

No. 37791-8

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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BATTLE GROUND PLAZA, LLC,

Respondent/Cross-Appellant,

v.

DOUGLAS M. RAY; EUGENE ANDERSON and WILLIAM  
MACRAE-SMITH, as co-personal representatives of the  
Estate of Irwin P. Jessen,

Appellants/Cross-Respondents,

and

SCOTT BROTHERS OIL, INC.; and TIME OIL  
COMPANY, INC.,

Third-Party Defendants.

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STATE OF WASHINGTON  
BY  DEPUTY

COURT OF APPEALS  
DIVISION II  
SEATTLE, WASHINGTON

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

Nearly nine years ago, in December 2000, plaintiff (“Purchaser”) contracted to purchase a shopping center (“the Property”) in Battle Ground, Washington, from defendants (“Sellers”).<sup>1</sup> The parties agreed to close shortly after the purchase and sale agreement (“PSA”) was signed. The PSA was drafted by Purchaser. It contained a representation by Sellers that the Property was not contaminated. Unbeknownst to Sellers, the Property was, in fact, contaminated.

Purchaser suspected the Property was contaminated before executing the PSA, which is why it included an environmental representation in the contract it drafted. After the PSA was executed, Purchaser obtained a Phase I Environmental Assessment, which confirmed the possibility of contamination. Despite this, Purchaser waived its rights under the PSA to conduct further environmental testing and

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<sup>1</sup> Plaintiff, Battle Ground Plaza, LLC, is actually the assignee of Bruce Feldman, Inc., the entity that entered into the PSA with Sellers. (See CP 27) Hereafter, references to “Purchaser” include both Battle Ground Plaza, LLC, and Bruce Feldman, Inc., as appropriate.

to back out of the agreement if that testing revealed contamination.

After the parties mutually agreed to extend the closing date, Purchaser obtained a Phase II Subsurface Investigation which showed the nature and extent of the contamination on the Property. Purchaser nevertheless proceeded with the transaction by paying additional earnest money to extend the closing date to August 1, 2001.

Purchaser did not tender the purchase price by August 1, 2001, and it has not done so to date. Instead of closing, Purchaser sued.

The trial court entered judgment for Purchaser, holding that Purchaser was entitled to specific performance—namely, that Sellers must remediate the Property at their expense, which the court will supervise and direct over a period of years. When the Property is clean, Purchaser may (but does not have to) tender the purchase price, and Sellers must deliver the Property to Purchaser at the contract price. The court reduced the contract price to reflect, among other things, \$510,000 in

damages because of “stigma.” The court also awarded over \$600,000 in attorney fees. The trial court erred.

First, specific performance applies only to enforce an existing agreement between the parties. By its terms, the PSA requires that Purchaser close as agreed. Purchaser’s failure to tender the purchase price by the August 1, 2001, closing date automatically terminated the PSA. As a result, there are no terms of agreement between the parties that can be specifically enforced.

Second, even if the PSA had not expired, its terms do not permit specific performance. Sellers did not fail to perform under the contract so as to trigger Purchaser’s right to specific performance. Nor can Purchaser enforce the PSA’s terms when it is in breach—i.e., when it has failed to close. The evidence does not support the trial court’s determination that Purchaser’s failure to obtain financing (and thus its failure to close) was proximately caused by the existence of contamination. And even if the contamination had caused Purchaser’s failure to close, the PSA does not permit Purchaser to avoid its obligation to

close in the event Sellers breached the environmental representation.

The trial court's order of specific performance orders Sellers to deliver clean property to Purchaser. Nothing in the PSA imposes such an obligation on Sellers. Instead, the agreement allows Purchaser to get its earnest money back in the event it discovers contamination before closing and entitles Purchaser to indemnity in the event it discovers contamination after closing.

There is no evidence in the record to support the trial court's finding that, when the Property is fully remediated, it has a value \$510,000 less than the contract price. The trial court failed to understand the evidence (which was that the market value of the Property as contaminated was \$510,000 less than the market value of the Property if it was not contaminated).

Finally, Purchaser, which has embroiled the parties in eight years of litigation with regard to Property as to which it has never tendered the contract price, is not entitled to prevail and, therefore, is not entitled to prevailing party

attorney fees. Sellers seek their attorney fees as prevailing party.

## **II. ASSIGNMENTS OF ERROR**

Appellants assign error to the following: (1) Findings of Fact and Conclusions of Law filed May 28, 2008: Findings of Fact Nos. 26, 51, 55; Conclusions of Law Nos. 2, 3, 4, 5; (2) Amended Order of Specific Performance and Judgment filed May 30, 2008; and (3) Order on Attorney's Fees and Supplemental Judgment filed September 5, 2008.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Purchaser's claim for specific performance is based upon the PSA. The PSA automatically expired August 1, 2001, the date set for closing, when Purchaser did not tender the purchase price by that date. Is Purchaser entitled to specific performance when there is no contract in existence for Sellers to specifically perform?

2. A party is not entitled to specific performance unless it has performed or tendered performance. Purchaser has not performed or tendered performance of its obligation

to pay for the Property. Is Purchaser entitled to specific performance?

3. Paragraph 29 of the PSA authorizes specific performance only in the event of a “default,” which means a party’s failure to “perform” a covenant or agreement. Sellers’ unintentional misrepresentation of an existing fact does not constitute a failure to perform, and any ambiguity in this regard must be construed against Purchaser, the drafter of the PSA. Is Purchaser entitled to specific performance under Paragraph 29?

4. Purchaser’s claims are based upon Sellers’ breach of the environmental representation set forth in Paragraph 30N of the PSA. The PSA contains a specific mechanism, in Paragraph 21(A)(2), that applies when the Purchaser discovers contamination *before* closing. Purchaser discovered that the Property was contaminated before closing and has not yet closed on the Property. Does Paragraph 30N apply?

5. After learning the Property was contaminated, Purchaser paid an additional \$10,000 in earnest money to

extend the closing date. Did Purchaser waive its right to seek recovery under Paragraph 30N when it proceeded toward closing with knowledge of the contamination?

6. The remedy for a breach of any of the representations or warranties set forth in Paragraph 30 is indemnification, not specific performance. Is Purchaser entitled to specific performance where the PSA does not provide such a remedy for breach of a representation or warranty?

7. Specific performance cannot be ordered unless the precise act to be specifically performed is clearly ascertainable from the contract. Here, the trial court ordered Sellers to clean up the Property before conveying it to Purchaser. The PSA imposes no such obligation on Sellers. Can Sellers be ordered to clean up the Property?

