

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 38783-2-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

JUDITH C. GREER, an individual, and STEPHEN CONNOR, and
individual

Appellants,

v.

DONALD B. MOUNTJOY and KATHLEEN L. CONNOR,
husband and wife,

Respondents.

REPLY BRIEF OF APPELLANT STEPHEN M. CONNOR

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I. SUPPLEMENTAL STATEMENT OF THE CASE

The trial court rejected Plaintiffs' claims of an oral promise by Defendant Judith Greer that Plaintiffs would have "unfettered rights in the Community Access Areas, so long as the Plaintiffs or their family own Lot 10" (CP 2067-2071). Plaintiffs resurrect this claim to excuse their continuing use of the Community Access Area after Bayfield's lawful termination of their license. CP 2184-86; CP 2188-89.

Plaintiffs quote from the March 1999 Agreement (the "Agreement") with Woodland and Bayfield, but understandably omit the companion dispute resolution provision, paragraph 6, providing not only for arbitration of "*any controversy or claim,*" but also that the parties shall have "*all remedies at law or in equity.*" This language is then incorporated into paragraph 7 regarding attorneys' fees:

6. Arbitration. *Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration with the rules, then pertaining, of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof. The parties shall have all remedies at law or in equity available to them for the violation or attempted violation of the covenants set forth herein ...*

7. Attorneys' Fees. *If said controversy or claim is referred to an attorney, the losing party shall pay the*

prevailing party's reasonable attorneys' fees and costs,
including attorneys' fees and costs incurred in any appeal.

(Italics supplied.) CP 402. In Defendant Connor's opening brief, these paragraphs 6 and 7 are referred to in combination as "integrated, remedial provisions," Appellant Connor's Brief at 6 (hereinafter "Dispute Resolution Provisions").

Plaintiffs continue to refer to "the alleged assault of their then 15-year old son by Defendant Connor." Respondents' Brief at 6-7. The subject of this alleged assault, however, Marlon Mountjoy, never submitted testimony in any form that would support their groundless charge. Plaintiffs cite to nothing other than the plainly hearsay declaration of Kathleen L. Connor. CP 2117-2121.

Bayfield's attorney addressed aggressive and offensive conduct by Plaintiffs and put them on notice that unless they adhered to basic standards of decency, the license to access Bayfield property, "immediately adjacent to and abutting Grantees' property," would be revoked. CP 2130. Contrary to Plaintiffs' erroneous assertions, Respondents' Brief at 7, access to this designated Bayfield property was necessary to access the beach as the pathway from Plaintiffs' property to the beach crossed Bayfield property. CP 179 (Plat map attached to

Plaintiffs' Second Amended Complaint). Plaintiffs were given nine (9) months to reform their behavior, which they failed to do, and it was only upon such failure that the second letter was sent by Bayfield's attorney on May 18, 2006. CP 2188-89. Plaintiffs do not dispute that the instructions they received from Defendants Greer and Connor pertain to the access to and protection of Bayfield property and that Plaintiffs' grievances related to Defendants Connor's and Greer's actions on behalf of Bayfield and Woodland:

If any of these provisions are violated by either you or your family members, Bayfield and Woodland Company will immediately exercise their right to revoke your permission to occupy and use the paths and beachfront areas as set forth in the Agreement.

CP 2186.

Plaintiffs continue to complain of, "an unrelenting and ever-increasing campaign of intimidation and harassment by Defendants," Respondents' Brief at 8, but they do not suggest that this "campaign" was related to anything other than enforcing the termination of beach access and performing Bayfield's and Woodland's legitimate work activities on the property. CP 154-56, Second Amended Complaint, ¶¶ 3.18, 3.19, and 4.4.

