

COURT OF APPEALS
DIVISION II

07 MAR -9 PM 3:12

No. 35372-5-II

STATE OF WASHINGTON
BY DM

RECEIVED
MAR -9 2007

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

HARRY MUNOZ AND VALERIE FYALKA-MUNOZ, a married couple

Respondents.

v.

RANDALL CHOPP and MICHELL CHOPP, husband and wife, and PIERCE
COUNTY, Washington municipal corporation,

Appellants,

OPENING BRIEF OF APPELLANTS

Mark R. Roberts
WSBA No. 18811
Attorneys for Appellants,
RANDALL CHOPP and MICHELLE CHOPP

DAVIS ROBERTS & JOHNS, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, Washington 98335
Telephone No. (253) 858-8606
Facsimile No. (253) 858-8646

ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR..... 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

III. STATEMENT OF THE CASE..... 2

 1. PROCEDURAL HISTORY 2

 2. STATEMENT OF FACTS 3

IV. ARGUMENT 11

 1. THE PARTIES DID NOT AGREE TO RELOCATE
 THE EASEMENT 12

 2. ANY AGREEMENT TO RELOCATE THE
 EASEMENT MUST BE IN WRITING 13

 3. THE MUNOZ EASEMENT WAS NEVER
 DEVELOPABLE AND THEREFORE THE
 CHOPPS COULD NOT HAVE INTERFERED
 WITH THE EASEMENT..... 15

 4. THE COURT LACKS THE EQUITABLE
 AUTHORITY TO GRANT A NEW EASEMENT
 OR MOVE AN EXISTING EASEMENT 17

 5. THE ONLY REMEDY AVAILABLE TO THE
 MUNOZES IS UNDER A PRIVATE RIGHT
 OF CONDEMNATION PURSUANT TO
 CHAPTER 8.24 RCW 18

V. CONCLUSION..... 20

TABLE OF AUTHORITIES

CASES

<i>Berg v. Ting</i> , 125 Wn.2d 544, 551, 886 P.2d 564 (1995).....	13
<i>Blue Mt. Construction Co. v. Grant County, School District 150-204</i> , 49 Wn.2d 685, 688, 306 P.2d 209 (1957).....	12
<i>City of Tacoma v. State</i> , 117 Wn.2d 348, 361, 816 P.2d 7 (1991).....	11
<i>Crisp v. VanLaeken</i> , 130 Wn.App. 320, 122 P.3d 926 (2005)	17, 18
<i>Doe v. Boeing Co.</i> , 121 Wn.2d 8, 846 P.2d 531 (1993).....	11
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 712, 732 P.2d 974 (1987).....	11
<i>Henry v. Bitar</i> , 102 Wn.App. 137, 142, 5 P.3d 1277 (2000)	11
<i>Key Design, Inc. v. Moser</i> , 138 Wn.2d 875, 887, 983 P.2d 653 (1999).....	14
<i>Leinweber v. Gallagher</i> , 2 Wn.2d 388, 391, 98 P.2d 311 (1940).....	19
<i>MacMeekin v. Low Income Housing Institute, Inc.</i> , 111 Wn.App. 188 (2002)	17
<i>Roslyn v. Paul E. Hughes Construction Co.</i> , 19 Wn.App. 59, 63, 573 P.2d 385 (1978)	12
<i>Sea-Van Investments Associates v. Hamilton</i> , 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).....	12

STATUTES

RCW 64.04.010..... 13
RCW 64.04.020..... 14
RCW 8.24..... 2, 10, 18
RCW 8.24.030..... 19

COURT RULES

OTHER AUTHORITY

Restatement (Second) of Contracts § 110, at 286 (1981)..... 14

I.
ASSIGNMENTS OF ERROR

Appellants Randall Chopp and Michelle Chopp assign error to the Trial Court's Findings of Fact and Conclusions of Law entered September 1, 2006 and the Judgment entered on September 1, 2006 as follows:

1. The Trial Court erred in entering Findings of Fact 16, 17, 19, 20, 21, 22 and 24.
2. The Trial Court erred in entering Conclusions of Law 1, 2, 3, 4, and 5.
3. The Trial Court erred in entering the Judgment.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court err in finding that the parties agreed to relocate the Munozes' road easement when the Munozes rejected a material condition of the Chopps' offer, which required them to also sign a road maintenance agreement?
2. Did the Trial Court err in finding that the parties agreed to relocate the road easement when the parties never signed a written document and thus any agreement would violate the statute of frauds?

