & p.19, fn.12 (CP 1637, 1655)
- On May 4, 2016, Respondent filed a motion for voluntary dismissal under CR 41(a)(1)(B).
- On May 12, 2016, the trial court dismissed with prejudice all claims to which the requests for admission pertained. *May 12, 2016 Order of Dismissal* (CP 1674-78).

The prerequisites for a CR 37(c) motion are met in this instance and Respondent has failed to provide any authority to the contrary. Indeed, the authorities cited by Respondent are either wholly distinguishable or actually support Icicle's position. We discuss them in turn.

Respondent excerpts a truncated segment of *Dellit v. Perry*, 60 Wn.2d 287 (1962) without providing necessary context or any meaningful

discussion of the actual holdings in that matter. *See Opposition* at p. 18. In regard to requests for admission, the *Dellit* Court held: (1) that neither requests for admission nor taking of a deposition constituted a request for affirmative relief under a Rule 41.08W (a precursor to present day CR 41); and (2) that the entitlement to sanctions under Rule 37(c) did not arise at the time a party “takes depositions of persons who testify (favorably to the [movant] to matters which are in dispute.” *Id.* at 290-91. As neither of these issues are present in this matter, *Dellit* is inapposite and inapplicable to the question at hand.

Respondent cites *Calvert v. Berg*, 177 Wn. App. 466 (2013) as supporting the proposition that only sanction motions on file *prior to* the filing of a CR 41(a)(1)(B) motion can be considered and ruled on by the trial court. *Opposition* at p.18. This proposition is both logically and legally infirm. First, Respondent mischaracterizes the rationale behind the reversal of the sanctions order in *Calvert*. Respondent claims that *Calvert* reversed a fee sanction order because the motion for sanctions was not pending at the time the CR 41 motion was filed. *See id.* at p.18. In fact, the *Calvert* court reversed the monetary sanction award because it was “based upon the [plaintiff’s] conduct after they filed their motion” under CR 41(a)(1)(B), *see Calvert*, 177 Wn. App. at 474 (emphasis added), not because the motion for sanctions was not on file prior to filing of the CR 41 motion. Here, Icicle’s motion for CR 37(c) relief is predicated on

events that undisputedly preceded Respondent’s CR 41(a)(1)(B) motion—specifically, the unequivocal abandonment and withdrawal of pertinent claims on May 2, 2016. Second, Respondent’s position improperly charges Icicle with clairvoyance in regard to his intentions to file a CR 41 motion that entitlement to seek or receive CR 37(c) sanctions is based on a “first to file” rule relative to any CR 41 motion a plaintiff may file. Respondent cites no authority requiring that defendants entitled to CR 37(c) relief be charged with this clairvoyance or insight into his impending legal strategy or filings.

Finally, Respondent cites—again, without providing full context—the out of state decision of *Sessions v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (S.C. Ct. App. 1997) for the proposition that CR 37(c) “does not allow for sanctions where the opposing party voluntarily withdraws the claim to which the request for admission is associated.” *Opposition* at p. 18 (quoting *Sessions*, 327 S.C. at 414-15). Respondent again fails to provide an accurate accounting of this ruling—which when read in its entirety supports Icicle’s position. The *Sessions* court elaborated as follows:

We do not believe that the fact that a party, for whatever reason, chooses to abandon a particular claim should automatically relieve the requesting part of the burden of proof placed on it by the clear language of Rule 37(c). Instead, we conclude that, under such circumstances, Rule 37(c) requires the requesting party to establish his entitlement to costs and expenses **by presenting evidence**, not just arguments of counsel, to the court hearing the

**motion. The court may award reasonable expenses if the evidence presented by the requesting party satisfies the court that it would have proven the truth of the matter raised in the request to admit had the claim been tried.**

*Sessions*, 327 S.C. at 415 (emphasis added). Ultimately, the *Sessions* court held that the trial court properly allowed the plaintiff to abandon a claim, and properly identified the defendant's right to seek costs under CR 37(c) in conjunction with that abandonment. *See id.* at 416. However, as the defendant in that matter did not provide any evidence in conjunction with the CR 37(c) request, it could not meet the burden of proof necessary to establish entitlement to a sanction award. *Id.*

