

67809-4

67809-4

No. 67809-4

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

ALFRED BARBER, III,

Appellant,

v.

BEVERLY ANKENY AND CHARLES ANKENY,

Respondents.

2012 MAY -1 PM 1:41  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

Appeal from the Superior Court of King County  
The Honorable Cheryl Carey, Department No. 2  
King County Superior Court Cause No. 11-2-08033-1KNT

RESPONDENTS' REPLY BRIEF

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ORIGINAL

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**A. STATEMENT OF RELIEF SOUGHT**

Beverly and Charles Ankeny (“the Ankenys”) respectfully request that (1) this court affirm the trial court’s order granting summary judgment and dismissing Alfred Barber’s case because he previously released the Ankenys from liability for the subject car accident; and (2) Mr. Barber’s appeal be dismissed.

**B. STATEMENT OF THE CASE**

Mr. Barber’s claims for personal injury arose out of a motor vehicle accident that occurred on March 7, 2008, when Beverly Ankeny was driving her mother, Bertha Van Asperen’s vehicle.<sup>1</sup> Ms. Van Asperen had auto insurance through PEMCO and Mrs. Ankeny had auto insurance through GMAC.<sup>2</sup> An agreement was reached to settle the claim for \$50,000 which was the total of Ms. Van Asperen’s policy limits.<sup>3</sup> Mr. Barber executed a release on May 4, 2010 which released all parties.<sup>4</sup> After this release was executed, Mr. Barber then brought an action naming

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<sup>1</sup> See, Complaint for Personal Injuries and Property Damage (February 28, 2011) (Appellant’s CP 1)

<sup>2</sup> See, Dec. Richards, Paragraph 3, (June 22, 2011) (Respondent’s CP 13)

<sup>3</sup> See, Dec. Richards, Exhibit A, General Release of All Claims. (June 22, 2011) (Respondent’s CP 13)

<sup>4</sup> See, Dec. Richards, Exhibit A, General Release of All Claims. (June 22, 2011) (Respondent’s CP 13)

Beverly and Charley Ankeny as the only defendants for personal injuries related to the March 7, 2008 car accident.<sup>5</sup>

The Ankenys moved for summary judgment to dismiss the case on the basis that Mr. Barber had released the Ankenys from any and all claims related to the subject accident.<sup>6</sup> In support of their motion, the Ankenys submitted the general release that was executed on May 4, 2010.<sup>7</sup>

In response, Mr. Barber submitted a brief in opposition to the summary judgment motion<sup>8</sup> and a declaration from Paul Landry,<sup>9</sup> explaining that the release was negotiated by claim representative Olga Rodriguez from PEMCO Insurance Company and that the negotiations with PEMCO Insurance Company were performed by his paralegal Chad Legg. Included in Mr. Landry's declaration was a declaration from Olga Rodriguez, which stated that there was nothing in the general release of all claims prepared in April of 2010 that was intended to impede or impair Alfred Barber's claims against Beverly and Charley Ankeny.<sup>10</sup> Also in Mr. Landry's declaration was a declaration from Mr. Landry's paralegal, Chad Legg, which stated that the release provided by PEMCO was not

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<sup>5</sup> See, Complaint for Personal Injuries and Property Damages (February 28, 2011) (Appellant's CP 1)

<sup>6</sup> See, Def.'s Motion for Summary Judgment. (June 22, 2011) (Respondent's CP 12)

<sup>7</sup> See, Dec. Richards, Exhibit A, General Release of All Claims. (June 22, 2011) (Respondent's CP 13)

<sup>8</sup> See, Pltf Barber's Brief in Opposition to Summary Judgment (July 22, 2011) (CP 15)

<sup>9</sup> See, Declaration of Paul Landry (July 22, 2011) (CP 16)

<sup>10</sup> See, Declaration of Paul Landry, Exhibit "B", ¶ 6 (July 22, 2011) (CP 16)

intended to release the Ankenys from liability, but was only meant to release PEMCO from liability for its insured.<sup>11</sup> A motion to strike the Ankenys' Reply Brief was also filed by plaintiff Barber on September 13, 2011.<sup>12</sup>

At the summary judgment hearing, the court granted the Ankenys' motion for summary judgment and struck the declarations of Olga Rodriguez and Chad Legg.<sup>13</sup> On September 26, 2011, Mr. Barber moved for reconsideration of the court's decision citing that extrinsic evidence should be admissible and that GMAC should be estopped from seeking a dismissal.<sup>14</sup> On September 27, 2011, the court denied Mr. Barber's motion for reconsideration of summary judgment.<sup>15</sup> The case was then dismissed with prejudice.

