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COURT OF APPEALS
DIVISION II

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NO. 37472-2-II

STATE OF

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

MICHAEL B. MCGRAW and CONNIE MCGRAW, husband and wife;
AL DOUD and PATRICIA DOUD, husband and wife,

Plaintiffs,

vs.

JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, husband and
wife; GREGG R. BIEBER and LYNNE M. BIEBER, husband and wife,

Defendants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara Johnson, Judge

Clark County Cause No. 05-2-06367-3

BRIEF OF PLAINTIFFS MICHAEL B. MCGRAW and CONNIE
MCGRAW

BRIAN A. WALKER
Attorney for Appellant

Walker & Fong-Urbe, P.S.
100 E. 13th Street, Suite 111
Vancouver, WA 98660
(360) 695-8886

TABLE OF CONTENTS

	Page
1. <u>TABLE OF AUTHORITIES</u>	1
2. <u>STATEMENT OF THE CASE</u>	2
3. <u>ARGUMENT</u>	12
4. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Butler v. Craft Eng. Constr. Co., 67 Wn.App. 684, 843 P.2d 1071 (1992).....10, 12,

Standing Rock Homeowners Assoc., v. Misich, 106 Wn.App 231, 23 P.3d 520 (2001)..... 10, 12

Meadow Valley Owners Ass'n v. Meadow Valley, LLC, 137 Wn.App 810, 816, 156 P.3d 240 (2007) 12

Wilhelm v. Beyersdorf, 100 Wn.App 836, 999 P.2d 5413

Drake v. Owen, 136 Wn.App 1021 (2006)13

Cole v. Laverty, 112 Wn.App 180, 185, 49 P.3d 924 (2002)13

Piepkorn v. Adams, 102 Wn.App 673, 683, 10P.3d 428 (2000) 13

The Lakes at Mercer Island Homeowners Ass'n v. Witrak, 61 Wn.App 177, 180, 810 P.2d 27 (1991) 14

Corbray v. Stevenson, 98 Wn.2d 410, 415, 656 P.2d 473 (1982)14

OTHER AUTHORITIES

Webster's New Collegiate (1981 edition) 14

1. STATEMENT OF THE CASE

Appelants Michael and Connie McGraw (McGraw) are the owners of the property located at 13103 NW 35th Court, Vancouver, WA, known as Lot 2 in the Chestnut II Subdivision in an area called Felida. (RP-14, Exh. 12).

Lot 1, abutting the McGraw lot directly to the west, is occupied by the Biebers. (RP-14, 16, Exh. 12). Lot 3 abuts the McGraw lot to the north side and is occupied by the Blackwells. (RP-29, 30 Exh 12). At the northernmost end of the subdivision is the Douds, Lot 4. (RP-30, Exh .12).

All four homeowners in the Subdivision agreed to the terms of Conditions, Covenants and Restrictions (CC&R's) when they purchased their Chestnut II lots. (Exh. 13).

The McGraws built their home in 1990. (RP-231, Exh. 12). During construction of an addition to their home, in approximately 2002, McGraws also constructed a 48 inch high brick-faced concrete retaining wall topped with a six foot vinyl privacy fence along their entire east and south borders, and approximately one-third the way along the western border they share with the Biebers. (RP-228, 9). The retaining wall and fence was identical in height and composition to the one built in 2006 around the remainder of the lot. (RP-263). There were no complaints as to the composition of height of the structure prior to this action. (RP-263). During the retaining wall and fence construction of 2006, McGraws applied a black, waterproof protective material to the Bieber side of the wall to withstand the effects of

the debris being piled there by the Biebers. (RP-268).

The Blackwells moved onto their lot in 1997. (RP-72). Shortly after moving in, Blackwells planted a Blue Spruce tree and created a landscaped “island” which protruded partly into the paved portion of the easement. The island is fitted with reflectors as it presents an obstacle to those using the easement. (RP-74).

Biebers purchased their lot in 1992 and constructed a home. (RP-44). When excavating for their crawl space and foundation, Biebers had the excavated dirt pushed to the northeast corner of their lot which created a substantial berm along the northwester corner of the McGraw lot. (RP-44, 231, 289). The berm rises sharply from an elevation even to the McGraws, and grows to five to six feet in height measured approximately 18 feet in from the northeast corner of the Bieber lot. (RP-46, 47).

