**IN THE SUPREME COURT**

**OF THE STATE OF WASHINGTON**

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**Supreme Court No. 1035080**

**Court of Appeals No. 866303 – Division I**

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**ANNA G. BELL,**

***Petitioner,***

v.

**CANDACE K. SCHUPP,**

***Respondent.***

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# ANSWER TO PETITION FOR REVIEW

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## I. STATEMENT OF CASE

At trial, judgment as a matter of law was entered for plaintiff Bell after she rested her case in chief, but before defendant Schupp had a chance to call any witnesses. Findings and conclusions were articulated from the bench as follows:

> [T]he testimony from Mr. [Norman] Hayes [predecessor to defendant Schupp] was very clear that it was his intention . . . by taking down the barbed wire fence and . . . allowing Mr. Bourcier [predecessor to plaintiff Bell] to use his driveway as it had originally been intended by Bourcier that this was, in fact, a grant as opposed to a license or permission. That he believed this was now Bourcier's land. And then, of course, Mr. Bourcier used the land as his own. So whether Bourcier thought it was merely permissive and not a grant is not part of the court's analysis when evaluating this claim.
>
> Given that that testimony [sic] was uncontroverted, the court does find that title vested in that 10 year time frame from 1991, so 10 years would be title essentially vested in 2001.

*RP 239:5-19.* The testimony of Norman Hayes was not controverted solely due to entry of judgment as a matter of law.

The trial court's ruling was memorialized in Findings of Fact and Conclusions of Law, as follows:

> Given that there would be no evidence to controvert Mr. Hayes' testimony . . ., the court does find that title vested in that 10-year time period from 1991 to 2001, and that title vested in Plaintiff's predecessors by adverse possession by 2001.

*CP 263:10-14.* The Superior Court rendered no decision regarding any other period of time. Defendant Schupp moved for reconsideration of judgment as a matter of law, *CP 171-74*; which was denied by the trial court. *CP 316.*

The Court of Appeals, Division I, found as follows:

> [I]n support of her motion for reconsideration filed after trial, Schupp supplied a sworn declaration from Frederick Price – Bell's neighbor who was listed as a defense witness and was prepared to testify at trial – stating that Hayes (1) had never given or conveyed any portion of the Bell Property to Bourcier and (2) did not construct the fence separating the properties until "several years after" Bourcier's death in 1992.

*Bell v. Schupp*, 86630-3-I, 2024 WL 3565958 at 4 (2024).

The Court of Appeals, Division 1, reversed the trial court's grant of judgment as a matter of law under CR 50(a):

> Given that the trial court "focused primarily on the testimony of Norman Hayes" in ruling in Bell's favor, Price's testimony undermining Hayes' testimony could have provided a "legally sufficient evidentiary basis" for a reasonable fact finder to have found for Schupp on some or all of the elements of Bell's adverse possession claim. See CR 50(a).

*Bell*, 86630-3-I, 2024 WL 3565958 at 5. The Court of Appeals also reversed an award of attorney fees and costs to plaintiff Bell:

> Because we reverse the trial court's entry of judgment in favor of Bell on her adverse possession claim, we vacate the trial court's orders awarding prevailing party attorney fees and costs under RCW 7.28.083(3) because Bell is no longer a prevailing party on that claim.

*Bell*, 86630-3-I, 2024 WL 3565958 at 6.

Plaintiff Bell now seeks discretionary review of the Court of Appeals decision denying reconsideration of its order reversing trial court's entry of judgment as a matter of law.

Plaintiff Bell attempts to proffer additional evidence without satisfying the Rules of Appellate Procedure:

> Under RAP 9.11(a), additional evidence may be taken by an appellate court if the following criteria are met:
>
> The appellate court may direct that additional evidence be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.
>
> The appellate court will accept new evidence only if all six conditions are met.

