72238-7

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Court of Appeals
Division I
State of Washington

No. 72238-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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PAULA G. ANDERSON and JOHN DOE ANDERSON, husband and wife,

Appellants,

v.

SIMON OROS and VIORICA OROS, husband and wife,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable John Ruhl

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# AMENDED BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERRORS

### A. Assignment of Errors

1. The trial court erred when it granted plaintiffs' Motion in Limine, and prohibited defendants from asserting defendants' corporation, Anderson Real Estate Group, Inc., should have been made a party, was the proper defendant, was the responsible party, or otherwise was liable for plaintiffs' alleged injuries.

2. The trial court erred when it granted plaintiffs' Motion in Limine and precluded defendants from offering evidence regarding any claims or defenses that initially belonged to defendants' corporation.

3. The trial court erred by denying a jury instruction that effectively precluded defendants from asserting they owed plaintiffs less than the amount stated in the parties' contract.

4. The trial court erred by not permitting parole evidence regarding the amount of damages to be paid plaintiffs.

5. The trial court erred by granting defendants' motion for an award of pre-judgment interest.

6. The trial court erred by granting defendants' motion for excessive attorneys' fees.

## II. STATEMENT OF THE CASE

Defendants Paula and Peter Anderson ("Anderson") were the sole shareholders of Anderson Real Estate Group, Inc., ("Anderson Real Estate") which was a corporation whose primary business in 2009 was to purchase and sell foreclosed properties. CP 52. Verbatim Report of Proceedings ("RP") 6/10/14, 136:14-17; 139:21-22. Anderson is a licensed real estate broker in the state of Washington. Plaintiff Simon Oros and Anderson Real Estate, by and through Anderson, established a working relationship through which Anderson Real Estate would assist Oros in identifying properties in foreclosure for Oros to purchase. *Id.* at 137:5-25; 140:1-21.

Anderson provided Oros with education regarding the types of foreclosure properties and the process by which Anderson Real Estate would identify the properties, communicate the opportunities to Oros, assist Oros in purchasing the properties and assist Oros in obtaining financing for the properties. *Id.* at 142:4-25; 145:1-19. To memorialize the process and the education, Anderson Real Estate required Oros to enter into a written agreement titled "Buying Equity Property" outlining the foreclosure process. Trial Exhibit 1; RP 162:1-21. This written agreement clearly stated the speed with which foreclosure properties were purchased and that once properties were purchased through the foreclosure process, the purchaser was not allowed to return the property or back out of the purchase. On or around June 9, 2009, defendant Simon Oros signed every page of "Buying Equity Property." Ex. 1; RP 65:22-25; 66:1-17.

Neither Anderson Real Estate nor Anderson would have entered into any business dealings with Oros unless he had agreed to the terms set forth in "Buying Equity Property". RP 142:4-25; 143:1-2. In fact, Anderson actually read the document to Mr. Oros to make sure that he understood the document and the process prior to witnessing him sign and initial the document. *Id.* at 143:1-11.

The document "Buying Equity Property" outlines the timeline during which the real estate transaction occurs. Trial Exhibit 1. On Wednesday afternoon and Thursday morning, Anderson Real Estate reviews the properties to determine which ones meet its clients' parameters. By Thursday afternoon, the client can review the market sheets developed by Anderson Real Estate. "Buying Equity Property" suggests that the client drive by the property on Thursday or Friday. *Id.* Specifically, the document notes,

> Notify us which properties you are interested in so we can order money, BUT we recommend you make time to drive the properties since there is NO RETURNS FOR AUCTION PROPERTIES.
>
> Friday morning. Either you may attend the auction or just be available by phone Friday from 10am to 12 noon minimum IF you wish, to listen in. But you must commit to verbal approval of the purchase in giving us your minimum bid and in purchasing the property for you. Auction is not for the faint at heart. You are taking risks and a verbal agreement is binding.

*Id.*

Anderson Real Estate worked with Oros and assisted him in purchasing a foreclosed property in Kenmore, Washington in June 2009. RP 31:13-25; 32:1-9 On July 9, 2009, Anderson identified a property to Oros

located at 18630 – 139th Way, SE, Renton, WA 98053, which is the subject of this lawsuit (hereinafter the "Property"). *Id.* at 34:16-25; 35:1-25. Oros talked with Anderson about the Renton property on the Thursday before the Friday foreclosure sale and decided to purchase it. *Id.* at 35:15-21. Oros drove by the Renton property on that Thursday night. *Id.* at 36:15-25. Oros instructed Anderson Real Estate to act as his agent, and he agreed to purchase the Property. *Id.* at 77:1-13. In good faith and at the instruction of Oros, Anderson Real Estate arranged for the purchase of the property in the amount of $340,100. *Id.*

Oros provided a check for a down payment of $85,025.00 to purchase the property. Id. at 41:20-25, 42:1-18. On July 12, 2009, Oros drove by the property a second time and changed his mind about purchasing the property. Id. at 40:10-20. Oros refused to go through with the purchase, breaching the agreement with Anderson Real Estate to purchase the property. Id. at 43:11-23.

When Oros breached the agreement to purchase the Property, Equity Northwest stopped working with Anderson Real Estate until the loan agreement was signed to consummate the agreement made prior to purchasing the property at auction. CP 53; RP 6/11/14 14-16. To preserve the business relationship between Anderson Real Estate and Equity Northwest and to protect Anderson Real Estate's client Simon Oros from losing his deposit on the Property, Ms. Anderson personally purchased the property with her husband Pete Anderson on behalf of Anderson Real Estate with the understanding that Mr. Oros would provide the down payment, and the down

payment would be re-paid from the proceeds of the sale of the property. Paula and Pete Anderson entered into a Loan Agreement with Equity Partners Northwest on behalf of Anderson Real Estate for the remainder of the purchase price of $255,075.00. *Id.* at 28:23-25; 29:1-9. The Loan Agreement was secured by a Deed of Trust in the same amount. *Id.*

Ms. Anderson, Equity Northwest, and Mr. Oros subsequently entered into a Property Agreement to memorialize the re-payment of the down payment made by Mr. Oros. Indeed, the Property Agreement memorializes the breach. "Seller" in the Property Agreement is defined as Simon and Viorica Oros.

