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No. 68494-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RANJIV HAYRE and SUKHJIWAN HAYRE,

Respondents,

v.

DEAN STREET and JANIS L. STREET, husband and wife, individually and their marital community,

Appellants,

EVERGREEN MONEYSOURCE MORTGAGE CORPORATION, a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION, INC. ("MERS"), a Delaware corporation; and SAXON MORTGAGE SERVICES, INC., a Texas corporation,

Defendants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MICHAEL J. HEAVEY

BRIEF OF APPELLANTS

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAY 15 AM 11:55

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I. INTRODUCTION

This is an action between co-tenants, in which respondent Hayres sought a partition of the 26 acre parcel of cotenancy real property and appellant Street, who served as managing cotenant, sought several hundred thousand dollars in damages, and a ruling that the Hayres are jointly liable for a promissory note secured by the property that benefitted all cotenants but was signed solely by the Streets. After two very short phone calls followed that afternoon by three even shorter emails, the Hayres' attorney accepted the Streets' 24-word offer to purchase the cotenancy property from the Hayres for $50,000, adding that "we [the attorneys] can work on an agreeable settlement and release." The Streets' attorney responded, "Agreed. Please prepare the paper work."

The "paper work" prepared by the Hayres' attorney contained several material terms that the parties had never discussed, let alone agreed to, including the form of the deed of conveyance and the accompanying real estate excise tax affidavit, who would pay the (potentially significant) excise tax, who would

pay the (potentially significant) fees of the court-appointed partition referee, and the scope of the parties' mutual release of claims.

When the Streets insisted that any settlement be conditioned on a release by the lender of their personal liability on the loan, the trial court granted the Hayres' motion to enforce a settlement agreement based on counsel's email exchange and awarded attorney fees. Because counsel's emails failed to address all material terms of a settlement involving the conveyance of the cotenancy real property, and because the parties contemplated that these terms would be addressed in a written settlement agreement, the Streets appeal.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its Order Enforcing Settlement Agreement and Granting Terms, which found as a matter of law that the parties agreed on all material terms to a binding and unconditional settlement of all their claims. (CP 371-73) (Appendix A)

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Counsel for the parties in a partition action exchanged three emails in which they agreed that one cotenant would acquire title to the cotenancy real property upon payment of $50,000 and a mutual

release of all claims related to the acquisition and ownership of the property, but also contemplated that counsel would "work on an agreeable settlement and release:"

A. Did the trial court err in finding as a matter of law that the parties agreed to all material terms of a binding and enforceable settlement despite their failure to address or even discuss the nature of the deed, liability for excise tax, and payment of the referee's fees incurred in the partition litigation?

B. Does CR 56(c) apply to a motion to enforce a settlement agreement?

C. Did the trial court err in assessing attorney fees as "terms" against the party opposing a settlement in the absence of any agreement, statute, or principle of equity supporting a fee award and in the absence of a finding that the opposition was frivolous?

IV. STATEMENT OF THE CASE

A. The Streets Invested With The Hayres In A 26 Acre Property As Tenants In Common.

Appellant Dean Street is a licensed real estate broker. For the past 23 years, Mr. Street has worked out of the Bellevue, Washington office of John L. Scott Realty, specializing in investor

foreclosure properties. (CP 27) Respondents Ranjiv and Sukhjiwan Hayre ("the Hayres") were long time close friends of Mr. Street and his wife, Janis. (CP 27)

In 2006, on the Hayres' behalf, Mr. Street reviewed a 26.6 acre parcel of real property in Enumclaw, Washington ("the Property") that was in foreclosure. (CP 27-28) The Property includes a large elegant residence, a barn, outbuildings, and 24-plus acres of grass which are enclosed by five miles of wooden fence. (CP 28)

In April 2006, the Hayres purchased the Property for $865,000 at the foreclosure sale. (CP 27) They asked Mr. Street to join them as equal partners in the investment. (CP 135) He agreed, and along with his wife Janice, paid the Hayres $288,333 for a one-third interest in the Property. (CP 27, 135) Ranjiv Hayre, Sukhjiwan Hayre, and the Streets each own a one-third interest in the Property as tenants in common. (CP 15-16, 27) The Hayres and Streets agreed to refurbish and sell the Property, that they would equally share the cost of its repair and maintenance, and that they would equally share the ultimate profits and/or losses from the investment. (CP 27)

Mr. Street oversaw and paid for the restoration and maintenance of the Property, as well as the real property taxes, insurance, and utilities. (CP 28, 35-55) He maintained a ledger of all his expenditures. (CP 35-55) Those expenditures were necessary to maximize the value of the Property for sale and to maintain its agricultural use zoning designation, which substantially reduced the real property taxes paid by the owners. (CP 29)

Mr. Street periodically requested reimbursement expenses from the Hayres. The Hayres paid Mr. Street their one-third shares each time they were asked, from April 2006 through September 2009. (CP 28) By the end of April 2007, each of the joint tenants had paid $288,000 to purchase the Property and they had paid a total of $572,149 to improve and maintain it. (CP 42, 35-55)

B. The Co-Tenants Each Received $500,000 From A $1.5 Million Loan Secured By The Property, But Only The Streets Signed The Promissory Note.

Before the restoration of the Property had been completed the Hayres informed Mr. Street that they wanted to pull as much money out of the Property as possible. (CP 135) Accordingly, they arranged to borrow $1.5 million in May of 2007, from which $500,000 was disbursed to each of the three cotenants. (CP 27,

135) The loan was made by Evergreen Moneysource Mortgage Corporation, and promptly assigned to Saxon Mortgage Services ("Saxon Mortgage"). (CP 27)

Mr. Street signed the $1.5 million promissory note on behalf of himself and his wife. (CP 136, 173) The Hayres did not sign the note. (CP 136, 173) At Saxon Mortgage's request, the Hayres signed the deed of trust encumbering the Property to secure the Streets' obligation to pay back the loan. (CP 28, 136)

In September 2007, the parties agreed that Mr. Street should attempt to sell the Property for $2.795 million. (CP 30) He has been actively trying to sell it ever since. (CP 30) The value of the Property has plummeted like all real property since the 2008 financial crisis. (CP 30) Between 2009 and April 2011 Mr. Street reduced the price nine times, from the initial $2.795 million price to $1.38 million. (CP 30)

C. The Hayres Stopped Reimbursing Mr. Street For The Property's Mortgage Payments, Maintenance, Taxes and Other Expenses, Which He Continues To Make On Behalf Of All Co-Tenants, And Sought To Quit Claim Their Interest To The Streets In Return For A Release.