*State v. Ziegler*, 114 Wash.2d 533, 541, 789 P.2d 79 (1990). Exhibits 1 through 11 attached to plaintiff Bell's Petition should be stricken and disregarded. *Petition at 57-78.*

## II. ARGUMENT

Defendant Schupp answers plaintiff Bell's issues as enumerated:

**PLAINTIFF'S ISSUE NO. 1:** The Rules of Appellate Procedure permit reconsideration by the Court of Appeals in limited situations:

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c)(2). This Court has noted that the foregoing rule "codified at least two historically recognized exceptions to the law of the case doctrine:"

> First, the appellate court may reconsider a prior decision in the same case where that decision is "clearly erroneous, . . . the erroneous decision would work a manifest injustice to one party," and no corresponding injustice would result to the other party if the erroneous holding were set aside. . . .

> Second, the language allowing consideration of the law at the time of the later review allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law.

*State v. Schwab*, 163 Wash.2d 664, 672-73, 185 P.3d 1151 (2008). In the present case, the Court of Appeals provided ample support for reversal of the trial court's entry of judgment as a matter of law; hence, its decision was not clearly erroneous:

> Washington courts repeatedly recognized that a litigant must be afforded an opportunity to dispute controverted issues before the trial court grants a CR 50 motion. See e.g. *Butson v. Dep't of Labor and Indus.*, 189 Wn.App. 288, 297, 354 P.3d 924 (2015) ("A CR 50 motion is properly granted after the nonmoving party presents its case and before the moving party presents its case."); *Smith v. Fourre*, 71 Wn.App. 304, 306, 858 P.2d 276 (1993) (error to grant defendant's motion to dismiss before plaintiff had completed presenting her case because "[a] fundamental principle of law is that every litigant is entitled to be heard before his or her case is dismissed"); *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 265, 501 P.2d 290 (1972) ("[A] plaintiff's motion to dismiss, made at the end of his own case, . . . should not be granted . . . if the defendant elects to proceed with the case.")

*Bell*, 86630-3-I, 2024 WL 3565958 at 5. The trial court's decision worked a manifest injustice upon defendant Schupp, not plaintiff Bell, because defendant Schupp was denied the opportunity to be heard at trial. Reversing the appellate decision would work the same manifest injustice upon defendant Schupp.

The majority of plaintiff Bell's argument addresses ***not*** the period upon which trial court decision was based, 1991 to 2001, but the period after Bell acquired her interest on December 31, 2018, and after her husband, Michael Wade, acquired the property on October 19, 2009. As to the elements of adverse possession, plaintiff Bell argues for the incontrovertibility of her evidence regarding her and her husband's use of the disputed parcel by between 2009 and present. *Petition at 12*. Of course, the trial court's entry of judgment as a matter of law at the close of plaintiff's case prevented defendant Schupp from proffering evidence of any period. Nonetheless, the trial court granted

judgment *only* as to the ten-year period of 1991 to 2001, from which we may infer that evidence of periods thereafter was insufficient to carry plaintiff's burden. *CP 263:18-20.*

Plaintiff Bell mistakenly argues that "[t]he trial was not the first bench trial in this case; it was preceded by a summary judgment where Schupp presented eight testimonies by her witnesses." *Petition at 12.* Obviously, the summary judgment hearing was not a trial and, while summary judgment may be reconsidered, it is no substitute for actual testimony at trial.

Plaintiff Bell's misunderstanding of summary judgment also motivates her argument that defendant "Schupp never controverted [Norman Hayes] evidence when it was presented in the summary judgment[,] and Schupp's unheard trial evidence was unduly delayed and meant to waste time." *Petition at 10.* Plaintiff Bell fails to cite clerk's papers containing evidence allegedly proffered at the summary judgment hearing; and she

fails to address declarations of Frederick Price, Rhonda Huss and Frederick Hayes filed in support of defendant Shupp's motion for reconsideration. *CP 175*; *CP 273*; *CP 270*, *infra*.

Plaintiff Bell appears to argue that RCW 4.44.080 renders trial court judges infallible as to questions of law. *Petition at 16-21*. However, RCW 4.44.080 does not prevent erroneous decisions which must be reviewed on appeal.