> Seller purchased a property ("Property") at foreclosure auction on July 10, 2009. The address of the Property is 18530 139th Way SE, Renton, WA 98053.
>
> Seller used their own funds of $85,025.00 as the down payment on the Property. Seller obtained a loan from Lender to fund the balance of the purchase prices [sic] totaling $255,075.00
>
> Seller desires [sic] not complete the transaction to purchase the Property.

Ex. 4, Recitals.

The Property Agreement also provides, "No interest shall accrue on the unpaid balance and the principal shall be due 180 days from the date of this agreement. Seller's deed of trust shall be paid from the proceeds of the closing of the sale of the Property." *Id.*

Although Ms. Anderson was working on behalf of Anderson Real Estate throughout this transaction, the Property Agreement was signed by Ms.

Anderson with no notation of her agency with Anderson Real Estate. *Id.* Ms. Anderson and her husband were required to personally enter into the Loan Agreement because Anderson Real Estate did not have sufficient assets or credit to secure the loan. RP 6/11/14 122:10-17. The Property Agreement notes that if the Property were to be sold for more than $450,000, then Mr. Oros would get the down payment back plus $2,000.00. If the Property were to be sold for less than $450,000, $2000.00 would be deducted from the down payment. Ex. ("Ex.") 4.

Anderson Real Estate and Paula and Pete Anderson undertook and paid for the repairs and upgrades necessary on the Property to get it ready for sale. The cost of the repairs and upgrades were supposed to have been shared by all parties, and these costs were intended to have been taken into account as the "proceeds" of the sale from which Oros would be paid RP 6/11/14; 36:7-13; however, Oros did not contribute to any of these costs. *Id.* pp. 41-45; 102:1-25. The costs were substantial. Trial Exhibit 28, which was improperly excluded by the Court, is attached as Appendix 1 and shows that the costs were approximately $76,299.39.

The Property was sold in August 2009 for $414,800.00. Complaint, CP 3. Anderson Real Estate paid Oros $32,381.00, which constituted the entire proceeds of the sale, taking into account the costs to renovate and update the house. *Id.* With the cost of the improvements and the downturn in the economy, the sale did not provide the profit that any of the parties anticipated.

In addition to the loss resulting from the purchase and sale of the property, Anderson Real Estate lost business as a result of Oros' breach because Equity Northwest refused to do further business with Anderson Real Estate. RP 6/11/14; 125:4-25; 126:1; RP 6/12/14 57:22-25; 58:1.

In 2013, almost four years after Oros was paid his portion of the proceeds of the sale, Oros sued Paula Anderson and her husband Peter Anderson in their personal capacity over the Property Agreement. Complaint, CP 1-3. By this time, Anderson Real Estate had been administratively dissolved by the Washington Secretary of State. CP 52. Anderson Real Estate did not exist and was, therefore, not a party to the case. Evidence of the corporation's dissolution was presented to the trial court. *Id.*

The trial court granted several motions in limine to Oros. First, the court ruled that the Andersons were "precluded from offering evidence, asserting, or arguing that Defendants' corporation, Anderson Real Estate ("ARE") should have been made a party, is the proper defendant or the responsible party, or is somehow liable instead of Defendants." The Court granted a second motion in limine ruling precluded the Andersons from "offering evidence, asserting, or arguing any claims or defenses that belong to Defendants' corporation (ARE)". CP 130-131.

After the conclusion of the evidence, the court granted Oros' motion to exclude evidence of any counterclaims and denied the Andersons' motion to amend the pleadings to assert the amount they spent associated with renovating the property as an offset. In addition, the jury Verdict Form A did not allow the jury to consider any of the costs incurred by the Andersons,

either personally or through Anderson Real Estate as an offset to the damages alleged. CP 491-493.

Because the evidence with respect to Anderson Real Estate's damages were excluded and the jury was not even allowed to consider any of the costs incurred by the Andersons in renovating the home as an offset, the jury ruled that Paula Anderson and Peter Anderson were personally liable to Oros in the amount of $50,644.00. CP 516.

The court also ruled that Paula and Peter Anderson are responsible for prejudgment interest on the breach of the Property Agreement in the amount of $27,006.43, costs and expenses in the amount of $3,183.09, and attorneys' fees in the amount of $25,998.00, for a total judgment of $106,831,52. *Id.*

## III. ARGUMENT

### A. The Trial Court Erred in Excluding Evidence and Testimony Relating to Counter Claims by Anderson Real Estate, Inc.

#### 1. The Assets of Anderson Real Estate, Inc., Including Any Claims Against Oros, Were Distributed to Its Sole Shareholder Paula Anderson By Operation of Law Upon Dissolution.

The genesis of this dispute was that Simon Oros decided to breach his agreement with Anderson Real Estate and back out of the purchase of property that he authorized Anderson Real Estate to purchase on his behalf. He knew that he could not back out of the purchase, and he knew that Anderson Real Estate would suffer damages if he did. Nonetheless, he backed out of the deal, and Paula and Peter Anderson were forced to purchase the property in their personal capacity in an effort to salvage Paula's business and Oros' down payment on the Property. Anderson Real Estate and the

Andersons personally suffered substantial damages that more than offset any damages suffered by Oros. However, the court did not allow the jury to consider any of these damages.