Under the *Sessions* analysis, Icicle is clearly entitled to move for Rule 37(c) relief. Icicle moved for summary judgment on all claims related to the requests for admission at issue and provided voluminous evidentiary support for its position. *Motion for Summary Judgment* at p. 14-17 & 24 & fns. 67-77<sup>14</sup> (CP 1624-27). Respondent provided no evidence in contradiction, and dismissal with prejudice on these claims was ultimately entered. *See Levy v. North Am. Co. for Life and Health Ins.*, 90 Wn.2d 846, 850 (1978) (affirming CR 37(c) fees where plaintiff was forced to call witnesses at trial to prove the assertion denied by

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<sup>14</sup> *See Declaration of Erin Ivie* with Exhibits (CP 156-194); *Declaration of Dr. Dennis Chong* with Exhibits (CP 61-110); *Declaration of Todd Zey* (CP 195-96); deposition excerpts of Respondent (CP 226-27) and treating thoracic surgeon Dr. Thomas Varghese (CP 335-36), and numerous other exhibits recited in footnotes 67-77 of Appellant's Motion for Summary Judgment (CP 1624-27, 1634).

defendant, and defendant “offered no evidence on this point and failed to challenge the conclusions of the witnesses [plaintiff] was forced to call.”).

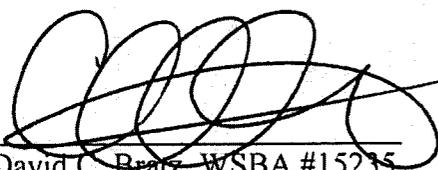
Accordingly, as Icicle’s right to petition for CR 37(c) relief was affixed as of the filing of Respondent’s opposition to the motion for summary judgment, such a motion was both permissible and warranted. Moreover, there was no basis articulated by the trial court for refusing to allow Icicle the opportunity to file a motion for such relief, Appellant respectfully asserts that the trial court abused its discretion by denying Icicle the opportunity to even submit a CR 37(c) motion for consideration. *Reid Sand & Gravel Inc. v. Bellevue Properties*, 7 Wn. App. 701, 705, 502 P.2d 480 1972) (trial court abuses its discretion when decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”). The May 12, 2016 Order should be reversed to allow Icicle to file a CR 37(c) motion for the trial court’s consideration.

#### **IV. The Relief Sought by Appellant is Warranted and Should Be Granted.**

For the reasons set forth in detail in the foregoing brief, Icicle respectfully requests that the Court of Appeals reverse the trial court’s grant of Respondent’s motion for voluntary dismissal under CR 41(a)(1)(B) and remand for further proceedings consistent with this reversal. Alternatively, the May 12, 2016, Order should be remanded for amendment of its terms.

RESPECTFULLY submitted this 28<sup>th</sup> day of September 2016.

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# V. APPENDIX

1 ICICLE SEAFOODS

2 SEP 27 2016

3 RECEIVED

4 HON. BETH M. ANDRUS

5 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
6 IN AND FOR THE COUNTY OF KING

7 CARLOS GUTIERREZ, an individual,

8 Plaintiff,

9 vs.

10 ICICLE SEAFOODS, INC., an Alaska  
11 corporation,

12 Defendant.

13 NO. 16-2-23216-7 SEA

14 SUMMONS

15 TO: ICICLE SEAFOODS, INC., defendant,

16 Plaintiffs have started a lawsuit against you in the above-entitled Court. Plaintiffs'  
17 claims are stated in the written complaint, a copy of which is served upon you with this  
18 summons.

19 In order to defend against this lawsuit, you must respond to the complaint by  
20 stating your defense in writing, and by serving a copy upon the person signing this  
21 summons within 20 days after the service of this summons, if served within the State of  
22 Washington; within 60 days if you are served outside of the State of Washington; or  
23 within 60 days if you are served through the Secretary of State pursuant to RCW  
24 46.64.040, all excluding the day of service, or a default judgment may be entered  
25 against you without notice. A default judgment is one where plaintiffs are entitled to  
26 what they ask for because you have not responded. If you serve a notice of appearance

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on the undersigned person, you are entitled to notice before a default judgment may be entered.

You may demand that plaintiffs file this lawsuit with the Court. If you do so, the demand must be in writing and must be served upon plaintiffs. Within 14 days after you serve the demand, plaintiffs must file this lawsuit with the Court, or the service on you of this summons and complaint will be void.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time.

This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the State of Washington.