The homeowners in the subdivision enter and exit their residences through a privately maintained road built upon a forty foot wide easement dedicated in approximately 1990. (Exh. 12). Each of the landowners have a portion of their respective properties dedicated to the easement. (Exh. 12).

To accommodate accessing their lot with their new motorhome, detailed more fully below, on or about October 14, 2005, McGraw sent to Co-plaintiffs the Douds and Defendants correspondence entitled “Notice Regarding Paving,” notifying each of their intent to pave an area of the designated easement on or after October 27, 2005. (Exh. 2). The proposed

portion to be paved is a five foot by 60 foot strip of the easement which is unpaved and which serves as a host to annual wildflowers which are allowed to die and dry up before being mowed and/or tilled under each year. (RP 75, 77, 78 Exhs. 2, 35, 36, 37, 38).

On or about October 17, 2005, McGraw received from the Blackwells correspondence objecting to McGraw's proposal. (Exh 5). Negotiations ensued but were to no avail. As a result, McGraw filed a Complaint to institute this lawsuit to, among other requests, establish finally the rights of the dominant estate holder with regard to the easement, and to enjoin the Blackwells and Biebers from maintaining rubbish on their lots in violation of the CC&R's.. (CP-2). The Blackwells and Biebers filed an Answer that denied most of the McGraws' allegations, asserted a number of Affirmative Defenses, and Counterclaimed against the McGraws to force them to lower and replace their fence with another material. (CP-6).

Following filing of the suit, Defendants moved to add the fourth and final Chestnut II residents, the Douds, to join the suit as necessary parties. (CP-11). The Court ordered that the Douds be added. (CP-19). The Douds chose to join the McGraws as Plaintiffs. (CP-21).

TRIAL EVIDENCE REGARDING PROPOSED PAVING

The circumstances which precipitated this lawsuit arose when the McGraws traded up to a larger motorhome. For several years, the McGraws owned a 36 foot motor home which they were able to maneuver in and out

of their yard and cul de sac and store at home in their RV garage. (RP-240).

In 2005, the McGraws replaced the 36 foot model with a 40 foot model which is 102 inches wide. (RP-240, 252). Though two sizes (five feet) shorter than the largest models made, the new motor home was too long and wide to maneuver easily and safely into and out of the McGraw lot.

(RP-241). The new motorhome can be driven to the McGraw home, but requires a person on the ground guiding the driver, and a great deal of jockeying, caution and risk of damage. (RP-21). This difficulty persists in spite of the fact that the driveway opening to the McGraw lot is wider than it was prior to the retaining wall and fence construction. (RP-254).

McGraws are now forced to store the motorhome offsite at a storage facility and are unable to conveniently and safely move the motorhome onto their property for cleaning and loading for their travels. (RP-241, 274).

Mike McGraw has learned that by swinging wider, onto several feet of the unpaved portion of the ingress and egress easement, he is able to bring the motor home forward through his driveway, at a straight angle, and safely onto his lot. (RP-241). In order to support the weight and path of his motorhome, Mike McGraw requested that he be allowed, at his own expense, to pave a five foot wide by 60 foot long strip adjacent to the paved surface; the portion of the easement currently covered by a seasonal wildflower patch at one of several unmonitored stages of growth, drying and decaying. (RP-242).

At trial, Lynne Bieber expressed no objection to the additional paving proposed by the Plaintiffs, aside from costs, and indicated that she would not be harmed by it. (RP-15).