After closing the Saxon Mortgage loan, Mr. Street continued to spend the money and perform the work necessary to keep the

Property in excellent condition. (CP 30) For more than two years, the Hayres continued reimbursing Mr. Street for their one-third share of those expenses (including the monthly payments on the Saxon Mortgage loan). (CP 28)

In late September 2009, the Hayres discontinued reimbursing the Streets and they have paid Mr. Street nothing since. (CP 28, 249) Mr. Street continues paying all the Property's expenses. (CP 30, 249) By February 2012, the Hayres owed Mr. Street over $200,000. (CP 249) That amount continues to grow with each payment by Mr. Street for the mortgage, property taxes, insurance, utilities, and maintenance of the Property. (CP 249)

Before and after commencing this action in November 2010, the Hayres – directly, and through their attorney – proposed deeding their interest in the Property to the Streets at what they claimed to be "no cost" to the Streets. (CP 30) The Streets declined those offers because the Hayres also demanded they no longer remain responsible for their two-thirds share of the Property's expenses. (CP 30)

Because they wanted to wash their hands of any further obligations in connection with the Property, the Hayres refused to

support Mr. Street's efforts to generate income from the Property. (CP 31) In February 2011 Mr. Street obtained an offer to lease the Property for one year for monthly rent of $9,912 plus property taxes and utilities, and an option to purchase it for $1.6 million. (CP 31) This offer – and all agreements – required the Hayres' consent since they had a two-thirds ownership interest in the Property. (CP 31) After several weeks of questions and objections from the Hayres' attorney – always with the suggestion that Mr. Street should accept the Hayres' quit claim deed and he would then not need the Hayres' consent – the deal fell through. (CP 31)

On two separate occasions Saxon Mortgage sent Mr. Street forms to apply for a modification of the loan encumbering the Property and/or for approval of a "short sale". (CP 31) These application documents requested information from the Hayres as well as the Streets, because although the Hayres were not personally obligated on the loan, they owned the Property as cotenants with the Streets. (CP 31) The Hayres refused to provide Saxon Mortgage with the requested information. (CP 31) In response to the second request, the Hayres' attorney suggested that Mr. Street simply allow the Saxon deed of trust to go into

foreclosure, notwithstanding the obvious catastrophic consequences of a default on the Streets' credit. (CP 31)

The Streets still owe Saxon Mortgage $1.5 million on the loan encumbering the Property. (CP 249) They are still waiting for Saxon Mortgage's response to their application for approval of a short sale to an interested buyer for $750,000. (CP 249)

D. The Hayres Commenced This Action For Partition And The Streets Counterclaimed For The Co-Tenancy Expenses Owed Them By The Hayres.

In November 2010 the Hayres filed a Complaint for Partition Declaratory Judgment and Rent Owing in King County Superior Court, asking the Court to appoint a partition referee to sell the Property and distribute the sale proceeds, and to confirm that they had no liability under the $1.5 million note. (CP 1-8)[1] The Hayres alleged that Mr. Street had not made a realistic effort to sell the Property because he was using it for his personal horse racing business, and had "refused to accept a deed from the Plaintiffs in order to allow them to divest their interests in the Property." (CP 5)

---

[1] They also named Evergreen Moneysource Corporation, Mortgage Electronic Registration, Inc. ("MERS"), and Saxon Mortgage as defendants, because of their interests under the deed of trust recorded against the Property. (CP 1-8) However, the Hayres quickly dismissed Evergreen MoneySource (CP 86–91), and the other defendants are not involved in this appeal.

In their answer, the Streets agreed that the Hayres and the Streets were joint tenants with equal one-third interests in the Property and that it should be sold. (CP 58-71) The Streets denied that Mr. Street had made inadequate efforts to sell the Property, and counterclaimed to recover from the Hayres their respective one-third shares of the prior and future expenses and the note payments, and damages for their failure to cooperate in Mr. Street's attempts to sell or to receive Saxon Mortgage's approval of a short sale of the Property. (CP 58-71)

The action was initially assigned to Judge Wesley Saint Clair. On May 16, 2011, Judge Saint Clair appointed Rebecca Wiess as a referee pursuant to RCW 7.52.080 to sell the Property. (CP 104) The action was then reassigned to Judge Michael Heavey ("the trial court"). (CP 506)

E. After Counsel Engaged In A Brief Exchange Of Three Emails Outlining Some Of The Terms Of A Potential Settlement, The Hayres Proposed A Settlement Agreement Containing Additional Terms Objected To By The Streets.

Nine months after appointment of the partition referee, the attorneys participated in two brief phone calls and exchanged three brief emails, all in a single afternoon. The Court held that these

discussions and emails created a binding and enforceable settlement agreement as a matter of law. (CP 371-73) The material facts underlying the trial court's order are undisputed:

On February 6, 2012, the Streets' attorney, Michael Hunsinger, telephoned the Hayres' attorney, Lawrence Glosser, and told him that the Streets were willing to settle the lawsuit with a payment of $50,000, a transfer of the Hayres' interest in the Property to the Streets, and the execution of a mutual release of all claims. (CP 185) Later that day Mr. Glosser responded by telephoning Mr. Hunsinger with a verbal counter offer of $40,000. (CP 185)

That afternoon, counsel exchanged three short emails:

At 2:48 p.m. Mr. Hunsinger informed Mr. Glosser:

> Dean rejects your clients' counter-offer of $40,000. He renews his offer to accept payment of $50,000 and transfer of title to the property to him and his wife, with mutual releases. If that is rejected, Dean would like to meet briefly with Ranjiv Hayre. You may also attend, as long as you do not participate. Please respond no later than noon tomorrow. Thank you. (CP 189-190)

