

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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NO. 35870-1-0

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JAMES LEROY BRUMMETT,

Appellant,

v.

WASHINGTON'S LOTTERY,  
CHRISTOPHER LIU, DIRECTOR  
MELINDA TRAVIS, COMMISSION CHAIR

Respondents.

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**BRIEF OF RESPONDENTS**

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ROBERT M. MCKENNA  
Attorney General

MARK C. JOBSON  
ASSISTANT ATTORNEY GENERAL  
WSBA No. 22171  
7141 Cleanwater Drive SW  
Tumwater, WA 98504  
360-586-6300

pm 6/27/07

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## **I. INTRODUCTION**

James Brummett bought several state lottery tickets in early 2005. Mr. Brummett thought that he was entitled to receive seven dollars worth of promotional tickets for free. He complained to the Lottery. The Lottery convened an adjudicative proceeding to hear and decide the complaint. The administrative law judge (ALJ) decided that Mr. Brummett received all the free promotional tickets that he was entitled to. The agency director affirmed the ALJ. Mr. Brummett did not seek judicial review of the agency final order. Instead, he filed an original suit for damages. The trial court dismissed the suit because the issue presented was previously litigated in the administrative proceeding.

## **II. RESTATEMENT OF ISSUES**

1. Whether the claim is collaterally estopped because the claim was previously litigated and Mr. Brummett did not appeal the final order.
2. Whether the complaint stated any claim for which relief could have been granted.

## **III. PROCEDURAL HISTORY**

James Brummett, appellant, appealed a decision of the Washington State Lottery denying his request for 7 free \$1 Quinto tickets. The Lottery denied the request on February 15, 2005. Mr. Brummett made a formal

ticket for the current draw received a free \$1 Quinto ticket.<sup>1</sup> CP at 29. The free Quinto ticket was only available for Lotto tickets purchased for the “current drawing.” CP at 29.

Mr. Brummett purchased nine \$5 Lotto game tickets in early 2005. He purchased an advance play ticket on February 9 before the promotion began on February 13. CP at 30. On February 15 and February 25, he bought two tickets for the current draw and six for advance draws. CP at 31. Mr. Brummett claimed that he was entitled to receive nine promotional \$1 Quinto tickets (one for each Lotto ticket purchased) and that he received only two Quinto tickets. CP at 5 (Complaint at 2).

On February 11, 2005, Mr. Brummett appeared in person to complain to the Lottery office that he did not receive a free ticket two days before. CP at 32. The Lottery agent told him that advance draw tickets “did not qualify for the free Quinto tickets and that the Lottery would only issue free Quinto tickets for Lotto tickets purchased for the current drawing.” CP at 32. “After concluding that Mr. Brummett was not entitled to any further free Quinto tickets, [the Lottery customer service agent] offered him coupons valued at \$1.00 which could be used to play

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<sup>1</sup> A person may purchase a ticket for the current play or sale or for a future drawing. “A current play or sale is a Lotto ticket purchased for the current or most immediate drawing. An advance play is a Lotto ticket purchased for a future drawing or game.” CP at 30.

various games offered by the Lottery.” CP at 31. The Lottery offered him coupons in order to try to satisfy a dissatisfied customer.<sup>2</sup> Mr. Brummett declined the coupons, choosing instead to take legal action. CP at 31.

When Mr. Brummett bought advance play tickets on February 15 and 25, he already knew that he was not entitled to promotional tickets for buying advance play tickets. CP at 30; 38. He claims that his chance to win a prize was reduced because he did not receive six promotional tickets to which he claims he was entitled. CP at 4-11. If Mr. Brummett had accepted the coupons and used them to purchase Quinto tickets, he would have had the same statistical chance of winning a prize as if he had been given the ticket at time of the original sale.

