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STATE
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NO. 357-32-1
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BROGAN & ANENSEN, LLC, a Washington Limited Liability
Company

Respondent,

v.

WAYNE LAMPHEAR

Appellant

No. 05-2-01593-1 Grays Harbor Superior Court

APPELLANT'S REPLY BRIEF

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III. RESPONSIVE ARGUMENT & AUTHORITY

A. SUMMARY JUDGMENT STANDARD

In reviewing an order of summary judgment, the court of appeals engages in the same inquiry as the trial court. The critical determination is whether there is a genuine issue as to any material fact and whether the moving party was entitled to judgment as a matter of law. Sarruf v. Miller, 90 Wash.2d 880, 586 P.2d 466 (1978). Washington Ass'n of Child Care Agencies v. Thompson, 34 Wash.App. 225, 230, 660 P.2d 1124 (1983). Summary Judgment should be granted where reasonable minds can reach but one conclusion. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). A party opposing summary judgment may not rely on "mere allegations or denials" set forth in the pleadings, but rather "must set forth specific facts showing that there is a genuine issue for trial." CR 56(e), Tiffany Family Trust Corp. v. City of Kent, 155 Wash.2d 225, 119 P.3d 325 (2005).

Brogan and Anensen did not submit any responsive documents to refute any of the facts verified in the numerous documents and declarations submitted in Wayne Lamphiear's Motion for Summary Judgment. They merely asserted the court could not consider the facts. If the court considers the facts summary judgment must be granted to Wayne Lampiear. Reasonable minds could reach only one conclusion after reviewing the uncontroverted facts.

1 B. SUMMARY UNCONTRAVERTED DECLARATION FACTS

2 Brogan and Anensen’s reply brief mischaracterizes the facts
3 contained in the declarations in support of Wayne Lamphiear’s Motion for
4 Summary Judgment. The facts are that Wayne Lamphiear was promised
5 he could keep all the improvements he had made to the property, and
6 remain in possession for one year while he moved the improvements to the
7 adjacent piece of property he was purchasing, and made arrangements for
8 his horses. See the following declarations: Lasley CP 173 pp. 3, Lewis
9 CP 175-176, Larry Birindelli CP 178 pp 4 to CP 179, Sweeny CP 181,
10 Rapheal CP 183, Anensen CP 185(brother of Garry Anensen), Lamb CP
11 420 pp 6 to 421, Fritz CP 202-203, Lamphiear, CP 295 line 1 to 11.

12 While Wayne Lamphiear has no doubt this court will review those
13 facts, for convenience included herein are a few of the significant portions
14 of those declarations.

15 I was standing right next to them when Gary specifically told Wayne in
16 my presence that as part of the deal he would have a full year to get all of
17 his stuff off the property.
Lasley CP 173 pp. 3

18 I know from Gary that Brogan and Anensen’s statement that there was no
19 agreement to take the buildings is a flat out lie. (was told by Gary Anensen
20 that Wayne Lamphiear had an entire year to move all the improvements,
21 and was hired by Wayne Lamphiear to help with the move until suddenly
cancelled due to Brogan and Anensen’s breach).
Lewis CP 175-176,

22 I have been involved in multiple discussions with Wayne, Garry, and Tim
23 Hamilton about this matter all the way through and am personally aware
24 because Garry told me himself that as part of the deal with Wayne they
25 were all operating with the understanding that all the buildings on
Wayne’s property were going with Wayne as part of the sale and that

1 Wayne had a full year to move everything off before they would start
2 developing.

3 After a few months had passed, Garry and Kenny started to state
4 publicly that it did not look like Wayne had started relocating anything
5 yet. Garry commented to me on occasion that: "Wayne only has ___
6 months left and that he had better get moving". The number that would be
7 in the blank on this quote always added up to a full year deadline that they
8 admitted to having promised Wayne."

9 Larry Birindelli CP 178 pp 4 to CP 179.

10 Gary and Wayne were discussing the fact that Wayne had a full year to get
11 everything off the property and it was clear that Garry and Wayne were on
12 the same page when they were talking about "everything". They
13 specifically mentioned all the buildings, the modular home, all the other
14 travel trailers, all the horses and everything that was not the actual land
15 itself being taken off by Wayne within that one year time period. They
16 specifically talked about how Gary was only buying the land itself for
17 development purposes and the fact that he did not want any of the other
18 stuff except raw land, and was not buying anything other than raw land.