Plaintiffs alleged ten (10) Causes of Action in their Second Amended Complaint. Respondents' Brief at 8-9. They also reference a Stipulation Clarifying Claims, Id., which was not filed with the court and has no Clerk's Papers number. While they allegedly "clarified," i.e., unilaterally dismissed the Second, Third, and Sixth through Tenth Causes of Action against Defendant Stephen Connor, this "clarification" did not occur until December 21, 2007, seven (7) months after Plaintiffs were granted leave to file their Second Amended Complaint on May 21, 2007, and after Mr. Connor incurred substantial litigation expense with regard to those claims. Defendant Stephen Connor's Motion for an Award of Attorney's Fees, Costs and Expenses, CP 1620-30; Declaration of Richard L. Martens in Support of Stephen Connor's Motion for an Award of Attorney's Fees, Costs and Expenses, CP 1329-1609.

Plaintiffs' Motion for Partial Summary Judgment on their Third Cause of Action for Declaratory Judgment sought to have the Relinquishment Provision of the Agreement declared void. While the trial court granted that motion, Plaintiffs disregard the fundamentally damaging implication of that ruling for their basic quest in their lawsuit to both retain Lot 10 and obtain permanent beach access:

Accordingly, there are two options available as a remedy: either (1) affirm the grant to plaintiffs and include the community access rights or (2) *rescind the transaction and attempt to do equity, given the passage of time and change in value of the property as well as the reliance of plaintiffs on the conveyance.*

* * *

What makes this case perhaps distinguishable from *M.K.K.I. v. Krueger* [135 Wn.App. 647 (Div. III 2006)] is that *Plaintiff and Defendant explicitly bargained for a result [relinquishment of community access rights] that is not legally enforceable.*

CP 864. In fact, in the Court's June 20, 2008 Order Regarding Remedies regarding the relinquishment provision, the Court ruled that while unenforceable against Plaintiffs "heirs, successors and assigns," it was enforceable against Plaintiffs personally:

ORDERED, ADJUDGED AND DECREED that except as provided herein, *the Agreement remains in full force and effect in accordance with its terms.*

CP 1234-38. Any claim by Plaintiffs that this was a victory because of the availability of community access to their heirs, successors, or assigns, is largely negated by Bayfield's right of first refusal under the Agreement:

2.1 Grantees' Property. Grantees agree not to transfer, sell, assign, convey or otherwise dispose of the Grantees' Property unless Grantees have first made an offer to sell the Property to Bayfield as described in Section 2.1.1

hereof and Bayfield has declined its rights pursuant to Section 2.1.2 hereof.

CP 397. Plaintiffs' claims of "their success on their declaratory judgment action," Respondents' Brief at 11, plainly do not withstand scrutiny.

As for Defendant Connor's counter-claims under CR 11 and RCW 4.84.185, Plaintiffs do not argue that these counter-claims were anything more than claims for attorneys' fees for having to defend against Plaintiffs' actions against him.

II. ARGUMENT

A. Plaintiffs' Privity of Contract Analysis Must Be Rejected.

Plaintiffs mistakenly rely on *Touche Valley Grain Growers, Inc. v. Opp & Siebold General Construction, Inc.*, 119 Wn.2d 334, 831 P.2d 724 (1992) for the general rule of privity that one who is not a party to a contract cannot claim benefits under it. That is not what *Touche Valley* held. Instead, the limited holding was as follows:

We further hold that the subrogation waiver protects Opp & Siebold's surety, National Surety Corp., but does not protect the subcontractor and manufacturer, Truss-T Structures, Inc., because Truss-T was not a party to the contract or a beneficiary of it.

Id. at 337. Thus, while subcontractor Truss-T was denied the benefit of a waiver of claims negotiated between building owner Touche Valley and

general contractor Opp & Siebold, Touche Valley had never sued subcontractor Truss-T or claimed that Truss-T had directly violated contract provisions or improperly implemented them, as is the case here with Plaintiffs' claims against Defendant Stephen Connor.

B. Mutuality of Remedies Requires the Grant of Defendant Connor's Attorneys' Fees.

Privity does not preclude the extension of contract benefits where the Plaintiffs have sued defendants who are non-signatories to a contract on the basis that they violated the contract's terms and should have liability for their actions on behalf of a corporation. As the Court of Appeals stated in *McClure v. Davis Wright Tremaine, et al.*, 77 Wash.App. 312, 316, 890 P.2d 466 (Div. I 1995):

Numerous courts have held that even when it is not explicitly provided for in an arbitration agreement, some non-signatories can compel arbitration under the doctrine of equitable estoppel or under normal contract and agency principles.

