

FILED
COURT OF APPEALS
DIVISION II

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Division II, Docket No. 40194-1-II

STATE OF WASHINGTON

Pierce County Superior Court No. 08-2-06664-4

DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON**

DIVISION II

CATHERINE HILL, a single individual,

Plaintiff/Appellant,

v.

WINDSONG VILLAGE APARTMENTS, a business licensed to conduct
business in the state of Washington, SONYA RENA SHORTER, an
individual, and N.R.B. PROPERTY MANAGEMENT, a business
licensed to conduct business in the state of Washington,

Defendants/Respondents.

REPLY OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

Table of Authorities.....	ii-iii
I. INTRODUCTION.....	1
II. ADDITIONAL STATEMENT OF FACTS.....	1-2
III. ARGUMENT	2
1. Respondents had more than sufficient notice of Appellant’s amended claims, which Respondents attacked throughout the summary judgment and motion for reconsideration proceedings.	2-5
2. The economic loss rule is inapplicable under the breach of a covenant to repair theory, which is categorized as a tort, not a contract, claim.	5-6
3. Respondent continues to erroneously reply on Dexheimer v. CDS, Inc., 104 Wn. App. 464, 17 P. 3d 641 (2001), a case that was overruled by the same court two years later in Tucker v. Hayford, 118 Wn. App. 246, 74 P.3d 980(2003).	7-9
4. Appellant was not barred from pursuing her claims against Respondents because the legal theories she alleged did not require that the defect be latent.	9-10
5. The level of “dangerousness” is a question of fact.	11-15
6. The trial court’s classification of the damage to the carpet as wear and tear was not resolved in the light most favorable to Appellant, the non-moving party at summary judgment.	15-17

TABLE OF CONTENT (cont.)

7. Respondents’ own agents believed the damaged carpet was unsafe and created an unreasonable risk of harm. 17-18

IV. CONCLUSION..... 18-19

V. DECLARATION OF SERVICE 20-21

TABLE OF AUTHORITIES

CASE CITATIONS

Atherton Condominium Apartment-Owners Association Board v. Blume Development Co. 13
115 Wn.2d 506, 799 P.2d 250 (1990)

Brown v. Hague 17, 18
105 Wn. App. 800, 21 P.3d 716 (2001)

Dexheimer v. CDS, Inc. 7
104 Wn. App. 464, 17 P.3d 641 (2001)

Lian v. Stalick 12
115 Wn. App. 590, 595, 62 P.3d 933 (2003)

Lightner v. Balow 4
59 Wn.2d 856, 370 P.2d 982 (1962)

Pinckney v. Smith 11-14
484 F.Supp.2d 1177 (W.D Wash. 2007)

Teglo v. Porter 6, 9, 10
65 Wn.2d 772, 399 P.2d 519 (1965)

TABLE OF AUTHORITIES (cont.)

Tucker v. Hayford 7, 8, 10
118 Wn. App 246, 75 P.3d 980 (2003)

Williams v. Western Surety Co.
6 Wn. App 300, 492 P.2d 596 (1972) 4

STATUTES

Revised Code of Washington 59.18.060 12

Revised Code of Washington 59.18.060(1) 8

Revised Code of Washington 59.18.060(5) 8, 16

Revised Code of Washington 59.18.090 8

REGULATIONS

RAP 2.5 (a) 3

OTHER AUTHORITY

Restatement (Second) of Property §17.6..... 11

Restatement of Torts §357 *Comment a* (1934) 10

Uniform Landlord Tenant Act 8

I. **INTRODUCTION**

Appellant Catherine Hill appealed the trial court's decision because it was reversible error for the Court to decide certain issues of fact that should have been left to the jury. Those facts were material to Appellant's case and the determination of those facts by the trial court affected Plaintiff's ability to bring claims under one or more theories of liability. Summary judgment should not have been granted at the trial level.

