

No. 34757-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NATKIN-SCOTT, et al.

Appellant,

v.

M + W ZANDER, U.S. OPERATIONS. INC.

Respondent

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*

BRIEF OF RESPONDENT M+W ZANDER

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I. INTRODUCTION

Respondent M+W Zander, U.S. Operations, Inc. (“M+W”) and appellant Natkin-Scott settled all issues between them through a document entitled Severin Agreement for Pursuit of Claims (the “Severin Agreement”). In that agreement, the parties clearly stated “*[i]n/o other representations, covenants, undertakings or other prior or contemporaneous agreements, oral or written, respecting such matters, which are not specifically incorporated shall be deemed in any way to exist or bind any of the parties.*” This provision precludes application of the implied warranty upon which Natkin-Scott’s appeal is based.

Moreover, as Natkin-Scott itself explains, the case relates to a very large and complicated construction project. From the beginning of the litigation, all parties were aware that contractor registration was a viable defense to the claims of Natkin-Scott and M+W. In fact, the issue of contractor registration hotly was being litigated at the time the Severin Agreement was negotiated. In sum, it was readily apparent that the right to make a claim against the project owner M+W assigned to Natkin-Scott in the Severin Agreement was subject to the defense of M+W’s lack of registration. There is no implied warranty against the existence of a readily apparent defense.

II. ASSIGNMENTS OF ERROR

M+W accepts Natkin-Scott's assignments of error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

M+W accepts all of Natkin-Scott's "issues pertaining to assignments of error" except number 1. The trial court did not rule that Natkin-Scott released its right to bring a claim for breach of the Severin Agreement.

IV. STATEMENT OF THE CASE

M+W generally accepts Natkin-Scott's statement of the case.

M+W, however, includes the following supplemental statement of the case.

A. The Terms of the Severin Agreement

The Severin Agreement, dated March 19, 2001, can be found at CP 103-12 (Larkin Decl., Exhibit 6). The Severin Agreement is attached to Appellant Natkin-Scott, JV's Brief of Appellant as Appendix 1. The following portions of the Severin Agreement are relevant to the issues in this appeal:

WHEREAS, on or about November 21, 1996, WaferTech, by and through its agent ADP/Fluor Daniel, Inc. ("ADP"), entered into a written contract with M+W;

* * * *

WHEREAS, N/S¹ considers it in its best interests that N/S's claims be pursued directly against WaferTech by assignment hereunder;

* * * *

1. N/S, as assignee, will pass through its claims and causes of action to WaferTech with counsel to be selected by N/S. In connection herewith, M+W specifically assigns to N/S all of its pass-through rights under said N/S Subcontract to N/S for purposes of asserting its claims and causes of action against WaferTech and such third parties as it may deem advisable to be asserted by Natkin/Scott [sic] as assignee In [sic] in their name.

* * * *

5. N/S will be entitled to receive for its claims and causes of action only such amounts as are received for N/S's claims, directly from WaferTech and any third parties.
6. For valuable consideration, receipt and sufficiency of which are hereby acknowledged, M+W and N/S, including the separate corporations which constitute N/S, each release, exonerate, acquit, discharge and waive any right or claim each may have against the other arising out of this Project with the exception of the pursuit of these claims and causes of action against WaferTech by and through this pass-through agreement. Nothing herein contained will adversely affect the validity of the claims and causes of action of N/S to be pursued against WaferTech herein
7. The parties have specifically contemplated the Severin Doctrine in the negotiation of this Agreement, which agreement is not intended to be a complete release for purpose of said Doctrine. In the event any court should make a contrary

¹"N/S" was the Severin Agreement's abbreviation for Natkin-Scott.

construction of this Agreement, then this Agreement is retroactively null and void.

* * * *

9. In any proceeding to enforce this Agreement, the prevailing party, in addition to any other remedy, shall be entitled to reasonable litigation costs, including attorneys' fees incurred in the enforcement of this Agreement.

