

63411-9

63411-9

NO. 63411-9-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ALEXANDER MCLAREN,

Appellant,

v.

DAVID CUTTER AND JILLIAN CUTTER,

Respondents.

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BRIEF OF APPELLANT

Skagit County Superior Court Case No. 05-2-00652-1

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2009 DEC -9 AM 11:53

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## **I. ASSIGNMENTS OF ERROR**

McLaren seeks review of all of the underlying orders of contempt/sanctions **CP 696-699, CP 717-720, CP 752-755, CP 756-758, CP 759-760, CP 792-795**, and the Order enjoining McLaren from transferring his property **CP 765-769**. Specifically, McLaren assigns error as follows:

(1) Did the trial court err when it found McLaren in Contempt on November 15, 2006 **CP 696-699** for non-removal of the Packard house when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided any purge clause before being found in contempt?

(2) Did the trial court err when it sanctioned McLaren on November 15, 2006 **CP 696-699** in the event he did not move the house within 75 days of the order when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided an adequate purge clause before being sanctioned?

(3) Did the trial court err when it continued the finding of contempt of the November 15, 2006 order in its Order (incorrectly designated as a Judgment and Order for Attorneys

Fees and Sanctions) dated May 3, 2007, when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided any purge clause? **CP 752-755.**

(4) Did the trial court err when it sanctioned McLaren on May 3, 2007, when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided an adequate purge clause before being sanctioned? **CP 752-755.**

(5) Did the trial court err when it filed a judgment dated May 3, 2007, for sanctions arising out of a deficient contempt order dated November 15, 2006, as set forth in Issue Number 1 and 2 above? **CP 752-755.**

(6) Did the trial court err when it awarded the Cutters' attorneys fees totaling \$1,250 relating to a judgment dated May 3, 2007, for sanctions related to a November 15, 2006 contempt order when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided an adequate purge clause? **CP 756-757.**

(7) Did the trial court err when it filed a Judgment Summary and Order on Judgment dated May 3, 2007, arising out

of sanctions related to a November 15, 2006 contempt order when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided an adequate purge clause? **CP 756-757.**

(8) Did the trial court err when it filed an Updated Judgment Summary dated May 30, 2008, arising out of sanctions related to a November 15, 2006 contempt order when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided an adequate purge clause? **CP 759-760.**

(9) Did the trial court err when it filed a Second Order of Contempt for Sanctions and Fees dated June 13, 2008, when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided any purge clause from which to avoid contempt and/or sanctions from this order? **CP 717-720.**

(10) Did the trial court err on March 20, 2009, when it ordered McLaren to remain in contempt, denied McLaren's motion to stay further sanctions and ordered that sanctions continue to accrue when McLaren no longer owned the Packard house, did not

have the financial or legal means to move it and was not provided any purge clause from which to avoid contempt and/or sanctions from this order? **CP 792-795.**

(11) Did the trial court err when it ordered McLaren to pay the Cutters an additional \$500 in attorney fees on its order dated March 20, 2009, when McLaren no longer owned the Packard house, did not have the financial or legal means to move it and was not provided any purge clause from which to avoid contempt and/or sanctions? **CP 792-795.**

(12) Did the trial court err when on December 19, 2008, it ordered McLaren be enjoined from transferring his property as a result of sanctions arising out of a November 15, 2006 Order of Contempt? **CP 765-769.**

(13) Did the Court err in finding McLaren in contempt of the aforementioned orders without a specific finding that he intentionally disobeyed the trial court's lawful orders when he sold the subject house in order to satisfy the July 20, 2006 order? **CP 80-81.**

## II. STATEMENT OF THE CASE

In 2005, David and Jillian Cutter successfully sued Alexander McLaren for breach of a real estate agreement for vacant land. On June 22, 2006, the trial court entered Findings of Facts and Conclusions of Law and ordered McLaren to specifically perform and sell one of his lots to the Cutters. **CP 61-71**. Nearly one month later, on July 20, 2006, an Order followed requiring McLaren to remove the Packard House (an historic house from his lot) within 60 days. **CP 80-81**.<sup>1</sup>

On October 23, 2006, the Cutters filed a Motion for Contempt due to McLaren's non-removal of the Packard house. **CP 797-800**. In response, on November 1, 2006, McLaren filed another Declaration with exhibits, including the Declaration of Thomas Hsueh. **CP 674-683**.

