

Original

No.36458-1-II

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

cm

HARRIS STOCKARD and PAMA STOCKARD,
husband and wife,

Respondents,

v.

JOHN HARER and JANE DOE HARER, husband and wife, d/b/a
AZALEA GARDENS, LLC; and COMMONWEALTH PROPERTY
MANAGEMENT SERVICES COMPANY, an Oregon corporation d/b/a
COMMONWEALTH REAL ESTATE SERVICES,

Appellants,

CHRISTINE MAYS and JOHN DOE MAYS,
wife and husband,

Defendants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiff retirees Harris and Pama Stockard, ages 78 and 62 respectively, desire to build an addition to their manufactured home in Azalea Gardens so Pama has a well-lit place to sew. The Stockards chose to retire at Azalea Gardens because it offered an opportunity to “retire in style” in a secure 55 and older community where they could purchase a new manufactured home subject to a long term 25-year residential property lease. Azalea Gardens and the Stockards entered into a 25-year lease effective January 1, 2002. In 2006, Azalea Gardens unfairly and unreasonably denied the Stockards’ multiple requests for a sewing room addition to their home in violation of the provisions of Washington’s Manufactured/Mobile Home Residential Tenant Act, RCW 59.20 *et seq.*

The Stockards hired an architect to prepare plans for the addition that conform in every respect to all applicable building codes and to the rules and regulations set forth in the 25-year long term lease and the Azalea Gardens Community Guidelines.

When they presented their plans for the addition to Azalea Gardens, the Stockards were told only that their request was declined. Azalea Gardens did not give a reason for its refusal to approve the proposed addition. Despite repeated inquiries, Azalea Gardens refused to tell the Stockards what they could do to make their proposed addition acceptable. The Stockards then retained attorney Brian McCoy to assist them in moving forward with their proposed addition. Mr. McCoy again

presented the proposed addition to Azalea Gardens through its agents. Mr. McCoy asked for either an approval or a reason why the proposal was denied. Mr. McCoy was told only that the Stockards' request remained denied.

After Mr. McCoy's efforts were unsuccessful to obtain an explanation, the Stockards approached one of the Azalea Gardens sales representatives who knew the landlord and asked him to intercede on their behalf. When that attempt appeared unsuccessful, the Stockards, in frustration, started preliminary ground work for the addition. Azalea Gardens intervened and directed Pierce County to deny the Stockards' building permit, bringing construction to a halt. With no other recourse, the Stockards filed suit, asking the Pierce County Superior Court to enter an order allowing them to proceed with construction of their addition.

After two hearings, the court ruled that Azalea Gardens and its agents – the landlord – had not acted in a fair and reasonable manner and therefore granted the Stockards the relief they sought. Azalea Gardens and its agents have appealed this ruling. The Stockards are asking this court to affirm the trial court's ruling to allow them to complete construction of their sewing room. In addition, the Stockards are requesting an award of attorney's fees and costs at the trial court level and on appeal.

II. RESTATEMENT OF THE ISSUES

1. Did the defendants receive a fair hearing on their motion for summary judgment, notwithstanding alleged procedural flaws, where the defendants were able to present and have the court consider additional evidence and argument in a motion for reconsideration?

2. Did the trial court properly grant the Stockards' cross-motion for summary judgment by awarding declaratory and injunctive relief after concluding that the landlord had not reviewed the Stockards' construction request in a fair manner as required by the Manufactured/Mobile Home Residential Tenant Act, RCW 59.20.045?

3. Did the trial court properly deny the defendants' motion for summary judgment where the trial court acknowledged the landlord's contractual and statutory right to approve any improvements to the leased property but determined that the landlord could not enforce that right because it had failed to comply with the Manufactured/Mobile Home Residential Tenant Act, RCW 59.20?

4. Are the named defendants proper parties in this action where each is a "landlord" as defined under the Manufactured/Mobile Home Residential Tenant Act, RCW 59.20.030(2)?

5. Are the Stockards, as the substantially prevailing party, entitled to their attorneys' fees at trial and on appeal?

III. COUNTER STATEMENT OF THE CASE

In late 2001, Harris and Pama Stockard signed an agreement (the "Lease Agreement") for a long-term lease of Lot Number 9 in Azalea

Gardens, a manufactured home community located in Graham, Washington and marketed to senior adults. CP 90, 93. The term of the lease was 25 years, beginning January 1, 2002. *Id.* Paragraph 15 of the Lease Agreement provides:

Improvements. Tenant agrees not to make or permit any construction, alteration, additions, painting, or improvements to the Manufactured Home Lot, nor to permit placement of a storage shed thereon, without the prior written consent of Landlord.

CP 95.

Paragraphs 10 and 11 of the Lease Agreement also require the Stockards to comply with the terms and conditions of fourteen pages of Community Rules and Regulations (“Rules and Regulations”) prepared by Azalea Gardens’ management and incorporated into the Lease Agreement by reference. CP 94, 97-113. Included in the Rules and Regulations are several provisions that are consistent with Paragraph 15 of the Lease Agreement in that they require tenants to obtain the prior written consent of the Landlord before making certain improvements to the tenant’s leasehold. *See, e.g.*, CP 100, ¶ I.3 (Prior Approval); CP 106, ¶ X.3 (Exterior Improvements); CP 106, ¶ XIV.3 (Accessory Buildings); CP 111, ¶ XIV.10 (Colors and Materials).

In January, 2006, the Stockards decided they would like to add an addition to their residence in Azalea Gardens – a sewing room. CP 90. They presented a proposal for that addition to Mr. David Omoth, the on-site property manager for Commonwealth Property Management Services

Company d/b/a Commonwealth Real Estate Services (“Commonwealth”). CP 90, 121. Commonwealth performed property management functions for Azalea Gardens pursuant to a written agreement with the owner of Azalea Gardens. CP 33.

Mr. Omoth reviewed the Stockards’ proposal and told them he saw no reason why it wouldn’t be approved. CP 90, 122. In reliance upon this preliminary review, the Stockards retained a professional architectural firm to draw up formal architectural plans for the addition. CP 90. The Stockards submitted the completed architectural drawings for the proposed sewing room, together with a completed “Alteration Request” form, to Mr. Omoth for presentation to the owner of Azalea Gardens for approval. CP 34, 70-71, 90-91, 122.

