NO. 33537-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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WILL T. PAYNE,

Appellant/Plaintiff,

vs.

JOHN STACY RUEGSEGGER and SHARIE KAY RUEGSEGGER,

Respondents/Defendants.

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# BRIEF IN REPLY OF APPELLANT WILL T. PAYNE

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Michael J. Beyer, WSBA #9109
Attorney for Appellant

810 South Cannon Street
Spokane, Washington 99204-4353
(509) 499-1877

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## A. ARGUMENT IN REPLY

1. Overview. A simple, basic review of the arguments raised in the "brief of respondents," JOHN "STACY" and SHARIE KAY RUEGSEGGER, makes clear these assertions are either totally inapposite, untrue, not well-taken, or otherwise skirt the issues at hand in terms of responding to the legal and equitable basis supporting the appeal of WILL T. PAYNE. Simply put, respondents' brief does not in any sense rehabilitate the errors of the superior court in granting respondents' summary judgment motion while, in turn, denying Mr. PAYNE'S cross-motion for summary judgment. See, pages 8 through 26 of "respondents' brief.

As Mr. PAYNE reiterates below, there were at the very minimum genuine issues of material fact which only a jury could decide in terms of whether the RUEGSEGGERS were, in fact, free from any and all liability to Mr. PAYNE as recognized under established case law. See, CR 56©. For example, the RUEGSEGGERS' reliance upon the irrelevant fact there was "no acceleration clause" in the "Addendum" is nothing short of a classic "red herring." See, "respondents' brief, at pages 15 through 16. As discussed again below, the RUEGSEGGERS' breach of the parties' agreement had the net effect of accelerating the financial debt owed by them to Mr. PAYNE. In addition, their futile attempts suggesting on pages 17 through 21 of the "respondents' brief" that there was no enforceable contract flies in the face of the holding of the supreme court in

Hedges v. Hurd, 47 Wn.2d 683, 289 P.2d 706 (1955), as well as other cited principles of contract law identified and discussed in appellant's opening brief, at pages 10 through 18.

In terms of the RUEGSEGGERS assertions on pages 25 through 28 of their brief, the record reflects Mr. PAYNE did, in fact, pled the equitable theories found in his opening brief, at pages 18 through 23, or to make any meaningful argument therein in support of the same, is blatantly untrue and typical of the RUEGSEGGERS' continuing efforts to mislead.

The subject equitable theories raised in this appeal were specifically raised before the superior court, albeit: in the answer to the respondents' counterclaim and again on summary judgment. [CP 197-205, 225-26]. Mr. PAYNE remains steadfast in his belief that, given the RUEGSEGGERS' indisputable acts of malfeasance and wrong-doing in the course of their dealing with him, the superior court should have, at the very least, exercised its equitable powers and provided him with some form of remedy.

Respondents' further ill-conceived claim on pages 28 through 30 of their brief, is equally unfounded. The "inherent authority of judicial review" to protect an individual from injury cause by the arbitrary and capricious conduct of others was inherently linked with Mr. PAYNE's equitable claims which once again were properly presented to the superior court. [CP 197-205, 225-26].

Lastly, the RUEGSEGGERS' bald assertion on pages 30 through

31 of their responsive brief, that the superior court properly denied Mr. PAYNE CR 59 motion for reconsideration fails to address and take into account the precise points made in support of reconsideration and outlined in appellant's opening brief, at pages 23 through 24. Accordingly, the RUEGSEGGERS' position in this regard is totally without merit. See, CR 59(a)(1), (3), (8) and (9).

2. Issue no. 1 [revisited] [erroneous trial court rulings on summary judgment]. The appellant, WILL T. PAYNE, once more submits that, contrary to the rulings of the superior court, the respondents, JOHN "STACY" and SHARIE KAY RUEGSEGGER, husband and wife, did not effectively establish, by way of any competent, admissible evidence, the claimed un-enforceability of the subject contract nor the relevancy of any lack of an "acceleration clause" in terms of the effectiveness of the parties' agreement. Furthermore, under the law identified below and previously cited in his original trial court memorandum in opposition to summary judgment [CP 197-205], Mr. PAYNE again maintains that he was entitled to judgment as a matter of law, either on the basis of an enforceable contract which was breached or, alternatively, on the equitable theories of equitable estoppel, unjust enrichment, restitution and imposition of constructive trust are referenced on pages 18 through 23 of his appellate brief.

