

64402-5

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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

NO. 64402-5-I

ROBERT S. PETERSON,

Appellant,

vs.

**JOSEPH D. WOODMANSEE and
KIMBERLY A. WOODMANSEE,**

Respondents.

BRIEF OF RESPONDENTS / CROSS-APPELLANTS

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ORIGINAL

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I. INTRODUCTION.

This was a fraud case which was proved with an unusual wealth of documentary evidence. Peterson did not attend the trial, and admits that the facts are essentially undisputed (Appellant's Brief, p. 5, n. 1). The Introduction to Appellant's Brief mistakenly states (at p. 2) that "the court found for Peterson". In fact the trial court found for Woodmansees on every material point in the case. Peterson assigns error to sixteen paragraphs of findings, but does not discuss the record. Peterson has the burden to show that challenged findings of fact are not supported by substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Substantial evidence supports the court's findings.

Peterson essentially claims a "privilege to lie" in order to disrupt a purchase and sale agreement after he has signed it, either in his own interest, or as an "agent" or "partner" with his tenants in common. But Peterson testified that he knew at the time that he had no authority to act on behalf of his co-owners, effectively ending his agency and partnership claims. Peterson argues that after he undertook to obtain for Woodmansees the signatures of his co-tenants on the PSA, he owed no duty to Woodmansees, and had every right to deceive them about it. He also claims that as one of the owners, he cannot be liable for interfering with the other owners executing the PSA, who would have signed it if they had known of it.

Woodmansees appeal the trial court's amended conclusions of law denying in part their requests for attorney fees and prejudgment interest. Woodmansees were entitled to fees because their claims for fraud in the negotiation of the PSA and interference with the co-owners' execution of the PSA are claims "concerning the Agreement" under the fees provision of the PSA, and were claims "on the contract". Woodmansees were entitled to prejudgment interest on all their damages because they were liquidated, regardless whether Peterson received all of the money his fraud cost them.

II. WOODMANSEES' ASSIGNMENTS OF ERROR.

1. The trial court erred in Conclusion of Law No. 1.12 of the Order Denying Motion for Award of Attorney Fees (Appendix A) by amending the Court's original Conclusion of Law No. 28 and denying Woodmansees' Motion for Award of Attorney Fees.

2. The trial court erred in Conclusions of Law No. 1.6 and 1.9 of the Judgment and Order Denying Motion for Award of Attorney Fees, by ruling that Woodmansees' tort claims were not 'on the contract' for purposes of an award of attorney fees.

3. The trial court erred in Paragraph No. 2 of the Judgment and Conclusion of Law No. 1.4 of the Judgment and Order Denying Motion for Award of Attorney Fees, by ruling that "Plaintiffs Woodmansees are awarded \$14,962.67 as the total attorney fees in this case . . .and the Woodmansees'

motion for award of additional attorney fees is Denied.”

4. The trial court erred in Conclusion of Law No. 3.5 of the Judgment and Order Denying Motion for Award of Attorney Fees, by ruling that “Woodmansees’ motion for an award of prejudgment interest on their purchase of the Parcel 3 interests of Sherons and Hillman should be denied, because Robert Peterson never had use of any of the funds paid by Woodmansees to Sherons and Hillman.”

5. The trial court erred in Conclusion of Law No. 3.6 of its Order Denying Motion for Award of Attorney Fees that “The Court’s Conclusion of Law No. 27 is modified as provided above.”

6. The trial court erred in Paragraph No. 3 of the Judgment, that “Plaintiffs are awarded prejudgment interest in the amount of \$54,200.15.”

III. WOODMANSEES’ STATEMENT OF ISSUES.

1. Woodmansees’ action for fraud in the negotiation of a Purchase and Sale Agreement and tortious interference with the co-owners’ execution of the PSA was a “suit concerning this Agreement” under the attorney fees provision of the PSA, entitling Woodmansees to an award of attorney fees. (Respondent’s Assignments of Error 1-3).

2. Woodmansees’ action for fraud in the negotiation of the PSA and interference with the co-owners’ execution of the PSA was an action “on the contract”, entitling Woodmansees to an award of attorney fees.

(Respondent's Assignments of Error 1-3).

3. Because the amount of their damages was liquidated, Woodmansees are entitled to prejudgment interest on the amount of their damages represented by money paid to Hillman and Sherons, and whether Peterson personally received that money is immaterial. (Respondent's Assignments of Error 4-6).

IV. STATEMENT OF THE CASE.

The essential facts of this case are not in dispute. After Peterson signed purchase and sale agreements with Woodmansees (Exs. 3, 4, 5) to sell three contiguous parcels of land (Ex. 1), he undertook to obtain the signatures of his co-owners on one of the parcels (Parcel 3), telling the Woodmansees he would do that to save them the time and effort. Ex.8, p.1; FF 9, CP 2609. Peterson told Woodmansees he had authority to act in their interest, Ex. 8, P. 1, and that they were hard to contact, Ex. 8, p. 4, which was untrue. FF 13, CP 2610; CP 421, 1170. But Peterson never told the other owners about it. CP 434, 1185, 1191; FF 9, CP 2609. Peterson knew that Woodmansees needed all three parcels for their funding. FF 5, CP 2608. After closing on the first parcel, he told Woodmansees that the co-owners had rejected the PSA and wanted a higher price. Ex. 8, p. 2. The co-owners testified that they would have signed the original PSA if they had known of it, CP 447, 1206, if only to get away from Peterson, CP 807, 1206, 1208; FF 23,

CP 2613, whom they considered “the world’s biggest jerk”. CP 363.

Relying on Peterson’s misrepresentations, FF 19, CP 2611, Woodmansees signed a second PSA (Ex. 9) for the higher price named by Peterson. Peterson secretly added a clause to the PSA requiring the co-owners to pay him a \$100,000 commission. Ex. 10. He threatened the co-owners that he would not close the sale unless they paid him. Ex. 11, p. 2; Ex 12, p. 1. They refused, CP 445, 1197, contacted Woodmansees independently, and signed a separate PSA for their half-interest. Ex.16. Peterson wrote to Woodmansee that he would not close on either parcel unless Woodmansee agreed to pay him \$100,000 per acre on Parcel 2 as well, despite the PSA he had signed at \$65,000 per acre. Ex. 14, p. 3; Ex.17, p. 2. After Woodmansees told Peterson that they had signed a separate PSA with the co-owners, Ex. 20, Peterson wrote to the co-owners offering to pay them more than Woodmansee. Ex. 21. They closed their sale to Woodmansees, Ex. 25; Peterson refused to close. Ex. 24, p. 4-5.

Woodmansees sued Peterson for fraud and breach of contract, and the trial court granted summary judgment based on breach of contract. This Court affirmed the trial court’s order of specific performance as to Parcel 2, but reversed and remanded as to Parcel 3 because the co-owners had not signed the original PSA. Before the trial date, Peterson sold his interest to Woodmansees for a yet higher price. Ex. 36. The trial court found Peterson

liable for fraud and wrongful interference and awarded Woodmansees damages measured by the amount they paid for Parcel 3 in excess of the original PSA price. FF 63, CP 2623; CL 27, CP 2628. Peterson appealed.

The trial court's original Conclusion of Law No. 28 awarded Woodmansees their attorney fees "pursuant to the provisions of the original PSA between the parties." CL 28, CP 2628. The PSA (Ex. 5, p. 3, ¶ p) contained the following fees provision:

p. If Buyer or Seller institutes suit against the other *concerning this Agreement*, the prevailing party is entitled to reasonable attorneys' fees and expenses.

But in its subsequent Judgment and Order Denying Motion For Attorney Fees (attached as Appendix A), the court amended Conclusion No. 28 and denied Woodmansees request for attorney fees, ruling that their action was not "on the contract". ¶ 1.6, 1.9, 1.12, p. 3-4, Appendix A.

The trial court's original Conclusion of Law No. 27 awarded prejudgment interest on the additional \$933,950.00 Woodmansees paid for Parcel 3. CL 27, CP 2628. But in its subsequent Judgment and Order, the court amended Conclusion No. 27 and ruled that Woodmansees were not entitled to prejudgment interest on the damages representing extra money they paid to Sherons and Hillman, "because Robert Peterson never had use of the funds paid by Woodmansees to Sherons and Hillman". ¶ 3.5, p. 6, Appendix A. Woodmansees appeal both of these amendments.

V. ARGUMENT ON APPELLANT'S ISSUES.

Standard of Review. “Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a fair-minded, rational person that the premise is true.” *Steineke v. Russi*, 145 Wn.App. 544, 566, 190 P.3d 60 (2008). Findings to which no error is assigned are verities on appeal. *Bingham v. Lechner*, 111 Wn.App 118, 127, 45 P.3d 562 (2002). This court reviews conclusions of law de novo to determine whether they are supported by the findings of fact. *Ibid.*

1. **Peterson was not privileged to misrepresent his co-owners’ position.**

Peterson’s primary defense is a claim that he was privileged to misrepresent the price at which the co-owners would sell, either because he was their “agent”, their “partner”, or because they “ratified” his actions. He argues (App. Br. p. 25) that Restatement (First) of Agency §348 allows an agent to make such misrepresentations as his principal is entitled to do on his own behalf. But this exception requires that the agent be “acting for the benefit of the principal”, and the trial court found the opposite: that Peterson was acting for his own benefit, and contrary to the interest of his co-owners. FF 19. CP 2611; FF 22, CP 2613. Peterson did not assign error to those findings, although he baldly asserts (App. Br. p. 37) that he was acting for their benefit.