II. **ADDITIONAL STATEMENT OF FACTS**

At the time Appellant moved to amend her Complaint, she filed in Pierce County Superior Court her motion to amend and served a copy on Respondents. CP 55 – 72. Attached to the motion was a clean copy of the Amended Complaint that Appellant was requesting the Court to accept in place of her original Complaint. CP 64 – 70. Both the trial court and opposing counsel had notice of the contents of Appellant's Amended Complaint. Appellant confirms that, subsequent to the trial court granting her motion to amend, Appellant did not file the same Amended Complaint with the Clerk of Court.

Throughout summary judgment and the reconsideration hearing, both Appellant and Respondents focused on the causes of action raised in

Appellant's Amended Complaint, a copy of which was served on Respondents as an exhibit to Appellant's Motion to Amend.

Although Respondents never formally answered the Amended Complaint, they had three opportunities to respond fully to the amended causes of action, which they did, at three different times: in their motion and reply in support of summary judgment and in response to Appellant's Motion for Reconsideration.

III. ARGUMENT

1. Respondents had more than sufficient notice of Appellant's amended claims, which Respondents attacked throughout the summary judgment and motion for reconsideration proceedings.

In their reply brief on appeal, Respondents raised, for the first time, the issue of Appellant's failure to formally file an Amended Complaint pursuant to the court rules. Up until the reply brief, Respondents had always maintained the position that Appellant could not prevail on the claims she alleged in her amended complaint, not because she failed to officially file the pleading with the court clerk, but because Respondent alleged that there were no genuine issues of material fact for the jury as it relates to those claims.

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RAP 2.5(a) provides in its entirety as follows:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RAP 2.5(a).

Respondents cannot raise the issue of the failure to officially file the Amended Complaint for the very first time on appeal if they did not raise the issue at the trial court level. The record at the trial level is replete with substantive arguments by Respondents about why they believed

Appellant could not prevail on the various claims she pled in her amended complaint. Not once did Respondent object to Appellant's claims based on the fact that she did not formally file her amended complaint. There is no record at the trial level regarding any objection by Respondents as to Appellant's failure to file the Amended Complaint with the court clerk. Respondents' failure to object at the trial level amounts to a waiver of such an argument.

But more importantly, Respondents were given more than fair notice of the claims being asserted by Appellant in her amended complaint and Respondents cannot dispute or deny that. Under our liberal rules of procedure, pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim being asserted. Lightner v. Balow, 59 Wn.2d 856, 370 P.2d 982 (1962). Although inexpert pleading has been allowed under the civil rule, insufficient pleading has not. Williams v. Western Surety Co., 6 Wn. App 300, 492 P.2d 596 (1972). A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests. Id.

Although Respondents claimed they were not given the opportunity to answer the Amended Complaint, they certainly took advantage of three occasions to respond fully and substantively, to Appellant's amended claims. Respondents addressed the amended claims

in their summary judgment motion and reply briefs and in their response to Appellant's Motion for Reconsideration. The trial court record only supports the fact that Respondents received more than fair notice of Appellant's amended claims. Respondents cannot now claim they were prejudiced by Appellant's failure to formally file the Amended Complaint.

Appellant urges this Court not to be derailed by Respondents' argument regarding the failure to formally file the amended complaint, an issue Respondent failed to raise at the trial level. Respondents chose to respond substantively to the amended claims, essentially waving the argument that Appellant violated a procedural rule. The true issue is whether or not Respondents had fair notice of Appellant's amended claims and Respondents cannot dispute or deny that they did.

2. The economic loss rule is inapplicable under the breach of a covenant to repair theory, which is categorized as a tort, not a contract, claim.

Contrary to Respondents' assertion in their reply brief, Appellant did assign error to the trial court's classification of a covenant to repair as a contract claim. Appellant argued extensively in her initial brief that the economic loss rule was inapplicable to her case because the covenant to repair theory is based on a tort duty which, if breached, provides for personal injury damages. But, Respondents did not address in their response brief why they believe the covenant to repair theory is a contract

claim. They simply distinguished the difference between contract and tort remedies in general and moved on.

