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COURT OF APPEALS
DIVISION II

No.36834-0-II

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STATE OF WASHINGTON
BY
DEPUTY

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

ASSOCIATED PETROLEUM PRODUCTS, INC.,

Respondent,

v.

NORTHWEST CASCADE, INC.,

Appellant.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

Northwest Cascade entered into a contract with Associated Petroleum to deliver fuel to its construction equipment at a negotiated price. For five months, Associated Petroleum billed Northwest Cascade twice monthly, at the agreed price. CP 50-63, 276. Associated Petroleum delivered fuel to its customer's equipment fleet on a nightly basis, according to the daily list of the construction sites provided by Northwest Cascade. CP 285.

The cost of Associated Petroleum's service was expressed as a profit margin; that is, Associated Petroleum charged Northwest Cascade an extra 20 cents for each gallon of fuel it delivered, as compensation for the delivery service. After a few months, Associated Petroleum began looking for a way to increase its profit margin without increasing the negotiated rate and losing Northwest Cascade's business. Its solution was to impose a surcharge for equipment that required less fuel, and to introduce the charge as a "way to help them become more profitable in our eyes." CP 253.

When the possibility of extra charges was mentioned, Northwest Cascade expressly refused to pay more than the agreed rate of 20 cents per gallon. CP 259. Nevertheless, Associated Petroleum included charges for small tank deliveries in its December 31, 2008 invoice – an invoice that in every other way was identical to the fleet fueling invoices it had been issuing for five months. *Compare* CP 50-63 *with* CP 65-75. Page nine of the invoice listed "time on site" charges, a term not used in the "Policies &

Procedures” Associated Petroleum claims to have given its customer. CP 281. It took Northwest Cascade three months to discover the buried charges, resulting in payments to Associated Petroleum well in excess of the negotiated price. The issue is whether Associated Petroleum has the right to keep the excess payments made during these three months.

Northwest Cascade asserts that it reasonably believed the disputed invoices were consistent with the agreement it had negotiated with Associated Petroleum. Northwest Cascade further asserts that its consent to the new charges should not be implied from its payment of the invoices, because Associated Petroleum did not terminate the existing agreement; did not change its performance in any way after it began imposing the new charges; and did not give sufficient notice that it had unilaterally modified its charges.

When a contract is terminable at will, either party may terminate the contract and impose a new price for its services. However, a party may not unilaterally modify the terms of an existing contract without notice, without consent, and without consideration for the modification. If on site fleet fueling service was the predominant aspect of the contract at issue, then the common law applies, and the parties could not modify the contract without both mutual assent and consideration. If, on the other hand, the contract was primarily a sale of goods (fuel), then the parties could modify their contract by a meeting of the minds and mutual assent to new terms, without new consideration. *Alaska Pacific Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn. App. 354, 360, 933 P.2d 417, review

denied, 133 Wn.2d 1006 (1997) (citing RCW 62A.2-209(1)). Either way, both parties must agree to the new contract terms.

Associated Petroleum argues that Northwest Cascade's assent should be implied by its payment without objection for three months, because the Uniform Commercial Code preserves common law doctrines such as "account stated." *Respondent's Brief*, p. 19. Unfortunately for the respondent, the UCC also preserves the common law with regard to using performance to imply assent to a material alteration of an agreement, and the right to benefit from a customer's mistaken overpayment, when one has contributed to causing the mistake, or has reason to be aware of it.

In light of Associated Petroleum's five-month performance of its contract to fuel Northwest Cascade's construction equipment at the agreed rate; its knowledge that the customer was unwilling to pay more; and its failure to notify the customer of the additional charges in its later invoices, a jury could find that Northwest Cascade reasonably accepted the disputed invoices as accurate statements of fuel delivered at the agreed rate, and that three months was a reasonable time in which to discover its mistake and object to the unauthorized charges.

Associated Petroleum relies on several misleading statements of fact to support its argument that Northwest Cascade should bear responsibility for the overpayment. Moreover, Associated Petroleum fails to establish the absence of material issues of fact and fails to establish that it is entitled to judgment as a matter of law. Therefore, summary judgment should be reversed.

