

APR 16 2012

No. 301656

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Lance J. Gonzales and Diana D. Kassap,

Petitioners,

v.

Pacific Northwest Title Company of Spokane, Inc., and First American
Title Insurance Company,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. REVIEW OF PERTINENT FACTS

Buyers contracted with Defendant Title Company in 2006 to close a real estate purchase and to provide title insurance. (CP at 230; CP at 236; 43, #3; CP at 71, #2; CP at 75). A manufactured mobile home (“home”) was on the property and the home retained its Washington State Department of Licensing (“State DOL”) personal property title (in essence, it was still licensed as a trailer). (CP at 236, #III; CP at 230, #4). Therefore, Buyers and bank lender made the elimination of the State DOL title to the home, which necessarily includes the legal recording of the home as real property, an express contingency of sale. (RCW 65.20.020 (3)).

Thus, the Contract for Sales and Purchase (“Contract”) was for the purchase at closing (“Closing”) of both the real estate (“land”) and the home together, as real property. The Contract therefore expressly required as a condition of purchase that the elimination of title to the home be completed at Closing since this legal process requires the home to be recorded with the County as real property.

Before the State would accept the application for the elimination of the State DOL title, it required that the local County where the property was situated first certify that there was a building permit on file for the home. (WAC 308-56A-505 (3)(b)). Defendant requested a copy of the

building permit for the home, if one existed, from the Spokane County Building and Planning Department (the record is silent as to whether Defendant requested more than one permit). (CP at 30, ln 24). The County responded to the request on May 11, 2006, by faxing to Defendant a permit associated with the land. However, the permit was not a building permit and did not apply to the existing home. (CP at 221, #20; CP at 83, see fax date/time/sender stamp; compare dimension and description to CP at 257, CP at 47, #1).

Defendant did not advise Buyers that the home apparently had no building permit. In fact, is no building permit. (CP at 221, #20). Instead, Defendant represented to Buyers at Closing on June 6, 2006, that the contingency of title elimination had been satisfied, although it had not. (CP at 72, 3-4) Further, Defendant only conveyed and recorded the land at Closing. (CP at 244-45, CP at 248, #6, 9; CP at 251, "vacant land"). The home itself was not conveyed and remained legally titled in the Sellers as personal property contrary to the Contract and the contingency. (CP at 48; CP at 52-53; CP at 43, #5; CP at 236, #III). Thus, Buyers did not buy the home.

Buyers, in reliance upon Defendant's representations, obtained funding and executed the Contract, mistakenly believing they were purchasing both land and home together as real property for the agreed

upon consideration. (CP at 72, 2-4). Sellers likewise surrendered the home and property to Buyers for the agreed upon consideration, mistakenly believing they were selling both land and home to Buyers. (CP at 31, ln 20-22; CP at 30, ln 11; CP at 31, ln 20-22; CP at 236 at #II-III; CP at 245, #4).

Defendant, approximately two months after Closing, made secret efforts to eliminate the State DOL personal property title on the home in an apparent attempt to satisfy the pre-sale contingency. (CP at 47-48; CP at 52-53). However, Defendant cites to nothing in the Record establishing any legal authority on behalf of Defendant to execute legal documents on behalf of Buyers after Defendant closed the Contract. Further, Defendant did not report its secret efforts at title elimination to Buyers who remained unaware of Defendant's actions.

The process of elimination of title also required the homeowners to release their legal interest in the home as part of the State DOL elimination of title application (Application"). (CP at 48, #6). Defendant obtained this release from the homeowners ("Sellers" under the expired Contract) on August 10, 2006, who presumably surrendered their legal interest in the home because they mistakenly believed they had already sold the home. (CP at 47, 48).

Defendant then used the permit number and property address consistent with the non-conforming and unrelated permit to complete the Application. However, Defendant did not use the description of the home found on the non-conforming permit, since the structure on the permit was different from the home currently on the land. Instead, Defendant entered the correct description of the home. (Compare dimension and description: CP at 83, CP at 47)

The Defendant then submitted the Application to the County for certification, although the permit number relied upon was not for a building permit. The County, apparently in reliance upon the invalid permit number, certified on the Application that there was a building permit for the existing home and returned it to Defendant.

