

NO. 35654-6-II

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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MEADOWMEER GOLF & COUNTRY CLUB,

Appellant,

vs.

DAN A. PRESTON & JEANA PRESTON,

Respondents.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION

Dan and Jeana Preston (“the Prestons”) filed a slander of title claim against Meadowmeer Golf & Country Club (“MGCC”) after it filed a lien on the Prestons’ property for unpaid member dues. Pursuant to the Meadowmeer Covenants, each lot owner is required to own and hold a valid certificate of membership in Meadowmeer Golf & Country Club. The Prestons refused to pay the required membership dues because their property was outside the Meadowmeer subdivision and was not referenced in the legal description of “Meadowmeer” in the Meadowmeer Covenants. MGCC seeks to enforce the Meadowmeer Covenants against the Preston property as a real covenant or equitable restriction since the original seller and purchaser agreed to bind the property to the Meadowmeer Covenants through contract.

The Prestons and MGCC filed cross-motions for summary judgment. MGCC requested that the trial court enter an order finding that the Preston property was subject to the Meadowmeer Covenants as a matter of law. The trial court denied MGCC’s motion, ruling that the Meadowmeer Covenants did not apply to the Preston property because the property was outside the Meadowmeer subdivision. MGCC requested reconsideration, which the trial court denied. The trial court held that the agreement between the original owner and purchaser of the property to bind the property to the Meadowmeer Covenants through contract was not effective. Neither the trial court nor the Prestons cited any authority that supports the trial court’s ruling. MGCC appeals from this decision.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in its August 17, 2006 and November 8, 2006 Memorandum Opinions when it held that the Meadowmeer Covenants did not apply to the Prestons' property, as a matter of law, because the subject property is not included in the legal description for the Meadowmeer subdivision.

2. The trial court erred when it failed to enforce the Meadowmeer Covenants under the doctrines of real covenants or equitable restrictions.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred when it held that the Meadowmeer Covenants do not apply to the Preston property because the legal description of the Meadowmeer subdivision does not include the Preston property, when the original purchaser and seller agreed to bind the Preston property to the Meadowmeer Covenants through contract?

2. Whether the Meadowmeer Covenants are enforceable under the doctrines of real covenants or equitable restrictions?

## **IV. STATEMENT OF THE CASE**

### **A. Factual Background**

Meadowmeer, Inc. owned the land on which the Meadowmeer subdivision is now situated and certain adjacent land, including the property in question. CP 152, 206. Meadowmeer, Inc. developed the Meadowmeer subdivision and filed a Declaration of Protective Covenants ("Meadowmeer Covenants") in May 1969, recorded under Auditor's File

No. 953961. CP 100. On December 27, 1979, Meadowmeer, Inc. recorded amended Meadowmeer Covenants under Auditor's File No. 791220105. CP 101, 152-160.

On January 3, 1979, Meadowmeer, Inc. sold some of the adjacent land to Meadowmeer Woods Associates. CP 4, 100. In December 1980, in connection with the sale, Meadowmeer, Inc. conveyed a Statutory Warranty Deed to Meadowmeer Woods Associates. CP 101, 202. The Prestons' real property located at 11621 Meadowmeer Circle N.E., Bainbridge Island, Washington is within the land sold to Meadowmeer Woods Associates. CP 99-102.

The land sold by Meadowmeer, Inc. to Meadowmeer Woods Associates was not included in the legal description of the Meadowmeer subdivision within the Meadowmeer Covenants that were filed in May 1969 or in the amendments that were filed in 1979. CP 102. Nevertheless, Meadowmeer, Inc. and Meadowmeer Woods Associates agreed to bind the adjacent land to the Meadowmeer Covenants. The deed provides, "SUBJECT TO restrictive and protective covenants, as amended, and recorded under Kitsap County Auditor's #7912291105." CP 202.

This deed contains a scrivener's error. The recorder's number referenced in the deed (791227**1105**) is one number different from the recorder's number for the Meadowmeer Covenants (791227**0105**). CP 152-60, 202. There is no document recorded at number 7912271105. CP 102.