Commonwealth responded to the Stockards’ request on behalf of the owner in a letter from Christina Mays, Commonwealth’s Asset Manager, dated March 24, 2006 (attached as Appendix “A”). CP 34, 73, 91, 114. In that letter, Ms. Mays informed the Stockards that “the alteration request you submitted to add an additional room to you [sic] home was declined by the Owner.” CP 73, 91. While she cited Paragraph XIII of the Rules and Regulations as the basis for the decision to decline the request, Ms. Mays did not provide any reason for that decision. CP 73, 91. Despite making repeated requests, the Stockards received no explanation as to what they might do to be able to satisfy the owner’s requirements. CP 91.

At the suggestion of their architect, the Stockards consulted an attorney, Brian McCoy, who sent a letter on their behalf to the Manager of Azalea Gardens (attached as Appendix “B”). CP 91, 115. Enclosed with Mr. McCoy’s letter were two professionally-prepared architectural drawings of the Stockards’ residence – one showing the existing floor plan and the other showing the floor plan with the proposed addition (attached as Appendix “C”). CP 91, 116-17. In his letter, Mr. McCoy assured the manager of Azalea Gardens that the proposed addition would comply with the requirements of Paragraph XIV of the Rules and Regulations (entitled “Home Construction”) in all respects. CP 91, 115. Mr. McCoy requested approval of the proposed addition to the Stockards’ house or, in the alternative, “a statement setting forth the specific reasons for disapproval.” CP 91, 115.

By letter dated July 25, 2006, Christina Mays responded to Mr. McCoy’s letter and informed him that the ownership of Azalea Gardens, in reliance on Paragraph XIII of the Rules and Regulations, continued to deny approval of the Stockards’ proposed addition (attached as Appendix “D”). CP 34, 79, 118. Ms. Mays did not respond to Mr. McCoy’s request for “specific reasons for disapproval” or provide any other explanation for the denial, nor did she provide any indication as to what changes might be made to make the Stockards’ proposal acceptable to the ownership of Azalea Gardens. CP 118. She simply told Mr. McCoy that the request “remains denied.” *Id.*

The Stockards then contacted one of Azalea Gardens’ sales agents, Pat Loomis, who had previously authorized other Azalea Gardens

residents to construct alterations and improvements to their homes. CP 91, 121-22. Mr. Loomis represented himself as a close friend of defendant Steve Harer (the original owner of Azalea Gardens and the managing member of Azalea Gardens, LLC,) and expressed confidence that he could persuade Mr. Harer to approve the Stockards' project. CP 33, 91. After several weeks had passed with no word from Mr. Loomis, the Stockards decided to continue with the construction process. CP 91-92. After obtaining permits and approval from the State Department of Labor and Industries, the Stockards proceeded with initial site preparation work. *Id.*

Shortly after the site work had begun, the Stockards were contacted by Mr. Omoth, who told them that they must stop work on their project. CP 92, 123. Thereafter, in October, 2006, Christina Mays directed the attorney for Azalea Gardens to contact Pierce County to prevent the Stockards from building their addition. CP 35. The Stockards were then notified by Pierce County that they could not get their building permit because the property owner had not approved the project. CP 92.

In response, the Stockards filed this action in Pierce County Superior Court in January, 2007. CP 1-6. In their Complaint, the Stockards alleged that the Landlord had violated provisions of the Manufactured/Mobile Home Landlord-Tenant Act, RCW 59.20, and had breached the Lease Agreement by denying, without just cause, the Stockards' request to proceed with the addition of the sewing room to their home. CP 3. The Stockards further claimed that by their actions, the defendants named in the lawsuit had committed intentional infliction of

emotional distress. CP 6. The Stockards sought an order from the court authorizing them to proceed with the construction of their sewing room and restraining the defendants from interfering with the construction of that addition to their home. CP 6. The Stockards also sought damages for breach of contract and intentional infliction of emotional distress together with an award of attorneys' fees incurred in enforcing their rights and bringing the lawsuit. CP 6.

In response to the Stockards' Complaint, the defendants named in the Complaint filed an Answer, Affirmative Defenses and Counterclaims together with a Motion for Summary Judgment. CP 7-11, 12-21. Counsel for the defendants transmitted the filing by Federal Express overnight delivery directly to Judge Cuthbertson's office rather than to the Pierce County Clerk's office. CP 281. Apparently there was some delay in getting those pleadings from Judge Cuthbertson's office to the Clerk's office, because they were stamped "FILED - April 23, 2007." CP 12, 22, 33, 80. The defendants also scheduled a hearing for their motion for summary judgment on May 18, 2007, exactly 28 days from the date the pleadings were delivered to Judge Cuthbertson's office. VRP 21, lines 20-21.

On May 9, 2007, Counsel for the Stockards filed responsive pleadings entitled "Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross Motion for Summary Judgment." CP 129-139. Included in the Stockards' memorandum was an assertion, based on the fact that the defendants'

motion had been file-stamped on April 23rd, that the hearing on the defendants' motion had not been set 28 days from the date of filing of that motion as required by CR 56(c). CP 132. The Stockards' memorandum also included a statement that "[p]laintiffs do not object, provided they can present/argue their Cross Motion for Summary Judgment on the same date."

On May 14, 2007, the defendants filed a Response to the Stockards' motion for summary judgment and a reply regarding the defendants' initial motion. CP 140-49. In a footnote on the first page of their Response, the defendants' acknowledged the Stockards' claim that the date set for the hearing of the defendants' motion for summary judgment was untimely. CP 140. In that same footnote, however, the defendants objected to the Stockards' "untimely motion for summary judgment" and asked the court below to consider only the defendants' motion for summary judgment and to "treat plaintiffs' moving papers only as a response to defendants' summary judgment motion." CP 140.

The hearing scheduled by the defendants for May 18, 2007, was held in due course. VRP 1-33. At the outset of the hearing, counsel for the defendants described the proceeding as "a summary judgment motion that's been filed by the plaintiff," to which Judge Cuthbertson responded, "They're cross-motions." VRP 2. At that point, counsel for the defendants voiced no objection to the Judge's characterization of the motions, nor did he raise any objection concerning the timeliness of the Stockards' motion for summary judgment. *Id.* Instead, the hearing proceeded and counsel for the

Stockards presented his arguments asking for summary judgment. VRP 3-8. Counsel for the defendants followed. VRP 8-19.

