

FILED

NOV 19 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 289796 III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

KELLY, ET AL.

Plaintiffs

v.

AMMEX TAX AND DUTY FREE SHOPS, WEST, INC.

Appellant/Defendant/Third-Party Plaintiff

v.

NORMAN G. JENSEN, INC.

Respondent/Third-Party Defendant

APPELLANT'S OPENING BRIEF

(Revised in accordance with 11/16/10 Commissioner's Ruling)

David M. Schoegg
WSBA No. 13638
Stephania C. Denton
WSBA No. 21920
MILLS MEYERS SWARTLING
Attorneys for Appellant

Mills Meyers Swartling
1000 Second Avenue, Suite 3000
Seattle, Washington 98104
Telephone: (206) 382-1000
Facsimile: (206) 386-7343

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Attorneys for Appellant

Mills Meyers Swartling
1000 Second Avenue, Suite 3000
Seattle, Washington 98104
Telephone: (206) 382-1000
Facsimile: (206) 386-7343

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I.

INTRODUCTION

Respondent, Norman G. Jensen Inc. (“Jensen”) contracted to give appellant Ammex Tax & Duty Free Shops West, Inc. (“Ammex”) the opportunity to purchase a piece of property in Oroville, Washington, *before* entering into negotiations with anyone else and to not offer the property to others on better terms for a period of 180 days. Jensen violated its agreement by subdividing the property, offering Ammex only one of the two lots, negotiating with a third party *before* offering the property to Ammex, and offering to sell the lot to Ammex for a price that was higher than the price Jensen had negotiated with the third party. By not honoring its contractual commitments, Jensen deprived Ammex of its valuable negotiated right of first refusal, which would have forced Jensen to make its offer to Ammex as attractive as possible without first negotiating with others. Jensen also deprived Ammex of its right to purchase the entire property rather than only a portion of it. In addition, when Jensen finally did offer the property to Ammex and Ammex accepted, Jensen nonetheless sold the property to someone else.

Despite these clear contract breaches by Jensen, the trial court dismissed Ammex’s claims on summary judgment. This dismissal should be reversed and the case allowed to proceed to discovery and trial.

II.

ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Ammex's claims for breach of contract and breach of the duty of good faith and fair dealing based on Jensen's subdivision and offer to sell only the residential portion of the property.

2. The trial court erred in dismissing Ammex's claims for breach of contract and breach of the duty of good faith and fair dealing based on Jensen's negotiations with third parties prior to setting a price and providing a sale notice to Ammex.

3. The trial court erred in dismissing Ammex's claims for breach of contract and breach of the duty of good faith and fair dealing based on Jensen's refusal to honor its agreement to sell the residential lot to Ammex for the agreed-upon price.

4. The trial court erred in dismissing Ammex's claims for breach of contract and breach of the duty of good faith and fair dealing based on Jensen's sale of the residential lot to a third party for a lesser price than offered to Ammex.

III.

STATEMENT OF THE CASE

A. Factual Background.

1. **The Parties' Agreement.**

In April 1992, Ammex and Jensen entered into a Deed of Restrictive Covenant With Right of First Refusal ("the 1992 Deed"), which placed certain restrictive covenants on the premises and granted Ammex certain rights in the event Jensen decided to sell. CP 29-35. Specifically, Jensen agreed that:

If [Jensen] shall desire to sell the premises, [Ammex] shall have the single, non-recurring right ("Right of First Offer") to have [Jensen] submit written notice ("Sale Notice") to [Ammex] of the desire to sell, which Sale Notice shall be deemed an offer of the premises to [Ammex] and ***shall be submitted to [Ammex] before [Jensen] enters into negotiations with any independent third party.***

CP 30-31 (emphasis added).