A. Peterson was not an agent for the co-owners.

The burden of establishing an agency relationship is on the party asserting it, and it is normally a question of fact. *Homeowners Assn. v. Kelsey Lane Co.*, 125 Wn.App. 227, 236 (2005). An agency is created by the actions of two parties: the agent manifests a willingness to act subject to the principal's control, and the principal expresses consent for the agent to so act. *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn.App. 637, 645, 898 P.2d 347 (1995). Tenants in common are not agents for each other by reason of that relationship. *Tungsten Products v. Kimmel*, 5 Wn.2d 572, 575, 105 P.2d 822 (1940). "[O]ne cotenant cannot do anything with respect to the common property to bind the cotenants without authorization or ratification." *In re Foreclosure of Liens*, 130 Wn.2d 142, 149, 922 P.2d 73 (1996). Peterson admitted that he had no authorization from his co-owners, and he did not argue ratification in his Appellant's Brief.

Peterson testified that he knew at the time that he did not have the authority to reject the first PSA on behalf of Hillman and Sherons:

Q. Well, did you think since you didn't have signature authority for Hillman and Sherons that you had the authority to decide to refuse for them?

A. Not really, no.

...

Q. And you didn't have authority to reject it for them, did you?

A. I guess I didn't.

Q. Yeah. You knew that at the time, didn't you?

A. Probably did.

Q. Certainly did?
A. Um-hmm.
Q. You mean yes?
A. Yes.
Q. So when you had second thoughts about them signing it or not, that was something that really was outside of your authority to decide for them?
A. Probably.
Q. Certainly?
A. Yeah.

CP 933-34. He also wrote to Woodmansees: “I have never had the legal authority for my partners regarding sale of 18.17 acres” (Ex. 8, p. 1). Those admissions dispose of Peterson’s claim that he was acting as Hillman and Sherons’ agent in rejecting the PSA, as the trial court concluded: “Peterson’s testimony that he knew at the time that he had no authority to refuse Woodmansees’ original offer on behalf of Hillman and Sherons vitiates his defense that he was acting as their agent when he misrepresented to Woodmansees that they had refused the original offer and wanted a higher price.” CL 11, CP 2625.

Additional evidence supports the court’s findings. Hillman testified that Peterson had no authority from him and had no verbal authority to act in his best interest, CP 436, he did not deputize Peterson to deal with Woodmansee, CP 437, he had never given Peterson any cause to believe that he would accept a price if Peterson recommended it, CP 451, and he did not give Peterson any authority to decide what the price would be. CP 457. Mr.

Sheron testified that Peterson had no more responsibility for the property than he had, CP 1162, they did not rely on Peterson for advice, CP 1203, they did not tell Peterson they would approve a price that Peterson recommended, CP 1203, and denied accepting whatever Peterson did “for them”. CP 1204. Mrs. Sheron testified that she was not depending on Peterson for anything, CP 819, and was not looking to him for advice. CP 806.

Peterson did not assign error to the court’s findings (FF 52, CP 2620) that Hillman and Sherons negotiated their own contract with Woodmansees, did not inform Peterson or ask for his advice, did not give Peterson any authority to decide the price or act in their interest, and Peterson had no authority to act for them. There was substantial evidence to support the court’s findings (FF 24, CP 2613) that Peterson knew he had no authority to reject Woodmansees’ offer on behalf of Hillman and Sherons, he had no authority from them, and was not their agent. The court’s findings support the court’s conclusions that Peterson was not their agent (CL 11, CP 2625), had no privilege to misrepresent or reject the PSA on their behalf (CL 14, CP 2626), and had no such privilege as their agent or partner (CL 16, CP 2626).

B. Peterson was not the partner of the co-owners.

Peterson claims (App. Br. p. 31-32) that he could misrepresent the co-tenants position because he was their “partner” and therefore their “agent”. But tenancy in common is not “partnership”; tenants in common cannot bind

their co-tenants. When one party contends there was a partnership and the other party denies it, the existence of a partnership is a question of fact that largely rests on the credibility of the persons testifying, and is left to the trier of fact. *Malnar v. Carlson*, 128 Wn.2d 521, 524, 536, 910 P.2d 455 (1996). Mr. Hillman ridiculed the suggestion of a partnership with Peterson: “if we are going to be partners, lets be partners instead of the partners turns out to be he dictated everything.” CP 367. Peterson would not tell Hillman the name, price or any details about any offer or potential offer, CP 413, 427, saying it was none of his business, CP 414. Hillman and Sherons testified that Peterson did not tell them about the original PSA. CP 434, 1206. Peterson did not assign error to the court’s finding that he “intentionally failed to disclose the original PSA to Hillman and Sherons.” FF 23, CP 2613. The additional testimony of Hillman and Sherons set forth above regarding Peterson’s “agency” theory is also applicable to his “partnership” theory. There was substantial evidence to support the court’s findings that “Peterson’s failure to inform Hillman and Sherons about the original PSA is inconsistent with his claim of partnership”, that “Peterson did not conduct himself as a partner towards Hillman and Sherons”, and that “Hillman and Sherons were not partners with Peterson in the ownership of Parcel 3.” FF 53, CP 2620.

Peterson asserts (App. Br. p. 32) that the various parties’ use of the

word “partners” is “conclusive”, citing *Nilsson v. McDole*, 73 Wash. 312, 131 P. 1141 (1913). But *Nilsson* (at 314) held only that the parties’ use of the term was admissible, not “conclusive”. The parties’ use of the term was also disregarded in *Malnar v. Carlson*, 128 Wn.2d at 536. Partnership is determined by the particular facts of a case, and “the facts are to be gleaned rather from the acts and conduct of the parties than from the spoken word.” *Collyer v. Egbert*, 200 Wash. 342, 347, 93 P.2d.399 (1939). Peterson did not assign error to the court’s conclusion (CL 12, CP 2625) that

The parties’ and the co-owners’ reference to Hillman and Sherons being “partners” with Peterson in the ownership of Parcel 3 is not determinative of their legal status. The colloquial language used did not change their relationship to Peterson.

Hillman’s testimony exemplifies the court’s rationale: “I felt as long as we owned part – you know, partners in the property he should know where I am at.” CP 404. Similarly, when asked if they were “partners” of Peterson, Mr. Torset (the agent) said “Yeah, joint ownership.” VR II, p. 122. Woodmansee testified that “the legal consequences of the term partner never crossed my mind” and that “It’s a generic word. It’s used fairly loosely in my industry.” VR I, p. 171. There was substantial evidence for the court’s finding.

Peterson claims that he had previously acted as an “arranger” of other transactions for Hillman and Sherons. App Br. p. 29. The legal parameters of the “arranger” status Peterson claims are not clear, nor are the facts on

which he bases it. Hillman testified that he had bought and sold six other properties on his own, CP 346, and Peterson never brought any offers to him on the one other property they owned together, CP 353, 354. Sherons also bought and sold a number of properties on their own, CP 1136-37, and only owned one other property with Peterson. CP 1141-42. Peterson argues (App. Br. p. 31) that common ownership of a prior property proves they had a partnership with him on Parcel 3, citing *Douglas v. Jepson*, 88 Wn.App. 342, 945 P.2d 244 (1997). But *Douglas* provides no support for Peterson. *Douglas* (at 349) relies upon *Briggle v. Cox*, 72 Wash 574, 131 P. 209 (1913), holding a partnership between tenants in common arose from their agreement to sell the property as a whole, “not from their mere status as tenants in common.”

Peterson did not offer any evidence that the owners agreed to sell Parcel 3 together. To the contrary, Hillman and Sherons sold their interests to Woodmansees separately, Ex. 16, and testified that they thought they had every right to do so. CP 1165, 1194-95. Mr. Sheron testified that he thought he could list his property interest separately, and did not have any obligation to Peterson. CP 1168. They felt free to sell their interest regardless of what Peterson might have wanted. CP 1162. They worked directly with Woodmansees’ agent, and did not notify Peterson about their sale. CP 1194. Peterson did not assign error to the court’s findings (FF 52, CP 2620) that

Sherons negotiated the third PSA by themselves, did not inform Mr. Peterson about it, and did not ask for his advice. Peterson neither opposed nor complained about their separate sale. There was substantial evidence for the trial court's finding that there was no partnership.

C. The co-owners did not ratify Peterson's acts.

Peterson assigns error to the court's conclusion that the co-owners did not ratify his actions by executing their own PSA with Woodmansees. CL 15, CP 2626. But Peterson never again refers to "ratification" in his brief, so he has abandoned the contention. *Kadoranian v. Bellingham Police Dept.*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). Further, he did not assign error to the court's findings (FF 51, 52, CP 2620) that the co-owners "did not ratify Peterson's actions", that they did not receive any benefit from his fraudulently extracted second PSA, that they did not adopt it, affirm it, or recognize it as binding, that they expressly rejected it, and took no action in furtherance of it. These findings match the essential inquiries used to determine whether there has been an implied ratification, *Barnes v. Treece*, 15 Wn.App. 437, 443-444, 549 P.2d 1152 (1976). Ratification is normally a question of fact. *See, Smith v. Hansen, Hansen & Johnson*, 63 Wn.App. 355, 370, 818 P.2d 1127 (1991). In order to constitute an affirmance, the benefits received or retained must be "something to which [the recipient] would not be *entitled unless* an act purported to be done for him were affirmed".

