

**FILED**

**MAY 10 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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STATE OF WASHINGTON**

**NO. 276376**

**BENTON COUNTY SUPERIOR COURT CASE NO. 06-3-01010-9  
THE HONORABLE JUDGE CARRIE RUNGE  
SUPERIOR COURT JUDGE**

**IN RE:**

**CRAIG MCDONALD, PETITIONER**

**V.**

**MEGAN MCDONALD, RESPONDENT**

**RESPONDENT'S BRIEF**

**DOW LAW FIRM  
2100 JADWIN AVENUE, SUITE 125  
RICHLAND, WA 99352  
(509) 946-4100**

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## A. INTRODUCTION

The present case involves a dissolution action during which Ms. McDonald (“Megan”) was permitted to move with the parties’ two children to Lake Oswego, OR following a hearing on temporary relocation. Megan’s principal reason for the relocation was a job offer with Boston Scientific which included an increase in salary and a more flexible work schedule.

By the conclusion of a six day trial, Megan had already been living in Lake Oswego and working for Boston Scientific for nearly a year. Before the entry of a final decree, however, she learned that her one-year contract would not be renewed due to company downsizing. In response, she accepted a position with the business of her then significant other.

Mr. McDonald (“Craig”) learned of Megan’s new employment prior to entry of a final decree. In response, he filed a CR 59 motion for a new trial or to reopen testimony on the basis that Megan had misled the trial court regarding her motivations for moving to Portland. Denying the motion, the trial court stated that it’s decision was unaffected by the fact that following the non-renewal of her contract, Megan accepted employment with a business owned by her significant other. Craig then filed the instant appeal.

Significantly, the present appeal should be denied for two general reasons addressed in further detail below. First, Craig incorrectly argues that the trial court failed to consider Megan's relocation when determining the best interests of the McDonald children. To the contrary, the trial court made a painstaking application of Megan's relocation within the context of the best interest factors of RCW 26.09. Second, Craig has taken a position entirely contrary to that at trial. Specifically, at trial Craig attempted to argue that the eleven (11) factors of the Relocation Act should not apply in an attempt to avoid the presumption in favor of relocation. He apparently believed that he had a better chance were the court to apply the best interest standard under RCW 26.09. This position was argued both in his trial brief as well as at trial via objections to the trial court considering testimony concerning the relocation factors. Not once did Craig argue that the court should have applied the relocation factors, even in his subsequent CR 59 motion for a new trial. As a result, the trial court decision should be upheld under both the doctrine of "invited error" and RAP 2.5(a).

In reality, the present appeal is simply retaliation for the fact that Megan both prevailed at trial, and found a significant other. Accordingly, and for the reasons argued below, the trial court's ruling in favor of Megan should be affirmed.

**B. STATEMENT OF CASE**

Petitioner Craig McDonald (“Craig”) filed a petition for dissolution of marriage November 7, 2006. CP 386. On February 21, 2007, a temporary parenting plan was entered which named Mrs. McDonald (“Megan”) the primary residential parent of the parties’ two children, Brantley (4) and McKenzie (2). CP 342.

On March 30, 2007, Megan filed a Notice of Intent to Relocate stating her intention to move to Portland, OR on the grounds that: 1) she had been offered her dream job which would allow her to spend more time with her children; 2) the local school systems were top ranked; 3) the new locale would provide an abundance of educational and extra-curricular for the children, and; 4) the relocation would not interfere with Craig’s visitation schedule. CP 330.

Prior to filing the notice of intended relocation, Megan had been working for Boston Scientific as a technician responsible for monitoring cardiology instruments such as defibrillators and pacemakers. RP 207-08. When she accepted the position in March of 2006 (RP 206), Boston Scientific had two other employees in the Tri-Cities area. RP 225. After one of these employees was relocated in February of 2007, Megan was forced to assume greater responsibilities. RP 228. This caused her to respond to an increasing number of calls both in the late evening and early

morning, as well as in increase in travel throughout a farther reaching territory. RP 228-230.

