

Court of Appeals No. 36847-1-II
Skamania County Superior Court No. 07-2-00043-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NIGHTRUNNERS TRANSPORT, LTD.,

Appellant,

v.

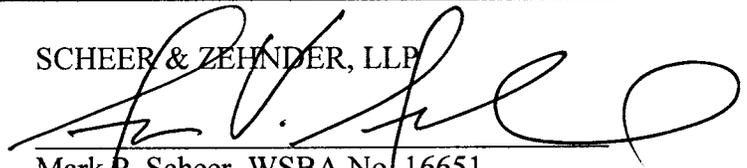
JUANITA ROSANDER and DAVID ROSANDER

Respondents.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

REPLY BRIEF OF APPELLANT

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I. REPLY

There are two primary issues at the heart of this appeal (1) proper notice and (2) review of the evidence presented.

The purpose of providing notice is to give the defendant an opportunity to appear and defend before the hearing on the motion, in which case the motion will be stricken. Not only did Respondent fail to strictly comply with CR 5(b)(2)(B) to establish the necessary proof for service by mail, service consistent with CR 5(b)(2)(A) does not provide Appellant, a foreign resident, with due process. Appellant did not receive sufficient notice of Respondent's motion, and the trial court's determination to the contrary is reversible error.

This Court unequivocally held in Pfaff¹ that the trial court does not act as trier of fact when considering a CR 60 motion. The trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant, in this case Appellant. Respondent's brief in no way provides a justification for the trial court's challenge to the credibility and sufficiency of Appellant's proffered evidence. The trial court need only determine whether the defendant is able to demonstrate **any** set of circumstances that would, if believed, entitle the defendant to relief. The trial court abused its discretion when it failed to consider equitable principles in making its decision, as well as the misunderstandings and miscommunications that plagued this matter.

Appellant should have an opportunity to defend this matter before a jury on the merits. As such, Appellant respectfully requests that this Court reverse and remand this matter to permit the same.

¹ Pfaff v. State Farm Mut. Auto. Ins. Co., 103 Wn. App. 829, 834, 14 P.3d 837 (2000).

A. The Question of Whether Appellant Received Sufficient Notice Should be Reviewed De Novo

Construction of a statute is a question of law which a court will review de novo. City of Pasco v. Public Employment Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

Here, in part, Appellant challenges the trial court's interpretation and application of CR 5. Issues concerning statutory construction regarding notice pursuant to CR 5, are separate and distinct from a determination of whether sufficient evidence has been presented to set aside an Order of Default, and therefore, have different standards of review. Appellant's position that (1) Respondent did not comply with CR 5(b)(2)(B) and (2) CR 5(b)(2)(A) does not provide foreign residents due process relate to the trial court's construction of CR 5, and should be reviewed de novo.

B. Respondent did Not Comply with CR 5(b)(2)(A)

CR 5(b)(2)(A) states that service by mail is permitted and deemed complete upon the third day following the day upon which the paper is placed in the mail. However, CR 5(b)(2)(B) goes on to set forth the necessary steps to establish proof of service by mail. Specifically, proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. The statute goes on to provide a form that should be used when serving a party by mail:

CERTIFICATE

I certify that I mailed a **copy of the foregoing** _____ to [*John Smith*], [*plaintiff's*] attorney, at [*office address or residence*], and to [*Joseph Doe*], an additional [*defendant's*] attorney [*or attorneys*] at [*office address or residence*], postage prepaid, on [*date*].

[*John Brown*]

Attorney for [*Defendant*]

CR 5(b)(2)(B) (emphasis added).

The requirements necessary to adequately and successfully serve a party by mail must strictly adhere to CR 5(b)(2)(B), and substantial compliance is not sufficient. Martin v. Triol, 121 Wn.2d 135, 144, 847 P.2d 471 (1993) (substitute service, including service by mail, requires strict adherence to the rule or statute); *see also* Chai v. Kong, 122 Wn. App. 247, 93 P.3d 936 (2004) (The substantial compliance doctrine applies only to personal service, not service by mail).

Here, Respondent conceded that the certificate of service submitted with its motion for default was deficient. Respondent's Response at p. 14. Respondent failed to comply with CR 5(b)(2)(B), and properly establish the necessary proof that the service by mail was effective. In its brief, Respondent asserted that Ms. Glazier admitted that the citation was "sent," and referred Appellant and this Court to CP 22 as the citation evidencing the same; however, no factual support for Respondent's contention is found at this citation. In addition, it does not appear possible that Ms. Glazier would be able to testify to when the citation was sent. Rather, Ms. Glazier provided sworn testimony that **ING did not receive** the Amended Citation for the Motion for Default until July 30, 2007 -- 15 days after it was deposited in the mail and four days after the Order granting the Default was entered by the trial court (July 26, 2007). CP 75; CP 134.

