No. 389189

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KIEMLE & HAGOOD COMPANY, a Washington Corporation, authorized agent for ST. CLOUD APARTMENTS,

Plaintiff/Respondent,

v.

MARIAM P. DANIELS aka PHOEBE DANIELS, a single person, and all other subtenants,

Defendant/Appellant.

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL

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I. INTRODUCTION

The Washington Law Against Discrimination (WLAD) and the federal Fair Housing Act Amendments of 1988 (FHAA) both protect people with disabilities from discrimination in housing. These protections include prohibiting landlords from denying requests for reasonable accommodations by tenants with disabilities.

Although these state and federal protections have existed for many years, there is little case law that addresses a key issue in this case: When may a landlord require a tenant who requests a reasonable accommodation to provide third-party verification of the tenant's disability and the nexus between the tenant's disability and the requested accommodation?

The Attorney General urges the Court to hold that when a tenant's disability is known or obvious and the nexus between a tenant's disability and a requested accommodation is readily apparent, a landlord may not request third-party verification from the tenant. This rule is consistent with guidance from state and

federal agencies, as well as the purposes of the WLAD and the FHAA.

In this case, Appellant Phoebe Daniels told her landlord's employees that she had difficulties with her back, and provided her landlord with medical records that confirmed she had impairments that meet the broad definition of a disability under the WLAD. To be sure, medical records are not necessary in most cases to confirm that a person has a disability for the purposes of requesting a reasonable accommodation from a landlord. However, by voluntarily providing such records here, Ms. Daniels clearly demonstrated that she has disabilities. What is more, a reasonable factfinder could have found that the nexus between Ms. Daniels's disabilities and the need for her requested accommodation was readily apparent to her landlord, which would have obviated any need for third-party verification regarding such a nexus. At a minimum, this question should not have been summarily resolved against Ms. Daniels by the trial court, but should have been left to a jury to decide.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General's statutory powers include the submission of amicus briefs on matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). The Attorney General has a strong interest in ensuring the correct interpretation of the statutes it enforces on behalf of the state. The Attorney General also has an interest in protecting the public interest, including the public's right to be free from unlawful discrimination. *See City of Seattle v. McKenna*, 172 Wn.2d 551, 560-62, 259 P.3d 1087 (2011) (Attorney General's "powers and duties" include "discretionary authority to act in any court, state or federal, trial or appellate, on a matter of public concern") (internal quotation marks omitted); RCW 49.60.010 (legislative finding that discrimination "threatens not only the rights and proper privileges of [state] inhabitants but menaces the institutions and foundation of a free democratic state").

In particular, as relevant here, the Attorney General has a strong public interest in combatting discrimination in housing, including discrimination against people with disabilities. This case considers when a landlord may require that a tenant provide third-party verification of a request for reasonable accommodations based on disability. It raises issues of significant public interest, including the scope of laws protecting Washington residents.

III. ISSUES ADDRESSED BY AMICUS

Amicus will address whether a landlord may require a tenant who requests an accommodation in housing due to a disability to provide third-party verification if the tenant's disability and the nexus between the disability and the requested accommodation is known or obvious.

IV. STATEMENT OF THE CASE

In December 2021, Ms. Daniels received a notice from her landlord, Respondent Kiemle & Hagood Co., to quit and vacate her apartment in Spokane due to alleged waste, nuisance, and/or

unlawful activity. The landlord commenced an unlawful detainer action against Ms. Daniels on January 10, 2022, in Spokane County Superior Court. CP 1-146.

On February 11, 2022, Ms. Daniels submitted a request for reasonable accommodation to her landlord. CP 172-74. The request stated that Ms. Daniels was 80 years old and had several significant disabilities and medical conditions, including degenerative disc disease, thyroid disease, high blood pressure, hypoglycemia, and incontinence. CP 173. She also indicated that she had lost eight inches of height over the years and currently stands at 4' 6". *Id.* She asserted that she had very limited strength and became fatigued very quickly and could no longer safely lift or carry more than 20 pounds at a time. *Id.*

Ms. Daniels asserted that her disabilities impacted her ability to perform basic housekeeping tasks and prevented her from lifting, moving, or unpacking boxes that had been stacked in her apartment by her movers when she first moved into the apartment. CP 173-74. As a reasonable accommodation,

Ms. Daniels requested that the landlord rescind the eviction notices, dismiss the unlawful detainer action, and allow Ms. Daniels to continue her tenancy and avoid homelessness. CP 172. She indicated that she was making the request to "give her time to obtain assistance in addressing the concerns raised by K&H in the pending unlawful detainer action." *Id.* Her request also indicated that her attorney would be working to help her find a resource to assist her with unpacking boxes and housekeeping. CP 174.

