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NO. 65844-1-I

**COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SKAGIT**

ALEXANDER MCLAREN,

Appellant,

v.

J. PHILLIP RHODES,

Respondent,

APPEAL FROM THE SUPERIOR COURT FOR SKAGIT COUNTY

The Honorable David R. Needy

BRIEF OF APPELLANT, ALEXANDER MCLAREN

ALEXANDER MCLAREN

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A. INTRODUCTION

This case involves an overly litigious contractor who wanted an even better deal after getting a discount to buy a lot that had a minor encroachment by the seller's adjacent house. Their agreement allowed the contractor to remove the encroaching portion under a certain condition.

The contractor intended on selling a custom-designed home on the lot but set the price too high – at least 25% above what an appraiser said the price should be – at a time when real estate prices were dropping. No customer ever came along and made an offer, so he became disillusioned and looked for a way out of his dilemma.

A year later, although the condition never arose, the contractor got a court order allowing removal of the encroaching portion and finding the seller in breach for not having removed it. When the seller didn't remove it, the contractor himself removed it at a cost of \$1,025.

The contractor then delayed another year before getting a building permit and arranging financing, and he blamed the 2-year delay on the seller. He mounted a multimillion-dollar lawsuit using two experts and two attorneys. The suit alleged nuisance, trespass, waste, and two claims of breach of contract.

During the course of litigation, the contractor admitted under oath that he wasn't really entitled to have the encroachment removed as the court had ordered. He confessed that the relevant provision in the

contract gave him (not the seller) the duty to remove the encroaching portion (not the entire house), and only if it hindered getting a permit to build a customer's house (but no customer ever came along).

Three years later when trial began the contractor still hadn't finished building the house.

When the contractor's multimillion-dollar case came on for trial the following year, the seller won all of the claims. The contractor won none. The trial court erred by designating the contractor the "prevailing party" and awarding him excessive damages, costs, and attorney fees for the minor victory that he had won – but admitted he shouldn't have – the year before.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred by entering an Order Granting Equitable Relief on March 15, 2007.
2. The trial court erred in entering finding of fact 3.22.
3. The trial court erred in entering finding of fact 3.24.
4. The trial court erred in entering finding of fact 3.25.
5. The trial court erred in entering finding of fact 3.26.
6. The trial court erred in entering finding of fact 3.27.
7. The trial court erred in entering finding of fact 3.28.
8. The trial court erred in entering finding of fact 3.29.
9. The trial court erred in entering finding of fact 3.30.
10. The trial court erred in entering finding of fact 3.32.

11. The trial court erred in entering finding of fact 3.35.
12. The trial court erred in entering finding of fact 3.37.
13. The trial court erred in entering finding of fact 3.66.
14. The trial court erred in entering finding of fact 3.68.
15. The trial court erred in entering conclusion of law 4.3.
16. The trial court erred in entering conclusion of law 4.11.
17. The trial court erred in entering conclusion of law 4.12.
18. The trial court erred in entering conclusion of law 4.14.

(2) Issues Pertaining to Assignments of Error

1. Is a seller in breach of a contract, and liable for damages, for not tearing down his entire house that slightly encroaches on the lot he sold where (a) the duty of removal is triggered by a condition subsequent that has not yet happened (b) if the duty to remove becomes triggered, the contract limits the extent of removal to only the portion that actually encroaches, and (c) the buyer admits in testimony that the duty to remove it is his own duty? (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18)

2. Is a home contractor who buys a lot to build a house on in 6 months entitled to be designated “prevailing party” and be awarded damages, costs, and fees for a brief construction delay caused by the seller where the contractor simultaneously inflicted much longer delays on himself when he (a) failed to apply for a building permit for a year after buying the seller’s lot, (b) failed to obtain a final building permit

for 2 years after buying the seller's lot due to his own change of building plans, (c) failed to obtain construction financing for nearly 2 years after buying the seller's lot, (d) failed to complete construction of the house by the time of trial nearly 3 years after buying the seller's lot, and (e) lost each and every one of his claims at trial? (Assignments of Error Nos. 1, 2, 5, 6, 7, 8, 9, 10, 11, 14, 17 and 18)

3. Where, after the trial court mistakenly found that the seller breached a duty to remove an encroachment on the property sold, the buyer admits in testimony that the duty to remove the encroachment was his own duty and the time to remove it would be triggered by a future condition that had not occurred, shouldn't the buyer then be liable for his own breach? (Assignments of Error Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 19)

4. Did the trial court err by awarding \$32,900 in damages to a contractor who, after buying a seller's lot to build a house on in 6 months, proved only \$1,025 in actual damages and the balance in speculative damages stemming from a construction delay he inflicted on himself when he (a) failed to apply for a building permit for a year after buying the seller's lot, (b) failed to obtain a final building permit for 2 years after buying the seller's lot due to his own change of building plans, (c) failed to obtain construction financing for nearly 2 years after buying the seller's lot, and (d) failed to complete construction of the house by the time of trial nearly 3 years after buying the

seller's lot? (Assignments of Error Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 19)

5. Did the trial court err by awarding a party more than \$35,000 in attorney fees where the fees were unreasonable in light of the end in view, excessive in light of the objective they attained, and where the attorney's cost and fee bill was so non-specific, insufficient, undecipherable, and lacking in detail to be adequately analyzed and attributed to the legal work for which it was claimed? (Assignments of Error Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 19)

6. Shouldn't the seller be designated the "prevailing party" and be awarded damages, costs, and fees of suit where he won all of the million-dollar claims at trial, and lost only a motion a year before trial on an minor issue that the buyer later admitted in testimony that the buyer himself was liable for? (Assignments of Error Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 19)

7. Shouldn't the seller be entitled to attorney fees on a nuisance claim that the buyer brought in tort, but which was provided for in the parties' contract and, therefore, barred by the economic loss rule? (Assignments of Error Nos. 11, 12, 14, 17, 18 and 19)

C. STATEMENT OF THE CASE¹

Respondent J. Phillip Rhodes, was a contractor. In summer 2005, he wanted to buy a lot owned by Appellant Alexander McLaren in

¹ The verbatim report of proceeding is referred to by date & witness, regardless of the volume it is bound into as, for example: VRP 11/3/2008: Rhodes

Anacortes to build a custom-designed house on and resell. He had visited the lot and neighborhood. He saw debris on the lot. He saw a dilapidated house on a neighboring lot owned by McLaren. VRP 11/3/2008: Rhodes at 72-74. He suspected it might encroach on the lot he wanted to buy.

Rhodes made a written offer to buy the lot for \$700,000 subject to removal of all debris and the entire adjacent house.

McLaren declined the offer. He wanted a non-contingent deal and was willing to discount the price to sell the lot "as is".

In December 2005 Rhodes made an offer of \$550,000. McLaren accepted and they entered into an agreement. Trial Ex. 3, See, Appendix A. The agreement discussed how they would deal with encroachment:

Buyer acknowledges that the existing house, an historic Anacortes mansion on the adjacent Lot 2 possibly encroaches on the easement running between Lots 1 and 2...and hereby accepts such encroachment until said house is removed by Seller who is actively engaged in its removal.

If the house should encroach to such extent as to prevent Buyer from obtaining a building permit, Seller agrees to remove that portion of the house that encroaches to such extent as to prevent issuance of the building permit.

The agreement also stated that in the event of suit "the prevailing party is entitled to reasonable attorneys' fees and expenses". Trial Ex. 3.

In January, within days after Rhodes bought the lot, McLaren gave Rhodes a free set of building plans for a house fitted to his lot that he could use if he so elected. VRP 11/3/2008: Rhodes at 94.

Rhodes financed the lot purchase with a 12-month loan. VRP 11/3/2008: Rhodes at 30, 53. Rhodes did not have an additional loan in place to build the house. VRP 11/3/2008: Rhodes at 53. His financing was to buy the lot only. VRP 11/3/2008: Rhodes at 54. After buying, Rhodes listed both the lot with a custom home to be built on it for sale. VRP 11/3/2008: Rhodes at 57. By the following summer of 2006 the real estate market had turned downward. VRP 11/3/2008: Rhodes at 92-93.

On October 24, 2006, Rhodes applied for a building permit. VRP 11/3/2008: Rhodes at 59-60, Trial Ex. 25. By then, 10 months of his 12-month loan had elapsed. VRP 11/3/2008: Rhodes at 30, 53.

On October 30 a city official denied his application. VRP 11/3/2008: Rhodes at 60, Trial Ex. 17. It was denied for five reasons. VRP 11/3/2008: Rhodes at 60, Trial Ex. 17. One reason was that Rhodes had not surveyed his lot to ascertain if there were encroachments. Trial Ex. 17.

On November 17, 2006 Rhodes sent McLaren a notice that the encroaching house prevented him from getting a building permit. VRP 11/3/2008: Rhodes at 36, 61. In January 2007 Rhodes sued McLaren seeking an order for the removal of the full house alleging it prevented him from getting a permit. VRP 11/3/2008: Rhodes at 37, CP 1-6, 7-12, 64-70. In January 2007 his loan expired. VRP 11/3/2008: Rhodes at 39.

On February 16, 2007 the court denied Rhodes' motion. Rhodes had failed to correct the deficiencies and it was not clear the encroachment was the true reason his application for a permit was rejected. Rhodes corrected the deficiencies. VRP 11/3/2008: Rhodes at 88.