The trial court granted two motions in limine that severely limited Anderson's ability to defend against Oros' claims. First, the court ruled that the Andersons were "precluded from offering evidence, asserting, or arguing that Defendants' corporation, Anderson Real Estate ("ARE") should have been made a party, is the proper defendant or the responsible party, or is somehow liable instead of Defendants." The second ruling precluded the Andersons from "offering evidence, asserting, or arguing any claims or defenses that belong to Defendants' corporation (ARE)". CP 130-131. The court wrongly reasoned that the exclusion of this evidence was proper because these damages belong to the corporation, not to the Andersons personally. Obviously, the admission of this evidence would have allowed the jury to weigh any damages asserted by Oros against the substantial damages suffered by Anderson Real Estate and the Andersons.

However, because Anderson Real Estate had been administratively dissolved, any and all claims by Anderson Real Estate were distributed by operation of law to the Andersons, its sole shareholders.

> When a corporation is dissolved administratively, it ceases to exist. RCW 23A.28.125(3). The corporate assets and liabilities pass to the beneficial owners of the corporation, *i.e.*, the shareholders, subject to the claims of corporate creditors. RCW 23A.28.250; *Ban-Mac, Inc. v. King County,* 69 Wash.2d 49, 416 P.2d 694 (1966).

Zimmerman v. Kyte, 53 Wn. App. 11, 18, 765 P.2d 905, 909 (1988)

In the Zimmerman case, the Zimmermans were shareholders of Plaza Drug Corporation, and the both the Zimmermans and Plaza filed suit against Kyte for tortious interference of contract. During the course of the lawsuit, Plaza was administratively dissolved by the Secretary of State. Kyte moved to dismiss the case claiming that the Zimmermans were not proper plaintiffs as they were merely shareholders of the dissolved corporation and did not have a cause of action. The Court of Appeals disagreed holding, "Nevertheless, when Plaza ceased to exist, the Zimmermans became owners of the cause personally . . .." *Id.* 53 Wn.App at 18; 765 P.2d 909.

Although the law cited in the Zimmerman case has been updated, like the previous statute, the current version of the Washington Business Corporation Act provides:

> A dissolved corporation may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
>
> . . .
>
> (d) Subject to the limitations imposed by RCW 23B.06.400, distributing its remaining property among its shareholders according to their interests;

RCW 23B.14.050.

In Ban-Mac, Inc. v. King County, the Supreme Court recognized that the statutory distribution of assets of a dissolved corporation to its

shareholders is simply the codification of the "established principal of corporate law" that shareholders own the assets of the corporation. The question before the Court was whether a taxable "sale" occurred when a corporate owner of real estate is dissolved, and the title to the property transfers to the shareholders by operation of law. The Court reaffirmed its longstanding ruling that such transfer was not a sale, holding as follows:

> Eleven years have passed since we first determined that such a transfer of ownership of real estate was not a taxable sale. *Deer Park Pine Indus., Inc. v. Stevens Cy.*, 46 Wn.2d 852, 286 P.2d 98 (1955). This was because such transfer was not in consideration of anything of value, passing from the trustee to the stockholder. Instead, it was a transfer pursuant to the established principal of corporate law that ownership of corporate stock carried with it the inherent right to share in the distribution of surplus corporate assets remaining on hand after discharge of corporate liabilities and expenses of dissolution.
>
> As stated in 19 C.J.S. *Corporations* § 1730, p. 1489 (1940), "In the absence of statute, the legal title to property belonging to the corporation passes by operation of law to the stockholders, who are the beneficial owners through the corporation, and who take as tenants in common . . . ."

Ban-Mac, Inc. v. King County, 69 Wn.2d 49, 50, 416 P.2d 694, 695 (1966).

Similarly, the Andersons, as the sole shareholders of Anderson Real Estate, became the owner of any claim, defense or cause of action previously owned by Anderson Real Estate, and the trial court erred in disallowing evidence that would have completely offset Oros' claims. Oros' breach of his agreement not to back out of a sale was the genesis of the entire transaction.

The trial court's failure to recognize any more than one side to this claim was manifest error.

### 2. The Assets of Anderson Real Estate, Inc., Transferred to Paula Anderson By Distribution.

In an alternate ruling, the Court in Zimmerman v. Kyte, noted that even absent a dissolution, distributions to corporate shareholders can happen any time.

> A corporation may "distribute" assets to a shareholder at any time, so long as creditors of the corporation are not prejudiced thereby. RCW 23A.08.420. The distribution need not be authorized by the corporation's board of directors when the corporation's shareholders unanimously consent. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 P. 380 (1895). No particular words are required for a valid and binding assignment entitling the assignee to sue in the assignee's own name. Rather, any language showing an intent in the owner to transfer and invest the cause in the assignee is sufficient. *Amende v. Morton,* 40 Wn.2d 104, 106, 241 P.2d 445 (1952).
>
> Finally, the assignment need not be in writing, at least not in this case. RCW 4.08.080 permits an assignee of a chose in action "by assignment in writing" to sue on the cause in the assignee's own name. This statute is in derogation of the common law rule *against* assignment of a chose, and should ordinarily be strictly construed. However, an oral assignment satisfies the statute when the assignor takes the witness stand and testifies that the assignment occurred. *Ingle v. Ingle,* 183 Wash. 234, 237-38, 48 P.2d 576 (1935). Since Zimmerman and Bloom, Plaza's sole shareholders and managing officers, both averred that Plaza transferred its tort claim to the Zimmermans, albeit under a mistaken notion of corporate dissolution, the oral assignment satisfies RCW 4.08.080.

Zimmerman v. Kyte, 53 Wn. App. 11, 17-18, 765 P.2d 905, 908-909 (1988)

Ms. Anderson was never allowed to take the witness stand to provide testimony with respect to a distribution of assets; however, in the Declaration of Paula Anderson In Response to Motions in Limine, Ms. Anderson notes the administration dissolution and the fact that she and her husband were the sole shareholders of Anderson Real Estate. CP 52, ¶ 2. Rather than allowing the Andersons to offer any testimony with respect to assignment, the trial court improperly disallowed all evidence relating to any claim that previously would have belonged to Anderson Real Estate, Inc. CP 130-131. The trial court's actions severely prejudiced the Andersons and should be overturned.