19 I specifically heard Wayne ask Gary about whether they should
20 put the details of moving everything off the property and the year time
21 period in writing and Gary responded that: This is a handshake detail(sic)
22 and a gentlemen's agreement. I'm telling you this is our deal. Isn't my
23 word good enough for you".

24 Sweeny CP 181 (apparently after the sales agreement was signed and Gary
25 was looking for reassurance.)

I've been talking to Gary about his purchase of the Lamphiear property all
the way through the buying process.

I remember one conversation with Gary in particular that we had at
the Next Door Café when Gary told me he had no use for the buildings on
the Lamphiear property. I also remember a conversation he had with
Wayne in my presence about Gary wanting to take his CAT up to the land
next door to the Lamphiear property that Wayne was purchasing and clear
out some space up there for Wayne to move his house over to. Wayne told
Gary that he was too nervous to be having Gary go up there before it
closed and cutting down trees and leveling areas. The entire time this
transaction was taking place Wayne was telling me what his plans were
for the buildings and I knew that Gary knew Wayne's plans.

About a month or so ago Wayne and I were sitting at the same
table at the Next Door Café and Gary came in a really bad mood. You

Reply Brief of Appellant Wayne Lamphiear-

1 could tell there was something on his mind. Gary sat down right next to
2 me and cut loose on Wayne about his still having all his stuff on the
3 property and he need to get his stuff off the property and get
4 insurance.(emphasis added)
5 Rapheal CP 183(declaration signed November 11, 2005).

6 I have been asked whether the year was simply a permission issue from
7 Garry to Wayne and I want to make clear that the one year was promised,
8 the removal of the buildings and the granting of the easement were all
9 material to the sale of that property. It was negotiated parts of the
10 transaction and it was part of the deal.

11 Garry does not normally take actions in contrast to his own word.
12 Garry is the type of guy who used to do business sitting at Denny's and
13 writing out ideas and getting agreements on napkins. Normally if Garry
14 says something you could feel comfortable taking his statement to the
15 bank. I think this whole thing is really not like Garry.

16 Anensen CP 185 (brother of Garry Anensen).

17 Sometime in June, Gary Aneson (sic) dropped into my place and asked:
18 Loren, are you mad at me?" I said, "what about?" he said, "well we closed
19 on Wayne's property and we're going to develop it." I said I wasn't mad
20 at him, but I didn't much like the idea of development. We talked awhile
21 about his plans and about Wayne and Gary specifically told me about his
22 promise to Wayne that he had a full year to sell or get all of his "shit" (and
23 that was his word) off the property and that they were going to wait a full
24 year before they started the development.

25 At the time Gary did not know that the zoning changes he was
undertaking were going to meet such resistance.

The court needs to understand the city of McCleary (if it does not
already) and it also needs to understand Ken Brogan and Gary Anneson's
ties to the city. In McCleary, if somebody you've known for a number of
years looks you in the eye and tells you that changing some thing I writing
is complicated and asks you top take them at their word then that is the
way you conduct yourself. Mr. Brogan was raised in McCleary. Mr.
Anneson is not only from McCleary -he's still living there today.
Lamb CP 420 pp 6 to 421.

I was sitting next to Wayne at the Next Door CafH (sic) when Garry
Anensen approached Wayne. Garry asked Wayne if he had gone into sign
the closing documents yet. Wayne said, in my presence, that he was
concerned that the documents did not indicate the buildings were going

1 with Wayne and stressed again that he wanted a guarantee that he was
2 getting the buildings. Anensen said- you don't have to worry about it
3 Wayne. We don't want anything that is on the property. He said it was
4 guaranteed that Wayne had a full year to vacate the property with all of his
5 belongings including the buildings.
6 Fritz CP 202-203.

7 Brogan and Anensen have not contested the facts as asserted in the
8 declarations. In fact no declarations were ever submitted by Brogan and
9 Anensen in Response to Wayne Lamphiear's motion for summary
10 judgment, which followed Brogan and Anensen's motion for summary
11 judgment.