Unfortunately, and as pointed out before, the challenged, erroneous decisions of the superior court denied Mr. PAYNE any remedy whatsoever

including, but not limited to, even the return of possession and title to the subject real property by defendants without full compensation to the plaintiff for the same. See, CP 8, 187, 188, 189. Thus, the superior court gave the RUEGSEGGERS "their cake and allowed them to eat it too."

**PLAINTIFF'S REMEDIES AT LAW**

a. Under governing legal principles, the parties had a binding and enforceable agreement. The gravamen of RUEGSEGGERS' motion for summary judgment was based upon their unsubstantiated claim that the subject contractual relationship between them and Mr. PAYNE did not specify (a) the time and manner for transferring title to the subject real estate, (b) the procedure for declaring forfeiture, and © the time and place for monthly payments, citing Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). [CP 61]. In addition, they opined that the "Addendum" [CP 8, 187, 188, 189] was required to contain a proper disclosure of encumbrances, and it dos not do so. [CP 62].

In addition, on pages 17 through 21 of their brief, the RUEGSEGGERS continue to claim that the "Addendum" contained no real estate purchase and sale agreement and this is fatal. They also argue on pages 15 through 16 of their brief that they were entitled to dismissal on summary judgment because the terms of the subject transaction contained no "acceleration clause."

As stated before, these claimed infirmities constitute nothing short

of the classic case of "buyer remorse" and nothing more. Contrary to the their position, the governing law as outlined in Mr. PAYNE's opening brief, at pages 10 through 18, demonstrates the parties had a binding and enforceable agreement. Simply put, there was a mutually accepted and biding contract as between these parties which included the necessary offer, acceptance and consideration. See, King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994).

As to the Kruse case, upon which respondents choose once again to rely upon, that case was based upon the underlying decision in Hubbell v. Ward, 40 Wn.2d 779, 782-83, 246 P.2d 468 (1952). On page 10 of their responsive brief, the RUEGSEGGERS continue to distort and misapply both the decisions in Kruse and Hubbell. This is evident when the decision in Hedges v. Hurd, 47 Wn.2d 683, 289 P.2d 706 (1955), is properly considered in the context of the facts of this case.

Notwithstanding respondents' arguments on pages 17 through 21 of their brief, the fact that certain terms were missing in the initial contract, addendum or earnest money agreement is neither fatal nor dispositive. It is clear such missing terms were to be supplied at a later date. In this vein, the Hedge court, at 684-87, held without hesitation that the "earnest money receipt and agreement in [that] case adequately describe[d] the subject matter of the sale as [to] certain real estate." As to other requirements of the sale, all required legal documents or instruments, including all terms relative to the transaction, were clearly to be provided by the time the

transaction was completed. Hedge, at 686-87.

Ultimately, the purchasers in Hedge were not allowed by the court to renege on their agreement since it was clear all missing and required terms would be provided later on. Id. In terms of its rationale for this decision, the Hedge court, at 685-86, took into account such factors as custom and usage, and the parties' course of dealings. The same should hold true here.

Simply put, the parties' "course of dealings," as well as various factors associated with custom and usage in the real estate sales industry, lend themselves to the fact the parties mutually understood and had treated their agreement or real estate transaction as a viable and binding contract as between them. See generally, Geonerco, Inc. v. Grand Ridge Properties IV, L.L.C., 146 Wn.App. 459, 465-69, 191 P.3d 76 (2008). As in Geonerco, Inc., the written agreement or instrument drafted by the respondents, along with its provision for future insertion of a more specific legal description of the land, is not inadequate as the RUEGSEGGERS continue to incorrectly claim on page 20 of their brief. Id.; see also, Noah v. Montford, 77 Wn.2d 459, 463, 463 P.2d 129 (1969); see generally, Nishikawa v. United States Eagle High, L.L.C., 138 Wn.App. 841, 845-46, 849-50, 158 P.3d 1265, (2007), review denied, 163 Wn.2d 1020 (2008). The parties' course of dealing in terms of this transaction bear this out. Id.