The Washington Supreme Court in Teglo v. Porter, 65 Wn.2d 772, 399 P.2d 519 (1965), which has not been overruled, categorized the duty to repair as a tort duty and provided for the recovery of tort damages in the event the covenant is breached. This ruling cannot be made any clearer.

In Teglo, the plaintiff tenant was severely injured as a result of the defendant landlord's breach of a covenant to repair. Although it may be rooted in a contract (lease agreement), the Court specifically held that the breach of this covenant provided for personal injury damages. The Court did not discuss the applicability of the economic loss rule because it did not categorize the covenant to repair as a contract claim and, therefore, the Court did not believe the economic loss rule was implicated. If we were to accept Respondent's and the trial court's argument regarding the applicability of the economic loss rule to cases involving the breach of a covenant to repair, it raises the question as to why the Teglo Court did not bar the plaintiff tenant from recovering personal injury damages. The only logical conclusion is that the Court did not categorize the breach of a covenant to repair as a contract claim and, therefore, the economic loss rule did not apply.

3. **Respondent continues to erroneously rely on *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 17 P.3d 641 (2001), a case that was overruled by the same court two years later in *Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003).**

Respondents continue to rely on *Dexheimer*, 104 Wn. App. 464, 17 P.3d 641 (2001), to suggest that the Washington Residential Landlord Tenant Act of 1973 (WRLTA) does not allow injured tenants to recover monetary damages for breach of the landlord's duties under the lease agreement. But, two years after *Dexheimer* was published, Division III overruled *Dexheimer* with respect to the decision regarding an injured tenant's inability to recover monetary damages under the WRLTA.

In *Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003), a case involving contaminated drinking water on the landlord's property, the court stated at the beginning of its decision the following:

In *Dexheimer v. CDS, Inc.*, *supra*, we concluded that the remedies available to a tenant under the Landlord-Tenant Act were limited to those outlined in the statute. *We were wrong. (Emphasis added).*

Tucker v. Hayford, 118 Wn. App. at 248.

The *Tucker* Court reiterated that the WRLTA required landlords to "keep the premises fit for human habitation and to particularly maintain

the premises in substantial compliance with health or safety codes for the benefit of the tenant.” RCW 59.18.060(1). This required the landlord to make repairs, except in the case of normal wear and tear, necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy. RCW 59.18.060(5). The Court recognized that the WRLTA provided for certain remedies, including “any remedy provided by law.” RCW 59.18.090.

The Tucker Court ruled that an injured tenant’s remedies were not limited to those listed in the statute and allowed for a cause of action for injuries sustained as a result of the breach of the WRLTA. The Court recognized that other states who modeled after the Uniform Landlord Tenant Act, just like Washington did, allowed a cause of action for injury sustained as a result of the breach of such statutory duties and that Washington commentators agreed with the reasons behind the rule.

The Tucker decision is not binding on this Court, but Appellant urges this Court to consider the policy behind requiring landlords to maintain and repair leased premises to keep tenants safe. It would be inconsistent to impose this duty to repair on a landlord, but then exempt the landlord from liability for injuries sustained by his or her tenant as a result of the landlord’s breach of that duty. The usual remedies of repair and deduct or lease termination are insufficient solutions for a tenant who

relied on the landlord's promise to repair damage or defects on the leasehold but was injured because the landlord failed to keep his end of the bargain after accepting rent payments from the tenant. Contract remedies simply fall short of fairness and equity in cases where landlords accept rent and benefit from such rent while ignoring the duties they agreed to assume in exchange for such benefit. It is unfair to this Appellant.

4. **Appellant was not barred from pursuing her claims against Respondents because the legal theories she alleged did not require that the defect be latent.**

Respondents argued that Appellant cannot recover damages because the damaged carpet in her apartment unit was patent. However, Appellant did not allege a cause of action under the latent theory of liability. Appellant recognizes that she would not have a cause of action against Respondents had there not been a covenant to repair at issue. But there was such a covenant in this case.