The trial court conducted a show cause hearing on February 14-15, 2022, where Ms. Daniels offered medical records that confirmed she had degenerative disc disease throughout her spine, was markedly kyphotic,[1] had lost several inches of height, and suffered from hypothyroidism and hypertension. Ex. D-2. As Ms. Daniels has noted in her briefing,

[1] Kyphosis is the "exaggerated outward curvature of the thoracic region of the spine resulting in a rounded upper back." *Kyphosis*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/kyphosis.

the landlord's employees also testified that Ms. Daniels had informed them of her issues with her back and difficulty unpacking boxes. App. Br. at 34; App. Reply at 16-17.

Following the show cause hearing, the trial court issued an oral ruling in favor of the landlord. RP 184-212. In a written order issued on March 18, 2022, the trial court made the following findings of fact regarding Ms. Daniels's request for reasonable accommodations:

> Defendant[']s counsel proffered Plaintiff with a portion of Defendant's medical records immediately before hearing as purported verification of Defendant's disability status and nexus between disability and Defendant's request to rescind all prior notices and dismiss this action as a reasonable accommodation. The medical records are not conclusive nor dispositive of Ms. Daniels['s] disability status or need for accommodation. Defendant failed to provide any third party verification of Defendant's disability or nexus.

CP 215.

The trial court also made the following conclusions of law regarding Ms. Daniels's request for reasonable accommodations:

> Evidence presented failed to substantiate Plaintiff had knowledge or regarded the Defendant as a disabled person.

> Evidence presented failed to indicate a need for accommodation of a disability was apparent or obvious to Plaintiff. Plaintiff is entitled to third party verification of Defendant's request for accommodation. Defendant's request to rescind all past notices issued and dismiss this action is not reasonable in light of Defendant's past conduct.

CP 217-18. The trial court denied Ms. Daniels's motion for reconsideration (CP 282-83), and this appeal followed. Ms. Daniels was evicted from her home on April 5, 2022. CP 277.

V. ARGUMENT

A. Both Federal and State Law Require Landlords to Grant Requests for Reasonable Accommodations by Tenants with Disabilities

1. Federal Fair Housing Act Amendments

In 1988, Congress amended the Fair Housing Act of 1968 to include protections for people with disabilities against discrimination in housing. These amendments are known as the Fair Housing Act Amendments of 1988, or "FHAA." Pub. L. No. 100-430, 102 Stat. 1619 (1988).

As relevant to this case, the FHAA makes it unlawful "to discriminate against any person in the . . . rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap . . . ." 42 U.S.C. § 3604(f)(2).[2] Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). The FHAA defines the term "handicap" as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." 42 U.S.C. § 3602(h).

[2] The Attorney General uses the term "handicap" only when it is a quote from the FHAA or related caselaw. The Attorney General recognizes that the term is outdated and offensive to the disability-rights community. Unless quoting text, the Attorney General will use the term "disability."

The FHAA is a "broad remedial statute" that "[c]ourts generously construe." *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994). The statute "imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons." *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994). Courts "interpret the FHAA's accommodation provisions with the specific goals of the FHAA in mind: 'to protect the right of handicapped persons to live in the residence of their choice in the community,' and 'to end the unnecessary exclusion of persons with handicaps from the American mainstream.'" *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1149 (9th Cir. 2003) (quoting *City of Edmonds*, 18 F.3d at 806).

2. Washington Law Against Discrimination

Since 1979, the Washington Law Against Discrimination (WLAD) has included protections for people with disabilities against discrimination in housing. *See* Laws of 1979, ch. 127. In 1993, the legislature amended the WLAD to explicitly include

requirements for reasonable accommodations in housing for people with disabilities. *See* Laws of 1993, ch. 69 § 5. Using language nearly identical to the FHAA, the WLAD makes it unlawful "[t]o refuse to make reasonable accommodation in rules, policies, practices, or services when such accommodations may be necessary to afford a person with the presence of any sensory, mental, or physical disability and/or the use of a trained dog guide or service animal by a person who is blind, deaf, or physically disabled equal opportunity to use and enjoy a dwelling." RCW 49.60.222(2)(b).