Restatement (Second) of Agency, § 98. Hillman and Sherons were not entitled to anything by Peterson's fraudulent conduct or from the second PSA Peterson defrauded Woodmansees into signing. The findings support the court's conclusion that there was no ratification.

2. Peterson had no "privilege to lie" in his own interest.

Peterson minimizes his lies as mere "sharp dealing", "rough and tumble" and "seller's talk" (App. Br., p. 3-4, 21). Fraud is not seller's talk. Peterson did not assign error to the court's findings (FF 16, 17, 18, 19, CP 2611) that his actions met all the elements of fraud, but does assign error to the court's conclusions that he committed fraud (FF 61, CP 2622; CL 2, CP 2623). Peterson spends considerable ink (App. Br. 22-29) on *Buckley v. Hatupin*, 198 Wash. 543, 89 P.2d 212 (1939) arguing that however unethical his conduct, it was not actionable. But he cannot escape the trial court's careful analysis of *Hatupin* (CL 13, CP 2526-27):

Peterson's misrepresentations to Woodmansee were not privileged "seller's talk". Defendant's reliance upon the rule of *Buckley v. Hatupin*, 198 Wash. 543, 89 P.2d 212 (1939) is misplaced. The questions in *Buckley v. Hatupin* (at 550) were whether the relationship of the parties justified the purchaser's reliance on the defendant, whether there was such reliance, whether the defendant was the purchaser's agent, and whether defendant as such misled the purchaser to their prejudice. The evidence in the present case is the opposite of *Buckley v. Hatupin* on all three points. Hatupin misrepresented what the seller was willing to take for his property, but he was the seller's agent, which is not the case here. Hatupin was never the purchaser

Buckley's agent, but Peterson was Woodmansees' agent or a volunteer to obtain the other co-owners' signatures. Finally, there was no evidence that Buckley relied on Hatupin's misrepresentations, but Woodmansees did rely on Peterson's.

Woodmansees cannot improve on the trial court's analysis. Peterson signed the PSA, he acknowledged that he had no authority to reject it for the co-owners, and he lied to Woodmansees after undertaking to obtain the co-owners' signatures for them. Even if the court upheld his claim of privilege to misrepresent a supposed price demand by the co-owners, it would not exonerate his undisputed misrepresentation that he had taken the PSA to the co-owners. FF 18, CP 2611. What Peterson did was fraud.

3. Peterson wrongfully interfered with Woodmansees' business expectancy with the co-owners.

The court found that "Peterson intentionally interfered with Woodmansees' offer to Hillman and Sherons under the original PSA, in order to personally profit by deceiving Woodmansees into raising the offer." FF 19, CP 2611. Peterson did not assign error to that finding, or to the court's finding that Peterson was acting in his own interest and contrary to that of his co-owners. FF 24, CP 2613. He also did not assign error to the court's finding that Hillman and Sherons had told Peterson that they wanted to sell and that Peterson had reason to think that Hillman and Sherons would sign the PSA. FF 23, CP 2613. He did not assign error to the court's finding that Woodmansees' expectation that the co-owners would sign the PSA "was

reasonable and not merely wishful thinking”. FF 26, CP 2613. These findings fully support the court’s conclusion that Peterson committed wrongful interference. CL 3, CP 2623; CL 9, CP 2624-25.

A. Woodmansees’ business expectancy with the co-owners.

Peterson argues (App. Br. p. 42) without citing authority that Woodmansees had no “relationship” with the co-owners because the co-owners did not know Woodmansees or their offer. But Washington courts have found liability for interference with unidentified potential customers. *Cherburg v. People’s Nat’l Bank*, 99 Wn.2d 595, 602, 564 P.2d 1137 (1977); *Seidell v. Taylor*, 86 Wash. 645, 151 Pac. 41 (1915). The mere fact that Woodmansees did not yet have personal contact with the co-owners does not mean there was no relationship. Peterson and Woodmansees’ signing of the PSA in itself created a prospective business relationship between the co-owners and Woodmansees, because the co-owners thereby became either necessary parties for the PSA to be complete as this Court held, or they would become tenants in common with Woodmansees if only Peterson’s interest was sold.

But deciding whether the unsigned parties to a partially executed contract have a “relationship” with those who have signed it is unnecessary, because what the court found was that Woodmansees had a “valid business expectancy” in obtaining the co-owners’ interests in Parcel 3. FF 25, CP

2613. “A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value”. *Newton Ins. v. Caledonian Ins.*, 114 Wn.App. 151, 158, 52 P.3d 30 (2002). An “expectancy” is simply “That which is expected or hoped for.” *Black’s Law Dictionary*, Rev. 4th Ed., West Publishing Co., p. 686), and “prospective” simply means “being still in the future; anticipated.” *Funk & Wagnalls Encyclopedic College Dictionary*, p. 1082, New York, 1968. It is uncontested that both parties reasonably thought that Hillman and Sherons would sign the PSA. That opportunity to obtain the co-owners’ agreement to the PSA was a protected expectancy.

The tort of interference with a business expectancy protects not only the opportunity to consummate **but also to obtain business relationships**. Proof of a specific contract is not required. **It is sufficient if the evidence reveals that the alleged interferor knew** or should have known of the business opportunity or expectancy. Our courts, as well as those in other states, have allowed recovery where a defendant’s acts destroy a plaintiff’s **opportunity to obtain prospective customers**. While the plaintiff must show that future business opportunities and profits are a reasonable expectation and not merely wishful thinking, certainty of proof is not required.

Caruso v. Local 690, 33 Wn.App. 201, 207-08, 653 P.2d 638 (1982) (citations omitted). The court found that Woodmansees’ expectation that the co-owners would sign the PSA “was reasonable and not merely wishful thinking” (FF 26, CP 2613), and Peterson did not assign error to that finding.

Woodmansees met their burden of proof under *Caruso*. An “opportunity to obtain” a relationship is not yet a relationship, but it is a protected expectancy. The opportunity to buy or sell land is specifically listed as a prospective relationship in *official comment c.* to RESTATEMENT (SECOND) OF TORTS §766.

The elements of the tort of wrongful interference are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) resultant damage. *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 156, 933 P.2d 288 (1997). “Interference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession.” *Newton Ins. v. Caledonian Ins.*, 114 Wn.App. at 158. Fraudulent misrepresentation is “wrongful means”. RESTATEMENT (SECOND) OF TORTS § 767, comment *c.* Peterson’s conduct was purposefully improper, and wrongful both in motive and means.

B. Peterson interfered with the co-owners' contract.

Peterson argues (App. Br. p.44) that “it is legally impossible to interfere with one’s own contract”, but that defense is irrelevant to the present case, first because it presumes that there *is* a contract, and secondly because he interfered not with his own contract, but with that of the co-owners. The defense Peterson relies on is that tort damages are not available when damages “may be fully recovered by the injured party in his breach of contract action.” *Hein v. Chrysler Corporation*, 45 Wn.2d 586, 598, 277 P.2d 708 (1954). But this Court has held that Peterson *did not have a contract* for Parcel 3, precisely because Hillman and Sherons had not signed it. Peterson cannot have it both ways: he cannot now claim that he can’t be liable in tort because there *was* a contract.

None of the cases Peterson cites (App. Br. p. 44-45) provide him any support; they simply say that a person cannot be liable in tort for breach of contract. None of the cited cases involve a party interfering with a *different* contracting party. *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 951 P.2d 782 (1998); *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn. 2d 596, 611 P.2d 737 (1980); *Hein v. Chrysler Corp*, 45 Wn.2d 586, 277 P.2d 708 (1954); *Olson v. Scholes*, 17 Wn.App 383, 563 P.2d 1275 (1977); and *Houser v. City of Redmond*, 16 Wn.App 743, 559 P. 2d 577 (1977)).

[A]n action for inducing a breach of contract will lie against a third party but a party to the contract itself cannot be held responsible *in tort* for inducing *himself* to commit a breach of that contract or for conspiring to breach it.

Hein, supra, at 597-598. Woodmansees do not claim that Peterson induced *himself* to breach his own contract. Peterson interfered with their expectancy of a contract with Hillman and Sherons.

Houser (at 745) cites the Restatement of Torts for the principle that a person is liable for causing a *third person* not to enter into a business relationship with another. That is actionable in tort, but not for breach of contract. Liability for wrongful interference lies when the interference is with a *third party*, and that is what Peterson did.

One who intentionally and improperly interferes with **another's** prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

- (a) inducing or otherwise causing a **third person not to enter into** or continue the prospective relation or
- (b) preventing the other from acquiring or continuing the prospective relation.

RESTATEMENT (SECOND) OF TORTS §766B. The trial court correctly characterized this subject: “Woodmansees do not claim that Peterson interfered with his own contract, but that he interfered with their prospective business expectancy with Hillman and Sherons. Plaintiffs are not barred from seeking tort damages.” CL 10, CP 2625.

4. Peterson breached duties he owed to Woodmansees.

The court found that Peterson was Woodmansees' agent for the purpose of obtaining Hillman and Sherons' signatures on the PSA, FF 12, CP 2610; CL 5, CP 2624, and that he "volunteered to act as agent" for them for that purpose. FF 11, CP 2609. That supports the court's conclusion that he owed them a duty as a volunteer and agent to attempt in good faith to obtain their signatures. CL 6, CP 2624. Peterson intentionally failed to attempt to obtain their signatures, which supports the court's conclusion that he breached his duty. CL 6, CP 2624.