b. Contrary to respondents' position, the parties' agreement was fully integrated and supported by adequate consideration given making the

agreement enforceable as a matter of law. Once again, the principles of contract law apply to this case regardless of respondents' claims to the contrary on pages 21 through 25 of their brief. By the terms of the parties' written contract, said contract was a fully integrated agreement concerning the sale and purchase of the subject real estate. The long-standing rule in Washington is that a written agreement to which the parties have contracted, evidence of a contemporaneous or prior oral agreement contradicting or altering the terms of the writing is prohibited and inadmissible. Buyken v. Ertner, 33 Wn.2d 334, 345, 205 P.2d 628 (1949); Brother's Intern. Corp. v. Nat'l Vacuum & Sewing Machine Stores, Inc., 9 Wn.App. 154, 159, 510 P.2d 1162 (1973). In other words, while parol evidence is generally admissible to construe a fully integrated written agreement and to determine the intent of the parties, parol evidence cannot add to, modify, or contradict the terms of that contract. See, Berg v. Hudesman, 115 Wn.2d 657, 669-70, 801 P.2d 222 (1990); Lopez v. Reynoso, 129 Wn.App. 165, 167, 118 P.3d 398 (2005).

Here, the subject agreement was drafted by the RUEGSEGGERS themselves. In the event it could be said that an ambiguity existed therein, it is also a long-standing rule that any such ambiguity must be construed against defendants as the drafters herein. See, King v. Rice, 146 Wn.app. 662, 671, 191 P.3d 946 (2008), review denied, 165 Wn.2d 1049 (2009).

Similarly, any issue whether a contract is supported by adequate consideration poses a question of law for the court to decide. Keeter v.

John Griffith, Inc., 40 Wn.2d 128, 130, 241 P.2d 213 (1952). Consideration is defined as any act, forbearance or promise given in exchange thereof. King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994); see also, Alexander & Alexander v. Wohlman, 19 Wn.App. 670, 682, 578 P.2d 530 (1978); Restatement of Contracts (1932), § 75. However, before an affirmative act, forbearance or promise can constitute consideration, it must be bargained for and be given in exchange for something which in turn constitutes consideration. Simply put, a bargained for exchange is one that has been sought by the promisor in return for his promise, and it is given by the promisee in return for that promise. Browning v. Johnson, 70 Wn.2d 145, 148, 422 P.2d 314 (1967). In this contest, the requirement of consideration can be met by a showing of a detriment to the promisee and in turn a benefit to the promisor, but either way it must be a bargained for exchange. King, at 505; Guenther v. Fariss, 66 Wn.App. 691, 696-97, 833 P.2d 417 (1992), review denied, 120 Wn.2d 1028 (1993). In sum, there was not an issue that consideration had been bargain for and was given in this case. Id. Thus, once again, there was no question that there was a binding and fully enforceable agreement as between these parties. Id.

c. By the same measure, the subject agreement cannot be deemed "illusory" or unenforceable. A putative contract or promise will be deemed illusory only if it is so indefinite that it cannot be enforced, or if its performance is somehow deemed optional or discretionary on the part of

the promisor or one of the contracting parties unilaterally. Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 317, 103 P.3d 753 (2004). Stated differently, an illusory agreement is by its very nature meaningless and incapable of enforcement because, by its very terms or lack thereof, it is without any decree of certainty as to the consideration being given and the rights of the parties thereunder. See, Quandrant Corp. v. American States Ins., 154 Wn.2d 165, 184-85, 110 P.3d 773 (2005). In other words, such contract will be considered unenforceable for lack of the requisite consideration given. St. John's Med. Ctr. v. DSHS, 110 Wn.App. 51, 68, 38 P.3d 383, review denied, 146 Wn.2d 1023 (2002); see also, Olympic S. S. Co. v. Centinenial Ins. Co., 117 Wn.2d 37, 51, 811 P.2d 673 (1991); McMahan & Baker, Inc. v. Continental Cas. Co., 68 Wn.App. 537, 578-70, 843 P.2d 1133 (1993).