Respondent's attempt to merely frame the improper notice of the Motion for Default as a "typographical error" does not overcome the strict requirements of CR 5(b)(2)(B). The defect found in Respondent's proof of service constitutes improper

notice and grounds for reversal of the trial court's decision denying Appellant's Motion to Set Aside the Motion for Default and Default Judgment.

C. Service by Mail did Not Provide Appellant with Sufficient Notice

Under the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without "due process of law", the quoted words require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. U.S. CONST. amended. XIV; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

The fundamental requisite of due process of law is the opportunity to be heard. Mullane, 339 U.S. at 314; *citing* Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. Id.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane, 339 U.S. at 314; *citing* Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940); Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751 (1914); Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520 (1900). The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. Id.

However, when notice is a person's due, process which is a mere gesture is not due process. Mullane, 339 U.S. at 315. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. Id. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. Id.

Washington adopted the Supreme Court's above test as stated in In re Saltis, 25 Wn. App. 214, 607 P.2d 316 (1980), where the Court held that the test for legal sufficiency of notice is whether it is "reasonably calculated to reach the intended parties." While the court in Collins v. Lomas & Nettleton Co. held that notice by certified mail satisfies this test, the court's analysis did not contemplate a foreign entity. 29 Wn. App. 415, 628 P.2d 855 (1981).

CR 5(b)(2)(A) is intended and designed to provide proper service by mail for residents of the United States, not those residing in a foreign country. It is difficult to contemplate how a Washington service rule that deems service complete upon the third day the paper is placed in the mail could be so expansive as to apply to foreign parties. The test is whether the method is reasonably calculated to reach the intended party, and whether the means employed are such to actually inform the absentee so that it might reasonably accomplish the same. Service by mail to a foreign party does not meet this test.

While Washington residents (and those in other U.S. states) can feel assured by the reliability of the United States Postal Service, residents of other countries may not be afforded the same level of dependability and consistency. The simple fact that there is no way of knowing whether service by mail is reasonably calculated to reach the intended foreign party makes the method of notice insufficient. Here, in addition to the inability to assure a method reasonably calculated to reach the intended foreign party, ING representative, Ms. Glazier, affirmatively declared that she, in fact, **did not receive** the Citation related to Respondent's Motion for Default until three days **after** the hearing was conducted. CP 75. This Court should find that service consistent with CR 5(b)(2)(A) did not provide Appellant, a foreign resident, due process and was not reasonably calculated to reach the intended foreign party to provide sufficient notice. The undisputed sworn testimony establishes that Appellant did not receive proper and timely notice of the Respondent's Motion for Default, and was prejudiced as a result.

If a defendant has appeared but is "not given proper notice prior to entry of the order of default, the defendant is entitled to vacation of the default judgment as a matter of right." Gutz v. Johnson, 128 Wn. App. 901, 117 P.3d 390 (2005). As discussed above and in its moving papers, Appellant did not receive proper notice. As such, the trial court's denial of Appellant's Motion to Set Aside the Order of Default and Default Judgment was an abuse of discretion and should be reversed.

D. Appellant Submitted Sufficient Evidence to Set Aside the Order of Default and Default Judgment

1. The Trial Court Abused Its Discretion When It Improperly Reviewed the Evidence Proffered by Appellant

In Pfaff, this Court unequivocally held that the decision in White v. Holm² demonstrated that a trial court does not act as trier of fact when considering a CR 60 motion. 103 Wn. App. at 834, 14 P.3d 837. Respondent's attempt to modify the trial court's role when reviewing a CR 60 motion should not be permitted. Respondent seeks to convince this Court that the trial court can make factual determinations when evaluating whether the movant, under CR 60(b), has met its burden; however, this is contrary to applicable case law.

Specifically, Respondent has asserted that the trial court in this matter did not abuse its discretion when it, in no uncertain terms, stated that it did not find the affidavit submitted by Appellant credible, and as a result, ruled that Appellant received sufficient notice of Respondent's Motion for Default. Respondent provided no support for its position that the excusable neglect prong of the White decision is not reviewed by the trial court in the light most favorable to the moving party. Rather, Respondent's interpretation of the trial court's role is contrary to the overriding principle that the trial court need only determine whether the defendant is able to demonstrate **any** set of circumstances that would, if believed, entitle the defendant to relief, and more generally, that default judgments are generally disfavored in Washington.