McLaren's response clearly establishes that as of September 4, 2006, McLaren sold the Packard house with a proviso that it be moved within four months from the date of

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<sup>1</sup> On August 1, 2006, McLaren filed a Declaration objecting to the July 20, 2006 Order alleging among other things: (1) the Cutters failed to provide proper notice (9 days) as required by SCLR 7; and (2) Removal of the house was never

purchase. **CP 674-683.** See also **CP 729-738** and **CP 777-791.** (**CP 736** is a true and accurate copy of the bill of sale for the subject house containing a clause that Mr. Hsueh will move from McLaren's lot within 4 months from the date of his purchase.)

Since Mr. Hsueh owned the house, McLaren had no legal ability to move it on or after the November 15, 2006 Order finding him in contempt and awarding sanctions in the event the house was not moved. Moreover, McLaren lacked the financial ability to otherwise move the subject house. His declaration states in part: "I was forced to sell the house because the award of irregular damages to the plaintiffs drained me of the funds required to move it." **CP 676-678.**

This was not an attempt by McLaren to shirk responsibility to remove the house. The opposite is true. McLaren contracted with the best party he could to relocate the subject house. McLaren was paid \$40,000 by Thomas Hsueh from the sale of the Packard House and those proceeds went directly toward paying the Cutters their legal fees. **CP 777-790.** This can only be construed as

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prayed for or provided for as relief in the Findings of Facts and Conclusions of Law. **CP 84-87.**

a good faith effort to comply with the trial court's decision and order to pay Cutters their legal expenses. After all, McLaren paid the Cutters \$167,485.53 for their legal fees and satisfied the judgment entered and filed with the Court. **CP 715-716.**

Despite these facts the Cutters still obtained separate but interrelated orders of contempt and/or sanctions against McLaren for non-removal of the house **CP 696-699; CP 717-720; CP 752-755; CP 756-758; CP 759-760, CP 792-795;** and an Order Enjoining McLaren from Transferring his Property. **CP 765-769.**

A notice for review of the first and last orders relating to contempt and or sanctions has been timely made. **CP 714 and CP 796.**

Despite timely review of the first Order dated November 15, 2006, and the last order dated March 20, 2009, this Court refused to accept review until August 14, 2009, following the Supreme Court's grant of Discretionary Review.

### **III. GROUNDS FOR RELIEF AND ARGUMENT**

**A. McLaren's two Notices for Review place all of the Orders relating to contempt and sanctions for non-removal of the Packard house before this Court.**

McLaren's two Notices for Discretionary Review (incorrectly designated as two Notices of Appeal) **CP 714 and CP 796** place the following orders before this court for review: **CP 696-699, CP 717-720, CP 752-755, CP 756-758, CP 759-760** and **CP 792-795**, and the Order Enjoining McLaren from Transferring his Property, **CP 765-769**.

McLaren timely and properly filed a Notice for Review within 30 days following both the first and the last orders at issue. **CP 714 and CP 796**. Review of the last order alone places all of the prior orders relating to contempt or sanctions before this court regardless of whether a Notice for Review of **CP 717-720, CP 752-755, CP 756-758, CP 759-760 and CP 765-769** was designated for review within 30 days of those orders or not. RAP 2.4(b).

Technically, McLaren should not have filed a Notice of Appeal of these orders. Instead, he should have actually filed Notices for Discretionary Review per RAP 5.1.

RAP 2.2 sets out the list of matters that can be appealed as a matter of right by filing a Notice of Appeal. While RAP 2.2 includes a "final judgment" as a matter that can be appealed as a

matter of right, it is clear that all of the orders of contempt **CP 696-699, 717-720, 792-795**; the order enjoining transfer of property **CP 765-769**; and, the “Judgments”, (“Judgment Order” re: sanctions **CP 752-755**; the Judgment Summary regarding the same **CP 756-758**; and, the Updated Judgment Summary **CP 759-760**) are all merely orders and neither a final order nor a final judgment.

The “Judgments” pertaining to contempt are simply orders because they are not the final determination of the court. Instead, they are simply calculations at a point in time of ongoing order(s) of sanctions and act as a continual order of contempt and continue sanctions. This cannot be appealed as a matter of right by a Notice of Appeal, as it, by definition, cannot be a judgment.

A judgment is defined by CR 54(1) as “the final determination of the rights of the parties in the action...” Here, where the judgment(s) stem from continuing and ongoing order(s) of sanctions, the “judgments” or “judgment summaries” are merely orders. “A court may find that an instrument entitled as a judgment is in fact an order or final order; and an instrument entitled as an order may in fact be a final judgment.”). *Mentor v. King* 2001 WL 898752, 4 (Wash.App. Div. 2) (Wash.App. Div.