With these considerations in mind, a simple review of the subject agreement leaves once again no doubt this was an enforceable, rather than an illusory, contract which the RUEGSEGGERS should not have been allowed to walk away from due to mere "buyer remorse."

d. In relation with their contractual obligations, respondents owed Mr. PAYNE an implied duty of good faith and fair dealing which was clearly breached in this case. It is clear that Washington recognizes, in the context of an existing contract, an implied duty of good faith and fair dealing. See generally, 25 DeWolf & Allen, "Contract Law and Practice," Wash. Prac., § 5.12 (2007 & Supp. 2008-2009); see also, WPI 302.11 and

comment. This includes the requirement that the parties cooperate and act fairly and refrain from bad faith activities, so each may ultimately obtain the full benefit of performance by the other party. Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). In other words, a party to a contract is not allowed to throw up an obstacle to his performance where one neither legitimately or genuinely exists under the circumstances. Id. Contrary to respondents' arguments on pages 22 through 23, they owed to Mr. PAYNE a duty of good fair and fair dealing. Their simple and bald assertion that there was no contract does not negate this duty and obligation owed the appellant.

e. Simply put, respondents' misconduct constituted a breach of contract. Once again, the undisputed facts establish that the parties had entered into a binding relationship with respect to the purchase and sale of the subject real property. Initially, both parties undertook to perform all contractual obligations which were owed by each. However, the respondents ultimately chose to renege on their contractual obligations resulting in their being in breach of contract towards Mr. PAYNE. Thus, it was also clear Mr. PAYNE suffered resulting damages as a proximate consequence of the RUEGSEGGERS' breach of their contract with him.

In sum, Mr. PAYNE should have been granted summary judgment as against the RUEGSEGGERS in this case. CR 56©. Under the common law, the essential elements to establish liability for breach of contract are the existence of a valid and enforceable contract between the

parties, the defendant has breached that agreement, and the plaintiff has suffered damages as a proximate result or consequence of such breach. Richardson v. Taylor Land & Livestock Co., 25 Wn.2d 518, 532, 171 P.2d 703 (1946); Northwest Independent Forest Mfrs. v. Dept. of Labor & Industries, 78 Wn.App. 707, 712, 899 P.2d 6 (1995); see generally, 25 "Contract Law and Practice, Wash. Prac, § 1.1.

f. Lastly, whether the agreement did, or did not, contain an "acceleration clause" is entirely irrelevant in light of respondents' undisputed repudiation of their contract. Intent to repudiate may be either expressly asserted or circumstantially manifested by a party's conduct. Crown Plaza v. Synapse Software, 87 Wn.App. 495, 502, 962 P.2d 824 (1997); CKP, Inc. v. GRS Constr. Co., 63 Wn.App. 601, 620, 821 P.2d 63 (1991). Here, it is clear the RUEGSEGGERS repudiated, without justification, their agreement with Mr. PAYNE resulting in his being entitled to bring suit on the terms of the agreement regardless of any ill-conceived and trumped up claim that the agreement lacks any reference to an "acceleration cause." In other words, and contrary to any assertion of the RUEGSEGGERS, it is axiomatic that their breach of the parties' contract in itself caused the subject debt and obligation to be accelerated and become due as of the time of this lawsuit. The trial court was thus in error in choosing to hang its hat on this mere technicality and stumbling block set up in bad faith by the respondents.

Again, as a matter of law, Mr. PAYNE satisfied his initial prima

facie burden of proving a lack of any genuine issue of material fact being in dispute, whereas the defendants failed to offer any factual or legal ground to prevent the entry of summary judgment against them by the trial court. See, CR 56© and (e).