DATED this 26<sup>th</sup> day of September, 2016.

FURY DUARTE PS



FRANCISCO A. DUARTE, WSBA.24056  
Attorney for Plaintiff

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ICICLE SEAFOODS

SEP 27 2016

RECEIVED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

CARLOS GUTIERREZ, an individual,

Plaintiff,

vs.

ICICLE SEAFOODS, INC., an Alaska  
corporation,

Defendant.

NO.

COMPLAINT

COMES NOW plaintiff, and for cause of action against defendant, alleges and states:

PARTIES

1. Plaintiff Carlos Gutierrez ("Gutierrez") was at all relevant and material times a seaman and a McFarland, Kern County, California resident.

2. Defendant Icicle Seafoods, Inc. ("Icicle") was at all relevant and material times an Alaska corporation that was licensed to do business in Washington State (UBI 578084151).

JURISDICTION AND VENUE

3. This Court has subject-matter jurisdiction.

4. This Court has personal jurisdiction over the parties.

5. King County is a proper venue because Icicle has its principal place of business in, and conducts business in, King County, Washington. RCW 4.12.025.

///

Complaint - 1

**FURY  
DUARTE** IS  
TRIAL LAWYERS

210 10th Avenue East  
PO Box 20397  
Seattle WA 98102  
1 (206) 726-6600  
1 (206) 726-0288

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**FACTS**

6. Icicle is a seafood company that employed Gutierrez as a seaman onboard some of its harvesting and processing vessels during the 2013 and 2014 Alaska fishing seasons. It owned/operated the processor P/V RM THORSTENSON as part of its fleet and assigned Gutierrez to that vessel for the 2014A season.

7. Gutierrez's first day of employ for the 2014A season was on December 26, 2013. RM THORSTENSON departed Seattle, Washington for St. Paul Island, Alaska the next day on December 27, 2013.

8. Shortly after departing Seattle, in January 2014, Carlos fell ill and developed a life-threatening and debilitating medical condition.

9. Despite Gutierrez's serious medical condition, Icicle failed to provide timely, competent, or appropriate medical care and failed to timely evacuate Gutierrez from the vessel, all of which caused Gutierrez significant, ongoing, and permanent injuries.

**CAUSE OF ACTION**

10. Gutierrez's medical condition and Icicle's negligent acts and omissions occurred onboard a vessel in navigation. This action is thus governed by US general maritime law.

11. Icicle owed Gutierrez the following duties:

- a. To provide a safe place to work;
- b. To provide timely, adequate, proper, and sufficient medical management, care, treatment, and attention; and
- c. To evacuate seamen who require onshore medical treatment and care from its vessels in a timely manner.

12. Icicle breached its duties to Gutierrez.

13. Icicle's breaches of its duties directly and proximately caused Gutierrez to suffer serious, ongoing injuries and damages.

14. Concurrently or alternatively, Icicle's breaches of its duties caused Gutierrez a lost chance of a better outcome from his medical condition.

1 15. Gutierrez was not at fault in causing his medical condition, injuries, or damages.

2 **DAMAGES**

3 16. As a direct and proximate result of Icicle's negligent acts/omissions, Gutierrez  
4 suffered serious personal injuries and/or lost chance of a better outcome. His physical injuries  
5 include, though are not limited to, a massive, near-fatal thoracic cavity infection, multiple  
6 invasive surgeries to his chest wall and neck, the therapeutic destruction of his sternum, and  
7 muscular deterioration and weakness in his chest and arms.

8 17. As a direct and proximate result of Icicle's negligent acts/omissions, Gutierrez  
9 incurred reasonable and necessary medical and health-care expenses, travel expenses, and other  
10 out-of-pocket expenses and economic damages, and suffered pain, anguish, disability, and loss  
11 of ability to enjoy life. He will suffer such damages into the future.

12 **PUNITIVE DAMAGES**

13 18. Icicle callously and/or willfully and wantonly failed to provide Gutierrez with  
14 the proper and prompt medical care Icicle's cure obligation requires. Gutierrez is thus entitled  
15 to punitive damages.