On March 15, 2007 the court granted an order allowing removal of only the encroaching portion – not the entire house. CP 59-63, See, Appendix B. The court found McLaren in breach for not removing it. CP 59-63. Rhodes removed the small encroachment in early June 2006. VRP 11/3/2008: Rhodes at 30, 65. The removal cost Rhodes \$1,025. CP 306, Finding No. 3.31.

After the encroachment was removed, Rhodes kept changing his building plans and did not get his permit until November 9, 2007. VRP 11/3/2008: Rhodes at 68, Trial Ex. 30. Rhodes, not a customer of Rhodes, got the permit. Trial Ex. 30.

At the time, real estate prices were dropping. VRP 11/3/2008: Rhodes at 92-93.

Rhodes had no home construction financing in place between December 2005 when he bought the lot and August 2007 when he obtained a construction loan. VRP 11/3/2008: Rhodes at 87.

Rhodes blamed McLaren for the delay. He brought a multi-million-dollar lawsuit and hired two experts and two attorneys. The lawsuit alleged nuisance, trespass, waste, and two claims of breach of

contract – one for the full house and the other for just the small encroaching portion. VRP 11/3/2008: Rhodes at 37, CP 1-6, 7-12, 64-70. In January 2007 his loan expired. VRP 11/3/2008: Rhodes at 39.

During pre-trial discovery, Rhodes admitted the duty to remove the small encroachment was his own. CP 77-301: Published Dep. Of Rhodes, P. 46, Lines. 11-16. He also admitted the duty was to be triggered by a certain condition that had not arisen. CP 77-301: Published Dep. Of Rhodes, P. 46, L. 11-16. Rhodes intended to “pre-sell” both the lot and a custom-designed house to a customer who would fund Rhodes’ construction of their house. VRP 11/3/2008: Rhodes at 90-91. Rhodes testified:

I asked him [McLaren] that if I market the property and have a purchaser, somebody who would buy the property within the time that he was moving the house, that he would allow me to remove the encroachment on the property so I can get the building permit. That was the condition that I asked for, and he wrote the language for that. *Published Deposition of Rhodes, P. 46, L. 11-16.*

Rhodes did not obtain a construction loan to build a house until August 30, 2007, more than a year and a half after buying the lot. VRP 11/3/2008: Rhodes at 66. Rhodes arranged construction financing on August 30, 2007. Trial Ex. 28, 29.

Within days after buying, Rhodes listed both the lot and custom home to be built on it for sale but he listed it at \$1,495,000 which was 25% above its appraised price of \$1,200,000. VRP 11/3/2008: Rhodes at 57, 93. At the time, the real estate market was dropping. VRP

11/3/2008: Rhodes at 92-93. Rhodes never found a buyer for his lot with the custom-home to be built on it. VRP 11/3/2008: Rhodes at 93.

From the time Rhodes bought his lot until trial, the degree of distress caused by the dilapidated house remained “pretty consistent” and the “house hasn’t changed”. VRP 11/3/2008: Rhodes at 83.

Trial began on August 12, 2008 and lasted six-days. Rhodes case took five and a half days. The trial court relied on a time chart to track events. Trial Ex. 30.

As of trial – 3 years after he bought the lot – Rhodes still had not finished building his house. VRP 11/3/2008: Rhodes at 68.

During trial the court struck Rhodes’ experts’ testimony when their assumptions underlying their calculation of damages were not supported by evidence. They assumed Rhodes would have built and sold his house and lot in 6 months but the evidence showed he had not applied for a building permit until a year after he bought and not obtained it for another year due to his change of building plans.

Rhodes’ deposition was published at trial. VRP 11/3/2008: Rhodes at 77; CP 77-301. His admission that the duty to remove the encroaching portion was his own duty and that the condition for removal had never been triggered went unchallenged.

The trial court granted McLaren a directed verdict dismissing all Rhodes’ claims except his nuisance claim. CP 309, Contract claim dismissed at Finding 1.4, Conclusion 4.5; Waste

claim dismissed at Finding 1.5, Conclusion 4.6; Trespass claim dismissed at Finding 1.6, Conclusion 4.8; Easement claims dismissed at Finding 1.7, Conclusions 4.7, 4.9.

Regarding the nuisance claim, Rhodes testified that from the time he bought the lot until trial the distress caused by the neighboring house remained consistent and the dilapidated house had not changed. VRP 11/3/2008: Rhodes at 83. At the end of trial the court dismissed Rhodes' nuisance claim as well. CP 309, Nuisance claim dismissed at Finding 3.65, Conclusion 4.10. Trial ended November 2008.

By the end of trial, Rhodes' only successful aspect of the entire lawsuit was the order granted a year earlier allowing removal of only the encroaching portion and finding McLaren in breach for not removing it. CP 310, Finding 4.3, Conclusion 4.11.

In March 2010, a year and a half after trial ended, Rhodes' attorney presented findings, conclusions, and judgment. CP 302-310., See, Findings and Conclusions at Appendix C. Despite Rhodes' admission of facts showing he breached, the trial court designated him "prevailing party" and awarded him damages, fees, and costs. CP 306, Finding 3.35, 4.14. The court awarded him \$32,900 in damages although his actual cost of removing the encroachment was only \$1,025. CP 306, Finding 3.31, 3.32.

In July 2010, four months later, Rhodes' attorney presented a bill for costs and fees. CP 314-317. The bill contained little detail. CP

314-317. The court awarded Rhodes \$36,423 in costs and attorney fees despite losing all claims at trial. Cp 314-317.

D. SUMMARY OF ARGUMENT

The trial court's order in favor of Rhodes for removal of the encroachment should be reversed and judgment awarding damages, costs, and fees should be reversed. Judgment should be entered for McLaren.

McLaren did not breach the contract by failing to remove the encroachment because, as Rhodes admitted, the duty to remove it fell to Rhodes, the duty could only be triggered by a condition subsequent that never happened, and if the duty were triggered the contract limited the extent of removal to only the portion that actually encroached.

Rhodes was not entitled to be designated "prevailing party" and be awarded damages, costs, and fees for a construction delay where he admittedly breached the provision pertaining to removal of the encroachment, simultaneously inflicted delay on himself by waiting 2 years to get a building permit and a year and a half to get construction financing, and lost each and every claim at trial.

McLaren should be designated prevailing party and awarded damages, costs, and fees of suit, including for his defense against the nuisance claim.

E. ARGUMENT

(1) Standard of Review

This Court reviews the trial court's findings of fact and conclusions of law to see whether they are supported by substantial evidence and whether those findings support the conclusions of law. In doing so, this Court must take into account the standard of proof required at the trial court and review the evidence according to that standard. *In re Disciplinary Proceeding Against Marshall*, __ Wn.2d __, __ P.3d __, 2007 WL 1377914*4 (2007) citing *Bay v Estate of Bay*, 125 Wn, App. 468, 475, 105 P.3d 434 (2005)).

The trial court's conclusions of law are entitled to no deference and are reviewed *de novo*. Conclusions of law mislabeled as findings of fact are reviewed as conclusions of law. *City of Tacoma v. William Rogers Co., Inc.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002).

(1) McLaren Didn't Breach the Contract by Failing to Remove the Encroachment Because the Duty of Removal Fell to Rhodes and the Time to Perform the Duty had Not Yet Arisen.

The main thrust of Rhodes' whole suit against McLaren was to remove the *entire* house on McLaren's neighboring lot and collect damages for its presence as shown by his attacks against the house under several theories.²

The court dismissed Rhodes' claim of breach of contract for failing to tear down the *entire* house on the grounds that the claim was precluded by the parol evidence rule as being inconsistent with the parties' agreement. (Finding 1.4; Conclusion 4.5) The agreement

² Theories of contract, waste, nuisance, and trespass.

clearly stated that only the encroaching portion of the house would be removed:

Buyer acknowledges that the existing house, an historic Anacortes mansion on the adjacent Lot 2 possibly encroaches on the easement running between Lots 1 and 2...and hereby accepts such encroachment until said house is removed by Seller who is actively engaged in its removal.

If the house should encroach to such extent as to prevent Buyer from obtaining a building permit, Seller agrees to **remove that portion of the house that encroaches** to such extent as to prevent issuance of the building permit. (Emphasis added)

The general rule is that contracts are upheld as they have been written. *In re Estate of Bachmeier*, 147 Wn.2d 60, 52 P.2d 22 (2002). Unless a different intention is manifested, words are given their generally prevailing meaning and construed in accordance with that meaning. *R.A. Hanson Co., Inc. v. Aetna Ins. Co.*, 26 Wn. App. 290, 612 P.2d 456 (1980). Specific and exact terms are given greatest weight. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 909 P.2d 1323 (1995).

Here, the contract was specific as to the requirement to only “remove that **portion** of the house that encroaches”. Thus, the trial court correctly dismissed Rhodes’ claim to remove the entire house.

But the trial court erred in other aspects of the contract as discussed below.

(a) The Duty of Removal Fell to Rhodes—Not McLaren.

The trial court erred when it found that McLaren had the duty to remove the encroaching portion. The trial court inferred from the

language “Seller agrees to remove” that it was McLaren’s duty to remove the encroaching portion but the inference was wrong in light of the clear evidence to the contrary.

