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No. 62034-7-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SHU-CHIN WANG and WEN-SHYAN WANG,  
husband and wife; and MOUNTLAKE INVESTMENT, LLC,  
a Washington limited liability company,

Appellants,

vs.

BUSINESS PLANS & STRATEGIES, INC., a Washington  
corporation; and ROSE M. CHISHOLM and TONY CHISHOLM,  
husband and wife, and their marital community,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JAY WHITE

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BRIEF OF APPELLANTS

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EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

Attorneys for Appellants

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## I. INTRODUCTION

This appeal arises from the respondents' sale of a commercial building to appellants in 2006. When they marketed and sold the building, respondents had in their property management files four investigation reports and estimates documenting water damage and critically needed repairs to the windows, siding, and structural elements of the building, dating from 2003 and totaling over \$600,000. Respondents delivered to appellants only a single siding repair estimate for \$175,000, obtained two days before respondents placed the building on the market, disclosing in marketing materials that the "siding on the building needs to be replaced. It needs to be stripped and reapplied in order to maintain the structural integrity of the building."

The evidence was disputed whether respondents and their agents affirmatively misrepresented that there were no other reports and estimates available to appellants' real estate agent. In either event, the real estate agent's knowledge by statute could not be imputed to appellants. The trial court's erroneous admission of "expert" testimony that the parties' purchase and sale agreement imposed only limited disclosure obligations on the sellers and their

agents, and its erroneous instructions making appellants responsible for a real estate agent's knowledge, caused the jury to decide that respondents had no liability in damages for the \$1.4 million in repairs actually required to the building. This court should reverse the trial court's judgment of dismissal, and its consequent award of fees to respondents, and remand for trial of appellants' claims to a properly instructed jury that considers only admissible evidence.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting the sellers' motion for summary judgment on the issue of fraudulent concealment. (CP 1206-08) (App. A)

2. The trial court erred in denying plaintiffs' motion in limine and admitting the "expert" evidence of Arvin Vanderveen on the meaning and proper interpretation of the parties' obligations under the purchase and sale agreement. (5/20 RP 15)

3. The trial court erred in giving Instruction No. 6, misstating the relevant law of agency in a manner prejudicial to appellant, (CP 1020) (App. B), and in refusing to give plaintiff's

proposed Instruction No. 11 or 31A, correctly setting out the applicable agency law. (CP 930, 994) (App. C, D)

4. The trial court erred in granting respondents' motion for directed verdict on the economic loss rule only after admitting "reliance" testimony relevant only to that tort claim, and in giving Instruction No. 7 commenting on dismissal of the tort claim in a manner prejudicial to appellants (CP 1021) (App. E), rather than giving appellants' proposed Instruction No. 46. (CP 1011) (App. F)

5. The trial court erred in giving Instruction No. 11 (CP 1025) (App. G), and in refusing to give plaintiff's proposed Instruction No. 22A on the parties' contractual duties. (CP 1007) (App. H)

6. The trial court erred in denying appellants' CR 59 motion for new trial, and in entering judgment on the jury's verdict. (CP 1211-12) (App. I)

7. The trial court erred in awarding respondents attorney fees under the purchase and sale agreement, and in entering its findings supporting the award. (CP 1213-24, Sub. 197A, Supp. CP \_\_\_) (App. J)

### III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the sellers breached the implied covenant of good faith by affirmatively disclosing only a portion of a building's defects, thus depriving the buyer of the benefit of the contractual feasibility condition, or, alternatively, committed the tort of fraudulent concealment?

2. Whether the trial court erred in allowing the jury to consider "expert" testimony that the sellers did not breach the contract because it is the "industry standard" not to provide buyers with all documents affecting a building's physical condition?

3. Whether the trial court erred in instructing the jury that a building's buyer was bound by its agent's knowledge and actions, when by statute the buyer is not responsible for a real estate agent's knowledge and actions?

4. Whether the trial court improperly commented on the evidence by instructing the jury that it had dismissed the buyer's negligent misrepresentation claims when buyer also had contractual claims based on the claimed misrepresentations?

5. Whether an award of attorney fees to the sellers under the parties' purchase and sale agreement should be

reversed, and whether the buyers are entitled to their attorney fees at trial and on appeal?

#### IV. STATEMENT OF FACTS

**A. Respondent Sellers Owned A Commercial Building That Leaked. Reports In Their Files Dating Back To 2003 Recommended Additional Investigation And Repairs.**

Respondents Rose M. Chisholm and Tony Chisholm, purchased the 6405 Building (hereafter "Building") in Mountlake Terrace through their corporation respondent Business Plans & Strategies, Inc. (BPS) in late 2001. (5/20 RP 132) The Building is a 3-story, flat-roofed structure of over 30,000 square feet (Ex. 59 at 23; 5/8 RP 67); its major tenant is the Rural/Metro Ambulance Service. (5/21 RP 28)

The Building was originally constructed in 1987 with wood lumber structural components; a 1998 addition has steel studs. (Ex. 59 at 23; 5/14 RP 47-48, 5/21 RP 30) The exterior of the Building was clad with EIFS, a siding system. (Ex. 17) Any incursion to the waterproof membrane of an EIFS building leaves the structural elements of the building vulnerable to decay. (5/12 RP 98, 102-03)

Beginning at least in 2002, BPS and the Chisholms made multiple efforts to deal with water intrusion in the Building, including drywall repair, window caulking, and siding repair:

Wayne Carter, who did business as “Wayne the Handyman,” worked on the Building from the fall of 2002 through fall 2004. Mr. Carter repeatedly recaulked leaking windows and repaired sheetrock damaged by water intrusion, “every two months to six months.” (5/8 RP 66-69, 72, 78-79, 107; Exs. 8, 10-15) In August 2003, Mr. Carter participated in an investigation with Sound Exterior Inspections to determine the source of the continuing water intrusion problems in the Building. (5/8 RP 89-90; Ex. 17)

Exhibit 17 is the report prepared by Doug Heck of Sound Exterior Inspections for the Building owners. (5/12 RP 47) Mr. Heck was selected for the inspection because he has expertise in EIFS buildings. (5/8 RP 89-90) Mr. Heck observed moisture intrusion in the Building’s siding and sealant joint failure around the window frames. (5/12 RP 51-52) He drilled “pilot holes” to gauge the extent of damage to the Building’s framing. (5/12 RP 51) Mr. Heck found that some portions of the Building substrate were in good condition, but that others near failing. (5/12 RP 73) The

inspection revealed rotted wood posts in the older portion of the Building. (5/8 RP 91-92) Mr. Heck testified that window joints had damage that would require removal and resealing. (5/12 RP 68-70, 76) Mr. Heck's written report noted that it was impossible to determine the extent of the damage without commitment to a more extensive inspection. (Ex. 17)

Mr. Carter communicated these findings to the Building's then-property manager, Cynthia Montagne, and provided an estimate to replace rotting studs and sheetrock damaged by water intrusion that had been discovered during the inspection. (5/8 RP 92-99; Ex. 19) Mr. Carter testified that after he submitted his estimate "nothing" happened, except that he was eventually ordered to cover the hole in the side of the Building. (5/8 RP 94) Mr. Carter became unwilling to continue to work on the Building, because he was fearful of liability for water intrusion problems that BPS was taking no steps to repair. (5/8 RP 99)

Mr. Heck testified that he talked to Tony Chisholm, BPS's principal, about the result of his inspection, and that Mr. Chisholm knew he had "issues" with the Building. (5/12 RP 60) Mr. Heck testified that he was given a verbal okay to perform an additional

inspection, but that the Building owners never signed an engagement letter or committed to the job. (5/12 RP 59) Mr. Heck did not prepare an additional report. (5/12 RP 61-62)

Respondents in April 2005 had put the Building on the market with GVA Kidder Matthews for \$5.2 million. (5/15 RP 137, 5/20 RP 185; Ex. 28) The Building did not sell. (5/15 RP 137) On September 1, 2005, GVA Kidder Matthews took over management of the Building through its employee and property manager Earl Wayman. (5/15 RP 66)

The Building still leaked. To address the ongoing problems, Mr. Wayman asked Eastside Glass to inspect “some leak conditions at the building.” (Ex. 32) In a letter dated September 21, 2005, Eastside reported “extensive failure” in the Building, and recommended that an EIFS contractor or consultant “assess current damage and conditions and advise the owner on a plan to remedy the exterior.” (Ex. 32)

At trial, Mr. Chisholm denied any knowledge of any of the invoicing, inspection, or repair estimates by Mr. Carter, Sound Exterior Inspections, or Eastside Glass. (5/20 RP 136, 138, 140, 143) Mr. Chisholm testified that his previous property manager Ms.