8. The trial court awarded Purchaser \$510,000 in “stigma” damages based upon testimony by Purchaser’s expert Wayne Hunsperger. Stigma damages represent a permanent loss in market value that remains even after physical damage has been remediated. Hunsperger did not

provide testimony regarding such damages; instead, he testified regarding the difference in value between contaminated (and unremediated) property and uncontaminated property. Did the trial court err in awarding stigma damages?

9. The PSA authorizes an award of attorney fees and costs to the prevailing party. In accordance with the PSA, the trial court awarded Purchaser \$610,068 in attorney fees and costs. Purchaser is not entitled to prevail and therefore is not entitled to recover attorney fees and costs. Instead, Sellers are entitled to recover attorney fees and costs incurred in the trial court and on appeal because they are entitled to prevail.

10. An award of attorney fees must include findings of fact and conclusions of law or at least sufficient information for the appellate court to evaluate the basis for the award. The trial court's award of attorney fees to Purchaser does not include findings of fact and conclusions of law or show how the court arrived at the award. If the

award is not reversed, should it be remanded to the trial court for entry of findings of fact and conclusions of law?

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background**

Sellers purchased the Property in 1968. (1/24/07 RP at 111) That same year, Sellers entered into a ground lease for the Property with Walter and Vera Bassett. (CP 455) The Bassetts constructed four buildings on the Property and leased them to various tenants. (CP 455-56) Beginning in the 1970's, Grace Anderson operated a dry cleaning business, Grace's Cleaners, in Building 3. (CP 456) Sellers purchased the Bassetts' interests in the leases and buildings in the late 1990's. (*Id.*)

Sellers also leased a portion of the Property to Quick Shop Minit Mart Food Stores, Inc., in 1968. (Trial Ex. 106) Quick Shop entered into an agreement with third-party defendant Time Oil Company pursuant to which Time Oil installed underground storage tanks and equipment to dispense gasoline at the Minit Mart. (CP 455) Third-party defendant Scott Brothers Oil, Inc., subsequently acquired

the right to provide gasoline to the Minit Mart. (*Id.*) In the 1990's, Scott Brothers took over operation of the Minit Mart. (*Id.*)

On October 2, 2000, Sellers listed the Property for sale with Marcus & Millichap, a commercial real estate broker. (Trial Ex. 19) Michael Kapnick, a broker with Marcus & Millichap, contacted Bruce Feldman, a real estate developer from California, and asked whether Feldman might be interested in purchasing the Property. (1/24/07 RP at 167) Kapnick knew Feldman already owned another shopping center in Clark County. (*Id.*)

Feldman did not come up to Washington to look at the Property himself. Instead, he asked Elliott Associates, a property management firm, to look at the property for him. (1/24/07 RP at 183) Before deciding to purchase the Property, Feldman learned that a dry cleaner and a gas station leased portions of the premises. (1/25/07 RP at 19)

On December 20, 2000, Purchaser and Sellers entered into the PSA. Purchaser agreed to buy the Property for \$3,285,000. (Trial Ex. 2) Feldman, a licensed real estate

agent and experienced real estate investor, drafted the PSA. (CP 456) The parties also executed a Counteroffer together with the PSA. (Trial Ex. 48; CP 456) Purchaser paid \$20,000 in earnest money<sup>2</sup> and agreed to pay the rest in cash at closing. (CP 458) Sellers did not consult with an attorney before executing the PSA and Counteroffer. (CP 51-52) Because of Feldman's awareness that the Property included a gas station and a dry cleaners, he specifically obtained, as part of the PSA, a representation and warranty from Sellers that the Property was not contaminated. (CP 1411)

Paragraph 21(A)(2) of the PSA granted Purchaser 90 days (from December 20, 2000) to "inspect the soil conditions and other hazardous materials on or about the Property and to notify the Seller in writing that Purchaser approves" of the condition of the Property. (Trial Ex. 2 at 7) Through its mortgage broker, Purchaser obtained a Phase I Environmental Assessment dated February 23,

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<sup>2</sup> Purchaser initially provided a promissory note for \$20,000 and subsequently replaced the note with a certified check. (Trial Exs. 2, 108; CP 458)

2001. (Trial Ex. 134) The assessment revealed the possibility of contamination and recommended that subsurface testing be conducted at the Minit Mart and Grace's Cleaners locations. (*Id.*) Three days later, before obtaining additional testing, Purchaser waived, as a condition to closing, the soil conditions contingency in Paragraph 21(A)(2) of the PSA together with all other contingencies contained in Paragraph 21, except for subsections 1(d), 1(e), and 1(f). (Trial Ex. 108; CP 457)

Disputes subsequently arose between the parties regarding income and expenses of the Property and applicable time frames. (CP 458) On April 27, 2001, the parties entered into an Addendum to Real Estate Purchase and Sale Agreement to address these issues. (Trial Ex. 3) Sellers reduced the purchase price to \$3 million, and the parties agreed to a closing date of July 1, 2001. (*Id.*) Purchaser could obtain an extension of the closing date to August 1 with the payment of an additional \$10,000. (*Id.*)

Purchaser contacted EverTrust Bank to obtain financing for purchasing the Property and submitted a loan

application to the bank on May 14. (Trial Ex. 137; CP 458-59) On May 18, John Gooding, the Vice President of EverTrust, wrote to Purchaser advising that several issues needed to be clarified before the bank could accept the loan application. (Trial Ex. 138) Gooding also informed Purchaser that the bank's underwriting criteria would not support the requested loan amount of \$2,520,000. (*Id.*)

Purchaser obtained a Limited Scope Phase II Subsurface Investigation dated June 1, 2001. (Trial Ex. 140) The assessment revealed the existence of subsurface contamination at the Minit Mart and Grace's Cleaners locations. (*Id.*) Sellers were unaware of the contamination before they learned of the results of the Phase II investigation from Purchaser. (CP 54, 461)

Despite the existence of contamination, Purchaser elected to proceed with the purchase of the Property. On June 19, 2001, Purchaser paid an additional \$10,000 in earnest money to extend the closing date to August 1, 2001. (CP 459) Purchaser was aware of the Phase II investigation

report at the time it paid the additional earnest money.