The Teglo Court, which clearly set out the covenant to repair theory, adopted portions of the Restatement Second of Torts which confirms that the defect need not be latent:

The lessor's duty to repair...is not contractual but a tort duty based on the fact that the contract gives the lessor ability to make the repairs and control over them...Unless

the contract stipulates that the lessor shall inspect the premises to ascertain the need of repairs, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs.

Teglo v. Porter, 65 Wn. 2d at 774 – 775 (emphasis added) (quoting RESTATEMENT OF TORTS § 357 cmt. A (1934)).

Notice then becomes the issue when the particular condition is inside the residence where the landlord has no right to enter. Tucker v. Hayford, 118 Wn. App. at 252.

Based on the principles above, it is clear that the defect under analysis pursuant to a covenant to repair need not be latent. Therefore, Appellant is not barred from bringing her claims due to the fact that the damaged carpet was known to her. In fact, in order for Respondents to be held liable here, Appellant had to notify Respondents of the defect, which she did. There is sufficient evidence in the trial court record regarding Appellant's notification to Respondents about the damaged carpet and her pleas to have the defect repaired.

5. The level of “dangerousness” is a question of fact.

Respondents also argued that they are not liable to Appellant because the damaged carpet was not unreasonably dangerous and that the analysis in Pinckney v. Smith, 484 F.Supp.2d 1177 (W.D. Wash. 2007) only confirms that Appellant cannot raise a question of fact because the damaged carpet did not substantially impair her health or safety.

The level of dangerousness is a question of fact. Pinckney v. Smith, 484 F.Supp.2d 1177, 1184 (W.D. Wash. 2007). In Pinckney, the plaintiff tenant rented a home from defendant. The home had an unfinished basement that had to be accessed using an exterior stairway, which had six steps and no handrails. Plaintiff was injured when she stepped on the exterior stairway and lost her balance when the heel of her shoe got caught on the cuff of her pants, causing her to lose her balance and fall to her right, fracturing her femur. Plaintiff sued the defendant landlord for failing her duties as a landlord and breaching the warranty of habitability when she failed to install a handrail on the stairway.

The plaintiff brought suit under Restatement (Second) of Property § 17.6, which is one of the claims asserted by this Appellant. According to the court, the tenant must show that the (1) condition was dangerous; (2) landlord was aware of the condition or had reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the

condition; and (3) the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. Pinckney v. Smith, 484 F.Supp.2d at 1180 (citing Lian v. Stalick, 115 Wn. App. 590, 595, 62 P.3d 933 (2003)).

The defendant landlord in Pinckney conceded that the first element, whether the condition was dangerous, was indeed a question of fact. Pinckney v. Smith, 484 F.Supp.2d at 1180. However, defendant argued that the plaintiff could not raise an issue of fact on the remaining two elements. Id.

Of relevant importance to the instant case is the defendant's acknowledgement and the court's approval that the issue as to whether the condition was dangerous was a question of fact. The court's analysis of the third element involving a violation of an implied warranty of habitability or a duty created by statute or regulation is also relevant and important to the instant case.

The Pinckney Court ruled that a landlord is in breach of Washington's statutory warranty of habitability if the landlord fails to maintain the premises in compliance with applicable building ordinances or regulations. Pinckney v. Smith, 484 F.Supp.2d at 1182. But, the defective condition must also be dangerous. RCW 59.18.060.

The Pinckney Court acknowledged the absence of controlling Washington law regarding what conditions are sufficiently dangerous to qualify a residence as uninhabitable. The Washington Supreme Court has not decided the issue and the appellate courts (Division I and III) are divided on the issue. But the Pinckney Court reiterated the Washington Supreme Court's position in Atherton Condominium Apartment – Owners Association Board v. Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990), declining to apply a bright line rule to determining the issue of dangerousness, stating that violations of the warranty of habitability should be determined on a case-by-case basis. Pinckney v. Smith, 484 F.Supp.2d at 1183.