16 **REQUEST FOR RELIEF**

17 WHEREFORE, Gutierrez requests that judgment be entered against Icicle as follows:

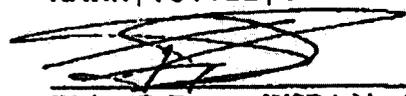
- 18 1. For damages as shall fairly compensate Gutierrez for his losses and damages in  
19 an amount as shall be proven at trial;
- 20 2. Costs, disbursements, and reasonable attorneys' fees;
- 21 3. Such other and further relief as this Court may deem just and equitable.

22 DATED this 26<sup>th</sup> day of September, 2016.

23 FURY DUARTE, PS.

23 KARR | TUTTLE | CAMPBELL

24   
25 Francisco A. Duarte, WSBA No. 24056  
26 Scott David Smith, WSBA No. 48108  
27 Attorneys for Plaintiff

24   
25 Walter E. Barton, WSBA No. 26408  
26 Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

Carlos Gutierrez

Plaintiff(s),

vs.

Icicle Seafoods, Inc.

Respondent(s)

NO. 16-2-23216-7 SEA  
ORDER SETTING CIVIL CASE SCHEDULE

ASSIGNED JUDGE: Andrus, Beth M., Dept. 35

FILED DATE: 9/26/2016

TRIAL DATE: 9/25/2017

SCOMIS CODE: \*ORSCS

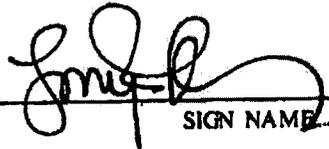
A civil case has been filed in the King County Superior Court and will be managed by the Case Schedule on Page 3 as ordered by the King County Superior Court Presiding Judge.

I. NOTICES

**NOTICE TO PLAINTIFF:** The Plaintiff may serve a copy of this Order Setting Case Schedule (*Schedule*) on the Defendant(s) along with the *Summons and Complaint/Petition*. Otherwise, the Plaintiff shall serve the *Schedule* on the Defendant(s) within 10 days after the later of: (1) the filing of the *Summons and Complaint/Petition* or (2) service of the Defendant's first response to the *Complaint/Petition*, whether that response is a *Notice of Appearance*, a response, or a Civil Rule 12 (CR 12) motion. The *Schedule* may be served by regular mail, with proof of mailing to be filed promptly in the form required by Civil Rule 5 (CR 5).

"I understand that I am required to give a copy of these documents to all parties in this case."

Tony R Arico  
PRINT NAME

  
SIGN NAME

## L NOTICES (continued)

### NOTICE TO ALL PARTIES:

All attorneys and parties should make themselves familiar with the King County Local Rules [KCLCR] -- especially those referred to in this *Schedule*. In order to comply with the *Schedule*, it will be necessary for attorneys and parties to pursue their cases vigorously from the day the case is filed. For example, discovery must be undertaken promptly in order to comply with the deadlines for joining additional parties, claims, and defenses, for disclosing possible witnesses [See KCLCR 26], and for meeting the discovery cutoff date [See KCLCR 37(g)].

### CROSSCLAIMS, COUNTERCLAIMS AND THIRD PARTY COMPLAINTS:

A filing fee of \$240 must be paid when any answer that includes additional claims is filed in an existing case.

### KCLCR 4.2(a)(2)

A Confirmation of Joinder, Claims and Defenses or a Statement of Arbitrability must be filed by the deadline in the schedule. The court will review the confirmation of joinder document to determine if a hearing is required. If a Show Cause order is issued, all parties cited in the order must appear before their Chief Civil Judge.

### PENDING DUE DATES CANCELED BY FILING PAPERS THAT RESOLVE THE CASE:

When a final decree, judgment, or order of dismissal of all parties and claims is filed with the Superior Court Clerk's Office, and a courtesy copy delivered to the assigned judge, all pending due dates in this *Schedule* are automatically canceled, including the scheduled Trial Date. It is the responsibility of the parties to 1) file such dispositive documents within 45 days of the resolution of the case, and 2) strike any pending motions by notifying the bailiff to the assigned judge.

Parties may also authorize the Superior Court to strike all pending due dates and the Trial Date by filing a *Notice of Settlement* pursuant to KCLCR 41, and forwarding a courtesy copy to the assigned judge. If a final decree, judgment or order of dismissal of all parties and claims is not filed by 45 days after a *Notice of Settlement*, the case may be dismissed with notice.

If you miss your scheduled Trial Date, the Superior Court Clerk is authorized by KCLCR 41(b)(2)(A) to present an *Order of Dismissal*, without notice, for failure to appear at the scheduled Trial Date.