*(Id.)*

Purchaser did not tender the purchase price by the closing date, August 1, 2001, and it has not tendered the purchase price at any time to date. (*See* CP 467)

**B. Procedural Background**

On March 8, 2002, Purchaser filed suit for breach of contract against Sellers. (CP 1-4) The complaint sought the following relief: (1) appointment of a property manager to manage the Property; (2) appointment of a property manager or receiver to perform environmental remediation; (3) an order compelling Sellers to cooperate with the property manager(s) and to perform their obligations under the PSA; and (4) damages. (CP 3-4)

The trial court conducted a bench trial from January 24 through February 8, 2007. (CP 211-28) On May 3, 2007, the court issued a memorandum opinion granting “specific performance” to Purchaser *following* tender of the \$3 million purchase price less deductions for “stigma” damages (\$510,000) and Feldman’s real estate commission

(\$15,000).<sup>3</sup> (CP 229-42) The court also ruled that Purchaser was entitled to recover attorney fees as the prevailing party. (CP 242)

The court specified the cleanup methods to be used for the Minit Mart and Grace's Cleaners and stated that it would continue to oversee the remediation of the Property despite the fact that the court expected this process to take as long as four to six years. (CP 238, 240-41)

On May 28, 2008, the trial court entered Findings of Fact and Conclusions of Law and an Order of Specific Performance. (CP 453-70) The court now directed Sellers to remediate the Property *before* requiring Purchaser to pay the purchase price. (CP 467) The court entered an Amended Order of Specific Performance two days later. (CP 535-40) Sellers appealed the court's decisions, and Purchaser filed a cross-appeal. (CP 477-504, 505-534, 936-

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<sup>3</sup> The court subsequently reduced the purchase price by an additional \$43,150 representing the amount the City of Battle Ground agreed to pay to Sellers for the condemnation of a portion of the Property, and \$14,993 in accordance with the Agreement Relating to Leasing Terms and Conditions between the parties, leaving a net purchase price of no more than \$2,386,857. (CP 467)

38, 1016-19) On September 5, 2008, the court entered an order and judgment awarding Purchaser \$610,068 in attorney fees and costs. (CP 574-76, 577-78)

## V. ARGUMENT

### A. Purchaser is not entitled to specific performance.

The Amended Order of Specific Performance directs Sellers to remediate the environmental contamination on the Property and then convey the Property to Purchaser for a purchase price of \$2,386.857. (CP 536) The order further states that the court “retains jurisdiction to determine if defendants have satisfied the environmental representation and whether the parties have met all their obligations under the terms of the Purchase and Sale Agreement in connection with the closing of the transaction.” (*Id.*)

Specific performance is not an available remedy in this case for two reasons. First, because the PSA automatically expired on August 1, 2001, when the transaction did not close by that date, there is no contract between the parties that can be specifically performed.

Second, even if the PSA had not expired, Purchaser is not entitled to specific performance under the terms of that agreement. Purchaser has not performed or tendered performance of its obligation to pay for the property and thus cannot obtain specific performance. Moreover, the PSA authorizes specific performance only in the event of a “default.” A breach of the environmental representation does not constitute a default and thus does not entitle Purchaser to specific performance.

Because Purchaser is not entitled to specific performance, the trial court erred in awarding this remedy, and its decision to do so must therefore be reversed.

- 1. The PSA automatically expired on August 1, 2001; therefore no contract exists to be specifically performed.**

Paragraph 26 of the PSA states that closing will occur 14 days after removal of all contingencies by Purchaser or as soon thereafter as practicable, unless extended by mutual agreement. (Trial Ex. 2 at 10) The PSA states, in two separate places, that “time is of the essence.” (Trial Ex. 2 at 3, 11)

In the Addendum to the PSA, the parties agreed to extend the closing date to July 1. (Trial Ex. 3) Purchaser could obtain a further extension by paying an additional \$10,000 in earnest money. (*Id.*)

In *Mid-Town Limited Partnership v. Preston*,<sup>4</sup> the Washington Court of Appeals explained that, when an agreement contains a provision making time of the essence, this reflects “a mutual intent that specified times of performance be strictly enforced.”<sup>5</sup> Thus, when an agreement makes time of the essence, sets a termination date, and there is no evidence of waiver or estoppel, “the agreement becomes legally defunct upon the stated termination date if performance is not tendered.”<sup>6</sup>

In this case, the Addendum to the PSA set forth a closing date of July 1, 2001. (Trial Ex. 3) On June 19, 2001, Purchaser paid an additional \$10,000 in earnest money to extend the closing date to August 1, 2001. (CP

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<sup>4</sup> *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 848 P.2d 1268 (1993).

<sup>5</sup> *Mid-Town*, 69 Wn. App. at 233.

<sup>6</sup> *Id.* (citing *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968)); see also *Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wn. App. 139, 142, 632 P.2d 911 (1981).

459) However, the transaction did not close by that date. Accordingly, the PSA automatically terminated.

Purchaser's claim for specific performance is based solely upon Sellers' alleged breach of contract. Because the contract automatically expired before either party performed—i.e., before Sellers conveyed the property and before Purchaser paid for the property—Sellers owe no contractual obligation to Purchaser that they can be required to specifically perform.

*a. The closing date is not suspended pending Sellers' cleanup of the Property.*

Purchaser argued to the trial court that the PSA is still in effect and that the closing date has been suspended indefinitely because Sellers breached the environmental representation and thus were in default or breach of their obligations under the PSA. The trial court agreed. (CP 467) Neither Purchaser nor the court cited any language in the Addendum providing that Purchaser's obligation to close would be suspended as a result of a breach of representation by Sellers. The Addendum did nothing more

than provide a new closing date for the transaction. When the closing did not occur by that date, the PSA automatically terminated. Thus, there is no valid, enforceable contract, and Purchaser cannot make out the basic elements necessary to obtain an order of specific performance.

***b. Purchaser waived its right to assert Sellers' breach of the environmental representation.***

Even if the PSA had not automatically terminated, Purchaser has waived its right to rely on Sellers' breach of the environmental representation to delay closing. "A waiver is the intentional and voluntary relinquishment of a known right."<sup>7</sup> It may be express or inferred from circumstances indicating an intent to waive.<sup>8</sup> In order for waiver to be inferred, the party's actions must unequivocally evidence an intent to waive.<sup>9</sup> Here, Purchaser waived any right to avoid its obligation to close

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<sup>7</sup> *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998).

<sup>8</sup> *Jones*, 134 Wn.2d at 241.

<sup>9</sup> *Id.*

due to the contamination of the Property on two separate occasions.

