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DIVISION II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

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NO. 39776-5-II

**Appeal from the Superior Court for Mason County
Cause No. 09-2-00338-0**

CHRISTIAN DOSCHER,

Appellant,

v.

STATE OF WASHINGTON AND THURSTON COUNTY,

Respondents.

THURSTON COUNTY'S RESPONSE BRIEF

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Appellant's claims are beyond the statute of limitations.
2. Whether Appellant failed to exercise due diligence in pursuing his claims.
3. Whether Appellant failed to exercise his rights under RCW 10.97.080.
4. Whether there was a continuing course of conduct by Respondent.
5. Whether Appellant failed to establish a claim for fraud.
6. Whether Appellant was disabled within the meaning of RCW 4.16.190 for purposes of tolling the statute of limitations.
7. Whether the Thurston County Superior Court records in Appellant's criminal case are admissible in Appellant's civil case.
8. Whether Appellant has a claim for breach of contract.

II. STATEMENT OF THE CASE.

On December 21, 1988, Deputy Prosecuting Attorney Rod Franzen filed an information in Thurston County Superior Court charging the Appellant, Christian Doscher, with the felony of Possession of Stolen Property in the First Degree in Thurston County Superior Court Cause No. 88-1-00706-7. CP 42 Declaration of David Klumpp Exhibit No. 1.

On January 24, 1990, Deputy Prosecutor Franzen filed an amended information reducing the charge against Mr. Doscher to Possession of Stolen Property in the Third Degree, a misdemeanor. CP 42

Declaration of David Klumpp Exhibit No. 2.

On January 24, 1990, in exchange for a recommendation from Deputy Prosecutor Franzen of a deferred sentence and credit for time served, Mr. Doscher entered a plea of guilty to the charge of Possession of Stolen Property in the Third Degree and Mr. Doscher was sentenced by Thurston County Superior Court Judge Doran. CP 42 Declaration of David Klumpp Exhibits Nos. 3 and 4.

An Order of Dismissal in Mr. Doscher's criminal case was entered on April 27, 1990. CP 42 Declaration of David Klumpp Exhibits No. 5 and 6.

Sometime in 1990 Mr. Doscher became aware that the Washington State Patrol records indicated that he was guilty of a felony and Mr. Doscher made "multiple efforts to fix this error." CP 42 Declaration of David Klumpp Exhibit No. 7.

Mr. Doscher states in paragraph 6 of his First Amended Complaint that a "Thurston County Clerk informed them (the Washington State Patrol) on or about April 27, 1990 that the January 24, 1990 conviction was not only a misdemeanor, but was also dismissed." CP 10.

Nineteen years later, on March 31, 2009, Mr. Doscher filed his original complaint against the State of Washington and Thurston County.

III. ARGUMENT

A. Standard of Review.

Appellate review of summary judgment is de novo; the reviewing court engages in the same inquiry as the trial court and views the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). Where the moving party brings forth admissible evidence supporting its claimed absence of any issue of material fact, the "adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." CR 56(e)

B. Appellant's Claims Are Beyond the Statutes of Limitations.

In paragraph 7 of his Amended Complaint, Mr. Doscher indicates that he is suing the State of Washington and the County of Thurston for "the torts of defamation, outrage, fraud and gross negligence."

Mr. Doscher's claims for outrage, fraud and negligence are subject to a three year statute of limitations under RCW 4.16.080. Mr. Doscher's claim for defamation is subject to a two year statute of limitations under

RCW 4.16.100.

The purpose of the statutes of limitations is to shield defendants and the judicial system from stale claims. *Douchette v. Bethel School District*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). When plaintiffs sleep on their rights, evidence may be lost and witness' memories may fade. *Douchette*, 117 Wn.2d at 813.

Mr. Doscher admits that he had knowledge of the facts that form the basis for his claims back in 1990. In his Claim for Damages dated 9-2-08 Mr. Doscher alleges that "The Court Clerk falsely reported my 1-24-90 misdemeanor conviction to the Washington State Patrol as a felony. My multiple efforts to fix this error, in 1990, didn't work." CP 42 Declaration of David Klumpp Exhibit No. 7.

On April 28, 2009, Respondent Thurston County propounded Interrogatories and Requests for Production to Mr. Doscher. In Interrogatory No. 10, Respondent Thurston County asked Mr. Doscher to state specifically each and every action he took "to fix this error" in 1990. Mr. Doscher responded as follows:

After first hearing about this in 1990, I contacted the Thurston Court clerk, who acknowledged that SCOMIS incorrectly showed a felony, but she didn't know how to answer the question, told me this not correctable by a Court Clerk, and refused to discuss possible solutions, fearing she'd be giving legal advice.