2,2001); *Nestegard v. Inv. Exch. Corp.*, 5 Wn.App. 618, 623, 489 P.2d 1142 (1971).

However, McLaren's incorrect designation of two Notices for Discretionary Review as two Notices of Appeal is not fatal; far from it. RAP 5.1(c) specifically allows for the court to simply characterize a notice of appeal as a notice for discretionary review and vice versa.

This is precisely what the Supreme Court did when it reformed McLaren's Petition for Review to a Motion for Discretionary Review before handing down its Order Granting McLaren's Motion for Discretionary Review on July 8, 2009.

Understanding this procedural history is essential to appreciate which orders are properly before the Court.

RAP 2.4 (b) states:

"The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the **order is entered**, or the ruling is made, **before the appellate court accepts review....**".

That bolded phrase "**order is entered ... before the appellate court accepts review**" is crucial.

Since McLaren filed what must only be characterized as two Notices for Discretionary Review, **CP 714 and CP 796**, the appellate court did not “accept review” until McLaren fully paid his filing fee since the Supreme Court’s Order Granting Discretionary Review, dated July 8, 2009, was conditional upon McLaren’s payment of a filing fee; Said fee was timely paid thereafter.

Accordingly, McLaren is able to have this court review all of the underlying orders of contempt/sanctions, **CP 696-699, CP 717-720, CP 752-755, CP 756-758, CP 759-760 and CP 792-795**; and, the Order Enjoining McLaren from Transferring his Property, **CP 765-769**. Review of said orders is proper and just. RAP 2.4(b).<sup>2</sup>

McLaren cites to the following cases in support of that proposition: *Right-Price Recreation, LLC v Connells Prairie Commy. Council*, 146 Wn.2d, 370, 46 P.3d 789 (2002);

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<sup>2</sup> While **CP 696-699** and **CP 792-795** have been designated as orders, **CP 752-760, CP 717-720, CP 756-758, CP 759-760 and CP 765-769** are designated as part of responsive materials. Per RAP 9.6(a) and to minimize clerk’s papers, they have not been separately designated. Rather those orders were including as exhibits in responsive briefing to the trial court and those clerk’s papers designations will be utilized unless the court otherwise instructs McLaren to file

*Wlasiuk v Whirlpool Corporation*, 76 Wn.App 250, 884 P.2d 13 (1994) and reaffirmed in *Wlasiuk v Whirlpool Corporation*, 81 Wn.App 163, 168, 914 Wn.App 104 (1996); *Adkins v Aluminum Company of Am.*, 110 Wn.2d 128, 134, 750 P.2d 1257, 756 P.2d 142 (1988); and *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992).

In *Right-Price Recreation*, the Supreme Court held that appellate review of a trial court's order denying a motion to dismiss was proper, despite the lack of a notice of appeal being filed within 30 days from the order because the motion to dismiss arose prior to the appellate court accepting review of a subsequent discovery order per RAP 2.4(b).

In addressing RAP 2.4(b), the only salient issue for the Court of Appeals, the Supreme Court chose not to frame the issue as whether a notice of appeal or notice for discretionary review had been filed within 30 days of each order. Instead, the Court focused on whether the prior orders affected or prejudiced the order subsequently designated in the notice for discretionary review.

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a supplemental designation of clerk's papers to have those orders individually designated.

*Right-Price Recreation* at 793-794. If they do, the prior, non-designated orders are reviewable.

In citing to *Adkins v. Aluminum Company of Am.*, the Court in *Right-Price Recreation* determined the “prejudice” prong of RAP 2.4(b) asking whether the last designated order was prejudicially affected by the prior order(s). If so, review of the non-designated orders is proper. *Right-Price Recreation* at 794.

Under that rationale, if we look at the last notice for discretionary review **CP 796**, and the “Order with Respect to Plaintiff’s Third Motion for Contempt against Defendant for Sanctions and Attorneys Fees...” **CP 792-795**, we must determine whether that order would be prejudiced if the prior orders were altered. Clearly that last Order of Contempt was prejudiced. The Order maintains the status quo, finding McLaren in contempt and fining him \$350 per day despite overwhelming evidence to suggest that the prior reflected orders, beginning with the November 15, 2006 order, were clearly erroneous.