12 As is evident from the declarations Garry Anensen was the one
13 who made most of the promises in public places. However, Kenneth
14 Brogan his business partner, made a stab at using weasel words, in an
15 attempt to Support Brogan and Anensen's Motion for Summary Judgment
16 which was filed before Wayne Lamphiear's Motion for Summary
17 Judgment.

18 Here, Wayne Lamphiear presented uncontraverted evidence that he
19 was promised that he could remain on the land for one year after the sale;
20 that he could keep all of his buildings and move them on to his adjacent
21 property; and that the sixty foot easement was to run the length of his
22 newly purchased property. Respondents only declaration came from
23 Kenny Brogan not Gary Anensen. Kenny Brogan did not deny that the
24 promises were made but responded with following double talk about
25 merger:

On that date, my understanding was that the purchase and sale
agreement included all the terms agreed to by the parties. Although
we discussed other terms during negotiations, it was my

1 understanding that because they were not part of the contract they
2 were not part of the agreement.
3 CP 49 Kenneth Brogan.

4 The declarations show the promises were not made only during
5 negotiations as implied by Kenneth Brogan's declaration. Garry Anensen
6 who according to the above witness made the public promises has never
7 denied making the contractual promises over and over in public places in
8 front of many witnesses; 1) during negotiations, 2) at the time the
9 purchase and sale agreement was signed, and 3) after the deal was signed.
10 Lasley CP 173 pp. 3(heard promises by Anensen over course of formation
11 more than once),Lewis CP 175-176(time promises by Anensen heard
12 unspecified), Birindelli CP 178 pp 4 to CP 179(over several months again
13 and again),Sweeny(during negotiations) CP 181, Rapheal CP 183(all the
14 way through the buying process), Anensen CP 185(brother of defendant,
15 "when the agreement at issue was formed and discussed"), Lamb CP 420
16 pp 6 (Anensen told her of promises in June the month after closing), Fritz
17 CP 202-203.(just before closing) Lamphiear CP 295 line 1 to 11(at time of
18 signing.)

19 There are no material facts alleged here that controvert the facts as
20 alleged in the numerous documents submitted in support of Wayne
21 Lamphiear's Motion for Summary Judgment. This is a mere denial, if that,
22 and was submitted before Wayne Lamphiear's Motion for Summary
23 Judgment and supporting documents.

24 However, Mr. Brogan only had one conversation with Mr.
25 Lamphiear where Mr. Brogan promised Wayne Lamphiear could keep the
buildings and retain possession for one year. Lamphiear CP 157 lines 1-

1 11. However, Kenneth Brogan came with Garry Anensen to his second
2 unannounced appearance at Wayne Lamphiear's property with a prepared
3 contract in hand. Wayne Lamphiear's uncontraverted declaration describes
4 the encounter this way:

5 Garry left and returned about five days later with Kenny Brogan
6 and another contract; again we talked in the driveway, as I
7 happened to be outside. We discussed the fact that I had a year to
8 get all of my possessions and buildings off the property. Kenny
9 Brogan assured me that my year would not present a problem
10 because they did not intend to do anything for over a year. I looked
11 at the contract and noticed, that although it contained a provision
12 for a sixty-foot easement, and the price was correct, it did not say
13 anything about the year I had to remove all of my buildings and
14 possessions from the land. So, I asked why that was not in the
15 contract. Kenny Brogan responded by saying it wan(sic) an
16 oversight and that it would cost too much to redo the paperwork
17 again. He accused me of not trusting him and said words to the
18 effect of "my word is as good as gold". I asked Garry Anensen "is
19 that the way it is with you Garry"? Then Garry assured me I could
20 trust their word. I then signed the contract on top of the car.
21 Lamphiear, CP 295 line 1 to 11.

16 C. PUBLIC POLICY

17 Brogan and Anensen argue that public policy supports granting their
18 motion for summary judgment. However, just the opposite is true.