Mr. Barber appealed the decision, assigning error to: (1) the court's granting of the summary judgment motion dated September 16, 2011; and (2) the court striking the declarations of Chad Legg and Olga Rodriguez.

### **C. LAW AND ARGUMENT**

The only issue to resolve in this case is whether Mr. Barber released Beverly and Charley Ankeny when he signed a general release

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<sup>11</sup> See, Declaration of Paul Landry, Exhibit "C", ¶ 4 (July 22, 2011) (CP 16)

<sup>12</sup> See, Plaintiff's Motion to Strike (September 12, 2011) (CP 19, 20)

<sup>13</sup> See, Order Granting Def.'s Motion for Summary Judgment (Sept 16, 2011) (CP 22)

<sup>14</sup> See, Motion for Reconsideration (September 26, 2011) (CP 23)

<sup>15</sup> See, Order Denying Pltf's Motion for Reconsideration (September 27, 2011) (CP 25)

dated May 4, 2010 releasing all parties, including Beverly and Charley Ankeny. As argued below, Mr. Barber failed to provide evidence to raise a genuine issue of material fact that the Ankenys were validly released in a written settlement agreement.

1. **Mr. Barber Produced No Evidence to Raise a Genuine Issue of Material Fact that the Ankenys were Released From Any and All Claims Related to the Subject Accident.**

Personal injury releases are contracts governed by contract principles.<sup>16</sup> “In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous.”<sup>17</sup> “Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party.”<sup>18</sup>

Generally, a release will be upheld as valid so long as there was no fraud, duress, overreaching, or false representations.<sup>19</sup> Courts are loath to vacate properly executed releases because Washington favors finality in

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<sup>16</sup> See, *Beaver v. Estate of Harris*, 67 Wn.2d 621, 627-28, 409 P.2d 143 (1965).

<sup>17</sup> *Mayer v. Pierce County Medical Bureau*, 80 Wn.App. 416, 420, 909 P.2d 1323 (1995).

<sup>18</sup> *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998).

<sup>19</sup> *Farmers Ins. Co. v. Romas*, 88 Wn.App. 801, 808, 947 P.2d 754 (1997), *review denied*, 135 Wn.2d 1007 (1998).

private settlements.<sup>20</sup> Words in a contract should be given their ordinary meaning.<sup>21</sup> Pursuant to the contribution statute found in RCW 4.22.060(2), a tortfeasor who is specifically named in a release is actually released from liability for the claim:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides.

A release may be voidable if there is clear and convincing evidence of mutual mistake; that is, that *neither* party would have entered into the contract if they had a proper understanding of the material facts.<sup>22</sup>

In that case, which is factually similar to the one at bar, the Washington State Supreme Court upheld a release where an injured passenger released all claims against a driver and a UIM carrier for policy limits. The passenger sought to void the release on the basis that he did not intend to release his first-party UIM claims. The release he signed specifically released the driver and insurer from “any and all claims...of any kind or nature whatsoever, and particularly on account of all injuries.”

The court upheld the release and looked at numerous factors leading up to the agreement, such as the fact that the passenger had time to

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<sup>20</sup> See generally *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 739 P.2d 648 (1987).

<sup>21</sup> *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982).

<sup>22</sup> *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1993).

review the release, he was represented by an attorney, and he had previously sought first-party UIM coverage. The court found there was no evidence of a mutual mistake relating to the release, rather the claimant took a conscious assumption of risk regarding what the contract purported to release. While the parties may have had a different subjective intent about the settlement, the court based its decision on the plain language of the release, stating that “the words employed in the general release signed by [the passenger] clearly constitute a release of all claims.” *Nationwide Mut. Fire Ins. Co. vs. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992).

A unilateral mistake could be grounds to invalidate a release if the other party to the release knew, or should have known, of the mistake, but unfairly did not inform the mistaken party of the error.<sup>23</sup> Misrepresentation of a material fact could also be grounds to avoid a settlement agreement. In *Brinkerhoff v. Campbell*,<sup>24</sup> an appellate court held that actual misrepresentation of policy limits would make a contract voidable. The party seeking to have the contract voided due to a misrepresentation has the burden of establishing that his or her acceptance was induced by a representation that was not in accord with the facts, that the representation

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<sup>23</sup> *Basin Paving Inc. v. Port of Moses Lake*, 48 Wn.App. 180, 7373 P.2d 1312 (1987).

