

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY  DEPUTY No. 38955-0-II

Jefferson County Cause No. 07-2-00144-1

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

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ALBERT YAUNKUNKS, Appellant

vs.

JON SCHLEIGER, Respondent

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**RESPONDENT'S BRIEF**

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## ARGUMENT

Schleiger's position in this appeal does not controvert long established case law cited in Yaunkunks' brief concerning easements shown on a plat (here the Amended Plat Ex. 5) as being part of a legal description, legal descriptions incorporating what is on a plat map, easements established by dedication being property rights, or that a purchaser of property can generally rely on what is depicted in plats of record.

Schleiger's position is that the common grantor Templet impliedly agreed or acquiesced or waived or abandoned any easement rights that the common grantor Templet had (as the then owner of Lot 2) over any portion of Lot 1 sold to Schleiger, and is estopped from asserting those easement rights; and that estoppel, under the facts of this case, also binds Yaunkunks as a subsequent purchaser of Lot 2 from the common grantor Templet, since Yaunkunks took title with notice of sufficient facts to put him on inquiry.

It appeared at trial that Schleiger believed that the entire cul de sac as shown on the Amended Plat (Ex. 5) was south of the Lot 1 depicted on the Amended Plat (Ex. 5), to a location south of the new amended line for Lot 1 as shown in the Amended Plat, Ex. 5. The Court did not say that in its oral opinion, but did say that the cul de sac depicted in the Amended Plat (Ex 5) did not appear to affect Schleiger's access to his property.

On Motion for Reconsideration Schleiger argued to the contrary, that indeed if the cul de sac depicted on the Amended Plat were opened up upon Lot 1 it would seriously jeopardize Schleiger's access to his residence. The Motion for Reconsideration did not ask for a finding for relocation of the entire cul de sac southerly to rest entirely on Lot 2, in the area south of the new boundary line

between the parties, but took the lesser position that the actions of Schleiger and the common grantor Templet terminated any easement rights on the newly configured Lot 1 for the benefit of Lot 2, and Yaunkunk's for any other owner of Lot 2 was estopped to claim easement rights upon Lot 1.

On April 19, 1996 the common grantor Templet recorded the Mountain View Large Lot Subdivision in Jefferson County, Washington, together with a Declaration of Restrictive Covenants and Road Maintenance Agreement (Exhibits 2 and 1).

Access from the county road was via Templet Drive, shown on the plat (Exhibit 2). Templet Drive went northeasterly from the county road and terminated at a cul de sac. Templet Drive and the cul de sac were originally located entirely on Lot 2 of the plat (Ex. 2).. It was obviously, and according to law, for the benefit of the future owners of Lot 1, since the owner of Lot 2 did not need any kind of easement on his or her own and by definition cannot have an easement on one's own property Coast Storage Co. v. Schwartz 55 Wash. 2d 848 (1960) Though other lots were present in this subdivision, only Lots 1 and 2 were served by Templet Drive. (RP Templet 23, l. 20)

Schleiger was interested in the purchase of Lot 1. However he was not interested in Lot 1 as it was shown on the original plat (Ex. 2) because, as configured, there were issues with the drain system, lay of the land, and there was no good access upon the property. (Schleiger RP, Page 3, line 5-24). Schleiger and Templet agreed to a change in the boundary line location between the lots.

Lot 1's **amended** southerly line began at the point where the northerly line of Lot 2 adjacent to Templet Drive hit the cul de sac depicted on the original

plat Ex. 2), and then went easterly to the center point of the cul de sac depicted on the original plat (Ex. 2) and thence northeasterly to the very northeast corner of Lot 1. This portion of the adjusted boundary line was described by the Court in the Finding of Fact No. 5 as “**the line**” (and hereinafter referred to such).