The Pinckney Court considered all the competing case law and concluded that the question of whether a condition is sufficiently dangerous to violate the warranty of habitability is ultimately one of degree and the analysis must be whether the building code violation substantially endangered or impaired plaintiff's health or safety. Id. at 1184. The Pinckney Court then recalled the evidence presented by plaintiff, including photos of the stairway without handrails, and the admission by defendant that the stairway failed to comply with local building codes. Based on the evidence, the Court ruled that plaintiff

tenant raised an issue of fact as to the level of dangerousness posed to her health or safety which was sufficient to preclude summary judgment.

This Court has not yet decided what conditions are sufficiently dangerous and Appellant urges this Court to consider the Pinckney case as it relates to the analysis of the warranty of habitability, as well as the analysis of what constitutes an unreasonable risk of harm under the covenant to repair theory.

The evidence in the instant case is sufficient to raise an issue of material fact as to what constitutes “sufficiently dangerous” to preclude summary judgment. There is no dispute that Appellant notified Respondents of the damaged carpet more than once. It was Respondents’ own agents who determined that the damaged carpet in Appellant’s apartment was so unsafe that they believed it needed to be repaired. In fact, when Appellant first notified Respondents of the damage, she told Karen Curry, the property manager at the time. Ms. Curry saw the carpet and believed that it needed to be repaired because it was unsafe. CP 122. She believed it posed a serious danger and admitted she had to contact the owner, Respondent Sonya Shorter, to inform her of the problem. CP 122. Ms. Curry indicated she was in the process of getting a repair estimate for the carpet when she was terminated as the property manager. CP 122. It is safe to assume that Respondent Shorter agreed that the

carpet posed a serious threat to Appellant's safety that she authorized Ms. Curry to obtain the estimate to repair the defect, which never happened.

When Nash Alarcon was subsequently hired as property manager, he, too, had the opportunity to examine the damaged carpet at the insistence of Appellant. Mr. Alarcon admitted that the carpet should have been repaired, but he knew afterward that it had not been repaired prior to Appellant's accident. CP 128.

Appellant took pictures of the defective carpet showing the condition of the damage and the huge slit in the carpet that ultimately caused Appellant to trip and seriously injure herself.¹

6. The trial court's classification of the damage to the carpet as wear and tear was not resolved in the light most favorable to Appellant, the non-moving party at summary judgment.

Mr. Alarcon admitted that when he first saw the damaged carpet in Appellant's apartment, he believed Appellant's cats caused the damage and told Appellant that she was responsible for the repair. CP 126, 128. This damage, which was in the hallway of Appellant's apartment leading from the bedroom and bathroom area to the living room and front door, did not exist in any other part of the apartment. The carpet extending

¹ These pictures were submitted to the Pierce County Clerk of Court as part of the Joint Statement of Evidence in preparation for trial which never happened. The exhibits were returned to Appellant unfiled as a result of summary judgment being granted in favor of Respondents.

into the other parts of the apartment were in good condition and without damage. After Mr. Alarcon informed Appellant that she was responsible for the damage, Appellant asked Mr. Alarcon to go ahead and repair the damage, which Appellant believed Respondents were obligated to do especially since they already took her \$600.00 deposit to cover pet damage in the apartment.

Classifying the damaged carpet as normal wear and tear was not beneficial to Appellant, nor was it decided in the light most favorable to Appellant. By finding the damage as normal wear and tear, the trial court barred Appellant from bringing an action under WRLTA's statutory provision requiring landlords to "make repairs, *except in the case of normal wear and tear*, necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy. RCW 59.18.060(5). (*Emphasis added.*)

The trial court prejudiced Appellant with its erroneous determination regarding the damage being caused by normal wear and tear. The evidence does not support the trial court's classification and Respondents are wrong to suggest that they would be insulated from any liability if the trial court ruled the damage to the carpet was caused by Appellant's pets. Respondents would clearly be held liable in this case because they already took Appellant's pet deposit to cover exactly this

kind of damage. Of course, the record shows Respondents did not make any repair whatsoever.