On March 28, 1983, Meadowmeer Woods Associates sold the property to Corman and Lavina Geisler, who were doing business as Corman Management, Inc. CP 200. The Quit Claim Deed states, “SUBJECT to restrictive and protective covenants, as amended and recorded under auditor’s file No. 7912271105.” CP 200.

In 1990, Corman Management, Inc. subdivided the property into three parcels: A, B, and C. CP 101. Corman Management, Inc. filed a Short Subdivision Application with the Kitsap County Auditor’s Office, File No. 9005240198. CP 101. The description of the short plat contained the following encumbrance: “Subject to restrictive and protective covenants, as amended and recorded under Auditor’s File No. 7912271105.” CP 102, 122.

Corman Management, Inc. sold parcel B to James and Susan Theros. CP 142. The Theros’s Deed of Trust contains a Planned Unit Development Rider that states that the property is part of the Meadowmeer subdivision and subject to the Meadowmeer Covenants:

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and contain common areas and facilities, as described in the Declaration of Covenants, Conditions and Restrictions (the “Declaration”). **The Property is part of a planned unit development known as Meadowmeer [sic] [Name of Planned Development] (the “PUD”).** The Property also includes Borrower’s interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the “Owners Association”) and the uses, benefits and proceeds of Borrower’s interest.

CP 134. The Theros's deed references restrictions contained in the Corman Management, Inc. short plat: "Covenants, conditions, restrictions and or easements and maintenance agreements contained in Short Plat No. 5169, recorded under Auditor's File No. 9005240198." CP 142.

The Prestons purchased the property at issue on November 30, 1998. CP 107-09. The Prestons' deed and title commitment report contain the following reference to covenants affecting their property:

1. Covenants, conditions, and restrictions contained in the following instrument;  
Recorded: May 24, 1992  
Recording No.: 9005240198

CP 109, 115. Auditor File No. 9005240198, to which these documents refer, is the Corman Management, Inc. Short Plat, which indicates that the property is subject to the covenants in Auditor's File No. 7912271105. CP 122.

#### **B. Procedural Background**

On March 21, 2006, the Prestons filed a slander of title claim against MGCC after MGCC filed a lien for unpaid member dues upon the Prestons' property. CP 3-9. On June 27, 2006, the Prestons moved for summary judgment on their slander of title claim. CP 58-73. The Prestons argued that MGCC's lien was wrongful on the basis that the Meadowmeer Covenants did not apply to the Preston property. CP 60-73. On July 13, 2006, MGCC filed its response and cross-moved for summary judgment seeking a determination that the Preston property was subject to the Meadowmeer Covenants under the doctrines of real covenants and

equitable restrictions, and asking that the trial court remedy a scrivener's error under the doctrine of reformation. CP 165-73. MGCC also moved to strike the Declarations of Dan Preston, Steve Green, and Jan Johnson that were filed in support of the Prestons' motion for summary judgment. CP 174-75.

On August 17, 2006, Judge M. Karlynn Haberly issued a Memorandum Opinion. CP 191-92. The trial court granted MGCC's motion to strike in part, striking the statements in Dan Preston's declaration that stated his subjective intent and striking Jan Johnson's declaration in its entirety. CP 191. The trial court did not strike any portion of Steve Green's declaration. CP 191. With respect to the Prestons' slander of title claim, the trial court denied their motion for summary judgment because of the existence of genuine issues of material fact. CP 191.