19 The recent trend of the courts has been to discredit fine print clauses
20 when to enforce them would be against public policy. See,
21 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 75
22 A.L.R.2d 1 (1960); see also, Norway v. Root, 58 Wash.2d 96, 361
23 P.2d 162 (1961); Udell v. Rohm & Haas Co., 64 Wash.2d 441, 392
24 P.2d 225 (1964); Kessler, Contracts of Adhesion-Some Thoughts
25 about Freedom of Contract, 43 Colum.L.Rev. 629 (1943).

. Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 251, 450
P.2d 470 (1969).

1 The citizens of McCleary came forward in an effort to correct an
2 injustice, and to stop the lies Brogan and Anensen were attempting to sell
3 to the court. Nearly every declaration makes clear the makers stepped
4 forward in spite long term relationships with Garry Anensen. Lasely CP
5 173 pp 2, Even though the witnesses were long term friends and family
6 members of Garry Anensen they wanted the truth known. In addition, it
7 serves public policy to protect their right to enter into verbal agreements
8 with others so that they can continue to trust the word of other local people
9 in business relationships. See declarations of Lewis CP 175, 176 – pp3
10 (“Gary Anensen’s lies are not just hurting Wayne but everybody in
11 McCleary who relies on the word of locals when it comes to doing
12 business”)

13 It would do harm to the public’s confidence in the justice system to
14 ignore the facts, and allow Brogan and Anensen to keep Wayne
15 Lamphiear's home and other improvements without compensation, and
16 add insult to injury to make Wayne Lamphiear pay Brogan and Anensen’s
17 attorney’s fees, when Brogan and Anensen have defrauded Wayne
18 Lamphiear.

19 D. FALSE RECITALS IN CONTRACTS AND PAROL EVIDENCE

20 The only real issue here is whether the court should consider the
21 evidence presented that Brogan and Anensen made the well documented
22 promises. If the court considers the evidence then the summary judgment
23 awarded Brogan and Anensen and judgment for over \$60,000.00 in
24 attorney’s fees and costs would be vacated, and Wayne Lamphiear would
25 be awarded summary judgment, and his attorney’s fees.

1 It is agreed that it is the parties' intent that controls whether merger
2 occurs and whether parole evidence can be considered. The law was well
3 covered in initial briefing. In the case of Davis v. Lee, contracting parties
4 attempted to get out of their promises to convey good title by alleging
5 merger. The court found merger did not apply, and that the intent of the
6 parties controlled. Intent is determined by the conduct of the parties. The
7 court went on to say that when promises are made that are not performed
8 at the time of delivery of the deed, they do not merge into the deed. Davis
9 v. Lee, 2 Wash. 330, 100 P. 752 Wash. (1909).

10 The only argument Brogan and Anensen has made to this Court in
11 regard to the facts is that Wayne Lamphiear should have known better
12 than to rely on Brogan & Anensen's promises.

13 Respondents point to the integration clause in the form REPSA
14 contract and boilerplate verbiage about turning keys over at closing to
15 attempt to prevent the court from looking at the fraud they have thus far
16 successfully perpetrated. REPSA CP 9, pp-n, CP 8 pp-c&f.

17 When determining whether or not to consider evidence outside of a
18 contract Washington State courts have exercised one hard and fast rule in
19 similar situations, a defendant cannot be bound by false recitals of fact, but
20 instead declarations are admissible to prove the assertions are false. Black
21 v. Evergreen Land Developers, Inc., 75 Wn2d 241, 450 P.2d 470
22 (1969) citing Cook v. Vennigerholz, 44 Wash.2d 612, 616--617, 269 P.2d
23 824, 827 (1954); see also, Federal Finance Co. v. Humiston, 66 Wash.2d
24 648, 651, 404 P.2d 465 (1965). Consequently, in cases such as the one at
25

1 hand where plaintiffs are relying on a false recital of facts in a boilerplate
2 contract, the court must consider the truth.

3 In the case of, Federal Finance Co. v. Humiston, the court decided
4 that plaintiff could not rely on a false statement in a contract that goods
5 had been delivered, when the overwhelming evidence was the goods had
6 not been delivered. Federal Finance Co. v. Humiston , 66 Wash.2d 648,
7 651, 404 P.2d 465 (1965).

