

No. 72817-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HARBANS GREWAL and JASBIR KAUR GREWAL, husband and wife,
And HARJIT KAUR GILL,

Appellants,

v.

KAMALJIT SINGH and HARMINDER KAUR, husband and wife;
KENT VALLEY APT., LLC, a Washington Limited Liability Company,

Respondents.

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BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves two sophisticated businessmen, Kamaljit Singh (“Kamaljit”)¹ and Harbans Grewal (“Harbans”),² who went into business as joint owners of an LLC. This was part of a multi-year project to develop and build a 32 unit apartment building with 10,000 square feet of retail space on the ground floor.

When the economic recession of 2009-2012 prevented financing and construction of the apartment project, Defendant/Appellant Harbans negotiated a buyout of Plaintiffs/Respondents’ interest in the Kent Valley Apartments, LLC for \$235,000 cash. All of the written agreements reflected a \$235,000 cash payment for the buyout, including the addendum to the agreements prepared by Harbans lawyer.

On December 20, 2010, Harbans met with Plaintiffs/Respondents and one of Kamaljit’s business associates who helped prepare the sale agreements. At these meetings, Harbans promised to give Plaintiffs/Respondents a \$235,000 check after they signed.

Harbans also told his attorney the buyout was for \$235,000 cash when the attorney prepared an addendum to the December 10, 2010 buyout agreements. Harbans met with Kamaljit’s wife, Harminder, and Manmohan

¹ Due to the common surname “Singh”, Kamaljit Singh will be referred to as “Kamaljit.”

² Due to the common surname “Grewal”, Harbans Grewal will be referred to as “Harbans.”

Grewal (“Manmohan”) on January 11, 2011 to have the addendum signed and notarized. Manmohan was another one of Kamaljit’s business associates who was present when Harbans gave the \$235,000 check to Harminder at the January 11, 2011 meeting.

All the parties in this case acknowledge the check was written on a closed account. Harbans denied that he promised to or gave Harminder the \$235,000 check. Harbans claimed that the check had been stolen and forged by Plaintiffs. At or about the same time that Harbans gave the \$235,000 check to Harminder, he recorded a \$675,000 deed of trust against the LLC property and in favor of Harbans wife, Jasbir.

The trial court properly held that defendants defrauded plaintiffs by giving them a check on a closed account while contemporaneously recording a deed of trust against the LLC property. Further, the court properly held that these were fraudulent transfers. Harbans recorded the deed of trust against LLC property without authority under the LLC agreement. The court also found that there was no credible evidence that the deed of trust had been given for reasonably equivalent value. The encumbrance of the LLC’s sole asset conferred no benefit on the LLC, and it reduced the LLCs assets so that its assets were unreasonably small in value in relation to the business for which the LLC had been formed, as well as beyond the LLC’s ability to pay.

Defendants/Appellants, in their Opening Brief, struggle to create an

“appealable issue” where none exists. The use of a translator(s) for Harbans and Kamaljit’s testimony was in accordance with advance agreement of the parties and confirmed repeatedly in open court on the record. Defendants/Appellants and their counsel believed that approach was the best means of presenting their case. Throughout the trial, the trial judge gave the business litigants and their counsel the latitude to put forward their proofs in the manner the defendants deemed most advantageous to them. Accordingly, defendants had no reason to and did not object to, use of the interpreter(s) as agreed. Defendants cannot take an inconsistent position from that agreed to during the trial, so that they might now try to invite “error” on the part of the trial court. An interpreter(s) was present and available throughout the trial. Defendants have waived any right to now raise an objection for the first time on appeal, to a procedure they agreed to.

The record shows that the witnesses were communicating effectively with counsel and the court throughout the trial. The court required counsel and witnesses to clarify for him any ambiguity pertaining to questions and answers.

The record reflects that Harbans and Kamaljit are fluent in English and neither required nor used translators in their day-to-day business transactions. Accordingly, neither of them needed an interpreter for their communications with counsel at trial. Neither of the attorneys performing direct or cross

examination ever needed or requested use of an interpreter.

Further, the record contains ample support for the courts findings and ruling, independent of Harbans and Kamaljit's testimony, which is the sole basis of defendants' newly raised objection on appeal. Most significantly, defendants do not identify a single point of "confusion" by the judge that led to a material error in the findings or ruling. Instead defendants simply argue the judge ruled against them, so he must have been "confused."

The other "errors" that defendants contend the trial court committed relate to defendants' untimely proffered "evidence" that the trial court judge concluded would not have changed his ruling. The court in some instances weighed the need for further evidence and found that the untimely submissions were duplicative and therefore of little to no additional probative value when weighed against the prejudice of additional cost and delay of admitting the testimony or records that had not been disclosed until trial or after the trial was concluded. It would have caused undue expense and delay to allow plaintiffs to conduct further discovery in conjunction with defendants' untimely submissions. Or to re-open the case for further testimony that would not have been dispositive. As noted above, there is ample evidence elsewhere in the record to support the courts findings and ruling.

II. ISSUES RELATED TO APPELLANTS' ALLEGED ASSIGNMENT
OF ERRORS

A. Are Defendants/Appellants barred from objecting to their own agreed upon use of an interpreter(s) and for the first time on appeal?

B. Are Defendants/Appellants barred by their agreements, their direction to the court, and their own tactical waiver from now inviting error by the trial court?

C. Should the trial court be affirmed based upon other ample evidence on the record and regardless of the alleged error regarding the agreed upon use of interpreters?

D. Should the trial court be affirmed because Defendants/Appellants alleged "error" regarding use of the agreed upon interpreters is without merit?

E. Should the trial court be affirmed because it properly excluded phone records that were not timely submitted and based on a defective offer of proof, and that would not have changed the trial court's finding or ruling and were otherwise supported by the evidence?

F. Should the trial court be affirmed because it properly refused to reopen the case to permit alleged testimony of a bank manager with no personal knowledge of the check and purportedly to the effect that generally "account closed" stamps have not been in use by the bank?

G. Should the trial court be affirmed because it properly awarded costs and attorney's fees citing to each of the factors in RPC 1.5(a) after an extensive review of the entire docket including all pleadings, motions and exhibits and counsel's billing records and summaries contained in the motion and defendants objections?

III. STATEMENT OF THE CASE

A. Factual Background.

1. Overview of the Parties and the Transaction.

Plaintiffs-Respondents Kamaljit Singh and Harminder Kaur are husband and wife. RP 249. Kamaljit has been a contractor and real estate developer in South King County since 1988 and has developed and built multiple residential and commercial real estate projects. RP 123-134.

In 2006, Kamaljit and another business partner acquired the real property that later became part of Kent Valley Apartments, LLC. RP 131-133. The site plans provided for a three-story building with 32 residential units and 10,000 square feet of retail space. RP 133-135. Kamaljit and his partner approximately \$800,000 in development of that project. RP 134. When Kamaljit bought out his partner in 2008, they put title to the property in the name of his wife, Harminder. RP 139. When Kent Valley Apartments, LLC was formed, she was listed as the 100% sole owner. Ex. 5.