The agreement permitted Jensen to approach the open market to negotiate a sale of the property only after first offering it to Ammex at a price chosen by Jensen. CP 32. If Ammex accepted the offer, the agreement required Jensen to submit a contract of sale, which Ammex was required to execute and return within 15 days. *Id.* If Ammex declined the offer, the agreement allowed Jensen to market the premises "or any portions or portion thereof" for 180 days, but prohibited Jensen from

either lowering its asking price or offering potential buyers any better terms or conditions during this 180-day period. *Id.* If the premises did not sell, Jensen could then lower the asking price, but not until after first offering it to Ammex at the new lower price. CP 32-33. This process is to be repeated until Ammex accepts, the property is sold to a third party on the same terms offered to Ammex, or Jensen withdraws the property from the market. *Id.* This mechanism prevents Jensen from testing the market before approaching Ammex or lowering the sale price, and benefits Ammex by motivating Jensen to make its offers to Ammex as attractive as possible.

2. Jensen Subdivides the Premises and Enters Into Negotiations With Third Parties to Sell a Portion of the Premises.

In approximately 2006, Jensen subdivided the premises into two lots. Jensen designated “Lot 1” as the eastern portion of the premises, which Jensen planned for single family residential use, and “Lot 2” as the western portion, which Jensen planned to retain for commercial use. CP 63. Jensen also entered into negotiations with Alan and Margaret Kelly and Glenn and Pamela Toppings (“Kelly and Toppings”) to sell Lot 1, and in November 2006, these negotiations culminated in a written agreement signed by Jensen to sell Lot 1 for \$420,000. CP 10-15.

3. After Negotiating With A Third Party Over Lot 1, Jensen Offers To Sell Only Lot 1 to Ammex.

Five months later, on or about May 8, 2007, Jensen sent a letter to Ammex that was designated "Sale Notice." CP 36. In this letter, Jensen informed Ammex that it had subdivided the premises, and that it was offering to sell Lot 1 (but not the rest of the premises) to Ammex for a sale price of \$430,000. *Id.* Also, Jensen did not inform Ammex that prior to sending the Sale Notice, it had entered into negotiations with third parties. *Id.* Nor did Jensen inform Ammex that it had negotiated a \$420,000 sales price with the third party – \$10,000 less than the offer to Ammex in the "Sale Notice." *Id.*

After further discussion with Jensen,¹ Ammex decided that even though Jensen's offer violated the terms of the 1992 Deed, Ammex would purchase Lot 1 under the offered terms. CP 26. Accordingly, on July 13, 2007, Ammex advised Jensen of its acceptance and asked Jensen to forward a Purchase and Sale Agreement consummating the transaction. CP 37. Ammex did not send Jensen a deposit check.

Jensen did not respond to Ammex's July 13, 2007, acceptance. CP 26. Nor did Jensen contact Ammex with any comments or questions,

¹ Although the agreement required Ammex to respond to Jensen's offer of sale within 30 days, CP 31, Jensen granted extensions of this deadline, CP 64, and the parties continued to communicate regarding the terms of the deal until Ammex accepted on July 13, 2007, CP 65.

request a check, or advise Ammex that Jensen believed Ammex's exercise of its right of first refusal was defective. CP 26. Instead, Jensen sold Lot 1 to Kelly and Toppings without any further notices or communications to Ammex.

B. Procedural History.

On December 29, 2008, Kelly and Toppings filed an action against Ammex seeking to quiet title in their names and reform their deed on Lot 1. CP 109-121. Ammex answered and filed a third party complaint against Jensen based on Jensen's breaches of the terms of the 1992 Deed, Jensen's failure to sell Lot 1 to Ammex, and Jensen's breaches of its duty of good faith and fair dealing. CP 96-103. The parties eventually agreed that Kelly and Toppings, innocent good-faith purchasers, would receive quiet title and would dismiss their claims, and that the case would proceed as a damages only action by Ammex against Jensen.

Jensen filed a motion for summary judgment, arguing that Ammex's claims should be dismissed either because Jensen's agreement to give Ammex a Right of First Offer is "meaningless and void" or because Ammex did not properly exercise its option. CP 79-85. The trial court granted Jensen's motion on March 19, 2010, dismissing all of Ammex's claims as a matter of law. CP 7-9.

On April 16, 2010, Ammex instituted this timely appeal.²

IV.