Rhodes, in his testimony, clarified what that language meant. His clearest explanation of the language is contained in his deposition that was published at trial. He testified:

I asked [McLaren] that if I market the property and have a purchaser, somebody who would buy the property within the time that he was moving the house, that **he would allow me to remove the encroachment on the property** so I can get the building permit. **That was the condition that I asked for, and he wrote the language for that.** *Published Deposition of Rhodes, P. 46, L. 11-16.* (Emphasis added)

It is clear from Rhodes above testimony that he asked that he himself be given the duty to remove the encroachment and that was the intention behind the language that was written. The trial court misapprehended this important admission by Rhodes that it was his own duty to remove the encroaching portion. As a result, the trial court erred by finding that the duty to remove the encroaching portion lay with McLaren.

(b) The Duty Was Triggered by a Condition Subsequent that had Not Yet Happened.

The trial court erred when it found that the encroachment should have been removed “within a reasonable time after signing” the contract. The focus here is on the **timing** of the removal and begins with the wording of the contract:

If the house should encroach to such extent as to prevent Buyer from obtaining a building permit, Seller agrees to

remove that portion of the house that encroaches to such extent as to **prevent issuance of the building permit**. (Emphasis added)

The above language clearly shows that the trigger for removal of the encroaching portion is somehow tied to obtaining a building permit – **not** to the signing of the contract.

Rhodes, a contractor who built and sold homes and developed property for a living, clarified in his testimony what that trigger relating to the “building permit” language meant. He testified:

I asked [McLaren] that if I **market the property and have a purchaser, somebody who would buy the property** within the time that he was moving the house, that he would allow me to remove the encroachment on the property **so I can get the [buyer’s] building permit**. That was the condition that I asked for, and he wrote the language for that. *Published Deposition of Rhodes, P. 46, L. 11-16.* (Emphasis added)

From the above language it is clear that duty to remove the encroaching portion didn’t arise merely if the encroachment prevented Rhodes from obtaining a building permit for himself. **The duty was to be triggered only if the encroachment prevented Rhodes from obtaining a building permit for a customer who bought his lot and hired him to get a permit to build their custom house on it.**

Rhodes’ testimony on this particular point is consistent with his other testimony that he sought to sell the property as a “pre-sale.” That is, Rhodes testified that he sought to market and sell his lot as a “pre-sale” where he would find a buyer and then have the buyer fund the purchase of the lot as well as Rhodes’ construction of a house for the buyer. VRP 11/3/2008: Rhodes at 54.

It is clear from the language in the agreement and Rhodes' testimony of what it meant that the duty to remove the encroachment would not arise until a third-party stepped forward and actually bought Rhodes' property and hired him to get a permit to build their house. As of the date of trial, this condition subsequent had not happened. VRP 11/3/2008: Rhodes at 93. So the duty to remove the encroachment had not yet arisen according to Rhodes's own admission as to the meaning of the language in the Addendum he signed.

Thus, the trial court erred by finding that the duty to remove the encroachment arose "within a reasonable time after signing" the contract. The clear language of the contract and Rhodes' own testimony show that the duty to remove the encroaching portion would not be triggered unless and until a third-party bought his lot and contracted Rhodes' services to obtain a building permit to build their house on Rhodes' lot.

(2) Rhodes is Not Entitled to be Designated "Prevailing Party" or Receive Damages, Costs, and Fees Because He (a) Breached the Contract, (b) Incurred Damages from Self-Inflicted Construction Delays, and (c) Lost All of His Claims at Trial.

(a) Rhodes is not the Prevailing Party in This Case.

The "prevailing party" is the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even if not to the extent of his original contention.

Klock Produce Co. v. Diamond Ice & Storage Co., 98 Wn. 676. 168 P. 476, 478.

Here, Rhodes did not prevail on the main issue. The main thrust of Rhodes' whole suit against McLaren was to remove the *entire* house on McLaren's neighboring lot and collect damages for its presence as shown by his attacks against the house under several theories.

Rhodes lost every claim against McLaren at trial – including his main claim to remove the entire house. McLaren prevailed on all of those claims without exception.

Rhodes prevailed only on the minor matter the year before trial of obtaining an order to remove the encroaching portion. Removal cost only \$1,025. Moreover, Rhodes prevailed only because the trial court mistakenly granted the order. Rhodes later admitted that he himself had the duty to remove the portion and that the duty would be triggered only if he applied for a customer's permit which he never did.

In light of the fact that Rhodes lost not only the main issue at trial as well as each and every other issue at trial, it is clear that Rhodes is not entitled to the moniker of prevailing party.

(b) Rhodes is not Entitled to Damages.

A party who claims breach of contract and sues for damages must prove damages as an element of their claim. WPI 300.01. In a claim for breach of contract "...a failure to prove **substantial damages**

is a failure to prove the substance of the issue, and warrants a judgment of dismissal.” *Ketchum v. Albertson Bulb Gardens*, 142 Wash 134, 139, 252 P. 523 (1927); *Woodhouse v. Powles*, 43 Wash 617 , 86 P. 1063; 8 L.R.A. (N.S.) 783, 117 Am.St. 1079; *Cassassa v. Seattle*, 75 Wash 367, 134 P. 1080. “The law does not concern itself with trifles.” *Ketchum* at 139; *Matzger v. Page*, 62 Wash 170, 113 P. 254; *Hewson v. Peterman Mfg. Co.*, 76 Wash 600, 136 P. 1158. Damages are an essential element of any claim for breach of contract. *N.W Ind. Forest Mfrs. v. Department of Labor and Industries* 78 Wash. App. 707, 712, 899 P.2d 6 (Div. 2, 1995); *Larson v. Union Investment & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932); *Alpine Industries, Inc. v. Gohl*, 30 Wash.App. 750, 637 P.2d 998 (1981), *review denied*, 97 Wash.2d 1013 (1982).

Rhodes is not entitled to an award of damages. First, he is not entitled because, as explained above, Rhodes himself had the duty to remove the encroachment. McLaren should not be held liable for damages for failing to perform Rhodes’ duty.

Second, the award was based on findings that are logically inconsistent with each other, unsupported by the evidence, and raise estoppel. Findings of fact nos. 3.26, 3.27, 3.28, 3.30 and 3.32 collectively find that McLaren’s failure to remove the encroaching portion delayed Rhodes’ construction for 7 months costing him \$32,900 in damages. Finding no. 3.28 states that the “The testimony

of Plaintiff [Rhodes] . . . shows that letters from Plaintiff to the Defendant in November 2006 effectively **gave notice** to the Defendant that the Packard House encroachment onto Lot 1 was preventing the issuance of a building permit for that lot. The specific effective date is **November 17, 2006.**” But this is inconsistent with Rhodes’ testimony cited in the section above. As shown above, Rhodes testified that the trigger for removing the encroachment was the inability to obtain a permit to build a customer’s house. If that triggering event is switched to merely sending out a notice, the question arises as to why Rhodes didn’t send McLaren the notice immediately after buying instead of waiting 11 months to do so on November 17, 2006? The answer to that question is that Rhodes didn’t send the notice out earlier because he was trying to comply with the contract. By the time he sent the notice in November 2006 the real estate market had clearly tanked and he had given up trying to comply with the contract in an attempt to stem his financial loss and salvage what he could.

Third, the award was based on findings that are logically inconsistent with a prior order of the trial court. In March 2006, a year before trial, the trial court granted an order allowing removal of the encroachment based on a city official’s affidavit dated only three days earlier on March 12, 2006 stating the only impediment to obtaining a building permit was removal of the encroachment. Only a month earlier the court had denied Rhodes’ same motion because he had failed

to correct several deficiencies in his application unrelated to the house. This raises the obvious question of whether Rhodes is entitled to an award of damages resulting from construction delays due to the encroachment as far back as November 2006 when the same trial court wouldn't grant him an order allowing him to remove the encroachment until March 15, 2006 based on the March 12 affidavit of the building official. Clearly, Rhodes is not entitled to damages stemming from a delay as far back as November 2006.

Fourth, Rhodes should not be awarded damages resulting from delay caused by the encroachment because he simultaneously inflicted other difficulties on himself that delayed his progress. After Rhodes obtained an order allowing removal of the encroachment the year before trial, he still could not begin building because he did not have construction financing or a final building permit. Rhodes admitted he did not apply for or obtain construction financing until late August 2007 – 20 months after buying the lot. He testified that he changed his building plans and received his final building permit in November 2007 – 23 months after buying the lot. Rhodes also testified that he did not begin construction until December 2007 – exactly 24 months (2 years!) after buying the lot. **Finally, Rhodes testified that he had not completed building the house as of the date of trial in October 2008 – 2 years and 10 months after buying the lot!**

The damages of \$32,900 that the trial court awarded Rhodes for delay in construction were erroneously blamed on McLaren. No evidence was educed at trial that McLaren actually caused delay. Even assuming *arguendo* that McLaren was required to remove the encroachment (contrary to Rhodes' own admission of breach discussed above), the duration of the encroachment did not actually delay Rhodes' start of construction because he still had not obtained construction financing nor a final building permit until months after the encroachment was removed, and he still had not finished building the house as of trial. Both financing and permitting were prerequisites to starting and completing the house. And, whether Rhodes' self-inflicted delays were conditions precedent or bars to recovery is not important. In either event, he was not entitled to damages for delays to his project that were brought about by his own dilatory failures. The court's findings unjustly enriched him and gifted him a windfall.

(b) Rhodes is not Entitled to Costs and Fees.