Defendants-Appellants Harbans Grewal and Jasbir Grewal are husband and wife and are Canadian citizens residing in Abbotsford, BC, Canada. RP 598. Harbans Grewal owns an electrical contracting company and has been licensed since 1988. RP 588, 632, 633. He owns six companies. RP 686. Jasbir has been in business for herself since at least 1992 or 1993 when she started a company that sold lighting and all related components. She currently owns a grocery store. RP 589. They also own real estate investments including interests in a Canadian company that owns and rents commercial buildings. RP 608.

Kamaljit met Harbans in the summer of 2009. RP 281. They discussed Harbans' intention of opening a business in the United States and investment in real estate. RP 282, 283. In September of 2009, they decided to become partners in the Kent Valley Apartments, LLC project. RP 283, 284.

As noted above, Kamaljit's wife, Harminder was listed as 100% owner of Kent Valley Apartments, LLC. Ex. 5. Harbans decided to purchase 50% of the ownership interest in the LLC and to put that ownership in the name of his sister, Harjit Gill. RP 598. Harbans held a power of attorney, authorizing him to act as attorney-in-fact for Harjit. RP 64, 149, 152-153, 860-861. Ex. 61.

Although Harjit and Harminder were the actual named owners of

the Kent Valley Apartments, LLC, Harbans and Kamaljit acted as de facto owners of, and partners in, the LLC. RP 157-158, 1052-53. In fact, as of several months before trial, Harjit had never seen any of the LLC documents. RP 461.

In September of 2009, Harbans purchased a 50% ownership interest in the LLC (in Harjit's name) for \$235,000. RP 84, 153, Ex. 9. Harbans wired the funds on September 15, 2009 (Ex. 10) and December 7, 2009 (Ex. 20). Therefore, Harjit and Harminder became 50-50 owners in the LLC.

Later, when the economic recession of 2009-2012 delayed financing and construction of the apartment project, Harbans negotiated a buyout of Kamaljit and Harminder's interest in the LLC for payment of another \$235,000 cash. RP 163, 164, 176-177.

On December 20, 2010, Harbans met with Kamaljit and Harminder and told them he had a \$235,000 check to purchase the 50% interest in the LLC after they changed the LLC ownership records in Olympia. RP 177. They went to the Secretary of State's office in Olympia on December 20, 2010 and filed an Amended Annual Report, reflecting that Harjit was the sole member of the LLC and Harbans was the new registered agent for the LLC. RP 177-178, Ex. 73.

When Kamaljit asked for the check upon leaving the Secretary of State's office, Harbans told him that he wanted sale documents prepared

and signed, then Harbans would give Kamaljit the \$235,000 check. RP 178-179.

2. All of the Non-Party Witnesses, Written Agreements, and E-Mail Corroborated the Agreement for \$235,000 Cash Sale Price and Payment by Check.

Later on that day, December 20, 2010, after Kamaljit and Harbans had returned from Olympia, they went to the home of Sabir Khan (“Khan”) in Kent and asked him to prepare forms of agreements that they could use to memorialize the terms of Harminder’s sale of her 50% interest in the LLC for payment of \$235,000. They told Khan what they wanted and Khan prepared the documents on his computer. RP 178-180, 184, 513-515. Harbans told Khan that he needed the documents signed before he could release any of the purchase money to Kamaljit. RP 521.

The agreements that were signed on December 20, 2010 were: (1) the above-described Amended Annual Report for the LLC reflecting that Harbans’ sister, Harjit Gill, would be the sole member and owner of the LLC (Ex. 73); (2) a one page document titled “Agreement between Harjit Kaur and Harminder Kaur” providing for payment of \$235,000 cash for Kamaljit and Harminder’s remaining 50% interest in the LLC (Ex. 25); (3) a Spouse’s Delegation of Rights signed by Kamaljit (Ex. 26); and (4) an amended Operating Agreement for the LLC (Ex. 28) reflecting that Harjit was the sole owner of the LLC.

Kamaljit, Harbans and Harminder went to a Kent branch of U.S. Bank to have the agreements signed and notarized. RP 186. Afterward, Kamaljit again asked for the \$235,000 check. Harbans told Kamaljit that the agreements were defective, that names were transposed at different places in the agreements, and that the notarization sections were defective. RP 189, 190, 674-675. Harbans wanted his attorney to review the paperwork. RP 190, 674-675. He said he would then pay the \$235,000. RP 190.

From December 20, 2010, and into January of 2011, Harbans contacted Kamaljit repeatedly and requested additional information to be provided so that they could “complete the deal.” Trial Ex. 27, 29, 30, 31, 32, 33. RP 190-198; RP 644-648. Harbans’ request for information to “complete the deal” is inconsistent with his testimony that payment had already occurred by “forgiveness” of a prior “cash loan” in India and that Kamaljit had already agreed (in June 2010) to transfer the LLC ownership if the “loan” was not repaid by December 20, 2010. RP 644-645, RP 655.

Further, Kamaljit restated the requirement for cash payment to complete the deal, in one of his emails to Harbans. RP 681; Ex. 36. Harbans did not “correct” Kamaljit by telling him the transfer was for “forgiveness of debt.” Harbans said this was because “he did not want to fight.” RP 684.

On or about December 21, 2010, Harbans retained John Meenk, a

lawyer in Lynden, Washington, to review the documents relating to Harjit's purchase of Harminder's interest in the LLC (Trial Ex. 25, 26, 28). RP 654-657.

Based on his conversations with Harbans, Meenk testified that he believed that the agreement with Harjit was for payment of \$235,000 cash for Harminder's 50% interest in the LLC and that occurred sometime on or before December 20, 2010; and that Harjit had therefore paid a total of \$470,000 cash for the entire 100% interest in the LLC. RP 407-408.

Harbans did not state to Meenk that there was any non-cash consideration that Harjit had exchanged for the additional 50% interest in the LLC, i.e., an alleged \$235,000 "cash loan" in India that had also allegedly been forgiven. RP 408-413; RP 702-703; RP 1036-1037. Harbans acknowledged that none of the contracts, email, correspondence or over 100 trial exhibits mention a cash loan of \$235,000 or "forgiveness" of that loan. RP 1037.³

³ Harbans testified the loan was in cash, transferred in India, "in a bag." RP 933. When asked for the source of the \$235,000 cash for the loans, Harjit testified it came from sale of real estate and loans from a real estate broker. RP 475-476. She testified there were no escrow or other documents evidencing that any of these transactions ever occurred. And they were all "cash transactions" too. RP 475-476. Harjit testified that the real estate broker required security documents for his cash loan to her, but she did not keep them. RP 476. The only other documented financial transactions between the parties related to: 1) exchange of checks to avoid a check clearance delay (Exs. 17, 18) RP 233; 2) when Kamaljit gave Harbans a signed blank check to purchase construction materials for a project (Ex. 16) that Kamaljit was working on in Kent and for which Harbans had supplied cost estimates. Ex. 14, RP 633. Harbans told Kamaljit he had destroyed the check, but Harbans did not. RP 226-232; RP 234-241. Harbans instead filled out the check and said

Meenk drafted an “Addendum to Purchase and Sale Agreement” (“Addendum”) (Trial Ex. 34), which was intended to clarify, amend and supplement the terms of the written Agreement between Harjit Kaur & Harminder Kaur (Ex. 25). RP 417-418; RP 1035-1036.