It was only after the trial court noted that the management of Azalea Gardens had approved “significant fixtures and improvements” for other residents that counsel for the defendants pointed out that he had only received the Stockards’ motion two weeks prior to the hearing. VRP 20. Counsel for the defendants then took issue with the Judge’s perception that the parties had stipulated to allow the Stockards’ motion for summary judgment and noted that the defendants had raised an objection in the footnote on the first page of their Response (CP 140). VRP 21-22.

The trial judge did not respond to the defendants’ objection. Instead he proceeded to grant partial summary judgment in favor of the defendants, ruling that there had been no showing of outrage or extreme infliction of emotional distress. VRP 22. The trial judge then acknowledged that paragraph 15 of the Lease Agreement required the Stockards to get the consent of the landlord before any improvements were made, but he also pointed out that RCW 49.20.045 requires the landlord to apply rules to all tenants in a fair manner. VRP 22. The court concluded that the landlord had not complied with RCW 59.20.045 and therefore issued declaratory relief in favor of the Stockards, permitting them to proceed with construction of the proposed addition to their residence. VRP 22.

After the trial court had made its ruling and the attorneys had worked to craft language for an order that accurately reflected that ruling,

counsel for the defendants re-opened the colloquy with the trial judge and requested a continuance pursuant to CR 56(f), noting that he had not anticipated that “an unstipulated cross-motion for summary judgment” would be granted at the hearing. VRP 29. In support of that request, counsel for the defendants again noted that the defendants had objected to the Stockards’ cross-motion. *Id.* When the Stockards’ attorney responded by pointing out that the order that had been prepared appropriately reflected the rulings that court had made, including deleting the damage claim for emotional distress, the judge agreed to sign the order, and counsel for the defendants voiced no further objection. VRP 30-32; CP 158-60.

On May 30, 2007, the defendants filed a Motion for Reconsideration. CP 161-172. Also filed with that motion was the Verbatim Report of Proceedings from the May 18, 2007 hearing. VRP 1-33. The defendants also filed four declarations in support of their motion for reconsideration: two from Christina Mays (CP 173-195 and CP 262-68) and two from Pat Loomis (CP 196-98 and CP 269-280). The first declaration from Ms. Mays provided additional information, including photographs, concerning various additions and structures that had been approved by the management of Azalea Gardens prior to the time the Stockards submitted their request. CP 173-195. The second declaration from Ms. Mays discussed an Alteration Request for a gazebo that was declined by the management of Azalea Gardens. CP 262-68. The first declaration from Mr. Loomis concerned the request that the Stockards had made asking Mr. Loomis to discuss with Steve Harer the Stockards’

request to add the addition to their home. CP 196-97. The other declaration from Mr. Loomis included copies of floor plans with figures showing the approximate square footage of homes that had been sold in Azalea Gardens from approximately 2001 until 2006. CP 269- 279.

On June 22, 2007, Judge Cuthbertson, after conducting a hearing, entered an Order denying the defendants' motion for reconsideration. CP 298-99. In that Order, Judge Cuthbertson dismissed Christine Mays and her spouse as defendants and formally dismissed the defendants' counterclaims. CP 299. The defendants then filed this appeal. CP 300-06.

IV. SUMMARY OF ARGUMENT

In this appeal, there are two primary issues before the court: one procedural and one substantive. The procedural issue is whether the defendants were denied a fair hearing in support of their motion for summary judgment and in opposition to the Stockards' cross-motion for summary judgment. The substantive issue is whether the defendants exercised a contractual and statutory right in a fair and reasonable manner. The answer to each of these questions is in the negative, and therefore the ruling of the trial court should be upheld. The two other issues before the court are whether the named defendants are proper parties to this action, and whether the Stockards are entitled to an award of attorneys' fees at trial and on appeal.

The procedural issue facing this court is not whether the trial court improperly considered the Stockards' untimely cross-motion for summary

judgment or whether the trial court failed to grant a continuance of that motion, as the defendants assert. Instead, the real issue is whether the defendants were afforded a full and fair opportunity to present evidence and arguments supporting their motion for summary judgment and opposing the Stockards' motion for summary judgment. While the proceedings below may have been less than ideal, the defendants nonetheless had ample opportunity to present both evidence and arguments on their motion for reconsideration. Consequently, any error that may have occurred at the initial hearing was cured, and the defendants were not prejudiced by those proceedings. Absent such prejudice, the defendants cannot establish that they were deprived of a fair hearing, and the trial court's ruling should not be overturned on procedural grounds.

The substantive issue before the court is not, as defendants assert, whether a landlord in a mobile/manufactured home development may give or withhold consent to a long-term tenant's request to construct an addition to his home. There is no question that both the Lease Agreement between the parties and the Mobile/Manufactured Home Landlord Tenant Act expressly provide that the landlord in this case has the right to grant or deny approval of the type of improvement the Stockards were hoping to add to their home. Instead, the real issue in this case is whether the landlord must exercise that right in a fair and reasonable manner. The trial court found as a matter of law that the landlord did not apply its contractual and statutory right to approve or deny the Stockards' addition in a fair manner. Accordingly, the trial court ruled that the landlord's right

to consent to the addition was unenforceable and that the Stockards were entitled to proceed with the construction of their addition. That determination was correct as a matter of law and the decision of the trial court should stand.

Each of the named defendants remaining in this case, Steve Harer, Azalea Gardens, LLC, and Commonwealth, is a “landlord” as that term is defined in RCW 59.20.030. The Stockards have alleged that the defendants violated RCW 59.20. Therefore, each named defendant is a proper party defendant in this action.

Finally, the Stockards, as prevailing party below are entitled to attorneys’ fees pursuant to both paragraph 27 of the Lease Agreement and pursuant to RCW 59.20.110. Under RAP 18.1, the Stockards should also be awarded their attorneys’ fees and expenses on appeal.

V. ARGUMENT

A. Standard of Review.

The Stockards agree with the statement in the defendants’ brief concerning the standard of review as it relates to the review of the motions for summary judgment, pointing out, however, that a grant of summary judgment is proper if reasonable persons could reach only one conclusion from the evidence presented. *Qwest Corp. v. City of Bellevue*, ___ Wn.2d ___, 166 P.3d 667 (2007) (citing *Hubbard v. Spokane County*, 146 Wash.2d 699, 706, 50 P.3d 602 (2002)).