Licensed Surveyor Wood was hired to draw up the new boundary line. (Exhibit 5). Common grantor Templet then conveyed Lot 1 to Karen Askin, who was the sister of Schleiger and a “straw man” in the purchase, done for reasons pertaining to Schleiger’s domestic problems. (Schleiger RP, Page 5-6). This sale occurred November of 1999. On September 24, 2003 Askin then quit claimed the property to Schleiger. (Exhibit 7)

Following the sale by common grantor Templet to Askin, Schleiger commenced to improve the property, brushing out the property, and culminating in the construction of outbuildings and also a 350’ plus driveway to a landing where he constructed his residence. The driveway ran northerly from a point just above “the line” a distance of 350’ up a steep hill to the home that Schleiger built. (Exhibit 13A and 13B) Schleiger also built a fence along the edge of the driveway for safety measures that went up the slope of the hill. (Exhibit 13 A and B). (See also Exhibits 12, 14A, 14B, 15, 18A, 22, 23, 27, 43F, 43G, 43H and 42A for additional views of driveway, house, protective fence adjacent to driveway and improvements of Schleiger).

Schleiger believed that the effect of the agreement obtained with the common grantor Templet was to move the cul de sac area to the south of **the line** of the newly described Lot 1; that after the amendment the cul de sac area was still located entirely on Lot 2, but moved southerly to accommodate the location of **the line** newly agreed to with Templet. Schleiger told Yaunkunks, after

Yaunkunks' purchase, about the incorrect position of the cul de sac versus the new surveyed line. (Schleiger RP Page 8). Schleiger believed that the flat area of the cul de sac depicted in Exhibits 13A and 13B was different from that depicted on the plat. (Schleiger RP, Page 16). He described the toe of the cul de sac at the bottom of the driveway depicted in Exhibits 14A and 14B. (Schleiger RP, Page 18). He testified that he was standing inside the cul de sac and looking at the driveway up to his house, depicted in Exhibit 18. (Schleiger RP, Page 24). Schleiger testified about the topography of Lot 1 and how his home had been built on a very substantial hillside depicted on Exhibit 15 (Schleiger RP, Page 19) and that the topography depicted on Exhibit 27 was the natural condition of the property. He testified that, while referring to the topography of the property, that "in reality, and "physically impossible for it to be there" (ie the cul de sac, referring to the location of the cul de sac in the plats). (Schleiger RP Page 44). He testified it wouldn't be "fair" (using defense counsel's language) to open it (ie, the cul de sac) "due to the circumstances of the land." (Schleiger RP, Page 47).

Standing alone, the conveyancing documents in the case would appear to grant an express easement in favor of Lot 2 against that portion of Lot 1 depicted as a cul de sac drawn north of the line, the new lot line. That is the basic argument that Yaunkunks makes in this appeal. Yaunkunks argues that the easements shown on the amended plat are part of the legal description of Yaunkunk's property and that Yaunkunks they took title to Lot 2 relying upon what was depicted in the amended plat. These propositions are correct as a matter of general law but are not applicable to the facts of this case. The rule is that one can rely on record title in absence of knowledge that title is in another or of facts "sufficient to put him on inquiry. Olson v. Trippel 77 Wash.App 545;

550,; Lind v. Bellingham, 139 Wash. 143, 147 (1926). As stated in Olson v. Trippel, above:

The inquiry rule impedes to a purchaser of real estate "notice of all facts which reasonable inquiry would disclose". Dimmel v. Morse 36 Wash. 2d 344, 348 (1950); see also Paganelli v. Swendson, 50 Wash. 2d 304, 308 (1957); Tjoesvig v. Butler, 180 Wash. 151, 159 (1934). It does not apply merely because "diligent inquiry would have led to a discovery" of pertinent facts outside the public record; rather, it applies only when a purchaser has a duty of inquiry, i.e., when the purchaser has "information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry". Paganelli, 50 Wash. 2d at 308.

Contrary to Yaunkunk's position, this case is not about unilateral termination of an easement, such as was involved in MakMeekin v. Low Income Housing Institute Inc. 111 Wash. App 188, 190 where it was held that an easement could not be released absent mutual consent. The facts of this case involve either consent of Schleiger and Templet, or estoppel of Templet and his successors in interest.