Montagne was “incorrect” when she testified that she had discussed needed repairs with him. (5/12 RP 38; 5/20 RP 133) Mr. Chisholm testified that Mr. Heck was “mistaken” that they ever met or discussed a proposal for further inspection of the window leaks. (5/20 RP 139)

**B. Sellers Marketed The Building With A \$175,000 Recladding Bid, Obtained Three Weeks After A \$600,000 Bid And An Investigation Revealing Serious Structural Defects In The Building.**

Mr. Chisholm testified that he first saw the Eastside Glass report, Exhibit 32, during his deposition in this litigation. (5/20 RP 144) But Mr. Chisholm could not deny knowledge of the Tatley-Grund inspections and bids obtained by Mr. Wayman as a result of the Eastside Glass report. That he had received these reports was fully documented by e-mail and fax transmissions from Mr. Wayman. (Exs. 34, 39, 40)

Mr. Wayman hired Tatley-Grund shortly after receiving the Eastside Glass recommendation. (5/15 RP 68) On December 13, 2005, Tatley-Grund issued its report documenting the serious problems with the EIFS siding on the Building. (Ex. 35) Joel Thornburg, who had performed the onsite investigation for Tatley-Grund, testified that water had become trapped within the Building

and saturated the plywood and foam in the walls. (5/12 RP 89-90, 103-04) Plywood sheathing and vertical framing in portions of the Building were rotten to a depth of 1.5 inches. (5/12 RP 105-06)

On February 2, 2006, Tatley-Grund provided estimates for a total strip and recladding of the Building that ranged from \$620,000 to \$653,000. (5/12 RP 156; Ex. 38) Mr. Thornburg and Tatley-Grund's estimator, David Pitt, testified that a structural engineer would need to determine what structural elements needed replaced. (5/12 RP 106, 159) Mr. Thornburg also proposed standard sill track testing of the windows in the Building. (Ex. 34; 5/12 RP 115) Mr. Thornburg testified that he did not know why that window testing was not performed. (5/12 RP 109-10)

Neither Mr. Thornburg nor Mr. Pitt heard back from the Building owners or managers after preparing their inspection report and bid. (5/12 RP 112-13, 163) Mr. Chisholm was "understandably shocked by the scope of the problem," and "shocked" by the estimate for repairs. (5/15 RP 71-72, 5/20 RP 161; Ex. 39) He directed Mr. Wayman to obtain other bids. (5/15 RP 91)

On March 6, 2006, Mr. Wayman faxed to Mr. Chisholm a bid for replacement of the siding for \$175,000 by DOM. Mr. Wayman's

fax cover sheet to Mr. Chisholm said “Tony – This is much better!”

(Ex. 44)

Two days later, on March 8, 2006, Mr. Chisholm placed the Building on the market with the brokerage side of the Building property management firm. (5/15 RP 113, Exs. 44, 45) The marketing materials noted that “siding on the building will need to be replaced . . . in order to maintain the structural integrity of the building,” and referred potential sellers to “the cost estimate of repair” also posted on the marketing website for the Building. (Ex. 118 at 131) This was the \$175,000 DOM bid, which was provided along with copies of tenant leases, and grounds and custodial maintenance contracts. (5/15 RP 144-45, 179; Ex. 118)

Although the reports and bids from Mr. Carter, Sound Exterior, Eastside Glass and Tately-Grund were also in the respondents’ property management file, only the DOM siding bid was included in the marketing materials for the Building. (See 5/15 RP 197-98, 5/20 RP 176-77; Ex. 118 at 193) The seller proposed a \$180,000 “hold back” in escrow to correct the disclosed siding defect. (5/12 RP 213, 5/15 RP 158; Ex. 118 at 131) The sellers’ real estate agent testified that Mr. Chisholm disclosed the DOM

estimate on the marketing website as a basis for the proposed holdback. (5/15 RP 211, 176-77) Mr. Chisholm admitted that he participated in providing information for the marketing materials. (See 5/20 RP 168-69)

**C. Seller Accepted Buyers' Offer, Which Was Based on the \$175,000 Bid, And Never Delivered The Other Reports And Estimates Before Closing.**

Appellant Sue Wang is an immigrant from Taiwan, who became successful exporting fruit to Asia. (5/20 RP 188-91) She is not a native English speaker, and has limited English comprehension. (5/12 RP 219-20) She and her husband, appellant Wen-Shyan Wang, had purchased two commercial buildings before this transaction, a 10,000 square foot professional building near Northgate, and a 26,000 square foot medical office building near Thrasher's Corner in Snohomish County. (5/12 RP 186) In each instance, Ms. Wang had negotiated a reduction of the purchase price to reflect the estimated cost of needed repairs. (5/20 RP 196-200) In the purchase of both buildings, the sellers had delivered all relevant documents to Ms. Wang for consideration (5/21 RP 44), and the repairs had been accomplished at a price consistent with the bids provided by the sellers. (5/20 RP 196-200)

Appellants' leasing agent, Doug Plager, presented the Building to Ms. Wang for consideration. This was the first commercial building purchase Mr. Plager had ever handled. (5/12 RP 205-06, 5/13 RP 87-88)

On June 9, 2006, appellants made an offer to purchase the Building for \$4.4 million, \$75,000 less than the listing price (Exs. 103, 54), with a proposed \$300,000 holdback to cover the cost of siding replacement. (5/12 RP 216) On June 17, 2006, the parties entered into a purchase and sale agreement (PSA) for \$4.225 million, which represented a \$175,000 reduction from the initial offering price, reflecting any "damage or expense arising from the [EIFS siding decay]." (Ex. 50)<sup>1</sup>

Paragraph 5(a) of the PSA required sellers to make available all documents relating to the Building and its condition. Paragraph 12(b) of the agreement was sellers' representation that the books and records "delivered to buyer pursuant to this agreement comprise all material documents in seller's possession or control

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<sup>1</sup> The signed PSA was Exhibit 49 at trial. Because of multiple refaxings, it was virtually illegible, and a less-faxed unsigned version of the PSA was admitted without objection as Exhibit 50. A completely legible version of the PSA is also designated as Supp. CP \_\_\_ (Sub. no. 194).

regarding the operation and condition of the property.” In paragraph 12(h), the sellers represented that they were “not aware of any concealed material defects in the property except as disclosed to buyer in writing during the feasibility period.” (Ex. 50)

Mr. Plager picked up from GVA/Kidder Matthew documents, expressly represented to be “Seller’s due diligence materials, books and records,” on June 21, 2006. (Ex. 52) When Mr. Plager picked up these materials, he was asked to and did sign a “receipt” for “Delivery of 6405 Building Books and Records” “Per paragraph #5a of the Purchase and Sale Agreement.” (Ex. 52; 5/13 RP 56-57) The “due diligence” materials were the same as those posted on the website. They included the DOM estimate, but none of the other damage reports or repair estimates in respondents’ property management files. (Ex. 118 at 193)

Mr. Plager testified that he was told by respondents’ agents that there was no other information available (5/13 RP 59, 167-68), and that the DOM estimate reflected what the owners knew about the structural condition of the Building. (5/13 RP 65) Respondents’ agent denied this exchange. (5/15 RP 169-70)

Buyers conducted a day-long inspection of the property through Seattle/Eastside Building Inspections, Inc. (SEBI) before removing the feasibility contingency. (5/13 RP 66-68) SEBI's report noted that "There are numerous visible areas of accidental or bird caused damage and there are some indications of possible hidden damage. All of these problems or potential problems warrant more extensive and most likely destructive further investigation. As both the investigation as well as proper repairs will be expensive, it is strongly recommended that the former take place prior to closing so that an accurate estimate of repair costs can be obtained prior to closing." (Ex. 55 at 2)

The SEBI report was not a surprise to Ms. Wang, and appeared to support the nature of the defects pointed out in the due diligence materials delivered to the buyers a few days earlier, which included \$175,000 the DOM estimate of repair costs. (5/13 RP 69-72, 157) Mr. Plager testified that he had also discussed the siding issue with BPS' property manager Mr. Wayman, and that Mr. Wayman mentioned no other estimates or reports, other than the \$175,000 DOM bid that had been provided in the due diligence materials. (5/13 RP 84, 112-15)

**D. After Closing, Buyers Were Given The Reports And Estimates Sellers Had Not Delivered Before Closing. Repair of The Building Could Exceed \$1 Million.**

The transaction closed on July 31, 2006. (5/13 RP 80) The purchaser was Wangs' corporation, appellant Mountlake Investment, LLC. (5/21 RP 113-14) On August 2, 2006, Ms. Wang and Mr. Plager went to the office of sellers' property manager for a "turnover meeting," expecting to pick up original leases and service contracts. (5/13 RP 81-83) At this meeting, Mr. Wayman also "turned over" for the first time the Tatley-Grund report, the Sound Exterior and Eastside Glass reports, and the estimates of repair by Mr. Carter and Tatley-Grund. (5/13 RP 83-87)

An inspection conducted after purchase showed extensive problems not just with the siding and the structural elements of the Building, but with the windows. (Ex. 65) Buyers' construction expert testified repair would cost as much as \$1.2 million. (5/15 RP 13-14) Buyers' appraiser testified that the defects in the Building decreased its value by the amount of the needed repairs. (5/14 RP 204)

**E. Procedural History.**

The Wangs and the designated Purchaser under the PSA, Mountlake Investment, LLC (collectively “buyers”) commenced this action against BPS, the Chisholms (collectively “sellers”), and the sellers’ agent on November 13, 2006. (CP 4) The buyers’ claims for fraud and fraudulent misrepresentation were dismissed on summary judgment. (CP 1206-08) The case went to jury trial May 5, 2008, on contract claims against the sellers and negligent misrepresentation claims against the sellers and their agents, before the Honorable Jay White in King County Superior Court.