As to the procedural errors alleged by the defendants – that the trial court erred in considering the Stockards’ untimely cross-motion for summary judgment and that the trial court erred by denying the defendants’ motion for a continuance under CR 56(f) – those issues are reviewed under an abuse of discretion standard. *See Cole v. Red Lion*, 92 Wn.App. 743, 969 P.2d 481 (1998); *Briggs v. Nova Services*, 135 Wn.App. 955, 147 P.3d 616 (2006); *Citizen v. Clark County Bd. of Com’rs*, 127 Wn.App. 846, 113 P.3d 501 (2005); *Mutual of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.*, 123 Wn.App. 728, 97 P.3d 751 (2004).

B. The Trial Court Properly Considered and Ruled on the Stockards’ Cross-Motion for Summary Judgment Because the Defendants Were Afforded a Full and Fair Opportunity to Present Evidence and Argument in Opposition to that Motion.

1. Even Assuming that the Stockards’ Motion was Untimely, the Trial Court Could Have Granted Summary Judgment *Sua Sponte*.

The defendants argue that the trial court erred by considering the Stockards’ “untimely cross-motion for summary judgment.” Technically, however, it is not even necessary for a party to bring a cross-motion for summary judgment because, if no genuine issue of material fact exists, the court can grant summary judgment *sua sponte*. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554 (1986) (district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence); *Gospel Missions of*

America v. City of Los Angeles, 328 F.3d 548 (9th Cir. 2003) (even where there has been no cross-motion for summary judgment, a district court may enter summary judgment *sua sponte* against a moving party if the losing party has had a full and fair opportunity to ventilate the issues involved); *see also Impehoven v. Department of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992) (Washington Supreme Court ordered entry of summary judgment in favor of nonmoving party).

Given the trial court's authority to grant summary judgment *sua sponte*, the proper issue before this court is not whether the Stockards strictly complied with the notice requirements of CR 56(c), but instead whether any failure to comply with those requirements worked to the prejudice of the defendants by depriving them of a full and fair opportunity to present evidence and argument on the Stockards' cross-motion for summary judgment.

2. The Defendants Have Failed to Establish Any Prejudice Resulting from the Trial Court's Consideration of the Stockards' Cross-Motion for Summary Judgment.

The failure to comply with the notice provisions of CR 56(c) has not been directly addressed by any Washington court, but the issue has been considered at the federal level and in other states. A general precept of federal practice consistent with Washington law is that in the absence of an objection, the defect of untimely service under F.R.C.P. 56 will be deemed waived. 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2719 (3d ed. 1998); 11 *Moore's Federal Practice*, §

56.10[2][a] at 56-49 (Matthew Bender 3d ed. 2004) (“[t]he 10-day notice requirement [under F.R.C.P. 56(c)] may be waived if a party fails to object to a violation of the 10-day rule at the hearing on the summary judgment motion); *see also Zimny v. Lovric*, 59 Wn.App. 737, 801 P.2d 259 (1990) (plaintiff’s failure to object at trial to violation of CR 6(d) five-day notice requirement constituted waiver and prevented issue from being raised on appeal). While it is arguable that, by their actions at the hearing on the motions for summary judgment, the defendants’ waived objection to the timeliness of the Stockards’ cross-motion, for purposes of this argument, the Stockards will assume that the defendants properly raised such an objection.

Even in cases in which the nonmoving party properly objects before the lower court, however, federal courts have refused to find reversible error in a court’s consideration of a motion for summary judgment within the ten-day notice period set by F.R.C.P. 56(c) if the nonmoving party is unable to show that he or she was prejudiced by the court’s action. 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2719 (3d ed. 1998) (“if the motion is served less than ten days before the hearing but no prejudice appears to have occurred, proceeding with the summary judgment motion still may be proper”); *Ikerd v. Lapworth*, 435 F.2d 197, 203 (7th Cir.1970) (failure to afford ten days notice is not grounds for reversal unless the nonmoving party can show prejudice).

While no Washington case has directly addressed noncompliance with the notice requirements of CR 56(c), several Washington cases have addressed the failure to comply with the notice provisions of CR 6, holding that CR 6(d)¹ is not jurisdictional, and that reversal for failure to comply requires a showing of prejudice. *Zimny v. Lovric*, 59 Wn.App. 737, 801 P.2d 259 (1990); *Brown v. Safeway Stores, Inc.*, 94 Wash.2d 359, 364, 617 P.2d 704 (1980); *Loveless v. Yantis*, 82 Wash.2d 754, 759-60, 513 P.2d 1023 (1973). The reasoning employed in these cases is consistent with that employed in the federal cases discussing F.R.C.P. 56(c), and is applicable by analogy to the case at bar because these cases implicate similar, if not identical, issues. *See, e.g., Cole v. Red Lion*, 92 Wn.App. 743, 969 P.2d 481 (1998); *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 88 P.3d 375 (2004).

When reviewing a failure to comply with the notice requirements of CR 6(d), Washington courts have held that a trial court has discretion in such matters and that a deviation from the normal time limits is permitted as long as there is ample notice and time to prepare. *Citizens Against Tolls*, 151 Wn.2d at 236, 88 P.3d 375 (citing *Loveless v. Yantis*, 82 Wash.2d 754, 759-60, 513 P.2d 1023 (1973)). In *Citizens Against Tolls*, the State brought a motion for an order shortening time to hear its motion for summary judgment, and the trial court shortened the time to eight days

¹ CR 6(d) provides, in pertinent part: “A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.”

between the filing of the motion for summary judgment and the hearing on that motion. *Citizens Against Tolls*, 151 Wn.2d at 236, 88 P.3d 375. The Washington Supreme Court ruled that in order to prevail on appeal, the objecting party must show that it was prejudiced by the ruling. *Citizens Against Tolls*, 151 Wn.2d at 236, 88 P.3d 375; *accord*, *Cole v. Red Lion*, 92 Wn.App. 743, 749, 969 P.2d 481 (1998)).