ARGUMENT

A. **The Trial Court Erred When It Granted Summary Judgment to Jensen Dismissing Ammex's Claims.**

Orders granting summary judgment are subject to de novo review on appeal. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). All facts must be considered in the light most favorable to the nonmoving party and summary judgment can be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); CR 56(c). The initial burden is on the moving party to show that there is no genuine issue as to any material fact. *Id.* Even if the moving party satisfies this burden, once the nonmoving party presents evidence demonstrating that material facts are in dispute, summary judgment is not proper. *Id.*

Any failure to perform a contractual duty constitutes a breach, and whether a party has breached a contract is a question of fact. *Rosen v. Ascentry Technologies, Inc.*, 143 Wn. App. 364, 369, 177 P.3d 765

² Because the case caption had not been reformed to eliminate Kelly and Toppings, this Court originally questioned whether the summary judgment order was appealable as of right. In an order dated June 16, 2010, Commissioner Monica Wasson ruled that it was appealable.

(2008); *Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 762, 150 P.3d 1147 (2007). Furthermore, “[e]very contract carries with it an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of performance.” *Ross v. Ticor Title Ins. Co.*, 135 Wn. App. 182, 190, 143 P.3d 885 (2006), *aff’d sub nom., Ross v. Kirner*, 162 Wn.2d 493 (2007).³

Here, Ammex presented evidence in opposition to Jensen’s summary judgment motion showing that (1) Jensen breached the parties’ agreement by offering Ammex the right to purchase Lot 1 rather than the entire premises; (2) Jensen breached its agreement to offer to sell the property to Ammex at a price set *before* negotiations with third parties; and (3) Jensen breached the contract and acted in bad faith by committing to sell Lot 1 to someone else at a lower than that offered to Ammex, and then by ignoring Ammex’s acceptance of Jensen’s offer. Thus, the trial court’s order granting summary judgment against Ammex was in error and

³ The contract at issue in this case is known as a “preemptive right” or “first refusal” contract. See, e.g., *Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853-54, 441 P.2d 128 (1968) (“In a preemptive right contract, sometimes called a ‘first refusal’ right, there is an agreement containing all essential elements of a contract, the terms of which give to the prospective purchaser the right to buy upon terms established by the seller; but only if the seller decides to sell. The corollary, even if unspoken or unwritten, implies an agreement by the owner that he will not sell to any other party at any more favorable terms – thus its common name—a first right to accept or reject any offer which the promisor may make.”).

should be reversed. This is true regardless of how the Court construes Ammex's July 13, 2007, since Jensen's earlier and more serious breaches entitle Ammex to its claim regardless of what followed.

B. Jensen Breached Its Agreement When Offered to Sell Only Lot 1 to Ammex.

The parties' agreement required Jensen to give Ammex a Right of First Refusal⁴ on "the premises," which is described as the entire undivided property. CP 31, 35. The agreement does, however, permit Jensen to "sell the premises, *or any portions or portion thereof*" only after first offering "the premises" to Ammex. CP 32 (emphasis added).

A right of first refusal is a valuable right, which many courts have held cannot be defeated or devalued by offering its holder the right to purchase property that is different than the property to which the right is attached. For example, in *New Atlantic Garden v. Atlantic Garden Realty Corp.*, 201 A.D. 404 (N.Y. App. Div. 1922), *aff'd*, 237 N.Y. 540 (1923), the landlord of property under lease with an option to purchase was obliged to provide the tenant with notice should the landlord receive an offer to purchase "the premises" within ten days of receipt of the notice. *Id.* at 411. The landlord received, and forwarded to the tenant, an offer to

⁴ Although this right is called a "right of first offer" in the 1992 Deed, it functions like a right of first refusal since the holder is not allowed to make an offer on the property. Ammex's right of first refusal is somewhat unusual in that the right comes into existence *before* the property is marketed rather than after a competing offer is received.

purchase the premises and adjoining property owned by landlord. The court held that the right of first refusal applied to the “premises” and the landlord could not undermine the right by altering the “premises” included. *Id.*; see also *Plante v. Town of Grafton*, 775 N.E.2d 1254, 1258 (Mass. App. 2002) (“Ordinarily, a vendor of real property may not defeat a right of first refusal by confronting the optionee with terms that include acquisition of land in addition to that covered by the right.”); *Pantry Pride Enter., Inc. v. Stop & Shop Cos.*, 806 F.2d 1227, 1229 (4th Cir. 1986); *Myers v. Lovetinsky*, 189 N.W. 2d 571, 575 (Iowa 1971); *Cf. Brotherson v. Professional Basketball Club, L.L.C.*, 604 F. Supp. 2d 1276 (W.D. Wash. 2009) (“[T]he optionor has a concomitant obligation not to frustrate the exercise of the option.”).