Defendant then submitted the Application to the State DOL and later succeeded in legally recording the home as real property on Buyer's land. However, there is no evidence in the Record of a purchase contract of any kind associated with the release of interest or the recording of the home, nor any record of consideration or gift. The Record only indicates the homeowners released their legal interest. (CP at 47-48). Buyers were neither aware of any of these actions on the part of Defendant, nor a party to them. (CP at 72, 3-4).

Buyers in 2009, still believing they owned both the home and land, prepared to sell the property. At that time they discovered that there was no building permit for the home, that a number of County code violations existed, and that the title elimination contingency had not been satisfied at Closing. One violation they discovered was the septic system. It had long been out of compliance with County codes and the cost of bringing the septic system into compliance was substantial.

II. ARGUMENT

A. **The Title Company did not satisfy its burden of proof because genuine issues of material fact are unresolved.**

The Title Company did not satisfy its burden of proof because genuine issues of material fact are unresolved. The Supreme Court defined the summary judgment standard in *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545, 552, 192 P.3d 886 (2008) (En Banc., internal citations omitted):

“We review summary judgments de novo. ‘Summary judgment is appropriate when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.’” When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party . . .

A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. The nonmoving party avoids summary judgment when it

‘set[s] forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.’”

The court has further found that “[A] trial is . . . absolutely necessary where there is a genuine issue as to any material fact.” *Bates v. Bowles White & Co.*, 56 Wash.2d 374, 379, 353 P.2d 663 (1960) (quoting 6 Moore, Federal Practice (2d ed.) 2101, § 56.15 [1]). As set forth below, Defendant has failed to prove the absence of all genuine issues of material fact in this case. Therefore, the summary judgment order of the lower court should be reversed.

B. The Trial Court erred in dismissing the breach of contract claim against First American because Defendant did not satisfy the terms of the Contract by eliminating the personal property title to the manufactured home at Closing, and by conveying the manufactured home to Buyers at Closing.

1. The Defendant failed to eliminate the personal property title to the manufactured home because the Contract called for the elimination of title at Closing and Defendant did not make efforts to eliminate title until well after Closing.

The Defendant failed to eliminate the personal property title to the manufactured home because the Contract called for the elimination of title at Closing and Defendant did not make efforts to eliminate title until well after Closing.

The “Agreement to Sell Real Estate” and the Contract both expressly conditioned the sale upon the Defendant’s elimination of the personal property title to the manufactured home. (CP at 230, #4; CP at 236, Item III).¹

The Buyers contracted with Defendant to eliminate the title at the time of Closing. (CP at 236, Item III; CP at 231, #12). Further, the parties agree that the date of Closing was June 6, 2006, and that the Closing itself acted to formally complete the contract. (CP at 5, ¶ 3.9; CP at 232, #19; CP at 237 IV (a)). Accordingly, it is uncontroverted that the Defendant was under a contractual duty to eliminate the personal property title to the mobile home on June 6, 2006.

“Elimination of title” for a manufactured home is defined by RCW 65.20.020 (3). RCW 65.20.020 (3) provides that elimination of the title of a manufactured home “means to cancel an existing certificate of title issued by this state . . . and recording the appropriate documents in the county real property records pursuant to this chapter.”

Thus, per the Contract and per RCW 65.20.020 (3), the Defendant was contractually obligated to “cancel [the] existing certificate of title . . .

¹ Defendant argues that Buyers have erroneously relied upon “Special Exemption 12” as the underlying contract provision breached by Defendant. (Br of Resp’t at 16-17). However, Defendant cites to nothing in the Record to support the assertion that Buyers relied upon any “exemption,” or that one even exists. Therefore, there is clearly a fundamental conflict on the factual issue as to what provision is at issue in the breach of contract claim. This places a genuine issue of material fact in question.

and [record] the appropriate documents in the county real property records . . .” at closing on June 6, 2006. (CP at 236, Item III; CP at 231, #12; Br. Resp’t. at 6-7). Therefore, Defendant’s application to eliminate title dated August 10, 2006, more than two months after the Defendant had closed the contract on June 6, 2006, is prima facie evidence of contract breach. (CP at 47-48).