In drafting paragraphs 5 and 7 of the Addendum (Ex. 34), Meenk assumed that Harjit had paid \$235,000.00 cash for the additional 50% interest in the LLC to Harjit when he wrote:

5. The obligations to be paid by Harminder Kaur may be paid on her behalf by Harjit Kaur and those amounts deducted from *Harminder Kaur’s proceeds from the sale of her interest* in Kent Valley Apt. LLC.

7. *Harjit Kaur has paid to Harminder Kaur a total of \$470,000* for Harminder Kaur’s interest in Kent Valley Apt. LLC and the Property. [emphasis added]. RP 416-418.

At Harbans’ request, Meenk also drafted a \$675,000 Promissory Note (“Note”) (Ex. 39) for signature by Harjit, payable to Harbans’ wife, Jasbir Kaur Grewal (“Jasbir”); and a related Deed of Trust (Ex. 40) against the LLC’s Property, securing the Note, to be executed by Harjit. RP 414-415. The Deed of Trust states that Harjit is the “sole member” of the LLC. Ex. 40.

On January 8, 2011 (one day after Kamaljit had left the United States for a several-week trip to India), Harbans contacted Kamaljit’s wife,

it was a post-dated check given to him by Kamaljit for the “cash loan,”; 3) Finally, Harbans wired money on December 29, 2009 to pay for his share of maintenance, taxes and assessments for the LLC. Ex. 22. RP 245-247.

Harminder, and told her that he was ready to deliver to her the \$235,000 check for the purchase of Harminder's 50% interest in the LLC. RP 85-86.

On that same day, January 8, 2011, Harbans went to Harminder's home to meet with her. Those present at the meeting included Harbans, Harminder, Harminder's parents, and Manmohan Grewal ("Manmohan"), who was a business associate of Kamaljit. Manmohan briefly reviewed the Addendum (Ex. 34); RP 837-838. Harbans gave the \$235,000 check (Ex. 35) to Harminder and Harminder showed the check to Manmohan. RP 86-87; RP 833-834.

Manmohan, Harbans and Harminder went to a UPS store to sign the Addendum in front of a notary public (Ex. 34). RP 88; RP 840. Harbans signed the Addendum in his capacity as attorney-in-fact for his sister Harjit.

Harbans requested that Harminder not deposit the \$235,000 check drawn on Harjit's bank account and explained that he had to wire sufficient funds to Harjit's bank account in the next few days to cover the check. Harminder agreed to hold the check. RP 88.

On January 25, 2011, Harjit signed the \$675,000 Note (Ex. 39) payable to Harbans' wife, Jasbir; and Harjit also signed the Deed of Trust (Ex. 40) against the LLC's Property, securing the Note, as the "sole member" of the LLC. RP 472.

No credible evidence was presented at trial to support the Defendants'

contention that Jasbir advanced a reasonably equivalent value to Harjit in exchange for the \$675,000 Note. No evidence of the “indebtedness” was provided to Meenk when Harbans asked him to draft the Note and Deed of Trust. RP 414-415. Jasbir testified that she kept an account of amounts “owed” by Harjit, but she “can’t find it.” RP 590. Harjit only signed the Promissory Note and Deed of Trust because “Jasbir asked her to.” RP 472. Harjit had “no idea” why the \$675,000 amount was inserted in the agreements and it could have been “any other amount.” RP 473.

On February 18, 2011, Harbans’ attorney, John Meenk, caused the Deed of Trust to be recorded against the LLC’s Property under King County Recorder No. 20110218001102. The Deed of Trust was recorded without notice to the Plaintiffs and without Harminder’s authorization. RP 91-92.

In late February 2011, Kamaljit returned to Seattle from India. After unsuccessfully attempting to contact Harbans to obtain authorization to deposit the \$235,000 check (Ex. 35), Kamaljit and his wife Harminder took the check to a Bank of America branch and presented it for payment. RP 89-90. The teller informed them that the checking account (the check was written on an old “Seafirst Bank” account) had been closed, and that the check therefore could not be honored. *Id.*

About the same time, Kamaljit and Harminder discovered that Harbans’ lawyer had caused the Deed of Trust to be recorded against the

LLC's Property. RP 91-92.

In March or April 2011, after attempting unsuccessfully to contact Harbans regarding the dishonored check, Harminder and Manmohan traveled to Abbotsford, British Columbia, and visited Harbans and his wife Jasbir at their home. RP 91-92; RP 816-818.

When confronted with the issue of the dishonored check, Harbans and Jasbir told Harminder and Manmohan that Harjit no longer wished to go through with the purchase of Harminder's 50% interest in the LLC. *Id.* They urged Harminder to cause the LLC to sell the Property and split the net sale proceeds pursuant to the members' respective interests as stated in the September 2009 LLC Operating Agreement (Trial Ex. 9); and they stated that they would cause the \$675,000 Deed of Trust to be reconveyed and released from the Property at the time of closing. *Id.*

On April 19, 2013, Jasbir executed a document entitled, "Assignment of Beneficiary's interest in Deed of Trust" ("Assignment") (Trial Ex. 41), by which she purported to assign to Satwinder Sharma ("Sharma"), as security for a loan, her beneficial interest in the \$675,000 Deed of Trust (Trial Ex. 40). The Assignment was recorded under King County Recorder No. 20130419000895.

No evidence was presented to show that Jasbir endorsed over to Sharma the \$675,000 Note (Trial Ex. 39) that is referenced in the Deed of

Trust (Trial Ex. 40). RP 602.

Sharma testified that he loaned money to Jasbir and the Deed of Trust (Ex. 40) was collateral for that loan. However, Sharma performed no due diligence regarding title to the Kent Valley Apts. LLC Property and was on constructive notice of the disputes regarding the allegedly fraudulent Deed of Trust, based on numerous recorded documents and a duty of inquiry.

B. Procedural Background.

1. The Defendants in This Business Dispute Agreed to and Instructed the Court as to Preferred Procedures for Use of an Interpreter(s) and Accordingly Never Objected to Those Procedures Throughout the Entire Trial.

At the beginning of trial, counsel for the parties explained to the court their desire to follow an agreement to use interpreter(s) in the manner they determined was best suited to present their respective cases. RP 10-14. The parties had established, based on strategic consultation with their respective counsel, that their agreed upon use of an interpreter(s) would lead to less delay and expense for the litigants, but would also provide a resource to best submit their evidence.

The trial judge confirmed with the interpreter that this was a beneficial approach to be followed and asked whether the entire proceeding should be interpreted. RP 11-12. Defendants' counsel again conferred with his clients in the courtroom and reconfirmed their decision as to how to best present their

case:

THE COURT: And do we need to interpret my questions and answers prior to the trial, then?

MR. PHARRIS: No, I don't believe so, Your Honor.

MR. LEININGER: Can I just inquire?

THE COURT: Yeah, why don't you go ahead and talk to your client.

MR. PHARRIS: Typically, we have -- since we have our family members interpreting for those who aren't as fast.

MR. LEININGER: Well, we're going to -- my one client, Harjit Gill, she basically doesn't grasp English well. But my other client's going to try and keep her apprised of what's going on. She does speak both languages. It's about the best we can do, Your Honor.

THE COURT: Okay. So we're going to use the interpreter only when we -- when somebody requests it during the trial. Is that basically how it's going to work? And your clients will interpret for each other as needed?

MR. LEININGER: Yeah. And my client, Harjit Gill, will need full interpretation when she's on the stand.

THE COURT: Right. Okay. Well, let's swear in the interpreter first.