II. LAW AND ARGUMENT

A. Associated Petroleum Repeatedly Misstates the Ongoing Nature of its Contract with Northwest Cascade

Associated Petroleum repeatedly claims that Northwest Cascade placed “new orders” after Associated Petroleum increased its charges, thereby implicitly agreeing to purchase fleet fueling at the new rate. *See, e.g., Resp. Br.* p. 7. This argument completely ignores the nature of the parties’ agreement, which was to provide nightly fueling of construction equipment at an agreed cost.

The service provided to Northwest Cascade was not unique; this is apparent from Associated Petroleum’s description of its overnight fueling service, in marketing material:

APP's Fleet Fueling & Wet-Hose Service eliminates costly labor and liabilities by fueling your vehicles during your downtime. While your vehicles are sitting at your job site and/or your facility, our drivers will fuel your equipment so you are ready to go at the beginning of each workday. We run a 24/7 operation and will fuel according to your schedule.

CP 236.

The parties’ agreement required Associated Petroleum to fuel all of the equipment at Northwest Cascade’s construction sites on a nightly basis, in return for 20 cents per gallon over the daily bulk fuel cost, until the agreement was terminated by either party. CP 290-91. Associated Petroleum did not terminate the agreement until April 14, 2006. CP 37.

The parties’ agreement also required Northwest Cascade to provide the job site location of each machine in the fleet on a daily basis. CP 213.

Associated Petroleum claims it was “poor management” for Northwest Cascade to include equipment that needed less than 200 gallons to refuel (*Resp. Br.*, p. 4, fn 1); in fact, this was what the parties had agreed to. Northwest Cascade performed its part of the agreement, and kept Associated Petroleum apprised of the location of its fleet. Associated Petroleum’s attempt to characterize this performance as “placing new orders” is not consistent with the facts or the evidence.

B. The Inadequacy of Associated Petroleum’s Notice of New Charges is at the Core of the Dispute

Associated Petroleum asserts that Northwest Cascade “admits” to having adequate notice that Associated Petroleum was unilaterally modifying its charges. In fact, the parties’ disagreement regarding the sufficiency of notice that later statements contained new charges, beyond the negotiated profit margin, is at the core of the dispute.

Associated Petroleum asserts that Northwest Cascade “admits that these invoices were perfectly adequate to inform” them that new charges had been imposed.¹ *Resp. Br.*, p. 1. Respondent further claims it is “undisputed” that it explained the new charges. *Resp. Br.*, p. 5. These assertions are again misleading, at best.

What is undisputed is that “time on site” charges do in fact appear, for the first time, on page 9 of respondent’s tenth fleet fueling statement.

¹ “Perfectly adequate” was not Jeffrey Warren’s phrase, as implied by respondent; the witness replied affirmatively to a question from respondent’s attorney, on page 105 of his first deposition. CP 204.

The fact that they appeared without explanation or consent is what gave rise to the parties' dispute. And the circumstances under which Northwest Cascade bears responsibility for detecting the new charges in the disputed statements is at the core of the legal issues on appeal.

Clearly, Northwest Cascade's fleet manager did not immediately notice the new "time on site" charges, and took responsibility for not discovering them when informing his bosses of his mistake:

Mark and Steve,

I apologize for not discovering this sooner.

After researching our Associated Petroleum invoices for in-field fueling of our construction equipment, I found that they began charging for something referenced as "Time On Site" as of the 12/31/05 invoice. **There were no charges for this prior to this invoice. * * ***

Because we are dealing with such a large sum of money, and the fact that this was at best, an underhanded business practice, I would like to consult with you both before I persue [sic] recovering our loss.

I apologize for not discovering this sooner. I failed to properly review these invoices before signing off on them. I won't let this happen again.

Jeff

CP 276 (emphasis added). The evidence also shows that Northwest Cascade was unable to determine from the invoices themselves what the charges were for, and had to ask for an explanation. CP 276-77. In light of the evidence, it is at best misleading to assert that Northwest Cascade agrees the invoices are perfectly adequate to explain the "time on site" charges.