Similarly, in *Wilson v. Whinery*, 37 Wn. App. 24, 678 P.2d 354, *review denied*, 101 Wn.2d 1019 (1984), the Washington Court of Appeals held that the defendant breached its agreement to give the plaintiff the right of first refusal on a parcel of property when the defendant granted a drain field easement over the property to a third party without notice to plaintiff. The Court noted:

A right of first refusal is a valuable prerogative, limiting the owner’s right to freely dispose of his property by compelling him to offer it first to the party who has the first right to buy.

Id. at 27. By granting an easement over the property, the defendant reduced the value of the plaintiff's contractual right and, therefore, breached the defendant's "duty not to repudiate or make [his] own performance impossible or more difficult by conveying the land to a third person." *Id.* at 28.

The same reasoning applies here. Jensen was obliged to provide Ammex with notice of its desire to sell so that Ammex could exercise its right to purchase "the premises." CP 31. Jensen was permitted to market "any portions or portion thereof" only after first giving Ammex its contractual right to purchase the entire premises. CP 32. Although Jensen was free to subdivide the property, the 1992 Deed required Jensen to offer all of it to Ammex before marketing any portion, and Jensen's offer of only part of the property prejudiced Ammex. CP 25. Thus, Ammex should have been allowed to proceed to trial on this clear breach of the parties' contract by Jensen rather than having its claim dismissed on summary judgment.

C. **Jensen Breached Its Agreement to Give Ammex a Right of First Refusal Before Entering Into Negotiations With Others.**

The evidence submitted by Ammex in opposition to Jensen's summary judgment motion also demonstrated that Jensen breached the contract and breached its duty of good faith and fair dealing by negotiating

with third parties before offering Lot 1 to Ammex. The parties' agreement expressly required Jensen to give Ammex written notice of its desire to sell at a designated price (which notice is to be deemed an offer) "***before [Jensen] enters into negotiations with any independent third party.***" CP 30-31 (emphasis added). The evidence in the record demonstrates that Jensen did not provide the required notice until May 8, 2007, CP 36, although Jensen had been negotiating with third parties to sell the property since at least November 2006. CP 10-15. Jensen's actions thus deprived Ammex of its valuable and negotiated right to purchase the property for a price set without the benefit of prior negotiations.

On summary judgment, Jensen attempted to avoid responsibility for its breach by asserting that it "had no obligation to inform Ammex of an intent to sell the property until it had reached an agreement with Kelly." CP 18-19. However, this contention directly contradicts the express terms of the parties' agreement, which require Jensen to set the offer price to Ammex ***before*** negotiating with third parties.

The timing of the required offer to Ammex was a valuable negotiated right that Jensen could not cure by offering the property to Ammex after-the-fact. Under Washington law, a breach is material if it relates to an essential element of the contract, *McEachren v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 580, 675 P.2d 1266, *review denied*, 101

Wn.2d 1010 (1984), or if it “substantially defeats the purposes of the contract and deprives the injured party of a benefit which he or she reasonably expected.” *Park Ave. Condominium Owners Ass’n v. Buchan Dev., LLC*, 117 Wn. App. 369, 71 P.3d 692, 698 (2003). Here, Jensen’s breach both violated an express essential element of the contract and deprived Ammex of the right to have the property offered at a price set by Jensen before testing the market. The trial court’s erroneous dismissal of this claim should be reversed so that Ammex can present evidence of Jensen’s breach and the damages caused by that breach to the fact finder in order to obtain redress.

D. Jensen Breached the Agreement By Offering Lot 1 to Ammex at a Higher Price Than Previously Negotiated With Third Parties.