RP 13-14.

Accordingly, Defendants never objected to use of interpreter(s) throughout the trial. But whenever they did perceive a need, or the court desired an interpreter, one was used. And an interpreter was present and/or available throughout the proceeding. Neither counsel ever required or requested the use of an interpreter for direct or cross-examination. But whenever a witness or the court made a request, the interpreter was available and used. The record reflects everyone understood what was being said.

The trial court placed no restrictions whatsoever on the length of trial

and made great efforts to insure the parties had every opportunity to explain their positions. The questions and answers posed by the court and counsel reflect the judge understood the testimony and required clarification if there was any ambiguity.

Defendants, in their attempt to raise an appealable “issue”, seize on a number of colloquies that occur in any trial where the proffered evidence or testimony requires clarification and the court obtains that clarification. Appellants’ Opening Brief, P. 11. In every instance the trial court insured that what was being presented was understood. This of course will not insure that the trial judge will agree with the position taken by defendants at trial, and he did not. Defendants fail to cite any specific instances where the witness said one thing and the court materially misinterpreted the testimony in his findings or ruling. Instead, Defendants simply complain that the court’s ruling is wrong, despite ample supporting evidence on the record.

Defendants are barred from objecting to the agreed trial procedures, and in order to then attempt to invite error by the trial judge for following their requested procedures and of course without a single objection during the entire seven day trial.

IV. ARGUMENT

- A. Defendants/Appellants Are Barred from Now Objecting for the First Time on Appeal to Their Agreed Upon Use of an Interpreter(s).

The appellate court should not, and has held it “will not” consider an issue raised for the first time on review. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). (“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them”); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) (“an issue theory or argument not presented at trial will not be considered on appeal.”)

The primary reason for the general rule is judicial economy. In *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988) the court noted:

“The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.”

In *Smith v. Shannon*, 100 Wn.2d. 26, 37, 666 P.2d 351 (1983), the Washington Supreme Court also explained:

“The reason for the rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.”

In this case, the trial court throughout the proceeding sought to insure that all parties had adequate time and full opportunity to present their evidence in the manner they believed best suited to persuade the court of the merits of their position. The court placed no time restriction on the trial and engaged in questioning to insure the testimony of each witness was clearly understood by

the court. Defendants have not cited one instance where the trial court misunderstood some material part of a witness's testimony and therefore entered an incorrect finding or ruling. Defendants never objected that the court was not properly receiving the testimony and never gave the court an opportunity to make any change in procedures. It is improper for Defendants, well-heeled business persons, to now object to procedures they never complained about to the judge, and that they designed with their counsel for their best strategic advantage. Yet, the court expressed every willingness to accommodate them if they had requested it.

Further, it is unfair to the court and Plaintiffs/Respondents for Defendants to fail to make any effort to raise the argument of alleged "error" by the trial court in light of the cost of a new trial and the subsequent receivership proceedings to sell the real property and distribute proceeds in accordance with the LLC Agreement and the court's order(s).

The policy of the Rules requires clear and unmistakable error at the trial court. Defendants are barred from raising this "issue" for the first time on appeal. Defendants, by their agreements and direction to the court, invited the alleged error and are similarly barred from appeal for the same reasons.

B. Defendants Are Barred by Their Agreements, Direction to the Court and Own Tactical Waiver from Inviting Error of the Trial Court.

Defendants cannot properly seek review of an alleged error which they

invited by their agreements and direction to the court. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 684 P.2d 692 (1984); *Johanson v. Centralia*, 60 Wn. App. 748, 749 n.1, 807 P.2d 376 (1991).

The doctrine of invited error applies even if the error is of constitutional magnitude (it is not in this case). *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). (refusing to review claim of constitutional error in jury instruction that defendant had requested at trial).

Similarly, because Defendants chose for tactical reasons the agreed upon method of using the interpreter(s), they cannot claim error, even on constitutional grounds, in the trial court. See *State v. Donahue*, 39 Wn. App. 778, 781-82, 695 P.2d 150 rev. denied, 103 Wn.2d 1032 (1985) where defendant waived his right to argue that certain evidence was improperly admitted where defense counsel admitted at oral argument he had consciously forgave that argument at trial for tactical reasons. See also, *State v. Valladares*, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983), involving defendant's affirmative withdrawal of a motion to suppress evidence.

Where a defendant proposed a jury instruction defining a critical term and stated that the instruction was a correct statement of the law, the defendant could not argue on review that there were no facts before the jury to find the evidence of the critical term based on a different definition than that in defendant's instruction. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246,

256, 840 P.2d 860 (1962). In this case, Defendants believed their use of the interpreter(s) was their best tactical means of presenting their case. They cannot now assert the trial court committed “error” by adopting their requested procedures. Further, this “issue” would not have affected the judge’s ruling.

C. The Trial Court Must Be Affirmed Based on Other Ample Evidence in the Record and Regardless of the Alleged “Error” as to the Agreed Upon Use of Interpreter(s).

Although Defendants have not cited to one material instance where Harbans or Kamaljit’s testimony was misconstrued by the trial judge, it would not matter. There is ample other evidence on the record to support the judge’s findings and ruling and as detailed in Section I above.

If a litigant is deemed to have waived its right to appellate review by failing to raise an issue in the trial court a trial court will usually be affirmed where there is any basis for sustaining its decision. In *Gross v. Lynnwood*, 90 Wn.2d 395, 401, 583, P.2d 1197 (1978), the court stated: “We are committed to the rule that we will sustain the trial court’s judgment upon any theory established by the pleadings and supported by the proof.”

One reason for this doctrine of affirmance on other grounds is that if an appellate court finds an alternate basis for the trial court’s decision, it must be assumed that the trial court would make the same decision if the case were remanded. It would be pointless to reverse and remand a case for that purpose.

D. Even If Defendants’/Appellants’ Argument Based on “Error” as to the

Agreed Upon Use of Interpreter(s) Is Considered by the Court (It Should Not Be) the Defendants' Argument Is Without Merit.

For all of the foregoing reasons set forth in Sections A-C above, Defendants/Appellants are not entitled to review based upon their agreed upon use of interpreter(s).

Nonetheless, Defendants/Appellants' argument is without merit. "[T]he appointment of an interpreter is a matter resting in the discretion of the trial court, to be disturbed only upon a showing of abuse." *State v. Trevino*, 10 Wn. App. 89, 94-95, 516 P.2d 779 (1973); *State v. Kovich*, 130 Wn. 243, 246, 226 P.2d 1016 (1924); *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999).

In this case, defendants/appellants have failed to show the trial court abused its discretion by making a "manifestly unreasonable" decision, exercised discretion on "untenable grounds" or on "untenable reasons."

Neither Kamaljit Singh nor Harbans Grewal "are unable to readily understand or communicate in the English language." Both understood completely the questions posed to them by counsel in English. RCW 2.43. And it is clear from the record that both counsel could understand them and engaged in lively back-and-forth during examinations. Neither attorney ever requested the assistance of an interpreter.

Moreover, the court made it clear that any witness or counsel could at

any time use the interpreter who was appointed to assist all witnesses “throughout the proceedings.” RCW 2.43.030(1). The court complied with the statute and had the interpreter available throughout the proceedings. Even when the witnesses chose not to use the interpreter, the court at times exercised its discretion and requested the interpreter to assist him if he felt it was beneficial or appropriate. And the court took the time on every occasion where it appeared the record might be confused due to two or more persons talking at the same time or an ambiguous response, to clarify the matters being testified to.