At 2:50 p.m., Mr. Glosser responded:

> I am authorized to accept the offer of $50k and conveyance of the property to Dean Street in exchange for a full and complete release of all claims

> and causes of action related to the acquisition and ownership of the property whether past, present, future, known or unknown. If that works, I will strike my motion before Judge Heavey and we can work on an agreeable settlement and release. (CP 189)

At 3:13 p.m., Mr. Hunsinger emailed Mr. Glosser:

> "Agreed. Please prepare the paper work." (CP 189)

Counsel's email discussion made no mention of the claims made by both parties regarding the Hayres' obligation for the Saxon Mortgage note, or the Hayres' obligation to reimburse the Streets for two-thirds of the mortgage payments already made. Counsel's brief communications reflected agreement on no more than the following four points:

- The Hayres would pay the Streets $50,000;
- The Hayres would convey their interest in the Property to the Streets;
- The parties would release all claims and causes of action related to the acquisition and ownership of the Property; and
- Work still needed to be done on "an agreeable settlement and release," for which Mr. Glosser was to "prepare the paper work."

There was no discussion, let alone any agreement, on many material terms regarding the other terms of a settlement, including:

- The date the $50,000 payment was to be made;
- The form of the conveyance (for example, quit claim deed or statutory warranty deed);
- The amount of excise tax that will be owed and who would pay it;
- Payment of the referee's expenses; and
- The language regarding the mutual releases.

On the very next day, February 7, 2012, Mr. Street confirmed his willingness to accept $50,000 and a conveyance of the Hayres' interest in the Property so long as Saxon Mortgage agreed to waive any deficiency with respect to its $1.5 million loan encumbering the Property. (CP 291) Mr. Street had received a "fairly solid" offer to purchase the property for $750,000. (CP 249) He was almost certain he would not be able to sell the Property for more than $1 million. (CP 249) He was waiting for Saxon Mortgage's response to his request that Saxon authorize a short sale and waive any deficiency. (CP 249)

Accordingly, on February 8, 2012, Mr. Hunsinger emailed a letter to Mr. Glosser (and to the attorney for Saxon Mortgage and the referee, Rebecca Wiess), confirming his client's willingness to release the Hayres upon Saxon's consent to a short sale:

> It was Dean Street's understanding that the agreement to accept $50,000 and a deed from the Hayres in return for their full release was conditional upon Saxon's agreement to a short sale that resulted in no additional obligation from the Streets to Saxon. . . .
>
> Accordingly, I do not yet have authority to enter into such an agreement with the Hayres on behalf of the Streets until we know Saxon's position regarding a short sale, and on behalf of Saxon, David [Elkanich, the attorney for Saxon Mortgage] understandably first wants to know what pending agreement Saxon is being asked to approve. Dean is in the process of providing David with that information.

(CP 297-298) Mr. Hunsinger's letter described the pending offer to buy the Property for $750,000, subject to Saxon Mortgage's approval. (CP 298)

In the meantime, Mr. Glosser sent Mr. Hunsinger an email (CP 328) with a proposed Release and Settlement Agreement (CP 331-334) ("the Settlement Agreement"), quit claim deed (CP 340-341), and excise tax affidavit (CP 300). That Settlement Agreement contained several material terms that counsel had not addressed in their brief exchange of emails and to which the Streets had never agreed:

1. The Form of the Conveyance.

The parties' counsel had never agreed to, nor even discussed, the form of the conveyance. The Hayres' proposed

Settlement Agreement called for the Hayres to convey their interest in the Property to the Streets via quit claim deed, which accompanied the draft Agreement in the email to Mr. Hunsinger. (CP 332, 340-341) However, the excise tax affidavit Mr. Glosser sent Mr. Hunsinger called for a statutory warranty deed to be filed. (CP 300) The Streets insisted that they receive a statutory warranty deed because it would contain warranties from the Hayres about the "cleanliness" of the title they were conveying that would not be included in the quit claim deed proposed by the Hayres. (CP 294)

2. The Amount of Excise Tax to Be Paid.

The parties never discussed payment of the potentially substantial excise tax arising from a conveyance. The affidavit proposed by the Hayres claimed that the conveyance of the Hayres' interest in the Property to the Streets would be exempt from real estate excise tax as a court ordered partition under WAC 458-61A-204. (CP 300) The Hayres' counsel acknowledged in his email of February 7, 2012, which attached the proposed settlement documents, that there might be an issue with the excise tax exemption. "I think the exemption on the Excise Tax Affidavit would apply to this case," Mr. Glosser stated, "but if for some reason it

doesn't work we can probably have the transfer ordered by the Court." (CP 328)

Because that exemption applies only to a transfer resulting from the physical partition of real property, whether by agreement or court order, the Streets believed that the transaction contemplated by this proposed settlement would not be exempt from excise tax under WAC 458-61A-204. (CP 292, 326) The proposed settlement did not involve a physical partition of the Property (which the parties agreed was not feasible): it called for the Hayres to pay $50,000 and convey their interest in the Property to the Streets, who in turn would relieve the Hayres of their potential obligation of several hundred thousand dollars. (CP 292) The Streets were not willing to sign a real estate excise tax affidavit falsely claiming an exemption from excise tax under penalty of perjury. (CP 292)[2]

The amounts of excise tax involved were substantial. The real estate excise tax rate for the transfer of real property in Enumclaw, Washington was 1.78% of the consideration received

[2] The excise tax affidavit accompanying whatever deed was to be recorded had to be signed by the Streets as being true and correct under penalty of perjury and subject to a Class C felony. (CP 300)

by the seller. (CP 293) The Streets claimed that the Hayres owed them approximately $200,000 for their two-thirds share of the Streets' expenses that they had not paid, and as much as another $500,000 for their two-thirds share of the hypothetical $750,000 deficiency between the $1.5 million debt to Saxon and the potential $750,000 short sale. (CP 293) Including $500,000 as the Hayres' share of the possible deficiency to the consideration would result in a potential excise tax of $11,570. (CP 293) Even if Saxon Mortgage waived the $750,000 deficiency, the Streets would owe excise tax of $2,670 (1.78% of the $200,000 claim forgiven by the Streets minus the $50,000 paid by the Hayres).