In regard to MGCC's cross-motion, the trial court held,

Defendant's Motion for Summary Judgment seeking reformation of the Short Plat documents filed under Kitsap County Auditor's #9005240198 as a matter of law is denied. The documents under that filing were unilaterally created by Bill Geisler and his agent. There was no bilateral agreement identified between Giesler and the "Meadowmeer" property legally described under Kitsap County Auditor's #7912270105. There are no material issues of fact in dispute as to the documents and creation of those documents. Based on these undisputed material facts, there were no parties that made a mutual mistake for whom the Court could or should exercise equitable powers to reform the documents. There was a unilateral mistake by Mr. Geisler that cannot be remedied by the doctrine of reformation. Assuming arguendo that the Court could

correct what could be found to be a scrivener's error under some other theory of law, the property is still not included in the legal description for Meadowmeer for which included properties are subject to the Meadowmeer covenants. Therefore, the Preston property is not subject to the covenants as a matter of law.

CP 192.

On August 28, 2006, MGCC filed a motion for reconsideration. CP 193-96. MGCC submitted new evidence of the deeds from the original developer, Meadowmeer Inc., to the original purchaser, Meadowmeer Woods Associates, and the deed from Meadowmeer Woods Associates to Corman Management, Inc. CP 197-206. MGCC argued that the deeds demonstrated mutuality of intent of the original developer and purchaser to bind the property to the Meadowmeer Covenants, an element the trial court ruled was missing in its August 17, 2006 Memorandum Opinion. CP 192, 193-196. The Prestons filed their opposition to MGCC's motion for reconsideration on October 6, 2006. CP 207-12. MGCC filed a reply on October 9, 2006. CP 213-17.

On November 9, 2006, the trial court issued a Memorandum Opinion on Motion for Reconsideration. CP 218-19. The trial court denied MGCC's motion. CP 219. The trial court held:

It is undisputed that the property Geisler<sup>1</sup> short platted is not within the property legally described for the Meadowmeer Restrictive Covenants and has never been

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<sup>1</sup> As noted above, Geisler is synonymous with Corman Management, Inc.

included within that legal description. It is undisputed that the three lots developed by Geisler were stated to be subject to the Meadowmeer Restrictive Covenants on the face of the plat.

The inclusion in the short plat and deeds to successors in interest that transferred the lots subject to the covenants could not and did not modify or amend the legal description of "Meadowmeer."

The owners of the lots within "Meadowmeer" never agreed to include the three lots owned by Geisler within the Plat of Meadowmeer. Therefore, there was no real covenant binding the Plaintiff's property to the Meadowmeer Restrictive Covenants. Alternatively, there was no equitable restriction because "Meadowmeer" never accepted the Geisler property into the Plat of Meadowmeer. The Geisler property was simply never included within the property bound by the Meadowmeer Protective Covenants. This is fatal to their attempt now to impose the provisions of the covenants on Plaintiff's property.

CP 219. Because the trial court ruled that the Meadowmeer Covenants could not apply to the Preston property, the trial court did not reach the issue of whether the scrivener's error should be reformed. CP 218-19.

On November 29, 2006, MGCC filed a Motion for CR 54(b) Certification on its Cross-Motion for Summary Judgment. CP 220-25. On December 4, 2006, MGCC filed a Notice of Discretionary Review. CP 232-33. Subsequently, the parties agreed to jointly submit a proposed order on the cross-motions, certifying the issues under CR 54(b). The trial court signed the Order on December 18, 2006. CP 238-41.

## V. ARGUMENT

### A. Standard Of Review

A party is entitled to summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Appellate courts engage in the same inquiry as the trial courts when reviewing an order of summary judgment; all facts and reasonable inferences are considered in a light most favorable to the non-moving party, while all questions of law are reviewed de novo. Coppernoll v. Reed, 155 Wn.2d 290, 296, 119 P.3d 318 (2005) (citing Berger v. Sonneland, 144 Wn.2d 91, 26 P.3d 257 (2001)).

### B. Meadowmeer's Covenants Are Not Inapplicable Merely Because the Legal Description Of The Meadowmeer Subdivision In The Covenants Does Not Contain The Preston Property.

The trial court, without citing any authority, ruled that the Preston property could not be bound by the Meadowmeer Covenants under the doctrines of real covenants and equitable restrictions, even if all the elements were satisfied, because the Preston property is not within the legal description of "Meadowmeer" contained in the Meadowmeer Covenants. CP 219. The trial court erred.