A. Peterson owed a duty as an agent or volunteer.

The facts and law discussed above regarding agency apply to Peterson's agency for Woodmansees, as well as to the lack of such agency for his co-owners. Peterson assigned error to the court's finding that "Peterson volunteered to act as agent for Woodmansees to communicate the original PSA to Hillman and Sherons and obtain their signatures", FF 11, CP 2609, but he did not assign error to the nearly identical finding that "Peterson offered to obtain the signatures of Hillman and Sherons to save Woodmansees and Torset the time and effort." FF 9, CP 2609. There is no meaningful factual distinction between these findings, only the phrase "volunteered to act as agent".

Agency is generally a question of fact, *Kelsey Lane Homewoners*

Assn. v. Kelsey Lane Co., 125 Wn.App. 227, 103 P.3d 1256 (2005). Peterson became Woodmansees' agent for the purpose of obtaining the other owners' signatures, when he undertook to do so upon Woodmansees' behalf, with Woodmansees' consent. "An agency exists when the principal consents to the agent's actions on the principal's behalf." *Newton Ins. v. Caledonian Ins.*, 114 Wn.App. 151, 159, 52 P.3d 30 (2002). The court found that Peterson was also Woodmansees' agent because as a licensed real estate broker for 40 years, Peterson knew that obtaining a party's signature on a PSA is the work of a real estate agent. FF 11, CP 2609; *RCW 18.85.010*.

Peterson argues (App. Br. 38) that the fact that he did not do what he promised proves that Woodmansees did not have control over his actions, and therefore he was not their agent. But that is mere circular argument; agents cannot vitiate their obligations by breaching them. And Peterson did not assign error to the court's finding that Peterson acknowledged that Woodmansees had the right to control him in the presentation of the PSA to the co-owners. FF 31, CP 2615. That is a verity on appeal, and effectively ends Peterson's claim that there was no control of him as their agent.

Peterson waves a red herring that Woodmansees contend Peterson had a "fiduciary duty to sell them his property". App. Br. p. 36-39. Woodmansees have never suggested that, and Peterson signed the PSAs in

any event. Rather, Woodmansees assert that he had a duty to attempt to perform the obligation he undertook. *Brown v. MacPherson's*, 86 Wn.2d 293, 300-301, 545 P.2d 13 (1975). He owed Woodmansees a duty to exercise diligence in performing the agency, *Para-Medical Leasing v. Hangen*, 48 Wn.App 389, 396, 739 P.2d 717 (1987), and to communicate truthfully with them. *Monty v. Peterson*, 85 Wn.2d 956, 959-60, 540 P.2d 1377 (1975). A volunteer has the same obligation as an agent to “not indulge in misrepresentations to his own profit and his principal’s prejudice.” *Buckley v. Hatupin*, 198 Wash. at 552. Peterson breached all these duties.

He also breached his duty by secretly inserting his commission provision into the second PSA after Woodmansees signed it, thereby interfering with the co-owners’ acceptance of the second PSA. “It is well settled that a person who undertakes to act for another in any matter shall not, in the same matter, act for himself.” *Hood v. Cline*, 35 Wn.2d 192, 205, 212 P.2d 110 (1949). Because an agent is a fiduciary, it is the agent’s burden to prove that he has met his duties. *Moon v. Phipps*, 67 Wn.2d 948, 954, 411 P.2d 157 (1966). Peterson did not carry his burden of proof.

B. Woodmansees were entitled to rely on Peterson.

Peterson did not assign error to the court’s finding that he “offered to obtain the signatures of Hillman and Sherons to save Woodmansees and Torset the time and effort” and that Woodmansees “relied on Peterson to do

what he said he would.” FF 9, CP 2609. Peterson instead argues (App Br. p. 36) that he was not a fiduciary to Woodmansees merely because they “trusted him”, citing *Micro Enhancement Intl, Inc. v. Coopers & Lybrand*, 110 Wn.App. 412, 435, 40 P.3d 1206 (2002). But in *Micro Enhancement*, at 436, the determining issue was that negligent misrepresentation by an advisor required representation of an *existing* fact. The Court observed: “Promises of *future* conduct may support a contract claim.” That is Woodmansees’ claim. The nature of Peterson’s promise was to act as their agent, and it is that relationship, rather than the promise, which carries a fiduciary duty.

C. A contract was formed by promissory estoppel.

The court concluded that “Peterson’s promise to obtain Hillman and Sherons’ signatures on the original PSA, coupled with Woodmansees’ foreseeable reliance on the promise, created a contract by promissory estoppel.” CL 7, CP 2624. Peterson does not dispute his offer to obtain the signatures, or Woodmansees’ reliance. FF 9, CP 2609. “When a promisee has relied to his detriment upon a promise which the promisor should have foreseen would be relied upon, the measure of damages can be the same as in a contract . . .the reliance of the promisee created a contract and damages may be awarded for the loss that directly results from the breach.” *Farm Crop Energy v. Old National Bank*, 109 Wn.2d 923, 940, 750 P.2d 231 (1988).

Peterson’s argues that this Court’s Opinion in the first appeal

eliminates any claim of promissory estoppel. App. Br. 35-36. But the first appeal concerned enforcement of the PSA under contract law; the contract now under discussion is not the PSA, but Peterson's undertaking to obtain the signatures of his co-owners. That was not decided in the first appeal.

Peterson next argues that he had no duty to Woodmansees because his acts were for his own benefit. App. Br. p. 37. Obviously he was making the misrepresentations acting in his own interest. But Peterson undertook to act for Woodmansees' benefit in obtaining the signatures, to "save them the time and effort". Ex. 8, p. 1. That was the contract he created with a promise coupled with foreseeable reliance.

Peterson finally argues (App. Br. 39-40) that promissory estoppel requires that Woodmansees must have shifted position and thereby incurred the loss, not merely an expectancy of loss. Neither of the cases cited by Peterson pertain. *Flower v. T.R.A Industries, Inc.*, 127 Wn.App 13, 31, 111 P.3d 1192 (2005) never mentions the theory attributed to it by Peterson, and simply found that the plaintiff had raised an issue of fact to support his promissory estoppel theory. *Shah v. Allstate Insurance Co.*, 130 Wn.App. 74, 121 P.3d 1204 (2005) was a negligent misrepresentation case in which promissory estoppel was never mentioned.

Peterson did not assign error to the court's findings that Woodmansees relied on Peterson's promise to obtain the co-owners'

signatures, FF 9, CP 2609, and that if they had known about his misrepresentations “they would have contacted the co-owners themselves.” FF 15, CP 2610. He assigned error to the court’s finding that Woodmansees consented to Peterson’s offer, and in reliance on Peterson forewent having Torset contact Hillman and Sherons. FF 12, CP 2609. There was substantial evidence to support that finding. Woodmansee testified he was depending on Peterson to get their signatures “for as long as I felt he was making good faith effort”, VR I, p. 154, and that if he had known Peterson had not told them about it, he would have contacted them himself. VR I, p. 73. Torset testified that he offered to assist Peterson and do “whatever it took” to get their signatures. VR II, p. 127.

5. Damages And Proximate Cause.

Peterson offers a grab-bag of undeveloped arguments concerning the measure of damages and proximate cause.

A. The statute of frauds does not affect the measure of damages.

Peterson makes a confused claim that the court cannot use the PSA as a point for calculating damages because it is barred by the statute of frauds. App. Br. 40-42. He offers no authority for his contention. The court correctly held that “Plaintiffs are not offering to prove the existence or terms of a contract by parole evidence” and that the statute of frauds does not bar the court from using the PSA to measure damages resulting from interfering

with it. CL 19, CP 2627. Peterson did not assign error to the court's conclusion that "the appropriate measure of damages for both fraud and wrongful interference is whatever losses were proximately caused by the tort". CL 23, CP 2627. The difference in price Woodmansees paid for Parcel 3 was a natural and ordinary consequence of Peterson's misconduct.

Peterson also claims that Woodmansees were trying to enforce an oral agreement to sell all three Parcels. App. Br. p. 34. But Woodmansees never made such a claim, and the trial court was not confused: it simply found that Woodmansees' agent told Peterson that their financing required that they obtain all three Parcels. FF 5, CP 2608. The court admitted testimony on this subject because "once he gets them on one it's more likely he's going to get them on the others." VR II, p. 163. The statute of frauds is not involved in this question.

B. "But For" Causation.

Peterson assigns error to the court's finding that but for Peterson's intentional failure to communicate with the co-owners, they would have signed it, and that his failure to disclose it was the only reason they did not sign it. FF 10, CP 2609. That finding is supported by the testimony of both Hillman and the Sherons that they would have signed it if they had known of it. CP 447, 1206, 1208. Peterson's objection that the court "ignored" their interest in maximizing their return and "Peterson's likely actions" if he had

told them about the PSA (App. Br. p. 9), should be disregarded for failure to cite to the record, and in the latter case as pure speculation. *Eisenbach v. Schneider*, 140 Wn.App. 641, 659-660, 166 P.3d 858 (2007).

Peterson assigns error to the court's conclusion (FF 10, CP 2609; C/L 22, CP 2627) that a valid contract would have been formed if Hillman and Sherons had signed the first PSA. But he did not assign error to the court's finding that "Had Peterson done what he said he would, a valid contract would have been formed." FF 55, CP 2621. Both conclusions follow from this Court's Opinion in the first appeal. Had the co-owners signed, the Parcel 3 PSA would have been enforced, as this Court previously disposed of Peterson's other contract arguments against the PSAs.