The WLAD's definition of "disability" is broader than the FHAA's definition of "handicap."[3] The WLAD's definition of

[3] The FHAA's definition of "handicap" is nearly identical to the definition of "disability" under the federal Americans with Disabilities Act, which Congress adopted two years after the FHAA. *See* 42 U.S.C. §12102(1). The Washington Supreme Court has noted that "[o]ur legislature has made it clear that the WLAD is broader than its federal counterpart, the Americans with Disabilities Act of 1990 (ADA), and we decline to use federal interpretations of the ADA to constrain the protections offered by the WLAD." *Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 617, 444 P.3d 606 (2019).

disability is "the presence of a sensory, mental, or physical impairment that: (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact." RCW 49.60.040(7)(a). Unlike the FHAA, the WLAD also specifies that "[a] disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or . . . limits any other activity within the scope of this chapter." RCW 49.60.040(7)(b).

The WLAD further provides that "[o]nly for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact . . . ." RCW 49.60.040(7)(d). The WLAD does not include a similar requirement for qualifying for a reasonable accommodation in housing.

Like the FHAA, the WLAD "is a broad remedial statute evidencing the Legislature's desire to confront many forms of discrimination." *Bennett v. Hardy*, 113 Wn.2d 912, 927,

784 P.2d 1258 (1990). The Legislature has specified that the provisions of the WLAD "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

B. Third-Party Verification May Not Be Requested by a Landlord When a Disability Is Known or Obvious and the Need for the Requested Accommodation Is Readily Apparent

Both the FHAA and the WLAD prohibit landlords from denying requests for reasonable accommodations by tenants with disabilities. Neither statute specifies whether (or if so, under what circumstances) a landlord may request that a tenant provide third-party verification of the tenant's disability or need for accommodation. To provide guidance on this question and other issues arising under the FHAA, the U.S. Department of Housing and Urban Development and the U.S. Department of Justice issued a joint statement in 2004 to provide "technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the [Fair Housing] Act relating to reasonable accommodations." Joint Statement of the Dep't of Housing & Urban Dev. & the Dep't of Justice, *Reasonable*

Accommodations Under the Fair Housing Act, at 1-2 (May 17, 2004) (hereinafter "Joint Statement").[4]

Among other issues, the Joint Statement addresses "[w]hat kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable accommodation" *Id.* at 12. The Joint Statement provides the following guidance:

> A provider is entitled to obtain information that is necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information about the requester's disability or the disability-related need for the accommodation.

Id. at 12-13. The Joint Statement also explains that "[i]f the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider may request only information

[4] The Joint Statement is attached as an appendix to Appellant's Opening Brief.

that is necessary to evaluate the disability-related need for the accommodation."[5] *Id.* at 13.

The Joint Statement is a statement of policy by the two federal agencies that are responsible for enforcing the FHAA.[6] *Id.* at 1. The Eleventh Circuit has noted that the Joint Statement is "entitled to respect to the extent it has the power to persuade." *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1286 n.3 (11th Cir. 2014) (internal quotation marks omitted).

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[5] The Joint Statement also provides three examples to illustrate the application of this rule. *Id.* at 13. As Appellant notes, "[t]hese examples are in no way an exhaustive and exclusive list – but rather, an illustrative sample of situations where the physical disability and disability-related need for the accommodation are readily apparent." App. Reply at 16.

[6] The Washington State Human Rights Commission also provides guidance on its website regarding verification that may be requested under the federal FHAA when a tenant requests an accommodation based on disability. The guidance states: "If a person has a visible disability and their request is reasonably tied to their disability, then ***no further verification is needed***. However, if the disability is not obvious, or the connection between the disability and what the person with the disability is requesting is not clear, then additional verification may be necessary." Wash. State Hum. Rts. Comm'n, *Disability in Housing* (emphasis added), www.hum.wa.gov/fair-housing/disability-housing (last visited Jan. 4, 2023).

Here, the Joint Statement's position that landlords may not ask tenants for third-party verification when the tenant's disability and need for a requested accommodation are known or obvious should be treated as highly persuasive and as a correct interpretation of the FHAA. Indeed, both parties in this matter rely on the Joint Statement to support their positions.

When a tenant's disability and need for a requested accommodation are known or obvious, no legitimate purpose is served when a landlord requests third-party verification from the tenant of their disability or their need for accommodation. Such requests only serve to impose needless burdens on tenants with disabilities, who are disproportionately likely to be low-income and to face barriers in obtaining such documentation. *See, e.g.*, Nat'l Council on Disability, *Highlighting Disability/Poverty Connection, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities* (Oct. 26, 2017), https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release (reporting that "[p]eople with

disabilities live in poverty at more than twice the rate of people without disabilities").