The parties' agreement states that in the event of suit, "the prevailing party is entitled to reasonable attorneys' fees and expenses." Black's Law Dictionary defines reasonable as "fitting, proper, and appropriate to the end in view", "not excessive".

For the reasons already stated above, Rhodes is not entitled to be designated the prevailing party. But assuming *arguendo* he deserves that moniker, the award of \$36,423 in attorney fees and costs was

excessive because he did not win a single claim at trial. He prevailed only on the motion brought a year before trial to remove the small encroachment and, for the reasons stated above, the court erred in granting the motion. In essence, then, Rhodes won \$36,423 in fees and costs for winning a single pre-trial motion. However, it must be recalled that Rhodes lost his first attempt at the motion in February and did not win until his second attempt the following month. By that standard, McLaren is entitled to \$36,423 in fees and costs for successfully defending against the first motion. And, McLaren's \$36,423 should off set Rhodes' \$36,423 in fees and costs.

In short, the trial court's award to Rhodes of \$36,423 in fees and costs was simply ridiculous. Rhodes won nothing whatsoever at trial. He admitted he himself would have the duty to remove the encroachment if the duty ever arose (but it never did).

(4) McLaren is entitled to be designated "prevailing party" and be awarded damages, costs, and fees.

McLaren is entitled to costs and fees of suit under the parties' contract. McLaren won all claims at trial. The main thrust of Rhodes' whole suit against McLaren was to remove the *entire* house on McLaren's neighboring lot and collect damages for its presence as shown by his attacks against the house under several theories. McLaren successfully defended on the main issue and Rhodes lost on the main issue. The "prevailing party" is the party who successfully

prosecutes the action or successfully defends against it, prevailing on the main issue. *Klock*.

McLaren is entitled to be awarded damages for removal of a portion of the house because, for the reasons stated above, the trial court erred in prematurely granting Rhodes's motion to remove the encroachment. By Rhodes' admission, removal would not be triggered unless and until Rhodes applied for a building permit for a customer, not himself, which never happened. Thus, Rhodes' removal of the small encroaching portion of the house entitles McLaren to compensatory damages.

McLaren is entitled to be awarded fees and costs of suit. Again, it cannot be emphasized enough that McLaren won all claims at trial. McLaren tried to settle the suit prior to trial but Rhodes smelled blood and couldn't be dissuaded from the scent of what he thought was a million-dollar victory.

(5) McLaren is entitled to fees for defending against the nuisance claim that should have been barred by the economic loss rule.

The trial court dismissed Rhodes' nuisance claim on tort grounds at the end of trial by finding that aesthetic blight to Rhodes' lot due to poor appearance of McLaren's adjacent house does not constitute nuisance under Washington law. (Finding 3.65, Conclusion 4.10) However, the court should have dismissed Rhodes' nuisance

claim at the start of trial on the grounds it was absorbed into his contract claim and, thus, barred by the economic loss rule.³

The economic loss rule is a doctrine that limits a party to his contract remedies when a loss potentially implicates both tort and contract relief. “[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.” *Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007).

It is a “device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract.... [E]conomic loss describes those damages falling on the contract side of ‘the line between tort and contract’”. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 822, 881 P.2d 986 (1994) (citation omitted) (quoting *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wash.2d 847, 861 n. 10, 774 P.2d 1199, 779 P.2d 697 (1989) (quoting *Pa. Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1173 (3d Cir.1981)).

The economic loss rule maintains the “fundamental boundaries of tort and contract law.” *Berschauer/Phillips*, 124 Wash.2d at 826, 881 P.2d 986. Where economic losses occur, recovery is confined to

³ By comparison, the court dismissed Rhodes’ trespass claim on the grounds it was absorbed into his contract claim and, thus, barred by the economic loss rule. (Finding 1.6; Conclusion 4.8)

contract “to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract.... If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity.” “A bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary.” *Berschauer/Phillips*, 124 Wash.2d at 827, 881 P.2d 986. In addition, the economic loss rule prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain. See, e.g., *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis.2d 395, 408, 573 N.W.2d 842 (1998). The economic loss rule applies to tort claims brought by property buyers. *Stuart*, 109 Wash.2d at 417-22, 745 P.2d 1284; *Griffith*, 93 Wash.App. at 212-13, 969 P.2d 486.

In the present case, Rhodes attempted to financially improve on the bargain he struck in contract with McLaren by bringing a tort claim against McLaren on the very matter contained in the contract. It is clear that when Rhodes entered into the contract to buy the lot, he was aware that McLaren’s house slightly encroached on the lot he was buying. Indeed, the encroachment was expressly treated in their agreement. Because the allocation of risk and liability for the encroachment was specifically bargained for in Rhodes’ and McLaren’s agreement,

Rhodes' claim of nuisance based on the encroachment fell squarely within the ambit of the economic loss rule and the trial court should have barred Rhodes' claim of nuisance under the rule. After having negotiated a firm deal on the basis of contract, the trial court should not have allowed Rhodes to try to improve on that deal in tort by grinding away hour-after-hour and day-after-day in trial. The numerous trial exhibits and factual findings of deficiencies pertaining to McLaren's neighboring house reflect the laborious time misspent during trial on this matter.

Rhodes purchased knowing of the presence and condition of the neighboring house and was attempting to seek compensation to reach a better deal than he got through his contract. That violated the economic loss rule and no evidence of Rhodes' tort claims should have been allowed. The trial court initially erred by failing to grant McLaren a directed verdict based on the economic loss rule at the start of trial (as it did with Rhodes' trespass claim) and then erred by eventually denying the nuisance claim on tort grounds instead of contract grounds under the economic loss rule.

Because Rhodes' nuisance claim should have been dismissed on contract grounds, McLaren is entitled to attorney fees under the parties' contract.

F. CONCLUSION

The trial court's order in favor of Rhodes for removal of the encroachment should be reversed and judgment awarding damages, costs, and fees should be reversed. Judgment should be entered for McLaren.

Rhodes bought a lot from McLaren at a discount knowing that McLaren's neighboring house encroached on it. He intended on selling a custom-designed home on the lot but set the price too high – at least 25% above what an appraiser said the price should be – at a time when real estate prices were dropping. No customer ever came along and made an offer, so after a year he became disillusioned and looked for a way out of his dilemma. He petitioned the trial court for an order to remove the entire neighboring house and sued McLaren for millions. After some effort, he got the court to order McLaren to remove the small encroaching portion and find McLaren in breach for not already removing it. When McLaren didn't remove it, Rhodes himself removed it at a cost of \$1,025.

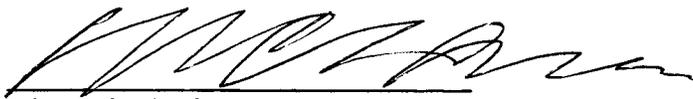
Later, under oath, Rhodes admitted that he wasn't really entitled to have it removed as the court had ordered. He confessed that the relevant provision in the contract gave *him* (not McLaren) the duty to remove the encroaching *portion* (not the entire house), and only if it hindered getting a permit to build a *customer's* house (but no customer ever came along).

When Rhodes' multimillion-dollar case came on for trial the following year, McLaren won all of the claims. Rhodes won none. The trial court erred by designating Rhodes as the prevailing party and awarding him excessive damages, costs, and attorney fees for the minor victory that Rhodes had won – but admitted he shouldn't have – the year before.

This Court should reverse the trial court's findings, conclusions, and judgment from trial. And, as a result of Rhodes' parol clarification of the meaning of the contract clause pertaining to removal of the encroachment following its removal, this Court should also reverse the trial court's earlier order on that topic. Rhodes should not be rewarded for malfeasance.

This Court should award McLaren his costs and fees of suit and on appeal and remand this case to the trial court for a determination of damages for Rhodes' malfeasance.

RESPECTFULLY SUBMITTED this 14th day of February, 2012.


Alexander McLaren

Phillip Rhodes
11-19-09

VACANT LAND PURCHASE AND SALE AGREEMENT
SPECIFIC TERMS

1. Date: December 20, 2005 MLS No.: _____
2. Buyer: Phil Rhodes
3. Seller: Alexander McLaren
4. Property: Tax Parcel Nos.: 3776-016-013-0007 (_____ County)
Street Address: NHN 5th Street, Lot 2, Anacorter Washington 98221
Legal Description: See Attached Exhibit A

5. Purchase Price: \$550,000.00 Five Hundred & Fifty-Thousand Dollars
6. Earnest Money: (To be held by Selling Broker Closing Agent)
Personal Check: \$2,000.00 Two Thousand Dollars
Note: _____
Other (_____): _____
7. Default: (check only one) Forfeiture of Earnest Money Seller's Election of Remedies
8. Title Insurance Company: Chicago Title Insurance Co.
9. Closing Agent: a qualified closing agent of Buyer's choice Chicago Title Insurance Company
10. Closing Date: On or before December 22, 2005
11. Possession Date: on Closing _____ calendar days after Closing _____
12. Offer Expiration Date: _____
13. Counteroffer Expiration Date: _____
14. Addenda: 34(Addendum) Exhibit A

15. Agency Disclosure: Selling Licensee represents Buyer Seller both parties neither party
Listing Agent represents Seller both parties
16. Subdivision: The Property is subdivided must be subdivided on or before _____
 is not legally required to be subdivided
17. Feasibility Contingency Expiration Date: 0 days after mutual acceptance _____

Phillip Rhodes 12/20/05
Buyer's Signature Date

Alexander McLaren
Seller's Signature Date

Buyer's Signature Date
3518 North West Avenue, #202
Buyer's Address
Bellingham, WA 98225
City, State, Zip
360-303-1381
Phone Fax

Seller's Signature Date
P.O. Box 911
Seller's Address
Tacoma, WA 98401
City, State, Zip
360-293-3666
Phone Fax

Buyer's E-mail Address

Seller's E-mail Address

Selling Broker MLS Office No.