Respondent attempts to rely on the statement in Pfaff where this Court held, "White demonstrates that a trial court must take the evidence and reasonable inferences in the light most favorable to the CR 60 movant when deciding whether the movant has

² White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

presented “substantial evidence” of a “prima facie” defense. 103 Wn. App. at 834, 14 P.3d 837. However, the excusable neglect prong was not even at issue in Pfaff³ and this Court stated in a preceding paragraph that “White demonstrates that a trial court does not act as trier of fact when considering a CR 60 motion.” Id.

As such, the trial court failed to take the evidence and reasonable inferences therefrom, in the light most favorable to Appellant, when it raised an issue as to the credibility of ING representative Fern Glazier.

Ms. Glazier swore under oath that she had a telephone conversation with Respondent’s counsel, and it was agreed that Respondent would set aside the Order of Default, and it was further agreed that Respondent would provide ING a two week extension to review the file and make a settlement offer. CP 75. When these facts were put before the trial court, Judge Reynolds made a determination directly in conflict with Ms. Glazier, “Mr. Robison agreed that he would...give I.N.G. two more weeks before he took his Default...That's the reason why we have lawyers that can explain to the Canadian insurance companies what American law is all about.” RP 40:14-16; 46:1316.

In addition, Ms. Glazier affirmatively testified that ING did not receive the Amended Citation until July 30, 2007. CP 75. Yet, the trial court ruled “I know there's an Affidavit that says they didn't get it until the 30th. I don't know if it got lost in their office or what happened to it, but I do not find that that is really credible in this case.” RP 42:13-16.

The trial court abused its discretion and misapplied the law. The trial court is not permitted to act as trier of fact when considering a CR 60 motion, and its determination

³ “White's second and third factors are not seriously in dispute. It is apparent that State Farm's failure to answer resulted from a mistake, and that State Farm acted with due diligence when it discovered the mistake.” 103 Wn. App. at 836, 14 P.3d 837.

related to credibility concerning an important and definitive question before it requires this Court to set aside the Order of Default and Default Judgment and remand this matter to be resolved on the merits before a trier of fact.

2. Appellant Asserted a Prima Facia Defense to Respondent's Claims

Respondent spends a great deal of time attempting to establish negligence on the part of Appellant; however, it cannot be ignored that no determination of negligence has been made in this matter. More importantly, Appellant has not even had an opportunity to defend this case. Respondent's analysis concerning fault is purely conjecture and speculation.

At issue in this case is the trial court's failure to (1) properly weigh the evidence presented by Appellant and (2) consider the inequitable result of not allowing Appellant its day in court. Appellant satisfies its burden of demonstrating the existence of a prima facie defense if it is able to produce evidence which, if later believed by the trier of fact, would constitute a defense to the claims presented. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 204, 165 P.3d 1271 (2007); *see also Pfaff*, 103 Wn. App. at 834, 14 P.3d 837. To clarify the trial court's review, this Court in Pfaff held that the White decision demonstrated that when a trial court is considering whether a CR 60 movant has presented "facts constituting a defense" within the meaning of CR 60(e)(1), the trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant. 103 Wn. App. at 834, 14 P.3d 837.

- a. *Appellant Should have the Opportunity to Present the Issue of Damages to the Jury*

Proceedings to vacate default judgments are equitable in character, and relief should be granted or denied in accordance with equitable principles. Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 238, 974 P.2d 1275; *citing* CR 60(b)(1).

The trial court abused its discretion when it failed to consider equitable principles in making its decision. The trial court's opinion is void of any analysis justifying the damages awarded to Respondent. Incorrectly, Respondent would like to frame Appellant's argument as being one premised on being "surprised" by the damages awarded. On the contrary, if Appellant was "surprised" it was because the trial court neglected to adequately review the damages claimed.

Respondent offers no response to the holding in Shepard⁴, where the reviewing court found that a trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense is established, or Calhoun⁵ where the court held that it would be inequitable and unjust to deny a motion to vacate the damages portion of the default judgment on the ground that the defendant failed to present a valid defense where the pain and suffering award warranted further discovery.