To establish prejudice where such notice requirements have not been met, the party challenging a deviation from those notice requirements must show (1) a lack of actual notice, (2) a lack of time to prepare for the motion, and (3) no opportunity to submit case authority or provide countervailing oral argument. *Citizens Against Tolls*, 151 Wn.2d at 236-37, 88 P.3d 375 (citing *Zimny v. Lovric*, 59 Wash.App. 737, 740, 801 P.2d 259 (1990)). Applying this same 3-part standard to the facts in the case at bar, it becomes evident that the defendants suffered no prejudice, and the trial court's ruling should therefore be upheld.

Here, the defendants received actual notice of the Stockards' cross-motion for summary judgment on or about May 9, 2007. CP 129, VRP 20. The defendants had well over a week before the date scheduled for hearing on the defendants' motion (May 18) to prepare a response to the Stockards' motion. While this amount of time is admittedly less than that required by CR 56(c), the Stockards' cross-motion involved many of the same facts and legal issues as the defendants' own motion for summary judgment. The defendants have not shown that this shortened time frame

prejudiced their ability to prepare for the motion, to submit case authority or to provide countervailing oral argument.

At the hearing on the summary judgment motions, counsel for the defendants did not immediately object to the Stockards' cross-motion. VRP 2. It was only much later, after both attorneys had finished their arguments, that counsel for the defendants raised any objection. VRP 20. In response to an inquiry from the trial court about instances where Azalea Gardens' management had approved structures or additions for other Azalea Gardens residents, counsel for the defendants contended that the defendants had not been able to respond appropriately because of the late notice they had received of the Stockards' cross-motion. VRP 20. Even then, while he reminded the trial court that defendants had objected in their reply brief to the tardy notice of the Stockards' cross-motion, counsel for the defendants also admitted that he had not fully responded to the Stockards' cross-motion not because of a lack of time, but "because – I mean, for it to matter, all of the legal argument we just made would have to be rejected by the Court." VRP 20.

Even assuming for purposes of argument that the defendants were unable to adequately respond to some of the factual questions raised by the Stockards' cross-motion because they had not received adequate notice of that motion, any potential prejudice that resulted was cured when the defendants moved for reconsideration. *See Cotton v. City of Elma*, 100 Wn.App. 685, 998 P.2d 339 (2000) (alleged failure of court to provide nonmovant with copy of summary judgment order in time to file motion for reconsideration was not

prejudicial, where trial court allowed nonmovant to file additional affidavits and reviewed merits of underlying summary judgment motion in connection with motion to vacate, thus treating motion to vacate as if it were a motion for reconsideration). The hearing on that motion was scheduled for June 22, 2007, more than one month after the first hearing. CP 298. Prior to this second hearing, the defendants' supplemented the record with a brief in support of their motion, four additional declarations, and a reply brief. CP 161-172, CP 173-195, CP 262-68, CP 196-98, CP 269-280 and CP 251-261. The defendants have not argued that they were unable to adequately respond at this second hearing.

At the motion for reconsideration, the defendants were able to present evidence of other instances where improvements requested by residents of Azalea Gardens had been approved and one instance where a improvement (a 10' by 10' gazebo) was not approved. CP 262-67. The defendants were able to present argument – both written and oral – urging the trial court to vacate its earlier ruling in light of this new information. CP 298. It was evident that the defendants received a fair hearing on reconsideration, because the trial court amended its earlier ruling and dismissed defendant Christina Mays and her spouse from the case. CP 298-99. In every other respect, however, it denied the defendants' motion for reconsideration, confirming its ruling on summary judgment. *Id.* While the defendants may disagree with the trial court's decision, they cannot now complain that they were denied a full and fair opportunity to submit adequate evidence and case authority or provide countervailing oral argument.

C. The Trial Court Properly Granted the Relief Sought by the Stockards in Their Complaint Because the Landlord Violated RCW 59.20 by Failing to Exercise its Right to Approve or Disapprove the Stockards' Proposed Addition in a Fair and Reasonable Manner.

There is no dispute that Azalea Gardens, as landlord, is entitled to give or withhold its consent to the construction of the addition proposed by the Stockards. That authority is granted by RCW 59.20.070(2), by paragraph 15 of the Lease Agreement, and by several other provisions in the Rules and Regulations. CP 95, CP 100, CP 106, CP 106, CP 111. The Stockards assert, however, and the trial court agreed, that the Mobile/Manufactured Home Landlord Tenant Act, RCW 59.20, requires such authority to be exercised in a fair and reasonable manner. The trial court expressly held that the landlord did not treat the Stockards in a fair manner when considering their request to construct the addition. VRP 21.

In making its ruling, the trial court cited RCW 59.20.045, which provides:

Rules are enforceable against a tenant only if:

- (1) Their purpose is to promote the convenience, health, safety, or welfare of the residents, protect and preserve the premises from abusive use, or make a fair distribution of services and facilities made available for the tenants generally;
- (2) They are reasonably related to the purpose for which they are adopted;
- (3) They apply to all tenants in a fair manner;
- (4) They are not for the purpose of evading an obligation of the landlord; and
- (5) They are not retaliatory or discriminatory in nature.

While RCW 59.20.070(2) allows a landlord to “reserve the right to approve or disapprove any exterior structural improvements on a mobile home space,” that reservation must be read in context with the entire statute, including the requirements pertaining to the enforceability of rules contained in RCW 59.20.045 and the obligation of good faith imposed by RCW 59.20.020.² These two statutory provisions constrain a landlord’s right to unilaterally impose and enforce rules and restrictions on tenants in a manufactured home development. While reserving the right to approve or disapprove any exterior structural improvements arguably fulfills a legitimate purpose under RCW 59.20.045(1), the procedures for implementing that purpose must be “reasonably related to the purpose for which they are adopted,” and those procedures must be undertaken in good faith. RCW 59.20.045(2); RCW 59.20.020.

Given their purpose and the context in which they are applied, the Rules and Regulations involved in this case are analogous to restrictive covenants in a residential development. As stated in the Introduction to the Rules and Regulations, “[t]he community’s rules and regulations were developed to protect the value and desirability of Azalea Gardens for all residents, both present and future.” CP 100. Similarly, “[r]estrictive covenants are designed to make residential subdivisions more attractive for residential purposes[.]” *Piepkorn v. Adams*, 102 Wn.App. 673, 681, 10

² RCW 59.20.020 provides: “Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performance or enforcement.”