Peterson did not assign error to the conclusion that the appropriate measure of damages was "whatever losses were proximately caused by the tort". CL 23, CP 2627. The court measured the value of the lost contract by the difference between the price on the lost contract, and the ultimate cost of the same property. CL 25, CP 2628. That was the same amount that Woodmansees reasonably paid to mitigate the fraud. FF 42, CP 2613. This was deducible purely from the undisputed findings and conclusions, and the amount was computed directly from the exhibits, as discussed below.

C. Expiration Date.

Peterson claims the PSA "expired" (App. Br. p. 17, 38 n. 2), but he

did not assign error to the court's findings on this point:

55. Peterson intentionally caused the expiration of the contract acceptance period in the original PSA by failing to disclose it to Hillman and Sherons or attempting to obtain their signatures on it. Had Peterson done what he said he would, a valid contract would have been formed. Peterson likewise caused the expiration of the acceptance period in the second PSA by interfering with it after Woodmansees signed it. Woodmansees waived the contract acceptance deadline in the PSAs by continuing to inquire and rely on Peterson to obtain the other owners' execution of the PSAs long after the acceptance periods had expired.

FF 55, CP 2621. Because he intentionally prevented the acceptance time condition from being satisfied, Peterson cannot claim the failure or impossibility of that condition. *Barrett v. Weyerhaeuser*, 40 Wn.App. 630, 636, 700 P.2d 338 (1985). The Court should decline Peterson's invitation to speculate whether timely obtaining the signatures "would have been a near impossibility" (App. Br. p. 39, n. 2). Hillman testified that he was not "hard to get ahold of", that Peterson "could call any time" by message phone, CP 421, and Mr. Sheron testified that Peterson contacted him by telephone about the second PSA. CP 1170.

D. The Damages Were Liquidated.

This section also applies to Woodmansees' cross-appeal on prejudgment interest below. Peterson does not assign error to the court's finding that Woodmansees' acquisition of Peterson's half of Parcel 3 was reasonable mitigation. FF 42, CP 2613. Instead, he argues that that finding

was an “exercise of discretion in determining the appropriate amount of damages”, and therefore the damages were not liquidated. App. Br. p. 46. But deciding whether a certain amount is reasonable mitigation does not change whether that amount can be calculated from documents. The damages detailed in FF 63, CP 2623 were calculated based on substantial evidence consisting of the closing documents for the original PSA and the final closings for the two halves of the parcel: Ex. 24, p. 6; Ex. 25, p. 1; Ex. 36, p. 4. That calculation does not rely on opinion or discretion, so the damages are liquidated, and an award of prejudgment interest was proper. *Dautel v. Heritage Home Center, Inc.*, 89 Wn.App. 148, 153-155, 948 P.2d 397 (1997).

Peterson’s citation to *King Aircraft Sales v. Lane*, 68 Wn.App. 706, 846 P.2d 550 (1993) is inapposite, as the court in that case used the lost profit measure of damages and compared those to “speculation” about potential sales prices. Neither lost profits nor potential prices are involved in the present case. Peterson did not assign error to the court’s conclusion (CL 24, CP 2627) that “Lost profits was not the measure of damages in this case. The damage for which plaintiffs seek redress is the additional amount they paid to acquire Parcel 3.” The prices on the PSAs were fixed, not “speculative”; they were documented; they were liquidated.

VI. ARGUMENT ON CROSS-APPELLANTS' ISSUES.

1. Woodmansees Are Entitled To Attorney Fees At Trial.

Whether a party is entitled to attorney fees is an issue of law which is reviewed de novo. *Ethridge v. Hwang*, 105 Wn.App. 447, 460, 20 P.3d 958 (2001). Attorney's fees are recoverable as costs of litigation if they are permitted by contract, statute, or recognized ground in equity. *Hudson v. Condon*, 101 Wn.App 866, 877, 6 P.3d 615 (2000).

A. This action was a "suit concerning this agreement" under the attorney fees provision of the PSA.

There are two lines of Washington cases with differing results, depending on whether a contractual attorney fees provision is "broad" or "narrow". The PSA language "concerning this Agreement" awards fees in any action related to the PSA. In contrast, a "narrow" fees provision restricts awards to actions brought to enforce specific contract terms. The PSA in this case contains a "broad" fees provision:

If Buyer or Seller institutes suit against the other *concerning this Agreement*, the prevailing party is entitled to reasonable attorneys' fees and expenses. Ex. 5, p. 3, ¶ q.

Because Peterson's torts concerned the PSA, Woodmansees' action was a suit "concerning" the PSA. The trial court's original conclusion was correct: "Woodmansees are entitled to their attorneys' fees pursuant to the provisions of the original PSA between the parties." CL 28, CP 2628. The court erred

when it later amended Conclusion No. 28 to deny fees because Woodmansees' tort claims were not brought to enforce the PSA. Judgment, p. 3-4, ¶ 1.8, Appendix A. That was not the contract standard. The trial court erred by confusing the two types of provisions.

1. The broad language of the PSA fee provision encompasses all claims that “concern” or “relate to” the PSA.

The ordinary meaning of the word “concerning” is defined interchangeably with “related to”: “Concerning: *Relating to*; pertaining to; affecting; involving; being substantially engaged in or taking part in.” *Black’s Law Dictionary, Rev. 4th Ed.*, West Publishing, 1968, p. 361; “concerning *prep.* In relation to; regarding; about.” *Funk & Wagnall’s Encyclopedic College Dictionary*, p. 280, 1968, New York. See also, *State v. Inzitari*, 6 Conn.Cir. 170, 269 A.2d 35, 37 (1969) (citations omitted):

One is concerned in a certain matter when he has some connection with it, when it affects his interests or involves him. This judicial definition is in tune with the latest definition of “concern” and “concerned” in the Random House Dictionary of the English Language (1966), i.e., “*To relate to*; be connected with’ be of interest or importance to; affect, interested or participating; having a connection or involvement.

In *Robert R. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98, n.16, 103 S.Ct. 2890, 77 L.Ed 2nd 490 (1983), the U. S. Supreme Court cited Black’s Law Dictionary 1158 (5th Ed.1979) to define “relate”: “Relate. To stand in some relation’ to have bearing or *concern*; to pertain; refer; to bring into

association with or connection with”. In *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.*, 5 Cal 4th 854, 868, 855 P.2d 1263, 1271, 21 Cal. Reprtr.2d 691 (1993), the California Court of Appeals observed:

“Related” is a commonly used word with a broad meaning that encompasses a myriad of relationships. . . .the fact that “related” can encompass a wide variety of relationships does not necessarily render the word ambiguous. To the contrary, a word with a broad meaning or multiple meanings may be used for that very reason—its breadth—to achieve a broad purpose.

The PSA language authorizes fees for claims which “concern”, that is, “relate to”, or “have a connection” to the PSA. This language has a broad meaning and purpose.

2. Claims for fraud and interference with the formation of the PSA “concern” the PSA.

Claims “concerning” a PSA include torts committed by the parties in relation to the PSA. Fraud in the negotiation of a contract, the same claim as in this case, was specifically held to be “contract-related” under a similar fee provision in *Western Stud Welding v. Omark Industries*, 43 Wn.App. 293, 299, 716 P.2d 959 (1986): “However, the complaint also contained *contract-related* allegations and prayers, including alleged fraud during the negotiation of the agreement...” Similarly, *Hudson v. Condon*, 101 Wn.App. at 877, held that claims of fraud and breach of fiduciary duty, while clearly not claims for breach of a specific contract term, were “related to” the parties’ agreement: “All of the Hudsons’ causes of action are related to the partnership agreement

and the duties that arise from it.” In *Failes v. Lichten*, 109 Wn.App. 550, 554, 37 P.3d 310 (2001), the defendant was awarded fees after the plaintiff’s claims for fraudulent concealment and misrepresentation in a house sale were dismissed, based on a provision awarding fees in “any dispute relating to this transaction”. The main issue of the case was whether the claims “related to” the transaction in the PSA.

In his amended complaint, Failes expressly sought to rescind the transaction, or to alter its economic consequences by obtaining an award of damages. . . The only available conclusion is that because of Failes’ lawsuit, he and the Lichtens were ‘involved in [a] dispute relating to this transaction’ within the meaning of the REPSA’s paragraph 15.”

The present case should reach the same result as *Western Stud Welding, Failes v. Lichten*, and *Hudson v. Condon*: the PSA authorizes fees for Woodmansees’ claims of fraud and interference in the negotiation of the PSA because the claims are “related to” or “concern” the PSA. Woodmansees’ claim for wrongful interference with the PSA is equally “contract-related”. Interference is not a free-standing tort: it has an object. Peterson interfered with the execution of the PSA; it “concerned” the PSA. Certainly it could not be said that Peterson’s torts were *unrelated* to the PSA, that they did not *concern* the PSA, in the ordinary sense of those words. Because fraud in the negotiation of the PSA and tortious interference with the execution of the PSA “concern” the PSA, Woodmansees’ suit “concerned”

the PSA, and they are entitled to contractual attorney fees.

In *Anderson's Lakeside Leisure Co. v. Anderson*, 314 Wis.2d 560, 757 N.W.2d 803, 823 (2008), the Supreme Court of Wisconsin held that the tort of trade name infringement “was clearly in the category of ‘any action concerning this Agreement’ because the Agreement was the instrument by which ownership of the tradename in question was transferred.” In *Yield Dynamics, Inc. v. TEA Systems Corp.*, 154 Cal.App.4th 547, 580-81, 66 Cal.Rptr.3d 1 (2007), the California Court of Appeal affirmed an award of fees for a fraud claim under a fees provision covering actions “concerning this Agreement”. The court held that the parties could contract for attorney fees awards “in any litigation between themselves, whether such litigation sounds in tort or in contract.” This Court should similarly give force to the broad fees provision of the PSA.