The trial court denied plaintiffs’ motion to exclude the testimony of “expert” Arvin Vanderveen, and allowed Mr. Vanderveen to testify as to how these agreements “operate”. (5/6 RP 61-63, 5/20 RP 15) Mr. Vanderveen, a commercial real estate broker with 30 years of experience, testified that he had helped draft the forms used in this transaction, that he could tell the jury what they mean, and that he had particular expertise in EIFS buildings. (5/20 RP 27-31)

Mr. Vanderveen testified that the provision in the parties’ agreement for delivery of relevant documents to the buyers really

meant that the documents had to be made available (5/20 RP 32-33), and that “make available” means the same thing as “delivered” in the PSA. (5/20 RP 68) Mr. Vanderveen also testified that a seller’s “representations” about the condition of the property were not enforceable warranties. (5/20 RP 37-38)

Mr. Vanderveen testified that the provisions of the PSA were satisfied if the purchasers were “directed” to the property manager’s office (5/20 RP 40), and that the partial disclosure of the EIFS siding problem was “reasonable and standard.” (5/20 RP 52-53) Mr. Vanderveen testified that the sellers had met any “duty of care” (5/20 RP 112-13), and that it was “customary” to prepare a receipt such as the receipt the agent signed when he picked up the “due diligence” materials. (5/20 RP 115) Contrary to the language of the receipt, Vanderveen testified that the document was merely a “marker” of the date documents are “made available.” (5/20 RP 115) Mr. Vanderveen testified that if Ms. Wang’s experience had been that material documents were actually delivered, that was not the “industry standard,” because Ms. Wang had only been involved in two deals, whereas Mr. Vanderveen had been involved in 600. (5/20 RP 70-71)

On the ninth day of trial, the trial court *sua sponte* raised the issue whether the economic loss rule was a legal impediment to plaintiffs' negligent misrepresentation claims. (5/20 RP 214) After soliciting briefing and argument, the trial court dismissed the negligence claims, and the sellers' agents as defendants from the case, before presenting the case to the jury. (5/22 RP 95-97; CP 1021)

The case went to the jury only on buyers' contract claims against BPS. Over objection, the court told the jury that it had dismissed buyers' negligent misrepresentation claims, but did not tell the jury why. (CP 1021; 5/27 RP 28) The trial court also told the jury over the objection of both sides that the party corporations could only act through their agents (CP 1020; 5/27 RP 70-71, 74-75), without instructing the jury that, as provided by statute, the buyers could not be bound by knowledge or notice of facts known only to buyers' real estate agent. RCW 18.86.090, 18.86.100.

The jury returned a verdict in favor of the sellers, and the trial court entered a judgment for \$153,065.36 in attorney fees and costs against the buyers based on the fee provisions of the PSA. (Sub. 197A, Supp. CP \_\_\_) The buyers appeal the judgment in

favor of the sellers BPS and the Chisholms, and the ensuing award of attorney fees. (CP 1203-04) Claims against the broker GVA/Kidder Matthews and its real estate agent Rosauer have been settled and those parties dismissed from the appeal.

## V. ARGUMENT

### A. **The Sellers Breached The Implied Covenant Of Good Faith Or Committed The Tort of Fraudulent Concealment By Disclosing Only Some Of The Building's Known Defects.**

"There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he may obtain the full benefit of performance." *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966). Here, the sellers' limited disclosure of defective siding breached the covenant of good faith in two respects: (1) the sellers undermined buyers' ability to obtain the full benefit of the 30 day feasibility period under paragraph 5, and (2) deprived buyers of the benefit of the seller's warranties under paragraph 12 of the PSA. (Ex. 50)

1. **The Sellers Breached The Covenant of Good Faith By Depriving The Buyers Of The Benefit Of The Contractual Feasibility Condition.**

The implied covenant of good faith precludes a party to a contract from interfering or obstructing the other party's contractual rights. In *Weaver v. Fairbanks*, 10 Wn. App. 688, 519 P.2d 1403 (1974), the court relied on the covenant of good faith to hold that a seller breached the implied covenant of good faith by undermining plaintiff's financing contingency. The seller had agreed to obtain an FHA appraisal reflecting a value of at least \$17,500 in order for the purchaser to qualify for financing. The court held that, even though the agreement also contained an "as is" clause, the seller had the obligation to "exercise good faith in his attempts to assist the purchaser with FHA financing," including the duty to undertake a \$500 repair required to correct building code defects revealed by the inspection. *Weaver*, 10 Wn. App. at 692.

While the duty of good faith may require a party's cooperation in fulfilling contractual duties, at a minimum it precludes a seller from actively interfering with a buyer's ability to fulfill contractual conditions. In *Cavell v. Hughes*, 29 Wn. App. 536, 539-40 629 P.2d 927 (1981), for instance, the parties' real estate

purchase and sale agreement was conditioned on the buyer's membership in the development's country club. The court held that the seller breached the duty of good faith by voting against the buyer's membership. **Cavell**, 29 Wn. App. at 540. More recently, in **Frank Coluccio Constr. Co., Inc. v. King County**, 136 Wn. App. 751, 766, ¶ 24, 150 P.3d 1147 (2007), this court held that the county breached its duty of good faith by falsely representing that it had procured all risk builder's insurance that would have covered the plaintiff's construction claims and then colluding with the insurer to deny the plaintiff's claims under a property insurance policy. See also **Gilmore v. Duderstadt**, 125 N.M. 330, 961 P.2d 175, 182 (1998) (where purchase option contingent on purchaser achieving net profit target under contract, duty of good faith precluded seller from increasing rent to interfere with buyer's ability to meet target).

Here, the sellers actively undermined buyers' ability to exercise contractual right under the PSA. Ms. Wang bargained for the right to decide whether to proceed with her purchase following a thirty day contingency period during which she could investigate and satisfy herself, in her "sole discretion, concerning all aspects of the Property, including its physical condition." (Ex. 50 at ¶ 5) In

order to rationally exercise her discretion and to obtain the full benefit of the five day contingency period, the contract obligated the sellers to “make available for inspection by Buyer and its agents within 5 days . . . after Mutual Acceptance all documents in Seller’s possession or control relating to the . . . Property.” (Ex. 50, ¶ 5(a))

The sellers affirmatively disclosed only the DOM report showing that defective siding could be repaired for \$175,000, while withholding from the buyers the much more significant Tatley-Grund report and estimate. By actively impeding buyers’ express contractual right to determine the property’s physical condition under the feasibility contingency, the sellers deprived buyers of one of the principal benefits of the contract and breached the implied covenant of good faith and fair dealing as a matter of law.

**2. The Sellers Breached The Duty Of Good Faith By Disclosing Only The Report Showing Defective Siding Without Disclosing The Report Showing Structural Defects.**

The implied covenant of good faith also imposes upon a contracting party the duty to avoid “subterfuges and evasions” in dealing with the other party, particularly the sort of half truths at issue here. See *Liebergessell v. Evans*, 93 Wn.2d 881, 892-93, 613 P.2d 1170 (1980) (duty of good faith may impose upon seller

duty of disclosure in absence of fiduciary duty); *Restatement (Second) of Contracts* § 205, comment d, at 100 (1981) (“bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.”). In ***Liebergesell***, the Court analyzed a borrower’s “fraudulent concealment” of the terms of a loan as a breach of the duty of good faith, holding that the borrower’s failure to disclose facts, knowing that the loan terms would preclude enforcement of the note, was a breach of the obligation to deal in good faith. 93 Wn.2d at 892-93.

The ***Liebergesell*** holding was well grounded in the Court’s precedent, particularly the “many vendor/purchaser cases in which buyers have recovered against sellers who failed to disclose information relevant to the subject matter of the agreement.” 93 Wn.2d at 892. One of those cases, ***Ikeda v. Curtis***, 43 Wn.2d 449, 261 P.2d 684 (1953), involved a commercial property seller who accurately represented that the hotel’s income came from “permanent and transient guests” without also disclosing to the immigrant purchaser that the income was largely derived from prostitution. 43 Wn.2d at 461. The Court held that “fraudulent misrepresentation may be effected by half truths calculated to

deceive.” *Ikeda*, 43 Wn.2d at 460. See also *Ross v. Kirner*, 162 Wn.2d 493, 500, ¶ 16, 172 P.3d 701 (2007) (trial court erroneously enforced real estate sales contract where seller failed to disclose an easement).

Similarly here, the sellers’ representation of siding defects that could be corrected for \$175,000 masked the Building’s undisclosed and far more serious structural defects. Moreover, here, an express warranty, as well as Ms. Wang’s previous experience in which sellers made accurate and complete disclosures, gave the buyers additional reason not to second guess the seller’s “half truth.”

Consistent with the \$175,000 DOM estimate for siding repair disclosed “per paragraph # 5a” as part of the seller’s “due diligence materials, books and records,” (Ex. 52), Wang “acknowledge[d] Seller Disclosure of EIFS siding decay on the building,” as reflected in the \$4,225,000 purchase price. (Ex. 50) In paragraph 12, the seller represented that “the books, records, leases, agreements and other items *delivered* to Buyer pursuant to this Agreement comprise all material documents in Seller’s possession or control regarding the operation and condition of the Property,” (Ex. 50, ¶

12(b)), and that the seller was “not aware of any concealed material defects in the Property except as disclosed to Buyer in writing during the Feasibility Period.” (Ex. 50, ¶ 12(h)) While there was a factual dispute whether the sellers affirmatively represented that there were no other reports and estimates beyond the \$175,000 DOM report, there was no dispute that the sellers knew of the Tatley-Grund report and estimate, and that neither the buyers nor their agent ever learned of it. (Exs. 34, 39, 40, 44, 118)

The sellers’ affirmative disclosure of the \$175,000 DOM bid for defective siding, without similarly disclosing, among other matters, the Tatley-Grund report and far more substantial bid for repairs, was the type of concealment or “half-truth” that is actionable as a breach of the implied covenant of good faith and fair dealing. While the sellers argued below that the buyers’ physical inspection of the property should have put her on notice that the building’s problems went well beyond decayed siding, the buyers were entitled to rely on the disclosures actually made by the sellers, particularly in light of the sellers’ express warranty under paragraph 12(b) that the sellers had delivered “all material documents in Seller’s possession or control regarding the operation

and condition of the Property.” (Ex. 50, ¶ 12(b)) The sellers breached the implied covenant of good faith.