First, on February 26, 2001, Purchaser wrote to Sellers, “Purchaser hereby waives solely as a condition to the closing the contingencies identified in paragraph 21 of the Agreement except where Sellers have failed to comply with their obligations under subparagraphs 1(d) or (e), and except for subparagraph (f) which the parties have extended by agreement.” (Trial Ex. 108; CP 457) Paragraph 21(A)(2), one of the provisions waived by Purchaser as a condition to closing, provides:

This contract is subject to and conditioned upon Purchaser having 90 calendar days from and after the date of mutual acceptance hereof to inspect the soil conditions and other hazardous materials on or about the Property and to notify the Seller in writing that Purchaser approves. If Purchaser fails to approve this contingency within the specified time, this P&S Agreement shall be null and void, Purchaser’s entire deposit shall be returned, and the Purchaser and Seller shall have no further obligations hereunder.

(Trial Ex. 2 at 7) The trial court found that Purchaser

waived the contingency set forth in Paragraph 21(A)(2).<sup>10</sup>  
(CP 457)

In accordance with Paragraph 21(A)(2), Purchaser had the right to conduct an investigation to determine whether the Property was contaminated. Purchaser then had the right to approve the condition of the Property and proceed with the transaction. Alternatively, Purchaser could fail to approve the condition of the Property, in which case the Purchaser would be entitled to the return of its earnest money and the PSA would become null and void.

Here, Purchaser elected to waive the soil contingency as a condition to closing. When Purchaser did so, it was aware of the Phase I Environmental Assessment that discussed the possibility of contamination at the Minit Mart and Grace's Cleaners sites. (*See* Trial Ex. 134)  
Nevertheless, Purchaser elected to proceed to closing

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<sup>10</sup> If Purchaser did not waive the soil conditions contingency in Paragraph 21(A)(2), its failure to approve the soil conditions of the Property within the requisite time period means the PSA is null and void. In fact, Purchaser's present assertion that it does not have to purchase the Property pending approval of the soil conditions can be characterized as a failure to approve the soil conditions contingency, thereby triggering the termination of the PSA.

without conducting any further inspection of the soil conditions at the Property. Because Purchaser waived its rights under Paragraph 21(A)(2) as a condition to closing, it cannot now rely upon any contamination of the Property in order to avoid the obligation to close.

Second, on June 19, 2001, Purchaser tendered an additional \$10,000 in earnest money to extend the closing date. (CP 459) At the time that it did so, Purchaser had received a copy of the Phase II report detailing the nature and extent of contamination and therefore *knew* the Property was contaminated. (*Id.*) Despite this knowledge, Purchaser elected to proceed with the transaction.

In sum, the PSA expired, by its own terms, on August 1, 2001, when the sale failed to close by that date. Sellers' breach of the environmental representation did not suspend the closing date indefinitely, as the trial court ruled. Thus, there is no contract between the parties and therefore no obligation Sellers can be required to specifically perform. The trial court erred in ordering specific performance, and its decision must therefore be reversed.

**2. Purchaser is not entitled to specific performance under the PSA.**

Even if the PSA survived Purchaser's failure to close, the terms of the PSA do not entitle Purchaser to specific performance, for three reasons. First, Purchaser has not established that it has performed or is willing to perform its contractual obligation to tender the purchase price. Second, the PSA authorizes specific performance as a remedy only in the event of a "default." Sellers' breach of the environmental representation does not constitute a "default." Third, Paragraph 30N, the environmental representation provision, contains a specific remedy for breach of that representation—indemnification—and that is the only remedy that would have been available to Purchaser had it (1) tendered the purchase price and (2) not waived its right to enforce Paragraph 30N.

***a. Purchaser is not entitled to specific performance because it has not tendered the purchase price.***

A party seeking specific performance must establish that it has performed or is willing to perform its obligations

under the agreement.<sup>11</sup> In *Boger v. Bell*,<sup>12</sup> the Washington Supreme Court explained, “Where title fails, a vendee can sue in damages, or he can waive the agreement to convey by a deed in form and take the title the vendor has at the time; but he cannot do so unless he in turn keeps his own covenant to pay the purchase price.”<sup>13</sup> In a subsequent decision, the court stated, “A party cannot enforce specific performance of a contract while in default of its terms.”<sup>14</sup> Here, it is undisputed that Purchaser has not performed its obligation to pay for the property. Nor has it evidenced a willingness to do so at any time during the last eight years. Accordingly, specific performance is not warranted.

Purchaser argued to the trial court that it is excused from the obligation to tender the purchase price because it

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<sup>11</sup> *Kreger v. Hall*, 70 Wn.2d 1002, 1009, 425 P.2d 638 (1967); *Coonrod v. Studebaker*, 53 Wash. 32, 36-37, 101 P. 489 (1909); *Paradiso v. Drake*, 135 Wn. App. 329, 335, 143 P.3d 859 (2006).

<sup>12</sup> *Boger v. Bell*, 84 Wash. 131, 146 P. 179 (1915).

<sup>13</sup> *Boger*, 84 Wash. at 134-35.

<sup>14</sup> *Smith v. Barber*, 97 Wash. 18, 21, 165 P. 873 (1917); *see also Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 P. 894 (1909) (bringing of an action seeking damages for breach of warranty “implies an affirmation of the contract of sale and a ***prima facie liability for the contract price*** less damages sustained in consequence of the breach of warranty.” (emphasis added)).

was unable to obtain financing due to the contamination of the property. Thus, according to Purchaser, Sellers' breach of the environmental representation relieved Purchaser of its obligation to pay for the Property. The trial court agreed that Purchaser was unable to obtain financing due to the contamination of the Property. (CP 459)

As a preliminary matter, there is no substantial evidence in the record establishing that Purchaser's inability to obtain financing was caused by the condition of the Property. The evidence was that contamination was only one of several impediments to financing and that other impediments were, or may have been, sufficient in themselves. On June 19, 2001, (the same day Purchaser tendered an additional \$10,000 to extend the closing date), EverTrust Vice President John Gooding informed Purchaser that he would not recommend the loan for EverTrust's loan portfolio. (Trial Ex. 143) Gooding described the primary reasons for the declination as:

- Inability to accurately underwrite the project's cash flow due to the quality of historical financial data submitted and the lack of a "leased fee" analysis in the

appraisal.

- Quality of proposed guarantor financial data, which included financial statements hand written in pencil and 1995-96 “current” tax returns.
- Age and condition of the proposed collateral, which does not meet EverTrust’s typical standards.