Easement rights can be lost. As stated in Volume 28 of Corpus Juris Secundum Easements, § 167:

An express easement can be extinguished by estoppel, and will be so extinguished when the owner of a servient tenement acts inconsistently with the continued existence of the easement and reasonable intent not to make use of the servient tenement in the future. Important factors in the determination of whether an easement is extinguished by estoppel are whether the owner of the

dominant tenement might reasonably have foreseen the servient owner's reliance and consequent actions, and whether the restoration of the easement to the dominant owner would cause unreasonable harm to the owner of the servient tenement.

Washington law concerning estoppel is at least one hundred years old. In Rhoads v. Bonds, 54 Wash 145 (1909), the court held that rights in real estate may be obtained and irrevocably fixed and determined by matters in *in pais*.

The acquiescence of the dominant estate can result in the loss of its easement rights. A dominant estate owner's failure to object to development on a servient estate that interferes with the easement may result in abandonment. 25 AmJur 2<sup>nd</sup>, Easements, § 113. This is consistent with what is said about acquiescence in Volume 31 of Corpus Juris Secundum, Estoppel and Waiver, § 175, which stated that acquiescence has been described as a quasi-estoppel and may be the basis of an equitable estoppel. The treatise states:

The representation of fact necessary to work an estoppel may be accomplished, **not only by positive acts, but also by acquiescence when good faith requires otherwise.**(emphasis supplied) "Acquiescence" has been defined as a conduct from which may be inferred an assent with a consequent estoppel or quasi-estoppel, and also has been described as a quasi-estoppel, or a form of estoppel. An acquiescence to a transaction is a person's tacit or passive acceptance, or an implied consent to an act...

The doctrine arises where a person knows or ought to know that he or she is entitled to enforce his or her right to impeach a transaction and neglects to do so for such a time as would imply that he or she intended to waive or abandon his or her right....

As further stated at § 176 of the above:

What will amount to a sufficient acquiescence, within the doctrine of estoppel, in any particular case, must largely depend on its own special circumstances, but for acquiescence to constitute an estoppel it must appear that the classical elements necessary to establish an estoppel *in pais* are present. An acquiescence may be by implication or by positive affirmation, and accordingly, acquiescence imports and is founded on knowledge and assent of the one against whom the estoppel is invoked, which will enable that party to take effective action, and is presupposes full knowledge or, in the alternative, circumstances which may be fairly said to put one on notice.

Washington law is in accord with the above authority set forth in the treatises. Washington law has held that where a person knows what is occurring and would be expected to speak, if he wished to protect his interest, his acquiescence manifests his tacit concern. Bunn v. Walch, 54 Wn2d 457 (1959); Findley v. Findley, 43 Wn2d 755 (1954), Waldrip v. Olympia Oyster, 40 Wn2d 469 (1952); Huff v. Northern Pacific Railway Company, 38 Wn2d 103 (1951); Stewart v. Johnston, 30 Wn2d 925 (1948); Peterson v. Blank Cabinet Manufacturing Company, 145 Wash 664 (1927). Permitting improvements and expenditures by one can estop another. Harms v. O'Connell Lumber Company, 181 Wash 194 (1935); Monroe Water Company v. Town of Monroe, 126 Wash 323 (1923); Florence-Rae Copper Company v. Iowa Mining Company, 105 Wash 503 (1919). Those improvements and expenditures can be by construction also. See Roggow v. Haggerty, 27 WnApp 908, 621 P.2d 195 (1980) (where no estoppel was found but that was due to the surprise of the dominant owner who didn't see the construction.)

Silence can lead to estoppel by acquiescence. In Voelker v. Joseph, 62 Wn2d 429 (1963) the court held that silence was not a waiver unless there was an obligation to speak, and this doctrine is invoked where there is a forfeiture. In Huff v. Northern Pacific Railway Company, supra, the court held that if one maintained silence where in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent.

In the instant case, the common grantor Templet was developing land for sale; it was residential property. Schleiger wanted to buy Lot 1 and develop it, and Templet wanted him to buy it. However, Schleiger did not want to buy Lot 1 as platted because of the drain system, the lay of the land, and because there was no good access. An agreement was made whereby the plat was amended by Templet, at Schleiger's expense, and the sale concluded with the conveyance by Templet to Lot 1 to Schleiger's sister Karen Akin. (Exhibit 7; Schleiger RP 5 & 6).