Gregg Bieber testified that he had no authority to agree or disagree with the proposed paving as the property is deeded to the Blackwells. (RP 49). He did speculate, and without foundation, however, that allowing the paving might bring upon the Subdivision problems of biblical number and proportions. (RP-49, 50)

Cynthia Blackwell testified that her only objection to the paving was the initial cost and the cost of maintenance. (RP-30). She testified that she did not object to vehicles being driven upon the unpaved portion of the ingress and egress easement. (RP-37, 8)

Joe Blackwell testified that he planted the wildflowers each year, and, when so inclined, places metal posts along the paved area to keep individuals from driving onto the dried wildflower patch. (RP-76). His objection to the paving was that it was not “necessary” in his opinion. (RP-81). He based this opinion in part on the fact that he had seen big trucks go in and out of the McGraw property during an earlier remodel. (RP-92). He otherwise did not feel that it would affect him in any way. (RP 82). Gregg Bieber also testified that he had seen big trucks go into and out of the McGraw lot, but not a motorhome. (RP-328, 331).

At trial, Plaintiffs’ counsel was not allowed to recall as a witness and

inquire of the Defendants' county code expert regarding the minimum dimensions of the paved surface on the plat map as the expert had not been subpoenaed by Plaintiffs. (RP-318).

TRIAL EVIDENCE REGARDING DEFENDANTS COMPOSTING

At trial, Lynne Bieber confirmed that she and her husband had been placing yard debris up against the McGraw retaining wall and intended to do so until the space between the wall and berm was completely filled. (CP-16, 25).

Gregg Bieber also testified that he had been filling the depression created by the slope of the berm with yard debris and vegetables for approximately five to six years, even before the McGraw fence went up, and intended to continue in order to build it up. (RP-55, 56, 59, 60, 70, 333, 335, 336). Gregg Bieber further testified to engaging in placing yard debris about his lot over the years. (RP-57, Exhs. 42, 43, 46-49).

General Contractor, Paul McGraw, also testified that the Bieber rubbish emitted an offensive odor from Spring through Summer while he was onsite working there. (RP-106).

Mike McGraw also found that the Bieber composting gave off an offensive smell, like "decaying garbage", and which continued to offend him at the time of trial. (RP-239, 256, 270).

General Contractor, Carl Robert Holbrook, Jr., testified that the Biebers had piled grass and dog feces onto the west McGraw retaining wall

when he returned to strip off the forms from the concrete portion of the retaining wall. (RP-185). During the fence and wall construction process, the deposits of yard debris and rubbish accumulated to approximately one half of the retaining wall height, and higher. (RP-203, 204). The build up of debris along the shared McGraw – Bieber property line did not begin until the McGraws began construction of the retaining wall and fence. (RP-259, 275).

Joe Blackwell also admitted to dumping yard debris in a pile at the southeast corner of his lot for the past 10 years. (RP-80, 81, Exh. 47, 48, 94).

TRIAL EVIDENCE REGARDING FENCE HEIGHT

Lynne Bieber testified at trial that the McGraw fence was constructed at the bottom of the Bieber North and East berm. (RP 24). Gregg Bieber testified, without foundation, and over objection, that he measured the McGraw fence with a stick he had made and that the fence was well over six feet tall at locations. (RP-299).

Cynthia Blackwell testified that she and her husband had added material to the southern border of their parcel to level it off, and then built a retaining wall, which had the effect of raising their lot higher than the McGraw lot. (RP-33, 34). They then erected a 6'-0" fence atop the retaining wall. (RP-34).

Carl Robert Holbrook, Sr., testified that the retaining wall on the McGraw side was raised to match the Blackwell ground elevation. (RP-184). McGraws actually had to build a second, higher retaining wall due to the Blackwells building up their yard during the wall construction process. (RP-237).

Paul McGraw also testified that he was required to place a higher retaining wall against the Blackwell property line as the Blackwells had increased the height of their property. (RP-160, 169).

Joe Blackwell testified that he attached to the top of the fence along his southern border a "trellis" that is a rectangular structure measuring 3-1/2 feet high and 18 feet in length, causing the fence to be more than 9-1/2 feet in height along its expanse. (RP-79, Exh. 32). Though nicely finished on his side of the fence, the Blackwell "trellis" structure resembles unfinished two-by-fours on the McGraw side of the fence. (RP-281). With regard to the McGraw fence along his southern boundary, Blackwell testified that his own fence exceeds the six foot limit at various locations. (RP-85). Otherwise, he said, the McGraw and Blackwell fences along that boundary are roughly the same height. (RP-95, 367).