(*Id.*) The June 19 letter does not mention the environmental contamination of the Property.

One week later, EverTrust Regional Manager David Thatcher wrote to Purchaser’s mortgage broker stating the bank would reconsider a loan “when the current issues are resolved.” (Trial Ex. 144) Thatcher added, “We need a more responsive ownership, a clear plan for the redevelopment, all environmental issues resolved, and proof that a manager who knows the retail industry is in charge.” (*Id.*) Purchaser did not follow up with EverTrust after receiving the June 26 letter. (2/7/01 RP at 26)

In its Memorandum of Opinion, the trial court found that the contamination of the Property “materially contribute[d]” to Purchaser’s inability to obtain financing. (CP 231) In support of this assertion, the court cited the

June 19 and June 26 letters from EverTrust. (*Id.*)

Although the Findings of Fact and Conclusions of Law are based upon and incorporate the Memorandum of Opinion (CP 461), Finding of Fact No. 26 goes much further than the court's earlier ruling and states, "Had the property not been contaminated, the purchaser could have secured financing from EverTrust on the terms stated in Finding of Fact No. 23." (CP 459) As set forth above, there were a number of factors preventing EverTrust from financing Purchaser's purchase of the Property. Purchaser therefore cannot rely on the fact that the Property was contaminated as an excuse for its failure to obtain financing; Purchaser did not establish that it would have been able to obtain financing in the absence of contamination. Because Finding of Fact No. 26 is not supported by substantial evidence, it should be overturned.

In any event, the PSA does not relieve Purchaser of its obligation to tender the purchase price due to Sellers' breach of the environmental representation. Paragraph 16 of the PSA provides:

## 16. TERMS OF SALE—FINANCING

Purchaser shall have 90 days from date of mutual execution of this P&S Agreement for removal of financing contingency; Purchaser may, however, have 30 additional days (“the financing contingency extension period”) for removal of financing contingency provided that Purchaser provides evidence to Seller that an application for financing has been submitted and Purchaser is taking reasonable steps to resolve impediments necessary to obtain the applied for funds.

(Trial Ex. 2 at 5) This provision does not extend the date for removing the financing contingency or relieve Purchaser of its obligation to tender the purchase price based upon Sellers’ breach of the environmental representation or any other representation. Purchaser drafted the PSA and could easily have included such an escape clause. (*See* CP 456) It failed to do so and cannot now rewrite the PSA to reflect what it wishes the contract provided.<sup>15</sup>

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<sup>15</sup> *See Huber v. Coast Inv. Co.*, 30 Wn. App. 804, 809, 638 P.2d 609 (1981) (contracts generally construed against drafter).

***b. Purchaser is not entitled to specific performance pursuant to Paragraph 29 of the PSA.***

Paragraph 29 of the PSA provides that, “[i]f either party fails to perform any covenant or agreement of that party contained herein, the party not in default may declare a default and there shall be the following remedies . . . .”

(Trial Ex. 2 at 11) Paragraph 29 further provides that, if Sellers are in default:

(1) Purchaser may elect to treat this contract as terminated, in which case all payments and things of value received hereunder shall be returned to Purchaser and Purchaser may recover such damages as may be proper, or (2) Purchaser may elect to treat this contract as being in full force and effect and Purchaser shall have the right to an action for specific performance or damage, or both.

(*Id.* at 12)

The trial court did not expressly base its order of specific performance on Paragraph 29; neither the Memorandum of Opinion nor the Findings of Fact and Conclusions of Law cite that provision. However, Purchaser contends it is entitled to specific performance

pursuant to Paragraph 29 because of Sellers' breach of the environmental representation. (CP 2, 460)

Paragraph 29 does not apply. Under Washington law, an event of default is what the parties have agreed it will be.<sup>16</sup> Here, the parties agreed a default exists only when "either party fails to *perform* any covenant or agreement . . . ." "Perform" means, "to carry out, execute, do" or "to act."<sup>17</sup> Thus, it is apparent the default provision (drafted by Purchaser) refers to future conduct, not to representations regarding existing facts. This makes sense, in that the remedy of specific performance involves a court ordering a party to do something it has agreed to do but for some reason is refusing to do—i.e., to convey property. Paragraph 29's reference to performance of an act cannot be ignored, nor can it be read to mean the same thing as breach—which can involve something other than the failure to perform an act.<sup>18</sup> Because Sellers' breach of the

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<sup>16</sup> *Foster v. Knutson*, 84 Wn.2d 538, 545, 527 P.2d 1108 (1974).

<sup>17</sup> THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1439 (2d ed. Unabridged 1987).

<sup>18</sup> In fact, the Addendum to the PSA specifically distinguishes between "default" and "breach." (Trial Ex. 3)

environmental representation does not constitute a “default” pursuant to Paragraph 29 of the PSA, the remedies set forth in that provision, including the remedy of specific performance, do not come into play.<sup>19</sup>

*c. Paragraph 30N does not apply nor does it authorize specific performance.*

The trial court ruled that Sellers breached the environmental warranty set forth in Paragraph 30N of the PSA and Purchaser is therefore entitled to an order requiring Sellers to clean up the Property. (CP 466-67) The trial court failed to appreciate that Paragraph 30N does not apply because (1) the transaction did not close and (2) Seller waived its right to enforce Paragraph 30N.

*(1) Paragraph 30N does not apply because the transaction did not close.*

The PSA contains a specific remedy that applies when Purchaser discovers contamination *before* closing. Paragraph 21(A)(2) grants Purchaser 90 days to investigate

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<sup>19</sup> See *Reiter v. Bailey*, 180 Wash. 230, 233, 39 P.2d 370 (1934) (pursuant to contract terms, vendors entitled to recover liquidated damages only if declaration of forfeiture is made; measure of damages for any other breach of contract is payments previously made).

the soil conditions of the Property. Purchaser can then (1) approve the conditions in writing or (2) fail to approve the conditions. If Purchaser fails to approve the conditions, the PSA is null and void, and Purchaser is entitled to a return of its earnest money.

Purchaser's waiver of its rights under Paragraph 21(A)(2) as a condition to closing cannot grant Purchaser greater rights (i.e., to remedies that apply only in the event of closing) than it otherwise would have had. In short, the PSA provides that, when contamination is discovered before closing, Purchaser can approve the condition of the soil and proceed with the transaction. If Purchaser does not do so, the PSA automatically terminates. Purchaser is not entitled to waive its rights under Paragraph 21(A)(2), refuse to tender the purchase price, and then recover under the terms of the contract. Instead, Purchaser is entitled only to the return of its earnest money.