Long before he filed this suit, Mr. Brummett filed an administrative appeal with the Lottery Commission. After an evidentiary hearing ALJ Williams denied Mr. Brummett’s request for relief. CP at 28-40. The ALJ found that Mr. Brummett could not reasonably rely upon the argument that he was ignorant of the contest rules or misled by the point of sale advertising. CP at 38-39. Mr. Brummett appealed to the lottery director who affirmed the denial. CP at 42-52. Mr. Brummett’s motion for reconsideration was denied. CP at 54-56. Mr. Brummett was notified

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<sup>2</sup> The Lottery did not give Mr. Brummett Quinto tickets because if such a ticket turned out to be a prize winner, it would appear that the lottery had favored him over other purchasers.

that he had a right to appeal to the Superior Court. CP at 52. He did not seek judicial review of the order in Superior Court.

Mr. Brummett filed the instant suit for damages against the Lottery in Superior Court. The complaint makes the same claim that was litigated in the administrative hearing. In the administrative proceeding the ALJ and the Lottery Director ruled that they had jurisdiction to decide “whether the Lottery acted properly in giving Mr. Brummett two free Quinto tickets when he purchased \$5.00 Lotto tickets during the period of the promotion or whether he was entitled to additional tickets.” CP at 35; 50. Mr. Brummett raised other issues during the hearing concerning whether the Lottery was “liable to Mr. Brummett for monetary damages based upon its actions.” The ALJ and the Lottery Director found that question “beyond the scope of an administrative appeal under Chapter 34.05 RCW.” CP at 50.

The ALJ found that Mr. Brummett was not “entitled to a free Quinto ticket based upon the Lotto ticket purchased on or about February 9, 2005, because the ticket was purchased before the promotion began and is not subject to the terms and conditions of the promotion.” CP at 38. He was “entitled to only two free Quinto tickets based upon two Lotto tickets purchased on February 15, 2005 and February 25, 2005, for current drawings.” CP at 39. He received the two free tickets. He was

“not entitled to any further tickets based upon Lotto tickets purchased during the promotion, as the purchases were for advance drawings.” CP at 39. The ALJ concluded that Mr. Brummett failed to prove that he “reasonably relied” upon representations made by the Lottery. CP at 39. The record at the administrative proceeding established that he knew of the current draw limitation when he purchased Lotto tickets on February 15 and 25. CP at 39.

On these dates, Mr. Brummett had full notice of the limitation and could no longer rely upon earlier representations from the Lottery. This continued reliance upon Lottery’s earlier omission on the placard was no longer reasonable after he had notice of the limitation. The evidence fails to establish that Mr. Brummett’s reliance on information contained in the Lottery’s point of sale materials was reasonable after he learned the Quinto tickets would only be given for current drawings. CP at 39.

## **V. LAW AND ARGUMENT**

### **A. Summary of Argument**

The Superior Court complaint alleged: (1) that Mr. Brummett purchased nine \$5 Lotto game tickets in January 2005; (2) that Mr. Brummett was entitled to receive nine free promotional \$1 Quinto tickets, one for each Lotto ticket purchased; and (3) that Mr. Brummett received only two free Quinto tickets. CP at 4-11. Mr. Brummett claimed that his chance to win a prize was reduced because he did not receive seven tickets to which he claimed he was entitled.

Long before filing this suit, Mr. Brummett filed an administrative appeal with the Lottery Commission under Chapter 34.05 RCW. In that appeal he made the same claim. After an evidentiary hearing, the ALJ denied Mr. Brummett's request for relief. Mr. Brummett appealed to the Lottery Director who affirmed the denial. Mr. Brummett's motion for reconsideration was denied. Mr. Brummett was notified that he had a right to appeal the order to Superior Court. Mr. Brummett did not appeal the final order. The trial court correctly ruled that the present suit was precluded by the doctrine of collateral estoppel. CP at 575-76. The order of dismissal should be affirmed.