3. Who Would Pay the Excise Tax.

The proposed Settlement said nothing about who would pay the excise tax. Mr. Street had not agreed to pay, and continued to refuse to pay, any excise tax. (CP 250) The Hayres failed to address this issue even when seeking an order enforcing their proposed Settlement Agreement. (CP 342-346)

4. Who Would Pay the Referee's Fees.

Ms. Wiess had been acting as the referee for nine months under the trial court's order, which called for Ms. Wiess to be paid $250 per hour for her services. However, the trial court's order of

appointment did not indicate who would pay for her services or when payment was due. (CP 336-338)

Mr. Glosser's proposed Settlement Agreement (CP 178-183) called for the Streets and the Hayres to each pay "one-half of the Court approved fees and costs due to the Referee." (CP 332) Like the conveyance document, excise tax affidavit, and payment of excise tax, the payment of the referee's fees had never been discussed, let alone agreed to, by Mr. Glosser or Mr. Hunsinger. (CP 293) Mr. Street did not, and would not, agree to pay any part of the referee's fee. (CP 294)

5. The Release Language.

The Hayres' proposed Settlement Agreement greatly expanded on the scope of the mutual release of "*all claims and causes of action related to the acquisition and ownership of the property* whether past, present, future, known or unknown," that the parties' counsel had very briefly discussed in their exchange of email. (CP 329) (emphasis added) The Hayres' proposed Settlement Agreement contained a far more expansive release, calling for the Streets and the Hayres to "completely release and forever discharge [the other] from and against any and all past,

present, and future causes of action, claims, damages, liabilities, and demands *of any nature whatsoever*, whether known or unknown, arising out of any and all prior dealings between the Parties *including, but not limited to*, *claims arising out of their tenancy in common in the Property and the claims alleged in the lawsuit*." (CP 332) (emphasis added)

F. The Trial Court Held As A Matter Of Law That The Parties' Exchange Of Email Constituted The Mutually Agreed Upon Terms Of An Enforceable Settlement And Directed The Streets To Sign A Settlement Agreement.

Mr. Street refused to sign the proposed Settlement Agreement. (CP 250) Within a few hours of receiving the Streets' counsel's February 8th letter, the Hayres' counsel served by email a Motion to Enforce Settlement Agreement and Request for Terms and filed it the following day, on February 9, 2012. (CP 178-183) The Motion to Enforce was noted for "hearing" without oral argument on six days notice. (CP 504)

Citing counsel's exchange of emails (CP 184-190), the Hayres asked the trial court to order that the February 6 email exchange constituted a "binding settlement of [the parties'] claims, and that such settlement is adequately memorialized in accordance with CR 2A" in their proposed Settlement Agreement and that ". . .

[t]he material terms of the settlement provide (a) payment of $50,000 to the Streets, (b) transfer of the Hayres' interest in the real property that is the subject of this partition action to Street and (c) mutual release of any claims." (CP 372) The Hayres argued that their proposed settlement agreement "incorporated the terms agreed to on February 6, 2011, and did not include any additional or different material terms." (CP 180, 192-195).

On February 17, 2012, the trial court considered the motion without oral argument and entered the Hayres' proposed Order Enforcing Settlement. (CP 371-73) The trial court granted the Motion To Enforce, denying the Streets' motion requesting an extra week to respond to the Motion and to have the matter heard in open court. (CP 373)[3] The trial court found as a matter of law that "the material terms of the settlement" provided for: "(a) payment of $50,000 to the Streets, (b) transfer of the Hayres' interest in the real property . . . and (c) mutual release of any claims." (CP 372)

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[3] When the Hayres' counsel refused to continue the motion, (CP 209, 224), the Streets moved on shortened time to continue the hearing for at least one week and for oral argument on the Motion To Enforce. (CP 226-28) When the trial court failed to rule on the motion to continue, the Streets timely responded to the Motion to Enforce. (CP 242-341)

The Order to Enforce gave the Streets twelve days to "sign a settlement agreement based on those terms [the Hayres' payment of $50,000 and transfer of their interest in the Property to the Streets]." (CP 372) In the event the Streets refused to sign the Settlement Agreement by February 29, 2012, the order authorized the Hayres to deposit $50,000 into the registry of the court, at which time partition referee Ms. Wiess "shall convey" all of the interest of the Hayres to the Streets, and the Streets' counterclaims would be dismissed with prejudice. (CP 372) The trial court also awarded the Hayres $500 "for the attorney fees incurred as a result of their having to bring this Motion." (CP 373)

G. The Parties And The Partition Referee Were Unable To Implement The "Binding Settlement Agreement" Because They Disagreed On Its Material Terms.

1. The Referee Sought And Obtained An Order Allowing Her To Seek A Ruling From The Department Of Revenue On Whether And How Much Excise Tax Is Owed.

On the same day the trial court entered its Order Enforcing Settlement, partition referee Rebecca Wiess filed a First Report (CP 350-70) and Motion for Instructions (CP 347-49). The Referee sought permission to seek a short sale of the Property and, if the short sale did not occur after a reasonable period of time, for

authorization to "deed the entire property to the debtor party." (CP 348) The Streets agreed that the referee should be instructed to work with the Streets to attempt to obtain Saxon Mortgage's approval of a pending $775,000 short sale offer. (CP 374-375)

In her reply, filed after entry of the Order Enforcing Settlement, the Referee described her struggles with the real estate excise tax issue that had not been addressed by the Hayres. (CP 376-380) She reported that the King County Recorder "will not accept this transaction for recording [i.e., the Hayres' conveyance to the Streets] without an advisory letter from the Washington State Department of Revenue on the taxability of the deed, a process which will take 30 days. If the transaction is exempt, no tax is owed; if tax is based on $50,000, the tax is $890, but if on $700,000, the tax is $12,460." (CP 377) Ms. Wiess asked the trial court for authority "to apply for an advisory letter on excise tax, to continue to seek a short sale until the advisory letter is received, and to seek further instructions if the State takes the position that tax is owing and the parties do not volunteer to pay the tax." (CP 377-78)

On March 1, 2012 the trial court entered Ms. Wiess' proposed Order on the Motion of the Referee for Instructions (CP 494-495), directing the referee to:

- Negotiate the terms of the proposed short sale with Saxon Mortgage and the potential purchasers and to move for confirmation of the sale if its terms become known in the interim;

- Apply to the Washington Department of Revenue for the advisory letter regarding the excise tax situation; and

- Seek further instructions from the Court if the Department demands payment in an amount which the parties refuse to pay.

