

original

No. 31738-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH KWIATKOWSKI,

Appellant,

vs.

RALPH DREWS and JAMES FROST, SEATTLE FIRST
NATIONAL BANK (BANK OF AMERICA), PUGET SOUND
NATIONAL BANK (KEY TRUST COMPANY), and US BANK
TRUST DEPARTMENT,

Respondents.

APPEALS
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE BEVERLY G. GRANT

BRIEF OF RESPONDENTS DREWS AND FROST

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

EKLUND ROCKEY
STRATTON, P.S.

By: Catherine W. Smith
WSBA No. 9542

By: Mary C. Eklund
WSBA No. 12416

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

521 Second Avenue West
Seattle, WA 98119-3927
(206) 223-1688

Attorneys for Respondents Drows and Frost

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I. RESTATEMENT OF THE CASE

A. Introduction.

Respondents Frost and Drews were accountants for the appellant's business when his wife was killed and he was seriously injured in an automobile accident in New Zealand in 1986. Over the next 11 years, respondents as special administrators operated appellant's business, and respondent Drews at times served as limited guardian of the appellant's person or estate. This appeal, following almost four years of litigation commenced long after the respondents were discharged from their fiduciary responsibilities, is proof of the axiom that no good deed goes unpunished.

Appellant's 100-page opening brief asserts 10 assignments of error against not only respondents Frost and Drews but against three banks who also acted in various fiduciary roles for appellant between 1986 and 2001. Only appellant's first, second, and tenth assignments of error concern respondents Frost and Drews, and only those assignments of error are addressed in this brief.

In his first and second assignments, appellant claims error in the trial court's April 21, 2004, entry of summary judgment dismissing his claims against respondents Frost and Drews, and its simultaneous denial of his motion to set aside the August 15, 1997,

order approving Frost and Drews' final report and discharging them as special administrators. It is these pleadings that are relevant to the court's review of these orders under RAP 9.12, and respondents' restatement of the case is based largely on this record. The facts are set out in a light most favorable to appellant, as required by CR 56, but most of the relevant facts are drawn from pleadings and orders entered in the underlying guardianship and probate actions and are indisputable.

In his tenth assignment of error, appellant complains of the trial court's refusal to allow him to amend his complaint to pursue renewed claims against all the respondents and against additional defendants, after declining to vacate a settlement that appellant had reached with the respondent banks, which had obtained fee awards against him after his claims had all been dismissed on summary judgment. The pleadings relevant to this decision also are relied on in this restatement of the case.

B. Orders In Underlying Actions.

In April 1986, Joseph and Jana Kwiatkowski were involved in a serious auto accident while traveling in New Zealand. Kwiatkowski was severely injured and his wife Jana was killed. (CP 3118) Respondents Drews and Frost were appointed in Jana's

probate as special administrators to operate the Kwiatkowskis' business, Sirius Enterprises, Inc. (CP 18)

Sirius Enterprises had had sales of \$1,726,000 in 1985, and Kwiatkowski and his wife had received salaries totaling \$361,000. (CP 2323, 4796) After Drews and Frost took over management of the company, net sales rose \$9,256,551 in 1986 and to \$10,127,398 in 1987, and Kwiatkowski was paid salary and bonus of \$2,064,345 in 1986 and \$876,000 in 1987. (CP 2323-2324, 4789) The 1986 payments to Kwiatkowski were intended to withdraw the liquid equity from the company and provide sufficient assets to provide for his care for the remainder of his life. (CP 19) Respondents' accounting firm billed and was paid \$190,468 in 1986 and \$208,462 in 1987 for their accounting and management services. (CP 4766)

Because of Kwiatkowski's injuries, a guardianship proceeding also was commenced. On November 13, 1986, attorney John Parr was appointed Kwiatkowski's guardian ad litem. (CP 3941-3942) At the urging of his neuropsychiatric medical and rehabilitation experts, Kwiatkowski was actively involved in the operation of his business. (CP 19-20) Kwiatkowski's guardian ad litem Parr testified that "Drews simply gave up two years of his life

to take care of” Kwiatkowski, and that Kwiatkowski was well taken care of both “personally and financially.” (CP 4809)