**3. Alternatively, This Court Should Reverse The Trial Court’s Order Granting Summary Judgment And Remand For A Trial On Buyers’ Fraudulent Concealment Claim.**

At a minimum, this court should remand for a trial on buyers’ claim for fraudulent concealment against the sellers and their principals. The buyers’ claim for fraudulent concealment was not barred by the economic loss rule, *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 204, ¶¶ 23, 194 P.3d 280 (2008), citing *Alejandro v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). The reasonableness of the buyers’ failure to discover the extent of structural damage in light of the limited disclosure of the DOM report presented an issue of fact that should have been resolved by the jury.

While the *Liebergesell* Court analyzed a claim of nondisclosure in the face of an affirmative duty to speak in terms of the contractual duty of good faith, the Court relied on cases that imposed a duty of disclosure on a seller of commercial real property under a tort theory of fraudulent concealment. See *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960) (liability for

failure to disclose termite damage to apartment house); ***Ikeda v. Curtis***, 43 Wn.2d 449, 261 P.2d 684 (1953) (liability for failure to disclose that hotel's income was largely derived from prostitution), cited in ***Liebergesell***, 93 Wn.2d at 893. While a purchaser has the burden of proving that the concealed defect “would not be disclosed by a careful, reasonable inspection,” ***Alejandre***, 159 Wn.2d at 689, ¶32, the reasonableness of a purchaser’s inquiry regarding a defect that is not readily apparent is generally a question of fact. See ***Atherton Condominium Apartment-Owners Ass’n Board of Directors v. Blume Development Co.***, 115 Wn.2d 506, 525, 799 P.2d 250 (1990).

Moreover, where as here, the sellers’ partial disclosure causes the buyers not to investigate further, liability can arise for hiding a defect or frustrating the purchaser’s investigation, even where the purchaser takes title to the property “as is,” or fails to exercise diligence to discover a concealed defect. See also ***Boonstra v. Stevens-Norton, Inc.***, 64 Wn.2d 621, 624, 393 P.2d 287 (1964) (“Where misrepresentations actually deceive and mislead a party . . . it is immaterial that proper investigation would reveal the truth.”); ***Sloan v. Thompson***, 128 Wn. App. 776, 115

P.3d 1009 (2005), *rev. denied* , 157 Wn.2d 1003 (2006). In **Sloan**, this court directed entry of judgment in favor of a purchaser as a matter of law even though the purchaser had lived in the defective house for six years under a lease/option, knowing of problems with the roofing, decks, electrical system and plumbing, because the sellers failed to disclose structural framing problems that made the house unsafe for habitation. 128 Wn. App. at 789-90.

Here, the buyers were entitled to rely on the sellers' representation that the defects were limited to siding and that there were no concealed structural problems in light of the sellers' representation that it had fully disclosed all documents relating to the condition of the building. (CP 417-19) See **Petersen v. Turnbull**, 68 Wn.2d 231, 235-36, 412 P.2d 349 (1966) (liability for false representation of business income without disclosing business records "which would have disclosed the truth or falsity of the representation . . . within the exclusive control" of seller). Alternatively, the trial court erred in dismissing the fraudulent concealment claim on summary judgment and not allowing a jury to consider that claim on the facts.

**B. The Trial Court Erred In Allowing The Jury To Consider “Expert” Testimony That The Sellers Did Not Breach The Contract Because It Is The “Industry Standard” Not To Provide Buyers With All Documents Affecting A Building’s Physical Condition.**

The trial court prevented buyers from proving a violation of the implied covenant of good faith by erroneously admitting a real estate broker’s expert opinion that the sellers’ failure to disclose or deliver the reports and repair bids complied with the PSA, and that the sellers “made available” documents disclosing the structural damage to the building because they kept in their property manager’s office all relevant documents, including the reports and repair bids. This was error. The testimony was improper expert testimony on an issue of law, irrelevant to any factual issue that was in dispute, and allowed the defendants to evade the implied covenant of good faith.

Only relevant evidence is admissible. ER 402. While an expert may testify how specific contractual terms are used within a particular industry, here the trial court instructed the jury on the definition of the terms “deliver” and “make available” as a matter of law in Instruction No. 13. (CP 1027) Expert testimony must “assist the trier of fact . . . to determine a fact in issue.” ER 702. Expert

evidence of industry custom and usage regarding the terms “deliver” and “make available” contradicted the trial court’s definition of these terms and was irrelevant to the issues of breach of the express contractual representations of the seller and the implied duty of good faith and fair dealing. The trial court abused its discretion in allowing a broker’s expert testimony that “industry standard” permits a seller to deliver one document relating to the building’s condition, while withholding other documents that contradict the “disclosure.”

Because it is the trial court’s role to determine and instruct the jury on the applicable law, an expert’s opinion of the legal standards that apply to a defendant’s conduct is inadmissible. ***Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.***, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993); ***Hyatt v. Sellen Construction Co., Inc.***, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985) (expert testimony that contractor required by statutes and regulations to provide safety barrier and that contractor violated regulations properly excluded). Here, the expert testified that the sellers had met any “duty of care” (5/20 RP 112-13), and that the seller agent’s representation in a receipt that the buyers’ agent had

picked up “due diligence” materials was merely a “customary” “marker” of the date documents are “made available.” (5/20 RP 115) This testimony nullified the contractual duty of good faith, contradicted the legal definitions given to the jury, and prejudiced appellants.

**C. The Trial Court Erred By Failing To Tell The Jury That The Buyers Could Not Be Bound By A Real Estate Agent’s Knowledge And Actions.**

The trial court’s erroneous admission of this “expert” testimony was exacerbated by the trial court’s refusal to tell the jury that, by statute, the buyers could not be bound by the knowledge and actions of their real estate agent, Mr. Plager. Instruction No. 6, (CP 1020), drafted and given by the court over all parties’ objections, allowed the sellers to argue to the jury that the buyers were responsible for the agent’s knowledge and actions – including the disputed claim that the agent was told additional materials were available for review. (5/27 RP 126-30)

RCW 18.86.090(1)(a) provides that in, a real estate transaction, a “principal is not liable for any act, error, or omission by an agent . . . [u]nless the principal participated in or authorized the act, error, or omission. . . .” RCW 18.86.100 provides that “a

principal does not have knowledge or notice of any facts known by an agent . . . that are not actually known by the principal.” Appellants’ proposed instructions that would have told the jury the buyers were not responsible for Mr. Plager’s knowledge or actions, as provided by statute. (CP 930, 944) The court’s inaccurate statement of the law of agency to the contrary, that “[a]ny act or omission of an officer, employee or agent is the act or omission of the corporation,” (CP 1020) allowed the defendants to argue, with explicit reference to the instruction, that anything Mr. Plager knew was imputed to the plaintiffs. (5/27 RP 130)

According to the sellers’ successful argument to the jury, Ms. Wang knew about the existence of additional documents, including the critical contractor documents, because her agent knew about them, and her agent’s failure to inspect those documents or inform the principal about their existence “per industry custom” was imputed to the buyers. Without an accurate statement of the law, the buyers were held by the jury to be responsible for any neglect or failure on the part of the real estate agent Mr. Plager, contrary to RCW 18.86.090 and .100. An instruction that inaccurately states the law in this manner is prejudicial error. *Hawkins v. Marshall*, 92

Wn. App. 38, 46, 962 P.2d 834 (1998). This court should reverse and remand for a new trial.

**D. The Trial Court Improperly Commented On The Evidence By Instructing The Jury That It Had Dismissed The Negligent Misrepresentation Claims.**

Article 4, section 16 of the Washington Constitution provides:

“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” See *also* CR 51(j) (“Judges shall not instruct with respect to matters of fact, nor comment thereon.”). The trial court erred in instructing the jury that it had “dismissed the negligent misrepresentation claims against” respondents and their agents (CP 1021) because it gave credence to the argument of the defendants and their expert that the sellers complied with industry standard in withholding the Tatley-Grund report and repair bids.

While a trial judge is not barred from accurately stating the law of the case, it is error to convey to the “jury a judge's personal attitudes toward the merits of a case or permits the jury to infer from what the judge said or did not say that he or she believed or disbelieved the testimony in question.” ***Casper v. Esteb Enterprises, Inc.***, 119 Wn. App. 759, 770-771, 82 P.3d 1223

(2004) (trial judge's statements interrupting witness's answers to declare that answer is witness "does not know," in order to conform to sanctions order binding defendant to witness testimony in deposition, held improper comment on evidence). Compare **Smith v. Behr Process Corp.**, 113 Wn. App. 306, 335, 54 P.3d 665 (2002) (trial judge could properly instruct jury that it had resolved certain factual issues adverse to defendant pursuant to default judgment entered as sanction); **Hill v. Cox**, 110 Wn. App. 394, 408-09, 41 P.3d 495, *rev. denied*, 147 Wn.2d 1024 (2002) (introductory instruction informing venire of nature of case and issues previously decided on summary judgment not comment on evidence).