Jensen also breached the agreement by offering Lot 1 to Ammex in the May 2007 sale notice for \$430,000, even though Jensen had previously negotiated to sell the lot to the Kellys and Toppings for \$420,000. CP 10-15, 36. In addition to prohibiting prior negotiations, the agreement required Jensen to offer to sell the property to Ammex at a set price and, if not accepted, prohibited Jensen from either lowering its asking price or offering potential buyers any better terms or conditions for a period of 180 days. CP 32. Jensen could lower its asking price only if the property did

not sell during the 180-day period -- and only after first offering the property again to Ammex at the lowered price. CP 32-33.

The record, however, demonstrates that Jensen agreed to sell the property to Kelly and Toppings for \$420,000 in November 2006, then offered to sell the property to Ammex for the higher price of \$430,000 five months later. CP 10-15, 36. This evidence demonstrated another breach by Jensen of its contractual and good faith duties that the trial court improperly dismissed on summary judgment.

E. Jensen Breached Its Agreement to Sell Lot 1 to Ammex.

On May 8, 2007, Jensen offered to sell Lot 1 to Ammex for \$430,000. CP 36. Despite Jensen's prior breaches (some of which were not yet discovered by Ammex), Ammex accepted the offer. CP 37. Under the contract, upon Ammex's acceptance of an offer and transmittal of a deposit, Jensen was required to submit a contract of sale for Ammex to execute and return. CP 32. Jensen failed to respond to Ammex's acceptance, but instead sold the property to a third party.

On summary judgment, Jensen argued that Ammex's acceptance was not valid and that Jensen's obligations were excused because Ammex did not include a deposit check with its acceptance. Although Washington law does provide that a failure to strictly comply with the manner in which an option is to be accepted may result in a forfeiture of rights under the

contract, “forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Pardee v. Jolly*, 163 Wn.2d 558, 574, 182 P.3d 967 (2008) (quoting *Hyrkas v. Knight*, 64 Wn.2d 733, 734, 393 P.2d 943 (1964)). Here, issues of fact exist regarding whether Ammex properly accepted Jensen’s offer to sell Lot 1 and, if not, whether Ammex was entitled to an equitable grace period in which to cure any defect in its acceptance. Accordingly, Ammex’s failure to include the check does not justify a total forfeiture of rights by Ammex as a matter of law.

In *Pardee*, the trial court entered judgment after trial against the holder of an option to purchase real estate, holding that the optionor failed to properly exercise his option to purchase when he did not provide written notice of his acceptance at the same time as the final payment. On appeal, the Washington Supreme Court held that the trial court erred in entering judgment without first considering whether the optionor was entitled to an equitable grace period to cure the deficiency in its acceptance of the option offer. *Id.* at 574. The Court noted that “[i]n order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement thereof, the courts have frequently granted a ‘period of grace’ to a purchaser before a forfeiture will be decreed.” *Id.* (quoting *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 783, 215 P.2d

425 (1950)). Similarly, in the case of *McCadam v. Hoshor*, 7 Wn. App. 913, 916-17, 503 P.2d 756 (1972), the appellate court held that the trial court erred when it granted summary judgment to the defendant based on a finding that the plaintiff forfeited its right to purchase certain property by failing to pay a deposit within a contractually-set time period; rather, “the forfeiture should not have been effected without granting plaintiffs a reasonable opportunity to cure the defect.”

Whether a grace period or opportunity to cure is warranted depends on the equities and facts and circumstances presented by each situation. *Pardee*, 163 Wn.2d. at 475-75. Here, even if Ammex did not strictly comply with the parties’ agreement by not including a deposit with its acceptance, the trial court erred in declaring a forfeiture without considering the equities of the situation. The factors that the trial court should have considered in this case include:

- (1) Whether Ammex’s failure to include the check “was inadvertent rather than intentional, culpable, or grossly negligent;
- (2) Whether Jensen was prejudiced by the lack of a deposit accompanying Ammex’s acceptance; and
- (3) Whether Jensen contributed to Ammex’s failure to give proper notice.

See id. at 575.