P.3d 428 (2000) (quoting *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 699, 974 P.2d 836 (1999)). While the Stockards do not own their lot in fee simple, they have leased that lot for a twenty-five year term and have a long-term property interest in the lot. Accordingly, case law interpreting restrictive covenants that require consent from a homeowners' association is highly instructive in this case and can be applied by analogy.

Covenants providing for consent before construction or remodeling will be upheld so long as the authority to consent is exercised reasonably and in good faith. *Riss v. Angel*, 131 Wash.2d 612, 624, 934 P.2d 669 (1997). Questions regarding the reasonableness of the decision made focus on the process employed and the facts considered. *Green v. Normandy Park*, 137 Wn.App. 665, 151 P.3d 1038 (2007). Similarly, in the case at bar, the provisions pertaining to the enforceability of rules contained in RCW 59.20.045, including requirements of reasonableness and fairness, and the obligation of good faith imposed by RCW 59.20.020 work together to restrict Azalea Gardens' right to consent to the construction of the Stockards' proposed addition. The trial court concluded as a matter of law, after reviewing the evidence presented by the Stockards and by the defendants, that the landlord had not met these obligations. Accordingly, based on that conclusion, the trial court properly granted the requested remedy – declarative and injunctive relief – to the Stockards. *See Piepkorn v. Adams*, 102 Wn.App. 673, 10 P.3d 428 (2000) (restrictive covenants are enforceable by injunctive relief).

The findings in both *Riss v. Angel* and the case of *Day v. Santorsola*, 118 Wn.App. 746, 76 P.3d 1190 (2003), are particularly pertinent to this case. In *Riss*, the Court concluded that the investigation of a lot owner's proposed construction plans was unreasonable because the homeowners' association board did not visit the site, relied on inaccurate and misleading evidence, and made no objective comparisons of existing homes and the proposed home with respect to size and height. *Riss v. Angel*, 131 Wash.2d at 625, 934 P.2d 669. In *Day*, the Court of Appeals affirmed the trial court's finding that a homeowners' association committee reviewing the Days' construction plans had been unreasonable because it did not provide the Days with the comments, correspondence, or expert opinions the committee received from other homeowners regarding the Days' plans, and because it failed to provide the Days with a meaningful opportunity to respond to the information submitted to the committee before the committee acted on the Days' plans. *Day v. Santorsola*, 118 Wn.App. at 760-67, 76 P.3d 1190. In both cases, the appellate court held that the authority to consent to the proposed construction was exercised unreasonably and in bad faith. *Riss v. Angel*, 131 Wash.2d at 625; *Day v. Santorsola*, 118 Wn.App. at 766-67.

In the instant case, there is absolutely no evidence that, prior to the time the Stockards filed this action, the landlord made any investigation of the Stockards' plans apart from simply reviewing the drawings submitted by the Stockards. A similar failure in *Riss*, where the homeowners association charged with the authority to approve or disapprove

construction plans failed to visit the site of the proposed construction or make objective comparisons with existing homes, resulted in the Supreme Court holding that the homeowners association had unreasonably denied consent. *Riss v. Angel*, 131 Wash.2d at 628-29. Furthermore, the landlord in this case failed to give the Stockards a meaningful opportunity to respond to its decision, a failing that was deemed unreasonable in *Day*.

In their Brief on Appeal, the defendants assert that the “LLC demonstrated that it was entirely reasonable and consistent for it to deny the Stockards’ request to erect an enclosed structure of 576 square feet, when the next largest addition which has ever been constructed by any resident involved an unenclosed patio of less than half (236 square feet) the size of the Stockards’ proposed addition.” Brief of Appellants, page 12. While it is questionable whether size alone would constitute a reasonable basis for denying the Stockards’ addition, the management of Azalea Gardens conducted no review of prior projects and approvals to make this determination until May of 2007 – after the initial hearing on the summary judgment motions. CP 173-77.

Furthermore, if the size the Stockards’ addition was the reason the landlord did not approve the Stockards’ request, that reason surely could have been communicated to the Stockards’ in either of Ms. Mays letters (CP 73 and 79). It was not.

Even assuming that the landlord actually communicated to the Stockards that their project “would deteriorate from the quality of the community in the long term” and “result in overconstruction of this

already high-density community,”³ the landlord provided no basis to support that conclusion and no information or process that would permit the Stockards to modify their project to make it acceptable. *See Riss v. Angel*, 131 Wash.2d at 627 (courts have found decisions unreasonable where there was no evidence in the record as to external design of any other structures in the subdivision aside from the applicant’s residence and the record showed merely conclusory statements of the chairman of an architectural control committee that the proposed residence was not harmonious with surrounding structures).

While we do not know what motivated the landlord to respond in this manner, David Omoth, the erstwhile on-site manager for Commonwealth, noted in his Declaration that “the lots directly across the street from Mr. and Mrs. Stockard were to remain unoccupied/undeveloped to ‘punish’ the Stockard’s [sic] for some perceived offense against the owner, J. Steve Harer[.]” CP 121. Whether or not this “perceived offense” factored into the landlord’s response is immaterial, however, because the landlord’s response does not meet the requirements of fairness or reasonableness imposed by the law.

The landlord did not engage in any review or other reasonable assessment of prior projects when considering the Stockards’ request. The landlord gave no reason – other than conclusory statements of opinion – for denying the Stockards’ request. Despite repeated requests, the

³ See Declaration of Pat Loomis at CP 197.

landlord did not give the Stockards any feedback as to how they might modify their project so that it would be acceptable. The landlord's denial of the Stockards' proposal was entirely arbitrary. *See Riss v. Angel*, 131 Wash.2d at 631 ("Regardless of the subjective assessment of the Board and the homeowners about the desirability of a proposal, the homeowners are not entitled to reject a proposal unless their decision is reasonable and in good faith."). For these reasons, the landlord's actions do not conform to the requirements of RCW 59.20, and the ruling of the trial court – denying enforcement of the landlord's right to consent and granting the Stockards' the right to complete construction of their addition – should be affirmed by this Court.

D. Each of the Remaining Named Defendants is a “Landlord” as that Term is Defined in RCW 59.20.030(2), and Therefore Each is a Proper Party to this Action.

