

NO. 73066-5-I
(consolidated with No. 73861-5-I)
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
May 16, 2016
Court of Appeals
Division I
State of Washington

McCLINCY BROTHERS FLOOR COVERINGS, INC. a
Washington corporation dba McClincy's,
Appellant,

v.

COLLIN CARPENTER and TRISH CARPENTER, husband
and wife, the Carpenter marital community; and RANDALL V.
BROOKS,

Respondents,

and

COLIN CARPENTER and TRISH CARPENTER, husband and
wife, and the Carpenter marital community,
Third Party Plaintiffs,

v.

TIMOTHY McCLINCY, a single man, and CROWN MOVING
CO., INC., a Washington corporation,
Third Party Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

BRIEF OF THE CARPENTER RESPONDENTS

Timothy J. Graham, WSBA No. 26041
HANSON BAKER LUDLOW
DRUMHELLER, PS
2229 112th Ave NE Ste 200
Bellevue WA 98004-2981
Telephone: (425) 454-3374
Facsimile: (425) 454-0087

Michael B. King, WSBA No. 14405
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Jennifer L. Karol, WSBA No. 31540
CEDAR LAW GROUP
23745 225th Way SE Ste 203
Maple Valley WA 98038-5294
Telephone: 425-413-0936

Attorneys for Carpenter Respondents

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	vi
I. INTRODUCTION.....	1
II. COUNTERSTATEMENT OF ISSUES	2
III. COUNTERSTATEMENT OF THE CASE.....	3
A. The Water Leak and Resulting Damage to the Carpenters’ Home.	3
B. McClincy Brothers Successfully Solicit the Carpenters for the Water Damage Repair Job, To Be Paid For By the Carpenters’ Homeowners Insurer, Encompass. The Carpenters Enter into a Written Contract for the Work, Drafted by McClincy Brothers. The Work Then Proceeds Under the Direction of McClincy Brothers Project Manager Randall Brooks. As Requested by McClincy Brothers, the Carpenters Put Most of Their Personal Goods and Household Furnishings Into Storage with Crown Storage, and Move Into an Apartment Pending Completion of the Repairs.....	4
C. The Carpenters Retain McClincy Brothers For Additional Interior Remodeling Work Unrelated to the Water Damage Repair Work. The Carpenters Also Decide to Have a Long-Planned Exterior Patio Addition Done, for Which They Do <i>Not</i> Retain McClincy Brothers. None of This Work in Any Way Interferes With the Ongoing Water Damage Repair Work.	7
D. On August 2, 2012, Tim McClincy Negotiates Over and Ultimately Accepts \$49,951.95 from the Carpenters as Payment in Full for McClincy Brothers’ Non-Water Damage Repair Work. McClincy and the Carpenters Also Agree that a Payment of \$40,736.07 by Encompass Will Fully	

TABLE OF CONTENTS

	<u>Page</u>
Cover the Water Damage Repair Work Remaining to be Completed.....	8
E. Notwithstanding the Terms of the Parties' Contract, Tim McClincy Demands his Company Be Paid in Advance for the Remaining Water Damage Repair Work. The Carpenters Refuse, and Tim McClincy Then Causes His Company to Abandon the Water Damage Repair Job, Makes False Reports of Insurance Fraud to Encompass, and Commences Wrongful Collection Activities Against the Carpenters -- Including Secretly Removing Their Personal Property Being Kept at Crown Storage.	9
F. The Carpenters Mitigate Their Damages Caused By McClincy Brothers' Abandonment of the Water Damage Repair Work.....	12
G. McClincy Sues First. The Carpenters Answer and Successfully Move for a Preliminary Injunction Regarding Their Property in McClincy's Possession. After McClincy Violates the Injunction, the Trial Court Finds McClincy in Contempt and Orders the Immediate Return of the Carpenters' Property.	13
H. The Trial Court Grants Pre-Trial Summary Judgments Dismissing All of McClincy Brothers' Claims Against the Carpenters Except for Breach of Contract and Unjust Enrichment.	17
I. Pre-Trial Proceedings on the Carpenters' Consumer Protection Act Claim.....	20
J. The Trial Court Dismisses McClincy's Remaining Claims at the Close of McClincy's Case in Chief.	21
K. Evidence Supporting the Carpenters' Counter-Claims Submitted at Trial.....	27
L. Denial of McClincy's Motion for Reconsideration on Accord and Satisfaction, and the Entry of	

TABLE OF CONTENTS

	<u>Page</u>
Findings and Conclusions in Favor of the Carpenters.....	30
M. Award of Attorney Fees.....	31
N. Final Judgment and Appeal.....	32
O. Post-Judgment Collection Efforts and Related Proceedings.....	32
IV. ARGUMENT	34
A. The Trial Court's Findings Are Supported by Substantial Evidence.....	34
B. The Trial Court Correctly Granted Summary Judgment Before Trial On McClincy's Claim for Unjust Enrichment Regarding the Patio Addition, and Correctly Granted the Carpenters' Motion to Dismiss at Trial McClincy's Remaining Claim for Unjust Enrichment Regarding the Interior Remodel.	40
1. Summary Judgment on the Patio Addition Claim.....	40
2. Dismissal of the Interior Remodel Claim.....	42
C. The Trial Court Did Not Err in its Breach of Contract Damage Award.....	44
D. The Trial Court Did Not Err in its Conversion Determinations.....	46
E. The Trial Court Correctly Awarded the Carpenters Prejudgment Interest.....	49
F. The Trial Court Correctly Determined that McClincy's Abusive Business Practices, Driven by a Philosophy of "Screw the Customer," Violated the Consumer Protection Act.....	51

TABLE OF CONTENTS

	<u>Page</u>
G. The Trial Court's Award of Attorney Fees Was Not Erroneous.....	57
H. The Trial Court's Post-Judgment Enforcement Rulings Should Be Affirmed.	60
I. Tim McClincy's Status as an Appellant.	64
V. RAP 18.1 Fee Request.....	65
VI. CONCLUSION.....	65

TABLE OF AUTHORITIES

Washington Cases	<u>Page(s)</u>
<i>Admasu v. Port of Seattle</i> , 185 Wn. App. 23, 340 P.3d 873 (2014)	41
<i>Berryman v. Metcalf</i> , 177 Wn. App. 644, 312 P.3d 745 (2013)	59, 60
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992)	55
<i>Camer v. Seattle Post-Intelligencer</i> , 45 Wn. App. 29, 723 P.2d 1195 (1986).....	54
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	34
<i>Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.</i> , 64 Wn. App. 661, 828 P.2d 565 (1992).....	43
<i>Dunn v. Guar. Inv. Co.</i> , 181 Wash. 245, 42 P.2d 434 (1935)	48
<i>Eastlake Construction Co., Inc. v. Hess</i> , 102 Wn.2d 30, 686 P.2d 465 (1984).....	2, 45
<i>Fidelity Mut. Sav. Bank v. Mark</i> , 112 Wn.2d 47, 767 P.2d 1382 (1989).....	64
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	3, 31, 54, 55, 56, 59
<i>Lewis v. Bell</i> , 45 Wn. App. 192, 197, 724 P.2d 425 (1986).....	55
<i>Marriage of Gillespie</i> , 89 Wn. App. 390, 948 P.2d 1338 (1997)	36
<i>Marriage of Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012).....	36
<i>Marriage of Kim</i> , 179 Wn. App. 232, 317 P.3d 555, <i>rev. denied</i> , 180 Wn.2d 1012 (2014)	34

	<u>Page(s)</u>
<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 70 P.3d 125 (2003)	40
<i>Northwest Gas Ass’n v. Washington Utilities and Transp. Com’n</i> , 141 Wn. App. 98, 168 P.3d 443 (2007)	46
<i>Pham v. City of Seattle</i> , 159 Wn.2d 527, 151 P.3d 976 (2007)	57
<i>Prier v. Refrigeration Engineering Co.</i> , 74 Wn.2d 25, 442 P.2d 621(1968).....	3, 49, 50
<i>Rabon v. City of Seattle</i> , 135 Wn.2d 278, 957 P.2d 621 (1998)	46
<i>Rekhter v. DSHS</i> , 180 Wn.2d 102, 124, 323 P.3d 1036 (2014)	50
<i>Seattle-First National Bank v. Shoreline Concrete Co.</i> , 91 Wn.2d 230, 588 P.2d 1308 (1978).....	48
<i>Scoccolo Constr., Inc. ex rel. Curb One, Inc. v. City of Renton</i> , 158 Wn.2d 506, 145 P.3d 371 (2006)	50
<i>Starkey v. Starkey</i> , 40 Wn.2d 307, 316, 242 P.2d 1048 (1952)	64
<i>State v. Base</i> , 131 Wn. App. 207, 219, 126 P.3d 79 (2006).....	65
<i>Wash. State Dept. of Revenue v. FDIC</i> , 190 Wn. App. 150, 359 P.3d 913 (2015).....	64
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 730 P.2d 45 (1986)	37
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	18

Federal Cases

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).....	18
---	----

	<u>Page(s)</u>
<i>In re 240 North Brand Partners, Ltd.</i> , 200 B.R. 653 (9th Cir. BAP 1996)	62

Constitutional Provisions, Statutes and Court Rules

RAP 10.1(g).....	64
RAP 18.1	65
RCW 7.60.005	60
RCW 7.60.015	61, 63
RCW 7.60.060(3).....	63
RCW 7.60.260	63
RCW 7.60.260(1).....	61, 63, 64
RCW 18.27.350	56
RCW Chap. 19.86 (Consumer Protection Act)	<i>passim</i>
RCW 48.30A.005.....	56
RCW 62A.1-201(9).....	62
11 U.S.C. § 363(c)(1).....	62

Treatises

M. Barreca, WASHINGTON’S RECEIVERSHIP ACT, Sept. 2008 (<i>available at</i> http://www.klgates.com/files/upload/Barreca_WAReceivership Act.pdf)	62
--	----

I. INTRODUCTION

*"Screw the Customer. I want to get paid."*¹

This case illustrates what should happen when abusive business practices collide with consumers who are willing and able to fight back.

Trish and Collin Carpenter's home flooded, and they needed the damage repaired. They hired McClincy Brothers to do the work -- a company experienced in dealing with home repairs covered by homeowners insurance. Things went reasonably well until company owner Tim McClincy demanded payment up front for work not yet done -- payment to which McClincy was not entitled under his own form contract. When the Carpenters said "no," McClincy unleashed a barrage of abusive pressure tactics, which he had used before to get people in the Carpenters' situation to knuckle under to similar payment demands. He had his workers walk off the job, he falsely accused the Carpenters of insurance fraud, and he took possession of the Carpenters' personal property. And when the Carpenters still refused to cave, McClincy sued -- as he had done dozens of times before.

But this time he lost. The trial court found the Carpenters credible, and Tim McClincy incredible. The court found that walking off the job was a breach of contract, that taking possession of the Carpenters' property

¹ Tim McClincy, as quoted by Randall Brooks. RP 7/29/14 at 48 (italics added).

was a conversion, and that McClincy's actions were part of a pattern of deceptive and unfair business practices implicating the public interest under the Consumer Protection Act. These determinations are amply supported by the evidence. And the trial court's attorney fee award is supported by a record showing what it takes for consumers to vindicate their rights under the Consumer Protection Act. This Court should affirm.

II. COUNTERSTATEMENT OF ISSUES

The Carpenters restate the issues as follows:

- Whether the findings to which error was assigned and argued are supported by substantial evidence.
- Whether a claim has been properly dismissed on summary judgment when the claimant has merely attempted to "retailor" another claim previously and properly dismissed.
- Whether a claim has been properly dismissed based on an accord and satisfaction.
- Whether a contract damages award is proper under *Eastlake Construction Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984).
- Whether a finding of a conversion is necessarily precluded by a preliminary injunction ruling that preserved the status quo by refusing to order the return of property before a trial on the merits.

- Whether a conversion damages award is supported by substantial evidence.
- Whether an award of prejudgment interest is proper under *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 442 P.2d 621(1968).
- Whether a finding of violations of the Consumer Protection Act is proper under *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).
- Whether a trial court abused its discretion in making a prevailing party fee award.
- Whether a trial court erred in post-judgment enforcement rulings regarding a receivership.