In addition, as the Joint Statement notes (and as Respondent acknowledges), "it is usually unlawful [under the FHAA] for a housing provider to . . . ask about the nature or severity" of a tenant's disabilities. Joint Statement at 11; Resp. Br at 46. As a result, efforts by a landlord to request unnecessary information about a tenant's disabilities in response to a reasonable accommodation request are improper.

Furthermore, a landlord's requests for unnecessary information or third-party verification may be used improperly to delay addressing a tenant's accommodation request, which can result in a constructive denial of the request. *See, e.g.*, *Bhogaita,* 765 F.3d at 1287 (finding constructive denial of a condominium resident's accommodation request where condominium association demanded "extraneous information" and noting "[g]enerally, housing providers need only the information necessary to apprise them of the disability and the desire and

possible need for an accommodation"). As the Joint Statement recognizes, "[a]n undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation." Joint Statement at 11.

As Appellant notes, there are few cases that have considered the Joint Statement's position that third-party verification may not be requested by a landlord when a tenant's disability and need for accommodation are known or obvious. However, those courts that have considered the Joint Statement have followed its interpretation that third-party verification or additional information may not be requested from a tenant in such cases. *See, e.g.*, *Sabal Palm Condos. of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272, 1286 (S.D. Fla. 2014) (citing Joint Statement for the proposition that "[i]t is only when either the requestor's disability or the disability-related need for the accommodation are not obvious that the provider may request reliable qualifying-disability or nexus information"); *Sanzaro v. Ardiente Homeowners Ass'n LLC*, 21 F. Supp. 3d 1109, 1117

(D. Nev. 2014) (same). Amicus has not identified any case in which a court declined to follow the Joint Statement's interpretation of the law on this point.

Therefore, amicus urges the Court to follow the Joint Statement's guidance that "[i]f a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information about the requester's disability or the disability-related need for the accommodation." Joint Statement at 12-13.

This rule is not only a correct interpretation of the federal FHAA, but should be equally applicable under the WLAD. As noted above, the WLAD's provision that prohibits landlords from denying requests for reasonable accommodations by tenants with disabilities is nearly identical to the FHAA's requirement. *Compare* RCW 49.60.222(2)(b) *with* 42 U.S.C. § 3604(f)(3)(B); *see also Wash. State Hum. Rts. Comm'n v. Hous. Auth. of City of Seattle*, 21 Wn. App. 2d 978,

987, 509 P.3d 319 (2022) (noting that the language of these provisions in the WLAD and FHAA are "virtually identical").

To be sure, the WLAD's definition of the term "disability" is broader than the FHAA's definition of the term "handicap." For example, the WLAD's definition of "disability" includes sensory, mental, or physical impairments that are "medically cognizable or diagnosable," while the FHAA's definition of "handicap" includes "a physical or mental impairment which substantially limits one or more of [a] person's major life activities." RCW 49.60.040(7)(a)(i), 42 U.S.C. § 3602(h)(1). Because the WLAD's more expansive definition of "disability" reflects a decision by the Legislature to provide greater protections to people with disabilities in housing than the FHAA, the WLAD should provide at least as much protection as the FHAA against unnecessary third-party verification requests when a tenant requests a reasonable accommodation from their landlord. The WLAD's broader definition of disability would also likely mean that a broader range of disabilities would be

known or obvious to a landlord when a tenant requests a reasonable accommodation.[7]

In addition, as noted above, the WLAD includes a provision that "[o]nly for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact . . . ." RCW 49.60.040(7)(d). The WLAD includes no similar requirement for qualifying for a reasonable accommodation in housing or any other context. The Legislature's choice to include such specific requirements for qualifying for an accommodation

[7] The Washington State Human Rights Commission has issued guidance regarding the WLAD that addresses the question "[c]an a person self-diagnose a disability, that is to say, decide for themselves that they have a disability." Similar to the Joint Statement's interpretation of the FHAA, the Commission's guidance notes that while "medical diagnosis is one excellent way" of determining whether a disability is medically cognizable, "[s]ome disabilities, such as blindness, deafness, or paraplegia, are self-evident." Wash. State Hum. Rts. Comm'n, *Guide to Disability & Washington State Nondiscrimination Laws: Frequently Asked Questions & Answers*, at 5 (2012), available at www.hum.wa.gov/sites/default/files/public/publications/Disability%20Q%20and%20A.pdf.

in the employment context while not including similar requirements in the housing context indicates that the Legislature did not intend to require tenants with disabilities who seek accommodation for a disability to be subject to the same requirements as people who seek accommodation for a disability in employment. *See, e.g.*, *Perez Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 680, 389 P.3d 476 (2017) ("[W]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions. And where the legislature includes particular language in one section of a statute but omits it in another, the exclusion is presumed intentional.") (internal citations and quotation marks omitted).