(2) *Purchaser waived its right to enforce Paragraph 30N.*

Finding of Fact No. 55 states, "There is no statement or conduct by Plaintiff or Bruce Feldman, Inc., amounting

to a waiver of the ‘environmental warranty’ or any other warranty contained within the Purchase and Sale Agreement.” (CP 466) This finding is not supported by substantial evidence and must therefore be reversed.

The evidence establishes that:

- Purchaser suspected the Property was contaminated before entering into the PSA. (CP 1411)
- The Phase I investigation report completed in February confirmed the possibility of contamination. (Trial Ex. 134)
- Purchaser then waived its right to conduct further soil testing as a condition to closing. (Trial Ex. 108)
- The Phase II investigation report confirmed the existence of contamination. (Trial Ex. 140)
- Purchaser nevertheless proceeded to pay additional earnest money to extend the closing date. (CP 459)

The evidence thus establishes that Purchaser proceeded with the transaction despite knowing, for a fact, that the Property was contaminated. This conduct constitutes a waiver of Purchaser’s right to pursue a claim for breach of Paragraph 30N.

In *Lambert v. Hein*,<sup>20</sup> the Wisconsin Court of Appeals ruled that the plaintiffs' decision to proceed with closing on the purchase of a home despite their knowledge of the home's water problems constituted a waiver of their claims for breach of warranty and misrepresentation arising out of such problems. The contract at issue, like the PSA, contained provisions allowing the purchasers to conduct an inspection of the home and to nullify the contract if they did not approve the condition of the property. The contract also contained a provision, like the PSA, stating purchasers agreed to take the property "as is" but that the seller's representations and warranties survived closing. (See Trial Ex. 2 at 6) Based upon this language, the plaintiffs argued they were entitled to close on the transaction and then sue for damages.<sup>21</sup> The court concluded the "as is" provision was ambiguous and thus looked to the purpose of the contract and the circumstances surrounding its execution to determine the parties' intent.<sup>22</sup>

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<sup>20</sup> *Lambert v. Hein*, 582 N.W.2d 84 (Wis. Ct. App. 1998).

<sup>21</sup> *Id.* at 728-29.

<sup>22</sup> *Id.* at 729.

The court explained:

Despite the contract's ambiguity as to the consequences when the buyers have prior notice of a defect but nonetheless chose to close the transaction, there is no uncertainty about the purposes of the contract's inspection and disapproval procedures. These provisions are intended to afford a buyer the opportunity to discover actual or potential defects in the property so that the buyer can then make an informed choice whether to proceed with the transaction, whether to seek amendments to the terms of the contract, or whether to abort the contract. Thus, these provisions avoid the prospect of future disputes and possible litigation. The [plaintiffs'] reading of these provisions runs contrary to these goals. Instead, they seek to use these provisions as armament for litigation. We reject that interpretation because it turns the purpose of the inspection/disapproval process against itself.<sup>23</sup>

Accordingly, the court ruled that the plaintiffs waived any claims based upon the defendant's warranties and representations relating to water problems by electing to proceed with closing.<sup>24</sup>

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<sup>23</sup> *Id.* at 729-30.

<sup>24</sup> *Id.* at 730; *see also Assocs. of San Lazaro v. San Lazaro Park Props.*, 864 P.2d 111, 115 (Colo. 1993) (court refused to enforce warranty where buyer did not rely thereon, noting that to hold otherwise might grant buyer an unfair advantage); *Maloney v. Sargisson*, 465 N.E.2d 296, 301 (Mass. Ct. App. 1984) (seller not liable for breach of warranty where buyers

Similarly, in this case, Purchaser knew, for a fact, that the Property was contaminated, yet elected to proceed with the transaction anyway. Under these circumstances, Purchaser has waived its right to seek recovery under Paragraph 30N of the PSA.

(3) *Paragraph 30N does not authorize specific performance.*

Even if Paragraph 30N did apply, Purchaser is not entitled to specific performance. Pursuant to this provision, Sellers represent and warrant that “[t]he Property and the land thereunder do not contain hazardous material or conditions.” (Trial Ex. 2 at 14) Paragraph 30 describes the remedy available for breach of any of the Sellers’ representations or warranties and states:

Seller agrees and hereby does indemnify, agree to defend with counsel of Purchaser’s choice and hold harmless Purchaser from any and all

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conducted their own investigation of the property and discovered soil problems); *Malzewski v. Rapkin*, 723 N.W.2d 156, 162 (Wis. Ct. App. 2006) (home purchasers waived right to pursue contractual warranty claim based upon representations by sellers where they waived right to conduct inspection and proceeded with closing); *cf. Reece v. Good Samaritan Hosp.*, 90 Wn. App. 574, 585, 953 P.2d 117 (1998) (in order to recover for a claim of breach of express warranty contained in advertisement, plaintiff must show justifiable reliance on statement contained in advertisement).

claims, causes of action, costs (including attorney's fees), damages, liability, cost of any remedial work or harm of any kind or nature which Purchaser may experience as the result of the breach of any of Seller's representations and warranties contained in this agreement.

(*Id.*)

The Washington courts have recognized that, “[w]here the happening of a condition has been foreseen and a remedy has been provided for its occurrence, the presumption is that the prescribed remedy is the sole remedy.”<sup>25</sup> Here, the parties contemplated that the Sellers might breach a representation and they provided a specific remedy for that breach—indemnification. The parties did *not* authorize specific performance as a remedy for breach of a representation.

In short, nothing in the PSA authorizes specific performance under the circumstances of this case, and the trial court's decision must therefore be reversed. Instead, Purchaser's only remedy is the return of its earnest money.

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<sup>25</sup> *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 685, 828 P.2d 565 (1992); *see also Goss v. N. Pac. Hosp. Ass'n of Tacoma*, 50 Wash. 236, 238-39, 96 P. 1078 (1908).