III. COUNTERSTATEMENT OF THE CASE

A. The Water Leak and Resulting Damage to the Carpenters' Home.

In April 2011, the water dispenser in the Carpenters' refrigerator began leaking. RP 7/24/14 at 134-135. The Carpenters were away when the leak started; they returned home to some three quarters of an inch of standing water. *Id.* Water had gotten into the kitchen, the dining area, hallways, a closet, a powder room, and under the stairway to the second floor of the house. RP 7/24/14 at 134-135; RP 7/28/14 at 40.

The kitchen would have to be completely remodeled, as the water had leached up into the cabinets and they could not be removed without

breaking the existing countertops. RP 7/24/14 at 138-140. The surrounding hallways had sustained extensive damage, and the flooring needed to be repaired. *Id.* at 135-36 Water had penetrated the floor and gone down through cavities into the crawlspace, requiring duct work and replacement of insulation. RP 7/28/14 at 173.

B. McClincy Brothers Successfully Solicit the Carpenters for the Water Damage Repair Job, To Be Paid For By the Carpenters' Homeowners Insurer, Encompass. The Carpenters Enter into a Written Contract for the Work, Drafted by McClincy Brothers. The Work Then Proceeds Under the Direction of McClincy Brothers Project Manager Randall Brooks. As Requested by McClincy Brothers, the Carpenters Put Most of Their Personal Goods and Household Furnishings Into Storage with Crown Storage, and Move Into an Apartment Pending Completion of the Repairs.

The Carpenters reported the water leak to their homeowners insurer, Encompass Insurance Company. CP 2250 (unchallenged FOF 1.1). The Carpenters then hired McClincy Brothers to repair the damage. CP 2250 (unchallenged FOF 1.2). Friends recommended McClincy Brothers; the Carpenters themselves knew Tim McClincy and Randy Brooks through a charity with which they are all associated. CP 2250 (unchallenged FOF 1.3); RP 7/15/14 at 124-125; RP 7/28/14 at 161-62. The Carpenters hired McClincy Brothers because of its reported expertise in dealing with insurance companies. RP 7/21/14 at 8.

The Carpenters entered into a written contract with McClincy Brothers, on May 4, 2011. Ex. 101. The contract was a standard-form

contract prepared by McClincy, to be used for repairs being paid for by an insurer when the work involved restoration and remodel. RP 7/28/14 at 163. The contract (1) recognized that McClincy would work with the Carpenters' homeowner's insurer on behalf of the Carpenters; (2) stated that full payment by the Carpenters was not due until "completion of the work"; (3) contemplated prior written notice of any "default" be given before any collection activity was commenced; and (4) authorized only a "MECHANICS LIEN IN THE EVENT OF DEFAULT" in the event of breach. *See* Ex. 101 ("Agreement Terms and Conditions" & "Pricing and Terms of Payment"). McClincy Brothers' role would be to "advocate" for the Carpenters with Encompass. CP 2251 (unchallenged FOF 1.8); RP 7/21/14 at 54-55 (McClincy).

McClincy assigned Randall Brooks as project manager for the job. RP 7/15/14 at 103. Brooks was the Carpenters' main contact for the job, and they communicated with Brooks on at least a weekly basis. RP 7/21/14 at 8. Brooks negotiated directly with Encompass on the Carpenters' behalf. RP 7/15/14 at 119-20; RP 7/17/14 at 14, RP 7/21/14 at 8. Encompass approved all costs submitted for the work. CP 2251 (unchallenged FOF 1.8); RP 7/14/15 at 130. The first time Tim McClincy came to the Carpenters' home was June 2012, over a year after the water leak occurred. RP 7/22/14 at 9-10 & 74.

As provided in the contract, the work proceeded in two phases. *See* Ex. 101 ("Pricing and Terms of Payment"). During the first phase, McClincy Brothers brought in air movers, dehumidifiers, and other equipment, to soak up the water and dry out the house. RP 7/28/14 at 164, 169 & 171-72. This phase took three weeks, and the Carpenters were able to remain in their home despite having no working kitchen. RP 7/24/14 at 137 & 140-41. During the second phase McClincy carried out the repairs to the kitchen and other affected areas. RP 7/28/14 at 163, 165; RP 7/29/14 at 6-7; *see* Ex. 102 (scope of work for second phase). Brooks recommended having most of the Carpenters' household furnishings removed from the house for this phase. RP 7/28/14 at 42, RP 7/16/14 at 90. The Carpenters agreed, and entered into a Bill of Lading Contract with Crown Moving and Storage, Inc. ("Crown"), under which Crown packed and removed various personal belongings and household items, for storage in a heated and dry warehouse until completion of the repairs. CP 2251 (unchallenged FOF 1.9, 1.10); RP 7/28/14 at 44; RP 7/29/14 at 15; Ex. 113 (list of items stored with Crown).

McClincy Brothers also coordinated with Encompass to allow the Carpenters to move out of their home until McClincy had finished the remodeling. CP 2251-52 (unchallenged FOF 1.13); RP 7/15/14 at 160; RP 7/28/14 at 170. This was done because it was inconvenient to have the

Carpenters living in the house during the repair phase. CP 2251-52 (unchallenged FOF 1.13); RP 7/24/14 at 141; RP 7/28/14 at 170. Encompass found them a 1,250 square foot apartment with rental furniture; the Carpenters moved out of their house on July 1, 2012. RP 7/24/14 at 142-143.

C. The Carpenters Retain McClincy Brothers For Additional Interior Remodeling Work Unrelated to the Water Damage Repair Work. The Carpenters Also Decide to Have a Long-Planned Exterior Patio Addition Done, for Which They Do *Not* Retain McClincy Brothers. None of This Work in Any Way Interferes With the Ongoing Water Damage Repair Work.

As the water damage repair work was progressing, the Carpenters negotiated with McClincy Brothers to do other interior work, unrelated to their water loss damage and not covered by insurance. CP 2252 (unchallenged FOF 1.20); RP 7/15/14 at 151; RP 7/16/14 at 34-35. The Carpenters agreed to pay McClincy Brothers directly from their own funds for this work, which largely consisted of installation of new hardwood floors and the painting of four upstairs bedrooms. CP 2252 (unchallenged FOF 1.21, 1.22); RP 7/15/14 at 163; RP 7/17/14 at 43. None of this work affected the water loss work. CP 2252 (unchallenged FOF 1.22); RP 7/28/14 at 46; RP 7/29/14 at 43.

During this time the Carpenters began to explore doing an outdoor addition -- a “covered patio” -- to their home, which they had been considering since 2007. CP 2252 (unchallenged FOF 1.23); RP 7/17/14 at

16. Brooks provided the Carpenters with a bid from McClincy Brothers to complete the work, but the bid was higher than what the Carpenters were willing to pay and they rejected it. CP 2253 (unchallenged FOFs 1.24 & 1.25); RP 7/14/15 at 157, 169-70; RP 7/17/14 at 28. Instead, the Carpenters proceeded as their own “general contractor,” hiring their own subcontractors and working directly with designers and engineers. RP 7/17/14 at 36-37. None of the work on the outdoor addition impacted the water loss repair work inside the Carpenters’ home. CP 2253 (unchallenged FOF 1.29); RP 7/21/14 at 9-10, RP 7/28/14 at 46.

D. On August 2, 2012, Tim McClincy Negotiates Over and Ultimately Accepts \$49,951.95 from the Carpenters as Payment in Full for McClincy Brothers’ Non-Water Damage Repair Work. McClincy and the Carpenters Also Agree that a Payment of \$40,736.07 by Encompass Will Fully Cover the Water Damage Repair Work Remaining to be Completed.

On August 2, 2012, Timothy McClincy and Brooks came to the Carpenters’ home. CP 2253 (unchallenged FOF 1.30) RP 7/16/14 at 174; RP 7/17/14 at 39-40. They presented Mr. Carpenter with a proposed “Supplement to Scope of Work” in the amount of \$52,449.55. Ex. 105. McClincy and Brooks represented that this supplement was intended to cover all of the “non-insurance” work, which McClincy Brothers had finished by this time. RP 7/16/14 at 175, 178. Mr. Carpenter objected to the supplement as written, because Tim McClincy had included a “contingency payment” of 5 percent over and above what was actually

owed. Ex. 105. Tim McClincy claimed to have suspicions that the balance of \$49,951.95 would be found not to cover all of the non-insurance remodel work McClincy's had actually done. RP 7/21/14 at 123. Mr. Carpenter insisted he would not pay more than the balance of \$49,951.95, and Tim McClincy ultimately accepted Mr. Carpenter's payment in that amount. *Id.*; Ex. 105.

That same day (August 2, 2012), Mr. Carpenter signed another supplement presented by McClincy, related to an additional \$40,736.07 that Encompass had agreed to pay. CP 2254 (unchallenged FOF 1.33); *see* Ex. 104 (scope of work for final phase). The repairs associated with this planned payment were to complete the water damage repair work. CP 2254 (unchallenged FOF 1.33)

E. Notwithstanding the Terms of the Parties' Contract, Tim McClincy Demands his Company Be Paid in Advance for the Remaining Water Damage Repair Work. The Carpenters Refuse, and Tim McClincy Then Causes His Company to Abandon the Water Damage Repair Job, Makes False Reports of Insurance Fraud to Encompass, and Commences Wrongful Collection Activities Against the Carpenters -- Including Secretly Removing Their Personal Property Being Kept at Crown Storage.

Soon after Mr. Carpenter signed the August 2, 2012 supplements, Tim McClincy demanded that the Carpenters pay McClincy Brothers in advance for the remaining water damage repair work. CP 2254 (unchallenged FOF 1.34); RP 7/17/14 at 52-53. When Mr. Carpenter

asked when the remaining work would be completed, so the Carpenters could move back into their home, McClincy refused to commit to a completion date until his company received payment for all that work in advance. *Id.*; RP 7/17/14 at 56-57. Mr. Carpenter then reminded McClincy that his company's contract required the work to be "completed" before final payment. CP 2254 (unchallenged FOF 1.36); *see* CP 2251 (FOF 1.6); Ex. 101 ("Pricing and Terms of Payment" provision, stating that "[u]pon completion of the Second Phase, Customer shall be presented with an Invoice for the remaining balance of the estimated repairs, which shall be due and payable upon receipt" (emphasis added)). When McClincy continued to demand full payment in advance, Mr. Carpenter contacted Encompass and asked it not to issue its check until the impasse created by Tim McClincy could be resolved. CP 2254 (unchallenged FOFs 1.37 & 1.38); RP 7/17/14 at 54-55; RP 7/28/14 at 59-60.

On August 13, 2012, soon after Tim McClincy had demanded payment in advance and Mr. Carpenter had refused to meet that demand, Tim McClincy secretly reported to Encompass that he had "fired" Brooks because Brooks and the Carpenters supposedly were defrauding Encompass, by (1) submitting false claims and (2) purposely delaying completion of the insured water loss repairs so non-water loss remodeling

could be completed while the Carpenters were out of the property living in housing paid for by Encompass. CP 2255 (unchallenged FOF 1.40); RP 7/23/14 at 156-157, 199. Encompass responded to the allegations by stopping all payments on the Carpenters' water loss claim. CP 2255 (unchallenged FOF 1.40); RP 7/23/14 at 158, 161-62. In fact, Tim McClincy had not fired Brooks; Brooks had resigned his position with McClincy Brothers, on August 13, 2012. CP 2255 (unchallenged FOFs 1.41 & 1.42); RP 7/29/14 at 41-42. Nor were there any charges billed to Encompass that were not related to the water loss work, and all payments received from Encompass had gone to McClincy Brothers. RP 7/16/14 at 171; RP 7/29/14 at 42. And finally, none of the non-water loss work (interior or exterior) had in any way impacted the progress of the water-loss repair work. CP 2252 (unchallenged FOFs 1.22 & 1.29).

Tim McClincy never told the Carpenters about the allegations he made to Encompass. CP 2255 (unchallenged FOF 1.43). Instead, in September he presented the Carpenter with two *more* Supplements to Scope of Work to sign, based upon what he claimed was newly discovered interior remodeling work unrelated to the water loss repairs, which somehow was not covered by the \$49,951.95 payment negotiated by Tim McClincy and Collin Carpenter on August 2, 2012. RP 7/21/14 at 130-

137.² Mr. Carpenter rejected the new claims and never signed either supplement. CP 2255 (unchallenged FOFs 1.49 & 1.50).