**PLAINTIFF'S REMEDIES IN EQUITY**

Even assuming, arguendo, that there was no proof of or legal grounds upon which to find an enforceable agreement in this case, this does not in any way equate with respondents' self-serving claims that they were entitled to dismissal of plaintiff's lawsuit. On appeal, it remains Mr. PAYNE's position that he was entitled to judgment as against these defendants either (a) on the basis of an enforceable contract which has been clearly breached and wrongfully ignored by defendants simply because of their unrelated financial woes [CP 188] or, alternatively, (b) on equitable bases of estoppel, unjust enrichment, restitution and imposition of constructive trust as is discussed and outlined below. Contrary to any assertion of the RUEGSEGGERS to the contrary, on pages 26 through 30 of their responsive brief, Mr. PAYNE was clearly entitled to invoke his equable remedies in this case.

a. Equitable estoppel foreclosed respondents from denying their liability to Mr. PAYNE. Again, the principle of equitable estoppel is based upon the reasoning that a party should be held to a representation made or position assumed where inequitable consequences would

otherwise result to another party who has justifiably and in good faith relied thereon. Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). Equitable estoppel is established when (a) there is an admission, statement or act inconsistent with a claim afterwards asserted by the offending party, (b) action by the aggrieved party in reasonable reliance on that admission, statement or inconsistent act, and © injury to the party who relied if the offending party is allowed to contradict or repudiate the prior act, statement or admission. Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318, cert. denied, 506 U.S. 1028 (1992). Here, there is clear, cogent and convincing evidence establishing each of the elements of equitable estoppel in terms of the undisputed facts contained in and set forth in plaintiff's accompanying "CR 56 Statement of Undisputed Facts," which has been filed with this court on the same date as this "memorandum."

b. Unjust enrichment and restitution were further equitable grounds upon which Mr. PAYNE was entitled to seek recovery. The question whether equitable relief is appropriate in a given case poses once again a question of law for the court to decide. Niemann v. Vaughn Community Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). In this vein, the respondents received a benefit conferred upon them by Mr. PAYNE, with full appreciation and knowledge of such benefit. Under the circumstances, their acceptance and retention of the same make it inequitable or "unjust" for them to be allowed to retain the same without

either payment and compensation or the return of the real property to the claimant. Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008); Cox v. O'Brien, 150 Wn.App. 24, 36, 206 P.3d 682 (2009); Dragt v. Dragt/DeTray, 139 Wn.App. 560, 576, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1047 (2008); Ellensburg v. Larson Fruit Co., Inc., 66 Wn.App. 246, 250, 865 P.2d 225 (1992); Bailie Communications Ltd. v. Trend Business Systems, Inc., 61 Wn.App. 151, 159-60, 810 P.2d 12 (1991); see also, Restatement (Third) of Restitution and Unjust Enrichment, § 1 & comm. b (Discussion Daft 2000). Accordingly, under the undisputed and documented facts, Mr. PAYNE was without question entitled to restitution of the property. Id.

Thus, even assuming, arguendo, that the subject transfer of possession and title to the subject real estate is not adequately supported by law, it remains subject to appellant's equitable claim of unjust enrichment. Id. In other words, the effect or result of such transaction should have been ruled a nullity by the trial court and deemed legally ineffective so as to not deprive the appellant of his right of ownership to the same. Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 188, 157 P.3d 847 (2007); Dragt, at 576.

c. At the very minimum, the undisputed facts required the imposition of a constructive trust. Lastly, there remains an additional, equitable remedy inherently intertwined with the respondents' breach of their combined fiduciary obligations to the plaintiff. It is the law that, in

the context of restitution, a constructive trust may be utilized by the court so as to marshall back funds, property or other assets held by a third-party and, for which, that party, or in this case the RUEGSEGGERS, has no legal or equitable right to otherwise claim or possess the same.

Simply put, a constructive trust will be imposed when the property is acquired under circumstances such that the holder thereof would be unjustly enriched at the expense of another. Huber v. Coast Inv. Co., 30 Wn.App. 804, 810, 638 P.2d 609 (1981). A finding of a constructive trust amounts to a holding that the offending party ought to be treated as if he had been a trustee for the beneficiary, in this case Mr. PAYNE, from the time the offending party's retention and holding of the property became unconscionable. Id.

In this vein, a constructive trust may arise even though the acquisition itself was not initially wrongful as in this case. Mehelich v. Mehelich, 7 Wn.App. 545, 551, 500 P.2d 779 (1972). Again, the law governing this case should require the imposition of a constructive trusts against the defendants.