Id. at 316. Similarly, here, where Defendants Greer and Connor are non-signatories, they can compel application of the Dispute Resolution Procedures. Such a result has been adopted in Washington under the mutuality of remedy rule. *Park v. Ross Edwards, Inc.*, 41 Wash.App. 833, 706 P.2d 1097 (Div. I 1985), *Kaintz v. PLG, Inc.*, 147 Wash.App. 782, 197

P.3d 710 (Div. I 2008). In a case where defendant PLG, Inc. took over the business of tenant Draper, plaintiff landlord Kaintz filed an unlawful detainer action against PLG seeking a writ of restitution, money damages, and attorneys' fees pursuant to the lease previously in effect between Kaintz and Draper. The Court of Appeals affirmed the trial court's award of attorneys' fees to plaintiff Kaintz notwithstanding that PLG had never signed the lease:

Mutuality of remedy is an equitable principle, recognized in the case law of Washington, that can support the award of attorney fees to the prevailing party in an action brought on a contract. Today we explicitly hold that this equitable principle can support such an award even in circumstances in which the party that prevailed did so by establishing that the contract at issue was unenforceable or inapplicable. Accordingly, we affirm the trial court's order awarding attorney fees herein.

Id. at 711.

Under the mutuality of remedy analysis in a California decision, *Reynolds Metals Company v. Alperson*, 25 Cal.3d 124, 599 P.2d 83 (1979), plaintiff Reynolds supplied aluminum goods and products to Titanium Metallurgical, Inc. (hereinafter, "TMI") and its subsidiary, Turner Metals Supply, Inc. When Turner and TMI became insolvent, plaintiff brought suit seeking to hold the shareholders and directors of TMI

personally liable for the debts owed Reynolds by Turner and TMI, claiming defendants were, “alter egos” of the two bankrupt companies. The case proceeded to trial and the trial court rejected the alter ego theory and awarded defendants their attorneys’ fees under the terms of the contract between Reynold and TMI, even though the shareholders and directors were not signatories. Relying on California Civil Code Section 717, California’s counterpoint to RCW 4.84.330, Washington’s mutuality of attorneys’ fee contract provisions, the California Supreme Court held:

Had plaintiff prevailed on its Cause of Action claiming defendants were in fact the alter egos of the corporation ... defendants would have been liable on the notes. Since they would have been liable for attorneys’ fees pursuant to the fees provision had plaintiff prevailed, they may recover attorneys’ fees pursuant to § 717 now that they have prevailed.

Id. at 129. Thus, the mutuality of remedy analysis in Washington under *Kaintz v. PLG, Inc.* and in California under *Reynolds Metals v. Alperson* makes it clear that, so long as Plaintiffs have pleaded for their attorneys’ fees under the contract in the Second Amended Complaint, CP 161, Defendant Connor is equally entitled to the benefit of the attorneys’ fees provided for under paragraph 7 of the Agreement.

While Defendant Connor disclaimed any connection with the Agreement, Respondents’ Brief at 14, this does not alter the operation of

the mutuality of remedy rule that, if the Plaintiffs claimed to be entitled to attorneys' fees if they had prevailed, the reciprocal right to attorneys' fees is granted to Defendant Connor. *Kaintz* at 789.

Plaintiffs' Second Amended Complaint brought virtually identical claims against Mr. Connor as had been brought against the corporate defendants. Appellant Connor Brief at 11–14. Even after Plaintiffs voluntarily dismissed some of their claims against Mr. Connor seven (7) months after Plaintiffs filed their Second Amended Complaint, there was a substantial overlap in Plaintiffs' claims against the corporate and individual defendants. *Id.* at 7, 11-14. As Plaintiffs made abundantly clear in their Motion for Leave to Amend First Amended Complaint, CP 93-118, their rationale for adding Mr. Connor and Ms. Greer was the extreme commonality of facts for the corporate and individual defendants and that Mr. Connor and Ms. Greer were the people through whom the corporate defendants acted in entering into and enforcing the Agreement. *Id.* at 7. Plaintiffs vociferously argued that there would be no prejudice to adding Mr. Connor and Ms. Greer in their individual capacities for these same reasons. *Id.*