The same is true of Associated Petroleum's assertion as to its oral explanation of the "time on site" charges. Mentioning to your customer that you want to charge for small tank deliveries, and receiving an emphatic refusal, hardly equates to "explaining" that you will bill for such deliveries with or without your customer's agreement. CP 244, 287. Clearly, Northwest Cascade did not understand Associated Petroleum's true intent; on April 24, 2006, its CEO asked his fleet manager to find out whether unauthorized charges had really been imposed, as it appeared, or whether it was "a tax of some kind." CP 276. Associated Petroleum relies on its customer's payment without objection. However, as the fleet manager testified, "I didn't object to it because I didn't know it was being charged." CP 204.

Thus, the existence and sufficiency of respondent's notice of a unilateral modification of the contract it negotiated with Northwest Cascade is very much a disputed issue of fact.

C. Pack Forest was Not Part of the Fleet Fueling Contract

One of the most misleading areas is respondent's use of invoices for unrelated fuel sales at "Pack Forest," from its "Eatonville office." *Resp. Br.*, pp. 6-8, 38-39, 46. Associated Petroleum uses these uncontested billings from an unrelated contract in two ways: to increase the number of times it claims Northwest Cascade paid "time on site" charges without objection, and to claim that sometimes Northwest Cascade did not object to "time on site" charges at all. However, these Pack Forest invoices have no relation to the fleet fueling contract at issue.

This case involves Associated Petroleum's contract to fuel equipment in Northwest Cascade's construction division. CP 273, 285. Its other divisions are Honey Buckets (portable toilets), and Flow Hawks (drain cleaning). CP 210. "Pack Forest" is a University of Washington site for authorized disposal of septic and toilet waste. *See* CP 181-195. Even from the limited record available on appeal, it can be seen that the Pack Forest invoices submitted by Associated Petroleum have no relationship to the contract at issue. *Compare* CP 50-63 *with* CP 181-195.

Not only are the Pack Forest invoices irrelevant to the fleet fueling contract, they are also not evidence of "course of dealing," because they do not use the term "time on site." Rather, they list the charges applicable to Pack Forest. CP 181-195 (e.g. "demurrage" and "environmental" surcharges). Associated Petroleum disingenuously relies on the one-page Pack Forest invoices to support its claim that Northwest Cascade agreed to "time on site" charges in the multi-page fleet fueling invoices, which were inserted several months after it began providing fleet fueling at a negotiated rate. *Resp. Brief*, p. 36 ("NWC paid without protest or reservation, almost 300 separate charges for 'time on site' and demurrage.") Including the Pack Forest invoices allows Associated Petroleum to inflate the times Northwest Cascade "failed to object."²

² *See Resp. Br.*, p. 1 ("266 instances"); p. 6 ("almost 300 separately itemized time on site and demurrage charges"); p. 33 ("ongoing payment of 280 invoiced time on site/demurrage charges"); p. 36 ("almost 300 separate charges for 'time on site' and demurrage");

Similarly, although Associated Petroleum admits that the Pack Forest billings were not contested, *Resp. Brief*, p. 7, n. 4, it supports the trial court's attorney fee award by asserting that attorney fees related to Pack Forest "are part of this case, this motion and this appeal." *Resp. Brief*, p. 46. These arguments are misleading, at best.

D. Evidence Supports the Fleet Manager's Lack of Authority to Modify the Contract at Issue

Associated Petroleum incorrectly asserts that there is "no support in the record" for Perry having the sole authority to agree to a modification of the contract at issue, and therefore no genuine issue of fact as to Warren's authority. *Resp. Br.*, p. 29. In fact, the record contains testimony from both Perry and Warren that Warren did not have authority to approve a new contract, and that sole authority rested with Perry. CP 287-88, 290-93. That Warren negotiated the contract does not mean that he had authority to set the rate, or approve changes to it.

Moreover, even if the scope of authority were not a disputed question of fact, Associated Petroleum concedes that Northwest Cascade did not assent to a modification, as a matter of law. *Resp. Br.*, p. 5.

E. Associated Petroleum Did Not Announce a Price Change

Associated Petroleum continues to argue that it could unilaterally modify its contract with Northwest Cascade by simply announcing a price change, without need for mutual assent or consideration. *Resp. Brief*, p. 33. However, a key question is whether Associated Petroleum did, in fact, "announce" a price change, or whether it tried to skip that step.