Even in “narrow” cases where the fees provision restricts fees awards to actions to enforce specific contract terms, Washington courts expressly recognize the differing results between broad and narrow fee provisions. In *Hemenway v. Miller*, 116 Wn.2d 725, 742, 807 P.2d 863 (1991), the Supreme Court specifically approved the ruling in *Western Stud Welding v. Omark*, but reached a different result because the *Hemenway* contract was narrow: “We agree with the principle of *Omark*, but note that the attorney fees provision there was broader than that provision here.” Similarly, in *Burns v.*

a contractual fees provision if it **arose out of the contract** and if the contract is **central to the dispute.**” *Tradewell Group, Inc. v. Mavis*, 71 Wn.App. 120, 130, 857 P.2d 1053 (1993). This definition has been interpreted to encompass tort claims when there is a broad fee provision. Where the fee provision is narrow, only claims for breach of contract terms are “on the contract.” *Boguch v. Landover Corp.*, 153 Wn. App 595 (2009). The differing result between “broad” and “narrow” fees provisions is critical: if the “on the contract” analysis is the same in both cases, then the difference in the contract language is rendered meaningless.

1. Torts arising from a contract.

A common law fraud action can arise from a PSA and the wrongful actions relating to it. For example, *Brown v. Johnson*, 109 Wn.App. 56, 59, 34 P.3d 1233 (2001) concerned misrepresentation in a real estate purchase:

Brown’s action for misrepresentation arises out of the parties’ agreement to transfer ownership of Johnson’s home to Brown. Moreover, the purchase and sale agreement was central to her claims.

In *Stieneke v. Russi*, 145 Wn.App. 544, 571, 190 P.3d 60 (2008), the Court of Appeals ruled simply “The Stienekes’ fraud claims are “on the contract”, citing *Hill v. Cox*, 110 Wn.App 394, 412, 41 P.3d 495 (2002). Their fraud claim was “on the contract” because the oral misrepresentations were about the subject of the contract, made in the course of negotiating the

contract. This Court should reach the same result in the present case. In *Ethridge v. Hwang*, 105 Wn.App. 447, 460, 20 P.3d 958 (2001), the plaintiff's claims "arose out of her inability to assign her lease under the lease agreement, so her claims arose under the lease." In the same way, Woodmansees' claims "arose out of the PSA" because they arose from Peterson's fraud and interference "concerning" the PSA.

In *Boules v. Gull Industries, Inc.* 133 Wn.App. 85, 134 P.3d 1195 (2006), the contract provided for fees in any litigation "arising out of this transaction". The Court of Appeals reversed the trial court's ruling that the fraud claim was not "on the contract". The Court held that the "transaction" naturally included the PSA, and covered fraud in the negotiation of the PSA.

The Kims argue that they are entitled to reasonable attorney fees under the purchase and sale agreement because the Bouleses' action for fraudulent concealment arose out of the purchase and sale transaction. The Bouleses counter that their action did not arise out of the transaction because the violations they alleged occurred before they entered into the contract with the Kims. We agree with the Kims.

Under the plain language of the agreement, the Bouleses engaged the Kims in litigation "arising out of this transaction", namely, the purchase and sale agreement for the Bouleses to sell their gas station to the Kims. The Bouleses sued the Kims, alleging that the Kims fraudulently forced them to sell their gas station at an unfair price. Because these allegations directly relate to conditions of the purchase and sale agreement, the litigation arose out of this purchase and sale transaction.

Woodmansees' claims against Peterson arise from the PSA exactly as in

Brown, Stieneke and Boules: misrepresentations about the subject of the PSA, during the negotiation of the PSA, “relate to” the PSA. The PSA was not mere background or the “but for” opportunity for fraud: the PSA itself was the subject of the fraud.

Recent case law suggests that the contract language “relating to” may be broader than the “arising from” element of the test for whether an action is “on a contract”. In *Townsend v. Quadrant Corp.*, 153 Wn.App. 870, 887 (2009), this Court observed that “an arbitration clause that encompasses any controversy “relating to” a contract is broader than language covering only claims “arising out” of a contract”, citing *McClure v. Davis Wright Tremaine*, 77 Wn.App 312, 314, 890 P.2d 466 (1995). *McClure* (at 315) held: “The term ‘relating to’ is sufficiently broad to include a claim for breach of fiduciary duty.” As the term “relating to a contract” is broader than “arising from a contract” and includes tort claims, the broad fee provision in this case arguably authorizes fees in circumstances broader than cases strictly “arising from” the contract.

In *Deep Water Brewing v. Fairway Res.*, 152 Wn.App. 220, 279, (2009) the contract granted fees in actions “relating to this Agreement”. The Court awarded fees in a claim for tortious interference, in the absence of any breach of contract claim, because the “essence” of the plaintiff’s case was enforcement of the contract.

Here, enforcement of the agreements and the claims that followed their breach is the essence of the Kenagys' tortious interference with contract claim against Mr. Johnson . . . We conclude, then, based on the fee provisions set out in the agreements that the court properly awarded fees jointly and severally against . . . Jack Johnson and the Homeowners Association (for tortious conduct arising from the agreements).

Similarly, enforcement of the PSA was the "essence" of Woodmansees' suit: they sought and were awarded damages measured by the difference between the PSA price and the price they ultimately paid for Parcel 3.

2. The PSA was central to the dispute.

The second element of the inquiry whether a claim is "on a contract" is whether the contract is "central" to the dispute. In *Burns v. McClinton*, 135 Wn.App. at 310, the Court of Appeals expressed a functional test: "The D&D Properties partnership agreement was not central to the parties' disputes, **which could be resolved without referring to it.**" In *Burns* the claims centered on professional negligence and the Consumer Protection Act as it applied to accountants. The parties also had a separate business partnership. *Burns* held that the fees provision of the partnership agreement did not apply to the professional negligence claims because the actions complained of did not concern the partnership. In contrast, Peterson's torts did relate to the PSA. Woodmansees' claims could not be "resolved without referring to the PSA", because all of Peterson's relevant actions were in relation to the PSA: he misrepresented the co-owners' rejection of the PSA; he undertook to

present the PSA to them; he intentionally failed to disclose the PSA to the co-owners; he secretly added terms to the PSA after Woodmansees signed it; he attempted to extort a commission from the co-owners as a condition of closing the PSA, etc.

The trial court cited *Burns v. McClinton* as its authority for denying Woodmansee's request for fees. ¶1.8, p. 3-4, Appendix A. Besides the critical difference that the PSA contained a broad fees provision, the material facts of *Burns* are the opposite of the present case: here the fraud and interference concerned the PSA itself. The wrongfulness of Peterson's conduct cannot be "resolved without referring to" the PSA. The PSA was "central" to the action.

See also, *Deep Water Brewing v. Fairway Res.*, 152 Wn.App. at 278-279, where there was a broad fee provision similar to the PSA. Division Two rejected the appellant's argument that the contract fee provision did not apply because the trial court dismissed all contract claims against him and only held him liable for tortious interference. "The court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements."

2. Woodmansees Are Entitled To Prejudgment Interest.

A. Standard of Review.

An award of prejudgment interest is reviewed on an abuse of discretion standard. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 775, 115 P.3d 349 (2005). A decision based on an erroneous view of the law constitutes an abuse of discretion. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 20, 177 P.3d 1122 (2008).

B. Woodmansees' Damages Were Liquidated.

As discussed above, the difference Woodmansees paid for Hillman and Sherons' half interest in Parcel 3 was a liquidated amount, \$309,475.00, and the difference they paid for Peterson's half of Parcel 3 above the original PSA price was \$624,475.00, which is likewise liquidated. The court awarded judgment for both of these items. Prejudgment interest was therefore owed on both of those amounts from the day they were paid. *Dautel v. Heritage Home Center, Inc.*, 89 Wn.App. 148, 155, 948 P.2d 397 (1997). The court's original Conclusion of Law No. 27 was correct:

27. Plaintiffs are entitled to judgment against defendant for \$933,950.00, together with prejudgment interest. . .

The court later erred by amending that Conclusion and denying prejudgment interest on the portion of the damages representing money that Woodmansees paid to Hillman and Sherons, "because Robert Peterson never had use of the funds paid by Woodmansees to Sherons and Hillman". ¶ 3.5, p. 6, Appendix A. That was simple legal error. The question is whether the

damages were liquidated, not whether the defendant had use of them.

Washington law has historically treated prejudgment interest as a matter of right when a claim is liquidated. . . The trial court was able to enter the judgment without any exercise of discretion or opinion regarding the amount due. Because the amounts owed to Dautel could be determined exactly, without reliance on opinion or discretion, the claims were liquidated, and thus an award of prejudgment interest is proper.

Dautel v. Heritage Home Center, Inc., 89 Wn.App. at 153-155. The rule applies equally to tort and contract cases. *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).