The fact that the Meadowmeer Covenants do not include the Preston property in the description of "Meadowmeer" does not mean that the original developer and purchaser were not free to bind the Preston property, and all successive owners, to the Meadowmeer Covenants through contract. Washington courts have noted that the writing containing

the covenant is often recorded as a declaration of covenants, set forth as a restriction contained in the deed transferring an interest in the property, **or** contained on the face of the subdivision plat. Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836 (1999). Thus, including the property in the description of “Meadowmeer” within the Meadowmeer Covenants was only one way to bind the property to the Meadowmeer Covenants. The property could also be bound through contract and deed.

Neither the Prestons nor the trial court has cited any authority that supports the Prestons’ position or the trial court’s decision. Research reveals no Washington decisions in which a court has ignored a covenant contained in a deed merely because the legal description within a subdivision’s covenants did not include the subject property. Cases in other jurisdictions have rejected the trial court’s “*per se*” approach.

In Dansie v. Hi-Country Estates Homeowners Association, 987 P.2d 30 (Utah 1999), the Utah Supreme Court addressed a similar issue. The owner of parcels of property that were adjacent, but outside, a subdivision, sought declaratory judgment that the parcels were not subject to the subdivision’s CC&Rs. Id. at 31-33. The property at issue was not included in the subdivision’s CC&Rs. Id. at 32, 34. The court recognized that the mere exclusion of the property from the subdivision’s CC&Rs did not necessarily render the CC&Rs inapplicable:

In the instant case, the Subdivision’s developers placed the CC&Rs by written instrument on Phase I alone. The developers’ written, signed, and recorded Protective Covenants expressly limit their application to “the described property,” which is Phase I. Furthermore, while

the Association's certificate of incorporation refers to "any addition[al property] as may hereafter be brought within the jurisdiction of th[e] Association," the Property has never either been part of Phase I or been brought under the Association's purview. **Therefore, if Association membership—with its corresponding fees, assessments, and CC&Rs—as is currently imposed on Phase I lot owners is to be impliedly imposed on the Property, it must be done in plain and unmistakable language.**

Id. at 36 (emphasis added). The court did not hold that failure to include the subject property in the subdivision's CC&Rs was *per se* fatal, as the trial court held in this case. Rather, the court required that in the absence of such inclusion in the CC&Rs, the proponent must demonstrate intent for the CC&Rs to apply by "plain and unmistakable language."

MGCC has met this burden because the deed unequivocally evidences the original developer and purchaser's intent to bind the Preston property to the Meadowmeer Covenants. There is simply no authority that supports the trial court's erroneous decision.

**C. The Meadowmeer Covenants Apply To The Preston Property Under The Doctrines Of Real Covenants And Equitable Restrictions.**

Although the Washington courts have not generally distinguished between "real covenants" and "equitable restrictions," the Washington Supreme Court has formulated the elements of a servitude in two ways. Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 254, 84 P.3d 295 (2004). A "real covenant" runs with the land if the following conditions are met:

(1) the covenant[] must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must “touch and concern” both the land to be benefited and the land to be burdened; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate between the original parties.

Id. (citing Lake Arrowhead Cmty. Club, Inc. v. Looney, 112 Wn.2d 288, 294-95, 770 P.2d 1046 (1989)). The Court also stated that an “equitable restriction” runs with the land if the following elements are met:

(1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or a successor in possession; (4) who has notice of the covenant.

Id. (citing Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836 (1999)). Regardless of the classification of the covenant in this case, the Preston property is bound by the Meadowmeer Covenants, as the elements for both a real covenant and equitable restriction are satisfied.