Associated Petroleum assumes the sufficiency of its “new price” announcement, and then relies on Northwest Cascade’s “new orders” of fuel as evidence that it agreed to the change. That is, it starts with the premise that the new “time on site” charges in the middle of its multiple-page billing statements were obvious, then reasons that Northwest Cascade’s daily notification of the location of its equipment equated to placing “new” requests for fleet fueling, at the new price. *Resp. Br.*, p. 33. However, both the premise and the conclusion are flawed.

Associated Petroleum asserts that it could unilaterally modify a contract “as a condition of its continuance.” *Id.* That is, Associated Petroleum could inform its customer that it was no longer willing to provide fleet fueling at the negotiated rate. This would have been akin to the facts in *Cascade Auto Glass*, in which an insurer provided updated pricing schedules to its glass repair shops. *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn.App. 760, 145 P.3d 1253 (2006), *review denied*, 161 Wn.2d 1012 (2007)

The problem is that there is no evidence Associated Petroleum ever made such an announcement. Associated Petroleum did not want to lose Northwest Cascade’s business, so it declined to say that it would not continue nightly fleet fueling unless it could charge more – at least until April, when it terminated the contract rather than submit a bid for comprehensive fuel services. CP 246. A conversation about operational procedures, ways to improve efficiency, is simply not the same as terminating a contract unless a stated condition is met. *See* CP 253-256.

Associated Petroleum may have wanted to impose a higher profit margin as a condition on continued performance, but knew it would likely lose the business if it did so. It had spent years soliciting Northwest Cascade's business. CP 240 (*Bertram dep.*, p. 11, 1-5). Instead of risking the loss, it tried to finesse the issue by inventing a new name for its service charge. CP 245 (*Bertram dep.*, p. 55, 17-19, "the margin technically never changed"). It is hardly surprising that when Northwest Cascade discovered the extra charges, it was affronted at having been tricked into paying almost 43 cents over fuel cost, for fleet fueling, rather than the 20 cents the parties had agreed upon. CP 279.

At a minimum, whether Associated Petroleum announced a price change, or announced a condition on its continued performance, are material questions of fact. Summary judgment should not be granted where an issue of credibility is present, or there is contradictory evidence. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

F. Consideration is Not Merely a Technicality; it May Operate as Evidence of a Meeting of the Minds

Associated Petroleum makes no claim (nor could it) that it gave new consideration for imposing the new "time on site" charges. Instead, it argues that because it was selling fuel, consideration was not required. *Resp. Br.*, p. 34. This case is an excellent example of the purpose for requiring an offer, acceptance, and consideration before an agreement will be enforced.

Associated Petroleum promised to fuel Northwest Cascade's fleet on a nightly basis. Now, it claims to have informed Northwest Cascade it would continue to fuel the equipment only if it could impose an extra charge for small tank deliveries. After the alleged announcement, Associated Petroleum continued to fuel the equipment nightly, and Northwest Cascade continued to pay. Because Associated Petroleum provided identical services before and after its alleged announcement, it cannot use its customer's payment as evidence of assent to the modification of the contract. Unlike the insurer whose written price lists expressly superseded prior schedules, there is no evidence to support Associated Petroleum's claim. *Cascade Auto Glass, Inc., supra*, 135 Wn. App. 760. Instead, one could reasonably infer from the evidence that Associated Petroleum tried to unilaterally modify its contract with Northwest Cascade, without bothering with either acceptance or consideration.

G. Payment Does Not Imply Assent When it is Obtained by a Deceitful Business Practice

Regardless of whether the fleet fueling contract was primarily for the sale of goods, and could thus be modified without new consideration, the modification was not valid without mutual assent to its terms. *Alaska Pacific Trading Co.*, 85 Wn.App. at 360. To rely on implied assent, Associated Petroleum has the burden of proving that the additions to its billing statements were so clearly stated that payment of its invoice prior to objecting implies assent to the additional charges, as a matter of law.

Associated Petroleum tries to liken this case to one in which two parties did business together for a decade before pursuing claims against each other. *Sunnyside Valley Irr. Dist. v. Roza Irr. Dist.*, 124 Wn.2d 312, 314, 877 P.2d 1283 (1994). However, the facts of the case do not support respondent's reliance. The parties in this case did business for less than a year, and Northwest Cascade objected to the charges as soon as Associated Petroleum explained them. CP 276-79.