**B. Even if Purchaser were entitled to specific performance, this does not extend to requiring Sellers to clean up the property.**

The Washington Supreme Court has repeatedly recognized that specific performance cannot be ordered unless the precise act to be specifically performed is clearly ascertainable from the terms of the contract.<sup>26</sup> As the court explained, “Specific performance connotes ‘performance specifically as agreed.’ Where the parties have not reached agreement, there is nothing for equity to enforce.”<sup>27</sup> Thus, the equitable remedy of specific performance “will not be granted in defiance of contracts or to modify their terms.”<sup>28</sup> Moreover, there must be “clear and unequivocal evidence”—a higher standard of proof than when damages are sought—before specific performance will be ordered.<sup>29</sup>

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<sup>26</sup> See *State v. Bisson*, 156 Wn.2d 507, 524, 130 P.3d 820 (2006); *Emrich v. Connell*, 105 Wn.2d 551, 558, 716 P.2d 863 (1986); *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wn.2d 109, 132, 173 P.2d 194 (1946); *Wright v. Suydam*, 59 Wash. 530, 536, 108 P. 610 (1910); see also RESTATEMENT (SECOND) CONTRACTS § 366 (1981).

<sup>27</sup> *Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.2d 953 (1963).

<sup>28</sup> *Boger*, 84 Wash. at 135.

<sup>29</sup> *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

Here, the trial court ordered Sellers to clean up the Property before conveying it to Purchaser and, in fact, did not even require Purchaser to go through with the transaction after cleanup has been completed. The court failed to recognize that the PSA imposes no obligation upon Sellers to clean up the Property. That is, although Sellers represented and warranted that the Property was not contaminated, nothing in Paragraph 30N (or any other provision of the PSA) requires Sellers to clean up the Property if that representation and warranty proved to be untrue.

In fact, the PSA specifically provides that Sellers *may* clean up any contamination; it does not require them to do so. Paragraph 4 of the PSA provides:

Seller warrants that Seller has not received, nor is aware of any notification from any governmental agency having jurisdiction requiring any work to be done on the property in order for it to conform to the applicable building code or other legal requirements. Seller further warrants that in the event any such notice is received by Seller prior to the close of escrow, and Seller is unable *or does not elect to* perform the work required in said notice, at Seller's sole cost and expense on or before the close of escrow, said notice shall be

submitted to Purchaser for its examination and written approval. Should Purchaser fail to approve said notice and thereby elect not to acquire the property subject to the effect of same, within five (5) days from the date Seller submits said notice to Purchaser, then this contract shall be canceled without further liability to either party.

(Trial Ex. 2 at 2) This provision gives Sellers the *option* to perform any cleanup work required by WDOE; it does not *obligate* them to perform such work.

In sum, nothing in the PSA obligates Sellers to clean up contamination on the Property. Under Washington law, Sellers cannot be ordered to specifically perform an obligation that is not clearly set forth in the contract. The trial court's order requiring Sellers to clean up the Property must therefore be reversed.

**C. Purchaser is not entitled to stigma damages.**

Finding of Fact No. 51 states, "The value of [the Property] at the time the parties contracted for the purchase and sale of the property must be reduced by \$510,000 for the stigma as defined in the testimony of Wayne Hunsperger." (CP 465) In its Memorandum of Opinion,

the court described the value of stigma damages as “uncontested.” (CP 239)

In awarding stigma damages, the trial court relied upon the Washington Supreme Court’s decision in *Mayer v. Sto Industries*.<sup>30</sup> In that case, homeowners sued a manufacturer for damages after water penetrated the exterior siding of the home and caused dry rot. The court awarded “stigma” damages to compensate the plaintiffs for having to disclose that their home was sided with EIFS, a product known to be defective.<sup>31</sup>

The *Mayer* court cited the Washington Court of Appeals decision in *Pugel v. Monheimer*,<sup>32</sup> in which the court ruled the plaintiff was entitled to recover for a permanent loss of market value in his property even though the physical damage to the property had been completely repaired.<sup>33</sup> Thus, in this case, if Purchaser established that

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<sup>30</sup> *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006).

<sup>31</sup> *Mayer*, 156 Wn.2d at 694-95; *see also Pugel v. Monheimer*, 83 Wn. App. 688, 922 P.2d 1377 (1996) (plaintiff may recover for permanent diminution in market value).

<sup>32</sup> *Pugel v. Monheimer*, 83 Wn. App. 688, 922 P.2d 1377 (1996).

<sup>33</sup> *Pugel*, 83 Wn. App. at 693.

the Property sustained a permanent loss in market value even after remediation had been completed, it could recover this amount (assuming it was otherwise entitled to damages).

The trial court's award of \$510,000 in stigma damages is based upon a fundamental misunderstanding regarding Hunsperger's testimony. In particular, the court failed to appreciate that the \$510,000 figure proposed by Hunsperger did not constitute stigma damages (i.e., permanent loss in market value following remediation); it actually represented benefit of the bargain damages (i.e., difference in value between contaminated and uncontaminated property). The Real Estate Consulting Assignment Report prepared by Hunsperger illustrates this distinction.<sup>34</sup> (*See* Ex. 36)

In his report, Hunsperger explained that he would form an opinion of the diminution in value to the Property as of March 2001, at which time cleanup had not even been

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<sup>34</sup> Hunsperger's report was admitted for illustrative purposes to assist the trial court in following along with Hunsperger's testimony.

commenced, much less completed. (*Id.* at 3) That opinion would “incorporate baseline value (unimpaired value) and value as impaired.” (*Id.*) His opinion did not include the cost of remediation. (*Id.* at 5)

It is apparent from Hunsperger’s report and testimony that his definition of “stigma” does not coincide with the legal requirements for stigma damages under Washington law. That is, to Hunsperger, stigma represents the difference in value between contaminated property and uncontaminated property including, in particular, the risks associated with contaminated property that has not yet been cleaned up. To Hunsperger, stigma does *not* represent a permanent loss of value that remains even after contaminated property has been cleaned up.

Hunsperger specifically testified that, in determining diminution in value, he considered “uncertainty as to the work that’s going to be undertaken and whether it’s going to be effective or not.” (2/1/97 RP at 80) Obviously, these factors would not come into play once the property has already been cleaned up and thus are not relevant to

determine permanent loss of value. Hunsperger further testified that, if the Property is entirely cleaned up, “that tends to *eliminate* stigma.” (*Id.* at 87) There is no dispute that the contamination on the Property can be completely cleaned up, and there is no evidence that the Property, after it has been cleaned, would be stigmatized.