7. Respondents' own agents believed the damaged carpet was unsafe and created an unreasonable risk of harm .

Respondent then argued that Brown v. Hague, 105 Wn. App. 800, 21 P.3d 716 (2001) was directly analogous to the instant case in that the defect complained of in both cases did not rise to the level requiring the landlord to be held liable for injuries sustained by the tenant. Respondents are wrong.

In Brown, the plaintiff tenants rented a home from the defendants to use as a residential home care facility for the elderly. The front door had a high threshold which no one considered unsafe, just inconvenient for pushing wheelchairs in and out of the home. Plaintiff was injured one day when she walked out the front door, turned to step back in, and caught her shoe on the threshold. Plaintiff fell, striking both shins on the threshold, causing severe damage to both of her lower legs. Plaintiff sued defendants, alleging that defendants breached their duty to provide their tenants with safe premises. Id., 105 Wn. App. at 802 – 803.

The Brown Court found that the defect was in a common area and that no one considered the high threshold as unsafe or defective, but only as an inconvenience to the tenants and their guests. The Court further

found that the high door sill was not unusual that it was considered defective or unsafe. The Court reasoned that the defendants were only obligated to do something about the door sill if it was unsafe. But, since no one considered it to be unsafe, the Court found that defendants' had no duty to repair the threshold. Id., 105 Wn. App. at 805 – 806.

The facts in the instant case are not analogous to Brown. First, the defect in the instant case was in the leasehold, not in a common area. Second, at least three people (Appellant, Ms. Curry, and Mr. Alarcon – the last two being agents of Respondent) believed the damaged/defective carpet was unsafe and posed an unreasonable risk of harm. It is undisputed that Respondents in the instant case had notice on more than one occasion, but failed to carry out their duty to Appellant. Now, Respondents are changing their story to say that the damaged carpet, like the door sill, was not unsafe. Respondents are wrong. Their own property managers, Ms. Curry and Mr. Alarcon, testified that they believed the damaged carpet was unsafe and that it needed to be repaired.

IV. CONCLUSION

The trial court erred in dismissing Appellant's lawsuit after it determined as a matter of law certain facts that should have been left to the jury. Appellant lost her right to her day in court because the trial court took it upon itself to decide that the defect was not unreasonably

dangerous, that the damage was due to normal wear and tear and that the economic loss rule barred Appellant any monetary recovery for her severe injuries.

Based on the arguments raised above, this Court should reverse the decision of the trial court and allow Appellant to proceed to trial on her claims against Respondents.

Respectfully submitted this 11th day of October, 2010.

LAW OFFICES OF D. MICHAEL TOMKINS, INC., P.S.

A handwritten signature in black ink, appearing to read 'D. Michael Tomkins', is written over a horizontal line. The signature is stylized and cursive.

D. Michael Tomkins, WSBA #4979
ATTORNEY OF APPELLANT

COURT OF APPEALS DIVISION II OF THE STATE OF
WASHINGTON

CATHERINE HILL, a single
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WINDSONG VILLAGE
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RENA SHORTER, an individual,
and N.R.B. PROPERTY
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licensed to conduct business in the
state of Washington,

Respondents.

Pierce County Superior Court No.
08-2-06664-4
Court of Appeals, Division II No.
40194-1-II

DECLARATION OF SERVICE
OF APPELLANT'S REPLY

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
SONYA THACH
PROPERTY

I, Sony Thach, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein. My address is 8420 Dayton Avenue North, Seattle, WA 98103.

2. On October 11, 2010, I served the following document on the individuals named below, in the specific manner indicated:

Appellant's Reply

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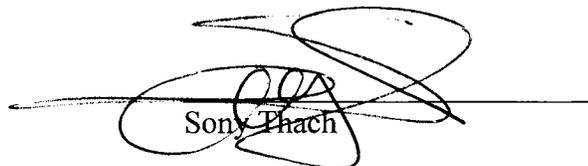
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

EXECUTED this 11th day of October 2010, at Seattle,
Washington.


Sony Phach