* * * *

12. This Agreement contains the entire understanding and agreement among the parties with respect to the matters referred to herein. ***No other representations, covenants, undertakings or other prior or contemporaneous agreements, oral or written, respecting such matters, which are not specifically incorporated shall be deemed in any way to exist or bind any of the parties.***

* * * *

15. The parties declare and acknowledge that they have been represented in the negotiations of this Agreement by legal counsel of their own choice, and that they have read and fully understand the terms of this Agreement. ***The parties further declare that they voluntarily accept the Agreement for the purposes of making a full compromise, adjustment and settlement of the claims released under this agreement, and each assumes any mistake of fact or law in connection with the execution hereof.***

CP 103-07 (emphasis added).

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B. The Contractor Registration Defense Was Apparent Long Before and at the Time of the Severin Agreement

There was no dispute of fact in the trial court regarding whether the contractor registration defense was readily apparent both long before and at the time of the Severin Agreement.

Natkin-Scott, in its May 8, 1998 Complaint, included allegations concerning both its registration status and M+W's registration status in its first two paragraphs. CP 54 ("Plaintiff was at all times herein mentioned was [sic], a duly licensed contractor under the laws of the State of Washington . . ." and "defendant Meissner + Wurst . . . Contractor's License and Registration Number is MEISSWUO38JB." Natkin-Scott expressly stated that it was registered at all material times, but, significantly, studiously avoided making the same allegation regarding M+W. Id.

On February 16, 2001 (more than a month before the Severin Agreement was executed), M+W filed a motion for summary judgment against Natkin-Scott on the basis of Natkin-Scott's failure to be registered. CP 212 (Memorandum at 2:4-7). On February 20, 2001 (one month before the Severin Agreement was executed), the owner filed a motion for summary judgment against Natkin-Scott's lien claim, "because Natikin/Scott was not a duly registered contractor as required under RCW

18.27.080 at the time it contracted for the performance of the work or entered into the contract for performance of work on the WaferTech project.” CP 205. Wafertech’s memorandum even recited that M+W and WaferTech entered into the prime contract “[o]n November 21, 1996” CP 206 (Memorandum at 2:12-14). On March 6, 2001, approximately two weeks before the Severin Agreement was executed, Natkin-Scott opposed M+W’s motion. It asserted:

Plaintiff Natkin/Scott asks the court to deny defendants’ motion to dismiss based on the affirmative defense that Natkin /Scott did not comply with RCW 18.27, the contractor registration statute. Natkin/Scott was in actual and/or substantial compliance with RCW 18.27 at the time it contracted with Meissner+Wurst for work on the WaferTech project. The alleged deficiencies in Natkin/Scott’s registration either did not exist or were so trivial that defendants’ motions to dismiss violate the requirements of CR 11 that motions be “well grounded in fact” and “warranted” by law.

Defendants’ frivolous motions to dismiss, brought over two years after this action commenced ***and all the information necessary for the motion was available to defendants***, to be heard less than one month prior to trial, should be seen as an attempt to harass Natkin/Scott and divert its attention from trial preparation.

CP 241-42 (Memorandum at 1:16-2:2) (emphasis added).

This Court’s opinion in Business Services of America II, Inc. v. Wafertech LLC, No. 28886-9-II (Div. II, March 9, 2004) (attached to Natkin-Scott’s brief as Appendix 4) establishes that the facts that

supported the defense that M+W was not registered were apparent long before the Severin Agreement was executed on March 19, 2001:

In three documents, M+W and WaferTech agreed that their contract began on November 21, 1996. On September 25, 1997, M+W and WaferTech signed the clean room contract and agreed that the “contract is entered into, effective as of November 21, 1996.” Exh. 659. On March 25, 1999, in M+W’s cross-claim against WaferTech, it states that the contract was entered into by the parties on November 21, 1996. And on February 8, 1999, M+W’s and WaferTech’s settlement agreement stipulated that their written clean room contract was effective November 21, 1996.

Natkin-Scott’s Appendix 4 at 12.

V. ARGUMENT

A. Summary of Argument

Natkin-Scott asserts that the trial court erred in its letter opinion. The letter opinion is a legally irrelevant red-herring; what matters is whether the Superior Court’s judgment is correct.

