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COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON  
DIVISION II

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NO. 44473-9-II

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FRANK HENSLEY and MARLYCE HANSEN, Appellants

V,

HERITOR, INC. , et al, Respondents

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BRIEF OF RESPONDENTS

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Laurason T. Hunt  
Attorney at Law  
WSBA # 910  
9522 Oak Bay Rd. # 100  
Port Ludlow, WA 98365

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## **RESPONSE TO INTRODUCTION**

Appellants distort the facts in their introduction. There are actually 99 lots in the Ripplewood community which are under private ownership. There are currently 19 lots hooked up to the water system. That is because only 19 lots have requested water service and paid the required water hook up fees. Water service is available to every lot in the plat.

Because of changes of the requirements by the Department of Health it has put a moratorium on new hook ups until there is an increase in the gallon per minute flow capacity of the system. The Department of Health will approve an application for additional hook ups when the applicant pays the required hook-up fee and the money is used to improve the system for the required increase in capacity. As will be shown the testimony conclusively showed that the Appellants can have water hooked up if they request their lots to be hooked up. They will be required to pay the current hookup fees. Mr. Hensley testified that he has not requested his lots to be hooked up to the system; has not tendered the required hookup fee and doesn't want water to be hooked up to his lots.

## **RESPONSE TO ASSIGNMENTS OF ERROR**

1. Finding of Fact No.1 is supported by substantial evidence. The Appellants relied on the Declaration which provides that the owner of the lots must hook up to the system; pay the hookup fees and use the system.

When it is installed and approved by the Department of Health..

2. Finding of Fact No. 2 is supported by substantial evidence.

Appellants have not hooked up to the system because they have not requested to be hooked up nor tendered the required hookup fees.

Appellant Hensley testified he does not want water to his lots to be hooked up.

3. Finding of Fact No. 3 is supported by the total lack of evidence of having no legal basis nor was frivolous.

4. There was a lack of evidence presented by the Appellants that Respondents committed a violation of the Washington State Consumer Protection statute RCW. 19.86 et seq

4. The Trial Court did not err in dismissing Appellants' case.

## **STANDARD OF REVIEW**

The trial court at the conclusion of the Appellants' case granted a motion to dismiss. The court reviewed the evidence and entered Findings of Fact and Conclusions of Law. The standard of review is whether substantial evidence supports the trial court's finding of facts and its conclusion of law. *Nelson Constr. Co. of Ferndale, Inc v. Port of Bremerton*, 20 Wn, App, 321,327, 582 P.2d 511 (1978).

## **RESPONSE STATEMENT OF THE FACTS**

The Plat of Ripplewood Tracts was approved by Mason County on August 7, 1967. Ex. 2. The plat contained a covenant regarding building a private water system for the entire plat. The covenant is as follows in part:

“Seller agrees to install a water system upon sale of 50% of the lots or within two years time for the use of Buyer and Buyer agrees to use said water system when it is Installed and approved by the Public Health Department of the State of Washington. Buyer Agrees to pay to Seller promptly upon completion of his hookup a hookup charge therefore not to exceed \$85.00. From the time water is delivered to Buyer's lot by said

hookup, Buyer agrees to pay a monthly use charge based on the rates established by the Washington State Public Service Commission. Et seq.” Exhibit 2; CP 48 P. 3 lines 8-19.

The Appellants relied on the covenant as authority for their claims. The covenant had a duty for the lot owners to hook up to the system and to use the system which Appellants ignored.

Appellants knew in 1998 that they could hook up their lots to the water system. RP 66 line 9; Exhibit 10; they knew the hook up fees due in 1999 were \$2,500. RP page 78 lines 21-23; RP page 75 lines 8-23.. However Appellant testified he doesn’t need water; doesn’t want water to be hooked up to his lots. RP page 95 lines 11-16. Plaintiff testified he hasn’t requested to be hooked -up. RP page 108 lines 18-20. In fact he doesn’t intend to hook up to the water system. RP page 103 lines 21-24.

Appellants rested their case in chief. RP page 109 lines 13-14. The Respondents then made a Motion to Dismiss the complaint for failure to present evidence to support their claims RP page 109 line 19- RP page 110 line 9. Appellants moved to re-open which was granted. RP Page 110 lines 20-22.