Moreover, Hunsperger offered an opinion regarding the amount of diminution in value in 2001, before any cleanup measures had been commenced. (*Id.* at 81-82) He offered no opinion as to the value of the Property at the time of trial, at which time the cleanup process was still underway (*Id.* at 82)

In short, it is apparent from Hunsperger’s testimony and report that he did not calculate (nor was he asked to calculate) the permanent diminution in value of the Property (if any) after cleanup had been completed. The \$510,000 figure is based upon the risk factors associated with a property that is known to be contaminated but that has not yet been cleaned up, and the case studies cited in Hunsperger’s report each involved such properties. (*See*

Ex. 36 at 40-46) Hunsperger simply did not provide any testimony with respect to what the trial court characterized as stigma damages. In fact, in awarding “stigma” damages, the trial court actually granted a double recovery to Purchaser by both awarding benefit of the bargain damages *and* requiring specific performance. Under these circumstances, the trial court’s finding on this issue is not supported by any evidence whatsoever, let alone substantial evidence, and it must be reversed.

**D. Purchaser is not entitled to an award of attorney fees.**

The PSA authorizes an award of reasonable attorney fees and costs to the prevailing party in the event of any litigation arising out of the contract. (Trial Ex. 2 at 3, 12) In accordance with the PSA, the trial court awarded Purchaser \$420,068 in attorney fees and \$190,000 in costs. (CP 574-76, 577-78)

As explained above, Purchaser is not entitled to prevail on its claims against Sellers, and the attorney fee award must therefore be reversed.

Even if Purchaser does prevail, the award must be reversed and remanded because the trial court has not provided sufficient information regarding its calculation of attorney fees and costs to permit this Court to determine whether the award should stand.

An award of attorney fees is reviewed for abuse of discretion.<sup>35</sup> However, “trial courts must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award.”<sup>36</sup> To this end, the trial court must enter findings of fact and conclusions of law to support an attorney fee award.<sup>37</sup> In the absence of an adequate record for review, remand to the trial court is required.<sup>38</sup>

In this case, the trial court memorialized its decision in a letter ruling and an Order on Attorneys’ Fees. (CP 549-51, 574-77) The court did not enter findings of fact and conclusions of law, and neither the letter ruling nor the

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<sup>35</sup> *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007).

<sup>36</sup> *Just Dirt*, 138 Wn. App. at 415.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 415-16.

order provides the information necessary to enable this Court to determine whether the lower court abused its discretion.

For example, the law firm of Cable, Huston, Benedict, Haagensen & Lloyd, LLC, sought attorney fees totaling \$237,213.25. (CP 575) The court awarded \$160,000, stating simply “Hourly rate and amount of time expended was reduced as I could not justify the amount as compared to that incurred by Mr. Shafton.” (CP 550)

Sellers challenged Purchaser’s request for attorney fees on several grounds, including that (1) Purchaser sought recovery of fees incurred in connection with unsuccessful motions and (2) Purchaser provided only minimal information and no supporting invoices or other information regarding its request for costs. (*See* CP 294, 297-99, 315, 559-73) The trial court did not address either of these issues in its ruling. Although it did reduce Purchaser’s request for costs to deduct amounts incurred for copying, mail, phone, and travel expenses, the amount

of costs awarded seems simply to be a round number selected at random.

In sum, Purchaser is not entitled to attorney fees and costs because it is not entitled to prevail. In the event Purchaser does prevail, the case must be remanded to the trial court so that the court can enter the requisite findings of fact and conclusions of law that will enable this Court to review the award.

**E. Sellers are entitled to an award of attorney fees.**

As noted above, the PSA authorizes an award of attorney fees and costs to the prevailing party. In accordance with the PSA and RAP 18.1(a), Sellers hereby request that they be awarded reasonable attorney fees and costs in the event they prevail on appeal. Moreover, as explained above, Sellers are entitled to recover attorney fees and costs incurred in the trial court, as Purchaser cannot prevail on its claim for specific performance.

**VI. CONCLUSION**

For the reasons set forth above, Sellers respectfully request that the trial court rulings described in the Assignments of Error be REVERSED.

DATED this 24th day of June, 2009.

BULLIVANT HOUSER BAILEY PC

By   
\_\_\_\_\_  
Jerret E. Sale, WSBA #14101  
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Attorneys for Estate of Irwin P. Jessen

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

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_

DEPUTY

BATTLE GROUND PLAZA,  
LLC,

Respondent/Cross-  
Appellant,

v.

DOUGLAS M. RAY;  
EUGENE ANDERSON and  
WILLIAM MACRAE-SMITH,  
as co-personal  
representatives of the Estate  
of Irwin P. Jessen,

Appellants/Cross-  
Respondents,

and

SCOTT BROTHERS OIL,  
INC.; and TIME OIL  
COMPANY, INC.,

Third-Party  
Defendants.

No. 37791-8

CERTIFICATE OF  
SERVICE

I hereby certify that on June 25, 2009, a true and  
correct copy of Appellant's Opening Brief was served on  
the following:

ORIGINAL

<p>Ben Shafton  Caron, Colven, Robison &amp; Shafton,  P.S.  900 Washington St., Ste. 1000  Vancouver, WA 98660</p>	<input checked="" type="checkbox"/> Federal Express <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Hand Delivery
<p>Michael P. Higgins  Marsh &amp; Higgins, PC  1112 Daniels St., Ste. 200  Vancouver, WA 98660-3071</p>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
<p>Mark M. Myers  Williams, Kastner &amp; Gibbs PLLC  Two Union Square  601 Union St., Ste. 4100  Seattle, WA 98101-2380</p>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
<p>Stephen J. Tan  Cascadia Law Group, PLLC  1201 Third Ave., Ste. 320  Seattle, WA 98101</p>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
<p>Patricia Dost  Schwabe, Williamson &amp; Wyatt  Pacwest Center  1211 SW Fifth Ave., Ste. 1900  Portland, OR 97204-3795</p>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery

Dated June 25, 2009, at Vancouver, Washington.

  
\_\_\_\_\_  
Kimberly Fergin

11711790.1



Appellant Douglas M. Ray hereby joins in the arguments set forth in the Opening Brief of Appellants filed by appellants Eugene Anderson and William MacRae Smith, as co-personal representatives of the Estate of Irwin P. Jessen.

DATED this 8th day of July, 2009.

MARSH & HIGGINS, PC

By Michael P. Higgins  
Michael P. Higgins, WSBA #12483

Attorneys for Appellant Douglas M. Ray



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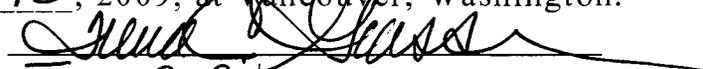
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

### CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2009, a true and correct copy of this document was served on the following:

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Dated July 13, 2009, at Vancouver, Washington.

  
Trena C. Grasser