On the merits, Natkin-Scott’s appeal must be denied, and the Superior Court’s judgment affirmed, for two reasons:

First, the Severin Agreement expressly disclaims any implied warranties. It does so by disclaiming any “*representations, covenants, undertakings or other prior or contemporaneous agreements, oral or written,*” relating to the subject matter of the Severin Agreement. Thus, the implied warranty found in Restatement (Second) of Contracts

§ 333(1)(b) (“section 333”) upon which Natkin-Scott’s appeal rests is not part of the Severin Agreement and cannot be enforced by Natkin-Scott.

Second, assuming for the sake of argument that the implied warranty in section 333 was part of the parties’ agreement, it does not, by its own terms, apply to defenses that were “apparent” at the time of the Severin Agreement. The defense of M+W’s lack of registration was apparent at the time of the Severin Agreement as a matter of fact and law. That Natkin-Scott was not subjectively aware of the defense does not matter.

B. Standard of Review

M+W agrees with Natkin-Scott’s statement of the standard of review.

C. The Court’s Letter Opinion Is Legally Irrelevant

Natkin-Scott’s first issue, related to its first assignment of error, asserts essentially that the Superior Court erred in its letter opinion by making a statement indicating that it might have misunderstood Natkin-Scott’s position on whether the Severin Agreement was enforceable. This “issue” is a non-issue, so M+W’s comments will be brief.

Under the standard of review applicable when the Superior Court grants a motion for summary judgment, the Court of Appeals “stand[s] in the shoes of the trial court [and] . . . make[s] the same inquiry” as the trial

court made. Dept. of Agric. v. Seven Acres of Bing & Lapon Cherries, 136 Wash. App. 795, 804, 150 P.3d 1172 (Div. III, 2007). Therefore, even if the Superior Court's letter opinion indicates that it misunderstood Natkin-Scott's position regarding whether the Severin Agreement was enforceable, that makes no difference. This Court's *de novo* review cures any such lack of clarity.

Moreover, in the Order the Superior Court lodged on April 18, 2006, which plainly supercedes the prior letter opinion, the Superior Court did not state in any form of words that it believed Natkin-Scott to be asserting that the Severin Agreement was unenforceable. To the contrary, the Superior Court stated:

The Plaintiffs admitted in their Opposition and on the record in open court that the current action is exclusively based upon an alleged breach of the Severin Agreement for Pursuit of Claims ("Severin Agreement") and not an attempt to revive or reassert any cause of action based upon the underlying subcontract agreement

Natkin-Scott's Appendix 3 at 2:1-3. As the Superior Court recognized that Natkin-Scott was seeking to enforce the Severin Agreement, it must have understood that Natkin-Scott's position was that the agreement was enforceable. Thus, there is no indication in the record to support Natkin-Scott's first issue on appeal.

**D. M+W Expressly Disclaimed the Implied Warranty
Natkin-Scott Seeks to Enforce**

The real gravamen of Natkin-Scott's appeal is that the assignment of the right to make a claim directly against the project owner that was accomplished through the Severin Agreement carried with it an implied warranty that no defenses against M+W's right to make a claim existed. According to Natkin-Scott, the implied warranty arises out of section 333(1)(b) of the Restatement (Second) of Contracts. According to Natkin-Scott, M+W breached the implied warranty because M+W was not properly registered as a contractor at the time it entered into its agreement with the owner (sometimes called "WaferTech") to perform the work.

M+W will assume that section 333(1)(b) is applicable under Washington law. The case upon which Natkin-Scott relies to support the proposition that section 331(1)(b) is applicable under Washington law is Lonsdale v. Chesterfield, 99 Wash.2d 353, 357, 662 P.2d 388 (1983). Accordingly, Natkin-Scott cannot avoid other consequences that follow from the analysis in Lonsdale. That analysis is dispositive of this action because it demonstrates that M+W expressly and effectively disclaimed the section 333(1)(b) implied warranty upon which Natkin-Scott relies.