3. Did the Trial Court err in entering a judgment moving the Munoz easement because it is not developable, when the Chopps did not take any action to prevent its development and the Munozes did not comply with the requirements of Chapter 8.24 RCW to condemn a private way of necessity?

III.
STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

The Plaintiffs, Harry and Valerie Munoz (“Munoz”), own unimproved property in Gig Harbor, Washington. Finding of Fact No. 1. They have a twenty (20) foot easement through the center of the Southview residential development owned by the Defendants, Randy and Michelle Chopp (“Chopp”). Exs. 1 and 2. However, beginning at the public road, Warren Drive, and for more than 250 feet toward the Munoz property, the easement runs up a cliff and steep slopes making it impossible to develop. RP 94.

After the Chopps and their predecessors incurred substantial construction costs for the permitting and development of a new serpentine paved road, which is partially outside of the Munoz easement, the Munozes attempted to obtain a free easement over the entire roadway by frustrating the Chopps efforts to obtain final

plat approval for Southview. When the hearings examiner rejected the Munozes' arguments, they commenced this action pursuant to the Land Use Petition Act, Chapter 36.70C RCW. They also made a claim to quiet title to a new easement over the newly developed road. CP 1-19.

The LUPA claim went to trial on February 16, 2005 before the Honorable Waldo Stone Pro Tem, who affirmed the Hearings Examiner and dismissed the Munozes Petition. CP 75. No appeal was ever taken from that decision.

The claim for quiet title to an easement went to trial on July 10 and 11, 2006 before the Honorable Thomas G. Felnagle. Judge Felnagle determined that the Munozes and the Chopps had agreed to relocate the easement and granted a new easement to the Munozes over the new road and rejected the Chopps' claim for compensation. CP 119-124, 125-127. The Chopps appeal that decision. CP 128-140.

2. STATEMENT OF FACTS.

In 1994, the Munozes purchased a twenty (20) acre undeveloped lot located in Gig Harbor near Warren Drive. RP 107; Finding of Fact No. 1. At that time, the Munozes property was the beneficiary of two adjacent 1976 access easements, each of which

is ten (10) feet wide and running in a straight line from Warren Drive, up a very steep slope, and connecting to the Munoz property. Exs. 1 and 2; Finding of Fact No. 2. The easement is depicted on Exhibit 14. The easement is through the middle of the Chopps' plat, Southview. Id.

At the time the Munozes purchased their lot, there was an old dirt road they could use to access their property. RP 107-108; Exhibit 4; Finding of Fact No. 4. In 1999 and as part of a platting process, the Marsten Group/HJS, the Chopps' predecessors, destroyed the old dirt road and began construction of rock retaining walls and a new serpentine road to negotiate around the steep slopes. RP 64-65, 110, 141, 175; Exs. 7 and 12; Finding of Fact No. 5. The new road meanders up the steep slope by using "switchbacks" so that the grade of the road is not too steep. Exs. 7, 12 and 15. Portions of the new road, and particularly the switchbacks, are outside of the Munozes' easement. RP 48, 50; Exhibit 6 page 4.

In 2004, the Chopps purchased Southview and completed all of the necessary plat improvements, including paving the road. RP 30, 161. The cost to construct the road was significant. RP 134. Once the road was completed, the Chopps offered to grant an

easement, for free, to the Munozes and to another neighbor, Terry Wilson. RP 164. There was only one condition: the Munozes and Mr. Wilson must sign a road maintenance agreement which required all of the lots using the road to pay their pro rata share of any future maintenance. RP 34-35, 53-54, 126-127, 169. Each lot would only be responsible for 1/13 th of the cost. RP 169.