Ultimately, Megan became concerned that her assumption of these greater responsibilities was preventing her from fulfilling her role as the primary caregiver of the parties' children. RP 229-30. Accordingly, she began to look into other positions which were more flexible and did not require the same level of on-call commitment. RP 230. When Boston Scientific found out that she was looking for other employment, she was offered a new position as a contract employee within the company. RP 232. As a contract employee, her hours and time commitment would have been more suitable to raising her children.

Megan was offered a contract position in either Seattle or Portland. RP 233. Ultimately, Megan opted for the position in Portland, OR because of the ease of travel for the children; they would not have to drive through mountain passes to the Tri-Cities as they would if they lived in Seattle, WA. Id. Her contract with the company was signed on June 30<sup>th</sup> 2007, followed by a temporary order allowing for relocation with the children. RP 234.

At trial, Megan was questioned extensively at trial about her relationship with "Ron," and whether that relationship was the basis for her relocation. RP 451-64. Megan testified that she met Ron through her

employment with Boston Scientific in a training class. RP 451. She acknowledged that they had been on a date together, and that they would get together with their children. RP 452. The latter included going to movies, bowling, and trips to the park. RP 453. Megan further testified that although at the time of trial Ron lived in Eugene, OR, he hoped to move to Portland to be closer to his son. RP 455-56. Finally, Megan testified that there was the potential for a long-term relationship, including the possibility of marriage. RP 457.

Another significant issue at trial was whether the court should apply the best interests of the child standard, or those under the relocation act. This matter was first raised in Craig's trial brief, which framed the issues before the court as follows:

1. Is the trial to be heard, a matter of dissolution or a hearing on permanent relocation?
2. What is the burden of proof? Best interest of the children?  
Or, is Megan allowed the presumption of being allowed to relocate the children?

(Petitioner's Memorandum in Support of Position at Trial, CP 399-407).

And, although attached to the trial brief was the statute relating to the best interests of a child standard in a dissolution action, it did not mention nor include any reference to Relocation Act. Id.

Also at trial, Craig offered the testimony of an expert witness who testified concerning the effect of relocation on children. During the course of cross-examination by Megan's attorney related to the factors under the Relocation Act, Craig's attorney, Mr. Steve Defoe, objected on the grounds that the action was not one regarding relocation: "Mr. Defoe: Objection. This is a dissolution, *this is not a relocation hearing*. And the ruling on the temporary relocation hearing in this matter is not binding on this Court." RP 729.

Thereafter, the oral ruling of the trial court accepted Craig's position that the matter before the court was an action for dissolution, not relocation:

So looking at the factors that I have to look at, and both Mr. Defoe and Mr. Pickett have pointed the Court to the factors that I have to look through—and I recognized this is not a relocation trial...And the statute that the Court finds and agrees is appropriate is 26.09.187.

RP 8454-45. Ultimately, Judge Runge awarded Megan primary residential placement of the McDonald children.

In late June of 2008, and prior to the entry of a final decree, Megan learned that Boston Scientific would be unable to offer her a new contract. CP 10. She informed her attorney of this fact, which was then relayed to Craig. Id. In response, on July 31, 2008, Craig filed a CR 59 motion for a new trial, or in the alternative to reopen the case for additional testimony

before the entry of judgment. CP 87. The motion was supported by the declaration of attorney Steven Defoe, which stated: “The petitioner has recently learned that the respondent is no longer working as a contract employee for Boston Scientific. The petitioner has learned that the respondent is apparently working for the company owned by her boy friend.” CP 88.

In response, Megan filed a declaration which explained that her loss of employment was due to the non-renewal of her contract by Boston Scientific. CP 10. She further explained that she immediately began seeking alternative employment, which she found with Ron’s company. CP 11. At the time, Ron continued to live in Eugene, OR, but did conduct business in the Portland area. Id.

In denying Craig’s CR 59 motion, Judge Runge determined that Megan’s loss of employment would not have changed her decision. CP 9. Thereafter, Craig filed the instant appeal.