Plaintiff Bell argues "[i]f Schupp or her witnesses would have testified in trial that Schupp occasionally maintained [the disputed tract], . . . it would not change Bell meeting all the adverse possession requirement[s]." *Petition at 20-21*. While it is true that "occasional, transitory use . . . will not prevent adverse possession," Washington law holds that:

> "Adverse possession must be as exclusive as one would expect of a titled property owner under the circumstances." "[T]he exclusivity element means that an adverse possessor may not share possession of the area claimed with the true owner . . ."

*Michel v. Seattle*, 19 Wash.App.2d 783, 790, 498 P.3d 522 (2021), *review denied*, 199 Wash.2d 1012, 508 P.3d 671 (2022). Defendant Schupp is the true owner of the disputed tract.

The foregoing authority also renders fallacious plaintiff Bell's argument, that "[t]he adverse possession claim on Bell's driveway and shoulder is inseparable from the prescriptive easement claim and they share exactly the same elements." *Petition at 23*. To the contrary, prescription need not be exclusive. *Curtis v. Zuck*, 65 Wash.App. 377, 384, 829 P.2d 187 (1992).

Plaintiff Bell argues that Norman Hayes' testimony was never controverted, even though the trial record includes the following attestations, filed in support of reconsideration:

> I, Frederick Price, declare that the statements contained herein are based upon personal knowledge of matters regarding which I am competent to testify.

1. I am the owner of Lot 2 of Short Plat 3-679, which is located immediately west of, and contiguous with, Assessor's Parcel No. 253299-000, owned by Anna Bell. . . .

4. I worked as an EMT, and George Bourcier [predecessor to Bell] died in my arms in April 1992. His wife Mary predeceased him in 1990. Norman Hayes did not construct the "old hog-wire fence" shown on the plat and surveys until several years after George Bourcier's death.

5. I was available to testify in the landing of the third floor of Clark County Courthouse on August 1, 2023, from 8:45 a.m. until the parties left the courtroom of Judge Emily Sheldrick, and informed me that the court had granted a directed verdict for plaintiff Bell, and my testimony would not be received.

*CP 175:1-176:11*, filed August 4, 2023.

* * *

I, Rhonda Huss, declare that the statements contained herein are based upon personal knowledge of matters regarding which I am competent to testify.

1. During the years 1990 through 1993, I baby-sat for Norman Hayes at the residence now owned by Candace Shupp. There was no fence

> separating the Schupp property from the property now owned by Anna Bell at any time during those years.

*CP 273:14-19*, filed September 1, 2023.

* * *

> I, Frederick Hayes, declare that the statements contained herein are based upon personal knowledge of matters regarding which I am competent to testify.
>
> **1.** I am Norm Hayes nephew, and I assisted him with projects on his property located at 4404 NE 399th Street, La Center, Washington, now owned Candace Schupp.
>
> **2.** We erected the fence between what are now the Schupp and Bell properties after the year 2000.

*CP 270:14-20*, filed September 1, 2023. The Order on Motion for Reconsideration was entered October 5, 2023. *CP 316*.

Plaintiff Bell argues that "Price's testimony was hearsay because Price was not Hayes." *Petition at 26*. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to

prove the truth of the matter asserted." ER 801(c). Attestations quoted above are in-court statements made by the declarants, attesting at hearing on defendant Schupp's motion to reconsider. Statements that George Bourcier died in Frederick Price's arms in April 1992, and that Norman Hayes did not construct the "old hog-wire fence" shown on the plat and surveys until several years after George Bourcier's death, are statements of observed facts; as are statements that there was no fence between the properties during the years 1990 through 1993, and that Frederick and Norman Hayes built the fence after the year 2000.

In any event, the Civil Rules clearly define exemptions to the hearsay rule:

> Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and

> reputation as to events of general history important to the community or state or nation in which located.

ER 803(a). We can imagine no situation in which the above-quoted statements would constitute hearsay.