I then went to Washington State Patrol, also in 1990 and told them to correct this error. They said the charging document shows felony, they cannot do anything about it, and refused to give more advice via fear it would be legal advice.

I then consulted my original public defender William Kopp, also in 1990, and he said I was reporting a civil rights violation, and declined to advise on the grounds that this was not the area of law he practiced.

I then inquired of Rodney Franzen in 1990, the original deputy prosecutor on this case, and he said he could not force WSP to change their records, and declined further advice due to the clear conflict of interest.

I then went to Edward Holms, also in 1990, to inquire how to fix this error, and he said the same thing as Franzen: he had no legal authority to change information in Washington State Patrol Records.

I then went to private Attorney William W. Messer, in 1991, to inquire about this, and he was unable to supply a solution, except to say that I should keep trying. I hired him later in 1997 to file my chapter 13 bankruptcy in Tacoma. He is now deceased.

I then inquired of an Olympia-based attorney in 1990, whose name I cannot recall, who said the same as Messer.

I made various future attempts through the years to fix this error, with the Thurston County Court clerk giving the same answer they gave in 1990 and with WSP following suit.

CP 42, Declaration of David Klumpp, Exhibit 8.

Mr. Doscher admits that he knew in 1990 that the Washington State Patrol records showed that he had a felony offense rather than a

misdemeanor offense and that he made attempts to resolve the problem. Mr. Doscher alleges in his Amended Complaint that on or about February 23, 1990, that a Thurston County Clerk sent a falsified court order to the Washington State Patrol. Mr. Doscher further states in his Amended Complaint that on or about April 27, 1990, a Thurston County Court Clerk informed the Washington State Patrol that the January 24, 1990 conviction was not only a misdemeanor, but was also dismissed. CP 10.

The actions of Thurston County employees that could be the basis of Mr. Doscher's claims had all occurred by April 27, 1990. Consequently, Plaintiff's claim for defamation had to be brought no later than April 27, 1992, and his other claims had to be brought no later than April 27, 1993.

1. APPELLANT FAILED TO EXERCISE DUE DILIGENCE IN PURSUING HIS LEGAL CLAIMS.

Mr. Doscher is asking this Court to apply the discovery rule and find that the statute of limitations does not start running until July 15, 2008, when he obtained a copy of the erroneous court order from the Washington State Patrol. Appellant's brief, page 23.

If the discovery rule applies, the statute of limitations runs from the time that Mr. Doscher in the reasonable exercise of diligence should have discovered the elements of his cause of action. *Green v. A.P.C.*, 136

Wn.2d 87, 95, 960 P.2d. 912 (1998). "In determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action." A court must consider the goal of the common law "to provide a remedy for every genuine wrong" while recognizing, at the same time, that "compelling one to answer stale claims in the courts is in itself a substantial wrong." *1000 Virginia Ltd. P'ship v. Vertics*, 158 Wn.2d 566, 579, 146 P.3d 423 (2006), (internal citations omitted).

The discovery rule requires that "when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered." A person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose. *1000 Virginia Ltd. P'ship v. Vertics*, 158 Wn.2d at 581(internal citations omitted).

Mr. Doscher knew in 1990 that the Washington State Patrol records indicated that his 1990 conviction was for a felony. In paragraph IV of his Amended Complain for damages Mr. Doscher claims that between March of 1990 and July of 2008 he was deprived of the right to vote, sit on a jury, own a hand gun, be free from unlawful police searches

and was unable to get and retain employment. CP 10. Under those circumstances, no reasonable person would have waited nineteen years to obtain a copy of the Washington State Patrol's records.

A party must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations. *Reichelt et al v. Johns Mansville Inc et al*, 107 Wn.2d 761, 772, 773 P.2d 530 (1987).

2. APPELLANT FAILED TO EXERCISE HIS RIGHTS UNDER RCW 10.97.080.

Mr. Doscher admits that he was aware in 1990 that the Washington State Patrol records indicated that he was convicted of a felony in Thurston County. Pursuant to chapter 10.97 RCW, Mr. Doscher could have requested to see the Washington State Patrol records and could have challenged the accuracy of those records.