### **C. STANDARD OF REVIEW**

When reviewing a trial court’s denial of a motion for reconsideration or to reopen testimony under CR 59, this Court is bound by the rule that “the evidence of the nonmoving party must be accepted as true and, together with all reasonable inferences that may be drawn therefrom, be interpreted in a light most favorable to that party.” *Bunnell*

*v. Barr*, 68 Wn.2d 771, 776 415 P.2d 640 (1966). And, except where questions of law are concerned, “the trial court’s determination will not be disturbed on appeal absent an abuse of discretion.” *Id.* Finally, where the basis for the CR 59 motion is “newly discovered” evidence, whether to grant the motion is “addressed to the sound discretion of the trial court, and that the exercise of that discretion will not be disturbed except in cases of clear abuse.” *Davenport v. Taylor*, 50 Wn.2d 370, 373, 311 P.2d 990 (1957).

#### **D. ARGUMENT**

Mr. McDonald presents three assignments of error in support of the present appeal: 1) the trial court failed to consider the significance of Ms. McDonald’s relocation to Oregon when apply the seven (7) factors under the Parenting Act; 2) the trial court failed to apply the eleven (11) factors under the Relocation Act, and; 3) the trial court erred by denying Mr. McDonald’s CR 59 motion on the basis of newly discovered evidence relating to the good faith of Ms. McDonald’s relocation. Appellant’s Brief at 4.

First, the oral ruling of the trial court meticulously addressed Ms. McDonald’s relocation in the context of the Parentage Act; any argument to the contrary could only result from a failure to read the transcript of Judge Runge’s ruling. Second, Mr. McDonald’s assignment of error

claiming that the trial court failed to apply the factors of the Relocation Act is precluded under both the doctrine of “invited error” and RAP 2.5. Under the former, Mr. McDonald openly argued at trial that the Relocation Act should not apply in an attempt to avoid the presumption in favor of relocation. Further, at no time whatsoever did he raise a claim of error during trial arguing that the court failed to apply the factors of the Relocation Act; even his subsequent CR 59 motion failed to raise this issue. Third, the trial court properly denied Mr. McDonald’s CR 59 motion because the “newly discovered evidence” showing that Ms. McDonald’s employment contract was not renewed following trial was not sufficient to satisfy each of the five (5) criteria which must exist in support of such a motion.

Each of the above arguments is addressed in turn below.

- 1. Mr. McDonald incorrectly argues that the trial court failed to incorporate the significance of Mrs. McDonald’s relocation to Oregon when it applied the factors under the Parenting Act**

Craig’s first assignment of error argues that the trial court failed to consider Megan’s move to Lake Oswego in the context of the Parenting Act. However, even the most cursory examination of the trial court’s oral decision shows that Judge Runge gave ample consideration to Megan’s

move to Lake Oswego when relevant to RCW 26.09.187. And, this is particularly true with respect to the factors identified by this Court in *In re Marriage of Combs*, 105 Wn.App. 168, 19 P.3d 469 (2001).

In *Combs*, this Court addressed whether the trial court in a dissolution action erred by refusing to consider Ms. Comb's intention to move to New York when determining the best interests of the child under RCW 26.09.187. Id. at 173. In reversing the trial court based on its failure to consider Ms. Comb's potential relocation *whatsoever*, this Court stated:

Relocation of a child to a different state certainly will affect his or her physical surroundings and thus would be directly relevant to factor (v). Depending on the circumstances, such a move also may be relevant to other factors, particularly (iii) and (iv). A plan to relocate a child to another state thus would be directly relevant to a determination of the child's best interests.

Id. at 175-76.

In the instant case we do not have a situation comparable to *Combs* where the trial court failed to address Megan's relocation at all. Rather, Judge Runge's oral ruling paid considerable attention to the relocation in the context of the factors of RCW 26.09.187 identified by the Comb's court. Specifically, listed below is each of the statutory factors identified by the Comb's court and Judge Runge's corresponding response:

RCW 26.09.187(3)(a)(i):

“In looking then at 26.09.187, the Court then—as was pointed out boy [sic] both counsel—looks to the relative strength, nature and stability of the child’s relationship with each parent... Certainly, Megan McDonald has provided a stable relationship for these children *while they have been with her down in Lake Oswego.*” (emphasis added) RP 846-47.