Listing Broker MLS Office No.

Selling Licensee (Print)

Listing Agent (Print)

Phone Fax

Phone Fax

VACANT LAND PURCHASE AND SALE AGREEMENT
GENERAL TERMS
(continued)

- a. **Purchase Price.** Buyer agrees to pay to Seller the Purchase Price, including the Earnest Money, in cash at Closing, unless otherwise specified in this Agreement. Buyer represents that Buyer has sufficient funds to close this sale in accordance with this Agreement and is not relying on any contingent source of funds or gifts, except to the extent otherwise specified in this Agreement. 1-4
- b. **Earnest Money.** Buyer agrees to deliver the Earnest Money within 2 days after mutual acceptance of this Agreement to Selling Licensee who will deposit any check to be held by Selling Broker, or deliver any Earnest Money to be held by Closing Agent, within 3 days of receipt or mutual acceptance, whichever occurs later. If the Earnest Money is held by Selling Broker and is over \$10,000.00 it shall be deposited into an interest bearing trust account in Selling Broker's name provided that Buyer completes an IRS Form W-9. Interest, if any, after deduction of bank charges and fees, will be paid to Buyer. Buyer agrees to reimburse Selling Broker for bank charges and fees in excess of the interest earned, if any. If the Earnest Money held by Selling Broker is over \$10,000.00 Buyer has the option to require Selling Broker to deposit the Earnest Money into the Housing Trust Fund Account, with the interest paid to the State Treasurer, if both Seller and Buyer so agree in writing. If the Buyer does not complete an IRS Form W-9 before Selling Broker must deposit the Earnest Money or the Earnest Money is \$10,000.00 or less, the Earnest Money shall be deposited into the Housing Trust Fund Account. Selling Broker may transfer the Earnest Money to Closing Agent at Closing. If all or part of the Earnest Money is to be refunded to Buyer and any such costs remain unpaid, the Selling Broker or Closing Agent may deduct and pay them therefrom. The parties instruct Closing Agent to: (1) provide written verification of receipt of the Earnest Money and notice of dishonor of any check to the parties and licensees at the addresses and/or fax numbers provided herein; and (2) commence an interpleader action in the Superior Court for the county in which the Property is located within 30 days of a party's demand for the Earnest Money (and deduct up to \$250.00 of the costs thereof) unless the parties agree otherwise in writing. 5-21
- c. **Condition of Title.** Buyer and Seller authorize Selling Licensee, Listing Agent or Closing Agent to insert, attach or correct the Legal Description of the Property. Unless otherwise specified in this Agreement, title to the Property shall be marketable at Closing. The following shall not cause the title to be unmarketable: rights, reservations, covenants, conditions and restrictions, presently of record and general to the area; easements and encroachments, not materially affecting the value of or unduly interfering with Buyer's reasonable use of the Property; and reserved oil and/or mining rights. Monetary encumbrances not assumed by Buyer shall be paid by Seller on or before Closing. Title shall be conveyed by a Statutory Warranty Deed. If this Agreement is for conveyance of a buyer's interest in a Real Estate Contract, the Statutory Warranty Deed shall include a buyer's assignment of the contract sufficient to convey after acquired title. If the Property has been short platted, the Short Plat number is in the Legal Description. 22-30
- d. **Title Insurance.** Seller authorizes Buyer's lender or Closing Agent, at Seller's expense, to apply for a standard form owner's policy of title insurance, with homeowner's additional protection and inflation protection endorsements if available at no additional cost, from the Title Insurance Company. The Title Insurance Company is to send a copy of the preliminary commitment to both Listing Agent and Selling Licensee. The preliminary commitment, and the title policy to be issued, shall contain no exceptions other than the General Exclusions and Exceptions in said standard form and Special Exceptions consistent with the Condition of Title herein provided. If title cannot be made so insurable prior to the Closing Date, then as Buyer's sole and exclusive remedy, the Earnest Money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to the Buyer, less any unpaid costs described in this Agreement, and this Agreement shall thereupon be terminated. Buyer shall have no right to specific performance or damages as a consequence of Seller's inability to provide insurable title. 31-40
- e. **Closing.** This sale shall be closed by the Closing Agent on the Closing Date. "Closing" means the date on which all documents are recorded and the sale proceeds are available to Seller. If the Closing Date falls on a Saturday, Sunday, or legal holiday as defined in RCW 1.16.050, the Closing Agent shall close the transaction on the next day that is not a Saturday, Sunday, or legal holiday. 41-44
- f. **Possession.** Buyer shall be entitled to possession at 9:00 p.m. on the Possession Date. Seller agrees to maintain the Property in its present condition, normal wear and tear excepted, until the Buyer is entitled to possession. 45-46
- g. **Closing Costs and Prorations.** Seller and Buyer shall each pay one-half of the escrow fee. Taxes for the current year, rent, interest, and lienable homeowner's association dues shall be prorated as of Closing. Buyer agrees to pay Buyer's loan costs, including credit report, appraisal charge and lender's title insurance, unless provided otherwise in this Agreement. If any payments are delinquent on encumbrances which will remain after Closing, Closing Agent is instructed to pay them at Closing from money due, or to be paid by, Seller. 47-51

Initials: BUYER: JFTC DATE: 12/20/05 SELLER: [Signature] DATE: 20-12-05 52
BUYER: [Signature] DATE: _____ SELLER: _____ DATE: _____ 53

VACANT LAND PURCHASE AND SALE AGREEMENT
GENERAL TERMS
(continued)

- h. **Sale Information.** The Listing Agent or Selling Licensee is authorized to report this Agreement (including price and all terms) to the Multiple Listing Service that published it and to its members, financing institutions, appraisers, and anyone else related to this sale. Buyer and Seller expressly authorize all Closing Agents, appraisers, title insurance companies, and others related to this Sale, to furnish the Listing Agent and/or Selling Licensee, on request, any and all information and copies of documents concerning this sale. 54-58
- i. **FIRPTA - Tax Withholding at Closing.** The Closing Agent is instructed to prepare a certification (NWMLS Form 22E or equivalent) that Seller is not a "foreign person" within the meaning of the Foreign Investment In Real Property Tax Act. Seller agrees to sign this certification. If Seller is a foreign person, and this transaction is not otherwise exempt from FIRPTA, Closing Agent is instructed to withhold and pay the required amount to the Internal Revenue Service. 59-62
- j. **Notices.** In consideration of the license to use this and NWMLS's companion forms and for the benefit of the Listing Agent and the Selling Licensee as well as the orderly administration of the offer, counteroffer or this agreement, the parties irrevocably agree that unless otherwise specified in this Agreement, any notice required or permitted in, or related to, this Agreement (including revocations of offers or counteroffers) must be in writing. Notices to Seller must be signed by at least one Buyer and shall be deemed given only when the notice is received by Seller, by Listing Agent or at the licensed office of Listing Agent. Notices to Buyer must be signed by at least one Seller and shall be deemed given only when the notice is received by Buyer, by Selling Licensee or at the licensed office of Selling Licensee. Receipt by Selling Licensee of a Real Property Transfer Disclosure Statement, Public Offering Statement and/or Resale Certificate shall be deemed receipt by Buyer. Selling Licensee and Listing Agent have no responsibility to advise of receipt of a notice beyond either phoning the party or causing a copy of the notice to be delivered to the party's address shown on this Agreement. Buyer and Seller must keep Selling Licensee and Listing Agent advised of their whereabouts in order to receive prompt notification of receipt of a notice. 63-74
- k. **Computation of Time.** Unless otherwise specified in this Agreement, any period of time stated in this Agreement shall start on the day following the event commencing the period and shall expire at 9:00 p.m. of the last calendar day of the specified period of time. Except for the Possession Date, if the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, the specified period of time shall expire on the next day that is not a Saturday, Sunday or legal holiday. Any specified period of 5 days or less shall not include Saturdays, Sundays or legal holidays. Time is of the essence of this Agreement. 75-80
- l. **Facsimile or E-mail Transmission.** Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original. At the request of either party, or the Closing Agent, the parties will confirm facsimile transmitted signatures by signing an original document. E-mail transmission of any document or notice shall not be effective unless the parties to this Agreement otherwise agree in writing. 81-84
- m. **Integration.** This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller. 85-87
- n. **Assignment.** Buyer may not assign this Agreement, or Buyer's rights hereunder, without Seller's prior written consent, unless provided otherwise herein. 88-89
- o. **Default.** In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then the following provision, as identified in Specific Term No. 7, shall apply: 90-91
 - i. **Forfeiture of Earnest Money.** That portion of the Earnest Money that does not exceed five percent (5%) of the Purchase Price shall be forfeited to the Seller as the sole and exclusive remedy available to Seller for such failure. 92-93
 - ii. **Seller's Election of Remedies.** Seller may, at Seller's option, (a) keep the Earnest Money as liquidated damages as the sole and exclusive remedy available to Seller for such failure, (b) bring suit against Buyer for Seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies available at law or equity. 94-97
- p. **Attorneys' Fees.** If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses. 98-99
- q. **Offer.** Buyer agrees to purchase the Property under the terms and conditions of this Agreement. Seller shall have until 9:00 p.m. on the Offer Expiration Date to accept this offer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is actually received by Buyer, by Selling Licensee or at the licensed office of Selling Licensee. If this offer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer. 100-103