General Contractor, Paul McGraw, testified that the Biebers placed a construction silt fence along their northeast corner where McGraw was constructing the fence, and began to rapidly back fill it to its 36" top with yard debris, vegetables and dog excrement. (RP-105). It was at this point

that Paul McGraw recommended to Mike McGraw that he build a retaining wall to prevent the Bieber rubbish from flowing against the fence. (RP-105, 173). The intent was to meet the anticipated build up of Bieber rubbish and then to have a six foot privacy fence above that. (RP-129, 133, 145, 148, 163, 166). The fence and retaining wall structure were inspected numerous times and no deficiencies were noted. (RP-137-139).

None of the retaining walls constructed by the McGraws were over 48 inches and permits and engineering were not required according to county code. (RP-194). Expert testimony at trial was presented that the height of a fence for two abutting properties of differing elevations is measured from the high side. (RP-312). Moreover, a wall is deemed a retaining wall according to its ultimate use, and a wall against which material is later backfilled, is a retaining wall. (RP-315, 316).

TRIAL COURT FINDINGS, CONCLUSIONS AND ORDER

A. PAVING: The Court found that McGraws are forced to use the “assistance of a second “ground” person and some jockeying” in order to maneuver their new motorhome onto their lot, but concluded that they failed to establish “reasonable necessity for expanding the paved surface”, under the reasoning of *Butler v. Craft Eng. Constr. Co.*, 67 Wn.App. 684, 843 P.2d 1071 (1992), and *Standing Rock Homeowners Assoc., v. Misich*, 106 Wn.App 231, 23 P.3d 520 (2001). (CP-82,4). The Court, therefore, denied Plaintiff’s request to expand the paved area as requested. (CP-83, 1).

B. COMPOST: The Court found that the “Plaintiffs have failed to establish a basis for a damages claim and injunctive relief”; and concluded that the yard debris scattered about both, Blackwell and Bieber, lots do not constitute “rubbish, or a nuisance” under the CC&R’s. (CP-82, 4). The Court denied Plaintiff’s request for injunctive relief. (CP-82, 2).

C. FENCE HEIGHT: Regarding the portion of the McGraw fence along its shared border with the Bieber property at locations where the Biebers do not have a retaining wall of their own, the McGraw fence exceeded the six foot limitations in the CC&R’s and ordered the that fence be lowered to no more than six feet in height as measured from grade on the McGraw side. (CP-82, 5 and CP-83-2).

D. BRICK FACING: The Court found that only the McGraw side of the McGraw retaining wall had a decorative brick facing, and concluded that the sealant treated façade of the Blackwell and Bieber sides of the retaining wall violated the CC&R’s. The Court ordered McGraws to pay for the installation of identical brick facing on both the Blackwell and Bieber sides. (CP-82-3,5 and CP-83-2,3).

Appelants McGraw appeal items A through D above.

2. ARGUMENT

A. PAVING.

The court erred in denying McGraw's request to pave an additional 5 foot by 60 foot strip in the dedicated ingress and egress easement.

The Court found that McGraws had not established reasonable necessity for expanding the paved surface", following the reasoning in *Butler v. Craft Eng. Constr. Co.*, 67 Wn.App. 684, 843 P.2d 1071 (1992), and *Standing Rock Homeowners Assoc., v. Misich*, 106 Wn.App 231, 23 P.3d 520 (2001). This was an error of law.

Claimed errors of law of the trial court are reviewed de novo. *Meadow Valley Owners Ass'n v. Meadow Valley, LLC*, 137 Wn.App 810, 816, 156 P.3d 240 (2007).

Nothing in the Plat Map of the Chestnut II Subdivision expressly limits the pavement width to that of the original pavement. The language in the Plat map which sets forth that the dedicated easement "is required to have a 16 foot wide paved roadway on a 40 foot wide private road easement". This establishes only a minimum dimension, not a maximum. It does not say, for example, that the pavement shall not exceed 16 feet. Also, the five foot by 60 foot portion of additional paving is not an expansion of the easement, but rather an enhancement of the dedicated "ingress and egress" easement and is intended to improve its intended use. Therefore, reasonable necessity is not required.