Furthermore, Defendant’s practice of law in selecting, preparing, and completing the State application after the contract had closed was performed ultra vires. Defendant sought and obtained Buyer’s power of attorney (“POA”) for the express purpose of satisfying at closing the pre-sale contingency of manufactured home title elimination. (CP 71- 72, #2-4; CP at 257). Thus, Defendant’s legal authority to act as Buyer’s attorney for the purpose of title elimination clearly derived from the POA.

Therefore, Defendant’s legal authority to select, prepare, and complete legal documents on behalf of Buyers for the purpose of title elimination necessarily expired when Defendant closed the contract on June 6, 2006, and represented to Buyers and Sellers that the contingency had been satisfied. Defendant had neither any legitimate reason, nor any legal authority, to execute legal documents on behalf of Buyers after Defendant closed the Contract. (CP at 237 IV (a); CP at 232, #19).

Defendant's delayed effort on August 10, 2006 to satisfy the pre-sale contingency of title elimination, made months later, was done without Buyers knowledge, consent, or authority. (CP at 72, items 3-5). The Defendant's actions on behalf of Buyers were therefore made ultra vires and could not satisfy the expired contract contingency.

Buyers agreed to buy the personally titled manufactured home and the land only if the Defendant eliminated the title at Closing so that Buyer would purchase the home and acreage together as real property. As such, the result of Defendant's after-the-fact and unauthorized attempt at compliance can in no way satisfy the express contingency of the Contract. Therefore, Defendant's tardy attempts to satisfy the Contract contingency were made ultra vires and render the title elimination ineffective with respect to the Contract.

2. The Trial Court erred in dismissing the breach of contract claim against First American because Defendant did not satisfy the Contract terms by conveying the manufactured home to Buyers.

The Trial Court erred in dismissing the breach of contract claim against First American because Defendant did not satisfy the Contract terms by conveying the manufactured home to Buyers.

The Buyers bargained for the purchase of both a manufactured mobile home and approximately five acres of real estate from Sellers in exchange for consideration. (CP at 236-40; CP at 230-35). However, Defendant only conveyed and recorded the real estate at the time of Closing on June 6, 2006. (CP at 245, 248, 251 “vacant land”). Therefore, Defendant did not convey the manufactured mobile home from Sellers to Buyers at Closing because legal title remained in Sellers, and because Defendant only conveyed and recorded the real estate involved in the transaction. (CP at 48, #6-7, 9; CP at 52-53).

In the context of summary judgment, a non-moving party need only raise a single genuine issue of material fact. *Bates*, 56 Wash.2d at 379. The duty of the court in such circumstance is not to resolve the factual issue, but to reverse summary judgment in light of the “absolute necessity” of a trial. *Id.*

The Defendant breached the Contract when it failed to satisfy the Contract’s express contingency of title elimination prior to Closing. It also breached when it failed to convey title to the home as real estate at the time of Closing. The result of Defendant’s after-the-fact attempts to comply with the Contract’s pre-sale contingency are of no moment with respect to satisfying the terms of the Contract.

Defendant asserts, and Buyers agree, that the failure to eliminate title is a material fact common to all three claims: breach of contract, professional negligence, and CPA. (Br. of Resp't. at 15). The terms of the Contract and the failure of Defendant to perform according to those terms clearly place the factual issue of breach at issue. Further, the central factual question of whether Buyers have ever actually owned the home is also in dispute, since there is no evidence of a purchase for value and it was not conveyed at Closing. Finally, reasonable minds could certainly disagree as to whether a contract exemption, a contract exception, or neither, was actually relied upon at Closing.

Thus, the Record demonstrates genuine issues of material fact with respect to which contract and what part of the contract is actually in dispute. These factual questions preclude summary judgment and make a trial an "absolute necessity." *Bates*, 56 Wash.2d at 379. Therefore, the court should reverse the summary judgment order of the trial court on all three claims and remand for trial.