RCW 59.20, the Manufactured/Mobile Home Residential Tenant Act, defines the term “landlord” as “the owner of a mobile home park and includes the agents of a landlord.” RCW 59.20.030(2). Each of the remaining named defendants is a “landlord” under the statute and therefore a proper party to this case.

Azalea Gardens, LLC, is the owner of Azalea Gardens and the lot leased by the Stockards. CP 33. As owner, Azalea Gardens is a landlord. Mr. Harer is an agent of the landlord by virtue of his being the managing member of Azalea Gardens, LLC. CP 33. Further, Mr. Harer was the prior owner of Azalea Gardens, LLC, which did not become the owner of

Azalea Gardens until April 28, 2003. CP 87-88. There is no question that Mr. Harer is a landlord under RCW 59.20.030(2). Commonwealth is the property manager for Azalea Gardens and acts as agent for Azalea Gardens pursuant to the terms of a Property Management Agreement signed by Mr. Harer. CP 33, CP 39-46. Commonwealth, too, is a landlord under RCW 59.20.030(2). As a landlord, each is a proper party herein.

E. Both the Lease Agreement and State Law Provide for an Award of Attorneys' Fees to the Stockards as Prevailing Party.

Paragraph 27 of the Lease Agreement provides: "In any action arising out of this Rental Agreement, including eviction, the prevailing party shall be entitled to its reasonable attorneys' fees and costs." Similarly, RCW 59.20.110 provides: "In any action arising out of this chapter, the prevailing party shall be entitled to reasonable attorney's fees and costs." In their Complaint, the Stockards allege that the defendants breached the Lease Agreement and violated RCW 59.20, the Manufactured/Mobile Home Residential Tenant Act. CP 3-6. The Stockards were the substantially prevailing party in the proceedings below and therefore they are entitled to an award of attorneys' fees and costs. *See Day v. Santorsola*, 118 Wn.App. at 770, 76 P.3d 1190 (plaintiffs were the substantially prevailing parties where the trial court allowed them to build a house nearly in accordance with the house they sought to have approved).

F. The Stockards are Entitled to Their Reasonable Attorneys' Fees on Appeal.

As noted above, both the Lease Agreement and the Manufactured/Mobile Home Residential Tenant Act provide that the prevailing party is entitled to reasonable attorney's fees and costs. Under RAP 18.1, this Court should grant the Stockards their attorneys' fees on appeal.

VI. CONCLUSION

The trial court properly determined that the defendants violated the Mobile/Manufactured Home Landlord Tenant Act by failing to give fair consideration to the Stockards' construction request and by failing to give any reason or explanation for denying that request. That determination, first made at the hearing on the cross-motions for summary judgment, was not altered when the defendants moved for reconsideration, even though the defendants had presented additional evidence and arguments in support of their position.

The fact that the Stockards had not given the full notice required by CR 56(c) for their cross-motion for summary judgment did not prejudice the defendants where the defendants had ample time to present additional evidence and argument after the trial court made its initial ruling. Any procedural error that may have occurred because the Stockards did not comply the notice requirements of CR 56(c) was cured when the motion for reconsideration was held.

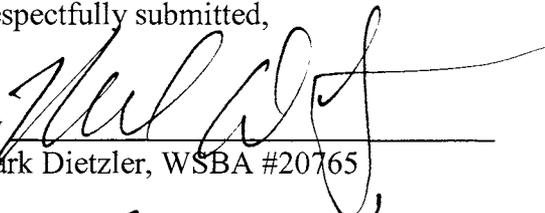
Each of the remaining named defendants is a "landlord" as that term is defined in the Mobile/Manufactured Home Landlord Tenant Act. For that reason, they are proper parties to this action and should not be dismissed.

The Stockards were the prevailing party below, and pursuant to the Lease Agreement and RCW 59.20.110, they are entitled to an award of the attorneys' fees they incurred in prosecuting the case at the trial court. This Court should affirm that the Stockards are entitled to an award of attorneys' fees and costs in the proceedings below, and should award the Stockards' their costs on appeal, including reasonable attorneys' fees.

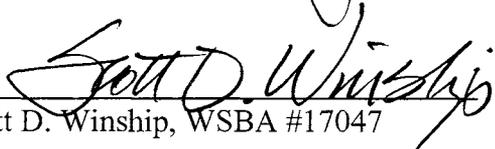
DATED this 5TH of November, 2007.

Respectfully submitted,

By


Mark Dietzler, WSBA #20765

By


Scott D. Winship, WSBA #17047

VANDEBERG JOHNSON &
GANDARA, LLP
1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
Telephone: (253) 383-3791
Attorneys for Respondents
Harris and Pama Stockard

APPENDIX A

Commonwealth

REAL ESTATE SERVICES

March 24, 2006

Mr. Harris & Mrs. Pama Stockard
PO Box 410
Ashford, Washington 98304

Dear Mr. & Mrs. Stockard,

Thank you for taking the time to call me yesterday. It was a pleasure to speak to you and I always appreciate hearing from our valued Residents.

As we discussed, the alteration request you submitted to add an additional room to you home was declined by the Owner. Pursuant to paragraph XIII entitled 'Home Construction and Contractor Guidelines' on page 10 of our Community Guidelines ... 'All changes and revisions must first be submitted to Azalea Gardens' management for written approval before proceeding with construction.' The Owner of the community has reserved the right to approve or decline alteration requests proposed by Residents to the individual homes and home sites.

I regret to hear you have funded preliminary steps of the requested alteration, however, I do not believe those amounts should be refunded to you by Azalea Gardens.

Please do not hesitate to contact you if I may be of further assistance.

Sincerely,



Christina Mays
Asset Manager

Cc: Dave Ornoth & Diane Lee, Community Managers

EXHIBIT 3

APPENDIX B

LAW OFFICES OF
BRIAN L. MCCOY
& Associates, Inc., P.S.

12515 Meridian East, Suite 102
Puyallup, Washington 98373-3436

Telephone (253) 841-4318
Facsimile (253) 841-2866
e-mail bmccoylaw@comcast.net

July 19, 2006

Azalea Gardens
Attn: Manager(s)
19614 - 100th Avenue Court East
Graham, WA 98338

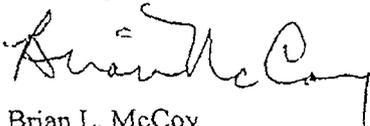
RE: Stockard addition

Dear Manager(s):

Please be advised that we have been retained by Mr. and Mrs. Stockard for purposes of officially submitting their plans for an addition to their home. Enclosed are copies of professionally prepared architectural drawings of the existing and proposed floor plans showing the sewing room addition the Stockards propose to build behind their existing garage. We have reviewed with the homeowner and architect the requirements of Paragraph XIV of the Azalea Gardens Community Guidelines and the Stockard addition will comply in all respects.