Lonsdale stands for the proposition that an implied warranty under section 333 is a type of "implied covenant:"

It is well established that in every contract, “[t]here is an ***implied covenant*** of good faith and fair dealing, . . . ***a covenant or implied obligation*** by each party to cooperate with the other so that [each] may obtain the full benefit of performance Petitioners contend that this ***covenant*** of fair dealings applies with equal force to assignment contracts. Specifically they contend that Chesterfield breached an implied warranty of noninterference arising from the assignment. Support for this contention is found in the Restatement of Contracts, which provides in pertinent part:

§ 333. Warranties of An Assignor

(1) ***Unless a contrary intention is manifested***, one who assigns or purports to assign a right by assignment under seal for value warrants to the assignee:

(b) that the right, as assigned, actually exists and is subject to no limitations or defenses good against the assignor other than those stated or apparent at the time of the assignment.

Lonsdale, 99 Wash.2d at 357 (emphasis added).

As indicated by the emphasized language, if the parties express a contrary intention, the “implied covenant” (also called an “implied warranty” in section 333(1)(b)) that otherwise would accompany an assignment does not exist and does not bind the assignor.

The meaning of “[u]nless a contrary intention is manifested” is explained further by the Restatement itself and is otherwise well settled law in Washington. Section 333 comment (b) provides:

The rules stated in this Section can be varied by express or implied agreement. Express warranties are created in the same way as express warranties in the transfer of goods, and implied warranties may be excluded or modified in the same ways. See Uniform Commercial Code §§ 2-312, 2-313, 2-316, 2-317.

In turn, RCW § 62A.2-316(3)(c), which is Washington’s codification of UCC § 2-316(3)(c) referred to in Restatement section 333 comment (b), provides that:

unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is’, ‘with all faults’ *or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.*

(Emphasis added.) And, as stated in McInnis & Co., v. W. Tractor & Equip. Co., 63 Wash.2d 652, 656, 388 P.2d 562 (1964) (emphasis added), “[t]he rule is *well settled* that no warranty, express or implied, will be found where, as here, the seller expressly refuses by merger and disclaimer clauses to give any warranties.”

To summarize, Natkin-Scott *must* agree with the following two propositions under Lonsdale, the UCC, and well-settled Washington law stated in McInnis. First, the implied warranty of section 333(1)(b) is a type of “covenant” or “implied obligation,” or “implied agreement.” Second, this implied covenant, obligation, or agreement does not exist or bind the parties if “a contrary intention is manifested” by language “which

in common understanding” disclaims the implied warranty, covenant, obligation or agreement, especially if that language is found in merger and disclaimer clauses making plain that “there is no implied warranty.”

These two propositions of well-settled Washington law dispose of this case entirely, given the language of the Severin Agreement. As explained above, section 333(1)(b) is an implied covenant, obligation, or agreement that exists “[u]nless a contrary intention is manifested.” The Severin Agreement, meanwhile, states:

This Agreement contains the *entire understanding and agreement among the parties with respect to the matters referred to herein*. No other representations, *covenants, undertakings* or other prior or contemporaneous *agreements*, oral or written, respecting such matters, *which are not specifically incorporated shall be deemed in any way to exist or bind any of the parties.*”

CP 105 (Severin Agreement, ¶ 12) (emphasis added). Thus, the Severin Agreement expressly provides in a combined merger and disclaimer clause that no “*covenants*,” “*undertakings*” or “*agreements*” with respect to the matters in the Severin Agreement except those stated in the Severin Agreement “exist or bind the parties.” Since all “implied warranties” in section 333 are “implied *covenants*,” obligations, or agreements under Lonsdale, paragraph 12 expressly manifests the parties’ intention that the implied warranties of section 333 *do not exist* between M+W and Natkin-

Scott, and expressly manifests the parties' intention *not* to be bound by the implied warranties of section 333.

Under the UCC, the emphasized language of paragraph 12 are words "which in common understanding" would alert Natkin-Scott that no promise of any kind was made by M+W other than those expressly made in the Severin Agreement. These are words that would alert Natkin-Scott that implied warranties were disclaimed, do not exist, and do not bind M+W. Under McInnis, paragraph 12's merger and disclaimer clause expressly precludes finding any implied warranties, or other obligations of any kind, other than those expressed within the four corners of the Severin Agreement.