2. The Hayres Proposed A Second Settlement Agreement And Excise Tax Affidavit With New Terms And Proposed For The First Time That The Trial Court Reserve For Future Consideration Payment Of The Referee's Fees.

Counsel for the Hayres and for the Streets faced similar difficulties in complying with the Court's instructions that the Streets sign a settlement agreement by February 29. On February 22, 2012, Mr. Glosser sent Mr. Hunsinger another proposed Settlement Agreement ("the Second Agreement") (CP 396–398), a second quit claim deed (CP 399-400), and a second excise tax affidavit. (CP 401-402) The Second Agreement and second excise tax affidavit both differed from those proposed in the Hayres' Motion to Enforce.

The first Settlement Agreement proposed that the Streets and the Hayres each pay one-half the partition referee's fees. (CP 332) However, the Second Agreement provided that "[e]ach party shall comply with any court order regarding payment of the fees and costs incurred by the aforementioned Referee in connection with the Lawsuit." (CP 397) Eight paragraphs from the First Settlement Agreement were deleted from the Second Settlement Agreement without explanation. (CP 405) The first excise tax affidavit called for the Hayres to convey their interest in the Property to the Streets via statutory warranty deed. (CP 300) The second excise tax affidavit changed the form of conveyance to a quit claim deed. (CP 401)

Upon expiration of the February 29, 2012 deadline for the Streets to sign "the settlement agreement," the Streets filed a memorandum and a declaration of counsel explaining that they would not sign any of the three documents because they contained numerous material terms that had not been discussed by them, let alone agreed to, during their "negotiations"; and some of the terms in the second round of documents even differed from those that had been previously submitted to the trial court by the Hayres as

part of a "binding settlement" that the Streets were ordered to implement. (CP 381-86, 387-93, 404-06)[4]

The Streets timely appealed the Order Enforcing Settlement and the Amended Order On The Motion of the Referee For Instructions. (CP 496-503) As of this date:

- The Department of Revenue has not issued its advisory letter regarding how much excise tax, if any, is owed;
- Saxon Mortgage has still not informed the Streets whether it will approve, or on what terms it will approve, a short sale; and
- The Property has not been sold.

[4] In response to the Streets' report, and in apparent contradiction with their position that the issue of the referee's fees and costs be "reserved" to the same judge that granted their motion for fees in obtaining the Order Enforcing the Settlement, the Hayres for the first time stated that they "remain ultimately responsible for paying any excise tax that is properly due and owing, and the final determination regarding excise tax would have no impact on Mr. Street." (CP 466)

V. ARGUMENT

A. Standard Of Review And Burden Of Proof: This Court Reviews The Trial Court's Order Enforcing A Settlement De Novo To Determine Whether Counsel's Exchange Of Correspondence Reflects Agreement On All Material Terms.

This court reviews de novo the trial court's Order Enforcing Settlement Agreement, which was entered without a hearing or trial on the basis of affidavits and documentary evidence. ***Brinkerhoff v. Campbell***, 99 Wn. App. 692, 696, 994 P.2d 911 (2000) (*citing* ***In re Marriage of Ferree***, 71 Wn. App. 35, 43, 856 P.2d 706 (1993)). *See also* ***Evans & Son, Inc. v. City of Yakima***, 136 Wn. App. 471, 475, 149 P.3d 691 (2006). The Hayres relied solely on their attorney's two declarations to support their motion to enforce the alleged settlement agreement. Accordingly, this court must review the trial court's granting of that motion *de novo*.[5]

Review of an order enforcing a settlement is akin to the standard on summary judgment. ***Lavigne v. Green***, 106 Wn. App. 12, 16, 23 P.3d 515 (2001) ("The standard of review is de novo because the motion to enforce a settlement agreement is like a

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[5] The ***Brinkerhoff*** decision effectively overruled ***Morris v. Maks***, 69 Wn. App. 865, 868, 850 P.2d 1357, *rev. denied*, 122 Wn.2d 1020 (1993), which had applied an abuse of discretion standard to a trial court's order establishing a settlement agreement.

summary judgment motion."). "[T]he party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement." ***Brinkerhoff***, 99 Wn. App. at 696-97. The court must review the documentary record in the light most favorable to the nonmoving party, and determine whether reasonable minds could reach but one conclusion. 99 Wn. App. at 697. If the nonmoving party raises a genuine issue of material fact in response to a motion to enforce a settlement agreement, the issue must be resolved in a fact-finding hearing. 99 Wn. App. at 697.

Settlement agreements are governed by general principles of contract law. ***Evans***, 136 Wn. App. at 477 (*citing* ***Morris v. Maks***, 69 Wn. App. 865, 868, 850 P.2d 1357, *rev. denied*, 122 Wn.2d 1020 (1993)). A valid settlement agreement requires a meeting of the minds on the essential terms. ***Evans***, 136 Wn. App. at 477 (*citing* ***McEachren v. Sherwood & Roberts, Inc.***, 36 Wn. App. 576, 579, 675 P.2d 1266 (1984), *rev. denied*, 101 Wn.2d 1010).

In addition to these settled principles of contract law, a trial court's authority to compel the enforcement of a settlement agreement is limited by Civil Rule 2A[6] and RCW 2.44.010.[7] These provisions preclude enforcement of a disputed agreement whose material terms are not established in a writing signed by the attorneys or the clients, or on the record in open court. *See* ***Morris***, 69 Wn. App. at 868.