C. **Whether Peterson Personally Received the Additional Money Woodmansees Paid to Hillman and Sherons Is Immaterial.**

In ¶ 3.4, p. 5, Appendix A the trial court correctly stated the rule that “it is the retention by defendant of money that should have been paid to the plaintiffs that triggers a defendant’s liability for prejudgment interest.” But the court then apparently reasoned that because Peterson “never had use of any of the funds” Woodmansees paid to Hillman and Sherons, he therefore could not have “retained” that money. That was error. The determining issue is not whether the *defendant* has “use of the funds”, but whether the *plaintiff* lost the “use value” of them. The focus is on the injured party, because prejudgment interest is compensatory in nature. “Prejudgment interest is awarded *to compensate a party who has lost the use of money* to which he or she was entitled.” *Lakes v. Von Der Mehden*, 117 Wn.App. 212, 217, 70

P.3d 154 (2003). “The plaintiff should be compensated for the “use value” of the money representing his damages for the period of time from his loss to the date of judgment.” *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). Woodmansees lost the use value of the additional money they had to pay to Hillman and Sherons, regardless of whether Peterson personally received it.

The court misinterpreted the phrase “retention of money that should have been paid”. When the amount owing is accurately determinable, that is when a party “should pay” that amount. Interest is awarded for “*delay in making compensation* . . . the time when it should have been paid is the time from which interest will be computed.” *Prier Refrigeration*, 74 Wn.2d at 34. Peterson had the use value of the liquidated amount which he “should have paid” to Woodmansees. Because the damages were liquidated, amount owed was known from the date Woodmansees paid for the two portions of Parcel 3, and therefore Peterson “ought to have paid” at that time. *Hansen v. Rothaus*, 107 Wn.2d 473, held that prejudgment interest should not be paid “when [the judgment debtor] is unable to ascertain the amount he owes to the plaintiff.” But when the amount is known, failing to pay it constitutes “retaining” it; failing to pay is “withholding payment” of money that is owed. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 775, 115 P.3d 349 (2005).

In *Prier v. Refrigeration Engineering* and *Hansen v. Rothaus*, the

liquidated cost of repairs caused by negligence drew prejudgment interest, but the defendants in those cases never received the money representing the damages their negligence caused. Whether prejudgment interest is awardable depends on whether the claim is a liquidated. *Hansen v. Rothaus*, 107 Wn.2d at 472. It does not depend on whether the defendant ends up with the damages money in his pocket. The court erred in denying prejudgment interest for the difference in cost of the co-owners' half of Parcel 3, which was a liquidated amount.

VII. REQUEST FOR ATTORNEY FEES ON APPEAL.

Woodmansees request an award of attorney fees and costs on appeal pursuant to RAP 18.1 and RAP 14.2. The PSA provided for attorney fees in any action “concerning this agreement”, and this action was “concerning” the PSA. Although the original PSA for Parcel 3 was held unenforceable by the Court of Appeals, attorney’s fees are still awardable under it. “Attorneys fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee provision is invalidated.” *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

Under the authorities cited above in support of Woodmansees’ request for fees at trial, authority for awarding fees at trial also supports an award of attorney fees on appeal. *CHD, Inc. v. Boyles*, 138 Wn.App.131, 141, 157 P.3d 415 (2007).

VIII. CONCLUSION.

There was substantial evidence to support the trial court's findings, and the findings support the court's conclusions, that Peterson was not privileged to misrepresent the co-owners' position to Woodmansees, that he was not their partner or agent, and that they did not ratify his fraudulent actions. There was substantial evidence to support the trial court's findings that Woodmansees had a reasonable expectation of a prospective business expectancy or relationship with Hillman and Sherons. The court's findings support the court's conclusions that Peterson committed fraud and wrongful interference, and that the appropriate damage award was the difference between the original PSA and the amount Woodmansees paid for the parcel. There was no error of law. The trial court's Judgment against Peterson should be affirmed.

The trial court erred in denying Woodmansees' request for attorney fees and prejudgment interest. They were entitled to fees under the PSA fees provision because their claims "concerned" the PSA. Their tort action was "on the contract" because their claims arose from the PSA and the PSA was central to their claims, which could not be resolved without referring to the PSA. Their damages were liquidated, and prejudgment interest was therefore appropriate. Woodmansees request that the Court of Appeals reverse that portion of the Judgment denying Woodmansees' attorney fees and

prejudgment interest, and remand to the trial court to establish the attorney fees and interest to be awarded to Woodmansees, together with attorneys fees on appeal.

RESPECTFULLY PRESENTED this 25th day of May, 2010.

BROIHIER & WOTIPKA

By: 
Jeffrey T. Broihier, WSBA #8857
Attorney for Respondents

APPENDIX A

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2009 DEC 30 AM 11:30
RECEIVED

Judge: Hon. John M. Meyer
Hearing Date: December 21, 2009
Hearing Time: 1:30 p.m.
With Oral Argument

DEC 30 2009

LAW OFFICE

**SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR SKAGIT COUNTY**

8 **JOSEPH D. WOODMANSEE and**)
9 **KIMBERLY A. WOODMANSEE,**)
10 **husband and wife,**)
11 **PLAINTIFFS'**)
12 **Plaintiffs,**)
13 **v.**)
14 **ROBERT S. PETERSON,**)
15 **Defendant**)

NO. 04-2-02102-5
JUDGMENT AND ORDER DENYING
MOTION FOR AWARD OF
ATTORNEY FEES, AWARDED
COSTS AND PREJUDGMENT
INTEREST AND SETTING
SUPERSEDEAS BOND
(WITH CONCLUSIONS OF LAW)
CLERK'S ACTION REQUIRED

JUDGMENT SUMMARY

- 17 1. Judgment Creditor: Joseph D. Woodmansee and Kimberly A. Woodmansee
- 18 2. Judgment Debtor: Robert S. Peterson
- 19 3. Principal Judgment: \$933,950.00
- 20 4. Prejudgment Interest: \$ 52,400.15
- 21 5. Attorney Fees: \$ 14,962.67
- 22 6. Costs: \$ 4,653.73
- 23 7. Interest Rate on Judgment 2.173 % per annum
- 24 8. Attorney for Judgment Creditor: Jeffrey T. Broihier

25 THIS MATTER having come on regularly for hearing on plaintiffs' Motion for Award of

26 Order Denying Plaintiffs' Motion for Attorney Fees, Awarding Costs and - 1
27 Prejudgment Interest and Setting Supersedeas Bond
28 (With Conclusions of Law)

Ralph I. Freese, Inc., P.S.
7009 - 212th Street S.W. #203
Edmonds, WA 98026
Tel. 425-774-6027
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Email: ralph@ralphifreese.com

1 Attorney Fees, Costs and Prejudgment Interest and defendant's request that the Court set
2 supersedeas bond; plaintiffs Woodmansee appearing by their attorney Jeffrey T. Broihier of
3 Broihier & Wotipka and defendant Peterson appearing by his attorney Ralph I. Freese of Ralph I.
4 Freese, Inc., P. S.; the Court having considered plaintiffs' motion and defendant's response thereto
5 and having heard argument of counsel; and it appearing that plaintiffs' motion should be Denied,
6 except for the attorney fees, costs and prejudgment interest to be awarded below, that Peterson
7 should be granted an offset for attorney fees previously awarded him as provided below and that the
8 Court should set supersedeas bond as provided below;
9

10
11 NOW, THEREFORE, the Court adopts the following Conclusions of Law:

12 **I. WOODMANSEES' MOTION FOR ATTORNEY FEES**

13 The Court makes the following Conclusions of Law with regard to the Woodmansees'
14 Motion for Award of Attorney Fees:

15
16 1.1 Plaintiffs were previously awarded attorney fees in the amount of \$29,356.00 on June
17 10, 2005, based on the April 15, 2004 Parcel 2 PSA, and Peterson was previously awarded a net
18 offset of appeal fees in the amount of \$4,608.00 on April 10, 2007 for defeating the April 15, 2004
19 Parcel 3 PSA;

20
21 1.2 The above attorney fees were appropriately awarded to the Woodmansees based on the
22 Woodmansees' successful summary judgment enforcement of the Parcel 2 PSA and to Peterson
23 based on Peterson's successful defense of the Parcel 3 PSA in the Court of Appeals;

24
25 1.3 The contractually based attorney fees previously awarded to the Woodmansees in the
26 amount of \$29,356.00 should be reduced by one-third, that is, by \$9,785.33, as suggested by the
27 Woodmansees, to an adjusted total of \$19,570.67, to account for the Woodmansees' failure to

1 prevail on their Parcel 3 PSA contract claim in the trial court;

2 1.4 The net award to Woodmansees of \$19,570.67 for prevailing on their Parcel 2 PSA
3 contract claim should also be reduced by the offset in appeal fees previously awarded Peterson in
4 the amount of \$4,608.00, for a net total attorney fee award to the Woodmansees in this case in the
5 amount of \$14,962.67;

7 1.5 Plaintiffs' Motion for Attorney Fees as prevailing parties in this action is based on the
8 contractual attorney fee clause in the April 15, 2004 Parcel 3 PSA, which the Court of Appeals has
9 held never became a contract between the parties;

11 1.6 The Woodmansees' causes of action from and after this Court's March 10, 2005
12 summary judgment order of specific performance through trial have been limited to their tort claims
13 of fraud, breach of fiduciary duty and tortious interference and have not been "on the contract" for
14 purposes of an award of attorney fees;

16 1.7 Attorney fees are not awardable to a party who prevails on tort claims that are not "on
17 the contract";