Only if the law required "magic words" such as, "M+W disclaims all implied warranties," or, "M+W disclaims the implied warranty of Restatement (Second) of Contracts § 333(1)(b)," could the emphasized language of paragraph 12 be understood differently. But, the law does not require magic words. It only requires words that "in common understanding" disclaim obligations other than those that exist on the face of the agreement. That is what paragraph 12 of the Severin Agreement does.

Perhaps Natkin-Scott will respond that it did not understand paragraph 12 to disclaim implied warranties. Natkin-Scott's subjective understanding is irrelevant under the Restatement, the UCC, and McInnis.

These authorities are interested in “language which in common understanding” would be understood to disclaim implied warranties. Subjective intent and understanding is not relevant to the meaning that must be ascribed to language in a contract. See Hearst Communications, Inc. v. Seattle Times, 154 Wash.2d 493, 503-04, 115 P.3d 262 (2005) (“Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.”) (internal citations omitted).

Moreover, any argument concerning Natkin-Scott’s subjective intent or understanding is foreclosed by paragraph 15 of the Severin Agreement:

15. The parties declare and acknowledge that they have been represented in the negotiations of this Agreement by legal counsel of their own choice, and that they have read and fully understand the terms of this Agreement. ***The parties further declare that they voluntarily accept the Agreement for the purposes of making a full compromise, adjustment and settlement of the claims released under this agreement, and each assumes any mistake of fact or law in connection with the execution hereof.***

CP 106 (emphasis added). If Natkin-Scott did not understand paragraph 12 of the Severin Agreement as a disclaimer of section 333(1)(b)’s implied

warranty (and any other “representations” or implied “undertakings or other prior or contemporaneous agreements”), that misunderstanding was either a mistake of fact or a mistake of law Natkin-Scott made “in connection with the execution” of the Severin Agreement. Natkin-Scott expressly assumed responsibility for “*any* mistake of fact or law in connection with the execution” of the Severin Agreement. Any means all. Therefore, Natkin-Scott cannot rely on its mistaken understanding to avoid the consequences of paragraph 12 of the Severin Agreement even if existence of its mistaken understanding was an undisputed fact.

E. The Contractor Registration Defense Was Apparent at the Time of the Severin Agreement and Therefore Was Not Part of Any Implied Warranty

Even if M+W did not effectively disclaim the section 333(1)(b) implied warranty, which it certainly did as established above, any implied warranty regarding the existence of defenses good against M+W does not include defenses “*apparent at the time of the assignment.*” § 333(1)(b) (emphasis added).

There is not a great deal of authority regarding what it means for a defense to be “apparent at the time of the assignment.” “Apparent” means “visible; manifest; obvious.” Black’s Law Dictionary at 93 (7th ed. 1999). Further, M+W notes that 6 Am. Jur.2d Assignments § 158 (2006) (emphasis added), like section 333(1)(b), provides that “there is an implied

warranty that . . . the right as assigned actually exists *and is subject to no limitations or defenses other than those . . . apparent at the time of the assignment.*” Meanwhile, the preceding section, 6 Am. Jur.2d Assignments § 157 (2006) provides: “Caution: It is the responsibility of the assignee to ascertain the status of the assignor’s rights and duties under the contract.” Accordingly, defenses “apparent at the time of the assignment” are, at a minimum, those of which Natkin-Scott should have been aware of based on even limited due diligence.

The existence of the defense of contractor registration as a legal issue unquestionably was “apparent” when the Severin Agreement was executed. Natkin-Scott included allegations regarding registration status in its Complaint. CP 54. Very shortly before the Severin Agreement was executed, Natkin-Scott’s registration status came under fire. CP 205-06, 212, 241-42. Given the allegations of the Complaint and the briefing during the month before the Severin Agreement was executed, it would be ridiculous for Natkin-Scott to assert that the existence of the defense of contractor registration as a legal question was not apparent at the time of the Severin Agreement.

The *facts* related to the defense also were “apparent.” Regarding its own registration status, Natkin-Scott asserted that motions against it were frivolous attempts to harass Natkin-Scott in the month before trial

because “*all the information necessary for the motion was available to defendants*” for the previous two years. CP 242 (emphasis added).