The trial court's Instruction No. 7 (CP 1021) was an impermissible comment on the evidence under the facts and given the procedural posture of this case. See **State v. Painter**, 27 Wn App. 708, 714, 620 P.2d 1001 (1980) ("The determination of a prohibited comment depends on the facts and circumstances of each case."), *rev. denied*, 95 Wn.2d 1008 (1981). Appellants' claims for breach of the express warranties and the implied covenant of good faith under the contract were so closely related to the claims for misrepresentation that the jury could not avoid

interpreting the judge's instruction that it had rejected the misrepresentation claims as a comment on the strength of the remaining contract claims.

By the end of the case, the jury heard not only that the sellers' partial disclosure of the building's defects was reasonable and standard practice and that the buyers had no right to rely on the "due diligence" representations, but that the sellers had made no misrepresentations to buyers as a matter of law. The instruction gave the trial court's imprimatur to the erroneous expert testimony and prejudiced appellants' ability to argue their theory that the partial disclosure was a breach of contractual duties, including the implied covenant of good faith.

**E. Respondents Were Not Entitled to Fees. Appellants Are Entitled To Fees On Appeal.**

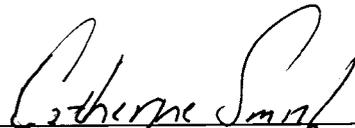
The trial court found that the sellers, including the Chisholms, who were not parties to the contract, were entitled to attorney fees as prevailing parties under the PSA. (CP 1213-24) When this court reverses, it should vacate the trial court's award of fees to the sellers, and award attorney fees to the buyers at trial and on appeal. *Sloan v. Thompson*, 128 Wn. App. 776, 793, ¶¶33, 115 P.3d 1009 (2005).

**VI. CONCLUSION**

This court should reverse, remand for trial before a properly instructed jury that considers only admissible evidence, and award appellants fees on appeal.

Dated this 2nd day of June 2009.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By:   
Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Appellants

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 2nd, 2009, I arranged for service of the Brief of Appellants, to the court and to counsel for the parties to this action as follows:

FILED  
 COURT OF APPEALS DIV. #1  
 STATE OF WASHINGTON  
 2009 JUN 2 3 PM 3:47

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| Office of Clerk<br>Court of Appeals - Division I<br>One Union Square<br>600 University Street<br>Seattle, WA 98101 | <input type="checkbox"/> Facsimile<br><input checked="" type="checkbox"/> Messenger<br><input type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Overnight Mail   |
| Kevin M. Winters<br>Hawkes Law Firm, P.S.<br>19929 Ballinger Way NE Suite 200<br>Shoreline WA 98155-8208           | <input type="checkbox"/> Facsimile<br><input type="checkbox"/> Messenger<br><input checked="" type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Overnight Mail   |
| Rodrick Dembowski<br>Christopher Osborn<br>Foster Pepper PLLC<br>1111 3rd Ave Ste 3400<br>Seattle WA 98101         | <input type="checkbox"/> Facsimile<br><input checked="" type="checkbox"/> Messenger<br><input type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Overnight Mail   |
| Charles Wiggins<br>Wiggins & Masters, P.L.L.C.<br>241 Madison Avenue N<br>Bainbridge Island, WA 98110-1811         | <input type="checkbox"/> Facsimile<br><input type="checkbox"/> Messenger<br><input checked="" type="checkbox"/> U.S. Mail<br><input checked="" type="checkbox"/> Email |
| Thomas S. Hayward<br>Attorney At Law<br>1000 Second Avenue, Suite 1750<br>Seattle WA 98104                         | <input type="checkbox"/> Facsimile<br><input checked="" type="checkbox"/> Messenger<br><input type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Overnight Mail   |

**DATED** at Seattle, Washington this 2nd day of June, 2009.

  
 \_\_\_\_\_  
 Carrie O'Brien

## Index To Appendices

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- Appendix B: Instruction No. 6 (CP 1020)
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- Appendix D: Plaintiffs' Proposed Instruction No. 31A (CP 994)
- Appendix E: Instruction No. 7 (CP 1021)
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- Appendix G: Instruction No. 11 (CP 1025)
- Appendix H: Plaintiffs' Proposed Instruction No. 22A (CP 1007)
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PHOTOCOPY

The Honorable Greg Canova  
Defendants' Joint Motion for  
Summary Judgment

**FILED**

KING COUNTY WASHINGTON

JAN 14 2008

SUPERIOR COURT CLERK  
BY DAWN TUBBS  
DEPUTY.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SHU-CHIN WANG and WEN-SHYAN WANG,  
husband and wife; and MOUNTLAKE  
INVESTMENT, LLC, a Washington limited  
liability company,

Plaintiffs,

vs.

KIDDER, MATHEWS & SEGNER, INC., a  
Washington corporation d/b/a GVA Kidder  
Mathews; JASON M. ROSAUER and ANNE M.  
MARKLEY, husband and wife, and their marital  
community; BUSINESS PLANS &  
STRATEGIES, INC., a Washington corporation;  
and ROSE M. CHISHOLM and TONY  
CHISHOLM, husband and wife, and their marital  
community,

Defendants.

NO. 06-2-36091-5 SEA <sup>(TAC)</sup>  
*in part and denying in part*  
ORDER GRANTING DEFENDANTS'  
JOINT MOTION FOR SUMMARY  
JUDGMENT

(PROPOSED) <sup>(TAC)</sup>

This matter came before the Court on the Defendants' Joint Motion for Summary Judgment seeking the dismissal of all claims and causes of action brought by Plaintiffs against each defendant.

The Court heard oral argument of Rodrick J. Dembowski and Thomas S. Hayward on behalf of Defendants and Kevin M. Winters on behalf of Plaintiffs. The Court considered the pleadings filed in this action and the following <sup>(TAC)</sup>:

ORIGINAL

BEST AVAILABLE IMAGE POSSIBLE

1. Declaration of Tony Chisholm, including Exhibits 2-9 attached thereto;
2. Declaration of Thomas S. Hayward, including Exhibits 11-14 attached thereto;
3. Declaration of Jens Johanson, including Exhibits 1-8, attached thereto;
4. Declaration of Kevin M. Winters, including Exhibits 9-21, attached thereto;
5. Declaration of Sue Wang, including Exhibits 22-29, attached thereto;
6. Declaration of Rod Dembowski, including Exhibits A and B attached thereto; and
7. More readable preliminary "Commercial and Investment Real Estate Purchase and Sale Agreement", delivered, without objection, to the Court by messenger on December 5, 2007; and 8. The Motion, Response and Reply on Summary Judgment (JPC)

Based on the argument of counsel and the evidence presented, the Court ~~finds that:~~ <sup>(JPC) Concludes</sup>

1. There is no genuine issue of material fact relative to the Plaintiffs' claim of misrepresentation by ~~the~~ <sup>(JPC)</sup> defendant ~~and defendants Kidder, Mathews & Segner, Inc.,~~ <sup>Business Plans & Strategies, Inc. and</sup> ~~d/b/a GVA Kidder Mathews; Jason M. Rosauer, Anne M. Markley; Business Plans & Strategies, Inc., Rose M. Chisholm and Tony Chisholm~~ <sup>and it is</sup> are each entitled to judgment of dismissal of this cause of action as a matter of law;

2. There is no genuine issue of material fact relative to Plaintiffs' claim for breach of contract <sup>against</sup> ~~and~~ defendants Kidder, Mathews & Segner, Inc., d/b/a GVA Kidder Mathews; Jason M. Rosauer, Anne M. Markley; ~~Business Plans & Strategies, Inc.,~~ <sup>(JPC)</sup> Rose M. Chisholm and Tony Chisholm <sup>and each is</sup> ~~are~~ each entitled to a judgment of dismissal of this cause of action as a matter of law;

3. There is no genuine issue of material fact relative to Plaintiffs' claim for fraudulent concealment and defendants Kidder, Mathews & Segner, Inc., d/b/a GVA Kidder Mathews; Jason M. Rosauer, Anne M. Markley; Business Plans & Strategies, Inc., Rose M. Chisholm and Tony Chisholm are each entitled to a judgment of dismissal of this cause of action as a matter of law;

2  
-1 4. There is no genuine issue of material fact relative to Plaintiffs' claim for fraud  
2 and defendants Kidder, Mathews & Segner, Inc., d/b/a GVA Kidder Mathews; Jason M.  
3 Rosauer, Anne M. Markley; Business Plans & Strategies, Inc., Rose M. Chisholm and  
4 Tony Chisholm are each entitled to a judgment of dismissal of this cause of action as a  
5 matter of law;

6 5. There is no genuine issue of material fact relative to Plaintiffs' claim for  
7 consumer protection and defendants Kidder, Mathews & Segner, Inc., d/b/a GVA Kidder  
8 Mathews; Jason M. Rosauer, Anne M. Markley; Business Plans & Strategies, Inc., Rose  
9 M. Chisholm and Tony Chisholm are each entitled to a judgment of dismissal of this cause  
10 of action as a matter of law;

11 ~~6. Plaintiffs plead a cause of action against each defendant for breach of contract.~~  
12 ~~The contract provides for an award of reasonable attorney fees to the prevailing party in~~  
13 ~~any suit brought concerning the contract (§ 21, last paragraph). Defendants are entitled to~~  
14 ~~an award of their reasonable attorney fees.~~

15 Based on the foregoing findings, it is ordered:

16 *Defendant's Motion for Summary Judgment is Granted, in part,*  
17 *Judgment of Dismissal of all claims brought by plaintiffs against each defendant is*  
18 *and Denied, in part, as reflected above.*  
19 ~~hereby entered and the amount of attorney fees to be awarded to each defendant is reserved~~  
20 ~~for further consideration.~~

21 Dated this 14<sup>th</sup> day of January, 2008.

22 *Greg Canova*  
23 \_\_\_\_\_  
24 The Honorable Greg Canova  
25

INSTRUCTION NO. 6

The plaintiff Mountlake Investment, LLC, and the defendant, Business Plans & Strategies, Inc., are corporations. A corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee or agent is the act or omission of the corporation.