RCW 10.97.080 provides as follows:

All criminal justice agencies shall permit an individual who is, or who believes that he may be, the subject of a criminal record maintained by that agency, to appear in person during normal business hours of that criminal justice agency and request to see the criminal history record information held by that agency pertaining to the individual. The individual's right to access and review of criminal history record information shall not extend to data contained in intelligence, investigative, or other related files, and shall not be construed to include any information other than that defined as criminal history record information by this chapter.

Every criminal justice agency shall adopt rules and make available forms to facilitate the inspection and review of criminal history record information by the subjects thereof, which rules may include requirements for identification, the establishment of reasonable periods of time to be allowed an individual to examine the record, and for assistance by an individual's counsel, interpreter, or other appropriate persons.

No person shall be allowed to retain or mechanically reproduce any nonconviction data except for the purpose of challenge or correction when the person who is the subject of the record asserts the belief in writing that the information regarding such person is inaccurate or incomplete. The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying of nonconviction data for any other purpose.

The Washington state patrol shall establish rules for the challenge of records which an individual declares to be inaccurate or incomplete, and for the resolution of any disputes between individuals and criminal justice agencies pertaining to the accuracy and completeness of criminal history record information. The Washington state patrol shall also adopt rules for the correction of criminal history record information and the dissemination of corrected information to agencies and persons to whom inaccurate or incomplete information was previously disseminated. Such rules may establish time limitations of not less than ninety days upon the requirement for disseminating corrected information.

Emphasis added.

If the Washington State Patrol refused to let the Mr. Doscher see his records or refused to provide him an opportunity to challenge the accuracy of those records, Mr. Doscher could have asked a superior court

judge to order the State Patrol to do so. Alternatively, Mr. Doscher could have simply asked a superior court judge to order the State Patrol to correct their records. The bottom line is that Mr. Doscher chose to do nothing between 1990 and 2009 when he filed this lawsuit.

3. THERE WERE NO ACTS OR OMISSIONS BY THURSTON COUNTY EMPLOYEES BEYOND 1990.

Mr. Doscher argues that he should be allowed to pursue his claim beyond the applicable statute of limitations under a theory of continuing course of conduct. Mr. Doscher relies primarily on employment law cases and none of the authority cited by the Plaintiff has any relevance to the issues before this Court.

After twenty years, it is a matter of speculation as to how the Washington State Patrol ended up with a different order than the one that is on file in the Thurston County Superior Court Clerk's Office. Assuming, for the sake of argument, that a Thurston County Superior Court Clerk's Office employee sent an incorrect copy of the Order of Probation to the Washington State Patrol, that error occurred in 1990. No new act or omission has occurred since 1990. Mr. Doscher in his amended complaint acknowledges that a Thurston County Court Clerk on or about April 27, 1990, informed the Washington State Patrol that Mr. Doscher's offense was only a misdemeanor and was also dismissed. CP

No new act or omission by any Thurston County employee occurred after April 27, 1990. To the extent that Mr. Doscher continued to be damaged beyond the applicable statute of limitations it is only because he failed to file a lawsuit or seek a court order to correct the problem. Mr. Doscher's failure to act or avail himself of his statutory remedy under RCW 10.97.080 does not create a continuing course of conduct on the part of Thurston County.

C. Appellant Has Failed To Meet The Elements Of A Cause Of Action For Fraud.

In a civil action, the nine elements of fraud are (1) representation of an existing fact, (2) materiality of the fact, (3) falsity of the fact, (4) the speaker's knowledge of the falsity of the fact, (5) the speaker's intent that the fact should be acted on by the person to whom the fact was represented, (6) ignorance of the fact's falsity on the part of the person to whom it is represented, (7) reliance on the truth of the factual representation, (8) the right of the person to rely on the factual representation, and (9) the person's consequent damage from the false factual representation. *Angelo v. Angelo*, 142 Wn. App. 622, 643, 175 P.3d 1096 (2008). To make a prima facie case for fraud, the Plaintiff bears the burden of proving all its nine elements by clear, cogent, and

convincing evidence. *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

Mr. Doscher has not named any individual defendants and has not identified by name who allegedly committed the fraud. Therefore, it is virtually impossible for Mr. Doscher to produce evidence of elements 4 and 5, the speaker's knowledge of the falsity of the fact and the speaker's intent that the fact should be acted on.