<sup>24</sup> 99 Wn.App. 692, 994 P.2d 911 (2000).

was either fraudulent or material, and the individual was justified in relying on the misrepresentation.<sup>25</sup>

In *Metropolitan Life Ins. Co. v. Ritz*,<sup>26</sup> the defendants executed and acknowledged before their attorney, as notary, a full release of all claims. Defendants later claimed that the release was for wage loss and general damages only and that it made no mention of, and was not intended to include, claims for medical expenses. This court concluded that regardless of the intent of the parties, an unconditional general release of “all claims” included all claims as a matter of law.

In the case at bar, the release is valid because the agreement was voluntarily entered into and there is no evidence of mutual mistake. The parties properly understood the facts of the release which were written in clear language. Similar to the claimant in *Nationwide*, Mr. Barber was represented by an attorney who would have had an opportunity to review and advise him about the release.

There is no ambiguity in the language contained in the release. Here, the release identified the Ankenys as “Releasees” in unmistakable capital letters. It stated the agreement would “release and forever

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<sup>25</sup> *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000).

<sup>26</sup> 70 Wn.2d 317, 422 P.2d 780 (1967).

discharge BEVERLY ANKENY and CHARLEY ANKENY...from any and all claims...arising out of a Bodily Injury claim..."

The second paragraph states that the release was "intended to cover any and all actions...against Releasees for...bodily or personal injuries...including all claims against Releasees..." The third paragraph states that the release was "a full and final release of all claims of every nature and kind whatsoever that Releasor has against Releasees" and that the payment Mr. Barber accepted was "all of the compensation that Releasor will receive from the Releasees." In the fifth paragraph, Mr. Barber agreed that he had "read the foregoing General Release and knows the contents thereof, and has signed the same as his free act and deed, after consulting with his attorney."

Finally, the last two paragraphs, written in capital letters, state that Mr. Barber "WAIVES ANY CLAIM THAT THE RELEASE WAS NOT FAIRLY AND KNOWINGLY MADE" and that the release and settlement was "A FINAL RESOLUTION AND SETTLEMENT OF ANY AND ALL CLAIMS AGAINST THE RELEASES FOR THE EXPRESS PURPOSE OF PRECLUDING FOREVER ANY OTHER CLAIMS BY THE RELEASER AGAINST THE RELEASES."

Given the very clear and unambiguous meaning and intent of the release, there could be no misrepresentations. It was clear that the agreement would release the Ankenys from claims related to the accident.

Furthermore, Mr. Barber has not produced any evidence that the settlement was induced by fraud, misrepresentation, or overreaching, or mutual mistake. Mr. Barber has not contested the terms of the release himself by stating he failed to understand the release or that he was mistaken about its terms or that it was misrepresented to him. In fact, he knowingly waived any subsequent claims that the terms of the release were not known to him or that it was not fair. As a result, there is no basis upon which to void the contract which is enforceable as it is written. This valid agreement specifically releases the Ankenys.

2. **The Declarations are Inadmissible Under the Parol Evidence Rule.**

It is well established that in the absence of accident, fraud, or mistake, parol evidence is not admissible for the purpose of contradicting, subtracting from, adding to, or varying the terms of an unambiguous written instrument.<sup>27</sup> Parol evidence is admissible to explain ambiguities

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<sup>27</sup> *Fleetham v. Schneekloth*, 52 Wn.2d 176, 179, 324 P.2d 429 (1958); *Grant County Constructors v. E. V. Lane Corp.*, 77 Wn.2d 110, 459 P.2d 947 (1969); *Maxwell's Electric, Inc. v. Hegeman-Harris Co. of Canada, Ltd.*, 18 Wn.App. 358, 366, 567 P.2d 1149 (1977).

or supply material omissions in a writing.<sup>28</sup> Parol evidence is also admissible to determine if the parties intended that a writing be a complete and accurate integration of their agreement.<sup>29</sup>

There is no ambiguity in the terms of the subject release. Mr. Barber agrees that the language of the release adequately manifests the objective intent of the parties. However, Mr. Barber misses the distinction between a claim against the Ankenys and an insurance claim. The release stated that it would not apply to the Ankenys' *liability insurance* with GMAC, not the Ankenys themselves. The release stated that it would "release and forever discharge BEVERLY ANKENY and CHARLEY ANKENY...from any and all claims...arising out of a Bodily Injury claim...", it was "intended to cover any and all actions...against [the Ankenys] for...bodily or personal injuries...including all claims against [the Ankenys] ...", and it was "a full and final release of all claims of every nature and kind whatsoever that [Mr. Barber] has against [the Ankenys]." The clarity of this language becomes even sharper with the fact that the plaintiff was represented by counsel and had the ability to ask questions and seek legal advice before signing the agreement. The terms

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<sup>28</sup> *Dennis v. Southworth*, 2 Wn.App. 115, 120, 467 P.2d 330 (1970).