To determine whether informal writings such as letters are sufficient to establish a binding settlement agreement, the court must conclude that (1) the parties agreed to the subject matter; (2)

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[6] No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A

[7] An attorney and counselor has authority: (1) To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney.

RCW 2.44.010.

all of the provisions of the agreement were set out in the writings; and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. ***Evans***, 136 Wn. App. at 475-76 (*citing* ***Morris***, 69 Wn. App. at 869).

This court should hold that the emails exchanged between counsel fail to establish an enforceable settlement agreement. The parties failed to agree to all material terms of a binding settlement, and intended to address those terms in a subsequent written agreement. This court should reverse the trial court's order and remand for trial on the merits, or at a minimum, hold that issues of fact precluded entry of the Order Enforcing Settlement on six days notice.

B. The Trial Court Erred In Enforcing A Settlement Agreement Based On Counsel's Exchange Of Emails That Failed To Address All Material Terms And Contemplated Further Agreement By The Parties.

1. Counsel's Brief Exchange Of Emails Failed To Establish The Existence Of An Agreement On All Material Terms Necessary To Settle The Parties' Dispute By Conveyance Of Real Property.

Counsel's exchange of three emails over the course of one afternoon failed to address all material terms of a settlement agreement, particularly those material to an agreement for the conveyance of real property. While public policy encourages the

settlement of judicial disputes, the court cannot impose upon the parties an agreement that they did not themselves reach. The Streets and Hayres did not reach agreement on the form of the deed, responsibility for excise tax, payment of the referee's fees, and most importantly, the scope of the mutual release, including whether the Hayres could be liable for a deficiency if the lender did not agree to a short sale.

This court has reversed the enforcement of settlement agreements where the parties failed to reach agreement on some material terms.[8] Conversely, the court has affirmed the enforcement of settlement agreements only where there is no

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[8] *See, e.g.,* ***Long v. Harrold***, 76 Wn. App. 317, 320, 884 P.2d 934 (1994) (correspondence between lawyers "did not contain the material terms of the alleged settlement."); ***Howard v. Dimaggio***, 70 Wn. App. 734, 855 P.2d 335 (1993) (parties' attorneys had agreed on the amount of settlement, but did not agree on terms of the hold harmless and release documents); ***Bryant v. Palmer Coking Coal Co.***, 67 Wn. App. 176, 858 P.2d 1110 (1992) (attorneys' correspondence was only a general summary of the agreement yet left many details undecided), *rev. denied*, 120 Wn.2d 1027 (1993); ***Brinkerhoff***, 99 Wn. App. at 699-700 (trial court failed to hold evidentiary hearing to find facts surrounding a party's misunderstanding when entering contract).

material dispute that the parties agreed to all of the material terms necessary to interpret and implement the agreement.[9]

In ***Evans***, 136 Wn. App. 471, Evans asserted that the City's direction to stop work on a development project caused Evans delay damages of $153,000. In a letter, the City offered to settle Evans' claim for $40,000. The letter also stated that settlement was contingent upon the parties executing a settlement agreement that the City's attorney would draft. 136 Wn. App. at 474. Evans' attorney accepted the offer "to resolve all issues pertaining to the Kissel Park construction contract." 136 Wn. App. at 474. The City's attorney sent Evans' attorney a draft of the settlement agreement, but Evans refused to sign the draft because it contained a provision which released the City from "any and all" claims instead of just claims arising out of the delay on the Kissel Park project. 136 Wn. App. at 474. When Evans sued the City for

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[9] *See, e.g.,* ***Patterson v. Taylor***, 93 Wn. App. 579, 969 P.2d 1106 (1999) (enforcing settlement agreement signed by all parties in mediation; rejecting claim of one party raised five months later that mediator coerced him into signing it); ***In re Marriage of Ferree***, 71 Wn. App. 35, 856 P.2d 706 (1993) (the wife/moving party presented declarations from the wife, her attorney, and her husband's attorney regarding material terms of agreement reached at the settlement conference and the husband provided no contrary testimony from anyone with personal knowledge); ***Stottlemyre v. Reed***, 35 Wn. App. 169, 665 P.2d 1383 (1983) (attorney of party opposing enforcement admitted on the record that a binding agreement had been reached), *rev. denied,* 100 Wn.2d 1015.

delay damages, the trial court granted summary judgment to the City on the ground that the claim had already been settled. 136 Wn. App. at 475.

The Court of Appeals reversed because the only material term reflected in counsel's correspondence was the settlement amount. 136 Wn. App. at 476. The writings made no provision for Evans' retainage on the park project, which the Court deemed a material term. 136 Wn. App. at 476. Further, the disagreement between Evans and the City concerning the scope of the release also raised a genuine issue of material fact as to whether there was a meeting of the minds. 136 Wn. App. at 477.

By contrast, in ***Morris v. Maks***, 69 Wn. App. 865, Morris sued Maks for breach of fiduciary duty regarding their partnership. 69 Wn. App. at 867. After discussing the terms of a settlement over the course of two months, the attorneys confirmed in a phone conference seven major points of agreement, with Morris' attorney stating that the agreement was acceptable subject to approval by Maks' tax advisor. 69 Wn. App. at 867. Upon confirmation that Maks' tax advisor approved, Morris' attorney sent a confirmation letter reiterating the points of agreement and concluding that "[t]his

will confirm your assurance to me that Tom Maks has agreed to this settlement and I have confirmed Evan Morris' approval." 69 Wn. App. at 871 & n. 1. Miller responded by writing, "[e]xcept as specifically set forth below, your letter accurately reflects the terms of the agreed settlement. I view the items listed below as clarifying or supplemental points rather than conflicts with your letter." 69 Wn. App. at 867-68. Maks informed his banker in writing that he had settled his claim with Morris. 69 Wn. App. at 871. Two weeks later, Maks attempted to terminate the settlement after learning from a second tax accountant that the settlement would have adverse tax consequences.