### 3. The Court's Reasoning In Granting the Motions In Limine Is Inconsistent With the Law.

In granting the Motions In Limine, the trial court wrongly reasoning that the Andersons cannot assert claims they own by operation of law unless they specifically asserted that they were a successor to the dissolved corporation in their initial pleadings..

> I think that the corporation, Anderson Real Estate, is not a party. For whatever reason it was never made a party. Anderson is not – Ms. Anderson has not alleged that she's a successor to the corporation. It's not in the pleadings. She's not alleged that she's asserting a claim on behalf of the corporation. . . . but the evidence of an agreement or claims by a corporation against – counterclaims by the corporation against the plaintiffs – I don't see it in the pleadings. I don't think it's fair now to mush things together and allow claim by a corporation or to allow plaintiff, who has not alleged that she's successor to the corporation, to assert the claim on behalf of the corporation.

RP 6/9/14, pp. 23:1-16.

Such an assertion is entirely unnecessary. In Zimmerman v. Kyte, the parties didn't even discover that the corporation had been administratively dissolved until a week *after* the trial. Zimmerman v. Kyte, 53 Wn. App. at 13-14 (1988). Further, Oros' attorney could not have been surprised by the fact that Anderson Real Estate Group, Inc., was administratively dissolved. Although Oros' attorney claims that he had no knowledge or proof of the corporation's dissolution, the dissolution is a matter of public record. He appears to claim that Paula Anderson was confused about the status of the corporation in her deposition, and that confusion misled him as to the corporation's status.

> And I even, in fairness to her, because it's a deposition, it's not cross-examination, and I said look, in my experience, this often indicates that the corporation is administratively dissolved, you know, where you see the date of inactive and the date of closure, there's a three-month gap, typically that often means somebody didn't pay the fees and the corporation just sort of dies on the vine. I even suggested that to her in the deposition. She couldn't agree or disagree with that one way or the other. She didn't know.

RP 6/9/14 17: 16-25; 17:1-3.

Ms. Anderson's recollection on the date of her deposition as to the corporate status of Anderson Real Estate is completely irrelevant. The corporate status is a fact that can easily be determined by requesting the corporate records from the Secretary of State. Any person with access to a computer and the internet can look on the website for the Secretary of State for the State of Washington and determine, within a few seconds, that a

corporation is inactive and then request the records for that corporation. In the Zimmerman case, the individual shareholders testimony on the stand with respect to the "dissolution" of their corporation was actually factually incorrect. The corporation was not administratively dissolved until after the shareholders had testified that it was dissolved because apparently, the shareholders had no idea what dissolution meant. Zimmerman v. Kyte, 53 Wn. App. at 13-14 (1988).

Nor can Oros' attorney claim that he was misled that Anderson was asserting claims or damages that had belonged to the corporation. The Andersons' Counterclaims clearly alleged damages that were owned by both Anderson Real Estate and by Paula Anderson. CP 126-129. During the trial, Paula Anderson answered questions and provided documents regarding damages claimed by both she and Anderson Real Estate. RP 6/11/14 pp.114-132.

Finally, the Court's ruling is inconsistent with Civil Rule 15(b).

> (b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court

> may grant a continuance to enable the objecting party to meet such evidence.

Superior Court Civil Rule 15(b)

Oros clearly had notice as of the date of Ms. Anderson's deposition that Anderson Real Estate was an inactive corporation. Mr. Galletch questioned Ms. Anderson as to whether the corporation was dissolved. Mr. Galletch's question with respect to whether Anderson Real Estate was administratively dissolved was answered by operation of law, and Mr. Galletch could have discerned that answer through a brief and absolutely painless search sitting in his office. He should not be able to cause a forfeiture of all of the Anderson's claims because he couldn't be bothered to look up a public record. Such a result is ludicrous.

#### 4. Because the Evidence Was Excluded, the Andersons Could Not Submit Argument Regarding the Definition of the "Proceeds" of the Sale.

The Property Agreement clearly stated that Mr. Oros "shall be paid from the proceeds of the closing of the Property." The "proceeds of the Property" should have accounted for the costs that Anderson Real Estate incurred to rehabilitate the property and get it ready for sale. Because of the drop in the real estate market, the sale price was not what any of the parties expected. However, because these costs were incurred by Anderson Real Estate rather than the Andersons, the Court's order on the Motion in Limine prohibited counsel for the Andersons to admit them in Court. The Court

wrongly refused to admit Exhibit 28, which detailed the expenses that were made to rehabilitate the house to make it ready for sale because it was "produced by an employee of the corporation. The corporation is not a party to this case, has no claim against a party in this case, so certainly the witness – the defendant is free to pursue a counterclaim and present evidence as to her counterclaim but not with this document." RP 6/11/14 at p. 115: 14-21. Further, the Court wrongfully did not allow the Andersons to present the costs as an offset to the Oros' claim, *see below*, RP 6/12/14 at p. 86: 14-16, and refused to allow a jury instruction that would allow the jury to determine whether the words "proceeds of the sale" meant that Mr. Oros' recovery was limited to the amount left over after the costs of the renovation were paid. RP 6/12/14 at p. 102:18 – 106:9. All of these rulings were based on the court's initial incorrect reading of the law regarding ownership of the claims.

Simon Oros created absolute havoc when he decided to back out of a real estate transaction that he directed Paula Anderson to make on his behalf. She did everything she could to try to preserve the down payment he had made on the property. The trial court did not allow any of the evidence of the damage that Simon Oros caused to reach the jury, clearly and obviously materially prejudicing the Andersons. This Court should remand the case

with instructions to either allow Paula Anderson to assert the claims of the corporation or allow the corporation as a third party defendant.[1]

## B. The Trial Court Erred In Not Allowing the Jury to Consider the Andersons' Damages As A Setoff to Plaintiffs' Claims.