<sup>29</sup> *Lynch v. Higley*, 8 Wn.App. 903, 510 P.2d 663 (1973); *Barovic v. Cochran Electric Co.*, 11 Wn.App. 563, 565, 524 P.2d 261 (1974).

of the contract manifest a clear intention of the parties to release the Ankenys.

Because there is no ambiguity in the terms of the release, the declaration of Ms. Rodriguez and Mr. Legg are inadmissible parol evidence and should be stricken from the record. The language of the release is unambiguous and extrinsic evidence is not required to determine the meaning of the written instrument. The release clearly stated the consequences of agreement. The Ankenys names were written in unmistakable capital letters. The terms of the release were written in understandable language in every paragraph of the release. The clauses are unambiguous and do not require extrinsic evidence for explanation. As a result, the declarations are not allowed to contradict, add to, or vary the terms of the release.

The declarations do not provide any admissible information about ambiguities or omissions of the parties. Ms. Rodriguez's declaration is based upon a misrepresentation of the terms of the release. She states "there was nothing in the general release of all claims prepared in April of 2010 that was intended to impede or impair Alfred Barber's claims against Beverly and Charlie Ankeny."<sup>30</sup> This is clearly not true as the release states that "[t]his general release is intended to cover any and all actions,

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<sup>30</sup> See, Declaration of Paul Landry, Exhibit "B", ¶ 6 (July 22, 2011) (CP 16)

causes of action, claims, and demands against Releasees [including the Ankenys] to cover any and all actions, causes of action, claims, and demands against Releasees.” Her declaration does not offer any omitted terms of the contract. She supports her position that the parties did not intend for the Ankenys to be released by quoting a provision from the contract that states “nothing in this General Release of All Claims applies to the liability insurance applicable to this claim...”<sup>31</sup> This clause merely addresses the liability insurance of the Ankenys and does not raise issue with the fact that the Ankenys were released from “any and all claims,” precluding Mr. Barber from subsequently bringing suit against them for the subject accident.

Mr. Legg’s declaration states that he and Ms. Rodriguez intended to “allow Mr. Barber to seek further compensation from GMAC’s Insurance policy” which is exactly what the release allows.<sup>32</sup> Mr. Legg asserts that he and Ms. Rodriguez did not intend to release the Ankenys, however, that is in direct contradiction to what the release states.

The declarations of Olga Rodriguez and Chad Legg should not be allowed to introduce a contradictory term to the unambiguous clauses that release the Ankenys. Therefore, the declarations must be stricken as inadmissible parol evidence.

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<sup>31</sup> See, Declaration of Paul Landry, Exhibit “B”, ¶ 8 (July 22, 2011) (CP 16)

<sup>32</sup> See, Declaration of Paul Landry, Exhibit “C”, ¶ 3 (July 22, 2011) (CP 16)

Again, the plaintiff agreed to specifically name Mr. and Mrs. Ankeny in the settlement. Plaintiff made the decision, with counsel, to settle for the amount that he did and to agree to the terms as written. Whether the consideration he received is sufficient compensation is not before this court and has no bearing upon whether the release is enforceable as written. Therefore, the terms of the settlement are clear and do not invalidate the release.

3. **The Duties the Ankenys are Alleged to have Breached and their Relationship to the Other Defendants are Moot Points and have No Bearing on whether the Ankenys were Parties to the Release.**

Mr. Barber's argument that the Ankenys cannot be released because they are joint/concurrent tortfeasors is misplaced. This is not a circumstance where they are attempting to ride the coattails of another defendant's release. The release in question clearly identifies Mr. and Ms. Ankeny as parties to the settlement. Their names are written in capital letters as releasees.

The duties the Ankenys are alleged to have breached and their relationship to the other defendants are moot points and have no bearing on whether the Ankenys were parties to the release. Again, the plaintiff agreed to specifically name Mr. and Ms. Ankeny in the settlement. Furthermore, it is disingenuous for the plaintiff to assert he received no

consideration from the settlement. According to the release, the plaintiff received \$50,000. He cannot now assert he did not receive any consideration from the Ankenys, who are named as releasees. Finally, plaintiff made the decision, with counsel, to settle for the amount that he did and to agree to the terms as written. Whether the consideration he received is sufficient compensation is not before this court and has no bearing upon whether the release is enforceable as written. Therefore, the terms of the settlement are clear and do not invalidate the release.