Specifically, that Order’s findings state in part: “1. McLaren **remains** in Contempt of the Court’s Order for failure to remove the white (Packard) house; 2. Judge Meyer’s prior Orders

of Contempt dated November 15, 2006 and June 13, 2007 shall remain in effect until a motion for further remedial sanctions is noted before Judge Meyer;" **CP 793**. It goes on to order a denial of Defendant's Motion to Stay ever escalating sanctions, and Orders that McLaren shall remain in contempt, and that those sanctions can only be increased. **CP 794**. Accordingly, if the non-designated orders are found to be invalid, the last order would be wholly inconsistent with the prior orders.<sup>3</sup> Review is proper.

**B. Standard of Review**

"Punishment for contempt of court is within the sound discretion of the judge so ruling. Unless there is an abuse of a trial court's exercise of discretion, it will not be disturbed on appeal." *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978) (quoting *State v. Caffrey*, 70 Wn.2d 120, 122-23, 422 P.2d 307 (1966)). "A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons." *In re Marriage of Myers*, 123 Wash.App. 889, 892-93, 99 P.3d 398 (2004). Here, the

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<sup>3</sup> While independent review of the November 15, 2006 order was brought **CP 714**, application of RAP 2.4(b) provides McLaren with a separate and distinct basis for review. Should this court overrule the November 15, 2006 order **CP 696-699** based upon **CP 714** without resort to RAP 2.4(b), the remaining orders

trial court abused its discretion by finding McLaren in contempt without making necessary findings that McLaren failed to perform an act that was still within his ability; failed to find that McLaren, in fact, had the ability to move his house; and, failed to provide a proper purge clause allowing McLaren the opportunity to have the house moved, assuming McLaren actually had the ability to move the Packard house. Finally, even if the court made all the correct procedural findings and provided an adequate purge clause, the court abused its discretion because McLaren could not have committed a plain violation of the orders since he sold the subject property prior to any order of contempt.

**C. The trial court abused its discretion when it ordered McLaren in contempt and awarded sanctions.**

The contempt orders **CP 696-699, CP 717-720, CP 752-755, CP 756-758, CP 759-760** and **CP 792-795** are all fundamentally flawed for three reasons: (1) the orders of contempt all failed to make necessary findings that McLaren failed or refused to perform an act that was still within his power to

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of contempt/sanctions including the June 13, 2007 order, are all fundamentally and facially flawed. *See* Sec. C *supra*.

perform; (2) McLaren did not actually have the power or ability to comply with the order; and (3) the Court failed to provide an adequate purge clause allowing McLaren the opportunity to somehow comply with the order to remove his house.<sup>4</sup>

Contempt of court is defined, in part, as intentional disobedience of a lawful court order. RCW 7.21.010(1).<sup>5</sup>

RCW 7.21.030(2) states in part:

If a trial court correctly determines that a party has **intentionally disobeyed** its lawful order and if the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

- (a) ...
- (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
- (c) An order designed to ensure compliance with a prior order of the court.
- (d) Any other remedial sanction other than the sanctions specified in (a) through

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<sup>4</sup> All but the order dated November 15, 2006, **CP 696-699**, completely fail to provide McLaren with any purge clause at all.

<sup>5</sup> The orders of contempt never find that McLaren intentionally disobeyed a court order. He did not. He sold the house subject to a clause for Mr. Hsueh to move the house in order to comply with the court's order. For this reason alone, contempt is not merited on any of the appealed contempt/sanction orders.

(c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) ...

In determining whether the facts support a finding of contempt, **the court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order**. *Johnston v. Beneficial Mgmt. Corp.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982) (**emphasis added**)

In determining whether the trial court abused its discretion, our courts have held “**exercise of the contempt power is appropriate only when “the court finds that the person has failed or refused to perform an act that *is yet within the person's power to perform.*”** *Britannia Holdings Ltd. v Greer*, 127 Wn.App 926, 113 P.3d 1041 (2005).

**1. The Orders of Contempt/Sanctions did not make the necessary Findings of Fact re: McLaren’s ability to perform.**

The court’s orders must have expressly found that McLaren failed or refused to perform an act that was still within his power to perform. RCW 7.21.030(b). However, no such

finding was ever made in any of the contempt/sanction orders. See **CP 696-699, CP 717-720, CP 752-755, CP 756-758, CP 759-760** and **CP 792-795**. As a matter of law, the contempt orders are facially unenforceable.

**2. McLaren could not Actually, Factually or Legally Move the House.**

Factually, McLaren's inability to move the house is underscored by the sale of McLaren's house to a 3<sup>rd</sup> party, Mr. Hsueh. As set forth in his declaration and not refuted, McLaren was legally unable to move a house that he no longer possessed and was financially unable to otherwise obtain a location to move the house to and/or hire movers to do so. **CP 674-683**.