Initials: BUYER: JPR DATE: 12/20/05 SELLER: [Signature] DATE: 2-10-12-05 104
 BUYER: _____ DATE: _____ SELLER: _____ DATE: _____ 105

VACANT LAND PURCHASE AND SALE AGREEMENT
GENERAL TERMS
(continued)

- r. **Counteroffer.** Seller agrees to sell the Property under the terms and conditions of this Agreement. If Seller makes a counteroffer, Buyer shall have until 9:00 p.m. on the Counteroffer Expiration Date to accept that counteroffer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is actually received by Seller, by Listing Agent or at the licensed office of Listing Agent. If the counteroffer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer. If no expiration date is specified for a counteroffer, the counteroffer shall expire at 9:00 p.m. 2 days after the counteroffer is signed by the last party making the counteroffer, unless sooner withdrawn. 106-112

- s. **Agency Disclosure.** Selling Broker represents the same party that Selling Licensee represents. Listing Broker represents the same party that the Listing Agent represents. If Selling Licensee and Listing Agent are different salespersons affiliated with the same Broker, then both Buyer and Seller confirm their consent to that Broker representing both parties as a dual agent. If Selling Licensee and Listing Agent are the same salesperson representing both parties then both Buyer and Seller confirm their consent to that salesperson and his/her Broker representing both parties as dual agents. All parties acknowledge receipt of the pamphlet entitled "The Law of Real Estate Agency." 113-118

- t. **Commission.** Seller and Buyer agree to pay a commission in accordance with any listing or commission agreement to which they are a party. The Listing Broker's commission shall be apportioned between Listing Broker and Selling Broker as specified in the listing. Seller and Buyer hereby consent to Listing Broker or Selling Broker receiving compensation from more than one party. Seller and Buyer hereby assign to Listing Broker and Selling Broker, as applicable, a portion of their funds in escrow equal to such commission(s) and irrevocably instruct the Closing Agent to disburse the commission(s) directly to the Broker(s). In any action by Listing or Selling Broker to enforce this paragraph, the prevailing party is entitled to court costs and reasonable attorneys' fees. 119-125

- u. **Feasibility Contingency.** It is the Buyer's responsibility to verify before the Feasibility Contingency Expiration Date identified in Specific Term No. 17 whether or not the Property can be platted, developed and/or built on (now or in the future) and what it will cost to do this. BUYER SHOULD NOT RELY ON ANY ORAL STATEMENTS concerning this made by the Seller, Listing Agent or Selling Licensee. Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry should include, but not be limited to: building or development moratoriums applicable to or being considered for the Property; any special building requirements, including setbacks, height limits or restrictions on where buildings may be constructed on the Property; whether the Property is affected by a flood zone, wetlands, shorelands or other environmentally sensitive area; road, school, fire and any other growth mitigation or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or a building permit; sufficient water, sewer and utility and any service connection charges; and all other charges that must be paid. Buyer and Buyer's agents, representatives, consultants, architects and engineers shall have the right, from time to time during the feasibility contingency, to enter onto the Property and to conduct any tests or studies that Buyer may need to ascertain the condition and suitability of the Property for Buyer's intended purpose. Buyer shall restore the Property and all improvements on the Property to the same condition they were in prior to the inspection. Buyer shall be responsible for all damages resulting from any inspection of the Property performed on Buyer's behalf. If the Buyer does not give notice to the contrary on or before the Feasibility Contingency Expiration Date identified in Specific Term No. 17, it shall be conclusively deemed that Buyer is satisfied as to development and/or construction feasibility and cost. If Buyer gives notice, this Agreement shall terminate and the Earnest Money shall be refunded to Buyer, less any unpaid costs. 126-145

- v. **Subdivision.** If the Property must be subdivided, Seller represents that there has been preliminary plat approval for the Property and this Agreement is conditioned on the recording of the final plat containing the Property on or before the date specified in Specific Term 16. If the final plat is not recorded by such date, this Agreement shall terminate and the Earnest Money shall be refunded to Buyer. 146-149

- w. **Property Condition Disclaimer.** Real estate brokers and salespersons do not guarantee the value, quality or condition of the Property. Some properties may contain building materials, including siding, roofing, ceiling, insulation, electrical, and plumbing materials, that have been the subject of lawsuits and/or governmental inquiry because of possible defects or health hazards. In addition, some properties may have other defects arising after construction, such as drainage, leakage, pest, rot and mold problems. Real estate licensees do not have the expertise to identify or assess defective products, materials, or conditions. Buyer is urged to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the Property. 150-156

initials: BUYER: JPR DATE: 12/2/05 SELLER: [Signature] DATE: 12-12-05 157
BUYER: [Signature] DATE: 12/2/05 SELLER: [Signature] DATE: _____ 158

ADDENDUM/AMENDMENT TO PURCHASE AND SALE AGREEMENT

The following is part of the Purchase and Sale Agreement dated December 20, 2005 1
between Phil Rhodes ("Buyer") 2
and Alexander McLaren ("Seller") 3
concerning NHN 5th Street, Anacortes, WA 98221 ("the Property") 4

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS: 5

Buyer acknowledges that the existing house, an historic Anacortes mansion, situated on the adjacent Lot 2 8
possibly encroaches on the easement running between Lots 1 and 2 by approximately three feet (less than the 10 9
foot boundary setback requirement for Lot 1), and hereby accepts such encroachment until said house is 10
removed by Seller who is actively engaged in its removal. If the house should encroach to such extent as to 11
prevent Buyer from obtaining a building permit, Seller agrees to remove that portion of the house that 12
encroaches to such extent as to prevent issuance of the building permit. 13
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ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged. 41

AGENT (COMPANY) _____ 42

BY: _____ 43

Initials: BUYER: JPR DATE: 12/20/05 SELLER: [Signature] DATE: 12.12.05 44
BUYER: _____ DATE: _____ SELLER: _____ DATE: _____ 45

Exhibit "A"

Legal Description

WMAN'S C.S.H.W.F. PLAT TO ANACORTES, BLOCK 16, ACRES 0.24, LOT 1 OF SURVEY RECORDED UNDER #200406210184 AKA THE NORTH 75.57 FEET OF LOTS 5 THROUGH 9, TOGETHER WITH THE NORTH 75.57 FEET OF E EAST 20.00 FEET OF LOT 10, EXCEPT ANY PORTION OF SAID LOTS LYING SEAWARD OF THE ORDINARY HIGH WATER LINE.

[Signature] 1 Dec 05

[Signature] 20-12-05
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SUPERIOR COURT OF THE STATE OF WASHINGTON, SKAGIT COUNTY

J. Philip Rhodes)	
)	
Plaintiff)	
)	No. 07-2-00019-7
v.)	
)	ORDER GRANTING
Alexander McLaren,)	EQUITABLE RELIEF
)	
Defendant)	
_____)	

THIS MATTER having come on for hearing upon Plaintiff's motion for equitable relief, and the Court having reviewed the parties' pleadings, papers and the file herein, and specifically having considered the following evidence:

- (1) Affidavit of Surveyor Paul Monohon of February 2, 2007, with survey attached;
- (2) Affidavit of Frank Jeretzky dated February 15, 2007;
- (3) Affidavit of Plaintiff Phil Rhodes dated February 14, 2007;
- (4) Supplemental Affidavit of Phil Rhodes dated March 12, 2007;
- (5) Affidavit of Don Measamer dated March 12, 2007;
- (6) Declaration of Alexander McLaren filed February 14, 2007;
- (7) ~~Supplemental Memorandum of Law of Defendant Alexander McLaren filed March 12, 2007;~~ *Sm*

1 Other Evidence:

2 - Site photograph copy of the
3 Peckard Estates, as provided by
4 the defendant.
5
6
7
8

9 And the Court having taken judicial notice of:

- 10 *SM*
- 11 (a) Judgment of the Skagit County Superior Court dated July
12 20, 2006 in the case of Cutter v. McLaren, requiring the
13 structure on Defendant's property to be removed within 60
14 days of closing of sale between Cutters & McLaren; and
15 (b) Order of the Skagit County Superior Court Order dated
16 November 15, 2006 in the case of Cutter v. McLaren,
17 requiring Defendant McLaren's structure to be removed from
18 his property within 75 days of the date of the Order with
19 sanctions of \$250/day thereafter;

20 And the Court

21 FINDING that Defendant McLaren's property, specifically, a
22 structure, encroaches onto Plaintiff's real property identified
23 in this action; and

24 FURTHER FINDING that Plaintiff has a clear right to control and
25 use all of his property; and

26 FURTHER FINDING that ~~Plaintiff has a well grounded fear of an~~
27 ~~immediate invasion of that right, in that~~ ^{Plaintiff's} right to control
28 and use his property is presently being invaded by the