Irrespective of what the amended plat map showed, it is clear from the record that Schleiger did not understand his Lot 1 to be impressed with any easement in favor of Lot 2 via a portion of the cul de sac still remaining on Lot 1.

First, it makes no sense for Schleiger to amend a boundary line and acquire fee title to additional real property depicted within the cul de sac area on the Amended Plat if the area so acquired would be subject to easement rights in favor of Lot 2. Why bother? The inference is that it was intended to move the cul de sac area south of **the line**, where he would then have more room to configure a driveway to where he wanted to and did site his new house; he wanted better access. (Schleiger RP Page 3). He believed that the flat area depicted in Exhibits 13A and 13B was the cul de sac area; it was in a different area than shown on the

plat. (Schleiger RP Page 16). (Also Schleiger RP 34; Exhibit 18. ) That “in reality, it was “physically impossible” for it (ie, cul de sac) to be in the area depicted on the plat, (Schleiger RP Page 44), that it wouldn’t be “fair” to open up the cul de sac (in the depicted area) “due to the circumstances of the land.” (Schleiger RP Page 47)

Second, Schleiger obviously thought that in amending the boundary line that he had accomplished this purpose because he told Yaunkunks about the “incorrect position” of the cul de sac versus the surveyed line. (Schleiger RP Page 8).

Third, the driveway constructed by Schleiger to the house on the hillside, as depicted in Exhibits 13, 13A, 12, 14A, 14B, 15, 18A, 22, 23, 27, 43G , 43 H, 43 F and 42A is totally inconsistent with the idea that any portion of the old cul de sac could exist north of the **new line** for Lot 1 for the benefit of Lot 2. A rather dramatic representation of this fact is shown by Exhibit 43G, which is taken from the flat area of the cul de sac looking north towards Schleiger’s house, with the survey stake which formerly represented the mid-point of the old cul de sac and now the eastern terminus of the **new line** arising from the boundary line adjustment, with Yaunkunks’ attorney Knauss in the background at a point sixty (60’) feet away from the mid-point of the old cul de sac. Going back to Schleiger’s testimony about the lay of the land, there being no good access (Schleiger RP, Page 3), the slope of the hill (Schleiger RP, Page 17; Exhibit 13A and 13B), the topography being a substantial hillside (Schleiger RP, Page 19; Exhibit 15), the circumstances of the land (Schleiger RP, Page 47), and the physical impossibility of a cul de sac to be located on the ground there (Schleiger RP, page 44), one can easily imagine what would happen to Schleiger’s property

if the old cul de sac area north of **the line** were to be now flattened to accommodate a cul de sac for the benefit of Lot 2. It would simply cut off Schleiger's driveway access to his home, leaving it to appear, from the photos, hanging a very substantial distance up in the air.

The testimony of Templet also clearly establishes he understood that the actual area of the cul de sac was on the ground south of **the line**. had been changed. At trial he testified that the cul de sac was now cut off by fencing. The record shows the only fencing that cut off the cul-de-sac was the fencing of Yaunkunks, all to the south of **the line**. See Exhibits 43A, 43D and 43 B.

Templet testified at trial that the cul de sac

"... have (had) been built--built and finished off and signed off by the County who inspected it. I have no idea who erected the fence"..."But when it was not -- when I say it was not in the condition that I-- that I left it when it was approved by the county"  
(Templet RP 41, l. 2-13 )

The photographic evidence clearly shows there was never any opened cul-de-sac area on any portion north of **the line** on Lot 1; the only opened area was south of **the line** on Lot 2, which also shows Yaunkank's fencing south of **the line**. See Exhibits 12, 13A, 13B, 14A, 14B, 15, 18A, 22, 23, 27, 43G, 42A, 43I and 42 F. All the land north of **the line**, except for Schleiger's driveway and house location, is in its natural condition. Templet was not referring to that property when he testified about a cul-de-sac having been built and finished and signed off by the county (Exhibit 2). Templet had to be referring to the opened area south of **the line** depicted in the photographs, all of which is off of Lot 1 and located on Lot 2.