On September 19, 2012 (between the issuance of the first and second new supplements), Tim McClincy secretly removed the Carpenters' personal belongings and household furnishings that were being stored with Crown. CP 2256 (unchallenged FOF 1.52); RP 7/28/14 at 60-61. On October 8, 2012, McClincy caused his company to send a Notice of Default to the Carpenters, declaring them to be in default under the contract for non-payment -- not giving notice that Tim McClincy had *already* taken possession of the Carpenters' personal property. CP 2256 (unchallenged FOF 1.54).

F. The Carpenters Mitigate Their Damages Caused By McClincy Brothers' Abandonment of the Water Damage Repair Work.

Virtually no work was done by McClincy Brothers after August to finish the water loss repairs. CP 2255 (unchallenged FOF 1.45). McClincy finally abandoned the job in October. RP 7/21/14 at 11. McClincy left the Carpenters with a home not ready to be occupied. CP 2256 (unchallenged FOFs 1.57 & 1.58). The Carpenters paid a consultant \$5,000 to look at the repair work that had been done, and recommend

² The first Supplement, dated September 6, 2012, was for \$21,505.71. CP 2255 (unchallenged FOF 1.47); Ex. 106 (copy). The second, dated September 29, 2012, was for \$48,747.24. CP 2255 (unchallenged FOF 1.48); Ex. 107 (copy).

contractors who could complete the work so that they could get back into their home. CP 2256 (unchallenged FOF 1.56); RP 7/21/14 at 12; RP 7/28/14 at 61. Based on the consultant's recommendation, the Carpenters hired and paid Edifice Construction Company \$35,800 to complete the water repairs, for a total out-of-pocket expense of \$40,800. CP 2257 (unchallenged FOF 1.61, 1.62); RP 7/21/14 at 12-13; RP 7/28/14 at 62.

G. McClincy Sues First. The Carpenters Answer and Successfully Move for a Preliminary Injunction Regarding Their Property in McClincy's Possession. After McClincy Violates the Injunction, the Trial Court Finds McClincy in Contempt and Orders the Immediate Return of the Carpenters' Property.

The Carpenters first learned in January 2013 that McClincy's had removed their furnishings from Crown. CP 2257 (unchallenged FOF 1.63); RP 7/28/14 at 63. Despite repeated demands to release the furniture, McClincy refused either to disclose the location of the Carpenters' property or to return it. CP 2257 (unchallenged FOF 1.65); RP 7/28/14 at 64-65.

It was McClincy, however, who managed to sue first. On January 23, 2013, McClincy filed a complaint against the Carpenters in the name of his company, alleging claims for breach of contract, unjust enrichment, aiding and abetting a breach of fiduciary duty (by Brooks), and conspiracy to defraud (again with Brooks). CP 2257 (unchallenged FOF 1.66); CP 1-8 (complaint). The Carpenters answered, denying all allegations against

them. CP 2257 (unchallenged FOF 1.66); CP 11-15 (answer at 3-7). They also asserted counterclaims for breach of contract, conversion, and trespass to personal property. CP 2257 (unchallenged FOF 1.66); CP 17-26 (answer at 9-17). The Carpenters restated these claims in a third party complaint against Tim McClincy individually, and also sued Crown for breach of contract and negligent bailment. CP 2257 (unchallenged FOF 1.66); CP 23-25 (answer at 14-16).³

The same day they answered and asserted their counterclaims and third party claims, the Carpenters successfully moved for a Temporary Restraining Order under which McClincy Brothers was enjoined and restrained from transferring, removing, or concealing the Carpenters' personal property and household furnishings. CP 2257 (unchallenged FOF 1.67); CP 70-72 (order granting TRO). On February 20 the trial court converted the TRO into a Preliminary Injunction. CP 2257 (unchallenged FOF 1.68); CP 128-132 (order granting preliminary injunction). The court found that McClincy Brothers "has presented no lawful justification for possessing the Carpenters' household belongings

³ On March 15, 2013, Brooks filed his answer and counterclaims, denying McClincy Brothers' allegations, and stating counterclaims for breach of contract and wrongful withholding of wages. CP 143-49.

without the Carpenters' permission or consent." CP 2257 (unchallenged FOF 1.68); CP 130.⁴

On April 26, after McClincy refused to disclose the location of the Carpenters' property and refused to allow an inspection, the trial court entered an order compelling McClincy Brothers to allow the Carpenters permission to conduct a CR 34 inspection of the property to ascertain its condition. CP 2257-2258 (unchallenged FOF 1.69); CP 436-38 (order). The court found that McClincy Brothers had violated both the Temporary Restraining Order and Preliminary Injunction by "concealing the household furnishings, failing to disclose information regarding the property's whereabouts and not agreeing to the CR 34 inspection." CP 2258 (unchallenged FOF 1.70); CP 437 (order at 2).

The CR 34 inspection took place on May 21, 2013. CP 2258 (unchallenged FOF 1.71); CP 347. During that inspection the parties learned that McClincy had placed some of the property in a self-storage facility in Renton and the remainder in a free standing storage shed owned by McClincy Brothers and located in Federal Way. CP 347. Then, during a deposition of Timothy McClincy taken on November 26, 2013,

⁴ The case was assigned under the King County Superior Court's case assignment procedure to the Hon. Barbara Linde. Aside from the TRO ruling (made, under King County procedure, by a court commissioner), all trial court rulings have been by Judge Linde, who also resolved all factual disputes as the trier of fact.

McClincy disclosed that, after the CR 34 inspection, he had *again* moved the Carpenters' property, without notifying the Carpenters or the court. CP 2258 (unchallenged FOF 1.73); CP 347.

The Carpenters brought a motion to show cause, to secure the return of their property. CP 2258 (unchallenged FOF 1.74); CP 337-345 (motion).⁵ On December 13, 2013, Tim McClincy personally was held in civil contempt for his actions in causing his company to willfully disobey the court's orders. CP 2258 (unchallenged FOF 1.75); CP 478 & 481 (Contempt Order at 4, FOF 5).⁶ The court found that McClincy (through his company) had "unilaterally converted the Carpenters' household furnishings without permission or authorization[.]" CP 2258 (unchallenged FOF 1.75); CP 477 (Contempt Order at 2, FOF 2). McClincy was ordered to immediately return the Carpenters' property "undamaged" to the Carpenters. CP 2258 (unchallenged FOF 1.75); CP 481 (Contempt Order at 5, ¶1).

The Carpenters' property was finally returned to them on December 18, 2013. CP 2258 (unchallenged FOF 1.76); RP 7/28/14 at

⁵ Crown joined in this motion, as it had joined in the prior motion to compel the CR 34 inspection. *See* CP 365-70 (joinder in show cause); CP 365-70 (joinder in motion to compel inspection). Ultimately the Carpenters settled with Crown for a payment from Crown of \$20,000. *See* Ex. 78 (settlement agreement).

⁶ The trial court clerk's office erred in reproducing the contempt order in the Clerk's Papers, initially dropping page 3 and then *restarting* with page 2 after page 4. The end result is a pagination sequence of 1,2,4,2,3,4,5. Fortunately, in the end the entire order was reproduced.

111. The furniture had sustained damage during the time it had been out of the Carpenters' home, including an ant infestation that spread throughout the Carpenters' home. RP 7/28/14 at 101, 106, 116; Ex. 114, 117.

H. The Trial Court Grants Pre-Trial Summary Judgments Dismissing All of McClincy Brothers' Claims Against the Carpenters Except for Breach of Contract and Unjust Enrichment.

On May 9, 2014, the Carpenters moved for summary judgment on McClincy Brothers' claims for aiding and abetting, conspiracy to defraud, and unjust enrichment (for the interior remodeling work, unrelated to the water damage repair work). CP 738-808 (motion). On May 30, 2014, while this summary judgment motion was pending, the Carpenters moved for summary judgment on any claim relating to an alleged unsigned, unwritten agreement for the exterior patio addition work. CP 1297-1300 (motion).

This second summary judgment was filed after Tim McClincy, testifying on May 9 as his company's CR 30(b)(6) representative, asserted a right to hundreds of thousands of dollars for work supposedly done by McClincy Brothers on the exterior patio addition project under an alleged unwritten contract. *See* CP 1365-1370 (McClincy 30(b)(6) testimony). This claim had never been pled, and now was being made 18 days before the expiration of the case's second discovery cutoff and with trial set to

begin in less than two months. *See* CP 1298-1300 (recital of procedural history by the Carpenters). McClincy said he was making the claim now because he had only recently learned that all contracts don't have to be in writing. CP 1365. But McClincy could not offer anything more than his "belief" that McClincy Brothers (through Brooks) had entered into an oral contract to do the patio addition work. CP 1365-66.

The Carpenters responded with a "no evidence" summary judgment, challenging McClincy to support this new claim with evidence. CP 1297-1300 (motion).⁷ The Carpenters supported their motion with evidence showing they had rejected McClincy Brothers' bid for the patio addition work. CP 1316 (Brooks Decl. at 2, ¶1). McClincy Brothers answered by moving for leave to file a second amended complaint in which McClincy's asserted claims against the Carpenters for *unjust enrichment* relating to the company's supposed work on the exterior addition. *See* CP 1484-1487 (motion); CP 1512-13 (proposed allegations of "Third Claim for Relief").⁸

⁷ The "no evidence" summary judgment motion, an established practice in federal court after the U.S. Supreme Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), was approved by the Washington Supreme Court in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

⁸ McClincy Brothers also submitted a declaration from Tim McClincy, but that declaration actually confirmed Brooks' testimony that he had only submitted an estimate for the patio addition to the Carpenters. *See* CP 1700 (McClincy Decl. at 5, ¶).

On June 6, 2014, the trial court granted the Carpenters' earlier summary judgment motion as to McClincy Brothers' aiding and abetting and conspiracy to defraud claims, while denying it as to McClincy Brothers' original unjust enrichment claim (for the interior remodel work). CP 1474-76 (order). On June 23, 2014, the trial court granted the motion to amend. CP 1843-44 (order); *see* 1890-1901 (amended complaint). But on June 27, 2014, after hearing oral argument, the trial court granted the Carpenters' motion and dismissed the claim -- both as originally characterized by McClincy in his deposition (as one for breach of an oral agreement), and as re-characterized by the amended complaint (as one for unjust enrichment). CP 2259 (unchallenged FOF 1.86); RP 6/27/14 at 47-48; *see* CP 2199-2201 (order) (signed and filed on July 15, 2014). In doing so, the trial court observed that the unjust enrichment version of the claim was nothing more than a "retailoring" of the aiding and abetting and conspiracy to defraud claims, stating "there's no evidence that the Carpenters colluded or were engaged in illicit activities, or false inducements or representations." RP 6/27/14 at 47.⁹

⁹ During this time the trial court also dealt with summary judgment motions brought by McClincy Brothers and Brooks on their contending claims. The court denied McClincy Brothers' motion, and granted in part and denied in part Brooks' motion. *See* CP 2195-98 (order). At trial the remaining issues would be resolved in favor of Brooks. *See* CP 2267-2278 (Defendants' Brooks' Findings and Conclusions).

I. Pre-Trial Proceedings on the Carpenters' Consumer Protection Act Claim.

On July 17, 2013, the Carpenters moved for leave to file an Amended Complaint to include a Consumer Protection Act claim against McClincy's. CP 158-162. The Carpenters' proposed CPA claim alleged that McClincy's breach of the contract and wrongful conversion of the Carpenters' property constituted unfair and deceptive practices, and that those practices also impacted the public interest. CP 232-33 (¶¶ 20.1-20.5). McClincy did not oppose the motion to amend. On July 26 the trial court granted the motion, and the amended complaint was filed on August 12, 2013. CP 2258 (unchallenged FOF 1.72); CP 214-259.