Defendants/Appellants complain that Mr. Singh repeatedly “answered in English” rather than using the interpreter. Defendants/Appellants Brief, p. 17-18. The interpreter repeated all English responses that were not simply “yes” or “no” or “ok” or the like. In fact almost every one of Kamaljit’s untranslated English responses was limited to one word answers or short phrases, in most cases, “no” or “yes” or “yeah.” A few non-exclusive examples are: RP 131, 133-134, 137-138, 140, 143, 149, 153, 155, 156-158, 160-162, 164, 177-179, 185-190, 192, 193, 195, 197, 203, 206-208, 210, 212, 218-220, 222, 224, 226-227, 230-231, 234-235, 240- 241, 244-250, 254-255, 260. But the rest of his untranslated trial testimony is similar. Further, Defendants/Appellants’ complaints concerning “inaudible” responses are not evidence the court, counsel or witnesses could not understand a response.

Rather, the court reporter transcribing the transcript could apparently not understand. On many occasions the court reporter also listed counsel or the clerk's statements as "inaudible."

From the context of the questions and answers, however, it is clear the attorneys and the court were communicating with the witnesses and they understood each other. This highlights the problem with Defendants' arguments. Defendants confuse a situation where the court does not agree with the substance of defendants/appellants testimony, as a "failure to understand."

Despite the places where the court reporter could not determine the entire phrase or word, the record is quite clear as to what each witness's testimony is. This is prominently evident by the fact that Defendants/Appellants have failed to cite to a single material misunderstanding in the record that was not almost immediately clarified. The trial judge stated after Harbans' first day of testimony, "I can understand him very well." RP 663.

A full review of the entire record and the ample evidence supporting the Court's findings and ruling indicate the Defendants/Appellants had a full "opportunity to be heard in a meaningful manner." The judge understood their position completely and simply did not agree with it. Defendants/Appellants' untimely objection is limited to Kamaljit and Harbans' testimony. The other

parties to the lawsuit used the interpreter at all times. Harbans Grewal testified for many hours over the course of three (3) different days. The trial judge made no attempt to limit the amount of any parties' testimony and in fact in numerous instances questioned them or asked counsel to clarify in order to insure he understood the witness's testimony completely. Again, Defendants/Appellants have not cited to one instance where the trial judge failed to understand their testimony. Defendants/Appellants' other claimed "errors" for untimely evidentiary submissions are without merit as well.

E. The Trial Court Properly Excluded Phone Records That Were Not Timely Submitted and Based on a Defective Offer of Proof, and That Would Not Have Changed the Trial Court's Finding or Ruling and Were Otherwise Supported by the Evidence.

The trial court properly excluded phone records that were never produced in discovery or disclosed prior to trial, despite a one (1) month delay in commencement of the trial. The trial court explained that it would weigh the prejudice of admitting the records against "the probity" and "relevance" of the documents. RP 25-26.

In his offer of proof, Defendants' counsel stated that the records were for the period "of basically 2009, May through September." RP 23. There is no dispute that the parties had multiple phone calls during May-September 2009, when they first became acquainted and negotiated an agreement. Both Harbans and Kamaljit testified as such. RP 140-141; 143; 845-846; 850; 852-

854.

The second time defendants/appellants' counsel proffered the phone records the court asked:

THE COURT: Are these just phone records showing a call made from a phone number to a phone number?

MR. LEININGER: Yes.

THE COURT: I've heard testimony that there were numerous phone calls made and I'm willing to accept that. I haven't heard any contradiction of that, so – and I'm not sure how seeing some records of phone calls from one number to another would deepen my understanding or really increase my knowledge. I mean, I – unless I hear testimony contradicting it, I'm – it's undisputed that the parties negotiated between when they first met in July and then more urgently in September – August and September. And they inked the deal, they signed a deal on November (September) 14th. So all your points are made. I don't know if adding the exhibit is really going to help your record.

MR. LEININGER: Okay. Thank you, Your Honor.

RP 859. (Parenthetical notation added).

Later defendants counsel again requested that the phone records be admitted. This was at the November 14, 2014 hearing when the court entered its findings and conclusions. This time, counsel indicated the phone records covered a different time period 2009-2011, versus his prior representation of May-September of 2009.

The trial judge again reiterated:

THE COURT: Regarding the phone records, I did take – I think there was testimony about multiple phone calls. I don't see how admitting

the phone records at this time would have any significant effect on the outcome of the case. So I think I have addressed – I may have missed some of it.

There was – it's true that not everything totally lined up, not everyone's memories were 100 percent accurate or I should say, you know, had 100 percent recall. That's never the case in any trial, but I was satisfied that the findings I did make are supported by the evidence in the manner indicated in the findings, so I will hit print again.

RP 11/14 hearing at 18-19.

Defendants' original offer of proof was defective as to what was being submitted. "[I]t is the duty of a party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid the court, then the appellate court will not make the assumptions in favor of the rejected." *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 617 P.2d 1156 (1998). Defendants cannot argue error at trial based on their defective offer of proof of records for only May-September of 2009 versus now May, 2009 – 2011. Nonetheless, the trial court concluded that the phone records would have been cumulative of prior testimony and would not materially change his findings or ruling.

The trial court properly weighed the prejudice of incurring the time and expense of allowing plaintiff's counsel to conduct discovery during trial, regarding the untimely documents. This was weighed against the probative value and prejudice to defendants of not allowing the documents. The court

accepted all of the testimony regarding the many, many phone calls that defendants testified to. And the cost and delay of allowing discovery on the issue during trial (the only reasonable alternative).

The excluded phone records were merely cumulative so exclusion was not prejudicial to defendants. Courts traditionally apply harmless error analysis to exclusion of cumulative evidence. *Jones v. City of Seattle*, 179 Wn.2d 322, 356, 314 P.3d 380 (2014); *Latham v. Hennessey*, 13 Wn. App. 518, 535 P.2d 838 (1975) *aff'd*, 87 Wn. 2d 550, 554 P.2d 1057 (1976).

The Court of Appeals should also uphold the trial court's ruling based on the well-recognized principle that "on appeal, an order may be sustained on any basis supported by the record." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 quoting *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991); *LanMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

The proffered phone records would not alter the court's findings that defendants agreed to pay \$235,000 cash for plaintiffs' LLC interest, Harbans gave them a check on a closed account, then recorded an unauthorized and fraudulent deed of trust against the LLC property. Nor would those records rebut the corroborating testimony of Manmohan Grewal who saw him deliver the check; or Sabir Khan who discussed with Harbans his promise of cash payment upon signing sale documents and later agreement to release the deed

of trust in exchange for payment of his total \$235,000 investment. And Harbans' own attorney who drafted the Addendum based on two \$235,000 cash payments (totaling \$470,000).