8 In the case of Cook v. Vennigerholz, 44 Wash.2d 612, 616--617, 269
9 P.2d 824, 827 (1954) the partnership contract at issue stated that each
10 partner owned an undivided half interest in the real property at issue. The
11 court however cited the rule that a party to a contract is not bound by a
12 false recital of fact and parole evidence is admissible to show the true state
13 of affairs. Cook v. Vennigerholz , 44 Wash.2d 612, 616--617, 269 P.2d
14 824, 827 (1954) citing I Restatement of Contracts, 344, sec. 244.

15 As pointed out in the first brief, the facts of this case are similar to two
16 Washington cases on point, where provisions in a contact (including
17 integration clauses) are in conflict with the oral provisions of the contract.
18 Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 450 P.2d 470
19 (1969), Ban- Co Inv. Co. v. Loveless, 22 Wash.App. 122,129-130, 587
20 P.2d 567 (1978). Both of those cases dealt with promises made in the
21 context of land sales and the court found in both cases that integration
22 clauses and minor provisions in a contract did not prevent the court from
23 considering oral promises. In both of those cases sellers were required to
24 abide by oral promises in spite of integration clauses and the doctrine of
25 merger being asserted as a defense. The biggest difference between those

1 cases and the case before the court is that in those cases the evidence of
2 the false promises was no where near as compelling.

3 Here we have not only a documented business purpose as
4 incentive to breach the oral contract terms as in the Ban- Co Inv. Co. case,
5 but multiple witnesses who heard the promises made again and again.
6 When their development plans fell through Brogan & Anensen, decided
7 they did not want to wait a year for Wayne Lamphiear to leave the land,
8 and they wanted to keep the improvements. Brogan and Anensen needed
9 to be annexed to the city of McCleary to develop to the extent they
10 desired. Attachment to Declaration of Bonin, Petition for Annexation CP
11 123, 124. At a meeting held on September 6, 2005, which addressed the
12 annexation petition, about 200 people turned out, and the meeting had to
13 be moved to the school gym. Declaration Hamilton CP 167, 168. When a
14 show of hands was requested asking how many people supported
15 annexation only three people were in favor, Brogan, Anensen and one
16 other person. Declaration Hamilton CP 167, 168.

17 Neither Brogan nor Anensen said anything about making Wayne
18 Lamphiear move or not allowing him to move the improvements as agreed
19 until October of 2006, when it was clear they would not be able to
20 develop as planned. Declaration Lamphiear CP 295 pp2.

21 Also, Brogan & Anensen put the property on the market for twice the
22 price they paid Wayne Lamphiear (one million dollars) in November of
23 2005. The property was listed without the improvements. Sparks CP 164-
24 166.

25

1 Brogan and Anensen allege that the court can not hear the evidence of
2 what was promised because of three things in the form MLS contract; 1)
3 the integration clause, 2) a line that says the keys are to be turned over at
4 closing, and 3) a line that reads fixtures such as windows are included.

5 An agreement may be only partially integrated, notwithstanding a full
6 integration clause, if the clause is false boilerplate, because parties are not
7 bound by incorrect statements of fact. Denny's Restaurants v. Security
8 Union Title Ins. Co., 71 Wash.App. 194, 203, 859 P.2d 619 (1993) (citing
9 Emrich v. Connell, 105 Wash.2d 551, 558, 716 P.2d 863 (1986)). See also
10 Black v. Evergreen Land Developers, Inc., 75 Wash.2d 241, 250, 450 P.2d
11 470 (1969) (citing Cook v. Vennigerholz, 44 Wash.2d 612, 616- 17, 269
12 P.2d 824 (1954)).

13 Even if the agreement had not been made at the time of the final
14 documents were signed it would still be enforceable as this court decided
15 in 2006.

16 On this point, we consider whether the prior agreement was the
17 inducing and moving cause of the final contract, whether a prior
18 agreement formed part of the consideration for the final contract, and
19 whether the final contract was executed on the faith of the prior
20 agreement. See Becker v. Lagerquist Bros., Inc., 55 Wash.2d 425, 430,
21 348 P.2d 423 (1960). See also Denny's, 71 Wash.App. at 203, 859
22 P.2d 619. In such cases, enforcement of a boilerplate integration clause
23 would amount to endorsement of a constructive fraud by the
24 defendants. Black, 75 Wash.2d at 251, 450 P.2d 470.
25 South Kitsap Family Worship Center v. Weir, 135 Wash.App. 900, 146
P.3d 935, Wash.App. (2006).