Appellant's continue to allege that Miller Utilities Ltd owns the lot the well is located and then they state without support that it owns an interest in the water system. The issue of Miller Utilities Ltd ownership of both the lot and the water system was denied in the pleadings and at issue. The Answer only admitted that Miller Utilities LTD was the owner of record but denies that it is the true owner of the lot and denies it is the owner of the water system. CP 31, 59, RP page 2 lines 4-5, lines 6-9, lines 21- page 3 lines 1-12.. After Appellants re-opened the case they had their opportunity to inquire of Mr. Miller as to what water systems Miller Utilities owns. The evidence proffered by their questioning is that neither Miller Utilities Ltd nor Mr. Miller owns an interest in the Ripplewood Water System. RP page113 lines 1-13. That testimony was not rebutted.

Appellants mischaracterize the status of the water system. The statements on page 5 of their Brief reported on RP page 29 lines 22-25 are answers to the questions formed by counsel. The entire Ripplewood plat is served by the water system. Mr. Hensley testified that he knew that the water system operated in a green capacity and that additional hook-ups were available Exhibit 10; RP 75 lines 14-23. Further he knew that the

hook-up fees were \$2500 RP page75 lines 8-13.

Appellants misstate the status of the water system with the Department of Health. The testimony of Mr. Shuck, a Registered Sanitarian and a licensed water distribution manager RP page129 lines 14-20 who is responsible for hooking up new customers at the Ripplewood water system RP page124 lines 8-13. He testified that there is a connection valve for every lot in the development. RP. Page 128 lines 17-19. Mr. Shuck testified that six additional hook-ups would be approved by the Department of Health based on improvements to the system to increase flow capacity from 50 gallons a minute to 63 gallons a minute. The cost of the improvements would be basically \$17,768 . RP page 132 lines 9-page 133 line 1. Since the hookup fees were \$2500 in 1999 and have likely increased those fees would have paid for the costs of improvements. Mr. Shuck further testified as follows:

“Hook-up fees are charged by most water systems that is the cost of doing business, the cost of adjusting. As time moves on, the state’s requirements change; what they require in testing and follow-up; the minimum standards change and the cost to provide service goes up

with time. Hence costs go up with time. Generally when new connections happen is a time or an opportunity for the water system to recoup some of those costs and as well and establish funds for future improvements as well. So it not only -it retroactively pays for improvements that may have been done in the past, but also looks to the future. RP 133 line 9-24,

The system could not survive without charging new customers hook-up fees. RP page134 lines 1-4.”

Appellants stated that there is no point in hooking -up until they have a building permit or a permit for a trailer or a plan to use the water. RP page 108 lines 21- RP page 109 lines 2. The same is true for any buyer of their lots. RP page 109 lines 3-5. This of course is in derogation of the requirements of the Declaration.

The trial Court granted the motion to dismiss stating that Mr. Hensley testified that he didn't want – didn't need the water. Without that the Court would grant the motion to dismiss, finding that the Plaintiffs have failed to establish that there is a breach and of course there 's no Consumer protection claim. RP page 140 lines 18-24.

## **RESPONSE ARGUMENT**

Appellants cite WAC-290-420 to require that public water systems shall provide an adequate quantity of water in a reliable manner at all times consistent with the requirements of this chapter. Appellants argue without authority that this duty exists as a matter of law and does not rise upon a request for service or payment of a fee. Hook up fees or latecomer fees are always charged whether by private water systems or public water systems to reimburse the system for the expense of developing the water system of pumps, storage capacity and underground water lines. Their statement appears to be the basis of the Appellants argument that this water system should expend the several thousands of dollars to improve the water system to be consistent with the current Department rules which have changed substantially over the 40 plus years to serve all 99 lots even though 80 lot owners have declined to pay the hook up fees and the usage fees. As Mr Shuck testified , “ The system could not survive without charging new customers hook-up fees” RP page 134 lines 1-4.

The system is currently operating pursuant to the requirements of the Department of Health in a green capacity. It will approve additional

hook-ups when requested and the system has the capacity to increase the water flow from 50 gallons a minute to 63 gallons a minute. That of course requires the system to spend approximately \$ 17, 768.00 to improve the system.