Kwiatkowski’s half-brother initially was appointed limited guardian of his person, and Seattle First National Bank (now Bank of America) was appointed limited guardian of his estate, on December 8, 1986. (CP 6-8) When Kwiatkowski’s brother resigned three years later, respondent Drews was appointed successor limited guardian of the person on December 26, 1989. (CP 294) On April 12, 1990, Drews and Frost’s authority as special administrators to operate Sirius Enterprises was transferred from Jana Kwiatkowski’s probate to the guardianship proceedings. (CP 22)

Puget Sound National Bank (now KeyBank) had succeeded Bank of America as limited guardian of the estate in 1991. (CP 329-331) U.S. Bank had succeeded KeyBank as limited guardian of the estate in 1994. (CP 113-115) Drews was appointed limited guardian of Kwiatkowski’s estate on February 28, 1997, succeeding respondent U.S. Bank. (CP 377) On April 2, 1997, on Kwiatkowski’s petition, Donna Holt was appointed his private attorney. (CP 2820-2821)

On August 15, 1997, with the approval of Kwiatkowski's guardian ad litem Parr, Frost and Drews' authority as special administrators was terminated and the court approved their final report:

James M. Frost and Ralph H. Drews are hereby discharged from the office of Special Administrator and from any and all liability in connection with their duties as Special Administrators

(CP 394) The court's discharge and approval was based on reports and evidence taken at this and earlier hearings. (CP 393) At the same August 15, 1997 hearing, Drews filed his final report as limited guardian of the person (CP 3124-3126) and his appointment as limited guardian of Kwiatkowski's person was terminated. (CP 398) Parr also was discharged as guardian ad litem, and Kwiatkowski's rights to control his person were restored. (CP 395-398) Kwiatkowski's attorney Holt was at the hearing and presented the order discharging Parr and terminating Drews' limited guardianship of the person. (CP 536)

Drews' appointment as limited guardian of the estate was terminated on Kwiatkowski's motion on January 26, 2001. (CP 166-167) The trial court directed the parties to agree upon completion and filing of Drews' final report as limited guardian of the estate. (CP 166)

On April 12, 2002, Kwiatkowski filed a motion for an order to show cause why Drews should not be held in contempt for failing to turn over documents requested by Kwiatkowski's attorney Holt. (CP 168-175) Drews filed his final report of limited guardian of the estate on May 3, 2002. (CP 176-178, 3132-3825) In that final report, Drews summarized transactions from his appointment as limited guardian of the estate on May 6, 1997 until January 31, 2001. The report showed that the net value of Kwiatkowski's estate, \$2,239,624.86 in 1997, had risen to \$2,587,803.56 by 2001, and that \$631,859.35 had been paid directly to Kwiatkowski between 1997 and 2001. (CP 179)

At the show cause hearing on May 10, 2002, the court ordered Kwiatkowski and Drews to try to resolve the document dispute and report back. A hearing was scheduled for May 31, 2002. (CP 2835) There is no indication in the record that this hearing occurred.

C. Procedural History.

On October 13, 2002, Kwiatkowski through his attorney Holt filed a claim for damages in the guardianship proceeding against all the respondents in this appeal. (CP 2840-2848) The claim for damages alleged that Frost as special administrator had breached

his fiduciary duty to Kwiatkowski, had a conflict of interest, and was negligent. (CP 2844) The claim for damages made the same allegations against Drews and further claimed that Drews was negligent as a board director and limited guardian of the person and of the estate. (CP 2843-2844)

At a November 21, 2003 hearing, the court ordered Kwiatkowski to personally serve each of the defendants with his claim. (CP 3826) Kwiatkowski filed his claim for damages under a new cause number on January 21, 2004, and dismissed his first claim for damages in the guardianship action on February 11, 2004. (CP 2851)