**B. Standard of Review**

The trial court granted the Lottery's Civil Rule 12(b)(6) motion to dismiss. This court's review is de novo, and the trial court should be affirmed if it can be said that there is no state of facts which the Appellant could prove entitled him to relief on his claim. *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (2002). The factual allegations of the complaint must be accepted as true for purposes of the motion. *Grimsby v. Samson*, 85 Wn.2d 52, 55, 530 P.2d 291 (1975). This Court may affirm the trial court on any theory supported by the pleadings and the record even if the trial court did not consider that theory. *Piper v. Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004).

**C. The Plaintiff's Claim That He Was Entitled To Seven Dollars Worth Of Tickets Was Litigated In An Administrative Hearing**

The doctrine of collateral estoppel, also known as issue preclusion, prevents a party from relitigating issues that have been raised and litigated by that party in a prior proceeding. Collateral estoppel promotes judicial economy and prevents inconvenience and harassment of the parties. *Clark v. Baines*, 150 Wn.2d 905, 913, 84 P.3d 245 (2004). Collateral estoppel applies in a subsequent litigation if the party asserting the defense proves: (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. *Id.* at 913.

Decisions of an administrative tribunal may have preclusive effect under collateral estoppel principles. *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Three criteria are employed for deciding whether to apply collateral estoppel to the findings of an administrative body: (1) whether the agency, acting within its

competence, made a factual decision; (2) agency and court procedural differences; and (3) policy considerations. *Id.* at 450.

Mr. Brummett filed an administrative appeal with the Lottery Commission. The Office of Administrative Hearings (OAH) assigned an ALJ to preside over a contested case hearing. Both sides presented evidence to the ALJ who issued an order. CP at 28-40. The order informed Mr. Brummett of his appeal rights. CP at 39. Mr. Brummett filed an administrative appeal to the Lottery Director who affirmed the ALJ. CP at 42-52. The final order informed Mr. Brummett of his right to appeal to the Superior Court. CP at 52. Mr. Brummett chose to petition for reconsideration. That petition was denied. CP at 54-56. Mr. Brummett did not appeal to the Superior Court.

All the elements necessary for collateral estoppel are present and the final administrative order should be given preclusive effect. First, the issue at the hearing was “whether Mr. Brummett is entitled to nine free Quinto tickets after purchasing (9) \$5 Lotto tickets during the Lottery promotion which ran from February 13 to March 5, 2005.” CP at 29. The order includes detailed findings of fact and conclusions of law. CP at 29-40. The order concludes that Mr. Brummett received all the free Quinto tickets to which he was entitled. CP at 39. Second, the ALJ’s initial order was final unless a petition for review was filed with the Lottery

Commission. Mr. Brummett did petition for review, and received a final appealable order from the Director of the Lottery. CP at 42-52. This order was a final judgment on the merits. Third, the parties are identical. Fourth, application of collateral estoppel works no injustice. The parties had a “full and fair hearing on the issue in question.” *Clark*, 150 Wn.2d at 913.

Finally, the agency order should be given preclusive effect because the *Reninger* criteria are met. The ALJ, an unbiased judicial officer, and the Lottery Director made findings within their competency. There were no significant procedural differences between the contested case hearing and a judicial hearing.<sup>3</sup> There were no policy considerations that weighed in favor of re-litigating the claim. The only policy considerations weighed in favor of barring the claim because the agency and the ALJ spent time, effort and money litigating the claim. The purpose of the doctrine is promoted by applying the policy to end the dispute, promote judicial economy, and prevent harassment and inconvenience to litigants. *Reninger v. Dept. of Corrections*, 134 Wn.2d at 437.

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<sup>3</sup> The Lottery Commission has adopted the Model Rules of Procedure, WAC 10-08 for its adjudicative proceedings. WAC 315-20-005.

**D. The Plaintiff's Legal Claims Have No Merit**

The Superior Court complaint alleged six “issues” but not a single “cause of action.” None of the six “issues” are actionable for the reasons stated below.