The Andersons presented evidence at trial that Simon Oros breached an oral agreement to participate in the renovation of the property and share in the costs required to renovate the property. The court granted Oros' motion to exclude any counterclaim by the Andersons based on this agreement on the basis that the agreement was oral and, thus, not enforceable as outside the three year limitations period. RP 6/12/14 82:14-19. Indeed, the court would not even allow the Andersons to assert the oral agreement as parole evidence as an offset defense to the Andersons' claims. These errors resulted in no jury instructions that would allow the jury to consider the Andersons' costs as an offset to the Oros' claims and a Verdict Form that essentially precluded any such consideration.

The error by the court began when it granted Oros' motion to exclude any evidence of a counterclaim based on the renovation costs. The basis of the court's ruling was that it could not be asserted as an oral contract beyond the statute of limitations; however, the costs were being asserted as parole evidence of the definition of the "proceeds" of the contract and as a defense to plaintiffs' affirmative claims. The very basis of the court's ruling was

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[1] Anderson Real Estate Group, Inc., was subsequently reinstituted as a corporation for the purposes of filing a separate lawsuit against Oros. The separate lawsuit was filed to preserve its claims in case this Court ruled against Appellant Anderson.

incorrect. "Statutes of limitations never run against defenses arising out of the transactions sued upon." Allis-Chalmers Corp. v. N. Bonneville, 113 Wn.2d 108, 112, 775 P.2d 953, 955 (1989)

> The Siebols also raised the bank's alleged breach of an oral promise as an affirmative defense. Statutes of limitation never run against defenses arising out of the transactions sued upon. *Allis-Chalmers Corp. v. North Bonneville*, 113 Wn.2d 108, 112, 775 P.2d 953 (1989). One such defense, recoupment, is not barred by the statute of limitation so long as the main action itself is timely. 51 Am. Jur. 2d *Limitation of Actions* § 77, at 656 (1970). The defense goes to the justice of the plaintiff's claim, and although no affirmative judgment can be had, recoupment is available as a defense even when barred as an affirmative cause of action. 20 Am. Jur. 2d *Counterclaim, Recoupment, and Setoff* §§ 10, 11, at 235-36 (1965).

Seattle First Nat'l Bank, N.A. v. Siebol, 64 Wn. App. 401, 407, 824 P.2d 1252, 1255 (1992)

The Andersons then requested the Court to amend their pleadings to conform their defenses to the evidence pursuant to CR 15(b); however the court refused to allow the jury to consider the costs incurred by the Andersons in rehabilitating the property to get it ready for sale as an either an offset to the damages alleged by Oros or as parole evidence to define the term "proceeds" of the sale, which would have allowed the jury to offset the costs as part of the contract.

Jury Verdict Form A further did not allow the jury to consider any of the costs incurred by the Andersons, either personally or through Anderson Real Estate as an offset to the damages alleged. *CP 491-493.* The trial court refused to allow the Andersons to submit jury instructions or argue with

respect to the amounts spent as an offset to the claims made by Oros without any more explanation than "I am going to deny the motion to amend the pleadings at this late stage. It's just too late." RP 6/12/14 86:14-15. The court's denial was an abuse of discretion and manifestly unfair to the Andersons. Courts are required to liberally construe Civil Rule 15(b) and allow amendment when the issues are raised and adjudicated at trial.

> We have held that this rule [CR 15(b)], as was the former rule (Rule of Pleading, Practice and Procedure 6(9), 34A Wn.2d 72 1), is to be liberally construed and applied. *Burlingham-Meeker Co. v. Thomas,* 58 Wn.2d 79, 360 P.2d 1033 (1961). An underlying purpose of the rule is to avoid a multiplicity of suits between thesame parties arising out of the same transaction. Thus, when the evidence, introduced with the express or implied consent of the parties, fairly raises compatible, though alternative, issues, the trial court is **duty bound to adjudicate the issues so presented even though such issues may not have been directly raised by the pleadings**. *Longenecker v. Brommer,* 59 Wn.2d 552, 368 P.2d 900 (1962); *Knudson v. Boren,* 261 F.2d 15 (10th Cir. 1958).

O'Kelley v. Sali, 67 Wn.2d 296, 298-299, 407 P.2d 467, 469 (1965). [Emphasis Added].

By not allowing the Andersons to even present the evidence of the costs as an offset, the court precluded the jury from considering any of the costs the Andersons incurred. Verdict Form A railroaded the jury into one conclusion: that Oros was entitled to the entire amount set forth in the contract. Mr. Oros clearly understood that the property had to be renovated for it to be ready for sale. RP 40-42. The Property Agreement stated that Oros was only to be paid out of the "proceeds" of the sale. Exhibit 4. The court's rulings did not allow any evidence of offset or even any parole

evidence with respect to the definition of the term "proceeds" as including the costs to renovate the property.

Even if the court's ruling with respect to disallowing any costs incurred by Anderson Real Estate Group, Inc., is incorrect, Paula Anderson testified that at least some of the funds used to renovate the home were either personal funds or personal loans. RP 6/11/14 103:25; 104:1-4. There was no surprise whatsoever with respect to the fact that the Andersons were claiming that Oros should share in the costs to renovate the Property, and the issue with respect to the amount spent by the Andersons on the renovation was fully litigated at trial.

The court's rulings disallowing the parole evidence regarding the costs to renovate the property materially prejudiced the Andersons, were improper and were an abuse of discretion and should be overturned.

### C. The Trial Court Erred in Granting Oros' Motion for an Award of Pre-Judgment Interest.

The trial court granted Oros' motion for pre-judgment interest in the amount of $27,006.43, an amount that represents fifty three percent (53%) of the principal. RCW 4.56.110(1) limits the amount of interest that a court may award in an action on a breach of contract to the following:

> (1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

RCW 4.56.110(1).