Had Plaintiffs prevailed in their claims against Mr. Connor and Ms. Greer, Plaintiffs would have almost certainly prevailed in those same claims against the corporate defendants, because of the near-identical facts and because Mr. Connor and Ms. Greer were at all times acting on behalf of the corporations. *Id.* at 7-14; Plaintiffs’ Motion to Amend, CP 93-118. Absent a ruling that Plaintiffs must pay Mr. Connor’s attorneys’ fees, Plaintiffs’ multi-defendant litigation strategy would give them what amounts to a virtually free shot at the individual defendants. This is precisely the type of circumstance in which the doctrine of mutuality of remedies should apply – *i.e.*, to prevent an inequitable result when one party would otherwise be entitled to their attorneys’ fees if they prevailed but the other party would not be entitled to their attorneys’ fees if the outcome was the other way around. “Thus, it is clear that mutuality of remedy exists as a ‘well-recognized principle of equity’ in Washington.” *Kaintz*, 147 Wash.App. at 759.

C. Judicial Estoppel Does Not Apply to Defendant Connor’s Claim for Attorneys’ Fees.

Plaintiffs’ reliance on judicial estoppel is misplaced. In *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 205 P.3d 111 (2009), Respondents’ Brief at 14, fn. 1, the court laid out the elements of judicial estoppel: (1)

whether the later position is clearly inconsistent with the earlier position;
(2) whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the parties' position; and (3) whether the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 951-52, citing with approval *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The *Ashmore* Court reversed the court of appeals imposition of judicial estoppel by a review of these three elements, *Id.* at 950, and application of judicial estoppel should be rejected here because:

- (1) Defendant Connor has never taken the position that if Plaintiffs somehow prevailed that they would not be entitled to attorneys' fees;
- (2) Nothing in the record has been cited by the Plaintiffs to suggest that the trial court was misled by any assertion by Mr. Connor that Plaintiffs would not be entitled to their attorneys' fees if they prevailed;
- (3) Plaintiffs identify no unfair advantage to Defendant Connor or unfair detriment to them if estoppel is not granted, given

that in their complaint Plaintiffs clearly sought their own attorneys' fees against Mr. Connor.

Plainly, judicial estoppel has no application to Defendant Connor's motion for attorneys' fees.

D. *McClure v. Davis Wright Tremaine* Requires the Grant of Attorneys' Fees Here.

Plaintiffs' attempts to distinguish *McClure v Davis Wright Tremaine*, 77 Wn.App. 312, 890 P. 2d 466 (Div.1 1995), must be rejected.

Plaintiffs first argue that Davis Wright was authorized to invoke the arbitration clause of a contract between its client and plaintiff McClure because, "the arbitration clause permitted 'any party involved' in a dispute to submit the matter to arbitration." Respondents' Brief at 16. Plaintiffs omitted from their brief any reference to paragraph 6 of the Agreement, because Plaintiffs cannot explain the critical interrelationship between the two Dispute Resolution Provisions, paragraphs 6 and 7:

6. Arbitration. *Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration with the rules, then pertaining, of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof. The parties shall have all remedies at law or in equity available to them for the violation or attempted violation of the covenants set forth herein...*

7. Attorneys' Fees. *If said controversy or claim is referred to an attorney, the losing party shall pay the prevailing party's reasonable attorneys' fees and costs, including attorneys' fees and costs incurred in any appeal.*

(Italics supplied.) *Id.* Ex. J, CP 402. Therefore, just as in *McClure*, these Dispute Resolution Provisions apply to the parties to “any controversy or claim” and not just to the signatories to the Agreement. It is the losing party in the controversy or claim, not a party under the Agreement, that is subjected to prevailing party attorneys' fees. Any concern about attempted application of these provisions to a non-signatory are not triggered when the party against whom the Dispute Resolution Provisions will be applied is a signatory. *McClure*, 77 Wn.App. at 315, n.1.