Appellants submit that *Brown v. Charlton*, 90 Wn. 2d 362, 366 583 P2d 1188 (1978) is authority for an equitable burden on the well water and the water system. The facts of *Brown* are totally inapplicable here. In *Brown* the Personal Representative of the owner/developer decided to shut down the water system leaving 14 customers who had hooked up to the system without water.

The subsequent case law cited by the Respondents is inapplicable because as the trial court found the evidence presented by the Appellants does not support a finding of a violation. In fact the Appellants testified that he didn't want or need water and no indication that they were going to hook-up to water.

### **FRIVOLOUS APPEAL**

Respondents assert that this appeal is frivolous pursuant to RAP

18.9 ( c)( 2) and entitled to an award of attorney fees pursuant to RAP.18.1 Appellants failed to present any evidence to support their causes of action set forth in their Second Amended Complaint, CP 48. Those Causes of Action are as follows:

5.1 Defendants Miller Utilities Ltd and/or Heritor LLC (sic) breached their duty to provide water service to meet reasonable domestic needs for the lots owned by the plaintiffs.

5.2 The Lien referenced in paragraph 4.14, is frivolous, and constitutes an unfounded cloud upon plaintiffs title.

5.3 The acts and practices of each of the defendants are unfair and deceptive acts or practices in the conduct of trade or commerce, in violation of Chapter 19.86 RCW.

The only evidence produced by the Appellants at trial was that they knew in 1998 and 1999 that they could hook up their lots to the water system and that the required hook up fees were \$2500 per lot. However the testimony was conclusive that they had not requested water to be hooked up to their lots, had not tendered the required hookup fees, did not need water, did not want water, and no indication they were going to hook up to

the water system. There of course was absolutely no breach of duty by the Respondents.

Further the Appellants produced no evidence that Miller Utilities LTD owned the water system and in fact only produced evidence that Miller Utilities LTD did not own the system at any relevant time in the past.

The Appellants produced no evidence regarding the lien whatsoever.

The Appellants produced no evidence to support a breach of duty to provide water service to the Appellants;. to the contrary the evidence produced disclosed that they could hook up to the water system and that they were in breach of their duty to hook up and pay for water usage pursuant to the Plat Declaration.

The test is in *Streater v. White*, 26 Wn..App. 430,434 (Div 1), 613 P. 2d 187 (1980). This appeal has produced no debatable issues upon which reasonable minds might differ and is so totally devoid of merit that there is no reasonable possibility of reversal and brought for the purpose of delay;

**CONCLUSION**

Respondent' s respectfully request that this appeal be denied and that Respondents recover an award of attorney fees pursuant to RAP 18.1

Dated April 1, 2014

Respectfully submitted,

THE HUNT LAW OFFICES

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Laurason T. Hunt  
Attorney for Respondents  
WSBA # 910

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

FRANK M. HENSLEY and MARLYCE )  
A. HANSEN, husband and wife, )  
 )  
 Appellant, )  
 v. )  
 )  
 )  
HERITOR, Inc., NOELE TIFFANY, )  
JOHN DOE TIFFANY, MILLER )  
UTILITIES, LTD., G. MILLER , JANE )  
DOE MILLER, the marital community )  
of G. MILLER and JANE DOE MILLER, )  
and R. UTILITIES CO., )  
 Respondents. )  
\_\_\_\_\_ )

**NO. 44473-II**

**DECLARATION OF SERVICE BY MAIL**

Laurason T. Hunt states under the penalty of perjury pursuant to the laws of the State of Washington that the following is true and correct.

On April 2, 2014 I placed in the U. S. Mail postage prepaid to

Michael G. Gusa  
Attorney at Law  
1700 Cooper Point RD . SW Bldg A-3  
Olympia, WA 98502

Court of Appeals of the State of Washington Div II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

The following documents.

1. Respondents' Appeal Brief
2. Letter to the Appeals court dated April 1, 2014.

Dated April 2, 2014

A handwritten signature in black ink, appearing to read "Laurason T. Hunt", written over a horizontal line.

Laurason T. Hunt WSBA # 910  
Attorney for Respondents