On May 30, 2014, McClincy moved for summary judgment on the Carpenters' CPA claim. CP 1229-1296. The Carpenters opposed, submitting documentary evidence and testimony in support of the claim. CP 1634-1658 (brief in opposition); *see* CP 1524-54 (Karol Decl.), CP 1555-59 (Cline Decl.), CP 1560-99 (Brooks Decl.); 1600-33 (C. Carpenter Decl.), CP 1819-38 (Graham Decl.), CP 1934-46 (Graham Decl.). In reply, McClincy claimed that the Carpenters' submission went beyond the scope of their CPA claim as pled, which McClincy asserted had been limited solely to the conversion of personal property. CP 1868-69 (reply at 2-3). At the hearing on McClincy's motion, McClincy reiterated that the CPA claim should be limited to the alleged conversion of personal

property. RP 6/27/14 at 44-45. The trial court denied McClincy's motion. CP 2259 (unchallenged FOF 1.87); CP 1972-73 (order).

Shortly before trial, on July 14, 2014, the Carpenters timely filed their answer to McClincy's Second Amended Complaint. CP 2146-2194. In this answer the Carpenters expanded on their CPA counterclaim, in light of McClincy's claims concerning the scope of the claim as originally pled. They did so by expanding on their description of the facts giving rise to their claims for breach of contract, and then making express that their CPA claim incorporated these claims by reference. *See* CP 2163 (answer to second amended complaint at 18, ¶¶ 16.1 & 16.2) (contract counterclaim allegations), CP 2165 (answer to second amended complaint at 20) (language expressly incorporating prior allegations including contract counterclaim allegations into CPA counterclaim). McClincy made no motion to strike these allegations.

J. The Trial Court Dismisses McClincy's Remaining Claims at the Close of McClincy's Case in Chief.

By the time of trial McClincy Brothers had two claims remaining: (1) unjust enrichment for work done on the interior of the Carpenters' house, unrelated to water damage repair work and in addition to the

\$49,951.95 already paid by the Carpenters for that work,¹⁰ and (2) breach of the contract governing water damage repair work:

- Unjust Enrichment Facts. During McClincy Brothers' case-in-chief, the testimony and admitted exhibits established the following facts:

The first time Tim McClincy was at the Carpenter property was June 2012. RP 7/22/14 at 24. He had free and open access to the property. *Id.* at 25. He inspected the entire interior of the premises. *Id.* at 25-26. He saw work that he didn't expect to see done. *Id.* He knew that his company had not been paid for the work that he observed that day. *Id.* at 106. He was determined to have the Carpenters pay for all this work. *Id.* at 81-82.

Brooks had provided oral estimates to the Carpenters for the work not related to the water damage repairs (and not covered by the Carpenters' insurance). RP 7/16/14 at 71-72, 174-75. Brooks was instructed by Tim McClincy to set up a meeting, the purpose of which was to have the Carpenters pay the balance owed for the non-water damage

¹⁰ This unjust enrichment claim had also been raised in McClincy Brothers' Second Amended Complaint. *See* CP 1896 (Second Amended Complaint at 7) (Second Claim for Relief). Before trial the Carpenters responded to this new claim as follows: (1) in their Answer to the Second Amended Complaint, the Carpenters pled the affirmative defense of accord and satisfaction, CP 2156; and (2) the Carpenters argued in their trial brief that the claim was barred because the \$49,951.95 payment from the Carpenters to McClincy was an accord and satisfaction. CP 3133-34 (trial brief at 15-16).

repair work. *Id.* at 174-75. By this time McClincy had spent dozens of hours investigating the Carpenter job order, including review of his company books and records. RP 7/22/14 at 107, 156-57.

The day before the meeting, on August 1, 2012, McClincy e-mailed Collin Carpenter. Ex. 18. The e-mail came from Brooks, but McClincy was copied on it and its contents were dictated by him to Brooks. Ex. 18; RP 7/16/14 at 174-75, 184-85. The email stated:

I just wanted to confirm our meeting tomorrow at 10:00 am at your house and provide you with a statement of account along with the detail of corresponding supplemental work. We have received the last check from the mortgage company and will need your endorsement. I've attached the additional supplements. McClincy's would like to receive payment on the balance of work tomorrow when we meet so that we can continue production at your house. Please give me a call with any questions.

Ex. 18. One of the referenced "supplements" was for \$52,449.55. *Id.* As previously described (Section III.E), it was for the interior work not related to the water damage repairs. Although the supplement was consistent with Brooks' oral estimates of the cost of that work, RP 7/16/14 at 71-72, the supplement as proposed also included a 5 percent "contingency." Ex. 18. Tim McClincy claimed that he wanted the contingency because he knew "there was circumvention to the detriment of McClincy's that had gone on at the property." RP at 7/22/14 at 87-88. If he later found there was other work that had been done and not paid for,

the contingency would be triggered. RP 7/21/14 at 122-23; RP 7/22/14 at 87-90.

Collin Carpenter rejected the contingency. RP 7/22/14 at 87-90. The purpose of the meeting was to identify and pay for all non-water loss repair work that had been done. RP 7/17/14 at 41; 7/21/14 at 31. McClincy agreed to remove the contingency and accept a lower payment from the Carpenters of \$49,951.95. RP 7/22/14 at 87. McClincy authorized Brooks to sign the supplement as negotiated by Tim McClincy and Collin Carpenter. RP 7/23/14 at 49. Brooks signed for McClincy Brothers and Carpenter paid McClincy the agreed amount of \$49,951.95 at the August 2, 2012 meeting. RP 7/22/14 at 89-90.

- Breach of Contract Facts. During McClincy Brothers' case-in-chief, the testimony and admitted exhibits established the following facts:

Tim McClincy testified that his company was to be an "advocate" for the Carpenters with their insurance company, Encompass. RP 7/21/14 at 54-55. Tim McClincy's claims that McClincy Brothers and Encompass were being defrauded by the Carpenters and Brooks were based on Tim McClincy's "suspicions." RP 7/22/14 at 7-8; *see* Ex. 162 (extract from Encompass records of McClincy recorded statement). Encompass considered McClincy an "informant" when he reported "dirty crap"

regarding the Carpenters' water loss claim. RP 7/23/14 at 184, 199; *see* Ex. 162. McClincy was the only source for the allegations against the Carpenters. RP 7/24/14 at 9 & 12. Based on McClincy's statements, Encompass suspected it had been defrauded and stopped all payments to the Carpenters. RP 7/23/14 at 154-55, 158 & 167.

McClincy's statement to Encompass that he fired Randy Brooks on the spot, on August 2, 2012, was not true. RP 7/22/14 at 137; RP 7/23/14 at 166, 197. Encompass never found any evidence to support Tim McClincy's assertions that much of the work billed by the Carpenters to Encompass was unrelated to the Carpenters' covered water loss. RP 7/23/14 at 166-167. Encompass never made any claim against the Carpenters, and it had renewed the Carpenters' policy four times by the time of trial. RP 7/24/14 at 10, 69. McClincy Brothers refused to complete the work it had agreed to do under its contract with the Carpenters. RP 7/21/14 at 11. McClincy Brothers never disputed that, after August 2, 2012, it refused to complete the water loss repairs, or that those repairs were not completed until 2013, after the Carpenters hired Edifice and long after McClincy Brothers abandoned the Carpenters' job in August 2012.

At the conclusion of McClincy's case-in-chief, the Carpenters moved under CR 41 to dismiss. RP 7/24/14 at 33-44 (motion), 52-58 (rebuttal supporting motion). The trial court granted the motion:

- Unjust Enrichment Ruling. The trial court found that the August 1, 2012 email sent the message to the Carpenters that "[w]hen we meet tomorrow we're going to be presenting you with the work that's been done and money that's owed." RP 7/24/14 at 62. The court then found that the actual negotiations of the parties the following day, which resulted in the removal of the contingency that McClincy wanted and McClincy instead accepting an accordingly reduced payment from the Carpenters, established the defense of accord and satisfaction as a matter of law. *Id.* at 63.¹¹ Moreover, the court went on to rule that, even if the defense of accord and satisfaction was not before it, "[i]f the Court were to weigh the evidence in this case, the Court would find for the Carpenters based on credibility issues related to the payment of that \$49,000 being a complete payment for the work that was owed. For the work that McClincy's did." RP 7/24/14 at 64.

¹¹ The trial court buttressed this conclusion by pointing out that Tim McClincy conceded that, by the time of the August 2 meeting, he had access to the job site and the workers and had spent over 100 hours investigating his "sense that something was not right." RP 7.24.14 at 63. And to the extent that McClincy went forward with the negotiated supplement and turned out to have missed something, the trial court found that this was a unilateral mistake by McClincy and not the result of any fraud by the Carpenters. *Id.*

- Breach of Contract Ruling. The trial court found that McClincy Brothers failed to complete the work that was part of the original contract, that McClincy Brothers breached the contract when Tim McClincy made inaccurate derogatory statements to the Carpenters' insurance company, and that McClincy Brothers further breached the contract when Tim McClincy required payment in advance before the remaining work would be done. RP 7/24/14 at 64-66. The court weighed the evidence, and found that McClincy's allegations were rebutted by the testimony of the Carpenters, whom the court found to be credible. *Id.* at 66-67. The court found that Tim McClincy was not credible and that he had failed to produce witnesses who he claimed would support his version of the facts. RP 7/24/14 at 68.¹²

K. Evidence Supporting the Carpenters' Counter-Claims Submitted at Trial.

The Carpenters began the presentation of their case at trial on July 24, 2014, and concluded on July 31, 2014. Their evidence included the following:

- Richard Lopes, the owner of Edifice Construction, testified with respect to meeting the Carpenters and visiting the property to

¹² Co-defendant Randall Brooks likewise moved to dismiss the claims against him. *See* RP 7/24/14 at 17-22 (motion), 29-33 (rebuttal in support of motion). The trial court weighed the evidence, and dismissed the claims against Brooks, as well. *Id.* at 68-75.

determine the scope of the remaining incomplete work required because of McClincy Brothers' abandonment of the job. RP 7/24/14 at 109-112 Mr. Lopes explained that the home was not move in ready as the trim, doors and hardware were missing, sinks, faucets, and kitchen appliances were not installed, electrical work was not completed, painting and wainscoting was incomplete. RP 7/24/14 at 111-112, 121. The bid to complete the work was \$35,800. RP 7/24/14 at 116. Edifice completed the work and was paid in full by the Carpenters. RP 7/24/14 at 119, 121-122.

- Michael Cline, the safety director and claims manager from Crown Moving Company testified with respect to the storage and then release of the Carpenters' furnishings to McClincy. RP 7/24/14 at 81, 85-89. He explained that Crown had not provided notice to the Carpenters regarding the release of furniture nor did they get permission from the Carpenters to release the furnishings to McClincy. RP 7/24/14 at 91. Mr. Cline further testified that Crown had situations in the past when McClincy did not want Crown to release furniture to customers without his permission, even though storage fees had been paid. RP 7/24/14 at 92-95. Crown made a determination that it did not wish to do further business with McClincy because their name was being harmed by association with McClincy's; the billing practices McClincy wanted

Crown to follow were inconsistent with Washington Utilities and Transportation Commission tariff requirements. RP 7/24/14 at 96.

- Shannon Michaelson, another McClincy customer, explained that McClincy collected \$148,000 from her insurance company despite only doing water remediation work worth approximately \$26,000. RP 7/28/14 at 15. McClincy then refused to complete the work required under their contract or return the funds. RP 7/28/14 at 17. She also testified that McClincy removed furnishings from her home and refused to return them unless she signed a release waiving claims against him for any wrongdoing in the future. RP 7/28/14 at 20-21.

- Randall Brooks testified to McClincy's "screw the customer" business philosophy and the abusive collection tactics McClincy employed consistent with that philosophy, including instructing his project managers to take possession of customer personal property and hold it until McClincy's payment demands had been met. RP 7/29/14 at 48-51. During the time Brooks was employed by McClincy, a major part of Brooks' job was to manage McClincy's legal actions; Brooks testified that between 2008 and 2013 McClincy was involved in dozens of collection litigations. *Id.* at 53-55.

L. Denial of McClincy's Motion for Reconsideration on Accord and Satisfaction, and the Entry of Findings and Conclusions in Favor of the Carpenters.