C. Summary Judgment was inappropriate on the professional negligence claim because the Defendant failed to notify Buyers prior to Closing that the home had no building permit.

1. Summary Judgment was inappropriate on the professional negligence claim because the Defendant had a duty to

notify Buyers prior to Closing that the home had no building permit and did not.

Summary Judgment was inappropriate on the professional negligence claim because the Defendant had a duty to notify Buyers prior to Closing that the home had no building permit and did not.

The Defendant's duty to notify Buyers arose from the Defendant's roles as a Limited Practice Officer ("LPO") and POA. First, an LPO is a legal practitioner admitted to practice law under Washington Court Admission to Practice Rule 12 ("APR 12"). (APR 12 (a)). An LPO has a fiduciary duty to the LPO's clients comparable to that of an attorney to an attorney's clients. *Bishop v. Jefferson Title Co., Inc.*, 107 Wash.App 833, 845, 28 P.3d 802 (2001); (APR 12 Comment 2; APR 12 (g)(1)). The LPO is "held to the standard of a lawyer" and "to comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." (APR 12, Comment 2, citing *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992) (En Banc)).

Second, the LPO, like other legal practitioners, works under Rules of Professional Conduct. The LPO Rules of Professional Conduct ("LPORPC") at LPORPC 1.7 and 1.2 further define their standard of care:

“[A]n LPO shall not knowingly fail to disclose all material facts to clients or any parties to the transaction, or make false statements of material facts to clients or any such party.” (LPORPC 1.7). Also, “[a]n LPO must act with reasonable diligence and promptness in the performance of his or her duties, including the timely preparation of documents required to meet the closing date specified by the clients.” (LPORPC 1.2). Further, “[l]ack of diligence is a professional defect.” (LPORPC 1.2, Comment).

Finally, Defendant had a fiduciary duty to the Buyers as their POA and attorney-in-fact. *Scott v. Goldman*, 82 Wash.App. 1, 6, 917 P.2d 131 (1996) (CP at 71-72, #2; CP at 78). The POA has a duty personal to the principal as attorney-in-fact for purposes within the scope of the POA. *Scott*, 82 Wash.App at 6. This duty attached to Defendant once the Defendant had solicited and obtained the Buyer’s POA. Defendant therefore voluntarily operated under an attorney’s fiduciary duty, the highest of legal duties, personal to Buyers for actions it made pursuant to the elimination of title; the scope of the POA.

Therefore, Defendant was required to practice at a fiduciary level of care while working as Buyers POA when Defendant sought to select and complete legal forms for Buyers to eliminate title. This is because the court has found that “[c]learly, the selection and completion of legal forms constitutes the practice of law.” (LPORPC 1.8, Comment (citing *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 582 (1983) (En Banc.) and Washington General Rule 24). The court has plainly stated that “[i]t

cannot be seriously disputed” that “selecting and completing the various documents necessary to process . . . [a] residential home loan” is the practice of law. *Perkins v. CTX Mortg. Co.*, 137 Wash.2d 93, 97-98, 969 P.2d 93 (1999) (En Banc.); *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wash.2d 443, 446-47, 635 P.2d 730 (1981) (En Banc.).

In this case, Defendant necessarily selected the appropriate Washington State DOL form used to make Application for the title elimination. The selection was made on behalf of Buyers and in the exercise of Buyer’s POA for the purpose of eliminating the title. Defendant also selected a copy of a building permit, if one existed, as the appropriate supporting document for the Application. Defendant requested a building permit for the home, but received back only an unrelated document. Defendant was therefore put on notice that a conforming document for use on the Application was unavailable and, from the perspective of a fiduciary, presumptively did not exist until proven otherwise.

The Defendant operated in the capacity of LPO and as POA for the Buyers while selecting and completing the legal forms involved in the process of eliminating the title. Therefore, as the attorney-in-fact for the Buyers, Defendant was under a duty to “exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a

reasonable, careful and prudent lawyer . . .” during the entirety of this process. *Hizey*, 119 Wn.2d at 261.