4. **GMAC is Not Estopped from Denying Mr. Barber's Claim.**

The Washington State Supreme Court has set forth the required showing for the defense of equitable estoppel: “(1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.”<sup>33</sup>

“Equitable estoppels have the effect of precluding one party from offering an explanation or defense that he or she would otherwise be able to assert.”<sup>34</sup> For this reason, estoppel is not favored. The party asserting

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<sup>33</sup> *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994), *review denied*, 135 Wn.2d 1010 (1998).

<sup>34</sup> *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993)

this defense must prove each element by clear and convincing evidence.<sup>35</sup>“{T}he facts relied upon to establish an equitable estoppel must be clear, positive, and unequivocal in their implication....”<sup>36</sup>

In this instant case, any statements made by GMAC or their representative were due as part of the negotiation process and are moot and have no bearing on the validity of the released signed by Mr. Barber.

As stated previously, Mr. Barber agreed to specifically name Mr. and Mrs. Ankeny in the settlement. Mr. Barber made the decision, with counsel, to settle for the amount that he did and to agree to the terms as written. Whether any prior negotiation or statements were made prior to the signing of the release is not before this court and has no bearing upon whether the release is enforceable as written. Therefore, GMAC is not estopped from denying Mr. Barber his claim.

5. **Summary Judgement was Properly Granted by the Trial Court.**

The trial court properly granted summary judgment. Summary judgment is proper when the pleadings, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.<sup>37</sup>

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<sup>35</sup> *Berschauer/Phillips*, 124 Wn.2d at 831

<sup>36</sup> *Colonial Imports*, 121 Wn.2d at 735

<sup>37</sup> CR 56(c); *Kesinger v. Logan*, 113 Wn.2d 320, 325, 779 P.2d 263 (1989).

Once a party has moved for summary judgment, the court must consider all facts submitted and all reasonable inferences from those facts in a light most favorable to the non-moving part.<sup>38</sup> A defendant may support the motion by “merely challenging the sufficiency of the plaintiff’s evidence as to any material issue.”<sup>39</sup> The burden then shifts to the non-moving party to prove the existence of a genuine issue of material fact.<sup>40</sup> In order to make this showing, the party opposing summary judgment must submit “competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact.”<sup>41</sup>

The non-moving party may not rest upon the mere allegations or denials of its pleadings. In order for the non-moving party to prevail on a motion for summary judgment, the party must either, by affidavits or as otherwise provided in the civil rules, set forth specific facts showing that there is a genuine issue for trial.<sup>42</sup> The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues

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<sup>38</sup> *Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1983).

<sup>39</sup> *Law v. Yellow Front Stores*, 66 Wn.App. 196, 198, 839 P.2d 744 (1992); *Younger v. Key Pharm.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

<sup>40</sup> *Younger* at 226.

<sup>41</sup> *Thompson v. Everett Clinic*, 71 Wn.App. 548, 555, 860 P.2d 1054 (1993).

<sup>42</sup> CR 56(e).

remain, but instead “must set forth specific facts that sufficiently rebut the moving party’s contentions.”<sup>43</sup>

In the instant case, there is no ambiguity in the language contained in the release. The release in question clearly identifies Mr. and Ms. Ankeny as parties to the settlement. Their names are written in unmistakable capital letters as releasees. Therefore, there is no genuine issue of material fact and summary judgment was properly granted.

**D. CONCLUSION.**

Mr. Barber has introduced no admissible evidence to raise a genuine issue of material fact that the Ankenys were validly released in a written settlement agreement. Based upon the foregoing, the respondents in this matter respectfully request this Court dismiss the suit against the respondents.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of APR, 2012.

LAW OFFICES OF ROBERT A. RICHARDS

By:   
Robert A. Richards, WSBA #27596  
Attorney for Respondents

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<sup>43</sup> *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner indicated a copy of the foregoing RESPONDENTS' REPLY BRIEF upon the following persons:

Paul Landry  
902 South 10th Street  
Tacoma, WA 98405  
 Via Mail  
 Via Fax  
 Via Hand Delivery

DATED this 30 day of April, 2012, in Seattle, WA.

  
Donna J. Robinson