**App. B**

1020

**Jury Instruction No. 11**

**WPI 50.01—Agent and Principal—Definition**

The law is different for different types of agents. The following instruction relates only to the agency relationship between a property owner and a property owner's property management agents. In this case, the property owner is Business Plans & Strategies, Inc., and its property managers are Cynthia Montagne and GVA Kidder Mathews in its role as property manager through its property management division employee Earl Wayman.

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. The agency agreement may be oral or in writing.

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

Notice given to and knowledge acquired by an agent within the scope of the agent's authority is deemed to be notice and knowledge to the principal. This is called imputed knowledge.

---

**Authority**

The first paragraph is added to avoid jury confusion on different legal rules relating to the different kinds of agents involved in this matter. A property management agent is not subject to RCW 18.86 or to its provisions modifying the common law of agency, since RCW 18.86.010 and RCW 18.86.110 limit the scope of that chapter to "the agency relationship created under this chapter or by written agreement *between a licensee and a buyer and/or seller* relating to the performance of real estate brokerage services by the licensee." Before entering into the purchase and sale transaction at issue in this case in 2006, Business Plans & Strategies, Inc. was not a seller but merely a property owner. This is further evidenced by the fact that a separate brokerage/listing agreement was entered into when the property was put on the market in 2005 and then again in 2006.

The remainder of the instruction comes from WPI 50.01 (definition); WPI 50.03 (act or omission); and Hurlbert v. Gordon, 64 Wn. App. 386, 396, 824 P.2d 1238 (1992) ("Under general theories of agency, notice given to and knowledge acquired by an agent is imputed to the principal as a matter of law.").

Jury Instruction No. 31A

The law is different for different types of agents. The following instruction relates only to the agency relationship between a property seller and a property seller's real estate agent and broker and a property buyer and that buyer's real estate agent and broker. In this case, the property seller is Business Plans & Strategies, Inc., its real estate agent is Jason Rosauer, and its real estate broker is GVA Kidder Mathews in its role as broker through its brokerage employee Jason Rosauer. The property buyers are Shu-chin Wang and Mountlake Investment, LLC, and their real estate agent is Doug Plager.

Real estate sellers and buyers are not liable for any act, error, or omission by their real estate agent, unless the seller or buyer participated in or authorized the act, error, or omission of its agent.

Real estate buyers and sellers are not deemed to have knowledge or notice of any facts known by their real estate agent that are not actually known by that agent's buyers or sellers.

---

**Authority**

The first paragraph is added to avoid jury confusion on different legal rules relating to the different kinds of agents involved in this matter.

The remainder of the instruction comes from RCW 18.86.090(1) (no vicarious liability without participation of principal) and RCW 18.86.100(1) (no agent knowledge imputed to principal).

INSTRUCTION NO. 7

The Court has dismissed the negligent misrepresentation claims against Tony Chisholm, Kidder Mathews & Segner, Inc. d/b/a GVA Kidder Mathews, and its agent Jason Rosauer. The claims against Anne Markley Rosauer, and Rose Chisholm have also been dismissed. The only remaining claim in this lawsuit is the breach of contract claim against Business Plans and Strategies, Inc., the seller of the building.

During your deliberations on the breach of contract claim, you should not consider, and your deliberations should not be impacted by the fact that the other claims and defendants have been dismissed from this lawsuit.

**INSTRUCTION NO. 46**

Negligence is no longer an issue in this case. You are not to consider the negligence of any party when deciding the contract claims made by plaintiffs and defendant.

---

This instruction is necessary because much of this case focussed on negligence of various parties. This would not have happened if the misrepresentation claims had been dismissed before trial. To avoid prejudice to plaintiffs, the jury should be instructed not to incorporate negligence into its determinations of the contract claims and defenses that are going to the jury.

App. F

1011

INSTRUCTION NO. 11

The failure to perform fully a contractual duty when it is due is a breach of contract. The duties at issue are the defendant's duties under Paragraph 5 (a) and Paragraph 12 of the Real Estate Purchase and Sale Agreement.

App. G

1025

**PLAINTIFFS' PROPOSED INSTRUCTION NO. 22A**

The failure to perform fully a contractual duty when it is due is a breach of contract. The duties at issue in this case are defendant's duty to make available all documents in seller's possession or control relating to the property and deliver all material documents in seller's possession or control relating to the condition of the building in accordance with the parties' contract, defendant's duty to disclose in writing information about concealed material defects in accordance with the contract, and defendant's duty of good faith and fair dealing.

---

WPI 302.01

**NOT AGREED**

App. H

1067

PHOTOCOPY

FILED  
KING COUNTY, WASHINGTON

JUL 01 2008

SUPERIOR COURT CLERK  
BY GABRIELLE JACOBSEN  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SHU-CHIN WANG and WEN-SHYAN  
WANG, husband and wife; and  
MOUNTLAKE INVESTMENT, LLC, a  
Washington limited liability company,

Plaintiffs,

vs.

KIDDER, MATHEWS & SEGNER, INC., a  
Washington corporation d/b/a GVA Kidder  
Mathews; JASON M. ROSAUER;  
BUSINESS PLANS & STRATEGIES, INC.,  
a Washington corporation; and TONY  
CHISHOLM,

Defendants.

Hon. Jay V. White

NO. 06-2-36091-5 SEA

~~Plaintiffs~~

ORDER DENYING PLAINTIFFS'  
CR 59 MOTION FOR NEW TRIAL  
AND CONTINUING  
DEFENDANTS' RESPONSE TO CHISHOLM'S  
PENDING MOTION AND  
SETTING BRIEFING  
SCHEDULE JW

THIS MATTER came before the Court on Plaintiffs' CR 59 Motion For A New Trial (the "Motion"). The Court considered the Motion, and also considered Defendant Business Plans & Strategies, Inc.'s Response to Plaintiffs' CR 59 Motion For New Trial, and Kidder Mathews' & Rosauer's Opposition to Plaintiffs CR 59 Motion, and Plaintiffs' Reply.

///

///

ORDER DENYING PLAINTIFFS' CR 59  
MOTION FOR NEW TRIAL - I

FOSTER PEPPER PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299  
Phone (206) 447-4400 Fax (206) 447-9700

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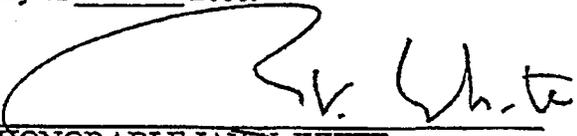
App. I

1211

1 The Court deems itself fully advised. Having considered the pleadings and the  
2 testimony and the Court's rulings at trial, the Court hereby

3 DENIES the Plaintiffs' Motion For A New Trial. \*

4 DONE IN OPEN COURT this 30 day of June 2008.

5  
6   
7 HONORABLE JAY V. WHITE

8  
9 Presented by:

10  
11 FOSTER PEPPER PLLC

12   
13 Rodrick J. Dembowski, WSBA No. 31479  
14 Attorneys for defendants  
Kidder Mathews and Mr. Rosauer

15 THOMAS S. HAYWARD

16  
17 By  #31479  
18 Thomas S. Hayward, WSBA #7359  
19 Attorney for Defendants Business Plans  
& Strategies, Inc. and Chisholm

\* Defendants BPS and  
Chisholm's Motion  
for Judgment on  
Jury Verdict and an  
Award of Attorney  
Fees and Expenses  
NOTED FOR 6/23/08  
IS continued to  
7/21/08. Plaintiffs  
May respond on or  
before 7/14/08 and  
Defendants BPS and  
Chisholm may reply  
on or before 7/21/08,  
and the Court will  
rule thereafter. 

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ORDER DENYING PLAINTIFFS' CR 59  
MOTION FOR NEW TRIAL - 2

FOSTER PEPPER PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299  
Phone (206) 447-4400 Fax (206) 447-5700

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KIDDER, MATHEWS & SEGNER, INC.  
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**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

SHU-CHIN WANG and WEN-SHYAN  
WANG, husband and wife; and  
MOUNTLAKE INVESTMENT, LLC, a  
Washington limited liability company,

Plaintiffs,

vs.

KIDDER, MATHEWS & SEGNER, INC., a  
Washington corporation d/b/a GVA Kidder  
Mathews; JASON M. ROSAUER and ANNE  
M. MARKLEY, husband and wife, and their  
marital community; BUSINESS PLANS &  
STRATEGIES, INC., a Washington  
corporation; and ROSE M. CHISHOLM and  
TONY CHISHOLM, husband and wife, and  
their marital community,

Defendants.

NO. 06-2-36091-5 SEA

ORDER GRANTING DEFENDANTS  
BUSINESS PLANS & STRATEGIES,  
INC.'S AND TONY CHISHOLM'S  
MOTION FOR ATTORNEY FEES &  
COSTS AND FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

The Honorable Jay V. White

~~PROPOSED~~

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND ORDER GRANTING MOTION.**

1.1 This matter came before the Court upon Defendants Business Plans &  
Strategies, Inc.'s and Tony Chisholm's (hereinafter collectively referred to as "BPS  
Defendants") motion for an award of attorney fees and costs against the Defendants.