At the conclusion of the trial, McClincy moved for reconsideration on the issue of accord and satisfaction, contending that this affirmative defense had not been properly raised by the Carpenters. *See* CP 2224-28 (motion). The court noted that whether to allow the defense was a matter within the court's discretion, and that the court "ha[d] to consider the circumstances here[.]" including that the plaintiff's second amended complaint was filed "relatively close to the trial date[.]" and that the plaintiff then failed to object in any way to the inclusion of the affirmative defense of accord and satisfaction in the answer to that complaint:

[T]here was no highlighting of the issue for the Court, no request to strike it or dismiss it or to be heard about it. It didn't come up to the Court's attention as an issue until the ... motion at the end of the plaintiff's case to dismiss[.]

RP 8/8/14 at 5. The court reaffirmed that it was "appropriate to exercise its discretion" and allow the defense of accord and satisfaction "to stand," observing that "the evidence ... met all the elements on accord and satisfaction." RP 8/8/14 at 6.

The trial court then ruled in favor of the Carpenters on their breach of contract, conversion, and CPA claims. RP 8/8/14 at 7-19. The court awarded damages for breach of contract of \$40,800 (the amount the Carpenters paid to have the work completed). *Id.* at 8. The court awarded

damages for conversion of \$32,864.70 (representing the Carpenters' loss of use of their personal property for 11.5 months). *Id.* at 12-13. The court awarded treble damages on the CPA claim. *Id.* at 17. On September 12, 2014, the court entered its first set of written findings and conclusion. CP 2249-2266.¹³ In those findings the court reiterated its determination during trial that the testimony of Collin and Trish Carpenter was credible, and the testimony of Tim McClincy was not credible. CP 2261 (unchallenged FOFs 1.100 & 1.101).

M. Award of Attorney Fees.

On November 26, 2014, the Carpenters submitted their application for attorney fees and costs. CP 2381-2403. In support of the application, the Carpenters submitted expert opinion testimony from Jeffrey Thomas as to the reasonableness of the fees requested. CP 2466-70. The Carpenters also submitted testimony from their counsel with detailed explanation and line item time entries as to the amount of time billed. CP 2404-65, 2471-2510 & 2523-24. A central focus of their fee claim was the effort required to gather the proof required to establish the public interest element of their CPA claim under *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).

¹³ In all, the trial court entered three sets of findings and conclusions: (1) Findings of Fact and Conclusions of Law on September 12, 2014, CP 2249-2266, (2) Amended Conclusions of Law on October 10, 2014, CP 2364-2370, and (3) Second Amended Conclusions of Law on October 14, 2014. CP 2374-2380.

See CP 2397-2398 (petition), CP 2412-2421 (trial counsel's declaration), 2463 (demonstrative graph) & CP 2470 (expert witness declaration). On December 15, 2014, the Court entered its Findings of Fact, Conclusions of Law and Order awarding attorney fees and costs to the Carpenters. CP 2525-2533.

N. Final Judgment and Appeal.

Final judgment was entered on February 10, 2015. CP 2659-67. McClincy Brothers only filed a notice of appeal. CP 2668. After the period for taking an appeal had run, Tim McClincy moved to join his company's appeal. Commissioner Neel referred McClincy's motion to the Panel on the Merits, and directed the parties to address in their briefs whether joinder would be proper under either RAP 5.3(f) or 5.3(i). *See* Commissioner's Ruling at 1-2 (June 15, 2015).

O. Post-Judgment Collection Efforts and Related Proceedings.

McClincy moved to supersede the judgment by offering to post "alternative security" in lieu of cash or a bond. CP 3162-67. The Carpenters¹⁴ opposed on several grounds: (1) McClincy had made no effort to liquidate assets or borrow against assets to post cash or a bond to stay enforcement, (2) the specific terms in the proffered deeds of trust

¹⁴ Randall Brooks is also a judgment creditor, but as the Carpenters took the lead in dealing with judgment collection matters, those efforts for simplicity's sake will be referred to as actions taken by the Carpenters.

were not before the court and at most offered mere junior lien positions as "security" for the judgment, and (3) the real property subject to the proposed deeds of trust and their proceeds would remain in Tim McClincy's absolute control, which left a significant risk that McClincy would waste or otherwise put his assets at risk by (for example) defaulting on the first position debts on the alleged security. CP 3222-35. The trial court denied McClincy's motion. CP 3292-95.

The trial court, after finding a receiver was reasonably necessary to give effect to and otherwise enforce the judgment, appointed a custodial receiver over individual parcels of income producing commercial and residential real property owned by McClincy. CP 2743, 2741-62. The receiver was granted the power to manage and collect rents from the receivership property. CP 2744 (order, ¶1.3). The trial court reserved the right to grant the receiver a power of sale. *Id.* ("ruling is reserved"). The Carpenters moved to compel McClincy's cooperation with the receiver, and to amend the receivership order to allow sale of receivership property. CP 2765-71.¹⁵ The trial court ordered McClincy to turn over all financial

¹⁵ Of particular concern was that McClincy Brothers Floor Coverings Inc. -- the tenant in several of the properties in the receivership estate, and still under the day-to-day direction of Tim McClincy -- was inexplicably in arrears in its rent to the receiver. CP 2925. Rents generated by the receivership estate were projected to be just over \$16,000 per month (if paid timely); however, rental expenses (before the receiver's fees were paid) were just over \$10,000 per month, leaving net income of just \$6,000 per month (before
(Footnote continued next page)

and account documents regarding estate property to the receiver, and granted the receiver power to sell receivership real property. CP 2957-81. McClincy responded by moving to have the fact of a receiver approved as supersedeas, in order to stop any sale of receivership property. CP 3646-51. The Carpenters opposed, CP 3575-3584, and the trial court denied the motion. CP 3652-56.¹⁶

IV. ARGUMENT

A. The Trial Court's Findings Are Supported by Substantial Evidence.

Unchallenged findings of fact are verities on appeal. *E.g.*, *Marriage of Kim*, 179 Wn. App. 232, 246, 317 P.3d 555, *rev. denied*, 180 Wn.2d 1012 (2014). A finding of fact becomes a verity unless an appellant both assigns error to it and supports that assignment with argument. *E.g.*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (where an appellant assigns error to a finding of fact but “present[s] no argument in their opening brief ... the assignment of error is waived” (citation omitted)).

payment of receiver fees), which was less than the monthly interest accruing on the Judgment of approximately \$7,251.81 per month. CP 2926.

¹⁶ On January 15, 2016, Timothy McClincy filed for Chapter 11 bankruptcy protection; this Court received notice of this filing *from the Carputers*, by a letter delivered to the Court on January 21, 2016 (on file). On March 21, 2016, the Bankruptcy Court granted relief from the bankruptcy stay to allow Timothy McClincy to continue with this appeal.

Evidently attempting to satisfy the "argument" requirement, McClincy dedicated a section of the opening brief to identifying what are called "Unsupported Findings of Fact." *See* Brief of Appellant at 38-39. McClincy represents that the Court will find "elsewhere in the brief" what McClincy calls "discuss[ion] in more detail" about how "many" of the trial court's findings either are "not supported by any evidence admitted at trial" or "contradict[ed by] undisputed evidence." *Id.* at 38. In fact, of the 14 findings that McClincy claims are "unsupported," only *two* are the subject of *any* discussion elsewhere in the brief: (1) Finding of Fact 1.31 (CP 2253) (on pages 12 and 29 of the brief), and (2) Finding of Fact 1.78 (CP 2258-2259) (on page 30 of the brief). As to the 12 other findings identified by McClincy as "unsupported," 11 are first identified by number, then briefly summarized as to content (e.g., "1.31 Finding that McClincy said the August 2 supplement included all remodeling..."), following which McClincy summarily states: "...not supported by any evidence."

As the Carpenters will show, all of the 11 findings challenged by the bare assertion of "not supported by the evidence" are in fact supported

by substantial evidence.¹⁷ The Carpenters will state the challenged finding, and then cite evidence supporting it.

Six of the 11 findings at issue are set forth in the trial court's "Findings of Fact, Conclusions of Law and Order" entered on September 12, 2014:

- Finding of Fact 1.32 (CP 2253-54) (McClincy accepted the August 2 \$49,951.95 check as payment in full for all non-water loss remodel work). *E.g.*, CP 1894-95 (second amended complaint at 5, ¶3.10) (stating that the first supplement "was for the extra work performed by McClincy's which was not covered by insurance and for which no contract existed in the amount of \$49,951.95"); Ex. 18 (August 1, 2012 e-mail from Brooks, proposing payment of "balance" owing on work, including for non-water repair remodel work); RP 7/16/14 at 174-75, 184-85 (Brooks) (McClincy dictated e-mail); RP 7/23/14 at 45 (McClincy admitting he accepted the "\$49,000" payment).
- Finding of Fact 1.39 (CP 2255) (McClincy convinced Encompass to stop payment and not reissue its check). *E.g.*, RP 7/22/14 at 120-21 (McClincy admitting he made allegations to Encompass); RP 7/23/14 at 139-150, 156-58, 161-62, 166-68, 174, 183-85, 188, 199 (testimony of Allstate/Encompass fraud investigator Michael Chesterman, describing McClincy as the source of reports of supposed misconduct by the Carpenters which were relied on by Encompass in deciding to stop further payments); RP 7/24/14 at 7-9 (further testimony by Chesterman); Ex. 162.
- Finding of Fact 1.44 (CP 2255) (McClincy Brothers abandoned the Carpenter job in August 2012). *E.g.*, RP 7/17/14 at

¹⁷ Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted. *Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). In determining whether substantial evidence exists to support a finding of fact, the appellate court reviews the record in the light most favorable to the party in whose favor the findings were entered. *Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997).

54-56 (testimony of Collin Carpenter about McClincy's refusal to do further work from August 2012); RP 7/21/14 at 11 (testimony of Collin Carpenter stating that McClincy did only "minute" work after August 2, 2012), 24-25 (testimony of Collin Carpenter stating that McClincy left the kitchen inoperable).

- Finding of Fact 1.90 (CP 2260) (Encompass did not reissue its check for \$40,736.07 due to McClincy's dishonest communications). This finding substantially overlaps with Finding of Fact 1.29, and the Carpenters refer the Court to the evidence previously identified supporting that finding.
- Finding of Fact 1.93 (CP 2260) (McClincy was involved in over 40 lawsuits). RP 7/29/14 at 53-54, 71-73 (testimony of Randall Brooks stating that McClincy was involved in "well over 40" lawsuits).
- Finding of Fact 1.99 (CP 2260) (Encompass has no claims against the Carpenters). RP 7/21/14 at 16-18 (testimony of Collin Carpenter stating that he is not aware of Encompass having any claim against them, and that Encompass has since renewed their homeowner policy).

The remaining five findings are set forth in the trial court's "Amended Conclusions of Law and Order Re: Carpenters," entered on October 10, 2014¹⁸:

- Finding of Fact ("Conclusion of Law") 1.9 (CP 2365) (Encompass did not reissue its check due to McClincy's dishonest actions). This finding, like Finding of Fact 1.90 (CP 2260), substantially overlaps with Finding of Fact 1.29, and the Carpenters refer the Court to the evidence previously identified supporting that finding.

¹⁸ Although each of these findings is labelled a conclusion of law, the Carpenters agree with McClincy that substantively these are findings of fact. Accordingly, they should be reviewed as such. *E.g., Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) ("[A] finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact").

- Finding of Fact ("Conclusion of Law") 1.24 (CP 2367) (The Carpenters were denied the use of their furnishings for 11.5 months). E.g., RP 7/28/14 at 113-15 (Trish Carpenter testifying to the time period when the Carpenters were denied the use of their furnishings after discovering that McClincy had taken them from Crown); see also Finding of Fact 1.77 (CP 2258) (finding that the Carpenters had to bear the burden of the cost of replacement furnishings from September 2012 through December 2013).

- Finding of Fact ("Conclusion of Law") 1.3¹⁹ (CP 2367) (The Carpenters suffered actual damages for loss of use of \$32,864.70). E.g., RP 7/28/14 at 111-113 (Trish Carpenter testifying to the factors that went into calculating their loss of use damages).

- Finding of Fact ("Conclusion of Law") 1.5²⁰ (CP 2367) (McClincy uses litigation as a business tactic to intimidate and bully customers). E.g., RP 7/29/14 at 48-50, 53-54, 59-60, 73-74 & 77 (testimony of Randall Brooks regarding McClincy's use of "screw the customer" tactics as a matter of corporate policy in order to get paid even before work was done, including withholding return of client property, filing liens and bringing lawsuits).