**1. Rule Adoption Challenge**

Mr. Brummett challenged the agency amendment of WAC 315-34-060 filed on January 21, 2005. CP at 4. The rule was adopted under the provisions of RCW 34.05.350, permitting an agency to adopt an emergency rule on a temporary basis for up to 120 days. The emergency rule authorized the Lottery Director to determine when and how many lottery drawings would be held each week. Mr. Brummett claims that there was no “emergency” and that the immediate adoption of the rule therefore violated RCW 34.05. Mr. Brummett did not allege and could not prove any set of facts that would entitle him to damages on this claim.

The Lottery Commission amended WAC 315-34-060 under RCW 34.50.350, declaring that immediate adoption was necessary for the public welfare and not contrary to the public interest. An emergency rule may not remain in effect longer than 120 days. RCW 34.05.350(2). The statute provides that a person may “petition the governor requesting the immediate repeal of a rule adopted on an emergency basis.” RCW 34.05.350(3). Mr. Brummett did not petition the governor. The

agency adopted the rule permanently on May 12, 2005. Mr. Brummett did not challenge the adoption of the permanent rule. Since the emergency rule has been replaced by a permanent rule adopted using normal public process, Mr. Brummett's challenge to the emergency rule is moot.

Even if his challenge were not moot, the APA provides the exclusive means for challenging the adoption of a regulation. RCW 34.05.510. This action is not an APA action, but an original action for damages and equitable relief. Since the APA provides the exclusive means for challenging the adoption of a regulation, this claim should be dismissed.

## **2. Alleged Violation of RCW 67.70.040(1)**

Chapter RCW 67.70 creates the state lottery. RCW 67.70.040 defines the powers and duties of the Lottery Commission and authorizes the Commission to adopt rules. The Legislature determined that the Commission should initiate a lottery "at the earliest feasible and practicable time, and in order that such lottery produce the maximum amount of net revenues for the state consonant with the dignity of the state." RCW 67.70.040(1). The Lottery Commission is authorized to determine the "frequency of the drawings or selections of winning tickets or shares." RCW 67.70.040(1)(f).

Mr. Brummett alleges that the Lottery sold tickets for the Monday, February 14, 2005, drawing before the Commission authorized Monday drawings on January 21, 2005. Mr. Brummett claims that this violates a rule but he does not identify any rule. CP at 5 (Complaint at 2, Issue Number 2). The Lottery sells tickets up to ten consecutive drawings in advance. Such sales are called “advance sales.” Therefore, Mr. Brummett could buy tickets in January for drawings in February and he chose to do so. He was in no way prejudiced by the fact that he purchased tickets for a drawing to occur several weeks later. Mr. Brummett had the same chance of winning as people buying tickets on the day of the drawing. There is no evidence in the record to the contrary.

### **3. Alleged Violation of State Consumer Protection Act**

At “Issue Number Three” the complaint alleges that the defendants engaged in “false advertising” in violation of the Consumer Protection Act, RCW 19.86.020. CP at 3-4 (Complaint at 3-5, Issue Number 3)<sup>4</sup>

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<sup>4</sup> Issue Number 3 also refers to “a violation of 16 CFR 251, RCW 67.70.050(8).” Complaint, Issue Number 3, p. 3. 16 CFR 251 is a Federal Trade Commission Rule “concerning the use of the word ‘free’ and similar representations.” The rule defines when merchandisers may use the term “free” as an inducement or incentive. The rule does not create any private cause of action or remedy. The Federal Trade Commission Act, under which the FTC adopted the rule, creates remedial powers that reside solely in the Federal Trade Commission. Private litigants may not invoke the jurisdiction of the court by alleging that a defendant engaged in an unfair business practice proscribed by the Act. *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981). RCW 67.70.050(8) authorizes the lottery director to “carry on a continuous study and investigation of the lottery throughout the state.” The statute does not create any private cause of action nor any remedies.