The Court of Appeals affirmed the trial court's order enforcing the settlement agreement, holding that the attorneys' confirmation letters addressed all of the material terms of the parties' agreement. 69 Wn. App. at 869-70. The court rejected Maks' claim that warranties had been added to the agreement, because the warranties contained in subsequent drafts of the agreement did not confer rights upon the parties that they would not have otherwise had under the law. 69 Wn. App. at 870 n. 2.

Here, by contrast, the negotiations between the attorneys in this case took place in one day, not two months as in ***Morris***, and consisted of two very brief phone calls and three very cursory emails, instead of numerous phone calls and letters. The attorneys discussed in generalities only three issues – payment of $50,000, conveyance of the property, and mutual releases of claims.

As in ***Evans***, the release language contained in the Hayres' proposed settlement agreement was broader than that contained in the parties' preliminary agreement. While counsel's email referred only to a release of "all claims and causes of action related to the acquisition and ownership of the property," the proposed Settlement Agreement referred to a release of all claims "of any nature whatsoever, . . . including, but not limited to, claims arising out of their tenancy in common in the Property and the claims alleged in the lawsuit." (*Compare* CP 189 and CP 332) The Streets objected to any settlement that included a release of the Hayres' liability should the Streets become liable on a deficiency judgment as alleged in their counterclaim. (CP 297-98) This court should reverse the trial court for this reason alone.

There are additional reasons, however, for concluding that the parties failed to agree to all material terms, as the conduct of the Hayres in proposing new and additional terms, and the referee in seeking additional instructions from the trial court, amply demonstrate. The trial court could not implement the purported settlement agreement without imposing additional material terms that the parties never discussed, let alone agreed to, including the form of deed to convey the Hayres' interest in the Property to the Streets, what will the excise tax affidavit say, who will pay the excise tax owed, and who will pay the partition referee's fees. The Washington Supreme Court has consistently held that the form of deed and responsibility for taxes constitute "material terms" of an agreement for the transfer of real property because "[a]greements to buy and sell real estate 'must be definite enough on material terms to allow enforcement without the court supplying those terms.'" ***Sea-Van Investments Associates v. Hamilton***, 125 Wn.2d 120, 129, 881 P.2d 1035 (1994), *quoting* ***Setterlund v. Firestone***, 104 Wn.2d 24, 26, 700 P.2d 745 (1985). *See also* ***Kruse v. Hemp***, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)

(agreements for conveyance of real property must contain 13 material terms in order to be enforceable under statute of frauds).

The Hayres made no argument that the form of conveyance, liability for taxes and the costs of the referee are not material to the transaction. Instead, they proposed that the trial court retain authority to implement its order requiring the conveyance of the Hayres' interest in the Property, dismissal of the lawsuit, and payment of the referee's fees, which after almost a year of litigation, would be substantial. The trial court erred in imposing on the parties a settlement agreement that was not their own based upon an exchange of emails that failed to address the material terms of settlement.

2. Counsel's Exchange Of Emails Establish That The Parties Intended To Address The Material Terms Of Settlement In A Formal Settlement Agreement.

The trial court's order was erroneous for the additional reason that counsel's exchange of emails contemplated that there would be no binding settlement agreement until execution of a formal document. A court may not enforce a binding settlement based on counsel's exchange of correspondence that reflects a mutual intent to await execution of a formal settlement agreement.

Evans, 136 Wn. App. at 477 (parties must intend "that their exchange of correspondence be their agreement"). This rule is not unique to settlement agreements. "Agreements to agree are unenforceable in Washington." ***Keystone Land & Development Co. v. Xerox Corp.***, 152 Wn.2d 171, 175-76, 94 P.3d 945 (2004), *cert. denied*, 544 U.S. 905 (2005) ("An agreement to agree is 'an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.'"), *quoting* ***Sandeman v. Sayres,*** 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957).

Here, as in ***Evans***, counsel's exchange of correspondence "show the parties desire to reach a settlement, the amount for the settlement, and the expectation that a settlement and release will be signed. But there is no suggestion here that the letters themselves are the binding agreement." 136 Wn. App. at 477-78. Indeed, here, the cursory email exchange between counsel concluded with the Hayres' attorney accepting the Streets' offer and saying, "If that works, . . . we can work on an agreeable settlement and release" to which the Streets' attorney responded, "Agreed. Please prepare the paper work." (CP 189) Both attorneys

anticipated that a settlement agreement and conveyance documents needed to be drafted and agreed upon. The Hayres' attorney drafted them, but they contained several material terms that were not accepted by the Streets or their attorney.

By contrast, in ***Morris v. Maks***, 69 Wn. App. 865, the exchange of letters following two months of negotiations reflected agreement on each of seven specific settlement details, the client himself signed the agreement, told his bank officer that he had settled the case, and counsel's correspondence confirmed the client's intent to be bound. ***Morris***, 69 Wn. App. at 871 ("'[T]his will confirm your assurance to me that Tom Maks has agreed to this settlement and I have confirmed Evan Morris' approval.'") When the trial court granted Morris' motion there was no difficulty enforcing the settlement agreement because the parties had already agreed on all its material terms.

As in ***Evans***, and in contrast to ***Morris***, the parties, through their counsel, contemplated that they would be bound by a signed settlement agreement and mutually acceptable release, not an informal exchange of three emails following two phone

conversations. The trial court erred in holding that counsel's email exchange constituted an enforceable agreement.

3. The Trial Court Erred In Hearing The Motion To Enforce On Six Days Notice.

The trial court's order is also procedurally defective because it was entered on six days notice, giving the Streets insufficient time to respond. The trial court erred in refusing to continue the motion to allow the Streets adequate time to establish the existence of a material fact regarding the existence of a settlement. (CP 226-28)

Because establishing the existence and terms of a settlement agreement required the Hayres to establish the absence of a disputed issue of fact, the court should apply the summary judgment procedure under CR 56:

> When a motion is made to enforce a settlement agreement on grounds that its existence and material terms are not genuinely disputed, the issue is also whether a genuine dispute of fact exists. Because the issue is the same, the governing rules should be the same.