Defendants' counsel at trial only offered records from May-September of 2009 and then, after trial for the first time broadened that request. In any event, the proffered evidence was merely cumulative and not probative and was properly rejected based on the lack of prejudice to defendants. Defendants falsely assert that Plaintiffs' counsel "misrepresented" a discovery stipulation (in response to a motion to compel discovery) by trying to argue the precise terms of the stipulation may not have required the phone records to have been produced on April 18, 2014 (5 months before trial). But all documents supporting defendants' defenses, affirmative defenses and counterclaims had been requested in discovery. Plaintiffs' counsel was making the point that considerable effort had gone into obtaining all documents by April 18, 2014. RP 24. Plaintiffs' counsel explained they "had problems with discovery very early on in this case . . . and those were never produced . . . we never had any chance to do discovery with respect to these documents. That's really the fundamental problem. It's not just submitting them at this time." RP 25. The stipulation referred to defendants' second amended responses (there were 5 or 6 amended responses). In any event, it was assumed all other documents had been produced. The fact that specific

items had not been received by the April 18, 2014 stipulation date was also applicable. All documents should have been produced. And further, none of the phone records were listed as trial exhibits and for more than six (6) weeks prior to trial when exhibit lists were prepared.

The trial court based its decision on the fact that it was unfair and prejudicial to plaintiffs and weighed against the fact that the records would not add any new or substantial evidence and in fact ultimately would not change the court's findings or ruling. The court properly exercised its discretion. Even if defendants' argument had any merit (it does not), the trial court's ruling would be at most deemed "harmless." This is because the proffered records were cumulative, and ample evidence supported the trial court's findings and ruling. *See, Jones*, 179 Wn.2d at 356, and *Burnet*, 131 Wash.2d at 493.

F. The Trial Court Properly Refused to Reopen the Case to Permit Alleged Testimony of a Bank Manager With No Personal Knowledge of the Check and Purportedly to the Effect That Generally "Account Closed" Stamps Have Not Been in Use by the Bank.

After trial was concluded, Defendants sought permission to reopen evidence to permit testimony from a Bank of America bank manager that "Account Closed" stamps have not been in use by the bank. The trial judge properly denied the request because defendants had already submitted a declaration containing the proposed testimony, the court considered the

evidence and stated that “I understand the testimony or whatever it is, the declaration but I don’t think that is sufficient to change my finding.” RP 11/14 hrg. at 19. Therefore, the court effectively allowed the evidence, considered it, and concluded that it would not have changed his ruling.

The bank manager’s testimony as to general practices would not have been specific as to the particular check that Harbans gave to Harminder (Ex. 35). Nor was the bank manager’s testimony offered as to any personal knowledge at all concerning who stamped the check “account closed.” That would have to come from the bank teller that the Plaintiffs/Respondents presented the check to.

Further, as noted by the court, “I don’t think there is any doubt the account was closed . . .” Therefore, the court ruled that the declaration would not change his findings. *Jones v. City of Seattle* at 356; *Burnet*, 131 Wn.2d at 493.

G. The Trial Court Properly Awarded Costs and Attorney’s Fees Citing to Each of the Factors in RPC 1.5(a) and After an Extensive Review of the Entire Docket Including All Pleadings, Motions and Exhibits and Counsel’s Billing Records and Summaries Contained in the Motion and Defendants’ Objections.

After one and a half years of litigation, and a 7 day trial, Plaintiffs/Respondents were granted judgment on all of their claims and in addition the court dismissed all of Defendants/Appellants’ counterclaims. Defendants/Appellants have acknowledged that Plaintiffs/ Respondents as

prevailing parties under the relevant contracts were entitled to an award of attorney's fees and costs.

An appellate court will uphold an attorney fee award unless it finds that the trial court manifestly abused its discretion. A trial court has broad discretion in determining the amount of attorney's fees to be awarded, so long as that award is reasonable and based on tenable grounds. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 666, 935 P.2d 555 (1997). Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Chuong Van Pham v. City of Seattle*, 159 Wash. 2d 257, 538, 151 P. 3d 976 (2007).

In making his ruling on Plaintiffs/Respondents' attorney fee award, the trial judge stated that he had reviewed all of the pleadings, motions and files listed in the docket on the electronic filing system "several times preparing for the case, during the case and again after." RP 11/14 hrg. at 13. The judge stated that he also reviewed the billing records to evaluate the work that was done. RP 11/14 hrg. at 13-14. Of course the judge conducted the seven day trial and post-trial hearings and the court reviewed the motion, defendants objections, all affidavits and heard supplemental argument from defendants/appellants' counsel. RP 11/14 hrg. at 5.

The trial judge then recited his application of each of the factors set forth in RPC 1.5(a) and that are incorporated into the controlling appellate

decisions. In doing so, the court at the same time encompassed and dealt with each of the Defendants/Appellants objections to the fees and costs where they arose under those same factors.

A verified statement of the attorney's fees and costs, including expert witness fees and mediation fees, was submitted with the motion, which included a list of services rendered and itemized by date, number of hours, detailed summary of tasks performed, rate, and attorney's name, evidence of reasonableness of rate, and costs incurred. CP 1703-1753. The judge concluded that, based on his review of the billing statements: "I do think there were detailed descriptions of time and labor." RP 11/14 hrg. at 14.

The Declaration that the court reviewed contains details such as the fact that Plaintiffs/Respondents were represented in this action primarily by Danial D. Pharris of the law firm of Lasher Holzapfel Sperry & Ebberson, P.L.L.C. As of October 13, 2014, plaintiffs' attorneys had expended approximately 996.05 hours over the past 1-1/2 years representing Plaintiffs in this case. Plaintiffs wrote off 46.8 of that time or approximately \$11,403 in order to insure billings were fair. The \$11,403 was not included in the motion and the hours are referenced as "no charge." All of the hours expended were in connection with Plaintiffs' claims against defendants that had a common core of facts and related legal theories pertaining to the

Operating Agreement and obligations arising therefrom, the Sale Agreement and Addendum and the contested Deed of Trust. CP 1703-1706.

In the Plaintiffs/Respondents motion and with reference to the billing statements submitted to the court, they provided a description of services rendered and summarized by category the number of hours billed and amounts charged for each of the following categories: 1) pre-filing work; 2) difficulty obtaining service of process and necessity of obtaining court orders for service by mail; 3) pre-trial discovery issues and work; 4) pre-trial motions; 5) work with experts; 6) mediation; 7) trial preparation work pertaining to ER 904 disclosures and objections, witness and exhibit lists, preparation of joint statement of witnesses and exhibits, preparation of trial exhibits, preparation of trial brief and findings and conclusions; 8) conferences with clients and witnesses and preparation for trial including review of deposition transcripts for all direct and cross examination of witnesses; 9) work at and during trial; 10) post-trial briefing pertaining to defendants alleged bona fide purchaser/encumbrancer status; 11) miscellaneous work over the 1-1/2 years the lawsuit was ongoing; 12) work spent on the motion for attorneys' fees and costs, judgment and motion to appoint receiver. CP 1684-1702.

Therefore, it is clear from the record that the judge reviewed Plaintiffs/Respondents' billing records to ascertain whether

Plaintiffs/Respondents sought fees for duplicative, unproductive or excessive work. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). The court also addressed the applicable factors in RPC 1.5(a) including the reasonableness of hourly rates, and in doing so addressed Defendants/Appellants' objections and based on those objections made a \$17,055 reduction in the fees as indicated below.

1. The Plaintiffs/Respondents' Motion Contained Calculation of Hours Billed and Applicable Rates by the Tenth of an Hour for A Lodestar Calculation.