The Chopps provided the Road Maintenance Agreement to both the Munozes and Mr. Wilson. RP 166, 170. After weeks passed and neither the Munozes nor Mr. Wilson had agreed to sign the Road Maintenance Agreement, the Chopps retracted their offer. RP 36-39, 58. Ultimately, Mr. Wilson paid \$42,000 for the easement the Chopps had originally offered to him for free and the Road Maintenance Agreement was signed. RP 42, 46.

By that time, the Munozes had still not signed the Road Maintenance Agreement nor offered any criticism of the document. Consequently, the Chopps faxed a letter to the Munozes advising that the Chopps were requiring Mr. Wilson to pay for the easement and that if the Munozes refused to sign the Agreement immediately they would also be charged for the new easement. Ex. 8.

The Munozes attorney then responded on their behalf, stating "I find the [Road Maintenance] Agreement to be well

written.” Ex. 10. He nonetheless demanded on behalf of the Munozes that the Chopps not only grant the new easement to them, but also pay the Munozes \$50,000 and double the width of their easement to 40 feet. Ex. 10. By doubling the width of the easement, the Munozes could subdivide their property and thus significantly increase its value. Ex. 10. Mr. Munoz testified that they demanded the \$50,000 in “retaliation” for the Chopps charging Mr. Wilson for his easement. RP 128-129. The Chopps rejected the Munozes’ effort to extort the money and their additional conditions. Ex. 9.

The Munozes then attempted to prevent Chopps’ final plat approval in order to place a financial hardship on the Chopps, hoping they could pressure the Chopps to grant them the new easement. RP 181. The Munozes argued that granting final plat approval would prevent them from being able to construct their own road within their easement. An experienced Hearing Examiner, Stephen Causseaux, rejected the Munozes arguments and granted final plat approval. CP 8-19. The Munozes subsequently appealed that decision, filing this action pursuant to the Land Use Petition Act (LUPA), chapter 36.70C RCW. CP 1-19. On appeal, Judge Stone

also rejected the Munozes' claims and affirmed the Hearing Examiner and the Plat. CP 75.

The Munozes then pursued their second claim, to "quiet title" to an easement over the Chopps' new road. This claim is based upon the same argument – that the Chopps' new road and plat prevents the Munozes from building a road on their own easement – that was previously rejected by both the Hearing Examiner and Judge Stone.

At trial, no one testified that the Munozes could have developed their easement if the Chopps' plat had not been approved. In fact, the Munozes expert, William Diamond, opined that due to the topography, there would be no way to build a road within the Munozes easement. RP 81-82, 88, 92, 94. The Munozes would be required to meet code, which would require them to construct a road that does not exceed a 15% grade. To meet that maximum grade requirement, the road would be 700 feet long, which is close to the length of the entire Southview plat. RP 93-94, 96.

As an experienced developer and contractor, Mr. Chopp considered the possibility of constructing a road within the Munoz easement to increase the number of lots in Southview. RP 173.

He concluded that it was impossible. RP 173 – 174. The 20 foot width of the easement was not sufficient to construct retaining walls and shoring and still have sufficient width for a road bed. RP 174. The cost to construct such a road, even if possible, would be significant.

At the conclusion of the trial, the Court entered the following Findings of Fact:

8. After construction of the new road was complete, the Chopps offered to provide a road easement over the new road at no cost to the Muñozs if they would execute a certain road maintenance agreement. The Muñozs did not sign the road maintenance agreement, and the Chopps ultimately barred the Muñozs from using the new road.

21. The parties both testified that the Muñozs agreed to the relocation of the easement. The Muñozes didn't mind utilizing the new road that the Chopps built. They just didn't want to have to pay for the privilege or pay to have it maintained.

22. The Chopps always indicated they wanted to adopt the relocation, so there is no dispute about the agreement to relocate. It's a dispute about money and what should happen as a result of this relocation.

CP 120, 122.

The Court then entered the following Conclusions of Law:

1. Washington law provides that an easement cannot be relocated absent the agreement of the parties. Washington law is built on the policy that you can't take somebody's property right without their agreement and you can't force someone to pay compensation if they don't want to pay

compensation. Consequently, there is no basis in the law for the Choppes to be compensated in this case.

2. The Muñozs' road easement has been relocated to ten (10) feet on either side of the centerline of the new road that crosses the Southview Plat.

CP 123.