RCW 26.09.187(3)(a)(iii):

“In looking at element three, what is each party’s potential and future for parenting functions, including whether a parent has taken great responsibility for performing the parenting functions relating to the daily needs of the child (RP ??)...[F]rom this Courts perspective, Megan McDonald has been in the past and certainly has been *since the move*, the primary parent performing the parenting functions.” (emphasis added). RP 847.

RCW 26.09.187(3)(a)(v):

“But, of course, the information I do have is that they are very involved in their current surroundings. That they attend a preschool or play school. That they’re involved in extra-curricular activities, such as gymnastics. That the School District is rated as excellent. That they do have friends in the Lake Oswego area. They’ve got a doctor. So, certainly, the kids have been integrated into their current physical surroundings and have activities.” RP 851.

Furthermore, Judge Runge thoroughly addressed the testimony of Craig’s expert witness regarding the relocation:

I sat and listened to and considered the testimony of Dr. Newell. And, of course, I recognize that I think what Dr. Newell really wants is really a perfect world that we don’t have. And I was most taken by some of his comments. Some of those comments that I noted in particular was that he indicated there was no direct empirical evidence or research on the issue of relocation on young children. He acknowledged that this whole area is a relatively new field. He cited to a study, but acknowledged that the study discussed—well, dealt with kids of college age. And that this

study on college-aged kids who where the product of divorce and for whom one side or the other had been relocated and kids did not have access to both parents, that at least on this study of college kids, that the kids had more negative outcomes. RP 846.

...  
In making this decision—Again, going back to Dr. Newell. Again, when I consider the credibility that this Court must consider in considering an expert witness, I look to the fact that not only did he admit that there was no empirical data regarding the impact of relocation, but it was concerning to the Court that his perspective was based on only his contact with Mr. McDonald and Mr. McDonald’s parents. And that he did not take the opportunity to meet with Mrs. McDonald, at any point, observe the children. I recognize he may have, in fact, read the depositions, the interrogatories, the declarations. Frankly, from this Court’s perspective, that’s just really black and white. And the Court gets so much more out of hearing and seeing witnesses testify. And so, again, the Court did not put a lot of credibility or weight into Dr. Newell’s testimony because it appeared, from this Court’s perspective, that it was a limited perspective. RP 854.

In light of the above, there is simply no basis for arguing that Judge Runge’s oral opinion merely gave “lip service” to Megan’s relocation, (See Appellant’s Brief, 5), and particularly when considering the factors identified by this Court in *In re Combs*, 105 Wn.App. 168 (2001). Thus, Craig’s first assignment of error is without merit, and the decision of the trial court should be affirmed.

2. **Mr. McDonald has failed to preserve for appeal his assignment of error which alleges that the trial court committed reversible error by failing to apply the eleven (11) relocation factors under RCW 26.09.520**

Mr. McDonald's principal assignment of error alleges that the trial court failed to "analyze the mother's relocation and whether it should be allowed by applying the 11 factors outlined at RCW 26.09.520 in its decision." Appellant's Brief at 4. However, Mr. McDonald is precluded from presenting such an argument on appeal because it has not been properly preserved for two reasons: 1) Mr. McDonald is precluded from raising this issue on appeal under the doctrine of invited error because he actually argued *against* the applying the 11 relocation factors of RCW 26.09.520 at trial, and; 2) Mr. McDonald failed to raise this issue before the trial court and is thereby precluded from raising it on appeal. Each of these arguments is addressed in turn below.

**a. The doctrine of invited error precludes Mr. McDonald from arguing that the trial court committed reversible error by not applying the eleven (11) relocation factors**

Even assuming *arguendo* that the trial court's oral opinion did not openly consider the eleven (11) relocation factors of RCW 26.09.520 ("Relocation Act"), Mr. McDonald is precluded from arguing the existence of reversible error pursuant to the doctrine of "invited error." Specifically, counsel for Mr. McDonald argued in both his trial brief and at trial that the court was bound by the factors of the Parentage Act to the

exclusion of the presumption in favor of relocation under the Relocation Act. By attempting to avoid the presumption in favor of relocation, then, Mr. McDonald cannot now claim reversible error based on the trial court's adverse finding that the relocation was in the best interests of the children when applying the factors of the Parentage Act.

Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *In re the Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995), citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). Here, the trial brief filed by Mr. McDonald clearly argued in favor applying the factors of the Parentage Act versus the presumption in favor of relocation under Relocation Act.

For example, the first two issues presented by Mr. McDonald's trial brief were stated as follows:

1. Is the trial to be heard, a matter of dissolution or a hearing on permanent relocation?
2. What is the burden of proof? Best interest of the children?  
Or, is Megan allowed the presumption of being allowed to relocate the children?

(Petitioner's Memorandum in Support of Position at Trial, CP 399-407).

Craig then argued that the trial court should not view Megan's move

through the lens of the Relocation Act: “[Counsel for Megan] posits an erroneous position that this matter is set for trial to determine if Megan McDonald shall be allowed to permanently relocate the children to Lake Oswego, OR.” Id. Thereafter, the only statutory authority cited by Mr. McDonald argued in favor of applying the factors under the Parentage Act, without any citation whatsoever to those under the Relocation Act. In fact, although Mr. McDonald’s brief attached the statutory factors of the Parentage Act as an exhibit, those under the Relocation Act were excluded. Id.

In addition, Mr. McDonald openly objected to the court’s consideration of the factors of Relocation Act at trial. Here, Megan’s attorney, Mr. Michael Pickett, attempted to elicit the opinion of Craig’s expert witness concerning whether the benefit to Megan and the children outweighed any detriment under RCW 26.09.520:

[Mr. Pickett]: So you know what the requirements are for relocation. And you know that in a particular case the Court ruled that it was, after considering those relevant factors, that it was in the best interests of the children to move.

Does that tell us that in some instance that either the parent or the Court has made the decision that relocating is in the best interests of the children and that the benefits outweigh the detriment?

Mr. Defoe: Objection. This is a dissolution, *this is not a relocation hearing*. And the ruling on the temporary relocation hearing in this matter is not binding on this Court.

RP 729 (emphasis added).

From the above, it should be apparent that Craig actually *opposed* the trial court's consideration of the relocation factors. And, given the second issue presented in his trial brief, it is reasonable to conclude that he took this position in an attempt to avoid the presumption in favor of relocation. Under the doctrine of invited error, then, Craig cannot now claim that the trial court misapplied the law as the basis for the present appeal. The decision of the trial court should therefore be affirmed.

**b. Mr. McDonald failed to argue that the 11 relocations factors should be applied at trial and is therefore barred from presenting such an argument on appeal**

Mr. McDonald's assignment of error which alleges that the trial court failed to consider the eleven (11) factors under the Relocation Act should be denied pursuant to RAP 2.5(a) because the issue is improperly being presented for the first time on appeal.

Generally, a party is precluded from raising an issue for the first time on appeal:

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.

The same rational requires parties to inform the court acting as trier of fact of the rules of law they wish the court to apply. While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse failure to seek correction of an error once the complaining party becomes aware of it. If by no other means, this can be done by a motion for a new trial. Failure to make such a motion when it would enable the trial court to correct its error precludes raising the error on appeal unless the error was pointed out at some other point during the proceedings.

*Stork v. International Bazaar, Inc.*, 54 Wn.App. 274, 282, 774 P.2d 22 (1989), quoting *Smith v. Shannon*, 100 Wn.2d 26, 37-38, 666 P.2d 351 (1983)(internal quotations and citations omitted).

Here, Mr. McDonald *never* argued to the trial court that it should apply the eleven (11) relocation factors. As indicated in *Stork v. International Bazaar, Inc.*, had he believed that the trial court did not apply the proper law, he should have at a minimum addressed the matter in a motion for a new trial.

Significantly, while Mr. McDonald did file a CR 59 motion for a new trial, he *never* argued that the trial court should have applied the relocation factors. CP 399-407. Rather, he sought a new trial solely on the grounds of newly discovered evidence. Id. Accordingly, the present appeal should be dismissed pursuant to RAP 2.5(a).