For these reasons, respondents did not even begin to satisfy their initial prima facie burden of proving a lack of any genuine issue of material fact being in dispute. They also failed to offer legal ground or theory so as to overcome or defeat any of the foregoing equitable remedies raised by Mr. PAYNE in this case [CP 197-205, 225-26]. See, CR 56© and (e).

Accordingly, there is no basis whatsoever upon which the RUEGSEGGERS should have been granted relief on their corresponding motion for summary judgment. Id. Instead, Mr. PAYNE's cross-motion should have been granted under the undisputed facts presented to the superior court.

Finally, with regard to these identified equitable remedies, it should be borne in mind that the Washington judiciary have consistently held to the view that a forfeiture will be abhorred by the courts. In this vein, it has also been a longstanding principle of law that the Washington courts have the inherent authority to protect individual citizens from injury caused by the arbitrary and capricious conduct of others and are thus vested with the power to create a remedy even where one might not otherwise exist. See, Williams v. Seattle Sch. Distr., 97 Wn.2d 215, 222, 643 P.2d 426 (1982); see also, Devine v. Dept. of Lic., 126 Wn.App. 941, 110 P.3d 237 (2005).

In more recent years, the Washington supreme court, in Saldin Sec., Inc. v. Snohomish Cy., 134 Wn.2d 288, 292, 949 P.2d 370 (1998), has further elaborated that such equitable authority to intervene and create an individual remedy where needed is wholly mandated by article 4, section 6, of the Washington state constitution. See also, U.S.Const., amend. 5 & 14. Thus, given the identified injustices in this case, the superior court should have afforded Mr. PAYNE with some form of remedy so that the respondents were not allowed to both have the title and

possession to Mr. PAYNE's property without providing, in turn, some form of consideration or remuneration for such benefit. Id. At a minimum, the superior court should have returned the parties to their original positions before the contract, which the court did not do.

Accordingly, this reviewing court should now, at the very minimum, remand this case to the superior court with directions requiring said court to formulate an appropriate remedy in favor of the plaintiff. See, RAP 12.2.

Fundamental fairness and equity require nothing less especially in light of the disingenuous nature in which the RUEGSEGGERS have acted in this case. Clearly, the equities lie with Mr. PAYNE in this instance.

3. Issue no. 2 [revisited][erroneous denial of post-judgment relief under CR 59]. Again, a motion for reconsideration of a final decision of the superior court is governed by the defined criteria set forth in Rule 59(a) of the Washington Civil Rules for Superior Courts [CR]. In this particular instance, the record is clear [CP 211-15, 221-24] that the plaintiff, WILL T. PAYNE, relied upon the provisions of sub-sections (1), (3), (8) and (9) of that rule which provide, in pertinent part:

> (1) Irregularities in the proceedings of the court . . . by which such party [aggrieved thereby] was prevented from having a fair trial [or, in this case, a fair summary judgment hearing];
>
> . . .
>
> (3) . . . [S]urprise which ordinary prudence could not have

court. See, RAP 12.2.

**B. CONCLUSION**

Based upon the foregoing points and authorities, appellant, WILL T. PAYNE, once more respectfully requests that this court grant that relief requested in appellant's opening brief, Part F., at pages 24-25.

DATED this 12th day of November, 2015.

Respectfully submitted:

Michael J. Beyer, WSBA #9109
Attorney for Appellant
WILL T. PAYNE

NO. 33537-2-III

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WILL T. PAYNE,

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# PROOF OF SERV ICE OF REPLY BRIEF

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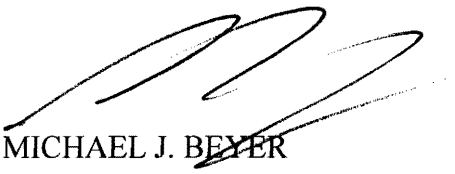
Michael J. Beyer, WSBA #9109
Attorney for Appellant

810 South Cannon Street
Spokane, Washington 99204-4353
(509) 499-1877

PROOF OF SERVICE

The undersigned hereby certifies that on November 13, 2015 I caused to be delivered to the attorney for the respondent, Stamper-Rubens, 720 W. Boone, Suite 200, Spokane, Wa. 99201 a true and correct copy of the Reply Brief of Appellant



MICHAEL J. BEYER
Attorney for Appellant