Plaintiff Bell cites *State of Washington v. Donald* in support of her argument for exclusion of defendant Schupp's evidence under ER 403 (presumably, Declarations of Frederick Price, Rhonda Huff and Frederick Hayes), as follows:

> The Court' Opinion remanding and allowing Schupp's excluded evidence which was unduly delayed, meant to waste time and hearsay is in conflict with its published opinion where it upheld the exclusion of evidence pursuant [to] ER 403 in *State of Washington v. Donald*, Wash. App. Div I (2013)."

*Petition at 27.* As an initial observation, we object to plaintiff Bell's failure to follow citation format; however, out of an abundance of caution, we located a solitary 2013 decision of Division 1 titled *State of Washington v. Donald*, which held as follows, construing ER 404(b), not ER 403:

> Because ER 404(b) is neither arbitrary nor unreasonably related or disproportionate to the ends it is designed to serve, we reject Donald's constitutional challenge to it. We reject his proposed construction of ER 404(b), which would exclude its application to evidence offered by a defendant. Further, the court did not abuse its discretion by excluding evidence of an alternative suspect's mental health history and criminal history, and Donald failed to preserve his alleged instructional error for review. Therefore, we affirm.

*State v. Donald*, 178 Wash.App. 250, 271-72, 316 P.3d 1081 (2013). Defendant Schupp did not rely upon "evidence of other crimes, . . . or acts," the sole issue addressed under ER 404(b).

Civil Rules provide for entry of summary judgment as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). Defendant Schupp provided argument, *CP 87-95*; that was sufficient to deny judgment on adverse possession. *CP 110.*

Moreover, litigants are not limited at trial to evidence that was, or could have been, filed in response to summary judgment. In faulting defendant Schupp for not filing the Declarations of Price, Huff and Frederick Hayes on summary judgment, plaintiff Bell appears to violate the rule articulated by Division 1 that:

> A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder.

*Kaplan v. Nothwest Mutual Life*, 115 Wash.App. 791, 799, 65 P.3d 16 (2003).

* * *

**PLAINTIFF'S ISSUE NO. 2:** Plaintiff Bell argues that "the Court's Opinion ... affirmed Bell's adverse possession at the same time it was reversing and remanding ... in the first paragraph on page 5." *Petition at 29*. We do not know where plaintiff is obtaining published opinions; however, a computer search found her quote from the Petition in the last paragraph on page 2:

> **Bell averred** that after her late husband, Michael Wade, acquired title to the Bell Property in 2009, he consistently maintained both (a) the entire gravel driveway by rocking it, plowing snow, and driving vehicles over it and (b) the area between the driveway and the fence by mowing grass, spraying grass killer, removing weeds, and trimming bushes. Bell maintained the driveway and shoulder in a similar manner beginning in 2013 and continued to do so after Wade's death in 2020. This evidence, **Bell argued**, established that the use of the easement occurred over a uniform route.

*Bell*, No. 86630-3-I, 2024 WL 3565958, at *2 (2024), emphasis added. As the above emphasis clearly demonstrates, the foregoing does not constitute findings or conclusions of the Court, but averments and arguments of plaintiff Bell.

Contrary to plaintiff Bell's argument, the Court did ***not*** find that Bell and Wade's maintenance of the gravel driveway and the area between the fence and driveway "was more than enough to establish adverse possession." *Petition at 29-30.* The Court actually found:

> The court subsequently issued a written order stating that "[Bell's] Motion for Summary Judgment is granted as to prescriptive easement" and "[a] legal description of the easement shall be determined by survey to be done at a later date."
>
> On this record, the trial court did not err in granting summary judgment in Bell's favor on her prescriptive easement claim regarding the portion of the driveway that encroaches on Schupp's property.

*Bell*, No. 86630-3-I, 2024 WL 3565958, at *3 (2024).