Obviously Schleiger wanted to make changes to make Lot 1 more accessible, and apparently this was agreeable to Templet. Notwithstanding the

lack of better or more proper paper documentation that was used to make changes, it was abundantly clear what Schleiger had in mind, and Templet's testimony was in accord. If Templet was of a different mind, Templet said nothing as Schleiger, in what was obviously very open construction, sank a substantial amount of money in perfecting a road access to a location for his home and then building a home there. If what Schleiger did was not in accordance with beliefs that Templet had concerning Templet's Lot 2 easement rights on Lot 1, Templet acquiesced in this construction and remained silent on the matter to the day that Templet sold to Yaunkunks (Exhibit 8). If estoppel does not apply under these circumstances, then Schleiger has forfeited the driveway and access to his home. Estoppel should apply to present this inequity.

If there is an estoppel, that estoppel also bars Yaunkunks' claim. In Humphrey V. Jenks, 61 Wash. 2d 565, the court held that the estoppel of the grantor to assert title may be extended to that grantor's grantee, in this case the estoppel against Templet being extended to Yaunkunks. The Humphrey court said that the estoppel of the grantor can bind a grantee where, at the date of purchase, a grantee knew of the existence of facts which would operate as a bar to a claim. The inquiry of that court was whether or not the grantee had knowledge which would have put him on inquiry, such as would have led the grantee to a knowledge of the facts. See also 31 CJS Estoppel, § 133 and 28 AmJur 2<sup>nd</sup>, Estoppel and Waiver, § 133, to the effect that estoppel may be asserted against a purchaser who has knowledge of the facts that would give rise to an estoppel against his or her vendor. See also Olson v. Trippel, supra-; Lind v. Bellingham, supra-; in Gold Creek North Ltd. Partnership v. Gold Creek Umbrella Association, 143 Wash. pp. 191, (2008), the court said:

Notice need not be actual or full knowledge that consists of

information from whatever source that "would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry."

That situation applies here. Yaunkunks came upon a Lot 1 fully developed by Schleiger. Schleiger's road, Schleiger's safety fence, and the house at the termination of Schleiger's access road, were all in place and highly visible at the time Yaunkunks purchased. The survey stake that Wood placed at the eastern terminus of **the line** at the midpoint of the old cul de sac depicted on the plats, was in existence. One simply had to look and see what was there to be observed to conclude that the activities on the ground were at a variance with, a very substantial variance with, what was depicted on the plat map. A view of the topography of Lot 1 would immediately cause one to wonder how a cul de sac, as depicted on the plats, could ever be created in that topography. Further, there was the huge expanse of flat area at the very bottom of Schleiger's driveway (the portion Schleiger thought was the location of the new cul de sac), visible to Yaunkunks indicating him what was being used on the ground for ingress, egress and a cul de sac. Yaunkunks knew that things were not in accordance with what was depicted on the amended plat because he made inquiry concerning the drain field and learned **that** no drain field was located on Lot 1 for the benefit of Lot 2. Templet RP 35, 36, 38, 39, 42, 43.

The sum total of all these things, taken together, veritably scream that things were radically different on the ground than what the plats maps purported to show, and was sufficient to put Yaunkunks on inquiry that would have led him to knowledge of the facts. Yaunkunks cannot argue he only had to look at the plat map and rely upon what it showed given the physical development and nature of activities already going on with Lot 1, and the knowledge that there was no drain

field on Lot 1 for the benefit of Lot 2 ,contrary to what the Amended Plat showed

As an aside, Schleiger wishes to respond to the citation in the appellant's brief of our RCW 64.0 4.175 and WAC 332.130.(3)(b) as it pertains to any irregularities in amending the plat. The letter of David Goldsmith of March 30, 2004, Ex. 31, shows the amendment was done pursuant to accepted methods in Jefferson County Washington. Witness Brewer agreed that the county legislative authority is the final arbiter. (RP 44)

### CONCLUSION

In summary, an examination of the platting documents show that more could have been done to avoid any confusion. At the same time, it's just as obvious that Schleiger and Templet believed that they had accomplished something. Templet's testimony in court was in accord with what Schleiger thought they had accomplished, and that was the relocation of the south line of Lot 1 and coincident removal of the cul de sac south of **the line**. Schleiger then made substantial improvements, improvements of such a nature that if Schleiger is now denied the use of them by opening up a portion of the old cul-de-sac depicted north of **the line** , he will have the access to his home destroyed. Schweiger's loss would be great, and for no real corresponding apparent benefit to the owner of Lot 2.