The determination of a reasonable fee begins with the calculation of a "lodestar" figure. *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 351, 279 P. 3d 972 (2012). "Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). To calculate the fee award, the court first determines a lodestar fee by multiplying a reasonable hourly rate by the number of hours reasonably expended. *Bowers*, 100 Wn.2d at 593-94 (citing *Miles v. Sampson*, 675 F.2d 5, 8 (1st Cir.1982)).

After explaining the records that he reviewed, the trial judge then applied each of the factors set forth in RPC 1.5(a) that have been incorporated into the controlling legal decisions and applied his review of the record to those factors and which related to Defendants/Appellants

objections on the same analysis.

2. The Factors Applied by the Trial Judge in His Ruling.

There is no specific list of factors that a court must consider in determining the reasonableness of a fee award. The trial judge did state in his ruling that he “looked at the factors set forth in the motion” RP 11/14 hrg. at 13. The trial judge stated that the factors he applied to the record that he reviewed “are all factors in RPC 1.5(a).” RP 11/14 hrg. at 13. RPC 1.5(a) sets forth nine factors to be considered in determination of whether an attorney’s fee is reasonable, including those factors the court specifically discussed that are most relevant to the attorney’s fee award and Defendant/Appellants objections in this case:

3. The Time and Labor Required, the Novelty and Difficulty of the Questions Involved, and the Skill Requisite to Perform the Legal Service Properly.

In addition to an attorneys usual billing rate, courts may consider “the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney’s reputation, and the undesirability of the case” in implementing the lodestar method. *Bowers*, 100 Wn.2d at 597. This was a difficult, heavily contested case and plaintiffs representation required considerable time and labor to achieve a successful result. The trial judge in making his ruling acknowledged this:

“The novelty and difficulty of issues I think is there. I do think a

request for a receiver, just by way of example, is an extraordinary or at least a very unusual request for relief. I think a request to rescind a deed of trust and a claim and the factual proof and the burden of proof associated with that is also quite high.”

RP 11/14 hrg. at 14.

The manner in which this proceeding was litigated by defendants dramatically increased its ultimate cost, as Defendants sought to make the litigation too expensive for Plaintiffs to pursue. The judge further stated:

“I have – this has been a very hard fought case. I don’t think I have seen one so hard fought in a long time.”

RP 11/14 hrg. at 5.

For example, having successfully avoided service of process in the first lawsuit, they tried the same tactic in this lawsuit. Plaintiffs incurred over \$15,000 in fees and costs trying to serve process on defendants (including Harjit Gill in India) and then after three separate contested motions for service of process by mail which were all granted by the court. This was after counsel had appeared (for the second time including the first lawsuit). Defendants refused to accept service of process and evaded the process servers. Plaintiffs in the Pharris declaration (CP 200) and the motion (CP 193) cited the court to their motions for service by mail, declarations in support thereof and defendants’ opposition.

Defendants failed to comply with discovery, and then refused to comply. Plaintiffs were required to initiate numerous attorney CR 37

conferences, eight pages of letters and numerous email correspondence. Plaintiffs were required to draft a motion, declaration and order to compel compliance with discovery requests resulting in five (5) supplemental discovery responses by the Grewals and three (3) by Harjit Gill. Plaintiffs were also required to prepare a Stipulation and Agreed Order Regarding Scheduling Depositions and Other Discovery. The Stipulation and Agreed Order was later violated by defendants and had to be enforced by contested motions and a court order finding that the defendants were in willful non-compliance. CP 198, 200.

Defendants led plaintiffs on a broad ranging goose chase and discovery to establish that they had no evidence of their spurious allegations of undocumented cash loans in India, a “forged” \$235,000 check (a check that defendants themselves prepared and tendered), and false allegations of insider “loans” pertaining to the fraudulent deed of trust.

Defendants/Appellants, in their opening Brief, object to discovery and other costs as excessive at pages 45-47. The trial judge specifically commented on this after review of the billing statements, and detailed examination of the docket and motions filed as well as the trial and exhibits and defendants’ objections. The judge stated:

“I think the defendants’ strategy in this case was to put the plaintiffs to strict proof on every factual issue and every legal issue. And I think you did an excellent job in representing your clients with that

strategy, but the strategy has consequences, and one of them is that fees and costs are going to be relatively higher and significantly higher than if some issues had been stipulated to or agreed to... It was an extraordinary amount of discovery and difficulties obtaining discovery. I also think that the fact that there are interpreters here had to have a significant effect, increasing the time in the work required of both parties, both preparing for trial and also during trial. Repeating things that were said in two languages. It didn't exactly double the length of the trial but it had a pretty big effect, and I don't know how much that occurred during depositions or during client conferences by Mr. Pharris and his clients or other situations where interpreters might or might not have been present. I can't tell, but I do know that interpreters certainly affected the trial. And I project that, to some extent, into the pretrial preparations including some of the discovery."

RP 11/14 hrg. at 13. Yet many of defendants/appellants objections on pages 45-47 are newly raised for the first time on appeal and not contained in defendants' post trial objection to Plaintiffs' motion for attorney's fees.

Defendants, in their post-trial Objection, did not provide any specific analysis or statement as to what they believe was the appropriate amount of time or expense necessary to be spent for each of the twelve categories of work summarized in the Plaintiff's motion and over the past 1-1/2 years. Instead, defendants seemed to imply that some comparison between their counsel's fee agreement and work on the case should have been a sufficient ground for objection. But Defendants did not identify what their fee agreement was, how their counsel's time records were compiled, how many hours were incurred for each category of work or how that would be an applicable comparison to the Plaintiffs' Motion and billings.

In this regard, the only information defendants provided in their objection is that their total cost was allegedly around \$70,000. It is hard to imagine that a round \$70,000 number could be arrived at using a billing procedure that employed an accounting system which records time entries by tenth of the hour time segments. Mr. Leininger may not use a computer or other contemporaneous time recording system and instead may simply estimate the amount of time incurred for a particular project. He may keep notes, or no time record at all. Most significantly, there was no attempt to provide a comparison between the amount of hours defendants counsel spent on each category of work to that performed by plaintiffs' counsel for the same category.

It would not be surprising that the defendants, as knowing wrongdoers, might have negotiated a reduced or set fee schedule to cut their potential losses. Based on Mr. Leininger's two line declaration, one could assume that defendants had some sort of agreed upon limitation on amounts that would be paid, notwithstanding the number of hours spent, if the time is recorded at all.

Defendants' Objection did not provide the trial court with any effective measuring stick. Defendants, in their Objection basically say "that is too much, look at what we spent," and otherwise left it up to the Court to make its own determination. Plaintiffs' detailed time records and the

breakdown of work by category in addition to all pleadings, motions and other documents in the court docket provided the trial court sufficient information to support his ruling.

Chicago Title Company initiated several motions for dismissal that defendants objected to. Those contested motions and negotiation of an agreed order resulted in approximately \$5,583 or approximately 20 hours of attorney time. Ultimately, Plaintiffs negotiated with Chicago Title to resign as trustee and an agreed order was entered.

Again, as the court pointed out, defendants' vigorous opposition led to Plaintiff's increased costs in the case. Plaintiffs' took measures not to increase cost by striking a summary judgment motion when it appeared defendants had raised an issue of fact. If Plaintiffs' summary judgment motion had been successful, Defendants as well as Plaintiffs would have been spared the substantial additional costs and attorneys' fees involved in the trial.