It is unclear whether Mr. Doscher is still arguing that the copy of his Order of Probation in the Washington State Patrol records was falsely completed by Judge Doran and Deputy Prosecuting Attorney Franzen. However, Mr. Doscher has produced no evidence to suggest that either Judge Doran or Mr. Franzen had knowledge that the Washington State Patrol had an erroneous court order and that either of them intended for the Washington State Patrol to act on a erroneous court order.

To claim that the judge and deputy prosecutor intended to commit fraud is at odds with the court records in Mr. Doscher's criminal case. An Amended Information signed by Deputy Prosecutor Franzen reducing the charge against Mr. Doscher to Possession of Stolen Property in the Third Degree and a Statement of Defendant on Plea of Guilty to Possession of Stolen Property in the Third Degree were filed on January 24, 1990. These documents clearly show that it was the intent of Judge Doran and

Deputy Prosecutor Franzen to convict and sentence Mr. Doscher for Possession of Stolen Property in the Third Degree. CP 42 Declaration of David Klumpp Exhibits No. 2 and 3.

Furthermore, Judge Doran is immune from civil damages suits for acts performed within his judicial capacity. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967); *Adkins v. Clark Cy.*, 105 Wn.2d 675, 717 P.2d 275 (1986); *Burgess v. Towne*, 13 Wn. App. 954, 538 P.2d 559 (1975); *cf. Pulliam v. Allen*, 466 U.S. 522, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984). “[A] judge will not be deprived of immunity because an action he took was in error, was done maliciously, or was in excess of authority; rather, he will be subject to liability only when he has acted in the ‘clear absence of all jurisdiction,’” *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

Deputy Prosecutor Franzen is also immune from liability. It is well established that a prosecutor who acts within the scope of his or her duties in initiating and pursuing a criminal prosecution is absolutely immune from liability. *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Mr. Doscher has failed to produce clear cogent and convincing evidence to meet the knowledge and intent element of civil fraud with regard to Judge Doran and Deputy Prosecutor Franzen. Even if he could

meet this and the other eight elements, both Judge Doran and Deputy Prosecutor Franzen are immune from civil liability. Furthermore, the public policy that provides immunity for judges and prosecutors extends to both the state and the county. *Creelman v. Swenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966).

It appears that Mr. Doscher is now alleging that some unnamed employee of the Thurston County Superior Court Clerk's Office knowingly sent an erroneous Order of Probation to the Washington State Patrol with the intent that the Washington State Patrol should act on the erroneous Order of Probation.

Mr. Doscher's allegations against this unnamed employee of the Thurston County Superior Court Clerk's Office is based entirely on speculation. Mr. Doscher's recollection of conversation with unidentified Clerk's Office employees is hearsay of the most unreliable kind and would be inadmissible at trial.

Mr. Doscher also claims that the County corrected its court file in 1990 and, therefore, knew that Order of Probation that was sent to the Washington State Patrol was false. Appellant's Brief at 44. Mr. Doscher has produced absolutely no evidence to support this claim that anyone named or unnamed ever corrected the Thurston County Superior Court file on his criminal case.

Mr. Doscher has the burden of proving all nine elements of fraud by clear, cogent and convincing evidence. When he cannot even identify the person that he alleges committed the fraudulent act, he fails to meet this burden.

Mr. Doscher argues that pursuant to RCW 4.16.080(4) he should be allowed to pursue his claims for fraud eighteen years after the allegedly fraudulent acts. RCW 4.16.080(4) contains an exception that “the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.” This has been interpreted to mean that “the statute of limitation for a damage action based on common law fraud does not commence to run until the aggrieved party discovers, or should have discovered, the fact of fraud by due diligence and sustains some actual damage as a result thereof.” *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 283, 864 P.2d 17 (1993).

Mr. Doscher acknowledges that he knew that his misdemeanor was mistakenly labeled as a felony in 1990, and that he was being damaged by the WSP’s dissemination of that information. As argued in Section B of this brief, Mr. Doscher either discovered or with reasonable diligence should have discovered facts sufficient to pursue his fraud claims in 1990. Therefore, Mr. Doscher’s cause of action for fraud is beyond the statute of

limitations.

D. Plaintiff Is Not Disabled Within The Meaning Of RCW 4.16.350

Mr. Doscher states that he has both Borderline Personality Disorder (BPD) and Functional Anxiety Disorder (FAD), and is apparently receiving Social Security Disability as a result of those conditions. Mr. Doscher argues that his action against Thurston County should be tolled due to his disabilities. Mr. Doscher's argument is based on RCW 4.16.260 which states as follows:

When two or more disabilities shall coexist at the time the right of action accrues, the limitation shall not attach until they all be removed.