18 1.8 Burns v. McClinton, 135 Wn.App. 285, 308-11, 143 P.3d 680 (2006), relied on by the
19 Woodmansees as supporting an award of further attorney fees in this case, is consistent with the
20 authorities supporting Peterson's position rather than that advocated by the Woodmansees, since in
21 Burns, the Court of Appeals rejected the argument made by the Woodmansees here that "...the
22 ...agreement was central to the dispute because if there had been no...agreement, [the
23 defendant] ...would not have been in a position to commit his various breaches...." There, the Court
24 of Appeals noted that the Washington Supreme Court "...has explained that mere but-for causation
25 is insufficient to render a dispute "on a contract" and held that "...the claims in question were not
26

28 Order Denying Plaintiffs' Motion for Attorney Fees, Awarding Costs and - 3
Prejudgment Interest and Setting Supersedeas Bond
(With Conclusions of Law)

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1 *brought to enforce the...agreement.”;*

2 1.9 Similarly, the Woodmansees' tort claims in this case are not "on the contract for
3 purposes of an award of attorney fees to a prevailing party;
4

5 1.10 Attorney fees are not awardable to the Woodmansees based on a "fraudulent conduct"
6 equitable ground, because in order for that equitable principle to apply, the alleged fraudulent
7 conduct must have occurred in the context of the litigation itself;

8 1.11 No other equitable or other ground exists to award the Woodmansees attorney fees as
9 prevailing parties in this case, other than the fees previously awarded, as adjusted above; and
10

11 1.12 The Court's Conclusion of Law No. 28 is modified as provided above and, except for
12 the attorney fees previously awarded the Woodmansees, as adjusted above, the Woodmansees'
13 Motion for Award of Attorney Fees should be denied.

14 **II. WOODMANSEES' MOTION FOR COSTS**

15 The Court makes the following Conclusions of Law with regard to the Woodmansees'
16 Motion for Award of Costs:
17

18 2.1 On June 10, 2005, the court awarded costs of \$331.00 for the filing fee,
19 recording of lis pendens and service of process, and those costs should be included in the final
20 award. The depositions of Mr. Peterson, Mr. Hillman, Mr. and Mrs. Sheron, Mr. VanderMey,
21 Mr. Torset, Mr. Woodmansee, Mr. Johnson, and Mr. Foote were introduced in their entirety as
22 testimony in this action, and the plaintiff's expenses of \$3,096.82 for the deposition transcripts
23 were necessary for the successful conduct of this action. The plaintiffs' expenses of \$1381.10
24 for transcribing the depositions for Mr. Hewitt and Mr. Sparks were for impeachment purposes
25 but not used extensively when cross examining those witnesses at trial. The plaintiffs incurred
26
27

28 Order Denying Plaintiffs' Motion for Attorney Fees, Awarding Costs and - 4
Prejudgment Interest and Setting Supersedeas Bond
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1 expenses of \$225.91 for certified copies of orders, service of the orders and exhibit preparation
2 and \$1,000 for the referee's fees in the partition action. Plaintiffs' total awardable costs
3 amount to \$4,653.73.
4
5

6 III. WOODMANSEES' MOTION FOR PREJUDGMENT INTEREST

7 The Court makes the following Conclusions of Law with regard to the Woodmansees'
8 Motion for Award of Prejudgment Interests:
9

10 3.1 The Woodmansees have claimed prejudgment interest for prejudgment interest in the
11 amount of \$109,472.05, including a loan fee of \$3,094.75, on \$309,475.00 of the purchase price
12 paid by them to purchase the interests of the Sherons and Hillman in Parcel 3 on March 18, 2005;

13 3.2 The Woodmansees have claimed prejudgment interest for prejudgment interest in the
14 amount of \$64,889.65, including a loan fee of \$12,489.50, on \$624,475.00 of the purchase price
15 paid by them to purchase Robert Petersons' interest in Parcel 3 on June 30, 2008;

16 3.3 The Woodmansees should be awarded their prejudgment interest on their purchase of
17 Robert Peterson's interest in Parcel 3 on June 30, 2008 in the amount of \$52,400.15, that figure
18 being the requested amount less the claimed loan fees, since loan fees were not included in the
19 Court's previous order and because Robert Peterson is not liable for sums paid by the
20 Woodmansees to obtain lines of credit used in financing their development projects;
21

22 3.4 Prejudgment interest awards are based on the principle that a defendant "who retains
23 money which he ought to pay to another should be charged interest upon it." Hansen v. Rothaus,
24 107 Wn.2d 468, 473, 730 P.2d 662 (1987). The plaintiffs' reliance on Mahler v. Szucs, 135 Wn.2d
25 398, 429-30, 957 P.2d 632 (1998) as applicable only to a situation where a plaintiff's own attorney
26
27

1 held his funds, is misplaced, since Mahler nevertheless affirms the foregoing general principle, also
2 set forth in Grays Harbor County v. Bay City Lumber Co., 47 Wn.2d 879, 891, 289 P.2d 975
3 (1955), Crest Inc. v. Costco Wholesale Corp., 128 Wn.App. 760, 775, 115 P.3d 349 (2005) and
4 Prier v. Refrigeration Engineering Co., 74 Wn.2d 25, 34, 442 P.2d 621 (1968), that it is the
5 retention by defendant of money that should have been paid to the plaintiffs that triggers a
6 defendant's liability for prejudgment interest.
7

8 3.5 The Woodmansees' motion for an award of prejudgment interest on their purchase of
9 the Parcel 3 interests of Sherons and Hillman should be denied, because Robert Peterson never had
10 use of any of the funds paid by Woodmansees to Sherons and Hillman; and
11

12 3.6. The Court's Conclusion of Law No. 27 is modified as provided above.

13 IV. INTEREST RATE ON JUDGMENT

14 The interest rate on the judgment to be entered should be 2.173%, as provided by R.C.W.
15 4.56.110 (3).
16

17 V SUPERSEDEAS BOND

18 5.1 Pursuant to RAP 8.1, the defendant has a right to stay the judgment of the Court pending
19 appeal;
20

21 5.2 Pursuant to RAP 8.1 (c) (1), the superseadeas amount in the case of a money judgment
22 shall be the amount of the judgment, plus interest likely to accrue during the pendency of the
23 appeal and attorney fees, costs, and expenses likely to be awarded on appeal;

24 ~~5.3 The issues to be presented on appeal in this case have already been briefed~~
25 ~~extensively by the parties, both in this Court and in the Court of Appeals, and are unlikely to~~
26 ~~disproportionate attorney fees and costs; and~~
27

28 Order Denying Plaintiffs' Motion for Attorney Fees, Awarding Costs and - 6
Prejudgment Interest and Setting Supersedeas Bond
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1 5.4 Supersedeas bond should be set in the amount of \$1,500,000.00 pursuant to RAP 8.1 (c)

2 (1). The sum of \$1,000,000, currently subject to the June 30, 2008 Writ of Attachment, should be
3 held as a portion of Defendant's supersedeas bond pending appeal.

4 Based on the above Conclusions of Law, It is Ordered, Adjudged and Decreed as follows:

5
6 1. Plaintiffs Woodmansee be and are hereby granted judgment against Robert S. Peterson in
7 the principal amount of \$933,950.00;

8
9 2. Plaintiffs Woodmansee are awarded \$14,962.67 as the total attorney fees in this case,
10 including the attorney fees previously awarded by the Hon. Susan K. Cook on June 10, 2005, as
11 adjusted above, and the Woodmansees' motion for award of additional attorney fees is Denied;

12 3. Plaintiffs are awarded prejudgment interest in the amount of \$54,200.15;

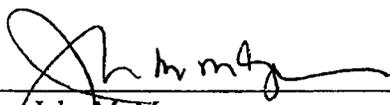
13
14 3. Plaintiffs are awarded costs, previously awarded by the Court on June 10, 2005, in the
15 amount of \$4,653.73;

16 4. All judgment amounts shall bear interest at the rate of 2.173% per annum;

17 5. The prejudgment attachment bond filed the plaintiffs is exonerated; and

18
19 6. Supersedeas is set in the amount of \$1,500,000.00 and the funds in the amount of
20 \$1,000,000.00, now held in the registry of the Court subject to the June 30, 2008 Writ of
21 Attachment, shall remain in the registry of the Court, where it shall constitute a portion of
22 defendant's supersedeas bond pending appeal and subsequent order of the Court.

23 DATED this 29 day of December, 2009.

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27 
Hon. John M. Meyer
Judge, Skagit County Superior Court

28 Order Denying Plaintiffs' Motion for Attorney Fees, Awarding Costs and - 7
Prejudgment Interest and Setting Supersedeas Bond
(With Conclusions of Law)

Ralph I. Freese, Inc., P.S.
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Presented by:

RALPH I. FREESE, INC., P.S.

By: _____

Ralph I. Freese WSBA #7824
Attorney for Defendant Peterson

Approved as to Form; Notice of
Presentation waived:

BROIHER & WOTIPKA

By: _____

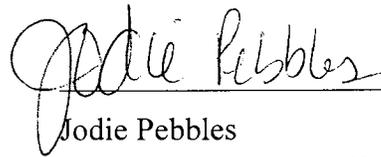
Jeffrey T. Broihier, WSBA #8857
Attorney for Plaintiffs Woodmansee

Order Denying Plaintiffs' Motion for Attorney Fees, Awarding Costs and - 8
Prejudgment Interest and Setting Supersedeas Bond
(With Conclusions of Law)

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 25th day of May, 2010.



Jodie Pebbles
Legal Secretary for Jeffrey T. Broihier

Attorney for Plaintiffs/Cross-Appellants:
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Broihier & Wotipka
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