Further, Respondent offered no argument in response to this Court's hold in Gutz, other than to say it "may" not be valid. In Gutz, this Court evaluated whether the movant, under CR 60(b), had established substantial evidence of a prima facie defense to the trial court's general damages award. 128 Wn. App. at 917, 117 P.3d 390. In short, this Court found that the trial court abused its discretion when it failed to equitably

⁴ Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 238, 974 P.2d 1275 (1999).

⁵ Calhoun v. Merritt, 46 Wn. App. 616, 622, 731 P.2d 1094 (1986).

review the facts of the matter in light of the general damages claimed -- similar circumstances occurred here.

Respondent admitted that Mrs. Rosander only incurred \$25,951.38 in medical costs. Respondent's Brief, p. 5. Yet, the trial court awarded general damages in excess of \$500,000.00! Respondent's unsupported and legally deficient claims for lost wages and future medicals is mere speculation. In light of the medical costs incurred and the injuries complained, it does not appear that the trial court even considered the equitable factors important to an analysis under a CR 60 motion to vacate. Appellant requests that this Court consider, as it did in Gutz, the necessity of allowing the parties to settle this matter on the merits when there has been an unreasonable amount of general damages claimed and awarded. The general damages claimed by Respondent are an indication that the Default Judgment was neither equitable nor reflective of the actual facts in this case.

Appellant respectfully requests that this Court reverse and remand this matter, and provide Appellant an opportunity to carry the decisive issue of damages to the jury in a trial on the merits.

b. Respondent Did Not Respond to Appellant's Argument Concerning the Trial Court's Failure to Apply the Proper Standard for Reviewing the Evidence Presented

The trial court stated "I do find that there's not a substantial evidence of defense in this case from the agreed facts." RP 42:20-24. The trial court's ruling evidences its improper steps to act as the trier of fact. The trial court arbitrarily determined what the "agreed upon" facts in the case were and applied the wrong standard of review.

The trial court improperly determined that Appellant's defense was not substantial, and therefore did not give rise to a defense. In determining whether a party is entitled to vacation of a default judgment, a trial court's initial inquiry is whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff's claims. The trial court negated this analysis, and in doing so abused its discretion.

Respondent did not put forth an argument, likely because there is not one, which would justify the trial court's misapplication of the law. The trial court failed to properly weigh the evidence presented by Appellant, and as such, abused its discretion.

3. Respondent Overstates the Holding of *Little v. King*

Respondent quoted the following language from the decision in Little:

"It is not a prima facie defense to damages that a defendant is surprised by the damage amount or that the damages might have been less in a contested hearing."

160 Wn.2d 696, 704, 161 P.3d 345 (2007); *citing* Shepard, 95 Wn. App. 240-42, 974 P.2d 1275. Respondent then goes on to overstate this holding and provide its own analysis as to the scope and brevity of the above language. The above language in no way precludes a party from challenging a trial court's consideration of equitable principles in making its decision, nor does the above language question the holdings in Shepard, Calhoun, Gutz where the reviewing courts found that the trial court abused its discretion when it failed to equitably review the facts of the matter in light of the general damages claimed.

Contrary to Respondent's interpretation of the holding in Little, the court stated that under certain circumstances a default judgment will be set aside based upon a

challenge to damages. 160 Wn.2d at 704, 161 P.3d 345; *see* CR 60(e)(1); White, 73 Wn.2d at 352, 438 P.2d 581. The amount of damages in a default judgment must be supported by substantial evidence. *Id.*; *see, e.g., Shepard*, 95 Wn. App. at 240-42, 974 P.2d 1275.

In the instant matter, the general damages claimed by Respondent are an indication that the Default Judgment was neither equitable nor reflective of the actual facts in this case. Here, the trial court abused its discretion when it failed to consider the equitable principles of CR 60, as such, Appellant should have an opportunity to carry the decisive issue of damages to the jury in a trial on the merits.

4. Appellant Set Forth Facts Sufficient to Establish Mistake, Inadvertence, and/or Excusable Neglect

Respondent cited to Prest v. American Bankers Life Assur. Co.⁶, Smith ex rel. Smith v. Arnold⁷, and Little v. King⁸ for the general premise that Appellant's failure to timely answer the Complaint was not occasioned by mistake, inadvertence, surprise, or excusable neglect. Interestingly and not relevant to this case, both the holdings Prest and Little involved an analysis of whether the defendant had “appeared” in the matter. Irrespective, none of the cases cited by Respondent reviewed a factual scenario where a party did not answer the complaint (or appear) as a result of statements/assurances provided by opposing counsel.