Plaintiffs argue at great length that, “*McClure* is further distinguishable based on the presumptions at play in the context of arbitration versus attorneys' fees.” Respondents' Brief at 17-18. Further, they ask this Court to disregard the express interrelationship between paragraphs 6 and 7 of the Agreement. Under paragraphs 6 and 7, any claim or controversy arising out of or relating to the Agreement triggers the rights of a party to said claim or controversy to (a) demand arbitration, (b) pursue remedies at law or in equity, and (c) be paid prevailing party attorneys' fees in arbitration, in litigation, and on appeal. “In the

interpretation of contracts every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible.” *Ball v. Stokely Foods*, 37 Wn. 2d 79, 83, 221 P. 2d 832 (1950). “[C]ourts favor the interpretation of a writing which gives effect to all of its provisions over an interpretation which renders some of the language meaningless or ineffective.” *Mayer v. Pierce County Medical Bureau*, 80 Wash. App. 416, 423, 909 P.2d 1323 (Div. 2 1995).

Paragraph 7 of the Agreement makes it clear that the right to attorneys’ fees commences prior to and is not dependent upon exercising the right to arbitration: “If said claim or controversy is referred to an attorney, the losing party shall pay the prevailing party’s reasonable attorneys’ fees and costs...”, and Plaintiffs have not asserted otherwise. Of course, such referral and the commencement of attorneys’ fees and costs would almost always precede a demand for arbitration. In addition, just as Plaintiffs elected to do in this case, a party may elect to proceed to court, not to arbitration, but that also does not alter the right to prevailing party attorneys’ fees.

E. The Context Rule Establishes Defendant Connor's Right to Attorneys' Fees.

Plaintiffs attempt to avoid the consequences of the "context rule," which "involves determining the intent of the contracting parties by viewing the contract as a whole, including ... the subsequent acts and conduct of the parties ..." *Tjart v. Smith Barney, Inc.*, 107 Wash.App. 885, 895-96, 28 P.3d 823 (Div. 1 2001). Appellant Connor's Brief at 29-30. To demonstrate that Plaintiffs believed that they were entitled to their attorneys' fees and costs from Defendant Connor, Mr. Connor directs attention to paragraphs 14.2 and 14.3 of Plaintiffs' Second Amended Complaint in which Plaintiffs sought all of their attorneys' fees against all of the defendants, without separately addressing Defendants Connor and Greer in any way. *Id.* at 11-14. Without citation to any motion, brief, or declaration in which Plaintiffs notified defendants or the lower court that Plaintiffs were not claiming attorneys' fees from defendants Connor and Greer, Plaintiffs respond: "This was not a conscious decision to seek fees against Defendants Greer and Connor, as they assert; it was a mere oversight." Respondents' Brief at 19. To substantiate this dubious notion, they argue that Defendants Connor and Greer and the lower court should have known that Plaintiffs were not making such a claim because

Plaintiffs did not alter the attorneys' fee language in paragraphs 14.2 and 14.3 of their Second Amended Complaint. This left paragraph 14.3 to read, "Plaintiffs are entitled to recover their fees and costs incurred in this action from defendants." CP 161. The only reasonable conclusion in this context is that Defendants Connor and Greer remained exposed to Plaintiffs' claim for attorneys' fees. Plaintiffs certainly could have, but did not, withdraw such claims even when they executed their Stipulation Clarifying Claims, Appendix A to Respondents' Brief.

Plaintiffs also argue without citation to the record that, after obtaining summary judgment that the relinquishment provision of the Agreement did not apply to their heirs and assigns, they moved for attorneys' fees only against Bayfield and Woodland, but not against Connor and Greer. Respondents' Brief at 19. In making this argument, Plaintiffs are in breach of RAP 10.3(a)(6), since their motion for attorneys' fees is not part of the record on review. Thus, Plaintiffs are incorrect as to any inference that negates their clearly stated claim in their Second Amended Complaint that paragraph 7 of the Agreement granted them a right to attorneys' fees and costs against Defendants Connor and Greer. As for any claim that Plaintiffs were the prevailing party on their

declaratory judgment claim, it should be recalled that they failed to achieve their primary objective of obtaining access to the beach. CP 1234-38; Appellant Connor's Brief at 17-18.