Drews and Frost moved for summary judgment on statute of limitations and res judicata grounds on March 17, 2004. (CP 222-239) In response, Kwiatkowski moved for an order setting aside the August 15, 1997 order dismissing Frost and Drews as special administrator and for an order requiring a full accounting. (CP 623-625) The court granted summary judgment dismissing all claims against Frost and Drews on April 16, 2004. (CP 242-243) Kwiatkowski filed a notice of appeal or discretionary review to this court. (CP 4775) At appellant's request, review was held in

abeyance pending resolution of Kwiatkowski's claims against the respondent banks. (CP 4778, 4781)

Thereafter, Kwiatkowski's claims against the respondent banks were dismissed on summary judgment. (CP 736-740, 753-756) After the banks obtained fee awards against Kwiatkowski, the banks and Kwiatkowski entered into a settlement agreement resolving all claims on January 13, 2005. (CP 936-937, 941-945)

The banks moved to enforce the settlement on May 12, 2005. (CP 929-935) On May 11, 2006, Kwiatkowski sought to vacate the settlement and reinstate his claims against all respondents, claiming newly discovered evidence. Kwiatkowski moved to amend his complaint to add additional legal theories and to add as a defendant retired attorney Arthur Davies and his firm Owen Davies, which had at various times represented the guardians, personal representatives, and special administrators. (CP 2145-2152) On June 12, 2006, after the trial court denied all Kwiatkowski's motions and judgment was entered (CP 2397-2401, 2553-2556), this appeal followed.

II. ARGUMENT

A. Appellant's Attack On The Order Discharging Respondents Drews And Frost As Special Administrators Is Barred By Res Judicata.

Respondents Drews and Frost were discharged from any and all liability as special administrators by an order of the court on August 15, 1997. Appellant Kwiatkowski's claim was properly dismissed as an improper collateral attack of this order. *Philbrick v. Parr*, 47 Wn.2d 505, 288 P.2d 246 (1955).

In *Philbrick*, an administratrix paid attorneys representing the estate without court approval. The administratrix was subsequently removed and hearings were held to approve her final report and justify her expenditures of estate funds. The court found that the estate did not benefit from the attorneys' work and that the estate was entitled to a return of the fees paid. The new administrator of the estate brought an action against the attorneys for the recovery of the fees and costs after they refused to return the fees. In response, the attorneys claimed that their fees were not an issue in the probate hearings regarding the administratrix's final report, and presented affirmative defenses to return of the fees.

The trial court agreed with the attorneys and allowed them to retain a portion of their fees ordered returned in the probate action. On appeal, the Supreme Court reversed, holding that the probate court's order regarding return of the fees was res judicata action in the subsequent action to collect the fees:

An order entered upon the final account of an administrator after due notice given, while not a final settlement of the estate, is res judicata as to the settlement of the final account. It fixes the rights and liabilities of the administrator and binds all persons interested as the matters embraced in such direct settlement until it is set aside in some direct proceeding.

Philbrick, 47 Wn.2d at 509.

Similarly here, the August 15, 1997 hearing on Drews and Frost's final report as special administrators was to review their activities and approve or disapprove the actions they had taken as special administrator. Kwiatkowski was represented by his guardian ad litem Parr, who did not attend the hearing but approved the order discharging Drews and Frost and waived appearance at its presentation. (CP 394) Kwiatkowski cannot now attack the court's order discharging Drews and Frost as special administrators.

The ***Philbrick*** court noted that a direct attack on a judgment may under some circumstances be made. 47 Wn.2d at 510. But

Kwiatkowski did not timely seek to vacate the order discharging Frost and Drews as special administrators under CR 60(b). Kwiatkowski was restored to his rights as a person in the same hearing at which Frost and Drews were discharged in August 1997. (CP 396, 398) The guardianship of his estate was terminated January 26, 2001. (CP 166-167) Any motion for relief from judgment based on mistake, irregularity, or newly discovered evidence had to be filed by January 26, 2002, one year after Kwiatkowski's disability, at the latest, ceased. Kwiatkowski first challenged either Frost or Drews' actions on April 12, 2002, when he asked Drews to show cause why he should not be held in contempt as limited guardian of the estate. (CP 168)

Further, having waited six years after discharge of Drews and Frost as special administrators before bringing his claim, Kwiatkowski did not act within a reasonable time in seeking relief under CR 60(b)(4) or (11). ***State ex. rel. Turner v. Briggs***, 94 Wn. App. 299, 971 P.2d 581 (1999).