**3. Mr. McDonald's final assignment of error should be denied because the trial court did not commit "clear**

**abuse” by refusing to reopen testimony or grant a new  
trial on the basis of newly discovered evidence**

A CR 59 motion for a new trial or to re-open testimony may only be granted on the basis of newly discovered evidence if “the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *Holaday v. Merceri*, 49 Wn.App. 321, 329, 742 P.2d 127 (1987), quoting *State v. Evans*, 45 Wn.App. 611, 613, 726 P.2d 1009 (1986). “Failure to satisfy any one of these five factors is a ground for denial of the motion.” *Id.* at 330. Finally, whether to grant the motion is “addressed to the sound discretion of the trial court, and that the exercise of that discretion will not be disturbed except in cases of clear abuse.” *Davenport v. Taylor*, 50 Wn.2d 370, 373, 311 P.2d 990 (1957).

In the instant case, the trial court properly denied Mr. McDonald’s CR 59 motion because the alleged newly discovered evidence: 1) would not have changed the result of the trial; 2) was not material, and; 3) was merely being offered to impeach the testimony of Megan.

First, the newly discovered evidence that Megan’s contract with Boston Scientific was not renewed would not have changed the result of trial. The fact that her employment with Boston Scientific was pursuant to

a year-long contract was made perfectly clear to the trial court. As a result, the trial court necessarily made its decision with the understanding that the contract was subject to non-renewal. Even more significant, in denying Craig's motion under CR 59, Judge Runge actually stated that Megan's subsequent unemployment would not have changed her decision.

Second, the fact that Megan's employment contract was not renewed was not material to the outcome at trial. As stated above, it was made perfectly clear to the trial court that the contract was for one-year subject to renewal. The possibility that the contract would not be renewed was certainly within the purview of the trial court, and therefore, it cannot now be said that the fact of non-renewal is somehow material.

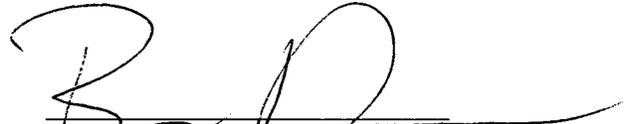
Third, the fact that Megan's contract with Boston Scientific was not renewed, and that she subsequently accepted employment with Ron, is merely being offered as impeaching evidence. The implication offered by Craig is that she did not actually move to Portland in pursuit of a job with Boston Scientific, but rather to be with Ron. In other words, Craig attempted to introduce the new evidence of her employment with Ron in order to impeach her testimony concerning the economic benefits of moving to Portland.

Again, Craig's failure to satisfy any of the five (5) requirements set forth in *Holiday v. Merceri*, 49 Wn.App. 321 precluded the trial court

from granting his motion under CR 59. And, Judge Runge's denial of his motion based on newly discovered evidence may only be reversed upon a showing of "clear abuse." *Davenport v. Taylor*, 50 Wn.2d 370, 373, 311 P.2d 990 (1957). However, Judge Runge did not commit clear abuse by denying the motion because the newly discovered evidence would not have changed the result of the trial, was not material, and was merely being offered to impeach the testimony of Megan. Thus, the decision of the trial court should again be affirmed.

#### **E. CONCLUSION**

The present appeal is motivated solely by Mr. McDonald's scorn over the fact that Megan was named the primary residential parent at trial, and has subsequently moved on following their dissolution of marriage. His legal arguments in retaliation are without merit both substantively and pursuant to RAP 2.5(a). It is simply impossible to conclude that the trial court would reach a different conclusion upon reviewing the "newly discovered" evidence already rejected in Craig's motion under CR 59. There is no basis, then, for having these parties sent back before the trial court, only to incur further expenses and hardship. Craig's appeal should therefore be denied, and the decision of the trial court affirmed.



~~Ben Dow, WSBA #39126~~  
Attorney for Respondent

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury pursuant to the laws of the State of Washington, that on the 6<sup>th</sup> Day of May, 2010, the foregoing document was filed with the Clerk of the Court and was delivered to the following persons via regular mail and facsimile:

Gary Stenzel  
Stenzel Law Office  
N. 910 Washington, Suite 201  
Spokane, Washington 99201

Dated this 6 day of May, 2010.



~~Ben Dow~~ Brian Gieszler