Brogan and Anensen argue that the Pruitt case is controlling because it
states improvements pass with property. However, the Pruitt case does
address any of the issues in this case. In Pruitt the issue was which party

1 was entitled to insurance proceeds after a sale of real property. The court
2 merely stated the obvious. Where there is no agreement to the contrary
3 improvements pass with the sale of real property. Pruitt V. Meyer, 2
4 Wn.App. 14, 467 P.2d 364 (1970). This case is no different than any other
5 when it comes to the existence of partial integration, the intent of the
6 parties is controlling.

7 Brogan and Anensen also cite Richardson v. Cox, 108 Wn.App. 881,
8 890, 26 P.3d 970 (2001) for the proposition that "...an alleged agreement
9 regarding Appellant's reservation of right of right of possession following
10 closing and right to remove the home and other improvements, any such
11 agreement is barred by the statute of frauds." Richardson v. Cox, states
12 that agreements conveying real property must be in writing. In that case an
13 easement. First, a verbal lease agreement could not possibly violate the
14 statute of frauds unless it exceeded one year. Firth v. Lu, 146 Wash.2d
15 608, 615 49 P.3d 117 Wash., (2002). The agreement here did not exceed
16 one year. Also, any concern about the statute of frauds is covered by the
17 written agreement and the doctrine of partial integration. In other words
18 there is a written agreement here, so the statute of frauds does not apply.
19 It is also true that full performance by one party removes the case from the
20 operation of the statute. 1 Restatement, Contracts, 260, § 197. Becker v.
21 Lagerquist Bros., Inc., 55 Wash.2d 425, 435 348 P.2d 423 (1960.) Here,
22 Wayne Lamphiear carried out his duties under the contract so the statute
23 of frauds does not apply. Even if Wayne had only partially performed the
24 Statue of Limitations would not apply.

25 Although we hold that the statute of frauds applies to the agreement in
question, we conclude that it is enforceable under the part performance

1 exception to the statute of frauds. The doctrine of part performance is
2 an equitable doctrine which provides the remedies of damages or
3 specific performance for agreements that would otherwise be barred
4 by the statute of frauds. See Beckendorf v. Beckendorf, 76 Wash.2d
5 457, 465, 457 P.2d 603 (1969); Miller v. McCamish, 78 Wash.2d 821,
6 479 P.2d 919 (1971).

7 The first requirement of the doctrine of part performance of oral
8 contracts is that the contract must be proven by clear, cogent, and
9 convincing evidence. *362 Granquist v. McKean, 29 Wash.2d 440,
10 445, 187 P.2d 623 (1947). The second requirement is that:

11 the acts relied upon as constituting part performance must
12 unmistakably point to the existence of the claimed agreement.
13 DewBerry v. George, 115 Wash.App. 351, 361-62, 62 P.3d 525 (2003.)

14 Here there is undisputed evidence of the oral provisions of the
15 contract and Wayne Lamphiear's actions are consistent with his claims.

16 E. EQUITABLE ESTOPPEL

17 Another equitable theory comes into play in conjunction with
18 determinations not to allow false statements to prevail simply because of
19 integration clauses in contracts, and that is equitable estoppel. Equitable
20 estoppel requires a showing that the party to be estopped (1) made an
21 admission, statement or act which was inconsistent with his later claim,
22 (2) that the other party relied thereon, and (3) that the other party would
23 suffer injury if the party to be estopped were allowed to contradict or
24 repudiate his earlier admission, statement or act. Heg v. Alldredge, 157
25 Wash.2d 154, 137 P.3d 9 (2006) (this quote comes directly from prior
briefing to the trial court, CP 406 lines 15-19.) Here, plaintiff Brogan and
Anensen made statement after statement relied upon by defendant Wayne
Lamphiear. Wayne Lamphiear was promised the land for one year, and all

1 of his buildings, as well as a sixty -foot easement all the way up the
2 adjacent property line. Therefore, Brogan and Anensen should be estopped
3 from arguing merger.
4

5 F. EASEMENT LENGTH

6 Brogan and Anensen present two arguments regarding the
7 easement. First they ask the court to disregard all the law previously cited
8 because they argue the “scope” of an easement is restricted to its width.
9 However, the “scope” of an easement is what the holder may legally do
10 under it. 17 William B. Stoebuck, Washington Practice, Real Estate:
11 Property Law sec. 2.9, at 109 (1995).