Further, the only supporting legal document involved in the Application was a building permit for the home. Had Defendant in fact “exercise[d] the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer” then Defendant, at an absolute minimum, would have stopped the Application process and called the client upon discovering the lack of a conforming document. In fact, a reasonable and prudent attorney would likely have stopped the process immediately, called the County to verify that there was no building permit, and then timely advised both Buyers and Sellers of the fault in the home. Having found that the most important permit for the home, the building permit, did not exist, a careful and prudent attorney most certainly would not have proceeded any further without examining the other associated permits, such as the septic permit.

Regardless, it can be safely said that utterly ignoring the absent building permit problem for weeks and then closing the Contract anyway, plainly fails to meet any reasonable definition of Defendant’s fiduciary duty.

Unfortunately, Defendant, instead of fulfilling its duty, negligently disregarded the absence of documentation, did not notify Buyers, closed

the Contract as if the home did have a valid building permit, did not include the home in the sale, and later negligently tried to correct the problem it had created. Defendant as attorney-in-fact had a duty to timely advise Buyers of the material fact that the home they contemplated buying had no building permit. (LPORPC 1.7; 1.2, Comment) Had it done so, Buyers expressly would not have made any purchase. Defendant's professional negligence in its breach of duty is therefore the plain and proximate cause of the myriad of damages that followed.

III. CONCLUSION

Defendant's negligent acts and misrepresentations have burdened Buyers with approximately 5 (five) acres of semi-rural County property that they purchased for approximately \$125,000 dollars under the mistaken belief they were actually buying a house and land together. (CP at 71, #2). This purchase was not bargained for and the amount is clearly in excess of the fair market value of the land. Further, Defendant afterward legally attached a home to Buyer's acreage as real estate without permission, without any new contract or consideration, and on notice that the home had no building permit.

Therefore, ownership of the home is in question and the absence of a building permit is a defect. In addition, Defendant obtained a release of

ownership of the home in apparent reliance upon Seller's mistaken belief that they had already sold the home, thereby creating a liability issue.

The home is defective due to the absence of proof of ownership, the lack of a building permit, the septic system, and other violations. Buyers can only rent or occupy the home if they undertake the significant expense of correcting at least the code violations. However, finding themselves with two mortgages and no way to mitigate the one with rent, Buyers are in significant financial distress and have suffered personally and emotionally from the ordeal. Buyers have also lost the opportunity to sell in the pre-economic downturn real estate market of summer, 2009.

Damages ultimately flow from the consequence of Defendant's primary act of professional negligence in failing to timely notify Buyers that there was no building permit for the home during the approximately four week period between the time the County demonstrated it had no permit and the Closing. Had Defendant simply notified Buyers at any time before Closing that the County had no permit on record for the home, the Buyers expressly would not have executed the Contract and no damages would have accrued.

Defendant's second act of professional negligence was in failing to satisfy the contingency of title elimination on the home prior to Closing, thus breaching the Contract. Defendant's third act of professional

negligence was in representing to Buyers and Sellers at Closing that Defendant had satisfied the contingency. As a consequence, Buyers and Sellers believed the home and land conveyed together as real estate in exchange for good consideration, when only the land was conveyed. This act of negligence led both Buyers and Sellers to execute the Contract on a mutually mistaken belief with respect to the material terms of the Contract.

Defendant's fourth act of professional negligence occurred when Defendant again breached the Contract by failing to convey the home at Closing. This act of professional negligence burdened Buyers with a mortgage for approximately \$125,000 in exchange for only five acres of semi-rural County property.

Defendant's fifth act of professional negligence occurred when Defendant executed legal documents on behalf of Buyers well after closing the Contract, therefore without legal authority, without Buyer's knowledge, with false information, and apparently in reliance upon homeowners (the "Sellers") continued mistaken belief. Thus, Defendant has created at least three clouds on the title:

- 1) There is no contract to prove ownership of the home,

2) “Homeowners” (Sellers) may now have a tort claim related to their mistaken belief that the home was not theirs at the time they surrendered their legal interest, and

3) Defendant recorded the home as real estate knowing it had no building permit.