Similarly, this Court’s conclusion that M+W was not registered was based on documents dated September 25, 1997, February 8, 1999, and March 25, 1999. Natkin-Scott’s Appendix 4 at 12. These documents from the record of the case in which the Severin Agreement was executed were as available to Natkin-Scott in the years before the Severin Agreement was executed as information necessary for the motions against Natkin-Scott was available to M+W and WaferTech, according to Natkin-Scott itself. And, of course, when M+W was registered as a contractor always has been a matter of public record.

In sum, by any standard, both the existence of the defense as a legal issue and the facts that ultimately supported it were apparent at the time of the Severin Agreement. Natkin-Scott must have been aware of the defense as a legal issue, and itself asserted that facts concerning its registration were available for two years before the Severin Agreement was executed. The facts concerning M+W’s registration status – including those relied upon by this Court – had been available to Natkin-Scott for a matter of years before the Severin Agreement was executed.

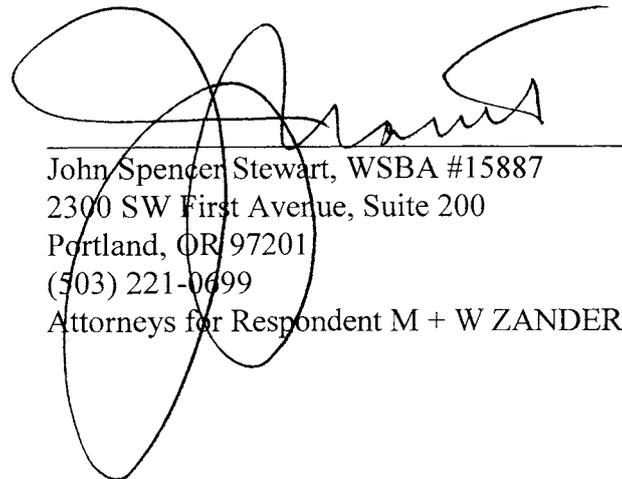
F. M+W Is Entitled to Attorneys Fees Awarded by the Superior Court and on Review

Because M+W is the prevailing party in an action brought for breach of the Severin Agreement, it was entitled to its attorneys fees in the Superior Court. Because M+W is the prevailing party on appeal, it is entitled also to its attorneys fees on appeal.

VI. CONCLUSION

M+W requests that the Superior Court's judgment be affirmed in all respects. The implied warranty Natkin-Scott seeks to impose expressly was disclaimed in paragraph 12 of the Severin Agreement. Moreover, the defense of M+W's registration status was apparent at the time the Severin Agreement was executed. M+W also is entitled to its attorney fees and costs in the Superior Court and for this appeal.

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CERTIFICATE OF SERVICE
OF
BRIEF OF RESPONDENT M+W ZANDER

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington as follows:

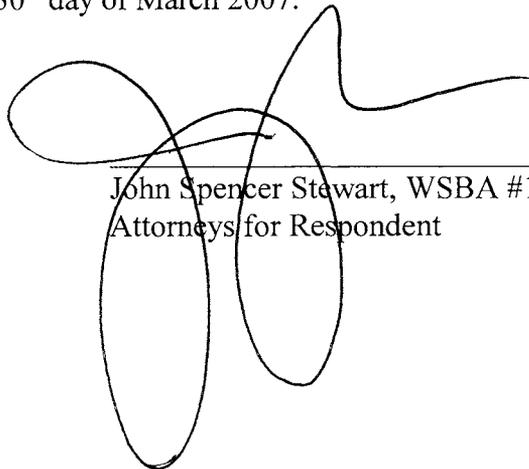
I am an attorney of the firm of Stewart Sokol & Gray LLC. I caused to be filed via overnight Federal Express mail in the above-entitled Court: BRIEF OF RESPONDENT M+W ZANDER. I further caused the same to be delivered via overnight Federal Express mail and addressed to the following opposing counsel:

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01 MAR -9 11 9:51
STATE OF WASHINGTON
BRIEF OF RESPONDENT
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DATED this 30th day of March 2007.



John Spencer Stewart, WSBA #15887
Attorneys for Respondent