Because Associated Petroleum failed to notify Northwest Cascade that its billing statements were not consistent with the parties' negotiated agreement, payment of those statements cannot imply assent. Assent may not be implied where the party that pays without objection has limited information, either as a result of deceitful conduct, or for any other reason. *Sunnyside Valley Irrig. Dist.*, 124 Wn.2d at 316. As Justice Utter explained, "the mere rendition of an account by one party to another does not show an account stated." *Id.* at 315-16. Although Associated Petroleum is not obliged to offer its services at the same price for any length of time, *Resp. Br.* p. 36, it is obliged to inform its customer when it is no longer willing to perform at the agreed price. This is especially true where it was aware that its customer was only willing to pay more than the negotiated price. CP 286. Associated Petroleum's reliance on *Sunnyside Valley Irrig. Dist.*, in which a party unambiguously assented to an annual accounting for ten years, is misplaced. 124 Wn.2d at 315-16.

When one party deliberately inserts unauthorized charges into its billing, with knowledge that its customer would not pay the statement if it

realized it was inconsistent with the parties agreement, the party cannot then rely on its customer's 'course of performance' as evidence of implied consent to the charges. Remarkably, Associated Petroleum asserts that a "time on site" charge that results in a total cost of \$ 0.428 per gallon for fleet fueling is not a material alteration of a contract to provide the same service for \$ 0.20 per gallon. *Resp. Br.*, p. 42 ("there are no 'express terms' of this 'terminable at will' arrangement which are inconsistent with the imposition of the 'time on site' charge."). Therefore, it argues, it should be allowed to look to Northwest Cascade's performance (daily notice of job sites and semimonthly invoice payments) to imply assent to the additional charges.

This is not the law in Washington. Where two parties already have a contract, one party may not unilaterally modify the contract based on the other party's silence in response to a written term that is not discussed between the parties, and which materially alters their agreement. *Tacoma Fixture Co., Inc. v. Rudd Co., Inc.*, 142 Wn. App. 547, 554, 174 P.3d 721 (2008). As the court explained,

Rudd could not unilaterally modify the contract based upon TFC's silence. In other words, Rudd could not change the contract by essentially saying to TFC, "Unless you say 'no' within five days, you mean 'yes'."

Id. at 554. This rule is not limited to warranties, as respondent states. *Id.* (citing, among others, *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440 (9th Cir. 1986), and *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn. App. 539, 625 P.2d 171 (1981)).

If Associated Petroleum believed it had consent to begin charging for its “time on site” when it made small tank deliveries, one would wonder why it did not confirm the fact. Instead, it made no mention of the charges other than to list them in the middle of its lengthy, multi-column billing statements. When a party bears responsibility for creating another party’s mistaken overpayment, it cannot complain when the party does not immediately discover the mistake.

For purposes of summary judgment, Associated Petroleum recognizes that it must concede that Northwest Cascade did not orally agree to the new charges. *Resp. Br.*, p. 5. Because Associated Petroleum failed to alert its customer that its later invoices for its services were no longer consistent with the negotiated agreement, or its previous invoices, but in fact included significant new charges, it cannot rely on the three-month delay in Northwest Cascade’s discovery of the unauthorized charges. Consent is not implied by belated objection; if anything, the delayed discovery was intended by the party drafting the invoice.

H. A Mistaken Party’s Negligence Does Not Bar His Recovery When the Other Party is Charged with Knowledge of the Mistake

Associated Petroleum insists this case is not about mistake because it “meant to charge every penny.” *Resp. Br.*, p. 23. It portrays itself as the victim in this situation, because it had “no reason to know” that Northwest Cascade was paying extra for “time on site” by mistake. This protestation of innocence defies credulity.

Associated Petroleum's operational manager described the company's internal discussions as to how the company could increase profitability without losing its customer. CP 253. The company was careful not to alert its customer that it was modifying the agreement. And when additional charges were mentioned, Associated Petroleum admits that the customer expressly refused to pay more than the 20 cent margin. CP 245. Nevertheless, Associated Petroleum did nothing overt to "announce" the unilateral modification, because it did not *want* to terminate the contract. CP 243, 253. Under these circumstances, respondent cannot reasonably characterize itself as "lacking reason to know" of the mistake when its efforts to increase its profitability succeeded.