In the instant matter, Appellant has asserted and Respondent has confirmed that “Mr. Robison agreed to put the default hearing over for two weeks so that Ms. Glazier could contact counsel who would file an answer.” Respondent’s brief p. 8. The July 12,

⁶ 79 Wn. App. 93, 900 P.2d 595 (1995).

⁷ 127 Wash.App. 98, 110 P.3d 257 (2005).

⁸ 160 Wn.2d at 705-06, 161 P.3d 345.

2007 telephone conversation between Ms. Glazier and Respondent's counsel forms the primary basis for Appellant's failure to timely answer the Complaint. Pursuant to Pfaff, a typical circumstance justifying the vacation of a default judgment includes the misunderstandings or miscommunications among attorneys and insurance companies. That is exactly what happened here. Further, Appellant's actions in this matter should also be viewed in light of its interactions with Respondent's counsel. The Supreme Court in Morin⁹ agreed with this Court's decision in Gutz, where it was held that Respondent may have acted diligently and the failure to appear may have been reasonably excused by the conduct of opposing counsel. 128 Wn. App. at 919, 117 P.3d 390.

Consistent with the sworn testimony of Appellant's agent, ING believed it had received a two week extension to review the file and make an offer, and that the plaintiffs would "set aside" the Order of Default. CP 75. In her own words, Ms. Glazier believed that "so long as she was committed to reviewing the file and then discussing settlement", Respondent's counsel would set aside the Default Order. Id. Respondent's counsel may have suggested he was going to "set over" the hearing; however, Ms. Glazier clearly understood that the default hearing was being set aside or cancelled.

The above factual circumstances illustrate the parties' failure to understand one another. Everyone agrees a conversation took place, but what was agreed to is unclear. Ms. Glazier believed after her telephone conversation with Respondent's counsel that the Order of Default would be set aside. The action of Respondent's counsel, in light of a completely different understanding, effectively evidences a reasonable justification for Appellant's failure to answer the complaint. Ms. Glazier was committed to reviewing

⁹ Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007).

Respondent's file and discussing settlement, as such, she was led to believe that Respondent's counsel was vacating the Order of Default.

The trial court failed to consider the misunderstandings and miscommunications that plagued this matter. More importantly, the trial court neglected to consider the actions of Respondent's counsel in contributing to why Appellant did not answer the complaint. The trial court inappropriately questioned Ms. Glazier's credibility, and inserted its opinion as to what constituted prudent behavior on the part of Appellant's insurer. RP 42:14-16; 43:13-17; 45:18-22; 46:13-21. As such, the trial court's justification for finding Appellant's actions inexcusable was based on untenable grounds and a misunderstanding of law; therefore, the trial court abused its discretion.

5. Respondent Concedes Prongs Three and Four of the CR 60 Test

Respondent provided no argument concerning the secondary factors: the party's diligence in asking for relief following notice of the entry of the default; and the effect of vacating the judgment on the opposing party as stated in Gutz. 128 Wn. App. at 916, 117 P.3d 390. As such, Respondent concedes that Appellant met its burden in this regard, and these two factors do not appear to be at issue before the Court.

II. CONCLUSION

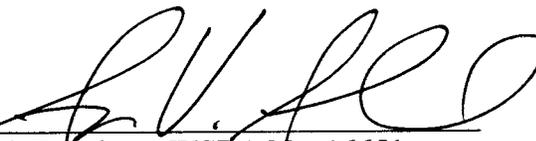
For the foregoing reasons, Appellant requests that this Court overturn the trial court's denial of Appellant's Motion to Set Aside the Order of Default and Default Judgment, and allow the parties to resolve this matter on the merits.

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RESPECTFULLY SUBMITTED this 28 day of, March 2008.

SCHEER & ZEHNDER LLP

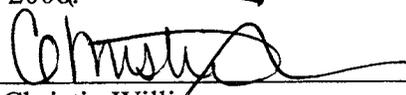
By 
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Sean V. Small, WSBA No. 37018
Attorneys for Appellant Nightrunners
Transport, Ltd.

CERTIFICATE OF SERVICE

I, Christie Williams, certify that on the 28 day of, 2008, I caused a true and correct copy of this to be served on the following in the manner indicated below:

Gideon Caron William Robison Caron Colven Robison & Shafton LLP 900 Washington St Ste 1000 Vancouver, WA 98660-3455	<input checked="" type="checkbox"/> Federal Express (Tracking No. 613088810001064) <input type="checkbox"/> Legal Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
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DATED 28 this day of March, 2008.

By: 
Christie Williams

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