We therefore, on behalf of Mr. and Mrs. Stockard would request your immediate approval of their proposed addition or a statement setting forth the specific reasons for disapproval within two weeks of the date of this letter. We will otherwise interpret lack of a timely response as acquiescence and Mr. and Mrs. Stockard will proceed with their project. Thank you for your attention to this matter.

Sincerely,



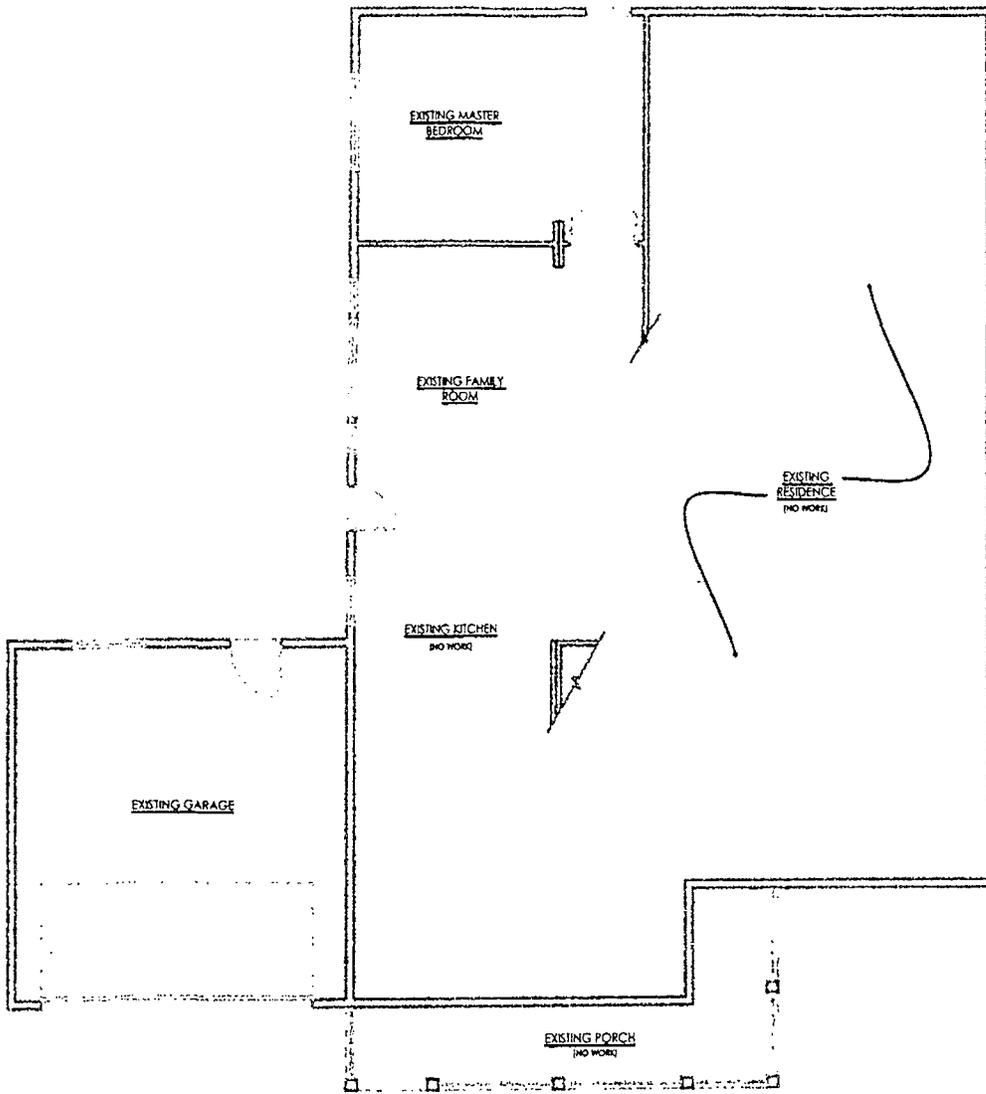
Brian L. McCoy

BLM:mm

cc: Mr. and Mrs. Stockard
H3 Architects

EXHIBIT 4

APPENDIX C



⊕ EXISTING FLOOR PLAN
1/8" = 1'-0"

APPENDIX D

Commonwealth

REAL ESTATE SERVICES

July 25, 2006

Mr. Brian L. McCoy
12515 Meridian East
Suite 102
Puyallup, Washington 98373-3436

RECEIVED

JUL 27 2006

LAW OFFICES OF
BRIAN L. MCCOY

Dear Mr. McCoy,

I am in receipt of your letter dated July 19, 2006 and subsequent enclosures. This matter has been reviewed with the ownership of Azalea Gardens who reserves the right to approve and disapprove alteration requests. Paragraph XIII of the Community Guidelines clearly states written approval must be given by management before alterations may be made. The Stockard's request to make an addition to their existing home remains denied. Please advise the Stockard's they may not make the proposed addition.

Sincerely,



Christina Mays
Asset Manager

Cc: Dave Omoth & Diane Lee

EXHIBIT 5

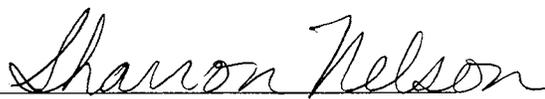
DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 5th day of November, 2007, I caused to be mailed via first class mail, postage prepaid, a true and correct copy of the Brief of Respondents in Court of Appeals Cause No. 36458-1-II, to counsel for appellants as follows:

Walter H. Olsen
Attorney at Law
Olsen Law Firm PLLC
604 W. Meeker St., Suite 101
Kent, WA 98032

Philip A. Talmadge
Talmadge Law Group, PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4630

SIGNED at Tacoma, Washington, this 5th day of November, 2007.


SHARRON NELSON

STATE OF WASHINGTON
BY: SHARRON NELSON
COURT OF APPEALS
NOV 14 2007