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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37556-7-II

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

KENNETH BRACKETT and DAYNA BRACKETT,
Husband and Wife,

Appellants,

vs.

RICHARD E. WALSH and LINDA M. WALSH,
Husband and Wife,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 07-2-01383-8

REPLY BRIEF OF APPELLANT

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PROVISION OF REPORT OF PROCEEDINGS

At page 1 of the Brief of Respondent, counsel for the respondent indicates that “the appellant has not furnished a transcript of the court’s oral decision from the hearing on the Walsh motion for summary judgment held on 02-15-2008.” To the contrary, the February 15, 2008, hearing was designated for transcription, was transcribed, and is a part of the record in this appeal. A copy of the transcripts of both the December 21, 2007, hearing and the February 15, 2008, hearing were furnished to counsel for Respondents along with a copy of the Opening Brief of Appellants on or about October 22, 2008.

CLAIM RE: FAILURE TO DESIGNATE EXTRINSIC EVIDENCE

Counsel for Respondents continually states in his Brief of Respondent that the Appellants have failed to identify the “extrinsic evidence” which the court failed to consider. For example, at page 3 of the Brief of Respondent, counsel states that “Brackett does not cite to or discuss what specifically is the ‘extrinsic evidence’ that the trial court refused to consider.” Again, the contrary is true.

At page 4 of the Brief of Appellants, counsel for Appellants referenced the filing of a Declaration of John Turner, trial counsel for the Appellants, to which was attached “several letters exchanged between himself and between prior counsel for the respondents, relative to the negotiations leading up to the execution of the Settlement Agreement at issue.” This document is in the Clerk’s Papers at pages 109-118. The appendix to the Order Granting Summary Judgment (located at CP 121 and referenced by both counsel in their briefs), indicates what documents and pleadings were considered by the Court. Item No. 9(a) in that Appendix is the Declaration of John Turner, to which the

several letters were attached. The entry on CP 121, at item 9(a) indicates that the Court considered the Declaration of John (**except attachments**). Thus, it is clear that the several letters attached to Mr. Turner's Declaration (viz. at CP 111-118) were not considered by the Court in making its ruling, and the Court stated such at page 10 of the transcript of the February 15, 2008, hearing, as previously pointed out in the Brief of Appellants at page 5.

Those letters are the "extrinsic evidence" which the Court refused to consider in its ruling, and are the basis of the Appellants' claim that it was error for the Court not to consider that extrinsic evidence. The significant language in those letters can be summarized as follows:

March 9, 2007, letter from Steinacker to Turner: One of the terms offered by Mr. Steinacker (counsel for the Walshes at the time) was "[a] release from making further monthly payments under the well agreement **until they are able to see their home.**" (Emphasis added). CP 111.

March 19, 2007, letter from Turner to Steinacker: "I propose that we enter a settlement agreement whereby the second well agreement would be rescinded and the suit dismissed **upon the Walshes selling their property and vacating the premises.** Until then, the Bracketts would retain moneys that the Walshes have paid to the well account and would return to the Walshes any unused portion of their well payments **at the time of sale and dismissal.**" (Emphasis added). CP 113.

April 9, 2007, letter from Turner to Steinacker: Turner suggests a term of the Settlement Agreement to read as follows: "The Walshes shall immediately list their property for sale and complete closing of sale no later than August 30, 2007. In any event, the Walshes agree to vacate their residence next door to the Bracketts not later than May

31, 2007. CP 114.

April 18, 2007, letter from Steinacker to Turner: “I am writing in response to Mr. Turner’s letter of April 9, 2007, proposing to **add a deadline for the Walshes to vacate the home and sell the property.** My clients object to the addition of this requirement to the settlement agreement. Your letter of March 19, 2007, offering settlement **did not have any requirement to vacate by a certain deadline...** That being said, Mr. Walsh has accepted a job offer in Arizona, and the Walshes have made arrangements to move out of their home prior to the end of May. Further, **the property is already listed for sale, as you are likely aware.** It should be understood that my clients’ decision to move out of the home prior to May 31 was not in response to any deadline the Bracketts have attempted to impose.” (Emphasis added). CP 115.

The import of this letter is that is in no way disputes the understanding that, as part of the agreement, the Walshes were to vacate the home **and** sell the home. The only bone of contention was the setting of a deadline for those things to happen.

April 19, 2007, letter from Turner to Steinacker: “I was sorry to hear that your clients are unwilling to commit to **vacating and selling their house. This has always been a central element to our settlement discussions...** I understand that the Walshes’ current intention is to list the property for sale and move. But they have repeatedly taken the ‘for sale’ sign up and down while verbally expressing their ambivalence about moving. **We cannot trust that they will move or sell without a tight settlement contract.** Perhaps we will be able to readdress a settlement agreement once your clients move.” (Emphasis added). CP 117.

April 30, 2007, letter from Turner to Steinacker: “Enclosed are the Settlement

Agreement and Water Easement and Maintenance Agreement containing the original signatures of my clients. Please let me know when your clients have vacated their residence, **as well as when the closing of the sale will occur, so we can finalize this matter.**” (Emphasis added). CP 118.

The clear and unequivocal intent of the parties is evident from these letters. It was the clear intent and understanding that the Walshes would, as an integral part of the agreement, vacate **and** sell their home. As Mr. Turner stated in his April 19 letter, the vacating of the home and the sale of the home was a “central element” to any settlement by the Bracketts. It is significant that there is **no objection whatsoever**, in any of the letter exchanges between counsel, to the concept that the settlement was intended to provide that the Walshes would both **vacate** the home and **sell** the home.

Such extrinsic evidence is critical to a full and complete analysis of the understanding of the parties, and it was clear error for the hearing judge to refuse to consider such evidence in deciding this case. The extrinsic evidence, as well as the very terms of the Settlement Agreement itself, clearly shows a mutual intent of the parties that both a vacation of the property and a sale of the property were part of the agreement.

ONE FINAL POINT

Paragraph 2 of the Settlement Agreement (without resort to “extrinsic evidence” at all), states that [o]n the **date of closing of sale** of the Walshes’ home...” This clause, in and of itself, clearly indicates the intent of the parties that the Walsh home was to be sold. Why else would a clause referencing a “closing date” be included in the Settlement Agreement? This has nothing to do with “extrinsic evidence”. Rather, it is a term included in the Settlement Agreement itself, which is a clear indication that the parties

contemplated a vacating and a sale of the property as the settlement terms. Given the strict policy regarding review of summary judgment decisions, cited previously in the Opening Brief of Appellants, relief in this matter is clearly warranted.

E. CONCLUSION

For the reasons stated herein, this court should reverse and dismiss the summary judgment and award of attorney's fees made to the Respondents in this matter and should either (a) remand the case for trial on the merits or (b) award a summary judgment to the Appellants herein, in view of the clear breach of the Settlement Agreement by the Respondents.

DATED: December 17, 2008.

Respectfully submitted,



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WSBA #6836

CERTIFICATE

I certify that I mailed a copy of the Brief of Appellant (Corrected) by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

Mr. Alan N. Rasmussen
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DATED this 18th day of December, 2008.



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