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM'S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - Page 1

THOMAS S. HAYWARD  
1000 SECOND AVENUE, SUITE 1750  
SEATTLE, WASHINGTON 98104  
(206) 682-4501 FAX (206) 624-5930

App. J

1213

1.2 The applicable law is well settled. Washington has adopted the lodestar method for determining the amount of an award for fees and costs. See, e.g., Bowers v. Transamerica Title Ins. Co., 100 Wn. 2d 581, 593 (1983); Mehlenbacher v. DeMont, 103 Wn. App. 240, 248 (2000). The applicable principles which guide this court in applying the lodestar methodology are summarized in Mahler v. Szucs, 135 Wn. 2d 398, 433-435 (1998) (emphasis in original):

Under this methodology, the party seeking fees bears the burden of proving the reasonableness of the fees [citing Scott Fetzer Co. Weeks, 122 Wn. 2d 141, 151 (1993)].

Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. Fetzer, 122 Wn. 2d at 151. Counsel must provide contemporaneous records documenting the hours worked. As we said in Bowers [100 Wn. 2d at 597], such documentation

need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.).

The court must also determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services [citation omitted].

Finally, the lodestar fee, calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result, may, in rare instances, be adjusted upward or downward in the trial court's discretion. Fetzer, 122 Wn. 2d at 150; Travis v. Washington Horsebreeders Ass'n, 111 Wn. 2d 396, 759 P.2d 418 (1988).

In the past, we have expressed more than modest concern regarding the need of litigants and courts to rigorously adhere to the

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM'S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 2

lodestar technology. See Scott Fetzer Co., 122 Wn. 2d 141. Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel. Nordstrom, Inc. v. Tampourlos, 107 Wn. 2d 735, 744, 733 P. 2d 208 (1987).

In Absher Construction Co. v. Kent School District No. 415, 79 Wn.App. 841, 848

(1995), the court stated:

The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties. An "explicit hour-by-hour analysis of each lawyer's time sheets" is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded [citation omitted]. An award of substantially less than the amount requested should indicate at least approximately how the court arrived at the final numbers, and explain why discounts were applied.

As to the showing necessary to show the reasonableness of hourly rates, as explained in Bowers, 100 Wn. 2d at 597:

Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate. The attorney's usual fee is not, however, conclusively a reasonable fee and other factors may necessitate an adjustment [citation omitted]. In addition to the usual billing rate, the court may consider the skill required by the litigation, time limitations imposed upon the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case. The reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate may well vary with each type of work involved in the litigation.

In McGreevy v. Oregon Mutual Insurance Co., 90 Wn. App. 283, 293 (1998), for purposes of establishing a reasonable hourly rate, the court found insufficient an affidavit that "does not discuss the issue of hourly rate." Regarding the reasonableness of the number of hours expended, the McGreevy court stated, 90 Wn. App at 292:

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM'S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
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In order to determine if the number of hours is reasonable, "the attorneys must provide reasonable documentation of the work performed." Bowers, 100 Wn. 2d at 597. That documentation must include, at a minimum, (1) the number of hours worked; (2) the type of work performed; and (3) the category of attorney who performed the work.

"The court must limit the lodestar amount to hours reasonably expended and therefore must eliminate hours 'spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.' Bowers, 100 Wn. 2d at 597", Van Pham v. Seattle City Light, 124 Wn. App. 716, 725 (2004).

As to the fees billed by paralegals or other nonlawyer personnel, there must be demonstrated compliance with the criteria approved in Absher, 79 Wn. App. at 845:

The following criteria will be relevant in determining whether such services should be compensated: (1) the services performed by the nonlawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and (6) the amount charged must reflect reasonable community standards for charges by that category of personnel. [Citation omitted.]

A mere showing of the hours worked and the hourly rate is insufficient. McGreevy, 90 Wn. App. at 292.

It also is the burden of the party seeking fees where there are multiple claims to segregate claims for which recovery is permitted under a statute or contract from claims where recovery is not so permitted. Nordstrom v. Tampourios, 107 Wn. 2d at 743.

Similarly, even if there is an interrelationship among the claims as to the basic facts, if

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM'S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 4

the legal theories which attach to the facts are different, then the moving party must separate the time spent on effort essential to claims for which recovery of fees is allowed from time spent on effort devoted to the other causes of action. Travis v. Washington Horsebreeders Association, Inc., 111 Wn. 2d 396, 410-411 (1988); Dash Point Village v. Exxon, 86 Wn. App. 596, 611-612 (1997). If the claims are separable, then "attorney fees should be allowed only for services related to the causes of action which allow for fees." Boeing Company v. Sierracin Corporation, 108 Wn. 2d at 66; citing Nordstrom, at 743. If the claims are inseparable or if it would be unnecessarily complex to segregate the attorney fees among the claims, then all reasonable attorney fees may be recovered. See Kastanis v. Educational Employees Credit Union, 122 Wn. 2d 483, 501 (1993) Stated another way, if the issues and evidence are so interrelated as to make division of the claims impossible without being arbitrary, then it is proper for the court to allow recovery of all reasonable attorney fees for all claims. See Blair v. Washington State University, 108 Wn. 2d at 571-572; Schmidt v. Cornerstone Investments, 115 Wn. 2d 148, 170 (1990); Bloor v. Fritz, 143 Wn. App. 718, 746-748 (2008).

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM'S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 5

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30w  
1.2 The Court, having reviewed (1) the BPS Defendants' Amended Motion; (2) the Amended Supplemental Declaration of Thomas S. Hayward; (3) Plaintiffs' response to the motion; and (4) BPS Defendants' reply; and (5) ~~the records and files herein;~~ *Supplemental Declaration of Thomas S. Hayward* dated 7/23/08; *Plaintiffs' Response to Proposed Order* dated 8/19/08  
NOW THEREFORE, the Court makes the following findings of fact and conclusions

of law:

2.1 The BPS Defendants incurred attorney fees of \$207,520 and expenses of \$14,815.36 to defend the Plaintiffs' causes of action for 1) misrepresentation, 2) breach of contract, 3) fraudulent concealment, 4) fraud, and 5) violation of the Consumer Protection

Act. *The court finds that defendants make no claim for fees or expenses under CR 68. Defendants Reply at 2.*

2.2 Each cause of action in the lawsuit related to the purchase by Plaintiffs of a commercial building owned by Defendant Business Plans & Strategies, Inc. pursuant to a Commercial Real Estate Purchase & Sale Agreement ("Agreement") entered into between Plaintiff Shu-Chiu "Sue" Wang as Buyer, subsequently assigning to Plaintiff Mountlake Investment, LLC and Defendant Business Plans & Strategies, Inc.

2.3 Before the case was submitted to the jury, the Court dismissed 4 of the 5 causes of action brought against the BPS Defendants, leaving only the Plaintiffs' collective claim of breach of contract against Business Plans & Strategies, Inc. for determination by the jury. The jury returned a verdict in favor of Business Plans & Strategies, Inc. Accordingly, the BPS Defendants successfully defended each claim brought by Plaintiffs and Plaintiffs were awarded nothing pursuant to their five-count complaint.

2.4 All claims brought by Plaintiffs against the BPS Defendants arose out of the Agreement and the Agreement was central to each claim placed by Plaintiffs, including the individual Wang Plaintiff's claim for breach of contract.

ORDER GRANTING DEFENDANTS BPS & CHISHOLM'S MOTION FOR ATTORNEY FEES & COSTS AND FINDINGS OF FACT AND CONCLUSIONS OF LAW - Page 6

THOMAS S. HAYWARD  
1000 SECOND AVENUE, SUITE 1750  
SEATTLE, WASHINGTON 98104  
(206) 682-4501 FAX (206) 624-5930

1 2.5 All claims brought by Plaintiffs against the BPS Defendants arose from the  
2 same facts and were closely related to one another. Accordingly, it is not possible to  
3 segregate fees incurred between the two BPS Defendants or between the five causes of action  
4 brought by the collective Plaintiffs against the BPS Defendants. This finding is also  
5 supported by the fact that the Plaintiffs were unable to separate their presentations of the  
6 various claims against the BPS Defendants.

7  
8 2.6 The Agreement from which the five causes of action <sup>arise</sup> ~~arouse~~ contains an  
9 attorney fee clause which provides:

10 If Buyer or Seller institutes a suit against the other concerning this Agreement,  
11 the prevailing party is entitled to reasonable attorneys' fees and expenses. In  
the event of trial, the amount of attorneys' fees shall be fixed by the court.

12 2.7 The Court has reviewed the sworn Supplemental Declaration of Thomas S.  
13 Hayward, attorney for the BPS Defendants, relating to the legal fees (\$207,520) and expenses  
14 (\$14,815.36) incurred by the BPS Defendants and has concluded the hourly rate charged by  
15 Mr. Hayward' (\$250/hour) is at or below market for similarly qualified and experienced  
16 attorneys in the Seattle market area, ~~and that the hours actually spent in defending this case are~~  
17 ~~reasonable.~~ <sup>OK</sup> The finding concerning the reasonableness of Mr. Hayward's hourly rate is  
18 supported by the fact that the Plaintiffs offered no argument to the contrary.