#### **1. Enforceable Covenant/Enforceable Promise**

A real covenant must be in writing and comply with the statutes of frauds. Lake Arrowhead Cmty. Club, Inc. v. Looney, 112 Wn.2d 288, 295, 770 P.2d 1046 (1989). The deed transferring the subject property from Meadowmeer, Inc., the original developer of the Meadowmeer subdivision and owner of the subject property, to Meadowmeer Woods

Associates, the original purchaser, clearly demonstrates that the original parties agreed in writing that the property at issue would be subject to the Meadowmeer Covenants. Accordingly, the evidence shows an enforceable bilateral agreement by the original parties to bind the subject property.

The Prestons did not dispute the satisfaction of this element in their opposition to MGCC's motion for summary judgment and motion for reconsideration.

## **2. Touches And Concerns The Land**

The purpose of the touch and concern requirement is to separate those covenants that are personal and unrelated to the covenantor's ownership of land, from those that are "connected with" the land. See 17 William B. Stoebuck, Washington Practice, Real Estate: Property Law § 3.3 at 128-29 (1995). To touch and concern the land, a covenant must be related to the land so as "to enhance [the land's] value and confer a benefit upon it." Rodruck v. Sand Point Maintenance Comm'n, 48 Wn.2d 565, 575, 295 P.2d 714 (1956). When determining whether a covenant touches and concerns the land, the courts place a "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." Riss v. Angel, 131 Wn.2d 612, 623-24, 934 P.2d 669 (1997).

There can be no doubt that the Meadowmeer Covenants touch and concern the land. Article IX, Section 2, of the Meadowmeer Covenants provides, "The said covenants shall run with the land and be binding upon all present and future owners of said lots. . ." CP 158. Additionally,

Article II, Section 3, which pertains to membership in the Meadowmeer Golf & Country Club, states, “All certificates of membership provided in this section shall be permanently assigned to the improved residential lot and may not be sold, conveyed or otherwise transferred except with the lot to which it is assigned.” CP 153. The terms of the Meadowmeer Covenants clearly indicate that the covenants are connected to the land, not to the property owners. Therefore the touch and concern element is satisfied.

The Prestons did not dispute the satisfaction of this element in their opposition to MGCC’s motion for summary judgment and motion for reconsideration.

**3. Intent To Bind Successors**

That the covenants were intended to bind successors is evident on the face of the deeds. Every deed in the chain of title attempts to make some reference to the subject property being subject to the Meadowmeer Covenants. The deeds either attempt to reference the recording number of the Meadowmeer Covenants or reference the Corman Management, Inc. short plat, which in turn attempts to reference the Meadowmeer Covenants. The parties’ intent to bind successors is clear even though the Meadowmeer Woods Associates deed contains a scrivener’s error. Indeed, even after the scrivener’s error, the Theros’s Planned Development Rider states that the property is subject to covenants and specifically refers to the Meadowmeer subdivision. CP 134.

#### **4. Vertical Privity**

The vertical privity requirement is also satisfied. Both MGCC and the Prestons are successors in interest to the parties who agreed to bind the property to the Meadowmeer Covenants, Meadowmeer, Inc. and Meadowmeer Woods Associates, respectively.

The Prestons did not dispute the satisfaction of this element in their opposition to MGCC's motion for summary judgment and motion for reconsideration.

#### **5. Horizontal Privity**

Horizontal privity is the transfer of some interest in land, other than the covenant itself, between covenantor and covenantee in connection with the making of the covenant. See, e.g., Bremmeyer Excavating v. McKenna, 44 Wn App. 267, 270-71, 721 P.2d 567 (1986). Here, the agreement to bind the property was made in connection with the sale of Meadowmeer, Inc.'s interest in the property to Meadowmeer Woods Associates. Accordingly, there was horizontal privity between the covenantor and covenantee.

The Prestons did not dispute the satisfaction of this element in their opposition to MGCC's motion for summary judgment and motion for reconsideration.

#### **6. Notice Of Covenant**

The principal element of an equitable restriction that the Prestons challenged in their opposition to MGCC's motion for summary judgment and motion for reconsideration was notice; the Prestons argued that they

had no notice that the Meadowmeer Covenants applied to the subject property. As noted above, the notice element pertains only to equitable restrictions. Notice is not required for enforcement of a real covenant. Here, however, the Prestons had sufficient notice, so the Court may enforce the covenants as a real covenant or equitable restriction.