Finally, Defendant has effectively removed the opportunity for Buyers to recover in tort for the County’s negligent misrepresentation because one element of negligent misrepresentation is “justifiable reliance.” *Lawyers Title Ins. Corp v. Baik*, 147 Wash.2d 536, 545, 55 P.3d 619 (2002) (En Banc.). To recover from the County, Buyers would have to show that Buyers relied upon the County’s representation that there was a building permit for the home, when there was none. To show reliance on the County’s negligent statement of fact, the purchase would have had to come after the representation. However, since Defendant recorded the home with the County in August, the County certified as to the building permit in August, but the Closing was in June, it is now essentially impossible to argue that the reliance on the County came before the purchase. This assumes that Buyers could even prove they purchased the home that Defendant failed to convey at Closing, another impossibility.

A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger*

Ins. Co., 164 Wash.2d at 552. Genuine issues of material fact remain in this case because: 1) Defendant has argued from the position that Buyers actually bought the house, when they did not, and that they own the house now, which they may not, and 2) it is unclear what contractual provisions are actually in dispute.

Defendant, far from submitting affidavits “establishing it is entitled to judgment as a matter of law,” can demonstrate no legal argument supporting its claims under these disputed facts. *Ranger Ins. Co.*, 164 Wash.2d at 552. Defendant’s professional negligence was the root cause of the misunderstanding about what was actually bought and sold at Closing, which in turn led to Buyers misunderstanding of what it owned and did not own at the time they first sought legal counsel.

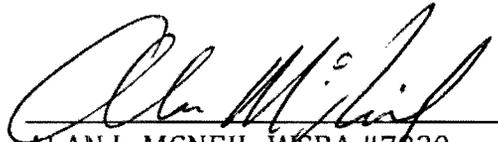
Because Buyers unknowingly labored under this misunderstanding in Buyers representations to counsel, counsel was unable to fully develop its case at summary judgment. Defendant, however, has had full access to the Closing Agent, supervisors, and management. All of these parties are professionals in the field of real estate transactions and reasonably knew, or should have known, that the Closing Agent never conveyed the home to Buyers and that their actions after the close of the Contract were made without legal authority. Defendant’s arguments to the contrary have caused Buyers unnecessary delay and burdened them with unnecessary

legal work in making this appeal. Buyers therefore ask the court to award

Buyers attorney fees and costs pursuant to and RAP 18.9(a).

Respectfully submitted on this 17th day of April, 2012.

UNIVERSITY LEGAL ASSISTANCE

A handwritten signature in black ink, appearing to read "Alan L. McNeil", written over a horizontal line.

ALAN L. MCNEIL, WSBA #7930
Attorney for Petitioners

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LANCE J. GONZALES, a single person and DIANA D. KASSAP, a single person,)	APPELLATE NO: 301656
)	
)	DECLARATION OF MAILING OF REPLY
)	BRIEF OF APPELLANTS
Petitioners,)	
v.)	
)	
PACIFIC NORTHWEST TITLE COMPANY OF SPOKANE, INC., a Washington Corporation, and PACIFIC NORTHWEST TITLE INSURANCE COMPANY, INC., a Washington Corporation; and FIRST AMERICAN TITLE INSURANCE COMPANY, its successor,)	
)	
Respondents.)	

I, Gregory Colley, declare as follows:

That I am a citizen of the United States; that on the 17 day of April, 2012,

I mailed a full, true and correct copy of: REPLY BRIEF OF APPELLANTS
by depositing said envelope in The United States Mail with sufficient postage affixed to:

1 Mr. Thomas T. Bassett & Thaddeus J. O'Sullivan, K & L Gates, LLP, 618 W. Riverside Ave.,
2 Ste. 300, Spokane, WA 99201-5102.

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

5 Signed at Spokane, Washington on the 17 day of April, 2012.

6 
7 GREGORY COLLEY
8