19 2.8 Although Plaintiffs dispute the fees sought on this motion, they presented no  
20 objection to the \$14,815.36 in costs sought by the BPS Defendants. <sup>Given No Wording</sup>

21 ~~2.9 Further, the Court has observed the conduct of the parties and their respective~~  
~~counsel and considered the particular circumstances of this case and determined the fees~~  
~~requested by the BPS Defendants in this case are reasonable.~~  
<sup>g. The contract, Defendants are not limited to statutory</sup>  
<sup>costs but may recover all reasonable "expenses".</sup>  
<sup>See Jenkins v. DSHS, 160 Wn 2d 287, 301-302 (2001).</sup>

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2.9 *OV*

~~2.10~~ The Court has considered the factors set out in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 299 (1983). Following *Bowers*, the Court must first establish the ~~loadstar~~ <sup>*loadstar*</sup> fee. Then the Court will consider whether departure is needed either upward or downward. Under *Bowers*, the Court determines the ~~loadstar~~ <sup>*loadstar*</sup> fee by multiplying the hours reasonably expended in the litigation by the lawyer's reasonable hourly rate. *OV*

2.10 *OV*

The Court finds that all of the factors set out in *Bowers, supra*, also support the conclusion that the rates actually billed are also reasonable under the circumstances. The BPS Defendants were charged by their attorney at his lowest applicable hourly rate giving rise under *Bowers* to a presumption of reasonableness. Even without the presumption, however, the Court finds that the record amply supports the Court's finding that the rate charged is reasonable.

~~2.12 Multiplying the hours reasonably expended by BPS' attorney, the Court concludes the loadstar fee is \$207,520. The Court concludes that, given the history of this controversy and the relative position taken by the opposing parties, as well as the litigation pursued as detailed by the record, the fees requested are amply justified and no adjustment is necessary.~~ *OV*

2.11 *OV*

Because Plaintiffs Mr. and Ms. Wang individually sued each of the BPS Defendants for breach of contract, the suit is deemed to be on the contract according to *Herzog Aluminum v. General American Window*, 39 Wn. App. 188, 197 (1984). As a result each of the BPS Defendants is entitled to an award of attorney fees pursuant to the contract

against the Wang Plaintiffs individually, *as well as Mountlake Investment, LLC, Shu-Chi Wang's assignee. Regardless how*

~~2.14 The BPS Defendants are entitled to an award of reasonable fees and expenses~~ *Plaintiffs characterized their claims (contract or tort), each claim arose because of the contract and the contract was central to the dispute. JW*

ORDER GRANTING DEFENDANTS BPS & CHISHOLM'S MOTION FOR ATTORNEY FEES & COSTS AND FINDINGS OF FACT AND CONCLUSIONS OF LAW - Page 8 *OV*

THOMAS S. HAYWARD  
1000 SECOND AVENUE, SUITE 1750  
SEATTLE, WASHINGTON 98104  
(206) 682-4501 FAX (206) 624-5930

2.12 The court has conducted an independent review of the records of litigation expenses incurred and applied discounts to account for duplicative, wasteful or unproductive time, and also disallowed time where it was unable to segregate unproductive time from productive time, or where there was insufficient detail provided for the court to evaluate the reasonableness of the time incurred. Although the court is not required to engage in an explicit "hour-by-hour analysis", Absher, 79 Wn. App. at 848, examples readily may be given: for the 12/4/06 entry, the court reduces the time by half. On 1/17/07, the court agrees with BPS that no time should be allowed for a second unrelated lawsuit, but that lawsuit was also referenced on 1/15/07, apparently one hour, which the court disallows. "Various conversations" for an hour on 1/18/07 is too vague. Entries on the February 21, 2007, statement fail to segregate time spend attempting to disqualify the first assigned judge, dismiss the second lawsuit, and deal with some sort of attorney fee demand. The court disallows time regarding interpreter issues on the September 24, 2007, statement; interpreters are not defendants' responsibility. It appears that in excess of 95 hours (generating claimed fees of at least \$23,750) was devoted to a summary judgment motion. Although the motion was partially successful, the court finds that 65 hours, if not less, is reasonable. The court disallows 4 hours on 1/17/08 devoted to negotiations with co-defendants' counsel regarding indemnification issues.

2.13 As to the trial, trial spanned May 5-8, 12-15, 19-22, and 27-28. Recovery of attorney fees is claimed for ten hours each day on May 5-6 for "motions in limine, preparation and argument"; 12 hours on May 7 for "jury selection"; 11 hours on May 8 for "first day of testimony"; 10 hours on May 12 for "trial"; 11 hours on May 13 for "trial

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM'S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
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and post-trial jury instruction work”; 11 hours on May 14 for “trial”; 11 hours on May 15 for “trial”; 11 hours on May 19 for “trial”; 9 hours on May 20 for “trial”; 9 hours on May 21 for “trial – Motions and jury instructions”; 12 hours on May 22 for “trial, pre and post preparation”; 9.5 hours on May 27 for “last day of trial, 7-4:30”; and 3 hours on May 28 for “appear in court to hear verdict (portal to portal)”. The court’s trial hours are 9 a.m. to 4 p.m., interrupted by two breaks and a ninety minute lunch hour, for a total of approximately 7 hours per day, although it is common to run late at times. The court finds it is probable that defense counsel was actively engaged in the representation of his clients during that entire time period. The court also recognizes that it is likely that additional time was spent daily on preparation for the following day, as well as for travel time (“portal to portal”) The court does not find it to be reasonable to allow recovery of travel time at an hourly rate of \$250. The chief difficulty here, however, is that the time entries (e.g. “trial”) are insufficient for the court to make an independent assessment of the reasonableness of fees charged for the work performed outside of the court’s trial hours so the court will limit recovery of trial time to 7 hours per day.<sup>1</sup>

2.14 In this case, the BPS defendants are seeking recovery of \$207,520 in attorney fees for 830.8 hours of work billed at \$250 per hour. At eight hours per day, this is the equivalent of nearly 104 days. The court finds that the hourly rate of \$250 per hour

---

<sup>1</sup> The court recognizes that plaintiffs’ counsel contends that the first and second days of trial actually were half days “while court reviewed the parties’ motions in limine.” Plaintiffs’ Response at 15. It appears to the court that counsel had to be present all day on May 5, but there was only an afternoon session on May 6. The court has taken into account these and other examples provided by plaintiffs’ counsel indicative of unproductive time or excessive time, e.g. research on CR 11 motions never brought; 14 hours preparing for the summary judgment hearing after having filed defendants’ reply brief; and 39 hours working on a response to plaintiffs’ motion for a new trial. *Id.* Plaintiffs’ counsel also questions whether the time records are contemporaneous, but the court is satisfied that it has accurate billing records. Amended Declaration of Thomas Hayward at 2-3, and Exhibits B and C thereto.

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM’S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
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1222

is reasonable for a lawyer of defense counsel's experience, and that is not contested in any event. The court also recognizes that amount at issue here was in excess of \$1.2 million, and defense counsel achieved a defense verdict. This is not a case where it would be appropriate for the court to reduce the fee award because of the amount at issue. See, e.g. Scott Fetzer Co. Weeks, 122 Wn. 2d 141, 150-151 (1993). Based upon its independent review of the billing statements, however, and taking into account the various limiting factors discussed herein and examples given, including a partial failure of proof where the evidence was insufficient for the court meaningfully to evaluate independently the reasonableness of the time attributed to various tasks, the court finds that the claimed hours reasonably may and should be discounted by one-third. See Mahler v. Szucs, 135 Wn. At 433-435; Absher Construction Co. v. Kent School District No. 415, 79 Wn.App. at 848. Applying lodestar methodology, the court finds that the reasonable lodestar amount for the attorney fees claimed is 553 hours multiplied by the reasonable hourly rate of \$250 which results in an award of \$138,250.

2.15 No adjustment of the lodestar amount is appropriate in this case. This is not one of those "rare instances" where the lodestar fee may be adjusted upward or downward. See Mahler v. Szucs, 135 Wn. 2d 1t 434-435. Because the court has taken in to account unproductive or unproven time, duplication of effort, and other factors discussed herein in establishing the lodestar itself, it would not be appropriate for the court to employ the same factors to reduce further the lodestar amount once the lodestar has been calculated. See Bowers, supra, 100 Wn. 2d at 598.

ORDER GRANTING DEFENDANTS BPS  
& CHISHOLM'S MOTION FOR ATTORNEY FEES  
& COSTS AND FINDINGS OF FACT AND  
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1 under the Agreement. Regardless of how Plaintiffs characterized their claims against the BPS  
2 Defendants (contract and tort), each claim arose from the contract and the contract was central  
3 to the dispute.

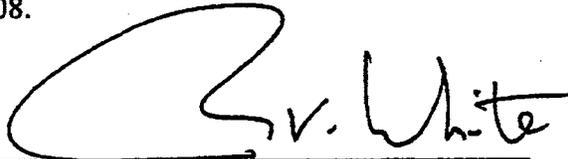
4 Accordingly, it is hereby **ORDERED**:

5 1. Business Plans & Strategies, Inc. and Tony Chisholm are jointly awarded  
6 \$14,815.36 in expenses, as set forth in the Supplemental Declaration of Thomas S. Hayward  
7 and the award shall be against ~~Defendants~~ <sup>Plaintiffs</sup> on a joint and several basis.

8 2. Business Plans & Strategies, Inc. and Tony Chisholm are jointly awarded  
9 \$ 138,250 as their reasonable attorney fees pursuant to the Agreement and this  
10 award shall be against the ~~Defendants~~ <sup>Plaintiffs</sup> on a joint and several basis.

11 3. The final judgment entered in this action shall reflect the foregoing awards.

12 Signed this 1<sup>st</sup> day of October, 2008.

13  
14 

15 The Honorable Jay V. White  
16 Judge

17 Presented by:

18   
19 Thomas S. Hayward, WSBA #7359  
20 Attorney for Defendants Business Plans &  
21 Strategies, Inc./Chisholm