The Property Agreement clearly states "[n]o interest shall accrue on the unpaid balance" of Oros' down payment. The trial court cannot award interest in excess of that which is set forth in the contract and erred in awarding any interest at all.

Even if the trial court were permitted to award interest, the award of pre-judgment interest, even on a liquidated claim, is not absolute, and courts must examine the equities in the fairness of the award.

> Our prejudgment interest rule is founded on the same judge-made principles of fairness pronounced by the United States Supreme Court in *Milwaukee, supra,* and in dozens of other cases. Neither do we believe that Washington trial judges are any less capable of exercising sound discretion than are their federal counterparts, so that a rigid rule regardless of considerations of fairness would not seem necessary to the orderly administration of justice in this state. Indeed, recognizing the authority of the trial bench to disallow prejudgment interest where it would otherwise be a matter of right, due to undue delay attributable to the claimant, would seem to encourage the expeditious prosecution of liquidated claims. We hold that prejudgment interest on liquidated claims ordinarily is a matter of right, but that **Washington trial judges have discretion to disallow such interest during periods of unreasonable delay in completing litigation that is attributable to claimants.**

Colonial Imports v. Carlton NW., Inc., 83 Wn. App. 229, 245, 921 P.2d 575, 583 (1996) [Emphasis added.]

Oros entered into a contract where he would receive no interest. He sits on the claim for years, never once requesting reimbursement and allowing the Andersons to negotiate a settlement or pay the amount. It is utterly inequitable for Oros to be allowed to benefit from the delay in the prosecution of his case such that he obtains far more than the benefit of his bargain. Not only did he get twelve percent interest on a debt for which the contractual rate

of interest is zero, and the market interest rate is extraordinarily low, he profited by the delay with a more than fifty percent increase in his recovery. The award of pre-judgment interest was patently unfair and inequitable, and this Court should overturn the award.

**D. The Trial Court Erred in Awarding Excessive Attorneys' Fees to Oros.**

The trial court awarded attorneys' fees and costs in the amount of $28,508.59 on a claim for $50,644.00. At its base, the amount of the attorneys' fees far exceeds what is reasonable for the amount of the claim. Indeed, when combined with the pre-judgment interest, it is greater than the principal judgment. Essentially, plaintiff recovered every penny of attorneys' fees allegedly incurred for this claim, even though of the plaintiffs' nine motions in limine, five were denied and two were withdrawn. Plaintiff should not be allowed to recover attorneys' fees for unsuccessful motions.

In addition, plaintiffs were awarded witness fees in the amount of $404.50 for witness Jerry Walker, who was under subpoena. There is also an impermissible increase in the attorneys' fees rate from $250.00 per hour to $265.00 per hour midway through the case.

The court must limit attorneys' fees to a reasonable amount. Wilkinson v. Smith, 31 Wn.App. 1, 14, 639 P.2d 768 (1982).

> The trial court is to take into account the amount involved and to set the award of fees with the total sum recovered in mind. The learned trial judge expressed himself eloquently and justifiably on the subject. On remand the guidelines of the Rules of Professional Conduct expressly require that the amount involved be considered in ascertaining reasonableness. The court may reduce the award of fees to

> that which he deems reasonable in light of the recovery on the note and fix a fee proportionate thereto. RPC 1.5.

Singleton v. Frost, 108 Wash. 2d 723, 731-32, 742 P.2d 1224, 1228-29 (1987) ($40,000 in fees for $25,000 in controversy is excessive.)

The amount of the attorneys' fees requested in this case far outweighs what is reasonable given the amount in controversy and the number of unsuccessful motions. This Court should remand the case to the trial court to reduce the amount of attorneys' fees awarded to a reasonable amount.

## IV. CONCLUSION

This Court should remand the case to the trial court to re-try the case and allow Appellant Paula Anderson to either assert the claims of Anderson Real Estate Group, Inc., or allow Anderson Real Estate as a third party defendant. The Court should also overturn the trial court's decision to disallow all evidence of the costs to renovate the Property as either an affirmative claim or as the defense of offset. This Court should also remand the case to the trial court to eliminate the pre-judgment interest award and reduce or eliminate the award of unreasonable attorneys' fees.

Dated this 23rd day of March 2016

Respectfully submitted,

THAXTON PARKINSON PLLC

Robynne Thaxton Parkinson, WSBA #21173
Attorney for Appellants Paula G. and Peter Anderson

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Appellants' Brief to be served on the following named person on the date indicated below via email and by mailing a true copy thereof, contained in a sealed envelope, addressed to said person at the address indicated below:

Michael B. Galletch
Puget Sound Business & Litigation, PLLC
411 University St.
Suite 1200
Seattle, WA 98101-2519