Plaintiffs argue that the context rule may not be used to contradict, modify, or add to the written terms of an agreement. Respondents' Brief at 20, citing language quoted from *Tjart v. Smith Barney*, 107 Wn.App at 895-96. Plaintiffs attempt to do just that by disregarding the interrelationship between paragraphs 6 and 7 of the Agreement.

F. Agency Rules Require the Award of Prevailing Party Attorneys' Fees to Defendant Connor.

Plaintiffs attempt to discount the *McClure* Court's reliance on the agency rules set forth in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993) as mere dictum. Respondents' Brief at 20. Plaintiffs are incorrect. In fact, *McClure's* extension of contractual arbitration rights to non-signatory Davis Wright was also founded on agency principles:

McClure's second argument is equally unpersuasive. Davis Wright characterizes itself as Lewison's agent. McClure does not dispute Davis Wright's contention that agents can enforce arbitration agreements made by their principals.

Id. at 316. The rule that agents may invoke arbitration clauses that apply to their principals is described further in a footnote:

The complaint merely states that because Davis Wright represented Lewison and EMC in other matters, it knew or could have known of Lewison's financial situation. From this assertion, it is possible to characterize the claim as stemming from the law firm's role as Lewison's agent. Other courts have found that agents can avail themselves of an arbitration agreement made by their principals. *E.g., Arnold v. Arnold Corporation-Printed Communications for Business*, 920 F.2d 1269 (6th Cir.1990).

Id., footnote 2. Here, of course, most, if not all, of Plaintiffs' claims against Defendants Connor and Greer are based on their actions as agents for Bayfield and The Woodland Company. See Appellant Connor's Brief at 7-14; Plaintiffs' Second Amended Complaint, CP 150-179. Because agents may enforce dispute resolution provisions in their principal's contracts, *Sunkist* applies to provide that right to Defendant Connor.

G. Defendant Connor Was the Prevailing Party.

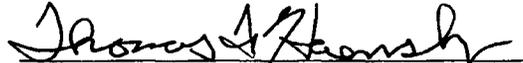
With regard to Stephen Connor, Plaintiffs' argument that both parties were successful in obtaining dismissal of the other's claims, Respondents' Brief at 23-24, must be rejected. The only claims that Mr. Connor asserted against Plaintiffs and for which Plaintiffs obtained a dismissal were that Plaintiffs' claims were frivolous under CR 11 and

RCW 4.84.185. Neither *Piepkorn v. Adams*, 102 Wn.App. 673, 10 P.3d 428, (Div. 2000) nor *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (Div. 1993) provide any support for the proposition that a party who avoids a finding that its claims were frivolous is a prevailing party. Instead, the test under *Piepkorn* is, “[i]n general, a prevailing party is one who receives an affirmative judgment in his or her favor.” *Id.* at 686. Defendant Connor prevailed on summary judgment and all of Plaintiffs’ claims against him were dismissed. He plainly was the prevailing party.

H. Plaintiffs Claim for Fees Under RAP 18.9(a) Should be Rejected.

RAP 18.9(a) allows an award of attorneys’ fees for filing a frivolous appeal. An appeal is frivolous if “there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn. 2d 225, 241, 119 P.3d 325 (2005). That contention itself by Plaintiffs is without merit, as demonstrated by the Defendant’s extensive citation to the record and to relevant case law. The Court should devote no further attention to Plaintiffs’ attempts in this regard.

DATED this 7th day of August, 2009.


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I, CRAIG H. NIM, being of adult years, certify under penalty of perjury under the laws of the state of Washington that on the below date I caused a true and correct copy of the Reply Brief of Appellant Stephen M. Connor to be filed in the Washington Court of Appeals, Division II and served by legal messenger upon the following counsel of record:

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DATED this 7th day of August, 2009.

By:  _____
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