There was no evidence offered at trial to support the Court's finding that the parties had agreed to relocate the easement. To the contrary, the undisputed evidence at trial was that the parties did not reach any agreement. This was made clear by Mr. Munoz himself, who testified as follows:

Q: But, would you agree with me that, as of September 17th, 2004, Randy Chopp was offering you a free easement so long as you signed and notarized the road maintenance agreement that day?

A: Yes.

Q: And you refused to sign that document?

A: Correct.

RP 126-127.

Q: When Mr. Chopp offered to you an easement over the existing road if you would sign the road maintenance agreement, what cost or expense did you believe you would be paying for?

A: I wouldn't be paying for anything, most likely.

Q: So that really wasn't a legitimate concern, was it?

A: It was just the way the road maintenance agreement was written. We weren't happy with it, and he wouldn't collaborate on anything. And we didn't want to be binded (sic) to a contract with him at all.

Q: So you rejected his offer, correct?

A. Correct.

RP 138.

Nor was there any evidence at trial that the Chopps had done anything to prevent the Munozes from developing their easement. Instead, the testimony of the Munozes' own expert established that the easement was not developable due to the existing topography.

Q: Correct, I'm talking about the top of the bank, which would be roughly on the north side of Lots 11 and 2, and from that, South, down to Warren Drive.

A: And the question is, could you go in and build that - - I'm not familiar with that part of the slope in there. I would say portions of it could be built. As an entirety, under current county code, without deviation, no.

RP 94.

Because there was no evidence to support the existence of an agreement, and because the Chopps did not cause the Munoz easement to be undevelopable, the Munozes only possible remedy to acquire a new easement is to condemn an easement pursuant to Chapter 8.24 RCW. But the Munozes, despite being specifically

placed on notice of this long before trial, steadfastly refused to plead such a cause of action. CP 106-107.

Based on the foregoing, the Trial Court decision granting a free easement to the Munozes must be reversed and remanded with instructions to dismiss the Munozes claims.

IV. ARGUMENT

The Court of Appeals reviews findings of fact to determine if they are supported by substantial evidence. See Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993) and Henry v. Bitar, 102 Wn.App. 137, 142, 5 P.3d 1277 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). Then the Court determines if the findings of fact support the conclusions of law. City of Tacoma v. State, 117 Wn.2d 348, 361, 816 P.2d 7 (1991).

In this case, there was no evidence to support the Trial Court's finding that the parties agreed to relocate the easement or its conclusion that the Munoz easement should be relocated for free.

1. The Parties Did Not Agree To Relocate The Easement.

The Trial Court found as follows:

21. The parties both testified that the Muñozs agreed to the relocation of the easement. The Muñozes didn't mind utilizing the new road that the Chopps built. They just didn't want to have to pay for the privilege or pay to have it maintained.

22. The Chopps always indicated they wanted to adopt the relocation, so there is no dispute about the agreement to relocate. It's a dispute about money and what should happen as a result of this relocation.

CP 120, 122.

However, the testimony of the parties was clear: The Chopps offered to grant an easement to the Munozes, for free, if they signed the Road Maintenance Agreement. The Munozes refused thus rejecting the offer and any contract. See Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994) ("The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.") See also Blue Mt. Construction. Co. v. Grant County. School District 150-204, 49 Wn.2d 685, 688, 306 P.2d 209 (1957). Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer, and does not consummate the contract. Roslyn v. Paul E. Hughes Construction Co., 19 Wn.App. 59, 63, 573 P.2d 385 (1978).

This is also clear from the trial court's finding of fact No. 8, which states in pertinent part as follows:

8. After construction of the new road was complete, the Chopps offered to provide a road easement over the new road at no cost to the Muñozs if they would execute a certain road maintenance agreement. The Muñozs did not sign the road maintenance agreement . . .

Although the Munozes certainly desired a new easement, they did not want to sign the Road Maintenance Agreement. Although the Chopps were willing to give the Munozes a new easement, they would only do so if the Munozes would sign the Road Maintenance Agreement. The Munozes deliberately chose not to accept the Chopps' offer, and consequently, no agreement was formed. Therefore, the Trial Court's finding of an agreement is not supported by any evidence.