Dated this 23rd day of March 2015

Robynne Thaxton Parkinson, WSBA #21173

# Appendix 1

# Anderson Real Estate Group

| Deposits | Date | | Deposit Received From | | | Deposit into Account | Amount | |
|---|---|---|---|---|---|---|---|---|
| Deposit | 08/03/2009 | | Anderson Real Estate Group | | | Renton Acct (7757) | 2,000.00 | |
| Deposit | 08/04/2009 | | Anderson Real Estate Group | | | Renton Acct (7757) | 4,000.00 | 6,000.00 |
| Deposit | 08/04/2009 | | Remax NW - commission | | | Renton Acct (7757) | 8,500.00 | 8,500.00 |
| Deposit | 08/18/2009 | | Personal Anderson money | | | Anderson Real Estate (3764) | 2,000.00 | |
| Deposit | 09/01/2009 | | Personal Anderson money | | | Anderson Real Estate (3764) | 6,000.00 | |
| Deposit | 09/21/2009 | | Personal Anderson money | | | Anderson Real Estate (3764) | 10,000.00 | |
| Deposit | 10/01/2009 | | NW Probate (7936) | | | Anderson Real Estate (3764) | 2,000.00 | |
| Deposit | 12/22/2009 | | Personal Anderson Money | | | Anderson Real Estate (3764) | 18,000.00 | 38,000.00 |
| | | | | | | | 52,500.00 | 52,500.00 |
| **Expenses** | | | | | | | | |
| Type | Date | Num | Name | Memo | Receipt | Split | Amount | Balance |
| Check | 04/29/2009 | 4138 | Cary White | fees | ck | Anderson Real Estate Group | 2,744.00 | 2,744.00 |
| Check | 06/09/2009 | 4145 | Ted Marshall | site work | ck | Anderson Real Estate Group | 5,000.00 | 7,744.00 |
| Check | 06/12/2009 | 4146 | Ted Marshall | site work | ck | Anderson Real Estate Group | 5,000.00 | 12,744.00 |
| Check | 06/17/2009 | 4149 | Shawn Cook | Oros commission | ck | Anderson Real Estate Group | 2,500.00 | 15,244.00 |
| Check | 06/19/2009 | 4245 | Nicole Anderson | casual labor | ck | Anderson Real Estate Group | 44.00 | 15,288.00 |
| Check | 08/04/2009 | 4104 | Ted Marshall | site work | ck | Anderson Real Estate Group | 5,000.00 | 20,288.00 |
| Check | 08/05/2009 | 4106 | John L. Scott | Commission | ck | Anderson Real Estate Group | 17,160.00 | 37,448.00 |
| check | 08/05/2009 | | Soos Creek Water | Sewer Lein | x | NW Probate (Rental) | 1,671.07 | 39,119.07 |
| Credit Card Charge | 08/06/2009 | | T and A Supply | master bath floor | x | US Bank LOC 4073/5662 | 576.95 | 39,696.02 |
| Credit Card Charge | 08/08/2009 | | Home Depot | Bath fixtures, kitchen | x | Home Depot CC | 1,071.00 | 40,767.02 |
| Credit Card Charge | 08/09/2009 | | Home Depot | kitchen pulls | x | Home Depot CC | 31.70 | 40,798.72 |
| withdrawal | 08/10/2009 | | US Bank | print checks | x | Renton Acct (7757) | 23.50 | 40,822.22 |
| anderson credit card | 08/10/2009 | | ABC Cleanup Services, Inc. | Dumpster | x | Anderson personal credit card | 898.02 | 41,720.24 |
| Check | 08/12/2009 | 4116 | HY Kitchen | master bath | x | Anderson Real Estate Group | 874.50 | 42,594.74 |
| Check | 08/13/2009 | 4115 | Ross | staging | ck | Anderson Real Estate Group | 59.10 | 42,653.84 |
| Check | 08/13/2009 | 4105 | Ted Marshall | site work | ck | Anderson Real Estate Group | 4,000.00 | 46,653.84 |
| Check | 08/14/2009 | 4120 | Communication Solutions Resource, LLC | Oros referral fee | ck | Anderson Real Estate Group | 1,020.00 | 47,673.84 |
| anderson credit card | 08/14/2009 | | Sherwin Williams | paint | x | Anderson personal credit card | 483.33 | 48,157.17 |
| Credit Card Charge | 08/14/2009 | | Home Depot | bath & kitchen | x | Home Depot CC | 423.21 | 48,580.38 |
| Check | 08/14/2009 | 4121 | Falcon Construction | site work | ck | Anderson Real Estate Group | 1,483.33 | 50,063.71 |
| Credit Card Charge | 08/15/2009 | | Home Depot | Faucets | x | Home Depot CC | 345.08 | 50,408.79 |
| Credit Card Credit | 08/15/2009 | | Home Depot | return kitchen pulls | x | Home Depot CC | -94.93 | 50,313.86 |
| Check | 08/18/2009 | 4269 | Cash | day laborer | ck | Anderson Real Estate Group | 150.00 | 50,463.86 |