In *Wilhelm v. Beyersdorf*, 100 Wn.App 836, 999 P.2d 54, the court accepted without question that the dominant estate holder had the right to expand the width of the 16 foot wide road to the full 40 foot width of the easement and that the servient estate holders would have to accommodate the dominant estate holders' use. A party who grants an easement over his or her land has a right to use the land as long as the use doesn't interfere with the dominant estate's use. *Drake v. Owen*, 136 Wn.App 1021 (2006). "If the dominant estate has established use of an easement right of way, obstruction of that use clearly interferes with the proper enjoyment of the easement." *Cole v. Laverty*, 112 Wn.App 180, 185, 49 P.3d 924 (2002).

All parties opposed to the paving testified that they would not be harmed by the proposed pavement, but only objected to costs. McGraws standing offer to pay for the paving eliminates this concern and there remains no reasonable argument for denying McGraw's request to use more of the dedicated easement.

B. COMPOSTING

The trial court erred by not enjoining "composting" and backfilling activities in the Subdivision.

CC& R's are to be given their plain meaning when provisions are unambiguously expressed. "...[A] 'covenant should not be read in such a way that defeats the plain and obvious meaning of the restriction.'" *Piepkorn v. Adams*, 102 Wn.App 673, 683, 10P.3d 428 (2000) quoting *The*

Lakes at Mercer Island Homeowners Ass'n v. Witrak, 61 Wn.App 177, 180, 810 P.2d 27 (1991).

“[W]ords and provisions in a contract [should be given] their ordinary meaning. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982)

The relevant portion of the CC&R's states under the heading of provision 6, “Nuisances and Maintenance”,

[n]o noxious or offensive activity shall be carried out upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood, Yards, grounds, and buildings shall be kept and maintained in a neat and sightly fashion at all times

Under provision 14. “Garbage and Refuse Disposal” the CC&R's provide that

[n]o lot shall be used or maintained as a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers, pending collection and removal

Webster's New Collegiate, 1981 edition, defines “rubbish” as “useless waste or rejected matter: TRASH”. One alternative definition of “trash” in Websters's is “2: ... *esp*: debris from pruning or processing plant material”

Joe Blackwell testified that he had been dumping miscellaneous yard debris at the southeast corner of his lot, adjacent to the McGraws for the past 10 years, with no other purpose than to fill in a hole and discard the yard material. Using a plain meaning approach, there is no reasonable

argument for characterizing such a practice as anything other than maintaining the southeast corner of the Blackwell lot as a dumping ground for rubbish.

The Biebers testified that they have been engaging in placing unwanted prunings and other plant refuse at many locations about their lot for “composting” and, along the McGraw border, for backfilling. The concept of composting has been around since man first learned to fertilize land. In particular, composting enjoyed a renewed and continued popularity since the 1960’s. It is unreasonable to assume that CC&R’s written and agreed to by parties within the last 20 years were not aware of “composting”. The CC&R’s clearly and expressly prohibit the Bieber “composting” and backfilling practice.

Further, Mike McGraw, Connie McGraw, Carl Robert Holbrook, Jr., Paul McGraw and Robert S. Holbrook collectively testified to the unsightly and smelly buildup of yard debris, vegetables and dog feces being piled by the Bieber against the McGraw property line. This is a violation of provision 6 of the CC&Rs engaging in activities which cause annoyance or nuisance to the neighborhood, and further that “[y]ards, grounds, and buildings shall be kept and maintained in a neat and sightly fashion at all times”.

Were composting anticipated as an authorized exception to provisions 6 and 14 of the CC&R’s, it would have been expressed.

Moreover, the provision that all such rubbish be placed in sanitary containers pending removal appears to be a clear expression of the intent to prohibit open dumping of yard debris in the Subdivision.

C. FENCE HEIGHT

The trial court's findings, conclusions and formulation of allowable fence height along the McGraw and Bieber shared property line are contrary to the evidence admitted at trial.

A trial court's findings may be reviewed to determine whether substantial evidence supports the trial court's findings and, if so, whether the findings in turn support the conclusions of law and the judgment. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7, (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987).