- Finding of Fact ("Conclusion of Law") 1.6²¹ (CP 2367) (McClincy uses multiple corporate identities in an unfair and deceptive manner). E.g., CP 2208 (summary judgment order on Brooks' counterclaims, finding that McClincy's employment contract with Brooks was void because it was signed by a "non-party, non-existent entity that lacks the capacity to make contracts"); Ex. 206 (copy of contract listing McClincy "Home Decorating" as contracting party); Ex. 145 (Dept. of Licensing printout showing Home Decorating as only an active trade name); Ex. 148 (showing McClincy penalty for licensing infraction); RP 8/6/14 at 55-57 (Brooks testimony about facts of his employment).

¹⁹ McClincy erroneously refers to this as Finding of Fact ("Conclusion of Law") 1.24.

²⁰ McClincy erroneously refers to this as Finding of Fact ("Conclusion of Law") 1.31.

²¹ McClincy erroneously refers to this as Finding of Fact ("Conclusion of Law") 1.32.

That leaves the three findings where McClincy's challenge went beyond the bare assertion, "not supported by any evidence":

- Finding of Fact 1.6 (CP 2251) (The contract provided for payment upon completion of the work). Trial Exhibit 101 is McClincy Brothers' written contract with the Carpenters. Under the bold heading "**Agreement Terms and Conditions**," the contract states that "McClincy's will directly bill your insurance company as a courtesy to you. However, if full payment is not paid by your insurance company..., the balance due or total payment becomes the responsibility of you, the Customer, and is due *upon completion of work*" (emphasis added). Under the bold heading "**Pricing and Terms of Payment**" the contract describes two phases of the work, from initial dry-out and clean-up through "complete restoration of the premises[.]" and states that the customer will "[u]pon completion" of the each phase receive an invoice which shall be due and payable "*upon receipt*" (emphasis added).
- Finding of Fact 1.31 (CP 2253) (McClincy said the August 2 Supplement was to cover all the non-insurance work). McClincy Brothers alleged in its Second Amended Complaint that the August 2, 2012 Supplement in the amount of \$49,951.95 was drafted and negotiated by McClincy for the purpose of having the Carpenters pay the balance due for "*the* extra work performed by McClincy's which was not covered by insurance and for which no contract existed in the amount of \$49,951.95[.]" CP 1894-95 (emphasis added). The August 1, 2012 e-mail, dictated by McClincy to Brooks, told Carpenter that McClincy would be presenting a "statement of account" and that McClincy wanted to be paid what was owed for the "balance" shown by the "statement of account." Ex. 18; RP 7/16/14 at 174-75, 184-85 (Brooks). Collin Carpenter testified that Brooks, McClincy Brothers' manager, told him that the purpose of the meeting was to identify and pay for all work that had been done by McClincy Brothers up to that point. RP 7/17/14 at 41.
- Finding of Fact 1.78 (CP 2258-59) (The furniture in storage represented at least half of the Carpenters' furniture). Trish Carpenter testified about the size of the Carpenter home relative to the apartment, explaining that the Carpenters had to rent furniture

for an apartment one quarter the size of their home, and that in calculating damages for the loss of use of their furniture they doubled the size of the apartment (or halved the size of the home), to account for the fact that not all of the furniture from the home had been placed in storage. RP 7/28/14 at 111-113. Collin Carpenter testified about the furniture that was in various areas of the home at the time of the water loss, the amount of furniture that had to be moved around the home to accommodate the repairs, the packing and moving of specific furniture, and what was sent to Crown and what stayed in the home. RP 7/28/14 at 42-45, 72-78. The inventory of items taken from the Carpenter home to be stored with Crown was admitted into evidence, including dozens of items of furniture (including beds, tables, chairs, cabinets, and an upright piano). Ex 113 (pages 4-7).

Regarding McClincy's challenge to any finding of fact, it should also be kept in mind that the trial court found Tim McClincy was not credible, and Collin and Trish Carpenter were credible. CP 2261 (unchallenged FOFs 1.100 & 1.101). “[C]redibility determinations are solely for the trier of fact.” *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). As shown, McClincy has challenged findings that repeatedly turn out to be supported by the testimony of one or both of the Carpenters.

B. The Trial Court Correctly Granted Summary Judgment Before Trial On McClincy’s Claim for Unjust Enrichment Regarding the Patio Addition, and Correctly Granted the Carpenters’ Motion to Dismiss at Trial McClincy’s Remaining Claim for Unjust Enrichment Regarding the Interior Remodel.

1. Summary Judgment on the Patio Addition Claim.

McClincy Brothers attempted to interject into the case a claim for unjust enrichment for the patio addition work by a second amendment to

its complaint, which it then offered as somehow answering the Carpenters' motion for summary judgment on an oral contract claim for that work, which Tim McClincy had attempted to interject into the case during his deposition as his company's 30(b)(6) representative. McClincy has abandoned the oral contract claim on appeal, while attempting to resurrect the unjust enrichment claim.

McClincy's only reason for why the unjust enrichment claim should be revived is the assertion that the Carpenters improperly sought summary judgment against the unjust enrichment claim by opposing it in their reply in support of their motion. But this is not a case like *Admasu v. Port of Seattle*, 185 Wn. App. 23, 340 P.3d 873 (2014), where the moving party did not seek summary judgment on claims that were in the case when the motion was made, then tried to use the reply to widen the scope of the motion to encompass those claims. *See Admasu*, 185 Wn. App. at 40-41. Here, McClincy Brothers tried to finesse a "no evidence" summary judgment, to which it had no substantive response, by throwing out a new claim via an amendment to its complaint, in the hope this would keep a claim for compensation for the patio addition work alive for trial. But the trial court recognized that this new claim was nothing more than an attempt to revive ("retailor...") the claims for aiding and abetting and conspiracy to defraud which the court had already dismissed on summary

judgment on June 6, and that McClincy *still* had no evidence to support those claims. *See* RP 6/27/14 at 47 (observing that the patio addition unjust enrichment claim was nothing more than a "retailoring of a fraud claim" and remained unsupported by any evidence).

McClincy fails to challenge the dismissal of the aiding and abetting and conspiracy to defraud claims, or to dispute that the unjust enrichment claim just slapped a new label on -- in the trial court's words, "retailor[ed]" -- the previously dismissed claims without offering any cure for the factual deficiencies that caused them to be dismissed in the first place. This double failure dooms McClincy's appellate attempt to revive the patio addition unjust enrichment claim.

2. Dismissal of the Interior Remodel Claim.

As stated, after McClincy Brothers rested its case in chief, the Carpenters moved for dismissal of McClincy's remaining unjust enrichment claim. The trial court found that accord and satisfaction had been proven as a matter of law. RP 7/24/14 at 61-63; CP 2253-54 (FOFs 1.30-1.33), CP 2261 (COL 1.2). The trial court also weighed the evidence and ruled that it would find for the Carpenters based on credibility issues related to whether their payment of \$49,951.95 tendered by them and accepted by McClincy was a complete payment for all non-water damage repair work. RP 7/24/14 at 64.

The elements of an accord and satisfaction are: (1) a debtor tenders payment, (2) on a disputed claim, (3) communicates that the payment is intended as full satisfaction of the disputed claim, and (4) the creditor accepts the payment. *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 685-86, 828 P.2d 565 (1992). McClincy's contention that an accord and satisfaction was not established rests primarily on the assertion that Carpenter and McClincy only agreed on how much would be paid to McClincy on August 2 ("that day"), and that when McClincy demanded yet more money Carpenter did not "stand on the accord and satisfaction" but instead "asked to negotiate." See Brief of Appellant at 28. This assertion, however, conflates two separate payment matters. The first concerned how much would be paid for the non-water repair damage interior work, and the trial court's findings of act establish that Carpenter tendered and McClincy accepted a payment of \$49,951.55 as payment in full for this work. See CP 2253-54 (FOFs 1.30-1.33). These findings are fatal to McClincy's appellate challenge to that determination, as they plainly establish the elements of an accord and satisfaction.²²

²² McClincy failed to assign error to FOFs 1.30 and 1.33, which makes those findings verities. And as the Carpenters have shown, McClincy's assignments of error to FOFs 1.31 and 1.32, asserting they are unsupported by substantial evidence, have no merit. See Section IV.A (discussing FOFs 1.31 and 1.32).

The second matter concerned McClincy's demand that his company be paid in advance for the remaining water damage repair work. The accord and satisfaction obviously had nothing to do with that demand, which explains why Collin Carpenter would not have attempted to link the two. If McClincy had just followed up the accord and satisfaction resolution of the non-water damage repair work, by having his company finish the water damage repair work and accepting payment upon completion of that work, the parties would not now be before this Court *because this lawsuit would never have happened*. It is only because McClincy decided instead to try and squeeze the Carpenters, as he had squeezed other customers before them -- consistent with his company business model of "screw[ing] the customer" -- that events unfolded as they did. McClincy's challenge to the trial court's accord and satisfaction determination boils down to nothing more than a request that this Court parse the evidence differently than the trial court did, and that is something this Court does not do.

C. The Trial Court Did Not Err in its Breach of Contract Damage Award.

McClincy argues that the trial court erred in its contract damage award because it failed to adjust for money the Carpenters supposedly saved as a result of McClincy Brothers' breach of contract. According to McClincy, the Carpenters supposedly would have had to pay McClincy

Brothers if the company had not walked off the job and had instead finished the water damage repair work. It is this money that McClincy asserts should have been subtracted, under the rule of *Eastlake Construction Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984).

McClincy fails to grasp that, if McClincy Brothers had performed its remaining contract obligations, the Carpenters would not have had to pay McClincy Brothers for that work. The work McClincy Brothers wrongfully refused to complete was water damage repair work for which Encompass would have paid, if McClincy had completed the work. Instead, McClincy walked off the job, and -- as the trial court found -- the Carpenters ended up having to pay for the completion of the work after Encompass refused to do so because of the false accusations made against the Carpenters by Tim McClincy. *See* CP 2255, 2262-63 (unchallenged FOF 139, COLs 1.9, 1.15 & 1.21²³) (finding that McClincy's false statement to Encompass meant the Carpenters had to pay for the completion of the water repair work). Moreover, the making of these false accusations was an *additional* breach of McClincy's contract obligations. *See, e.g.*, CP 2262 (COL 1.8). In sum, there should be no reduction under *Eastlake*; the trial court did not error in its contract damage award.

²³ Conclusions of Law 109, 115, and 121 are in their substance findings of fact, and (as previously noted) they should be treated as such.

D. The Trial Court Did Not Err in its Conversion Determinations.

McClincy challenges the trial court's conversion determinations on two grounds. First, he argues that the trial court's refusal to order an immediate release of the Carpenters' property, as part of the preliminary injunction issued shortly after the case had commenced, defeats the Carpenters' conversion claim as a matter of law. *See* Brief of Appellant at 29-30. McClincy cites no authority supporting this claim, and for good reason. A court does not adjudicate the ultimate issues in a case when making a determination as to a preliminary injunction. *Rabon v. City of Seattle*, 135 Wn.2d 278, 285-286, 957 P.2d 621 (1998) (citations omitted). A preliminary injunction simply preserves “the status quo until the trial court can conduct a full hearing on the merits of the complaint.” *Northwest Gas Ass’n v. Washington Utilities and Transp. Com’n*, 141 Wn. App. 98, 115-16, 168 P.3d 443 (2007) (citation omitted). Here, the status quo was that McClincy was in possession of the Carpenters' property; in its preliminary injunction determinations the court was simply deciding that the property would remain in McClincy's possession until the court could determine whether McClincy had wrongfully taken it. Nothing in the court's order or the surrounding record suggests the court was intending to go beyond the usual scope of a preliminary injunction, and

then and there adjudicate whether McClincy had lawfully taken the Carpenters' property.²⁴

Second, McClincy argues that the trial court's measure of damages is flawed because the court awarded damages based on a loss of use measure for a period when the converted possessions (specifically furniture) could not have been "used" because the Carpenters' house was not yet habitable. *See* Brief of Appellant at 31. To begin, this issue was not preserved for appellate review. Before the start of trial, McClincy's conversion defense was limited only to disputing whether McClincy's possession of the Carpenters' property constituted a conversion. *See* CP 2084-87 (McClincy trial brief at 13-16). At the close of trial, McClincy challenged the Carpenters' conversion damages case on several grounds, but not on the basis now advanced on appeal. *See* RP 7/31/14 at 184-89 (McClincy's closing argument on conversion addressing damages). Not even on reconsideration, following the entry of the trial court's findings and conclusions, did McClincy raise the challenge to the trial court's

²⁴ McClincy Brothers then failed to preserve the status quo, by "concealing the household furnishings, failing to disclose information regarding the property's whereabouts and not agreeing to the CR 34 inspection." CP 479-80 (order holding McClincy in contempt at 2-3, FOF 8); CP 2257-2258 (unchallenged FOF 1.69, 1.70). The trial court held McClincy in civil contempt for willfully violating the preliminary injunction, finding that McClincy "unilaterally converted the Carpenter's [sic] household furnishings without permission or authorization[.]" CP 479 (order on contempt at 2, FOF 2), CP 2258 (unchallenged FOF 1.75). It makes no sense for the court to have made these determinations, if -- as McClincy now insists -- the court intended by its prior order to validate McClincy's taking possession of the Carpenters' property.

conversion damages award now being pressed on appeal. *See* CP 2280-96 (motions for reconsideration). Accordingly, McClincy's present challenge to the trial court's conversion damage awards should be rejected because McClincy failed to preserve the issue for appellate review. *E.g.*, *Seattle-First National Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240-41, 588 P.2d 1308 (1978) (citations omitted).