* * *

**PLAINTIFF'S ISSUE NO. 3:** Plaintiff Bell argues that the Court of Appeals vacation of an award of attorney fees causes her to violate WAC 388-76-10000, *Petition at 31*; which regulates "Adult Family Homes," defined as follows:

> "Adult family home" or "AFH" means:
>
> (1) **A residential home in which a person or an entity is licensed to provide personal care, special care, room, and board to more than one but not more than six adults who are not related by blood, adoption, or marriage to a provider**, entity representative, resident manager, or caregiver, who resides in the home. An adult family home may

> be licensed to provide care to up to eight adults if the home receives approval under WAC 388-76-10031 or 388-76-10032.
>
> (2) As used in this chapter, the term "entity" includes corporations, partnerships, and limited liability companies, and the term "adult family home" includes the person or entity that is licensed to operate an adult family home.

WAC 388-76-10000, emphasis added. Chapter 388-76 WAC further specifies the licensing requirement as follows:

> License – Required.
>
> (1) Any person or entity must have a license by the department to operate an adult family home.
>
> (2) No person or entity may provide personal care, special care, and room and board for more than one resident without a license.

WAC 388-76-10005. As plaintiff Bell freely admits in her Petition that she is related to persons receiving her care:

> Bell is unemployed and has a small fixed monthly income on which she takes care of her two dependents – her young daughter who is home[-] schooled due to her needs[,] and her 81-year-old mother who is disabled and lives with Bell.

*Petition at 32*. Plaintiff Bell does not produce a license that would allow her to operate an Adult Family Home; but even if she did, her mother and daughter, "related by blood, adoption, or marriage," would not qualify as "residents:"

> "Resident" means any adult living in the adult family home and who is unrelated to the provider and who receives personal or special care from the adult family home.

WAC 388-76-10000. There is simply no possible circumstance under which plaintiff Bell could violate Chapter 388-76 WAC by abandoning care of her mother and child.

We sympathize with plaintiff Bell's financial problems; however, defendant Schupp did not file the action for which discretionary review is sought, she merely defended herself and her property from Bell's claims. Plaintiff Bell has provided no relationship between her financial situation and attorney fees incurred. RCW 7.28.083(3) does ***not*** authorize consideration of financial need; the Court should disregard her arguments.

**ATTORNEY FEES GENERALLY:** Plaintiff Bell's argument to restore an award of attorney fees and costs is pendant upon her argument to restore trial court judgment in her favor, and would otherwise violate precedent established by Division 2:

> The plain language of RCW 7.28.083(3) allows an award of attorney fees only in an action asserting title to real property, not in an action asserting a property interest but no title. We cannot rewrite the statute by disregarding this language. Because a prescriptive easement claim does not actually assert title to property, RCW 7.28.083(3) does not apply to McColl's prescriptive easement lawsuit.

*McColl v. Anderson*, 6 Wash.App.2d 88, 92-93, 429 P.3d 1113 (2018). In 2021, Division 1 of the Court of Appeals determined that "the language in Workman suggesting that a party who asserts only a prescriptive easement claim is entitled to attorney fees under RCW 7.28.083(3) is dicta." *Southwest Suburban Sewer District v. Fish*, 17 Wash.App. 2d 833, 841, 488 P.3d 839 (2021); citing *Workman v. Klinkenberg*, 6 Wash.App. 2d 291, 305, 430 P.3d 716 (2018).

Hence, the appellate decision reversing the award of attorney fees in the present case is correct because, as yet, plaintiff Bell has prevailed only upon prescriptive easement claims, and defendant Schupp should prevail on adverse possession claims, defending her title to real property.

Plaintiff Bell also requests an award of attorney fees and costs under the frivolous defense statute, RCW 4.84.185. This Court has held that defenses must be frivolous in their entirety to support an award under said statute:

> The lawsuit or defense, in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorneys' fees may be made pursuant to the frivolous lawsuit statute, RCW 4.84.185.