1 encroachment of Defendant's structure onto Plaintiff's
2 property; and

3
4 FURTHER FINDING that the encroachment of Defendant's structure
5 onto Plaintiff's property is ^{as of March 12, 2007 DM} resulting in substantial injury to
6 the Plaintiff, and will continue to result in substantial
7 injury until that encroachment is removed; and ^{which is inability}
8 ^{to obtain a permit DM}

9 ~~FURTHER FINDING that, in conjunction with the Defendant's sale~~
10 ~~of Packard Estates lot 1 to Plaintiff, Defendant advised in~~
11 ~~clear and certain terms that he would remove any encroachment~~
12 ~~of a structure from Defendant's lot 2 onto Plaintiff's lot 1,~~
13 ~~if the presence of that structure impeded the Plaintiff's use~~
14 ~~of that lot 1; and~~

15
16 FURTHER FINDING that in conjunction with the sale identified
17 above, Defendant and Plaintiff made a written agreement that
18 Defendant would remove the encroachment from Plaintiff's
19 property if that encroachment prevented Plaintiff from
20 obtaining a building permit for his property; and

21
22 FURTHER FINDING that the City of Anacortes will not issue a
23 building permit to the Plaintiff until and unless the
24 encroachment of Defendant's structure onto Plaintiff's property
25 has been removed; and therefore

1 CONCLUDING that the encroachment of Defendant's structure onto
2 Plaintiff's property constitutes a ~~trespass as a matter of law;~~ ^{violation of the contract}
3 and SM

4
5 FURTHER CONCLUDING that a valid and legally enforceable
6 contract is in place between Plaintiff and Defendant, which
7 requires Defendant to remove the encroaching structure from
8 Plaintiff's property; and

9
10 FURTHER CONCLUDING that, as a matter of law under the contract
11 between the parties, the cost of removing such encroachment is
12 the responsibility of Defendant Alex McLaren; and

13
14 FURTHER CONCLUDING that as a matter of law, Plaintiff is
15 therefore entitled to an Order requiring that the encroachment
16 of Defendant McLaren's property onto Plaintiff's property
17 should be removed; now, then, it is hereby

18
19 ORDERED that Defendant Alex McLaren shall, ^{by April 16, 2007} ~~within ten (10)~~
20 _____ ~~days from this date,~~ remove any portion of the house
21 known as the Packard House, which house is the property of said
22 Defendant, from any encroachment onto lot 1 of the Packard
23 Estates, which lot 1 is the property of the Plaintiff, where
24 such lot 1 is described on that certain survey recorded in
25 Skagit County Washington under Auditor's file number
26 200312160027; and it is

1 FURTHER ORDERED that in the event the encroachment of the
2 Packard House onto lot 1 is not removed from lot 1 ~~within ten~~^{by}
3 April 16, 2007
~~(10)~~ days, Plaintiff may remove any such encroachment on
4 lot 1 and charge the expense of removal to the Defendant Alex
5 McLaren; and it is

6
7 FURTHER ORDERED that in view of the clear responsibility of
8 Defendant to remove the encroaching structure from Plaintiff's
9 property, Plaintiff's bond to be posted for this Order shall be
10 the nominal amount of \$ 100.00 .

11
12 ADDITIONAL FINDINGS, CONCLUSIONS AND TERMS:

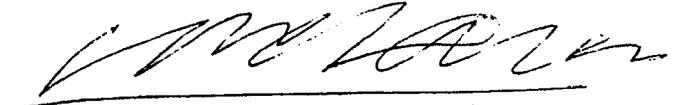
13 Defendant may, before thirty days from the date
14 of this order, provide evidence to the Court
15 that the Packard House will be moved shortly
16 after April 16, 2007, thus obviating the
17 need for the Plaintiff to himself remove the
18 encroaching portion of the Packard House. The
19 Defendant may move to modify this order within 30 days
20 ~~of this order~~ for the above state reasons.

21 Done this 15 day of March, 2007.

22
23 
24 JUDGE

25 Respectfully presented:

26
27 
28 Alan R. Souders, WSBA #26192
Attorney for Plaintiff

25 
26 and content:
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28 A. Mc LAREN

OK

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SUPERIOR COURT OF THE STATE OF WASHINGTON, SKAGIT COUNTY

J. Phillip Rhodes)

Plaintiff)

v.)

Alexander McLaren,)

Defendant)

No. 07-2-00019-7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

I. CASE AND TRIAL BACKGROUND

1.1 This matter for Trespass, Easement, Breach of Contract and Nuisance as against Alexander McLaren was tried to the Court without a jury on August 12th and 13th, 2008; and November 3rd, 4th, 24th and 25th, 2008, with Judge David Needy presiding at the trial.

1.2 The plaintiff J. Phillip Rhodes appeared at the trial personally and by and through his attorneys of record, Alan R. Souders and John P. Livingston. The defendant Alexander McLaren appeared personally at trial and by and through his attorney, Richard J. Hughes.

1.3 Plaintiff claimed that the continuing existence of the old house on the seller's lot breached a provision of the parties' purchase and sale agreement that required removal of the house in its entirety. Plaintiff also claimed Defendant's failure to timely remove an encroachment onto plaintiff's lot breached the purchase and sale agreement and that encroachment constituted a trespass. Plaintiff also claimed defendant's neighboring lot and house constituted a nuisance. Plaintiff further claimed that he was owed an easement to access his property from the west.

1.4 Defendant moved for a Directed Verdict to dismiss all of plaintiff's claims. The Court dismissed plaintiff's major breach of contract claim for removal of the entirety of the house on the grounds that the claim was inconsistent with the

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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express terms of the parties' agreement and precluded by the Parol Evidence Rule. The Court deferred determination of the plaintiff's breach of contract claim to remove a portion of the house that was encroaching on the plaintiff's property and expressly discussed in the parties' agreement.

1.5 The Court dismissed the plaintiff's claim regarding removal of the debris from seller's lot because it was not alleged in the plaintiff's initial or amended complaints.

1.6 The Court dismissed the plaintiff's claim for trespass on the grounds that the duty to remove an encroachment was expressly stated in the purchase and sale agreement and therefore barred by the Economic Loss Rule.

1.7 The Court dismissed the plaintiff's easement claim on the grounds that an easement was not expressly conveyed to the plaintiff, was not a part of the parties' agreement, and was not implied or necessary under plaintiff's circumstances as he had alternative direct access to his lot and it was not prescriptively granted or otherwise available to plaintiff.

II. EVIDENCE PRESENTED

2.1 The following witnesses were called and testified:

- (a) For the plaintiff: Alexander McLaren, J. Phillip Rhodes, Paul Monohon, Candace Cooper, J. Randy Cox, Frank Jeretzky, Scott Reed, David Parsons, Dr. David Fewings, Brian Youngquist and Don Measamer.
- (b) For the defendant: Alexander McLaren and Roberta Galloro.

2.2 The exhibits listed on the attached exhibit list were offered and admitted into evidence.

III. FINDINGS OF FACT

Based on the evidence presented at trial and pursuant to CR 52, the Court finds:

3.1 Plaintiff owns the real property at 101 Fifth Street in the City of Anacortes, Skagit County, Washington.

3.2 Plaintiff's property is lot 1 of the Packard Estates, shown by survey recorded under Skagit County Auditor's file number 200406210184.

3.3 Plaintiff purchased lot 1 of the Packard Estates from Defendant in December of 2005 under a written Purchase and Sale Agreement.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

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3.4 Defendant owns the real property at 107 Fifth Street in the City of Anacortes.

3.5 Defendant's property is lot 2 of the Packard Estates, as shown by the survey noted above.

3.6 Plaintiff's south property line adjoins the north property line of Defendant's north property line.

3.7 Plaintiff's west property line adjoins a portion of Defendant's northeasterly property line.

3.8 Defendant's property includes an abandoned residential structure, referred to hereinafter as the Packard House.

3.9 The Packard House encroached onto the Plaintiff's property at lot 1 by an area approximately six feet by eight feet.

3.10 The Packard Estates consist of five residential lots and one shared lot of tidelands, which are available for use by the five residential lot owners.

3.11 The Packard Estates include a twenty-foot wide access easement for use by the residential lot owners.

3.12 The access easement is in the shape of a "U" with the closed end of the U facing south and the two ends of the U connecting to Fifth Street, a public street.

3.13 Defendant's property at lot 2 includes a portion of the twenty-foot wide access easement, running north and south across the westerly portion of his property.

3.14 The access easement runs through the center of a panhandle shaped portion of Defendant's property, at the northwesterly side of that property.

3.15 To connect to the access easement from the west side of Plaintiff's property, it is necessary to cross a portion of Defendant's lot 2, through which the access easement runs. However, Plaintiff has alternate access to his property from a public street.

3.16 The plans for the Packard Estates envisaged a driveway from the garage on the west side of Plaintiff's lot 1 which would cross Defendant's lot 2 to connect to the U shaped access easement.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

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3.17 Subsequent to the sale of lot 1 to Plaintiff, Defendant provided plans for a house on lot 1 showing a garage facing west, toward the parhandle of lot 2, and with a driveway crossing lot 2 to connect to the U shaped access easement.

3.18 Lot 1 adjoins a public street - Fifth Street - and so does not require use of the U-shaped easement for access to the property.

3.19 Plaintiff and Defendant made a written contract on December 20, 2005, by which Plaintiff would purchase lot 1 from Defendant for \$550,000.