Ammex submitted evidence to the trial court that its failure to include a deposit check with its acceptance was inadvertent, and that the company would and could have provided a deposit rapidly upon request by Jensen. CP 26. Ammex also pointed out that Jensen was required to place deposits in an escrow account where the interest would not go to Jensen, further demonstrating that Jensen was not harmed by Ammex's oversight. CP 31. By contrast, Jensen provided no evidence and did not even claim that it was prejudiced by not receiving a deposit check with Ammex's acceptance. Furthermore, Jensen itself had not complied with the terms of the parties' agreement.⁵ Instead of merely providing notice to Ammex of the need for a deposit, Jensen ignored Ammex's acceptance of the offer and sold Lot 1 to the third party with whom Jensen had improperly negotiated in 2006.

Under Washington law, Jensen did not have the right to unilaterally (and secretly) declare a forfeiture of Ammex's contract rights without giving Ammex the opportunity to cure. Balancing the equities of the situation, questions of fact exist regarding whether Ammex's inadvertent failure to include a deposit justified the harsh consequence of a forfeiture of its contract rights – particularly in light of the fact that Jensen

⁵ Washington courts recognize “the general rule that a breaching party cannot demand performance from the nonbreaching party.” *Parsons Supply, Inc. v. Smith*, 22 Wn. App. 520, 523, 591 P.2d 821 (1979).

had itself already breached the 1992 Deed in three serious respects. The trial court improperly resolved these issues against Ammex on summary judgment, and its dismissal of Ammex's claims on this basis should be reversed.

V.

CONCLUSION

The evidence in the record shows that: (1) Jensen breached the parties' agreement in the 1992 Deed by: (1) offering Ammex only Lot 1 rather than the entire premises; (2) negotiating with Kelly and Toppings before offering the property to Ammex; (3) offering Lot 1 to Ammex for a price that was higher than Jensen had already negotiated with Kelly and Toppings; and (4) ignoring Ammex's July 13, 2007 acceptance of the belated Sale Notice. These breaches were all material and damaged Ammex. Moreover, the first three are actionable regardless how the Court rules on the fourth. Thus, the trial court erroneously dismissed Ammex's claims on summary judgment; the dismissal should be reversed and the case remanded for trial.

RESPECTFULLY SUBMITTED this 18th day of November,
2010.

MILLS MEYERS SWARTLING

A handwritten signature in black ink, appearing to read "Denton" with a stylized initial "D" that loops back.

David M. Schoeggl
WSBA No. 13638
Stephania C. Denton
WSBA No. 21920
Attorneys for Appellant

CERTIFICATE OF FILING AND SERVICE

I, Christine Stanley, hereby certify that I filed the foregoing by placing one copy of the document into the United States mail for service upon the following counsel of record:

J. Patrick Aylward
J. Kevin Bromiley
Jeffers, Danielson, Sonn & Aylward, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688

DATED this 18th day of November 2010.



Christine Stanley

DIVISION III, COURT OF APPEALS OF THE STATE OF WASHINGTON

ALAN KELLY and MARGARET KELLY,)
husband and wife, and GLENN TOPPINGS)
and PAMELA TOPPINGS, husband and)
wife,)
Plaintiffs,)

v.)

AMMEX TAX AND DUTY FREE SHOPS)
WEST, INC., a Maryland corporation)
Defendant.)

AMMEX TAX AND DUTY FREE SHOPS)
WEST, INC., a Maryland corporation,)
Third Party Plaintiff/Appellant,)

v.)

NORMAN G. JENSEN, INC., a Minnesota)
corporation,)
Third Party Defendant/Respondent.)

Court of Appeals No. 289796-6-III

Proof of Service

TO THE CLERK OF THE COURT:

PROOF OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the

Appellant's Opening Brief (revised) upon the following persons:

DATED this 18th of November, 2010.

J. Patrick Aylward
J. Kevin Bromiley
Jeffers, Danielson, Sonn & Aylward, P.S.
2600 Chester Kimm Road, P.O. Box 1688
Wenatchee, WA 98807-1688

U.S. Mail
 Legal Messenger
 Email

By: 
Christine Stanley

ORIGINAL