Respondent goes to great lengths to characterize Northwest Cascade as "consciously ignorant" when it failed to realize it was paying significantly more than agreed for fleet fueling service. Associated Petroleum relies on a rule that applies when a party "is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Restatement (Second) § 154. This rule does not apply here.

The "mistake" at issue here is Northwest Cascade's belief that Associated Petroleum's statements were consistent with the parties' negotiated agreement, as they had been until December 31, 2005. There is no evidence in the record of any reason for Northwest Cascade to know, when it negotiated a fleet fueling contract in August 2005, that five

months later Associated Petroleum would insert unauthorized charges on page nine of an 11-page invoice, effectively doubling the price of its services. CP 65-75. This was not “conscious ignorance,” although possibly an excess of trust.

As noted in appellant’s opening brief, a party’s negligence in failing to discover that an invoice is not an honest, accurate statement of the parties’ negotiated contract does not deprive him of his remedy. *Gammel v. Diethelm*, 59 Wn.2d 504, 508, 368 P.2d 718 (1962) (quoting 3 Corbin on Contracts § 614, p. 730). Negligence in failing to ascertain that a writing is correct does not bar the remedy of reformation in the case of mistake. *Wash. Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 529-31, 886 P.2d 1121 (1994). The rules governing mistake are based in equity, which relieves a negligent party from the burden of his mistake when the other party is charged with knowing of it. *Basin Paving, Inc. v. Port of Moses Lake*, 48 Wn. App. 180, 185, 737 P.2d 1312 (1987). Rather, negligence does not bar reformation “except under extreme circumstances, which include a failure to act in good faith or to abide by reasonable standards of fair dealing.” *Wash. Mut. Sav. Bank*, 125 Wn.2d at 531.

In determining whether summary judgment should be reversed, Northwest Cascade is entitled to the benefit of all reasonable inferences in its favor. It is reasonable to infer that that Associated Petroleum deliberately undertook to unilaterally modify its fleet fueling contract with Northwest Cascade by imposing additional charges in a manner least likely to draw notice and objection. It is reasonable to infer that

Associated Petroleum had reason to know that Northwest Cascade was unaware that the invoices after December 31, 2005, were no longer consistent with the parties' agreement. A reasonable finder of fact could certainly find that Northwest Cascade is entitled to recover the amounts it mistakenly paid to Associated Petroleum in January, February, and March, 2006. Under these circumstances, summary judgment should be reversed.

III. CONCLUSION

Northwest Cascade presented ample evidence of Associated Petroleum's failure to give notice that it intended to impose new charges for fleet fueling service without obtaining Northwest Cascade's assent. Associated Petroleum failed to meet its burden that it was entitled to judgment as a matter of law.

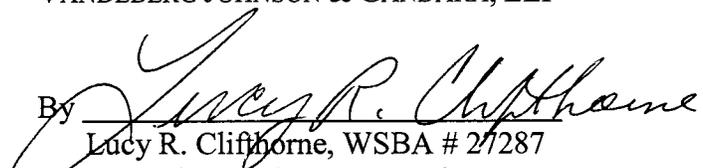
Northwest Cascade respectfully asks that the trial court's orders granting summary judgment and awarding fees and costs to the respondent be reversed. In addition, Northwest Cascade asks that its fees be awarded on appeal, pursuant to the parties' contract, CP 46, and RAP 18.1.

DATED this 28th of May, 2008.

Respectfully submitted,

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By


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NORTHWEST CASCADE, INC.,)	
)	
Appellant,)	No. 36834-0-II
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v.)	CERTIFICATE OF
)	SERVICE
ASSOCIATED PETROLEUM)	
PRODUCTS, INC.,)	
Respondent.)	

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I personally delivered a true copy of Appellant's Reply Brief to the attorney of record for Respondent, at his last known business address as follows:

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Tacoma, WA 98401

Dated this 28th day of May, 2008, at Tacoma, Washington

[Signature]
KAREN L. GORDON