The trial judge concluded after complete review of the record and defendants' objections:

“Regarding the time and labor, they are considerable, but in general with some exceptions I think they're reasonable. I am willing to—and I will reduce the fees by 5% just to eliminate or address the objections by the plaintiffs [sic] regarding possible duplicate efforts. That's a rejection of just about \$17,055.” [Emphasis added.]

RP 11/14 hrg. at 15.

4. The Fee Customarily Charged in the Locality for Similar Legal Services.

The trial court reviewed the declaration of plaintiff's counsel regarding the rates ordinarily charged and the fees charged in the downtown Seattle market and for the respective attorney's levels of experience. CP 1704-05, and a detailed personal biography. *Id.* at 1708-09. The court concluded after review of the relevant records that:

“As for Mr. Pharris his firm's hourly rates, I can't say they're out of line with firms in the downtown Seattle area. There are firms with higher rates. And I think they are customary for this kind of case and for services that are similar to these.”

RP 11/14 hrg. at 14.

When attorneys have an established rate for billing clients, that rate will likely be a reasonable rate. *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 292, 951 P.2d 798 (1998) (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). The court is not bound, however, by the attorney's usual fee and may consider the level of skill required by the litigation, time limits imposed by the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case. *McGreevy*, 90 Wn. App. at 292. In fact, after taking those factors into consideration, the court may increase the hourly rate to reflect a reasonable rate. *McGreevy*, 90 Wn. App. at 292. While the courts presume that the lodestar represents a reasonable fee,

occasionally a risk multiplier is warranted because the lodestar figure does not adequately account for the high risk nature of a case.

A lodestar enhancement may be appropriate in a particularly difficult case, where plaintiff's attorneys overcome serious evidentiary challenges such as lack of access to key documents or witnesses. *See Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 336, 858 P.2d 1054 (1993) (where trial court found that the likelihood of success was low because attorneys did not have initial access to what turned out to be the determinative "smoking gun" documents).

Defendants did not object to the trial court that the billing rates and fees "customarily charged in the locality for similar legal services" by Plaintiffs' counsel was inappropriate. RPC 1.5 (a) (3). Mr. Leininger, in a two line declaration, merely stated that his "hourly rate in this matter is \$250." Defendants' counsel did not indicate in the Objection or Declaration that is his "normal hourly rate" or that is "the rate he charges other clients in similar lawsuits and types of work as in this case." Defendants stated in their Objection that opposing counsel's hourly rate can be "considered" by the court as part of the analysis of the fee request. As explained above, however, defendants failed to establish what counsel's "normal rate" charged to other clients is, to compare their fee agreement or their attorney's accounting methods with those employed by plaintiffs' attorneys, or how

defendants' counsel's \$250 "hourly rate" pertained in any way to the billings submitted with plaintiff's motion.

Plaintiffs/Respondents in this case did not ask the court to award an enhanced fee, but merely asked that the court award a reasonable attorney's fee based on plaintiff's attorney's established billing rates. The court properly awarded fees at Plaintiffs/Respondents' attorneys' regular hourly billing rates. The court did note that the effort required in the case was extraordinary, and the burden of proof was high, and factored that into the award. RP 11/14 hrs. at 5, 13.

5. The Amount Involved and the Results Obtained.

In *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993), the Supreme Court stated that: "While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness." *Fetzer*, 122 Wn.2d at 150, 859 P.2d 1210. This is particularly true where a fee award "grossly exceeds" the amount in controversy. *Fetzer*, 122 Wn.2d at 150, 859 P.2d 1210.

As to this factor, the court stated:

"As for the amount involved in the case it definitely was a case that was large enough to justify the kind of litigation here. The stakes were very high for both sides. The land— well, it's worth what it's worth. I don't know what it's going to fetch at sale, but vacant land in this market is valuable and I think that the amount involved

justified the litigation and the level of it here. The results obtained, I think were there— the plaintiffs definitely did prevail and there is no doubt that they are the prevailing parties... And I will continue the amount involved in this case— excuse me, the hourly basis, I think that was a reasonable relationship.”

RP 11/14 hrg. at 14.

Defendants/Appellants sought to foreclose and eliminate plaintiffs’ rights to \$430,000 from the sale of the LLC real estate plus an additional 50% of all sales proceeds over \$665,000. In addition, Defendants/Appellants sought an award of their costs and attorney’s fees from plaintiffs based on their counterclaims that could have equaled the same amount as Plaintiff’s attorney’s fee claim. Thus, Plaintiffs/Respondents had at risk a total of approximately \$800,000. Accordingly the trial court awarded a reasonable attorney’s fee that allowed for an adequate remedy to Plaintiffs/Respondents necessary to defend their rights and also to protect them against an adverse judgment.

6. The Experience, Reputation, and Ability of the Lawyer or Lawyers Performing the Services.

The trial judge stated that in his review of the record he specifically applied to his ruling the factor pertaining to “the experience, reputation, and ability of the lawyers who worked for the Plaintiff.” RP 11/14 hrg. at 13. As noted above, Counsel’s declaration in support of the motion for fees and costs included a detailed personal biography as Exhibit “A”. CP 1708-09.

Plaintiff's counsel, Mr. Pharris, has over 31 years of experience in representing parties in creditors' rights and commercial litigation matters. CP 1708-09.

The court concluded that Plaintiff's attorneys had the experience and requisite skill and ability to justify their hourly billing rates and stated:

“As for Mr. Pharris's firm's hourly rates, I can't say they are out of line with firms in the Downtown Seattle area. There are firms with higher rates. And I think they are customary for this kind of case and for services that are similar to these.”

RP 11/14 hrg. at 14.

7. Whether the Fee Is Fixed or Contingent.

The court found that Plaintiffs/Respondents hired their attorneys on an hourly fee basis and that it was reasonable. Accordingly, the trial judge stated, applying this factor to his review of the record:

“It could have been handled on a contingency basis, but I think it was reasonable for the plaintiffs' counsel to take the case on an hourly basis because the risk was so high. I'm not sure the plaintiffs might have been able to get somebody to handle it on a contingency basis.”

RP 11/14 hrg. at 14-15.

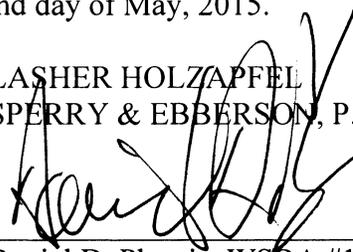
V. CONCLUSION

The court properly concluded that Plaintiffs/Respondents Kamaljit and Harminder still owned their 50% interest in the LLC and the parties could not sell the property or move forward with the development of the

planned apartment project. The business relationship had been irretrievably broken. The LLC had to be dissolved, wound down and sold. The court properly awarded Plaintiffs/Respondents their costs and reasonable attorney's fees and costs and ordered that part or all of them should be deducted from Harbans/Harjit's interest in the LLC upon sale of the real property by a receiver. The receiver was properly appointed to effectuate the sale and distribute the proceeds because the LLC was deadlocked and could not transact business or sell the property or do anything without court intervention.

Respectfully submitted this 22nd day of May, 2015.

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CERTIFICATE OF SERVICE

I certify that on May 22, 2015, I caused a copy of the foregoing document to be served via legal messenger, to the following counsel of record:

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