3.20 The terms of the contract noted the encroachment of the Packard House onto lot 1, by an Addendum. The language of that addendum was as follows:

Buyer acknowledges that the existing house, an historic Anacortes mansion, situated on the adjacent Lot 2 possibly encroaches on the easement running between Lots 1 and 2 by approximately three feet (less than the 10 foot boundary setback requirement for Lot 1), and hereby accepts such encroachment until said house is removed by Seller who is actively engaged in its removal. If the house should encroach to such extent as to prevent Buyer from obtaining a building permit, Seller agrees to remove that portion of the house that encroaches to such extent as to prevent issuance of the building permit.

3.21 The terms of the contract Addendum noted that the Defendant was actively engaged in moving the Packard House from the Packard Estates.

3.22 The terms of the contract Addendum noted that the encroachment of the Packard House onto lot 1 would be removed by Defendant if that encroachment prevented issuance of a building permit for lot 1.

3.23 The encroachment of the Packard House onto lot 1 did prevent the issuance of a building permit for lot 1.

3.24 Defendant was obligated to remove the Packard House from the Packard Estates by his contract with Plaintiff.

3.25 Defendant never took any action to comply with his contract obligation to remove the encroachment.

3.26 Plaintiff was damaged by Defendant's failure to remove the encroachment.

3.27 Trial Exhibit 38, while not a complete representation of all events, shows a time line for important events of the dispute which led to the trial of this action.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 4

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3.28 The testimony of the Plaintiff and that time line show that letters from the Plaintiff to the Defendant in November of 2006 effectively gave notice to the Defendant that the Packard House encroachment onto lot 1 was preventing the issuance of a building permit for that lot. The specific effective date is November 17, 2006.

3.29 Nothing in the contract between the parties required that the Packard House encroachment be the only factor preventing issuance of a building permit for lot 1.

3.30 The encroachment of the Packard House onto Plaintiff's lot 1 and Defendant's failure to remove that encroachment delayed the Plaintiff from commencing construction until June 30, 2007, when Plaintiff removed the encroachment under authority of an order from this court.

3.31 The direct cost to Plaintiff for removal of encroachment: **\$1,025.00**

3.32 David R. Fewings, MBA, Ph.D., testified for the Plaintiff regarding monetary damages incurred by the Plaintiff due to the Defendant's Packard House encroaching onto Lot 1. The Court finds that the Defendant delayed Plaintiff's construction between November 17, 2006 and June 30, 2007. This delay cost the Plaintiff \$32,900 due to a number of factors, including:

- (a) The need for additional financing of the property due to expired financing: \$5,055
- (b) Additional property taxes for the seven-month delay: \$3,194
- (c) Increased construction costs, due to Inflation: \$9,534
- (d) Additional carrying costs of Plaintiff's loan payments (principal & interest): \$15,117

3.33 The December 2005 contract between the parties did not obligate the Defendant to remove the entire Packard House from its present location.

3.34 The contract between the parties provided for attorney fees to the prevailing party if suit was brought to enforce the contract.

3.35 Plaintiff is the prevailing party for enforcement of this contract action. Defendant is the prevailing party on Rhodes' contract claim for duty to remove the house in its entirety.

3.36 Plaintiff has incurred attorney fees and costs in bringing and maintaining this lawsuit.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5**

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3.37 The Packard House is abandoned and in very poor condition.

3.38 The Packard House is derelict.

3.39 The Packard House is beyond effective repair.

3.40 The Packard House has been vandalized.

3.41 The Packard House has broken windows which have not been boarded up or repaired.

3.42 The Packard House condition is unhealthy for habitation.

3.43 The Packard House is unsafe for persons on the property and potentially to neighboring properties in case of fire. However, a previous minor fire at the Packard House failed to cause any personal injury or damage to adjoining property owners.

3.44 The Packard House and its grounds contain significant debris.

3.45 The Packard House's condition distresses and reduces the value of the neighboring properties.

3.46 The Packard House grounds have not been maintained.

3.47 The Packard House has been damaged by a fire in an upstairs room.

3.48 The Packard House has had standing water in its basement from time to time.

3.49 The Packard House has extensive mold and mildew on the walls and ceilings in its interior.

3.50 The Packard House has no water service.

3.51 The Packard House has no sewer service.

3.52 The Packard House has no electric service.

3.53 The Packard House has no telephone service.

3.54 The Packard House has no gas service.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 6

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- 1 3.55 The Packard House attracts vagrants.
- 2 3.56 No use is being made of the Packard House.
- 3
- 4 3.57 The Packard House shows evidence of drug use by persons who have
broken into the house.
- 5 3.58 The Packard House is not set back from its side lot lines in accordance
6 with zoning requirements.
- 7 3.59 The Packard House is approximately 6-8 feet away from the house to its
8 immediate south [on lot 3].
- 9 3.60 The Packard House is approximately 5 feet away from the house under
construction on Plaintiff's lot 1.
- 10 3.61 The condition of the Packard House and its close proximity to the Rhodes
11 house pose a fire hazard to the Rhodes house.
- 12 3.62 The Packard House encroaches onto and prevents full use of ten-foot
13 wide easements located on the property lines between lots 1 and 2 and lots 2 and 3.
- 14 3.63 By encroaching onto those easements, any person using the easements
15 must use the five feet of the easements which lie on lot 1 and on lot 2.
- 16 3.64 Neighbors in the vicinity of the Packard House have complained to the
City of Anacortes about its condition and sought its removal.
- 17 3.65 The presence of the Packard House is offensive, inconvenient and
18 annoying, however, it does not constitute a nuisance under Washington law.
- 19 3.66 The Packard House is a permanent feature, and the effect on the
20 Plaintiff's property at lot 1 is permanent, not temporary.
- 21 3.67 The presence of the Packard House has decreased the value of Plaintiff's
property.
- 22 3.68 While Plaintiff only prevailed on one of his causes of action, he is the net
23 prevailing party in this action, entitled to his reasonable attorney fees and costs in
24 accordance with his contract with Defendant McLaren for the action on
25 which he prevailed. Defendant McLaren may submit his attorney's fees for the
issues on which he prevailed for possible offsetting against the Plaintiff's attorney
26 fees.

27 FINDINGS OF FACT AND
28 CONCLUSIONS OF LAW - 7

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CONCLUSIONS OF LAW

In accordance with the findings above and again pursuant to CR 52, the court makes the following conclusions of law:

4.1 This court has jurisdiction to decide this matter, pursuant to RCW Section 2.08.010. Jurisdiction over the parties is proper because the Plaintiff and Defendant are Washington residents.

4.2 Venue is proper under RCW 4.12.010, because this action affects title to real property in Skagit County. Venue is also proper under RCW 4.12.025, because Defendant McLaren is a resident of Skagit County.

4.3 The encroachment of the Packard House belonging to Defendant onto Plaintiff's lot 1 was a breach of contract when not removed in a reasonable period of time after Plaintiff acquired lot 1.

4.4 The damages for the Packard House encroachment are governed by the December 2005 contract between the parties.

4.5 Plaintiff's breach of contract claim for removal of the entirety of the house is denied on the grounds that the claim is inconsistent with the express terms of the parties' agreement and precluded by the Parol Evidence Rule.

4.6 Plaintiff's breach of contract claim for removal of the debris in defendant's lot is denied because it was not pled.

4.7 While the layout of the Packard Estates envisaged a driveway from the garage on lot 1, where that driveway would cross lot 2 to connect to the twenty-foot wide access easement on lot 2, Plaintiff did not rely on such access under the terms of the December 2005 contract between the parties and an easement across lot 2 was thus not implied.

4.8 Plaintiff's claim in tort for trespass is denied and barred based on the Economic Loss Rule.

4.9 Plaintiff's breach of contract claim for easement is denied based on the Parol Evidence Rule and Statute of Frauds because defendant never promised to grant an easement in the parties' agreement nor has plaintiff otherwise acquired an easement by prescription, necessity or otherwise.

4.10 Plaintiff's claim in tort for nuisance is denied for the following reasons: The Packard House and lot, while not aesthetically pleasing, are not a nuisance as a matter of law. That lot contains debris, in large part, caused by removal of the

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 8**

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encroachment. While the Packard House is structurally sound, the facts set forth in the findings pertaining to its unappealing condition do not meet the nuisance standard in Washington statute and case law. Specifically, neither the adjacent house nor its lot physically invade or create any emanation that physically invades, encroaches, or otherwise disturbs the use of the plaintiff's lot.

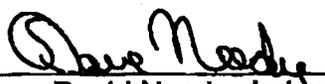
4.11 Defendant breached his contract with Plaintiff by not removing the encroaching part of the Packard House from lot 1, when that encroachment prevented Plaintiff from obtaining a building permit.

4.12 Plaintiff is entitled to a judgment for damages for Defendant's breach of that contract.

4.13 Pursuant to RCW 7.48 and per the court's review of the applicable case law, the condition and location of the Packard House cannot be found to constitute a nuisance as a matter of law, despite the potential diminution in value to Plaintiff's property that such condition causes.

4.14 As the net prevailing party, Plaintiff is entitled to attorney fees and costs for Defendant's breach of his contract, subject to possible offset of defense attorney fees for those actions on which he prevailed.

Done this 11 day of March, 2010.


David Needy, Judge

Respectfully presented:


Alan R. Souders, WSBA No. 26192
Attorney for the Plaintiff

Approved as to form:
 #22847
Attorney for Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 9

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