The challenge is also substantively meritless. Damages for conversion can be awarded for the period of time during which the owner was wrongfully deprived of the converted property. *Dunn v. Guar. Inv. Co.*, 181 Wash. 245, 248, 42 P.2d 434 (1935). The Carpenters sought conversion damages from September 19, 2012, contending this was the date when McClincy's wrongfully took the Carpenters furniture from Crown without the Carpenters knowledge and consent. CP 2164, 2303 & 3129. Judge Linde, however, limited her award of conversion damages from January 4, 2013, using the loss-of-use measure of their furniture. CP 2258-59 (FOF 1.78). This measure of damages recognized the fundamental problem created by McClincy's breach: that a water damage repair project that should have been completed within a few months of August 2012 was delayed well into the following year.

If McClincy had just done what should have been done, and finished the water repair damages work, the Carpenters would have been

back in their house with their belongings by January 2013 at the latest. But McClincy did not do what should have been done, and the end result was the Carpenters' house was not ready for occupancy until July 2013. And because of McClincy's conversion, the Carpenters' personal property was not returned to them until mid-December 2013, when the court ordered its return. The end result was precisely the 11.5 months of loss of use -- January to mid-December 2013 -- for which the Carpenters were awarded damages. As for the monthly loss of use value employed by the trial court: that number was amply supported by the evidence. *See* RP 7/28/14 110-115 (Trish Carpenter); Ex. 113 (Crown Rental inventory).

E. The Trial Court Correctly Awarded the Carpenters Prejudgment Interest.

"[W]here the amount sued for may be arrived at by a process of measurement or computation from the data given by the proof, without reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest." *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 33-34, 442 P.2d 621(1968) (citing and quoting McCormick on Damages). Here, the damages amounts awarded the Carpenters for breach of contract and conversion were arrived at by precisely such a process of measurement or computation from the data given by the proof, without reliance upon opinion or discretion, and after the concrete facts had been determined.

To review: the Carpenters were awarded contract damages of \$40,800 based on the amounts they paid to Edifice Construction Company (\$35,800), and Michael Showalter of Construction Dispute Resolution (\$5,000). CP 2263 (COLs 1.21 & 1.22). And they were awarded conversion damages of \$32,864.70 based on the loss of use of their furnishings and the cost they incurred to replace them over a period of 11.5 months. CP 2258-59, 2264 (FOFs 1.77 & 1.78, COL 1.29). These awards are liquidated, under the test for liquidated damages adopted by our state's supreme court in *Prier*.²⁵ The contract damages are based on "concrete facts": the amounts actually paid to the consultant and contractor for their work. The conversion damages are likewise based on such facts: the amount the Carpenters had to pay to furnish a space half the size of their home during the period of the conversion.

McClincy asserts that the trial court referred to its contract damage award as "conservative." *see* Brief of Appellant at 33, citing FOF 1.80 (CP 2259). That reference was actually to the court's *conversion* damage award, and the fact the trial court characterized its conversion damage award as "conservative" -- because the court chose not to go beyond the

²⁵ This is the same test expressly applied by McClincy's case authorities. *See Rekhter v. DSHS*, 180 Wn.2d 102, 124, 323 P.3d 1036 (2014), *Scoccolo Constr., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006) (both citing and quoting *Prier*).

concrete loss-of-use approach and include an amount for emotional distress, *see* CP 2259 (FOFs 1.79 & 1.80) -- does not render the award unliquidated. McClincy also claims the trial court based its conversion award on a range of 50 to 75 percent of the Carpenters' furniture being in storage. *See* Brief of Appellant at 33, citing FOF 1.78 (CP 2258-59). In fact, the trial court found that "at least 50%" of the Carpenters' furniture was in storage, and its computation of loss-of-use damages reflects the court's employment of that concrete fact. *See* FOF 1.78 (CP 2258); *see also* RP 8/8/14 at 12-13 (court's oral ruling explaining determination of conversion damages).

F. The Trial Court Correctly Determined that McClincy's Abusive Business Practices, Driven by a Philosophy of "Screw the Customer," Violated the Consumer Protection Act.

It is important to recognize that McClincy is not challenging the trial court's factual findings regarding McClincy's abusive business practices, which all originated with his business philosophy of "screw the customer." As the trial court observed at the close of the case:

[T]he ethos that was described as the "screw the customer" or stronger words, "f" the customer, it's all about getting my money," that wasn't denied by Mr. McClincy, who had every opportunity, was on the stand multiple times, to put some different -- some sort of different light on what the driving philosophy of his interaction with the customer and the public was. *And he didn't do so.*

RP 8/8/14 at 15 (trial court's oral rulings) (emphasis added).

It was Randall Brooks, with his extensive firsthand knowledge of Tim McClincy's business methods, who testified that McClincy's attitude was "[s]crew the customer, I want to get paid." RP 7/29/14 at 48. Brooks described how McClincy believed he was entitled to receive any money issued by an insurance company, regardless of whether McClincy Brothers had actually completed the work the insurance company was paying for. *Id.* at 49.²⁶ To make sure he got that money, McClincy was prepared to employ a wide array of collection devices, including taking possession of a customer's stored property and holding it until McClincy's payment demands had been met. *Id.* at 49-50. To that end McClincy instituted a "policy" regarding customer stored property, instructing his project managers that "under no circumstances w[ere] any contents, personal belongings that are moved offsite -- whether in McClincy's possession or in somebody else's -- ... to be returned until the bill was paid in full." *Id.* at 50. Brooks, who was in charge of collection efforts from 2008 until his resignation in 2012, described McClincy's overall approach -- his "general policy" -- as follows:

[H]e didn't care what the circumstances were with a customer. He didn't care if the customer didn't receive what was obligated to

²⁶ Although the transcript labels the relevant portion of this page as being a question by the Carpenters' counsel Mr. Graham, it is clear from the text itself that it is Mr. Brooks' answer to counsel's question, given immediately after an objection to that question had been overruled.

them by McClincy's. Whether it be contractual or verbal, or for that matter work that was performed on their premises. He wanted to be paid in full for work, either half done, not done at all, or almost completed.

Id. at 50-51.²⁷

The trial court found that McClincy applied these abusive practices against the Carpenters. Thus, Tim McClincy demanded payment in advance of \$40,736.07 from Encompass for work that was not complete. FOFs 1.34 & 1.35 (CP 2254). And when the Carpenters rejected this demand, McClincy caused his company to abandon the job and then started turning the screw on the Carpenters with abusive collection activities (e.g., making secret and false claims to Encompass that they were being defrauded by the Carpenters; presenting bills and invoices to the Carpenters demanding additional payments for work either already paid for or never done; secretly removing the Carpenters' furnishings from Crown to create additional leverage; filing a lawsuit eventually seeking hundreds of thousands of dollars in damages). FOFs 1.39, 1.40, 1.44, 1.46-50, 1.52, 1.54, 1.65, 1.66 (CP 2255-57). The trial court found that McClincy had applied these abusive practices against other customers, FOF No. 1.98 (CP 2260), and that McClincy's actions were "part of a

²⁷ Brooks testified that within a period of five years McClincy was involved in over forty collection lawsuits. RP 7/29/14 at 53-55, 59. Brooks witnessed Tim McClincy shred documents requested sought in discovery by those McClincy was suing. RP 7/29/14 at 61.

broader company pattern that strongly support[s] the potential for additional harm to the public at large." COL 1.34 (CP 2264); *see also* FOFs 1.64, 1.94 & 1.97; COLs 1.31, 1.32, 1.33, 1.36, 1.39 & 1.41 (CP 2257, 2260, 2264-65).²⁸

These findings are amply sufficient to uphold the trial court's CPA determinations under the public interest showing requirement laid down by our state supreme court in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). And, as stated, McClincy does not dispute that these findings are supported by substantial evidence -- evidence he made no attempt to rebut at trial.

Instead, McClincy asserts that none of the facts found by the trial court "were pled as part of the [Carpenters' CPA] claim." *See* Brief of Appellant at 32. If this statement is intended to be a challenge based on the law governing pleading a cause of action, it is unsupported by any citation to authority and therefore waived. *E.g., Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986) (citations omitted).²⁹ It also is meritless. Pleadings are required only to give notice

²⁸ Several of these determinations labeled "conclusions of law" are substantively findings of fact, and therefore (as previously noted) should be treated as such.

²⁹ Not only does McClincy fail to cite any authority, he also failed to state an issue regarding pleading law, and further failed to assign error to the trial court's rejection of this same pleading point when it was raised in the reply in support of the motion for summary judgment seeking dismissal of the CPA claims (which, as previously stated, the trial court denied). *See* Section III.I (discussing McClincy's failed summary judgment
(Footnote continued next page)

of the general nature of the claim asserted. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). Notice pleading does not require a statement of all of the facts supporting a claim, but only a “short and plain statement of the claim showing the pleader is entitled to relief.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) (quoting CR 8(a)). “The notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint.” *Id.* In opposition to McClincy's motion for summary judgment on the Carpenters' CPA claims, the Carpenters submitted four detailed declarations in support of the “public interest” *Hangman Ridge* elements of their CPA claims. CP 1524-1633. The Carpenters also timely and properly renewed and re-asserted their CPA counterclaim when McClincy's filed its Second Amended Complaint, and those pleadings gave express notice of the Carpenters intent to pursue a public interest claim. CP 2146-67. In sum, McClincy got full and timely notice of the scope of the Carpenters' CPA claim, and the trial court's findings fully support affirming the trial court's CPA determinations under the public interest showing requirement set forth in *Hangman Ridge*.³⁰

motion seeking dismissal of the CPA claim, including the raising of the pleading point now being reasserted on appeal).

³⁰ McClincy states that a breach of a contract, as such, cannot sustain a finding of a CPA violation. *See* Brief of Appellant at 31-32. While the statement is accurate as far as it goes, what matters here is the *way* McClincy violated his contract with the Carpenters, *(Footnote continued next page)*

McClincy also takes issue with the *per se* violations of the CPA found by the trial court. First, this Court need not reach the issue of *per se* violations of the CPA, given the trial court's overall CPA determinations can be upheld under the public interest showing requirement of *Hangman Ridge*. Second, a statutory violation will constitute a *per se* violation of the CPA if the statute involved has a statutory declaration of "public interest impact." *Hangman Ridge*, 105 Wn.2d at 791. Both of the statutes at issue have such declarations. RCW 48.30A.005 states that "the business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters[,]" while RCW 18.27.350 states that a violation ("infraction") of the Contractors Registration Act is a violation of the CPA.