While evidence was presented at trial that the McGraw fence along the Bieber property line exceeds six feet from where the higher of the Bieber and McGraw grades meet the McGraw retaining wall, overwhelming and uncontroverted evidence was presented at trial that Bibers had begun, and intended to continue, backfilling the ditch-like depression created between the Bieber artificial berm, and the McGraw fence.

Contractor Paul McGraw testified that he saw the material being deposited and built up to approximately one half of the height of the 48 inch

retaining wall, held back only by a temporary silt fence. It was his recommendation to build a wall to retain all that the Biebers could deposit.

Mike McGraw, and contractors Carl Robert Holbrook, Jr., and Robert S. Holbrook testified to the build up of material as well.

Most compelling of all was the testimony of Lynne and Gregg Bieber themselves who admitted at trial they fully intended to backfill the ditch-like space between the McGraw fence and their artificial berm until it was full. Gregg Bieber testified that he intended to provide an estimated 48 cubic yards of material in order to level his yard to the fence line.

The intent of the McGraws, at the advice of their contractors, was to provide a suitably protected surface against which the Biebers could realize their dream of a level yard, without causing unsightly damage to the McGraw fence. According to the evidence at trial, once the Bieber lot was leveled, the McGraw fence would only be six feet in height relative to the higher (Bieber) grade, and the wall would be a true retaining wall.

To require McGraws to lower their fence and wall to a net height of six feet and then to allow the Biebers to backfill, would give McGraws only an approximately two foot high "privacy fence". This is inequitable, contrary to the CC&R's and a finding and order not supported by the evidence admitted at trial.

D. BRICK FACING ON RETAINING WALL

The trial court erred in requiring the McGraws to provide and pay for brick facing on the Blackwell and Bieber sides of the retaining wall.

The trial court's order for the McGraws to pay for brick facing on the Blackwell and Bieber sides is an order pursuant to a finding not supported by the evidence.

As set forth above, McGraws had a protective coating applied to the Blackwell and Bieber sides of the McGraw retaining wall to accommodate the backfilling done, in particular, by the Biebers. Biebers admitted that they would continue to backfill and the court refused to enjoin the practice. The Court now requires the McGraws to pay tens of thousands of dollars for a decorative brick facing that will be buried by their composting neighbor. Such an order is inequitable, and not supported by common sense and the evidence admitted at trial.

McGraws request that the Court be required to relieve them of the obligation of brick facing the Blackwell and Bieber sides of the McGraw retaining wall, or to enjoin the backfilling practice.

As a second concern, the CC&R's require that fences be of a "wood, brick or cyclone design ... [and] not detract from the Subdivision atmosphere". The CC&R's do not say that each fence or retaining wall must be surfaced with the same material on both sides. Had the Blackwells and Biebers offered to share in the costs of the fence and retaining wall, their wishes should be taking into account. As the sole financier of the fence and retaining wall construction, McGraw should be able to choose the material as long as it complies with the CC&R's.

There is no CC&R provision or any evidence presented at trial which support the order of the trial court requiring that the McGraws provide and pay for costly decorative brick in their neighbors' yards.

III. CONCLUSION

The Court erred in denying McGraw's request to pave by applying a reasonable necessity standard which is the proper standard for expansion of an easement, not for using more of an already dedicated easement, as here.

The composting practices of the Blackwells and Biebers violates the CC&R prohibitions on maintaining a noxious and annoying material on their lots and, regardless, is against the CC&R's provision against dumping yard prunings on the lots.

The formula fashioned by the Court regarding the height of the McGraw retaining wall and fence along the Bieber side defies common sense and deprives the McGraws of the benefits of a six foot privacy fence as enjoyed by the Biebers.

Forcing the McGraws to provide and pay for decorative brick facing on the Blackwell and Bieber sides is not required by the CC&R's and requires the McGraws to make a significant expenditure on something the neighbors have said they would cover with dirt and yard debris.

For the foregoing reasons, the McGraws request that the foregoing portions of the Court's order be vacated and that this matter be remanded for entry of an order providing for the relief requested herein.

DATED this 4 day of September, 2008.

Respectfully submitted,


BRIAN A. WALKER, WSBA # 27391
Of Attorneys for Appelants McGraw