The general rule is that a person purchasing real property may rely on the record title to the property, in the absence of facts sufficient to put the purchaser on inquiry. Hollis, 137 Wn.2d at 692-93 (citing Olson v. Trippel, 77 Wn. App. 545, 550-51, 893 P.2d 634 (1995)). However, where sufficient facts exist to put the purchaser on inquiry, the inquiry rule imputes “notice of all facts which reasonable inquiry would disclose.” Diimmel v. Morse, 36 Wn.2d 344, 348, 218 P.2d 334 (1950). Here, the Prestons’ deed and their title report referenced that the property is subject to covenants. Accordingly, the inquiry rule imputes to the Prestons “notice of all facts which reasonable inquiry would disclose.” The Prestons argue that despite the notation of the property being subject to covenants in their deed and title report, they were not on “notice” because of the scrivener’s error. In other words, although the Prestons had notice that the property was subject to some covenants, they did not have notice that the property was subject to the Meadowmeer Covenants.

This is not the test. The test is whether a reasonable inquiry would reveal that the property was subject to covenants. The face of their deed and title report clearly put them on notice that they were purchasing property that was subject to covenants. Moreover, reviewing the chain of

title would have revealed that the Theros' deed of trust contains a Planned Development Rider that specifically references the Meadowmeer Covenants. Therefore, a reasonable search would have revealed that the covenants that were referenced in the Prestons' deed and title report were the Meadowmeer Covenants.

To permit the Prestons to escape the applicability of the Meadowmeer Covenants, which all the preceding owners intended to apply, when the Prestons knew that the property was subject to some covenants, simply because the scrivener's error made it more difficult to identify the Meadowmeer Covenants as the applicable covenants, would be inequitable. The Prestons purchased their property with notice that the property was subject to covenants. The Prestons are not entitled to more than what they bargained for: a property subject to covenants.

As noted above, even if the Court agreed with the Prestons that they had insufficient notice of the Meadowmeer Covenants, thus precluding enforcement as an equitable restriction, the covenants are still enforceable as a real covenant, since notice is not a required element.

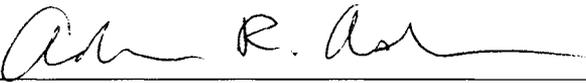
Based on the foregoing, the trial court erred in holding that the Meadowmeer Covenants do not apply to the subject property. All of the requisite elements necessary for enforcement of the covenants as either a real covenant or equitable restriction are satisfied.

**VI. CONCLUSION**

Based on the foregoing, MGCC respectfully requests that the Court reverse the trial court's rulings and find that the Meadowmeer Covenants apply to the Preston property as a matter of law.

DATED this 22<sup>nd</sup> day of March, 2007.

BETTS, PATTERSON & MINES, P.S.

By 

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Attorneys for Appellant

NO. 35654-6-II

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DECLARATION OF SERVICE

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I, Laraine Green, am a citizen of the United States, a resident of King County, I am over 18 years of age and not a party to this action. My business address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA 98101-3927.

On, Thursday, March 22, 2007, we made arrangements with ABC Legal Messengers to file our Appellant's Brief, along with a copy of this Declaration of Service. A copy of the above-referenced documents were deposited in the U.S. Mail First Class Postage Prepaid directed to: William H. Broughton, Attorney for Plaintiffs, Broughton & Singleton, P.S., 9057 Washington Avenue N.W., Silverdale, WA 98373, and VIA Facsimile to William H. Broughton at (360) 692-4987 on today's date.

EXECUTED this 22nd day of March, 2007.

A handwritten signature in black ink that reads "Laraine Green". The signature is written in a cursive style with a large, looping initial "L" and a stylized "G" at the end.

By \_\_\_\_\_  
Laraine Green, Legal Assistant to  
Steven Goldstein and Adam R. Asher  
Attorneys for Appellant