Mr. Brummett alleged that a point-of-sale placard did not clearly notify him that he would receive a promotional Quinto ticket only for each \$5 Lottery ticket he purchased for the current draw. He received a Quinto ticket for each Lottery ticket he purchased for the current draw. He did not receive a Quinto ticket for the advance play tickets nor was he entitled to any. The promotional offer did not apply to advance play tickets, therefore he did not receive free Quinto tickets for his purchase of tickets other than for the current draw.<sup>5</sup>

As a matter of law the Consumer Protection Act (CPA), RCW 19.86, does not apply to the state or its agencies. *Ottgen v. Clover Park Technical College*, 84 Wn. App. 214, 221, 928 P.2d 1119 (1996) (holding that political subdivisions of the state are exempt from the CPA); *see also*, *Washington Natural Gas v. P.U.D. No. 1*, 77 Wn.2d 94, 459 P.2d 633 (1969). Since the Lottery Commission is a state agency (RCW 67.70.030), this claim was properly dismissed.

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<sup>5</sup> Mr. Brummett knew before he purchased tickets on February 15 that the advance draw tickets did not entitle him to any free promotional tickets. He had already met with a Lottery customer service agent who explained the contest rules to him. CP at 38.

#### **4. Alleged Violation of RCW 19.170.030(c)**

The complaint alleged that the defendants violated RCW 19.170.030(c)(sic).<sup>6</sup> CP at 6 (Complaint at 5, Issue Number 4). RCW 19.170.030 is not itself enforceable, nor does it create any remedies. The statute defines certain parameters of “deceptive promotional advertising” which are defined and prohibited in other sections of RCW 19.170.

RCW 19.170 is not enforceable by a private person against the lottery commission for at least three reasons: (1) the statute provides remedies under the CPA which does not apply to the Lottery Commission; (2) promotional tickets offered by the lottery are not “prizes” as defined by the statute; and (3) the “buy one get one” offer at the root of this claim is not a “promotion” as defined by the statute. These reasons are explained in more detail below.

##### **a. RCW 19.170 Does Not Apply to the Lottery**

The Legislature determined that “deceptive promotional advertising of prizes is a matter vitally affecting the public interest *for the purpose of applying the consumer protection act*, Chapter 19.86 RCW.”

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<sup>6</sup> This reference to the statute is in error as there is no RCW 19.170.030(c). There is an RCW 19.170.030(3)(c) and the Lottery assumed that Mr. Brummett was referring to this statute. “The odds must be stated in a manner that will not deceive or mislead a person about that person’s chance of being awarded a prize.” RCW 19.170.030(3)(c).

RCW 19.170.010(1)(emphasis added). A “violation of [RCW 19.170] is an unfair or deceptive act in trade or commerce *for the purpose of applying the consumer protection act, Chapter 19.86.*” RCW 19.170.010(2) (emphasis added). RCW 19.170 applies to certain types of “promotion offers.” RCW 19.170.010(3). As explained above at pp. 13-14, the CPA (RCW 19.86) does not apply to state agencies. Since RCW 19.170 provides a remedy for the purpose of applying the CPA, RCW 19.170 does not apply to state agencies.

**b. The Quinto Tickets At Issue In This Suit Are Not “Prizes”**

For purposes of applying RCW 19.170 a “prize” is “a gift, award, travel coupon or certificate, free item or any other item offered in a promotion that is different and distinct from the goods, service, or property promoted by the sponsor.” RCW 19.170.020(2). The Lottery offered to give a free Quinto ticket to each person who purchased a current draw \$5 Lotto ticket during the promotional period. The Quinto ticket may be a “free item,” but it is not different and distinct from the goods “promoted by the sponsor.” It is an example of the very same “good promoted by the sponsor.” The definition excludes items that are of the same type sold or promoted by the sponsor. So, for example, a grocer may offer a free bottle of ketchup with each package of hot dogs without

making the ketchup a “prize” as defined by the statute. Just like the grocer, the Lottery may offer a free Quinto ticket with each Lotto ticket purchased without making the Quinto ticket a “prize” as defined by the statute.