### NOTICES OF APPEARANCE OR WITHDRAWAL AND ADDRESS CHANGES:

*All parties to this action must keep the court informed of their addresses.* When a Notice of Appearance/Withdrawal or Notice of Change of Address is filed with the Superior Court Clerk's Office, parties must provide the assigned judge with a courtesy copy.

### ARBITRATION FILING AND TRIAL DE NOVO POST ARBITRATION FEE:

A Statement of Arbitrability must be filed by the deadline on the schedule if the case is subject to mandatory arbitration and service of the original complaint and all answers to claims, counterclaims and cross-claims have been filed. If mandatory arbitration is required after the deadline, parties must obtain an order from the assigned judge transferring the case to arbitration. Any party filing a Statement must pay a \$220 arbitration fee. If a party seeks a trial de novo when an arbitration award is appealed, a fee of \$250 and the request for trial de novo must be filed with the Clerk's Office Cashiers.

### NOTICE OF NON-COMPLIANCE FEES:

All parties will be assessed a fee authorized by King County Code 4A.630.020 whenever the Superior Court Clerk must send notice of non-compliance of schedule requirements and/or Local Civil Rule 41.

King County Local Rules are available for viewing at [www.kingcounty.gov/courts/clerk](http://www.kingcounty.gov/courts/clerk).

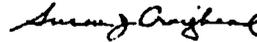
## II. CASE SCHEDULE

✓	CASE EVENTS	DATE
	Case Filed and Schedule Issued.	9/26/2016
✓	Last Day for Filing Statement of Arbitrability without a Showing of Good Cause for Late Filing (See KCLMAR2.1(a) and Notices on page 2). \$220 Arbitration fee must be paid	3/6/2017
✓	DEADLINE to file Confirmation of Joinder if not subject to Arbitration [See KCLCR 4.2(a) and Notices on page 2]	3/6/2017
	DEADLINE for Hearing Motions to Change Case Assignment Area [KCLCR 82(e)]	3/20/2017
	DEADLINE for Disclosure of Possible Primary Witnesses [See KCLCR 26(b)]	4/24/2017
	DEADLINE for Disclosure of Possible Additional Witnesses [KCLCR 26(b)]	6/5/2017
	DEADLINE for Jury Demand [See KCLCR 38(b)(2)]	6/19/2017
	DEADLINE for Change in Trial Date [See KCLCR 40(e)(2)]	6/19/2017
	DEADLINE for Discovery Cutoff [See KCKCR 37(g)]	8/7/2017
	DEADLINE for Engaging in Alternative Dispute Resolution [See KCLCR 16(b)]	8/28/2017
	DEADLINE for Exchange Witness & Exhibit Lists & Documentary Exhibits [See KCLCR 4(j)]	9/5/2017
✓	DEADLINE to file Joint Confirmation of Trial Readiness [See KCLCR 16(a)(1)]	9/5/2017
	DEADLINE for Hearing Dispositive Pretrial Motions [See KCLCR 56;CR56]	9/11/2017
✓	Joint Statement of Evidence [See KCLCR 4(k)]	9/18/2017
	DEADLINE for filing Trial Briefs, Proposed Findings of Fact and Conclusions of Law and Jury Instructions (Do not file proposed Findings of Fact and Conclusion of Law with the Clerk)	9/18/2017
	Trial Date [See KCLCR 40]	9/25/2017

The ✓ indicates a document that must be filed with the Superior Court Clerk's Office by the date shown.

## III. ORDER

Pursuant to King County Local Rule 4 [KCLCR 4], IT IS ORDERED that the parties shall comply with the schedule listed above. Penalties, including but not limited to sanctions set forth in Local Rule 4(g) and Rule 37 of the Superior Court Civil Rules, may be imposed for non-compliance. It is FURTHER ORDERED that the party filing this action must serve this *Order Setting Civil Case Schedule* and attachment on all other parties.



DATED: 9/26/2016

\_\_\_\_\_  
PRESIDING JUDGE

#### IV. ORDER ON CIVIL PROCEEDINGS FOR ASSIGNMENT TO JUDGE

##### **READ THIS ORDER BEFORE CONTACTING YOUR ASSIGNED JUDGE.**

This case is assigned to the Superior Court Judge whose name appears in the caption of this case schedule. The assigned Superior Court Judge will preside over and manage this case for all pretrial matters.