Schleiger did not take a calculated risk or act in bad faith or indifferently in this matter. The record is devoid of any evidence supporting those conclusions.

Yaunkunks is not an innocent bona fide purchaser. Yaunkunks came onto the scene after Schleiger had built his property up. Yaunkunks could see where the cul-de-sac on the ground existed, that Schleiger's road access north of **the line** was on real estate that was not susceptible to being opened up as a cul-de-sac, the

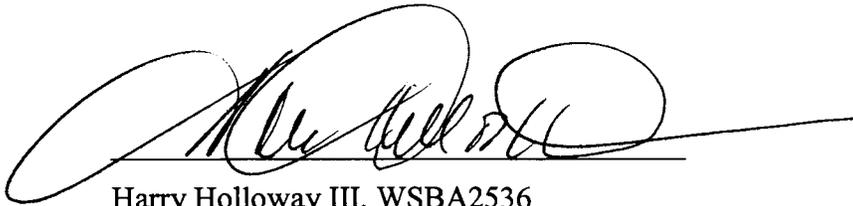
pin at the eastern terminus of **the line** at the point of the old cul-de-sac was readily available to be seen, such that the whole situation on the ground did not compare with what was reflected on the plat. Further, Yaunkunks knew there was differences with the plat because he had discussions concerning a drain field that he thought he would be entitled to located on Lot 1.

The decision of the trial court should be upheld. The statement in your books appellate brief that the court's memorandum opinion was handed down immediately following trial while all the evidence was fresh before the court is incorrect. Trial occurred June 24, 2008 and the court did not render its Memorandum Opinion until July 25, 2008. Thereafter Schleiger's Motion for Reconsideration was filed December 10, 2008 and the court entered its Findings and Judgment on January 27, 2009. Before entry of any final judgment and notwithstanding the court's statements in it's oral opinion, an error in the court's understanding of the case was brought to the trial judge's attention, argument and authority were submitted, and the court entered its Findings and Conclusions based upon substantial evidence. On appeal, an appellate court reviews a trial court's findings of fact for substantial supporting evidence in the record. If the evidence supports the findings, the appellate court then considers whether the finding supports the court's conclusions of law. Landmark Development v. City of Roy, 138 Wash. 2d 561, 573 (1999) Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. Sunnyside Valley Irrigation Dist. v. Dickie 149 Wash. 2d 873, 879 -- 80 (2003). If that standard is met an appellate court is not to substitute its judgment for that of the trial court. Sunnyside Valley Irrigation Dist. 149 Wash. 2d at 879 -  
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If any or all of the court's decision should be considered for reversal, the

appellate court should consider the enormous disparity in the relative hardships between Schleiger's interests and Yaunkunks interests and remand for further proceedings to consider equitable remedies that will balance those equities, Proctor v. Huntington, 146 Wash. App. 836, (2008)..

Respectfully submitted this 30th day of September 2009

A handwritten signature in black ink, appearing to read "Harry Holloway III", written over a horizontal line. The signature is highly stylized with large loops and a long horizontal stroke extending to the right.

Harry Holloway III, WSBA2536

Atty. for Respondent, John Schleiger

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BY \_\_\_\_\_  
DEPUTY

No. 3895 and-0-II

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ALBERT YAUNKUNKS, Appellant

vs.

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**DECLARATION OF SERVICE**

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I., Harry Holloway III, do hereby declare under penalty of perjury under the laws of the State of Washington this 19th day of September, 2009 as follows:  
That on the 30th day of September 2009 I personally delivered a copy of the Respondent's Brief (corrected copy) to the office of Knauss and Seaman, PLLC at 203A West Patison Street in Port Hadlock WA 98339

Signed in Port Townsend Washington this 19th day of September 2009



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