Appellant argues that the August 15, 1997 discharge order is not res judicata and that his challenge to it may be made at any time, because the court lacked jurisdiction to enter the August 1997 order, which as a consequence is void. But in the case appellant

principally relies upon, *State ex rel. Patchett v. Superior Court*, 60 Wn.2d 784, 375 P.2d 747 (1962), unlike here, the court never obtained jurisdiction over the estate because of the failure to provide proper notice to creditors. Here, there is no dispute that the guardianship action was properly commenced.

Patchett itself notes that the court would have had “the jurisdiction to discharge a personal representative for any cause it deems sufficient during the course of administration . . .” 60 Wn.2d at 797. The order discharging Drews and Frost did not terminate the guardianship and the court had authority to discharge them as special administrators. Appellant through his guardian ad litem had notice of and approved the final report, and the court properly exercised its jurisdiction in discharging respondents as special administrators. See *Batey v. Batey*, 35 Wn.2d 791, 215 P.2d 694 (1950) (final account of former guardian entered by court having jurisdiction over estate not subject to collateral attack). Appellant’s attack on the order discharging respondents Drews and Frost as special administrators is barred by res judicata.

B. Appellant’s Claims Are Barred By The Statutory Limitations On Claims Against Fiduciaries.

Frost and Drews were discharged as special administrators on August 15, 1997. (CP 394) Drews was dismissed as limited

guardian of the person on August 15, 1997, and as limited guardian of the estate on January 26, 2001. (CP 166, 398) Appellant's claims also are barred by the applicable limitations governing claims against fiduciaries.

“[A]n action against a personal representative for alleged breach of fiduciary duty by an heir, legatee, or other interested party must be brought before discharge of the personal representative.” RCW 11.96A.070(2). A “personal representative” is defined to include a “guardian,” “limited guardian” or “special administrator”. RCW 11.02.005 (1), (10), (13). Since no claim was made before discharge of the respondents in their fiduciary capacities, appellant's claims are barred by the statute of limitations in RCW 11.96A.070(2).

The statute of limitations was not tolled as to appellant because he was represented by a guardian ad litem when the August 15, 1997 orders were entered:

The tolling provisions of RCW 4.16.190 apply to this chapter except that the running of the statute of limitations under subsection (1) or (2) of this section, or any other applicable statute of limitations for any matter that is the subject of dispute under this chapter, is not tolled as to an individual who had a guardian ad litem . . . to represent the person during the probate or dispute resolution proceeding.

RCW 11.96A.070(4). Similarly, when the January 2001 order discharging Drews as limited guardian of the estate was entered, Kwiatkowski had a private attorney appointed by the court representing his interests pursuant to RCW 11.92.180 after he requested discharge of his guardian ad litem. (CP 395-398)

Appellant claims that Drews was never finally discharged as limited guardian because the guardianship proceeding was never officially closed. Drews is still entitled to summary dismissal because any objection to his reports was not timely made under RCW 11.92.050(1).

RCW 11.92.050(1) provides that “upon the filing of any intermediate guardianship or limited guardianship account required by statute, or of any intermediate account required by court rule or order, the guardian or limited guardian may petition the court for an order settling his . . . account. . . .” RCW 11.92.050(1). Upon entry of an order approving the account, “the order shall be final and binding upon the incapacitated person, subject only to the right of appeal as upon a final order,” if, as here, the incapacitated person is represented by a guardian ad litem. RCW 11.92.050(1). The order may thereafter only be challenged at the time of final account on the ground of fraud.

No objection was filed when Drews was dismissed as limited guardian of the person or when he filed his final report as limited guardian of the estate on May 3, 2002. Since appellant had either a guardian ad litem or a private appointed attorney representing him when the orders discharging Drews were entered, the orders cannot now be collaterally attacked absent a showing of fraud. Appellant's claims for damage do not allege fraud.

Appellant also for the first time on appeal argues that these limitations on his ability to attack the orders discharging respondents do not bar his claims because respondents were acting as "de facto" guardians. First, the court should not consider this argument because it is raised for the first time on appeal. RAP 2.5(a). Even if the court considers this argument on the merits, it has none.