As applied to the facts here, there should be little question that Ms. Daniels has disabilities as the term is broadly defined by the WLAD. Given the testimony of several of the landlord's employees that they knew of Ms. Daniels's difficulties with her back, there should have been no dispute as to whether her

disabilities were known or obvious to her landlord when she initially made her accommodation request. Even if there had been such a dispute, Ms. Daniels subsequently provided medical records that confirmed that she has degenerative disc disease, as well as kyphosis, hypertension, and hypothyroidism. These are physical impairments that are medically cognizable or diagnosable and meet the WLAD's definition of a disability. *See* RCW 49.60.040(7)(a)(i). While the Joint Statement correctly notes that medical records are not necessary in most cases to verify a disability (*see* Joint Statement at 14), nothing in the WLAD or FHAA prohibits a tenant from voluntarily providing such information to a landlord in supporting a reasonable accommodation request.

The next question is whether the nexus between Ms. Daniels's disabilities and the need for her reasonable accommodation request should have been known or obvious to the landlord. The requested accommodation sought dismissal of the unlawful detainer action in order to provide Ms. Daniels with

time to obtain assistance with unpacking boxes and housekeeping. As Ms. Daniels notes, a factfinder could have determined that it was readily apparent to her landlord that she was unable due to her disabilities to lift or move the heavy boxes that had been stacked in her apartment by her movers. *See* App. Br. at 35-38. Nonetheless, the trial court held that "[e]vidence presented failed to indicate a need for accommodation of a disability was apparent or obvious to [the landlord] and that the landlord "is entitled to third[-]party verification of [Ms. Daniels's] request for accommodation." CP 217-18. But the question of whether it should have been known or obvious to the landlord that Ms. Daniels needed the requested accommodation due to her disabilities was a disputed question of fact and should not have been resolved by the trial court against Ms. Daniels at a show cause hearing. *See, e.g.*, *Webster v. Litz*, 18 Wn. App. 2d 248, 254, 491 P.3d 171 (2021) (noting that under RCW 59.18.380, "[i]f issues of material fact exist, the matter must proceed to trial in the 'usual manner'");

see also Kuhn v. McNary Ests. Homeowners Ass'n, 228 F. Supp. 3d 1142, 1150 (D. Or. 2017) ("Whether an accommodation is necessary is a question of fact."); *McGary v. City of Portland*, 386 F.3d 1259, 1261-64 (9th Cir. 2004) (resident with a disability entitled to "fully developed record" on FHAA claim before city may deny his accommodation request for more time to clean his yard before incurring charges for violating the city's nuisance abatement ordinance).

VI. CONCLUSION

For the foregoing reasons, amicus urges the Court to hold that under the FHAA and the WLAD, a landlord may not require third-party verification of a tenant's disability and need for an accommodation if the tenant's disability is obvious or otherwise known to their landlord, and if the need for the requested accommodation is also readily apparent or known. Such a holding would be consistent with existing federal and state guidance and would help to ensure that tenants are not forced to

provide unnecessary verification to support requests for reasonable accommodations in housing.

Amicus also agrees with Appellant Phoebe Daniels that the trial court erred by holding that she was required under the facts of this case to provide third-party verification of her disabilities and the nexus between her disabilities and her requested accommodation. The landlord's employees testified that they knew of Ms. Daniels's difficulties with her back, and Ms. Daniels had already voluntarily provided medical records that confirmed that she had several disabilities, precluding any further documentation request on that issue. And at a minimum, the question of whether it should have been known or obvious to the landlord that there was a nexus between Ms. Daniels's disabilities and her requested accommodation was a question of fact that should not have been resolved by the trial court against Ms. Daniels at a show cause hearing, but instead should have been considered at trial.

This document contains 4,380 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the Court of Appeals, Division III, using the Washington Appellate Courts' Portal e-filing system. I certify that I caused the foregoing document to be served via the Courts' Portal on the following recipients:

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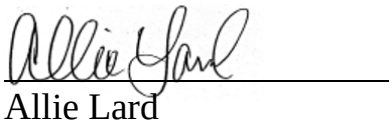

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