In re Marriage of Ferree, 71 Wn. App. 35, 43, 856 P.2d 706 (1993) (*citing* CR 56(c)); ***Brinkerhoff v. Campbell***, 99 Wn. App. 692, 696, 994 P.2d 911 (2000) ("When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely

disputed, the trial court proceeds as if considering a motion for summary judgment.").

The trial court failed to follow the procedures of CR 56(c) here, by requiring the Streets to respond to the motion on six days notice. At a minimum, this court should reverse because the trial court's refusal to continue the hearing deprived the Streets of their ability to dispute the enforceability of counsel's email exchange as a binding settlement and because the parties' mutual intent to conclude their litigation by settlement is a disputed issue of fact.

C. The Streets' Opposition To Enforcement Of A Settlement Provided No Basis For An Award Of Attorney Fees.

The trial court erred in assessing attorney fees against the Streets in its Order Enforcing Settlement Agreement and Granting Terms. (CP 373) "In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity." ***In re MacGibbon***, 139 Wn. App. 496, 504, 161 P.3d 441 (2007) (reversing order granting attorney fees) (quotation omitted).

The trial court stated no grounds for its fee award in its order. The Hayres' motion stated, without citation of authority, that "[t]he Court has discretion to impose an award of attorneys' fees in connection with this matter." (CP 183) Counsel's exchange of emails had no fee shifting term, and no statute or recognized ground in equity authorized the fee award. This court should reverse the award of attorney fees.

VI. CONCLUSION

The trial court imposed the material terms of a settlement on the Streets because the parties failed to agree to those material terms themselves in their brief exchange of email that expressly contemplated negotiation of the language of a formal settlement agreement and release. The parties still do not know the answers to any of the following questions, all of which were asked by the Streets in their Response to the Hayres' Motion to Enforce:

- What deed will the Court order the Hayres to sign and the Streets to accept?
- What form of excise tax affidavit will the Court order both parties to sign under penalty of perjury?
- Who will the Court order should pay the excise tax, which might exceed $10,000?

- Who will pay for the attorneys' fees incurred by the referee ordered by the Court on the Hayres' motion for partition?

- What will be the language describing the scope of the parties' mutual releases of claims against each other?

This court should reverse the trial court's Order to Enforce and allow the parties' claims to proceed to trial on its merits.

Dated this 14th day of May, 2012.

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Attorneys for Appellants

DECLARATION OF SERVICE

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

That on May 14, 2012, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger X U.S. Mail ___ E-Mail
Lawrence S. Glosser Ahlers & Cressman 999 Third Avenue, Suite 3800 Seattle, WA 98104-4088	___ Facsimile ___ Messenger X U.S. Mail ___ E-Mail
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Rebecca K. Wiess Attorney at Law 1420 Fifth Avenue, Suite 3775 Seattle, WA 98101	___ Facsimile ___ Messenger X U.S. Mail ___ E-Mail

DATED at Seattle, Washington this 14th day of May, 2012.

V. Isaksen

Victoria K. Isaksen

The Honorable Michael J. Heavey
February 17, 2012
Without Oral Argument

FILED
KING COUNTY WASHINGTON
FEB 21 2012
SUPERIOR COURT CLERK
KARLA GABRIELSON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RANJIV HAYRE and SUKHJIWAN HAYRE, Plaintiffs, v. DEAN STREET AND JANIS L. STREET, husband and wife, individually and their marital community; EVERGREEN MONEYSOURCE MORTGAGE CORPORATION, a Washington corporation, MORTGAGE ELECTRONIC REGISTRATION, INC. ("MERS"), a Delaware corporation, and SAXON MORTGAGE SERVICES, INC. a Texas corporation, Defendants.	NO. 11-2-11663-8 KNT ORDER ENFORCING SETTLEMENT AGREEMENT AND GRANTING TERMS [redacted]

THIS MATTER came before the Court on Plaintiffs' Motion to Enforce a Settlement Agreement, and impose terms against Defendant Dean Street. The Court having carefully reviewed the Motion and supporting declaration, and any opposition thereto, and being fully advised on the matter enters the following:

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121221.1/100784.1

ORIGINAL

The Court finds that on February 6, 2012 Plaintiffs and Defendants Dean and Janis Street entered into a binding settlement of their claims, and that such settlement is adequately memorialized in accordance with CR 2A. The material terms of the settlement provide (a) payment of $50,000 to the Streets, (b) transfer of the Hayres' interest in the real property that is the subject of this partition action to Street and (c) mutual release of any claims. The settlement was neither made nor accepted as a conditional settlement, and attorney Michael Hunsinger was acting as attorney and agent for Dean Street. Accordingly, Dean Street is bound by the acts of his agent in regard to the material terms of the settlement agreement.

Based on the forgoing, it is ORDERED that the settlement terms stated herein are enforceable against Dean Street and Janis Street. In the event that the Defendants refuse to sign a settlement agreement based on those terms by February 29, 2012, the following shall occur:

(1) Plaintiffs shall deposit the $50,000 settlement proceeds into the registry of the court;

(2) Rebecca Wiess, as duly appointed Referee in this case, shall convey all of the interest of Ranjiv Hayre and Sukhjiwan Hayre interest in the subject property to Dean Street and Janis Street;

(3) Upon the occurrence of the foregoing actions, all of Dean Streets counterclaims against Plaintiffs shall be dismissed with prejudice.

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IT IS FURTHER ORDERED that judgment is entered against Defendant Dean Street in favor of Plaintiffs in the amount of $[illegible],10 for the attorneys fees incurred as a result their having to bring this Motion.*

DONE IN OPEN COURT this 17th day of February, 2012.

Hon. Michael J. Heavey, Judge

Presented by:

AHLERS & CRESSMAN PLLC

By: _____
Lawrence S. Glosser, WSBA #25098
Attorney for Plaintiffs Ranjiv Hayre and Sukhjiwan Hayre

* Defendants Street motion for continuance of this motion is denied.

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