The "de facto" guardian concept adds nothing to the responsibility respondents had already undertaken in the probate and guardianship proceedings. "De facto" guardianship has been used to validate action taken on behalf of an incapacitated person when the statutory provisions for guardianship have not been met, but it is not a basis for liability. See, e.g., *Estate of Phillips*, 46 Wn.2d 1, 278 P.2d 627 (1955) (approving settlement reached on

behalf of minor heir by de facto guardian). Appellant's claims are barred by the statutory limitations on claims against fiduciaries.

C. The Trial Court Did Not Abuse Its Discretion In Preventing Appellant From Amending His Complaint.

As appellant's claims were barred by the statute of limitations and res judicata, his efforts to amend his complaint were also properly rejected by the trial court. To the extent appellant's claims were based on allegedly new evidence, the record in fact showed that the "newly discovered" information had been in appellant's possession for years.

Appellant claims that respondent Drews received undisclosed fees in 1986-1987. (CP 2372) But the financial statements upon which these claims were made were disclosed in the probate and guardianship proceedings, in documents that were not filed due to appellant's privacy concerns. (CP 2320, 4795-4797) Appellant's guardian ad litem Parr testified in 2006 that he didn't specifically recall the 1986-87 financial statements two decades later, but that his usual procedure was to look at the financial information, review it with Kwiatkowski, and in many cases ask the court to look the information over as well. (CP 4806-4807) Further, in 2002, appellant's counsel received copies of respondents' invoices, bill and timesheets, for work performed for

appellant and his company during the guardianship. (CP 2330-2331) These invoices also showed that respondents' firm billed a total of \$190,468 in 1986 and \$208,462 in 1987. (CP 4766)

A motion to amend a complaint is addressed to the trial court's discretion. ***Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.***, 105 Wn.2d 878, 719 P.2d 120 (1986) (trial court did not abuse discretion in denying motion to amend); ***Dewey v. Tacoma School Dist. No. 10***, 95 Wn. App. 18, 974 P.2d 847 (1999) (trial court did not abuse discretion in denying motion to amend following summary judgment, motion to dismiss, and after case had rested). The court should consider the "probable merit or futility of the amendments requested." ***Doyle v. Planned Parenthood of Seattle-King County, Inc.***, 31 Wn. App. 126, 131, 639 P.2d 240 (1982). Particularly when made after summary judgment of dismissal, "the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation." ***Doyle***, 31 Wn. App. at 130-131.

In ***Doyle***, the plaintiff moved to amend her complaint to add a strict products liability theory after her other claims against defendants had been dismissed on summary judgment. The Court

of Appeals held that the trial court did not abuse its discretion in denying the motion to amend as untimely and because the proposed amendment lacked legal support. See also **MacLean v. First Northwest Industries of America, Inc.**, 96 Wn.2d 338, 635 P.2d 683 (1981) (trial court properly refused amendment after summary judgment); **Ino Ino, Inc. v. City of Bellevue**, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997), *cert denied*, 522 U.S. 1077 (1998) (trial court properly denied amendment after final judgment).

Appellant could have alleged his new cause of action complaining about respondents' fees when he filed his claim for damages in January 2004, since his attorney had all the invoices in her possession then. If the claim had been included, it would have been dismissed on summary judgment for the same reason his other claims were dismissed. Appellant's attempt to assert additional claims against respondents and additional defendants had no legal or factual basis and was untimely. The trial court did not abuse its discretion in preventing appellant from amending his complaint.

D. Any Remand Need Not Go To A Different Judge.

Although remand should not be necessary, any remand need not go to a different judge. Appellant claims bias only because the trial court ruled against him. This court should reject his meritless argument for remand to a different judge because if accepted it would allow any dissatisfied summary judgment litigant to disqualify a trial judge.