12 Second Brogan and Anensen’s briefing implies a misunderstanding
13 of the factual situation. The RESPA Addendum reads:

14 Buyers agree to grant Mr. Wayne W. Lamphiear a 60 foot wide
15 access easement onto the adjacent parcel currently under contract
16 for purchase. Easement to be located at the SW corner of parcel
#18050223000.

RESPA Addendum CP 12

17 Brogan and Anensen’s arguments would make sense if parcel #
18 18050223000 was the Property Wayne Lamphiear was being provided
19 access to, however it is not. The SW corner of parcel #18050223000 is
20 nine-hundred feet away from Wayne Lamphiear’s property. See map in
21 Plaintiff’s Reply Motion in Support of Motion for Partial Summary
22 Judgment Regarding Easement CP 463. Consequently, what Brogan and
23 Anensen want this court to find is that the term “access” means they only
24 have to provide the shortest access possible, even though they verbally
25

1 agreed to provide access along the entire length of the property up an
2 existing roadway. Lamphiear CP 424-425, CP 224, CP 226,

3 The purpose of the easement was to give Wayne Lamphiear access to
4 his new home site at the back of the property up the existing roadway, and
5 to provide maximum access to the Forty Acres Wayne was purchasing for
6 future development. Lamphiear CP 424, 425 That was why Wayne
7 Lamphiear insisted on a sixty-foot wide easement, it had to be that wide to
8 allow for future development of Wayne's new property. Lake CP 434

9 It took a long battle before Brogan and Anensen recorded any
10 easement. When it became clear Brogan and Anensen would not be able to
11 develop the property as planned, Garry Anensen threatened Wayne
12 Lamphiear that would never get the promised easement. Lamphiear CP
13 394. Next, in discovery responses professional developers, Brogan and
14 Anensen, began a continuing argument they had satisfied their obligation
15 by transferring a twenty-foot wide utility easement. Interrogatory
16 Response CP 442-43. This argument was made in Brogan & Anensen's
17 initial Motion for Summary Judgment. Brogan and Anensen argued that
18 the sixty foot wide easement merged into a 20 foot wide utility easement.
19 Motion for Summary Judgment CP 449-51. At oral argument in March of
20 2006 Respondents finally conceded the issue, but still did not deliver an
21 easement. Transcription of Hearing CP 238, 289-90. Brogan and
22 Anensen, in fact stated in open court they would prepare the easement on
23 March 27, 2006. Transcription of Hearing CP 290 The easement had been
24 described by Wayne Lamphiear's counsel at the court's request as "it
25 would be where they negotiated for, Your Honor, which has not been

1 included in the material terms, which would be on the far---- **the far west**
2 **line**, 60- foot in width”. Transcription of Hearing CP 289 (emphasis
3 added). To which Respondent replied in open court “We will prepare
4 that”. Transcription of Hearing CP 290 line 8.

5 Respondent Kenny Brogan admitted to a witness in February or
6 March of 2006 that he was delaying transferring the easement as long as
7 possible, because they did not want Wayne Lamphiear to sell his property
8 before Brogan and Anensen sold or developed theirs. Deposition Birindelli
9 CP 331-333 Then on June 8, 2006, Respondent’s recorded the shorter than
10 promised easement, and never provided opposing counsel with the
11 promised copy of the easement, but instead moved to enter a final order,
12 alleging they had fulfilled the obligation of recording the easement as
13 promised. Recorded Easement CP 352, Declaration Bonin CP 308 line 22
14 to CP 310.