Mr. Doscher has provided no legal authority to suggest that RCW 4.16.260 applies to his mental disorders. In fact, RCW 4.16.260 refers to legal disabilities as set forth in RCW 4.16.190 which provides as follows:

Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either **under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.**

RCW 4.16.190(1). Emphasis added.

Mr. Doscher is not disabled as a result of being under the age of eighteen nor is he being held in jail awaiting sentencing. Mr. Doscher has not provided any evidence to suggest that his mental disorders are so severe that he could not have understood the nature of the proceedings in this case or that he was incompetent or disabled according to chapter 11.88 RCW.

In order to toll the statute of limitations under RCW 4.16.190, there is a four factor test in which Mr. Doscher must show that (1) he is entitled to bring the action, (2) he was incapacitated at the time the cause of action accrues, (3) he is incompetent or disabled to the degree that he cannot understand the nature of the proceedings, and (4) the incompetency or disability exists as “determined according to chapter 11.88 RCW.” *Rivas v. Overlake Hosp. Medical Center*, 164 Wn.2d 261, 268, 189 P.3d 753 (2008). The above test is based on the pre-2006 wording of RCW 4.16.190, but the court said “The differences do not appear material” between the two laws, and in any event Plaintiff’s claim takes place before 2006. *Rivas*, at 265.

Mr. Doscher has provided no evidence to meet the last three factors. He has failed to allege or produce evidence that his mental disabilities existed at the time the cause of action accrued,

that he could not understanding the nature of the proceedings, and that he was disabled according to chapter 11.88 RCW.

E. The Thurston County Superior Court Records In Plaintiff's Criminal Case Are Relevant To Appellant's Claims Against Respondents.

Mr. Doscher argues that his conviction should not be admissible for any purpose. Thurston County agrees that his conviction cannot be used for impeachment purposes, but maintains that the court records in Mr. Doscher's criminal case are highly relevant and admissible for the purposes of defending the County against Mr. Doscher's claims. Mr. Doscher has made his entire criminal file relevant and admissible by filing this lawsuit.

F. Appellant Has No Claim for Breach of Contract.

Mr. Doscher's Amended Complaint contains no cause of action for breach of contract. Even if it did, any breach of contract claim related to the plea bargain would be between deputy prosecuting attorney Franzen and Mr. Doscher.

A prosecutor is obliged to fulfill the State's duty under the plea agreement by making the promised sentencing recommendation. *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). The Thurston County Superior Court record shows that in fact Mr. Franzen did amend the information to Possession of Stolen Property in the Third Degree and Mr.

Doscher did receive a deferred sentence as promised in the plea bargain. CP 42 Declaration of David Klumpp Exhibit No.2 and 4. Therefore, Mr. Doscher has no breach of contract claim.

IV CONCLUSION

It would be a substantially wrong to require Thurston County to defend against Mr. Doscher's claims twenty years after the court order in question was signed and entered. The individuals that were involved in Mr. Doscher's criminal case, cannot reasonably be expected to remember the details of a possession of stolen property charge that they dealt with twenty years ago.

Mr. Doscher is unable to identify the Thurston County Superior Court clerks with whom he discussed the problem with his criminal history. The judge in Mr. Doscher's criminal case, Judge Doran, retired in 1993. Rod Franzen, the deputy prosecutor handling the Plaintiff's criminal case, left the Prosecutor's Office in December of 1994. Will Kopp, Mr. Doscher's criminal defense attorney, has lived in Israel for at least the last 15 years. CP 42 Declaration of David Klumpp.

Mr. Doscher has failed to diligently pursue his claim. His claims are beyond any applicable statute of limitations and this Court should affirm the Trial Court's order granting the Thurston County's Motion for

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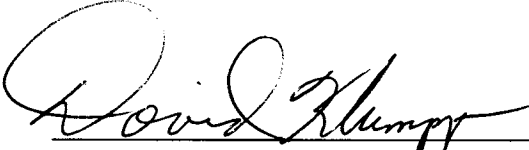
STATE OF WASHINGTON

BY Ca
DEPUTY

Summary Judgment.

Respectfully submitted this 18th day of June, 2010.

EDWARD G. HOLM
PROSECUTING ATTORNEY


DAVID KLUMPP, WSBA #10910
Chief Civil Deputy

A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s)

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: June 18, 2010

Signature: 