**COMPLEX LITIGATION:** If you anticipate an unusually complex or lengthy trial, please notify the assigned court as soon as possible.

**APPLICABLE RULES:** Except as specifically modified below, all the provisions of King County Local Civil Rules 4 through 26 shall apply to the processing of civil cases before Superior Court Judges. The local civil rules can be found at [www.kingcounty.gov/courts/clerk/rules/Civil](http://www.kingcounty.gov/courts/clerk/rules/Civil).

**CASE SCHEDULE AND REQUIREMENTS:** Deadlines are set by the case schedule, issued pursuant to Local Civil Rule 4.

**THE PARTIES ARE RESPONSIBLE FOR KNOWING AND COMPLYING WITH ALL DEADLINES IMPOSED BY THE COURT'S LOCAL CIVIL RULES.**

##### **A. Joint Confirmation regarding Trial Readiness Report**

No later than twenty one (21) days before the trial date, parties shall complete and file (with a copy to the assigned judge) a joint confirmation report setting forth whether a jury demand has been filed, the expected duration of the trial, whether a settlement conference has been held, and special problems and needs (e.g., interpreters, equipment).

The Joint Confirmation Regarding Trial Readiness form is available at [www.kingcounty.gov/courts/scforms](http://www.kingcounty.gov/courts/scforms). If parties wish to request a CR 16 conference, they must contact the assigned court. Plaintiff's/petitioner's counsel is responsible for contacting the other parties regarding the report.

##### **B. Settlement/Mediation/ADR**

a. Forty five (45) days before the trial date, counsel for plaintiff/petitioner shall submit a written settlement demand. Ten (10) days after receiving plaintiff's/petitioner's written demand, counsel for defendant/respondent shall respond (with a counter offer, if appropriate).

b. Twenty eight (28) days before the trial date, a Settlement/Mediation/ADR conference shall have been held. **FAILURE TO COMPLY WITH THIS SETTLEMENT CONFERENCE REQUIREMENT MAY RESULT IN SANCTIONS.**

##### **C. Trial**

Trial is scheduled for 9:00 a.m. on the date on the case schedule or as soon thereafter as convened by the court. The Friday before trial, the parties should access the court's civil standby calendar on the King County Superior Court website [www.kingcounty.gov/courts/superiorcourt](http://www.kingcounty.gov/courts/superiorcourt) to confirm the trial judge assignment.

#### **MOTIONS PROCEDURES**

##### **A. Noting of Motions**

**Dispositive Motions:** All summary judgment or other dispositive motions will be heard with oral argument before the assigned judge. The moving party must arrange with the hearing judge a date and time for the hearing, consistent with the court rules. Local Civil Rule 7 and Local Civil Rule 56 govern procedures for summary judgment or other motions that dispose of the case in whole or in part. The local civil rules can be found at [www.kingcounty.gov/courts/clerk/rules/Civil](http://www.kingcounty.gov/courts/clerk/rules/Civil).

**Non-dispositive Motions:** These motions, which include discovery motions, will be ruled on by the assigned judge without oral argument, unless otherwise ordered. All such motions must be noted for a date by which the ruling is requested; this date must likewise conform to the applicable notice requirements. Rather than noting a time of day, the

Note for Motion should state "Without Oral Argument." Local Civil Rule 7 governs these motions, which include discovery motions. The local civil rules can be found at [www.kingcounty.gov/courts/clerk/rules/Civil](http://www.kingcounty.gov/courts/clerk/rules/Civil).

**Motions in Family Law Cases not involving children:** Discovery motions to compel, motions in limine, motions relating to trial dates and motions to vacate judgments/dismissals shall be brought before the assigned judge. All other motions should be noted and heard on the Family Law Motions calendar. Local Civil Rule 7 and King County Family Law Local Rules govern these procedures. The local rules can be found at [www.kingcounty.gov/courts/clerk/rules](http://www.kingcounty.gov/courts/clerk/rules).

**Emergency Motions:** Under the court's local civil rules, emergency motions will usually be allowed only upon entry of an Order Shortening Time. However, some emergency motions may be brought in the Ex Parte and Probate Department as expressly authorized by local rule. In addition, discovery disputes may be addressed by telephone call and without written motion, if the judge approves in advance.