# Anderson Real Estate Group

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Credit Card Charge | 08/22/2009 | | Home Depot | bath & kitchen | x | Home Depot CC | 136.04 | 50,599.90 |
| Check | 08/23/2009 | 4122 | Fred Meyer | supplies | ck | Anderson Real Estate Group | 81.70 | 50,681.60 |
| Check | 09/01/2009 | 4119 | Ted Marshall | site work | ck | Anderson Real Estate Group | 5,000.00 | 55,681.60 |
| Check | 09/01/2009 | 4124 | Sherwin Williams | paint | ck | Anderson Real Estate Group | 4,561.24 | 60,242.84 |
| Credit Card Credit | 09/01/2009 | | Home Depot | towel bar | x | Home Depot CC | -21.89 | 60,220.95 |
| Credit Card Charge | 09/01/2009 | | Home Depot | renton | x | Home Depot CC | 13.88 | 60,234.83 |
| Check | 09/03/2009 | 4271 | Cedarwood Estate Home Assoc | see receipt | x | Anderson Real Estate Group | 57.50 | 60,292.33 |
| Check | 09/03/2009 | 4272 | Old Republic Title | title | x | Anderson Real Estate Group | 140.00 | 60,432.33 |
| Credit Card Charge | 09/09/2009 | | Home Depot | door lock, plants | x | Home Depot CC | 408.81 | 60,841.14 |
| Check | 09/11/2009 | 4200 | Ted Marshall | site work | ck | Anderson Real Estate Group | 600.00 | 61,441.14 |
| Credit Card Charge | 09/12/2009 | | Home Depot | plants | x | Home Depot CC | 55.74 | 61,496.88 |
| Credit Card Charge | 09/13/2009 | | Home Depot | const supplies | x | Home Depot CC | 90.86 | 61,587.74 |
| anderson credit card | 09/13/2009 | | Lowes | paint | x | Anderson personal credit card | 34.67 | 61,622.41 |
| Credit Card Credit | 09/16/2009 | | Home Depot | aqua timer | x | Home Depot CC | -26.96 | 61,595.45 |
| Check | 09/17/2009 | 4201 | Dr. Koss | injury | ck | Anderson Real Estate Group | 105.49 | 61,700.94 |
| Check | 09/22/2009 | 4202 | Ted Marshall | renton | ck | Anderson Real Estate Group | 1,000.00 | 62,700.94 |
| Credit Card Charge | 09/22/2009 | | Home Depot | bath fittings | x | Home Depot CC | 13.93 | 62,714.87 |
| Check | 09/23/2009 | 4206 | Ross | staging | x | Anderson Real Estate Group | 61.73 | 62,776.60 |
| Check | 09/23/2009 | 4203 | NWMLS | signs | ck | Anderson Real Estate Group | 22.61 | 62,799.21 |
| Credit Card Charge | 09/23/2009 | | Home Depot | accum finance charges | x | Home Depot CC | 50.07 | 62,849.28 |
| Check | 09/28/2009 | | Sign Manangement | sign placement | x | Renton Acct (7757) | 204.92 | 63,054.20 |
| Check | 09/25/2009 | | Farmers Insurance | insurance | x | Renton Acct (7757) | 194.13 | 63,248.33 |
| Check | 09/25/2009 | 4207 | Falcon Construction | site work | ck | Anderson Real Estate Group | 6,227.07 | 69,475.40 |
| Check | 09/26/2009 | 4208 | Emerald Aire | furnace | ck | Anderson Real Estate Group | 2,650.00 | 72,125.40 |
| Credit Card Charge | 09/27/2009 | | Home Depot | lamp, light bulbs, supplies | x | Home Depot CC | 115.74 | 72,241.14 |
| Check | 09/28/2009 | 4277 | thE-Solution, LLC | accounting sudit | ck | Anderson Real Estate Group | 100.00 | 72,341.14 |
| Check | 09/29/2009 | 4210 | Ross | staging | x | Anderson Real Estate Group | 32.25 | 72,373.39 |
| Check | 09/29/2009 | 4211 | Sign Pros | sign | ck | Anderson Real Estate Group | 135.00 | 72,508.39 |
| Check | 09/30/2009 | 4213 | Dr. Koss | injury | ck | Anderson Real Estate Group | 96.46 | 72,604.85 |
| Credit Card Charge | 10/16/2009 | | Big Lots | renton | x | US Bank LOC 3921/7892/7789 | 55.08 | 72,659.93 |
| Credit Card Charge | 10/18/2009 | | Home Depot | plants | x | Home Depot CC | 32.93 | 72,692.86 |
| Credit Card Charge | 11/01/2009 | | Ace Hardware | supplies | x | Amderson personal credit card | 9.49 | 72,702.35 |
| Check | 11/13/2009 | 4218 | Auburn Landscaping | plants | ck | Anderson Real Estate Group | 35.00 | 72,737.35 |

# Anderson Real Estate Group

| Type | Date | Num | Name | Memo | Receipt | Split | Amount | Balance |
|---|---|---|---|---|---|---|---|---|
| Check | 11/18/2009 | 4294 | Puget Sound Energy | utilities | x | Anderson Real Estate Group | 108.05 | 72,845.40 |
| Check | 11/18/2009 | 4296 | Puget Sound Energy | utilities | x | Anderson Real Estate Group | 131.22 | 72,976.62 |
| credit card charge | 12/09/2009 | | Cascade Pest Control | Rodent Service | x | Anderson personal credit card | 400.73 | 73,377.35 |
| credit card charge | 12/15/2009 | | Home Depot | supplies | x | Home Depot CC | 203.99 | 73,581.34 |
| Check | 12/17/2009 | 4220 | West Coast Enterprises | belt - repair | x | Anderson Real Estate Group | 10.95 | 73,592.29 |
| Check | 12/22/2009 | 4224 | D&D Custom Design | window | ck | Anderson Real Estate Group | 350.00 | 73,942.29 |
| Check | 12/22/2009 | 4151 | J&L insulation | crawl space | x | Anderson Real Estate Group | 1,925.00 | 75,867.29 |
| Check | 12/23/2009 | 4313 | Soos Creek Water | water/sewer | x | Anderson Real Estate Group | 34.14 | 75,901.43 |
| Check | 01/17/2010 | 4308 | Puget Sound Energy | utilities | x | Anderson Real Estate Group | 395.74 | 76,297.17 |
| Check | 02/27/2010 | 4320 | Puget Sound Energy | utilities | x | Anderson Real Estate Group | 2.22 | **76,299.39** |
| | | | | | | **Difference between deposits and expenses** | | **-23,799.39** |

| | | |
|---|---|---|
| Escrow Money | **125,692.65** | |
| remodel costs from 2009 taxes | -110,011.47 | Remodel costs 76299.39 |
| Actual costs 76,299.39 | | payment to Simon 32381.00 |
| pmt to Simon 32,381.00 | | **111680.03** |
| = 111,680.03 | | |
| costs not in taxes 1,635.56 | | |
| Pete's milage | -272.00 | |
| Pmt to Terry (private money loan) | -8,800.00 | |
| commission to Paula | -6,609.18 | Amount owed to Paula for labor $4,325.00 |
| | -125,692.65 | (never paid) |
| | | Total amt Paula earned $ 2,284.18 |
| Money PA should have made | | |
| Commission from Purchase | 6,820.00 | |
| Commission from Sale | 12,444.00 | |
| Labor from Remodel | 4,325.00 | |
| Total | 23,589.00 | |
| Amount paid | 6,609.18 | |
| **Amount owed to Paula** | **16,979.82** | |