15 G. ATTORNEY’S FEES AND COSTS

16 The errors in awarding Attorney’s Fees to wrongdoers, and the
17 lack of support for the fees requested were addressed in prior briefing.
18 However, pursuant to Barber v. Peringer, 75 Wash.App. 248, 877 P.2d
19 223 (1994), cited by Brogan & Anensen in their reply brief and award of
20 Attorney’s fees cannot be claimed if they are based on a contractual right
21 which has merged into a deed.

22 III. FEES BASED ON BREACH OF THE REPSA

23 The trial court awarded attorney fees to the Barbers pursuant to
24 paragraph 18 of the REPSA, which grants attorney fees to a party
25 who must commence legal action to enforce any rights contained
in the REPSA. However, because the REPSA merged into the
statutory warranty deed, there were no contractual rights for either
party to enforce. The attorney fees provision was restricted to

1 enforcing rights under the REPSA. Accordingly, it is not collateral
2 to the deed. We conclude that the attorney fees provision of the
3 REPSA therefore also merged into the deed and that the parties'
4 right to attorney fees for an action under the REPSA ended when
5 the deed was executed and accepted. Barnhart v. Gold Run, Inc.,
6 68 Wash.App. 417, 424, 843 P.2d 545 (1993). The award of
7 attorney fees on this basis was error.
8 Barber v. Peringer, 75 Wash.App. 248, 253-54, 877 P.2d 223
9 (1994).

10 The facts here are exactly on point. Brogan and Anensen argued
11 that merger occurred, and the court agreed. The award of attorney's fees
12 was based entirely upon the REPSA (Residential Purchase and Sales
13 Agreement which reads " If Buyer or Seller institutes suit against the
14 other concerning this Agreement, the prevailing party is entitled to
15 Attorney's Fees." Residential Purchase and Sale Agreement CP 10, pp3 .

16 Brogan and Anensen argued in Respondent's Brief to Appellant's
17 Opening Brief at page 15, pp2.

18 Once the deed has been executed and accepted, the doctrine of
19 merger extinguishes any contractual right created by the purchase
20 and sale agreement or a prior agreement .

21 Consequently, if this court agrees with the trial court that merger
22 occurred then there is no contractual right to attorney's fees.

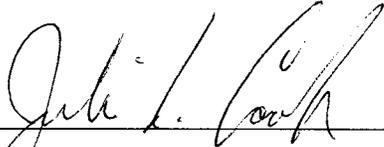
23 Brogan and Anensen again cite Barber v. Peringer, at page 16 of
24 their responsive briefing and clarify that this was the basis of the trial
25 courts ruling.

Execution, delivery, and acceptance of the deed becomes the final
expression of the parties' contract and therefore subsumes all prior
agreements." Barber v. Peringer, 75 Wn, App. 248, 251 877 P.2d
223 (1994) (citing Snyder v. Roberts , Wn. 2d 865, 871, 278 P.2d
348 (1955). As a matter of law, the Appellant's Counter-Claim was
appropriately dismissed.

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Therefore, even if Brogan and Anensen prevail on the claim there is no basis for an award to Brogan and Anensen of Attorney's fees and costs and the prior order and judgment must be vacated. If however, Wayne Lamphiear is the prevailing party based on the doctrine of partial integration and the fact that Brogan and Anensen breached the verbal terms of the agreement, an award of attorney's fees and costs based on Brogan and Anensen's violation of the RESPA contract is appropriate.

Dated this 22nd day of October 2007.

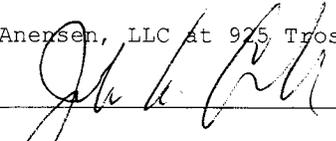


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JULIE K. COOK
APPELLANT

CERTIFICATE OF SERVICE

I Julie K. Cook certify under penalty of perjury of the laws of the State of Washington that on October 22, 2007, I caused to be served a copy by U. S. Mail postage prepaid APPELLANT'S REPLY BRIEF upon John L. Jarrett, Attorney for Respondents, Brogan & Anensen, LLC at 925 Trosper Road SW, Tumwater, WA 98512.

 , October 22, 2007

Julie K. Cook, WSBA #25298

Reply Brief of Appellant Wayne Lamphiear-

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