**c. The Quinto Ticket Offer Was Not A “Promotion”**

For purposes of applying RCW 19.170 a “promotion means an advertising program, sweepstakes, contest, direct giveaway, or solicitation directed to specific named individuals, that includes the award of or chance to be awarded a prize.” RCW 19.170.020(4). The lottery “buy one get one” offer was not such a promotion because it was not “directed to a specific named individual” and it did not include the award of a “prize” as defined elsewhere in the statute. The Quinto offer was made to purchasers of current draw Lotto tickets during the promotion and not to any “named individual.” Therefore, the Quinto ticket offer was not a “promotion” as defined in the statute.

**5. Alleged Violation of Constitutional Due Process**

The complaint alleges that the Lottery violated Mr. Brummett’s due process rights under the 14th Amendment of the U.S. Constitution. CP at 6-7 (Complaint at 4, Issue Number 5). Mr. Brummett claims that “lottery players are not treated equally for each \$1 they spend during

promotional drawings and current draw versus advance draws.” CP at 6 (Complaint at 3). This claim seems to be based upon the argument that the lottery is constitutionally prohibited from offering a free promotional ticket to a person who purchases a current draw ticket without offering the same free ticket to a person who buys for a future draw. There is simply no constitutional basis for this argument.

First, there is no allegation or evidence that the Lottery discriminates between buyers on the basis of any suspect class. Therefore, equal protection analysis calls only for minimum scrutiny. There is no equal protection violation if there is a rational basis for the decision. In this instance, the commission had a rational basis for treating current draw ticket purchasers differently than future draw ticket purchasers. CP at 29. The Lottery chose to make the offer only to current draw purchasers in order “to increase participation of first-time and/or infrequent Lotto players.” CP at 29. The agency is entitled to do so without running afoul of any equal protection problem. All ticket purchasers no matter what their race, gender, ethnicity, etc., are treated equally. All current draw purchasers were entitled to receive the free ticket; all advance draw purchasers were not.

**6. Alleged Breach of an Unidentified Tort Duty**

The complaint alleges that the commission had a “duty under the department rules and state laws to stop the promotion during the period 14 February 05 thru 5 March 2005.” CP at 7 (Complaint at 4, Issue Number 6). Mr. Brummett did not cite any rule or statute creating such a duty nor is there any common law duty that required the Lottery to suspend the promotion. Mr. Brummett left this “duty” up to the imagination of the defendant and the trial court. This claim is insufficient on its face. There is no statute, no regulation, and no common law duty that required the commission to suspend the promotion at any time.

**VI. CONCLUSION**

Mr. Brummett’s claim that he should have received more promotional Quinto tickets than he received was litigated to a final order adverse to him. Mr. Brummett did not appeal the order. Mr. Brummett’s subsequent law suit based upon the same claim is precluded. Therefore,

the Lottery was entitled to judgment as a matter of law, and the trial court's order of dismissal should be affirmed.

RESPECTFULLY SUBMITTED this 27 day of June, 2007.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Mark C. Jobson". The signature is written in a cursive style with a horizontal line underneath it.

MARK C. JOBSON  
WSBA No. 22171  
Assistant Attorney General  
Attorney for Respondent

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY [Signature]  
DEPUTY

**PROOF OF SERVICE**

I certify that I served a copy of *Brief of Respondent* on all parties or their counsel of record on the date below via United States Mail, proper postage affixed, as follows:

James L. Brummett  
P. O. Box 73442  
Puyallup, WA 98373

Office of the Clerk  
Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of June, 2007, at Tumwater, WA.

[Signature]  
LINDA K. HARRISON