2. **Any Agreement To Relocate The Easement Must Be In Writing.**

Even if the parties had orally agreed to relocate the easement, they never executed a document confirming that agreement as required by statute. RCW 64.04.010 provides that "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." An easement is an interest in real estate and therefore subject to the statute. Berg v. Ting, 125 Wn.2d 544, 551,

886 P.2d 564 (1995). RCW 64.04.020 describes the requisites of a deed, stating “Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.”

As the Washington Supreme Court stated in Key Design Inc. v. Moser, 138 Wn.2d 875, 887, 983 P.2d 653 (1999), “[t]he statute of frauds in general provides a channeling function, as well as the evidentiary function just discussed. *Restatement (Second) of Contracts* § 110, at 286 (1981). The formal requirements of the statute for land contracts helps to create a climate in which parties often regard their agreements as tentative until there is a signed writing.” Thus, no agreement affecting real property is effective in Washington until it is reduced to writing. Any agreement that fails to meet that requirement violates the statute of frauds and is therefore unenforceable. Id.

In this case, the Chopps and the Munozes never executed a deed and therefore any purported agreement would be violative of the statute of frauds and thus unenforceable.

3. The Munoz Easement Was Never Developable And Therefore The Chopps Could Not Have Interfered With The Easement.

The Munozes have argued that the Chopps prevented them from developing their easement and thus are entitled to a new easement over the new road. However, they completely ignored the fact that the easement would run straight up a cliff or provide any evidence that they could have constructed a road within the entirety of their easement “but for” the Chopps actions. Although the Trial Court, through both Judge Stone and Judge Felnagle, disagreed with the Munozes argument, Judge Felnagle entered findings related to this issue as follows:

12. The Chopps maintain that the Muñozs can access the Property only through the area described by the 1976 road and utility easements.

15. The Muñozs could not, more than likely, now get approval to build a road on the easement as it was originally configured in 1976.

16. It would be totally impractical for the Muñozs to build a new road in the location of the 1976 easements, even if they could get approval from the County in conformity with these easements.

17. Even if the Muñozs could get approval from the County to develop a road in conformity with the 1976 easements, they would have to traverse over the new road.

20. It is now totally impractical to suggest that there is any other reasonable alternative left to the Muñozs other than to use the new road constructed on Southview.

CP 120-122.

Though the Trial Court did not so state, it appears that its decision to relocate the Munozes' easement was based at least in part on these findings. However, although constructing a road within the easement may be expensive, difficult and burdensome for the Munozes, there was no evidence to suggest that the Chopps or their predecessors interfered with the Munoz easement. In fact, the Munozes own expert testified to the contrary as follows:

Q: Correct, I'm talking about the top of the bank, which would be roughly on the north side of Lots 11 and 2, and from that, South, down to Warren Drive.

A: And the question is, could you go in and build that - - I'm not familiar with that part of the slope in there. I would say portions of it could be built. As an entirety, under current county code, without deviation, no.

RP 94.

The Munozes have the same ability to develop a road within their easement area as they had prior to the construction of the new road and the approval of the Chopps' plat. Unfortunately, it simply is not possible to construct a road within their easement that would comply with Pierce County codes. As there is no evidence and the Trial Court did not find that the Chopps interfered with the Munozes easement, there is no basis for relocating the Munozes' easement at the Chopps' expense.

4. **The Court Lacks the Equitable Authority to Grant a New Easement or Move An Existing Easement.**

The Munozes requested that the Trial Court unilaterally gift to them a new easement over the Chopps' road, arguing that the Court has the authority to do so in equity. That argument ignored the clear law of Washington, which expressly prohibits courts from using their equitable powers to relocate easements for the benefit of one party. See Crisp v. VanLaeken, 130 Wn.App. 320, 122 P.3d 926 (2005) and MacMeekin v. Low Income Housing Institute, Inc., 111 Wn.App. 188 (2002). Both of those recent Washington decisions held that "easements, however created, are property rights, and as such are not subject to relocation absent consent of both parties." MacMeekin, 111 Wn.App at 207 (Emphasis added). Although those cases generally deal with a request by the servient estate to relocate an easement, the proposition applies equally to a situation where the dominant estate seeks to relocate the easement. Moreover, the basis for the Munozes' request is not to benefit the Chopps, but rather to benefit themselves by avoiding the costs associated with building their own road.