McClincy does not dispute that Tim McClincy's false statements to Encompass constituted deception and dishonesty in an insurance matter, and that determination is sufficient to uphold the trial court's overall CPA determinations on *per se* violation grounds. McClincy does challenge whether there was a violation of the Contractor Registration Act. *See* Brief of Appellant at 33 (claiming Randall Brooks' contract was with an

which the Carpenters showed was consistent with an overall business model involving abusive collection practices -- a business model that McClincy made no effort to deny he held to, and pursued with vigor.

active McClincy corporate entity). But McClincy failed to assign error to Finding of Fact 1.96, which found that McClincy's Home Decorating, the named party to the McClincy contract with Randall Brooks, was not an active corporation. The failure to assign error renders FOF 1.96 a verity, and is fatal to McClincy's challenge. The challenge also lacks merits on its own terms; trial exhibit 145 does not say that Home Decorating is an active corporation, only that it is an active trade name.

G. The Trial Court's Award of Attorney Fees Was Not Erroneous.

A trial court's award of fees should be reversed only if the trial court manifestly abused its discretion by exercising that discretion on untenable grounds or for untenable reasons. *E.g., Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (citations omitted).

This case involved almost twenty-four months of litigation, eighteen months of discovery, investigation of the thirty-five witnesses disclosed by McClincy, twenty depositions, motions for a temporary restraining order and preliminary injunction, discovery motions, a contempt motion, five summary judgment motions, motions in limine, and eleven trial days over three weeks. CP 2520 (summary of procedural scope). Two attorneys represented McClincy and his company. *Id.* The damages claimed by McClincy exceeded \$300,000 before attorney fees and costs. CP 2524.

The Carpenters petition for attorney fees was supported by meticulous, contemporaneous, and meaningful billing entries. CP 2404-65 & CP 2471-2510. Each of the Carpenters' trial attorneys submitted declarations setting forth billing records with detailed descriptions of time spent on tasks, amounts charged, and the category of individual who spent time. *Id.* The Carpenters submitted the testimony of Jeffrey Thomas, the managing partner of the Seattle law firm of Gordon Tilden Thomas & Cordell LLP, in support of their application. CP 2466-70. Mr. Thomas conferred with the Carpenters' trial attorneys to get an understanding of the issues involved in the case, reviewed the case pleadings, reviewed trial counsel's billing records, and reviewed the Carpenters' fee application. CP 2467-68 (Thomas Decl., ¶3). Mr. Thomas opined that not only were the rates of the Carpenters' trial attorneys reasonable, the time spent was well within the range of reasonableness and was appropriate given the Consumer Protection Act claim at issue and McClincy's litigation tactics. CP 2468-70 (Thomas Decl., ¶¶4-5). McClincy offered no rebuttal to this expert testimony.

The Carpenters provided a bar graph chart demonstrating how the attorney fees incurred in this case increased rapidly after McClincy walked out of a mediation without responding to the Carpenters' settlement offer. CP 2410 & 2463. As the case progressed, the Carpenters had to expend

significant time and effort investigating and proving the elements of their Consumer Protection Act claim. CP 2411-19. This required demonstrating McClincy's unfair and deceptive collection practices toward the Carpenters were not an isolated matter, but the result of an abusive business model. CP 2420-21. This is the kind of effort that must be expended by victims of deceptive and unfair business practices, under the demanding standard for proving a CPA claim laid down by our state Supreme Court in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). It would frustrate the consumer protection purpose of the CPA to refuse to award the kind of fees that must be invested in order to establish a right to recover under that statute against abusive business practices, which is precisely what the Carpenters had to do and did do here.

McClincy claims that the Carpenters' fee request did not comply with the requirements for fee requests set forth by this Court in *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013). See Brief of Appellant at 40. McClincy's sweeping argument that the Carpenters' billing records are "impenetrable stacks of documents without any means to cross reference or analyze them," see Brief of Appellant at 42, is not supported by the record. Trial counsel's billing records demonstrate that each task was clearly described and billed, tasks were appropriately

divided between counsel and their respective firms, and the billing descriptions were clear and unambiguous. *See* CP 2404-65 & CP 2471-2510.

The trial court's order granting the Carpenters' fee application was detailed and included numerous findings of fact, to which no error has been assigned. CP 2525-32. The trial court specifically noted and rejected virtually every argument that McClincy is making to this Court (including the *Berryman* argument being advanced again on appeal), finding that that it was McClincy's abusive tactics that compelled the Carpenters to incur the fees they did. CP 2529-30 (Order Granting Carpenters' Application for Attorney Fees and Costs at 5-6, FOF 1.24). In sum, the trial court did not abuse its discretion, and its attorney fee award should be affirmed.

H. The Trial Court's Post-Judgment Enforcement Rulings Should Be Affirmed.

The Receivership Act fully supports the trial court's order allowing sale by the receiver of receivership real property, subject to court approval of any proposed sale, and upon notice and hearing. The Receivership Act's fundamental purpose is "to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein." RCW 7.60.005.

Custodial receiverships and receiver’s sales are discussed together in the Receivership Act in just two places, neither of which prohibits a custodial receiver from being authorized to sell real property. First, RCW 7.060.015 states that “[a] receiver must be a custodial receiver if the receiver is appointed to take charge of limited or specific property of a person or is not given authority to liquidate property.” *See* RCW 7.60.015. Second, RCW 7.60.260(1) states that “estate property consisting of real property may not be sold by a custodial receiver other than in the ordinary course of business.” *See* RCW 7.60.260(1).

The Legislature’s use of the disjunctive “or” in RCW 7.60.015 is significant. Its employment means that the Legislature intended that a receiver should *not* be confined to the powers of a mere custodian if the receiver *is* given authority to liquidate property.³¹ Moreover, RCW 7.60.260(1) by its terms grants a power of sale even to custodial receivers if that sale is done “with the court's approval after notice and hearing” and “in the ordinary course of business[,]” with the exception of (1) sales of a “leasehold estate” and (2) a “vendor’s interest in a real estate contract[.]”

³¹ Before the trial court McClincy cited footnote 6 of this Court's decision in *Wash. State Dept. of Revenue*, 190 Wn. App. 150, 359 P.3d 913 (2015), *see* CP 3649, but has not cited it on appeal. Footnote 6 states: “In contrast, a 'custodial receiver' is 'appointed to take charge of limited or specific property of a person [and] is not given authority to liquidate property.' RCW 7.60.015.” *Wash. State Dept. of Revenue*, 190 Wn. App. at 160, n. 6. It was unexplained why this Court in that case changed the express wording of RCW 7.60.015 to have it state in the conjunctive with its insertion of “[and]” when the Legislature used the disjunctive “or.”

McClincy presented no evidence to the trial court to suggest that this case involves either of those exceptions. And while the Receivership Act does not define an "ordinary course of business" sale, under the Bankruptcy Code, from which the Receivership Act substantially draws,³² ordinary course of business sales are those that have a valid business justification and are proposed in good faith. *See In re 240 North Brand Partners, Ltd.*, 200 B.R. 653, 659 (9th Cir. BAP 1996) ("Good faith encompasses fair value, and further speaks to the integrity of the transaction."); *see* 11 U.S.C. § 363(c)(1) (permitting a bankruptcy trustee managing a debtor's assets to sell estate assets in the ordinary course of business, without notice or a hearing).³³

It should follow that, under the Receivership Act, a custodial receiver can sell real property with the trial court's approval after notice and a hearing, so long as that sale is proposed in good faith, is for a fair price, and has a valid business purpose. Here, there is no disputing that McClincy is an investor in the business of owning income producing properties. The receiver has not been presented with any third party offer

³² *See generally*, M. Barreca, WASHINGTON'S RECEIVERSHIP ACT, Sept. 2008 (available at http://www.klgates.com/files/upload/Barreca_WAReceivershipAct.pdf). Mr. Barreca was appointed in July 2010 as a judge of the U.S. Bankruptcy Court for the Western District of Washington.

³³ Similarly, under Washington's Uniform Commercial Code, a "[b]uyer in [the] ordinary course of business" is "a person that buys ... in good faith ... [and] comports with the usual or customary practices in the kind of business in which the seller is engaged[.]" RCW 62A.1-201(9).

to purchase any receivership property. As a result, no proposed sale of receivership property has ever been presented to the trial court for approval. The trial court merely authorized the receiver to *pursue* the marketing and sale of the receivership properties for the highest and best price possible, pursuant to the procedure set forth under RCW 7.60.260. *See* CP 2958-59. There is nothing about this limited state of affairs that violates the Receivership Act.

Moreover, there is no absolute permanence to a trial court's initial designation of a receiver as either general or custodial. "The court by order may convert either a general receivership or a custodial receivership into the other." RCW 7.60.015. Furthermore, "[t]he various powers and duties of a receiver provided for by this chapter may be expanded, modified, or limited by order of the court for good cause shown." RCW 7.60.060(3). Thus, once the trial court here amended its initial order appointing the receiver to grant the receiver a power of sale, *see* CP 2958-59, as a practical matter either (1) the receiver was converted to a general receiver over McClincy's rental properties with authority to liquidate "with the court's approval after notice and a hearing" under RCW 7.60.260(1), or (2) the receiver remained a custodial receiver over McClincy's rental properties but with the authority to liquidate to a good faith buyer for a fair price "with the court's approval after notice and a

hearing" under RCW 7.60.260(1). And either way, the trial court' actions appropriately adhered to the Receivership Act's ultimate purpose of administering property for the benefit of McClincy's creditors.³⁴

McClincy contends trial court barred the Judgment Creditors from seeking modification of the scope of the receiver's powers. *See* Brief of Appellant at 44-45. This reading of the trial court's order ignores that the "right to pursue statutory provisional remedies in an attempt to collect a judgment is inherent in every judgment." *State v. Base*, 131 Wn. App. 207, 219, 126 P.3d 79 (2006), citing *Starkey v. Starkey*, 40 Wn.2d 307, 316, 242 P.2d 1048 (1952). Nothing in this record suggests the trial court intended to deprive the Judgment Creditors of those rights.

I. Tim McClincy's Status as an Appellant.

The Carpenters adopt, under RAP 10.1(g), the arguments of Respondent Randall Brooks.

³⁴ McClincy errs in claiming a guaranteed redemption right upon any receiver sale of his property. *See* Brief of Appellant at 44. Washington law is clear that a property owner has a right of redemption after a foreclosure and sale only if the statute under whose authority the foreclosure or sale takes place provides for one: "[T]he right of redemption is not an interest in land, but a mere personal privilege *given by statute.*" *Fidelity Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 52, 767 P.2d 1382 (1989) (emphasis added). And the Receivership Act does not grant redemption privileges. *See Wash. State Dept. of Revenue v. FDIC*, 190 Wn. App. 150, 162-63, 359 P.3d 913 (2015) ("[U]nlike an execution of a judgment under chapter 6.17 RCW, the privately negotiated sale of real estate by a receiver under chapter 7.60 RCW is not subject to a public auction and the sale results in a transfer of property that is not subject to redemption rights"). There is no guaranteed or absolute right to redemption in Washington.

V. RAP 18.1 Fee Request

The Carpenters request an award of fees on appeal under the same authority by which the trial court awarded fees. *See* CP 2530 (COLs 2.1 & 2.2) (awarding fees pursuant to the contract and the CPA).

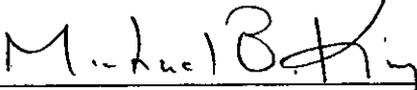
VI. CONCLUSION

The trial court should be affirmed.

Respectfully submitted this 16th day of May, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By



Michael B. King, WSBA No. 14405
Attorneys for Carpenter Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

Matthew F. Davis Mark Jordan Bracepoint Law 277 Harbor Ave. SW 4 th Floor, Suite D Seattle, WA 98126-2138 mjordan@bracepointlaw.com mdavis@bracepointlaw.com	Nicolas F. Corning The Corning Law Firm 4616 25 th Ave. NE, Suite 315 Seattle, WA 98105 ncorning@corninglawfirm.com
Timothy Graham Hanson Baker Ludlow Drumheller PS 2229 112 th Ave. NE, Suite 200 Bellevue, WA 98004 tgraham@hansonbaker.com	Jennifer T. Karol Law Offices of Jennifer T. Karol 23745 225 th Way SE, Suite 203 PO Box 1470 Maple Valley, WA 98038 jkarol@cedarriverlaw.com
Tyler J. Moore 2600 Two Union Square 601 Union Street Seattle, WA 98101 moore@lasher.com	

DATED this 16th day of May, 2016.



Patti Saiden, Legal Assistant