*Biggs v. Vail*, 119 Wash.2d 129, 133, 830 P.2d 350 (1992). Defendant Schupp's defenses against adverse possession claims were not frivolous in their entirety as exemplified by prevailing on summary judgment. *CP 110.*

Finally, it is not clear whether Bell's request seeks attorney fees under RAP 18.1 for the present petition; however, Washington Courts hold that unlicensed *pro se* litigants are not entitled to such awards. *Price v. Price*, 174 Wash.App. 894, 905, 301 P.3d 486 (2013).

Plaintiff Bell asks the Court "to hold her pro se pleadings to less stringent standards than formal pleadings drafted by attorneys," citing *Haines v. Kerner*, 404 U.S 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (197[2]). This relaxed federal standard does not apply to *pro se* petitioners in Washington Courts:

> Despite the noncompliance with our procedural requirements, Rhem urges us to "liberally" construe his statement because he was a pro se petitioner. . . . He relies on federal case law to support a more relaxed pleading standard. However, in our cases, we have established a stricter approach that pro se petitioners must comply with applicable rules and statutes and, importantly, we hold them to the same standard as an attorney.

*Matter of Rhem*, 188 Wash.2d 321, 328, 394 P.3d 367 (2017).

## III. CONCLUSION

The appellate decision in *Bell v. Schupp* should be affirmed because the trial court's entry of judgment as a matter of law denied defendant Schupp a fundamental right to be heard before her case was dismissed. There is clear evidence on the record that excluded testimony would have undermined the evidence upon which the trial court relied in reaching its decision. The Declarations of Frederick Price, Rhonda Huss, and Frederick Hayes, which contradicted Norman Hayes' testimony, are not excluded hearsay, they are in-court statements of observed fact.

Plaintiff Bell's argument fatally misconstrues the divergent purposes, and rules governing, summary judgment and trial. Her arguments of uncontrovertable evidence are entirely unsupported by citations to the record, most likely because the record does not support her conclusions. Her attempt to supplement the record now with exhibits in violation of Court rules must not be allowed.

The Court of Appeals decision provided ample support for reversal of the trial court decision, based upon existing precedent. Plaintiff Bell fails to show either clear error, or an intervening change in law. Contrary to plaintiff Bell's argument, the elements of prescription and adverse possession not the same; rather, she failed to prove the element of exclusivity required for adverse possession.

Plaintiff Bell's argument confuses Appellate Court findings and conclusions with her own averments and arguments. The Court of Appeals did ***not*** find that her and her predecessor's maintenance was sufficient to establish adverse possession.

Plaintiff Bell mis-describes her property as an Adult Family Home under the Washington Administrative Code, but she does not provide care for more than one unrelated adult. Therefore, the appellate decision will not result in "abandonment" of her mother under the Code.

There is no basis to award attorney fees to defendant Bell because the governing statute is limited to actions asserting title to real property, not merely the right to use. Neither does the frivolity statute apply because defendant's argument against adverse possession, which prevailed at summary judgment, is clearly not frivolous in its entirety.

Of course, plaintiff Bell is a *pro se* litigant representing herself; hence, RAP 18(j) is not available. Nor should the Court hold her pleadings to a relaxed standard under the Washington rule which holds her to the same standard as an attorney.

According to word processing software, the certified count is 4454 words in this document.

**DATED** this 11th day of October, 2024

ERIKSON & ASSOCIATES, PLLC
Attorney for defendant/respondent Schupp

By: _____
Mark A. Erikson, WSBA #23106

**CERTIFICATE OF SERVICE**

**Supreme Court No. 1035080**

**Court of Appeals No. 866303 – Division I**

I certify that on October 14, 2024, I caused a true and correct copy of the foregoing Answer to Petition for Review to be served on the following in the manner indicated below:

**Respondent:**

| | |
|---|---|
| Anna Bell<br>4400 NE 399th Street<br>La Center, WA 98629 | (X) US Mail<br>( ) Hand Delivery |
| **E-mail: abarsukova@gmail.com** | (X) E-mail, as agreed by recipient |

**DATED** this 14th day of October, 2024

By: Kris Eklove
Kris Eklove

# ERIKSON & ASSOCIATES, PLLC

## October 14, 2024 - 1:49 PM

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