As Washington Courts have stated, to allow the unilateral change of an easement "would introduce uncertainty in real estate

transactions” and “invite endless litigation.” Crisp, 130 Wn.App. at 325-6. In this case, it would create both uncertainty and a fundamental unfairness to the Chopps who would bear the entire cost of the road while allowing the Munozes to avoid any of the costs they would incur in developing their own road.

The Trial Court acknowledged this clear law in its Conclusion of Law No. 1, stating “Washington law provides that an easement cannot be relocated absent the agreement of the parties. Washington law is built on the policy that you can’t take somebody’s property right without their agreement ... ” Inexplicably, the Trial Court thereafter proceeded to relocate the Munoz easement despite the undisputed evidence that the Chopps had not agreed to such relocation. The Court’s decision to do so was clear error that must be reversed.

5. **The Only Remedy Available to The Munozes is Under a Private Right Of Condemnation Pursuant to Chapter 8.24 RCW.**

If the Munozes’ easement is truly not developable, the only remedy available to them is to seek a private way of necessity pursuant to Chapter 8.24 RCW. That chapter provides criteria for determining the selection of the route for such an easement and the priorities for the Court to follow in selecting that route, as well as a

procedure for determining the compensation that the Munozes would have to pay to the Chopps for obtaining such an easement. None of these statutory requirements were considered by the Trial Court.

RCW 8.24.030 specifically provides that, even when a court determines that a claimant is entitled to condemn the property of another for a private way of necessity, “no private property shall be taken or damaged until the compensation to be made therefore shall have been ascertained and paid...” If the procedures set forth in that statute were followed and the Munozes were able to demonstrate that their easement is truly not developable, the Trial Court would have the power to grant the Munozes an easement over the existing road. In doing so, however, the Court would be obligated to require the Munozes to pay for the easement, including the Chopps’ reasonable attorney’s fees and costs. See RCW 8.24.030.

However, a private condemnation action must be expressly pleaded in order to invoke the statutory authority. See Leinweber v. Gallagher, 2 Wn.2d 388, 391, 98 P.2d 311 (1940). The Munozes have refused to plead such a claim and thus are barred from that relief. The Judgment granting them a relocated easement over the

Chopps' property is thus clearly erroneous and must be reversed.

V.
CONCLUSION

The Munozes purchased their property knowing that their easement was in the center of Southview and up steep slopes. Now they ask this Court to ignore the express reasoning and holdings prohibiting a Court from moving or creating a new easement absent the agreement of the servient landowner so that they may enjoy, for free, a new and superior easement.

The Munozes have failed and refused to plead the only relief applicable to this case: private condemnation. They do so to avoid the obligation of compensating the Chopps for this new and valuable right. This is especially ironic, as the only reason this lawsuit was filed is because the Munozes refused to accept the Chopps offer to provide them the easement they now seek free of charge. Having refused that offer, the Munozes are not entitled to a new easement through the Court.

For all of the above reasons, the Chopps respectfully request that this Court reverse and remand this case back to the Trial Court with instructions to dismiss the Munozes claims.

Respectfully submitted this 7th day March, 2007.

DAVIS ROBERTS & JOHNS, PLLC

A handwritten signature in cursive script, appearing to read 'Mark R. Roberts', written over a horizontal line.

MARK R. ROBERTS, WSBA #18811
Attorneys for Appellants Chopp

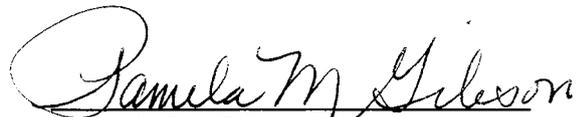
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2007, I caused to be served the foregoing OPENING BRIEF OF APPELLANTS on the following individual in the manner indicated:

Dianne K. Conway
GORDON THOMAS HONEYWELL
1201 Pacific Avenue Suite 2200
Tacoma, Washington 98401-1157

(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 9th day of March, 2007, at Gig Harbor, Washington.


Pamela M. Gibson