Washington courts have repeatedly held that “[w]ithout evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” **Santos v. Dean**, 96 Wn. App. 849, 857, 982 P.2d 632 (1999), *rev. denied*, 139 Wn.2d 1026 (2000), *quoting State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). No Washington court has reversed a summary judgment order and ordered that further proceedings be held before a different judge, but two courts have rejected such a request. In **Santos**, Division Three reversed the trial court's grant of summary judgment, but rejected the appellant's argument that trial should be held before a different judge. 96 Wn. App. at 856-57. The court held that the trial court's decision “turned on a legal issue” and that although this court decided the issue differently than the trial court, that was not “evidence of actual or potential bias.”

Santos, 96 Wn. App. at 857. In **Neighbors & Friends of Viretta Park v. Miller**, 87 Wn. App. 361, 385, n. 11, 940 P.2d 286 (1997), *rev. denied*, 135 Wn.2d 1009 (1998), Division One reversed summary judgment but denied appellant's request to disqualify the trial judge who performed "unannounced, unaccompanied site visits" to the locations at issue in the case.

Here, the trial court judge showed remarkable patience and fortitude in examining two decades of estate and guardianship pleadings, fully reviewing appellant's complaints of procedural and substantive irregularities, and correctly concluding that appellant had no viable claims against any of the respondents. Any remand need not go to a different judge.

E. Respondents Drews And Frost Should Be Awarded Fees on Appeal.

This court should deny appellant's claim for fees and award respondents Drews and Frost their fees on appeal. RCW 11.96A.150(1) ("the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings . . . as the court determines to be equitable."). Appellant's continued pursuit of this lawsuit in the face of statutes and orders foreclosing his claims makes this a proper case for the award of fees on appeal to

respondents Drews and Frost. See *Villegas v. McBride*, 112 Wn. App. 689, 696-97, 50 P.3d 678 (2002), *rev. denied*, 149 Wn.2d 1005 (2003) (awarding fees on appeal pursuant to RCW 11.96A.150(1); RAP 18.1(a).

F. Respondents Drews And Frost Adopt The Arguments of Bank Respondents.

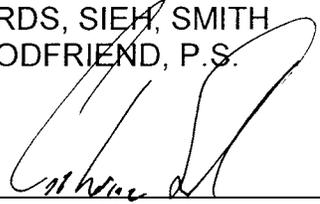
To the extent necessary to affirm the trial court's decision and award respondents their fees on appeal, respondents Drews and Frost adopt the arguments of any and all of the bank respondents. RAP 10.1(g)(2).

III. CONCLUSION

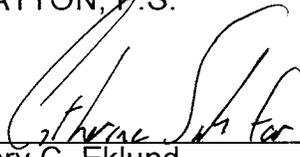
This court should affirm the summary judgment of dismissal and award respondents Frost and Drews their fees on appeal.

Dated this 26th day of March, 2007.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 
Catherine W. Smith
WSBA No. 9542

EKLUND ROCKEY
STRATTON, P.S.

By: 
Mary C. Eklund
WSBA No. 12416

Attorneys for Respondents Ralph Drews and James Frost

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DIVISION II

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DECLARATION OF SERVICE

STATE OF WASHINGTON
BY Chum

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 26, 2007, I arranged for service of the foregoing Brief of Respondents Frost and Drews, to the court and counsel for the parties to this action as follows:

Office of the Clerk Court of Appeals – Div. II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Robin H. Balsam Balsam McNallen LLP 609 Tacoma Avenue So. Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Donna L. Holt Attorney at Law 6334 Littlerock Road SW, Bldg. 6 Tumwater, WA 98512-7332	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Michael E. Kipling Marjorie Walters Kipling Law Group PLLC 3601 Fremont Ave. No., Suite 414 Seattle, WA 98103	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Greg Montgomery Miller Nash LLP 601 Union Street, Suite 4400 Seattle WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail

Matthew B. Turetsky Averil Rothrock Schwabe Williamson & Wyatt, PC 1420 Fifth Avenue, Suite 3010 Seattle WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Matthew B. Edwards Owens Davies, P.S. 926 - 24th Way SW Olympia WA 98507-0187	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Mary C. Eklund Eklund Rockey Stratton, P.S. 521 Second Ave. West Seattle, WA 98119-3927	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-mail

DATED at Seattle, Washington this 26th day of March, 2007.



Tara D. Friesen