McLaren did not plainly violate the court's order when he sold the house to a 3<sup>rd</sup> party on September 4, 2006, subject to a clause to have the house removed within four months from the date of the sale. **CP 736** and **CP 674-683**. He states in part "I have sold the house on September 4 to a third party who has not had time to remove it due to his travel abroad. **"I was forced to sell the house because the award** of irregular damages to the plaintiffs **drained me of the funds required to move it."** **CP 676**

**and 678.** The court will recall that McLaren was under an order to pay Cutters their legal fees arising out of the lawsuit and McLaren managed to pay the Cutters the whopping sum of \$167,485.53 to satisfy their judgment. **CP 715-716.**

**3. The Orders Contained an Insufficient Purge Clause.**

The imposition of remedial (and punitive) sanctions carry certain procedural requirements. RCW 7.21.010(2). “An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for noncompliance.” *In re: Rebecca K.*, 101 Wn.App. 309, 314, 317 P.3<sup>rd</sup> 501 (2000) (quoting *State ex rel. Schafer v. Bloomer*, 94 Wn.App. 246, 253, 973 P.2d 1062 (1999)).

In this case, the first order on appeal found McLaren in contempt and that finding took immediate effect and was unavoidable. **CP 698.** Sanctions or not, as of November 15, 2006, McLaren could not un-ring the bell of condemnation by the trial court; he was in contempt.

RCW 7.21.010(1) also distinguishes between punitive and remedial sanction. McLaren was given a “remedial sanction” as

set forth in subsection RCW 7.21.010(3) (which “means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.”). The court’s order specifically states in part “I direct that the Defendant shall pay to Plaintiffs a remedial sanctions in the amount of \$250 per day pursuant to RCW 7.01.030. **CP 698**

While that same order, delayed imposing *monetary sanctions* 75 days to move the house before the onset of a sanctions, but the grace period, “purge clause” was meaningless because McLaren no longer owned the house McLaren had no power to move it. **CP 674-678.**

McLaren could not avoid any enforceable duty to move or have the house moved as a result of the July 20, 2006 Order **CP 80-81**. However, the imposition of contempt or sanctions to effectuate that Order must (1) contain a purge clause sufficient to allow McLaren the opportunity to obtain and enforce a judicial order against Mr. Hsueh; and (2) must be sensitive to McLaren’s financial capability or incapability and, (3) this Court must make a

determination that McLaren's contact to Mr. Hsueh was simply an intent to avoid the order requiring removal of the house.

**4. The Order enjoining McLaren from selling his property is improper because it relies upon the errant assumption that the trial court properly imposed sanctions against McLaren**

The order enjoining McLaren from selling his remaining property **CP 765-769** is premised upon the errant assumption that McLaren has amassed a judgment of near or above \$300,000 in sanctions. Based on the foregoing, the application of RAP 2.4 (b) and the cases cited under Section 2 of this brief, that order should be overruled.

**IV. CONCLUSION**

Orders **CP 696-699, CP 717-720, CP 752-755, CP 756-758, CP 759-760, CP 792-795** and **CP 765-769** should be overruled as they are all in error and McLaren should be awarded his legal fees in bringing this appeal and reimbursed for attorney fees paid to the Cutters or their counsel, if any, arising out of those orders.

RESPECTFULLY SUBMITTED this 8 day of December, 2009.

By:   
**Richard J. Hughes, WSBA 22897**  
**HUGHES LAW GROUP, PLLC**  
**Attorney for Appellant**

**NO. 63411-9-I**

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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**ALEXANDER MCLAREN,**

**Appellant,**

**v.**

**DAVID CUTTER AND JILLIAN CUTTER,**

**Respondent.**

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**DECLARATION OF SERVICE**

**Skagit County Superior Court Case No. 05-2-00652-1**

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**Richard J. Hughes, WSBA 22897  
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Attorneys for Appellant**

I, Richard J. Hughes, am over the age of eighteen, reside in Skagit County and am competent to make the following declaration based upon my personal knowledge and belief:

On December 9, 2009, via email, as previously agreed, I sent a true and accurate pdf file of Appellant's Appellate Brief and Declaration of Service to John Groen, attorney for Respondents.

I swear under penalty of perjury under the laws of the state of Washington that the above is true and correct to the best of my belief and knowledge

Dated this 8 day of December, 2009.

A handwritten signature in black ink, appearing to read "Richard J. Hughes", is written over a horizontal line.

Richard J. Hughes  
Attorney for Defendant/Appellant