**B. Original Documents/Working Copies/ Filing of Documents:** All original documents must be filed with the Clerk's Office. Please see information on the Clerk's Office website at [www.kingcounty.gov/courts/clerk](http://www.kingcounty.gov/courts/clerk) regarding the requirement outlined in LGR 30 that attorneys must e-file documents in King County Superior Court. The exceptions to the e-filing requirement are also available on the Clerk's Office website. The local rules can be found at [www.kingcounty.gov/courts/clerk/rules](http://www.kingcounty.gov/courts/clerk/rules).

The working copies of all documents in support or opposition must be marked on the upper right corner of the first page with the date of consideration or hearing and the name of the assigned judge. The assigned judge's working copies must be delivered to his/her courtroom or the Judges' mailroom. Working copies of motions to be heard on the Family Law Motions Calendar should be filed with the Family Law Motions Coordinator. Working copies can be submitted through the Clerk's office E-Filing application at [www.kingcounty.gov/courts/clerk/documents/eWC](http://www.kingcounty.gov/courts/clerk/documents/eWC).

**Service of documents:** Pursuant to Local General Rule 30(b)(4)(B), e-filed documents shall be electronically served through the e-Service feature within the Clerk's eFiling application. Pre-registration to accept e-service is required. E-Service generates a record of service document that can be e-filed. Please see the Clerk's office website at [www.kingcounty.gov/courts/clerk/documents/efiling](http://www.kingcounty.gov/courts/clerk/documents/efiling) regarding E-Service.

**Original Proposed Order:** Each of the parties must include an original proposed order granting requested relief with the working copy materials submitted on any motion. Do not file the original of the proposed order with the Clerk of the Court. Should any party desire a copy of the order as signed and filed by the judge, a pre-addressed, stamped envelope shall accompany the proposed order. The court may distribute orders electronically. Review the judge's website for information: [www.kingcounty.gov/courts/SuperiorCourt/judges](http://www.kingcounty.gov/courts/SuperiorCourt/judges).

**Presentation of Orders for Signature:** All orders must be presented to the assigned judge or to the Ex Parte and Probate Department, in accordance with Local Civil Rules 40 and 40.1. Such orders, if presented to the Ex Parte and Probate Department, shall be submitted through the E-Filing/Ex Parte via the Clerk application by the attorney(s) of record. E-filing is not required for self-represented parties (non-attorneys). If the assigned judge is absent, contact the assigned court for further instructions. If another judge enters an order on the case, counsel is responsible for providing the assigned judge with a copy.

**Proposed orders finalizing settlement and/or dismissal by agreement of all parties shall be presented to the Ex Parte and Probate Department.** Such orders shall be submitted through the E-Filing/Ex Parte via the Clerk application by the attorney(s) of record. E-filing is not required for self-represented parties (non-attorneys). Formal proof in Family Law cases must be scheduled before the assigned judge by contacting the bailiff, or formal proof may be entered in the Ex Parte Department. If final order and/or formal proof are entered in the Ex Parte and Probate Department, counsel is responsible for providing the assigned judge with a copy.

#### **C. Form**

Memoranda/briefs for matters heard by the assigned judge may not exceed twenty four (24) pages for dispositive motions and twelve (12) pages for non-dispositive motions, unless the assigned judge permits over-length memoranda/briefs in advance of filing. Over-length memoranda/briefs and motions supported by such memoranda/briefs may be stricken.

**IT IS SO ORDERED. FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDER MAY RESULT IN DISMISSAL OR OTHER SANCTIONS. PLAINTIFF/PETITIONER SHALL FORWARD A COPY OF THIS ORDER AS SOON AS PRACTICABLE TO ANY PARTY WHO HAS NOT RECEIVED THIS ORDER.**



**PRESIDING JUDGE**

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served in the manner noted below a copy of the document to which this certificate is attached on the following counsel of record:

Attorneys for Respondent

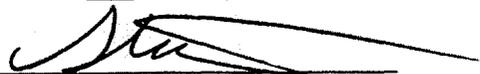
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fad@furyduarte.com  
sds@furyduarte.com

**Via Hand Delivery**

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28<sup>th</sup> day of September 2016.



Signed at Seattle, Washington

2016 SEP 28 PM 3:33  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON