

NO. 37791-8  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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BATTLE GROUND PLAZA, LLC,

Plaintiff, Respondent/ Cross-Appellant,  
vs.

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

Defendants, Appellants/Cross-Respondents,

and

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

Third-Party Defendants.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE JOHN F. NICHOLS

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REPLY BRIEF OF RESPONDENT

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## INTRODUCTION

In Appellants' Reply/Response Brief, Douglas Ray and the Estate of Irwin Jessen (the Sellers), made argument concerning the assignments of error Battle Ground Plaza, LLC (BGP) set out in the Brief of Respondent. BGP now responds. Unfortunately, it will be required to reiterate some of the arguments it has previously made.

## ARGUMENT

### I. BGP Is Entitled to Damages Even If Specific Performance is Not Warranted.

#### a. The Sellers Have Misconstrued the PSA and the Addendum.

The Sellers contend that the trial court erred by entering an order requiring specific performance. Then, they claim that BGP is not entitled to the alternative remedy of damages because “(1) it failed to tender the purchase price, (2) it waived all conditions to closing, and (3) the seller was willing and able to convey the property.” Appellants' Reply/Response Brief, pps. 23-24. These contentions are simply wrong, and they do not deprive BGP of the remedy of damages.

First of all, BGP was not required to tender the purchase price under the terms of the 2001 Addendum to the Real Estate Purchase

and Sale Agreement (the Addendum). BGP was required to pay the purchase price on or before August 1, 2001, only if the Sellers were not in breach of the terms of the Real Estate Purchase and Sale Agreement (PSA). Since the property was contaminated by hazardous substances in contravention of the Sellers' representations and warranties contained in Paragraph 30(N) of the PSA on that date, the Sellers were in breach, and BGP was not required to close. Brief of Respondent/Cross-Appellant, pps. 17-21.

Apparently conceding that they were in breach of the terms of Purchase and Sale Agreement (PSA) after August 1, 2001, the Sellers claim that the transaction terminated on that date because Battle Ground Plaza, LLC (BGP) was not obligated to close. Appellants' Reply/Response Brief, p. 8. In other words, they argue that their false representation that the property contained no hazardous substances allows them to terminate the transaction. Such an argument is obviously fallacious because it allows the Sellers to profit from their contractual breach and their clear misrepresentation. There is certainly nothing in either the PSA or the Addendum that states that the transaction terminates at the Sellers' option if the Sellers are in breach. Furthermore, no term of any agreement required BGP to terminate the transaction because of the sellers' breach.

Finally, the Addendum makes it clear that the Sellers can only terminate the transaction if BGP fails to close within the times set out under its terms. BGP was not required to close under the terms of the Addendum because the Sellers were in breach. Therefore, the Sellers had no power to terminate. As the trial court noted, when the terms of the Addendum precluded the Sellers from terminating the transaction, construing the Addendum such that transaction automatically terminates would be illogical. Brief of Respondent/Cross-Appellant, p. 20.

Secondly, BGP most assuredly did not waive all conditions to closing. The PSA set out a number of contingencies that needed to be satisfied before BGP would be required to close the transaction. Under the terms of the PSA, BGP was required to waive these before it would be required to tender the purchase price. But disputes then arose between the parties that led them to enter into the Addendum. The language of the Addendum changed the duties of the parties in connection with closing. BGP agreed to close by July 1, 2001—which date could be extended to August 1, 2001—but only if the Sellers were not in default or breach by the date set for closing. The Sellers not being in breach, therefore, became a condition precedent to BGP's duty to close under the terms of the Addendum. As noted above, the Sellers were in breach on July 1, 2001, and on August 1, 2001, because of their misrepresentation that the

property was not contaminated by hazardous substances. BGP has never waived this breach. The trial court never found such a waiver.

The Sellers go on to argue that because BGP did not terminate the transaction on account of the presence of hazardous substances as it had the right to do under Paragraph 21(A)(2) of the PSA, that it waived all claims on account of hazardous substances. That argument is flawed first of all because the contingencies set out in Paragraph 21(A) are explicitly “solely for the benefit of Purchaser.” The Sellers cannot stand that provision on its head by arguing that, somehow, its provisions somehow benefit them.

In making this argument, the Sellers contend that BGP’s sole remedy on account of the presence of hazardous substances was to terminate the transaction. Their argument is wrong because nothing in the PSA makes the termination allowed by Paragraph 21(A)(2) the purchaser’s sole remedy. A remedy is not exclusive unless explicitly made so by the terms of the contract. *Graoch Associates #5 Limited Partnership v. Titan Construction Corp*, 126 Wn.App. 856, 109 P.3d 830 (2005); Brief of Respondent/Cross-Appellant, pps. 27-28.

If BGP’s sole remedy related to the presence of hazardous substances would be termination of the transaction under the terms of Paragraph 21(A)(2), the warranty set out in Paragraph 30(N) would be

superfluous because it could never be activated. If the purchaser closed, the purchaser would necessarily have waived any claim under the terms of the warranty. Such a construction is not permissible. Courts should not adopt a contract interpretation that renders a term ineffective or meaningless. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166, 487, 209 P.3d 863 (2009).

Finally, the Sellers willingness to close the transaction is not meaningful when BGP was not obligated to close. In any event, the Sellers seem to contend that BGP should have tendered the purchase price and contemporaneously sued the Sellers for breach of the environmental warranty contained in paragraph 30(N) of the PSA. Such a construction of the PSA makes no sense. Brief of Respondent/Cross-Appellant, pps. 30-31.

As Sellers' arguments clearly lack merit on their face, they should be rejected.

b. Our Case Cannot Be Distinguished from *Friebe v. Supancheck*.

Contrary to the Sellers' arguments, a purchaser need not close a transaction to obtain damages when the seller has misrepresented the property. The Court so held in *Friebe v. Supancheck*, 98 Wn.App. 260, 992 P.2d 1014 (1999). That case is conceptually identical to ours. The

Court held that the purchasers were entitled to damages based on the sellers' misrepresentation of the number of "legal units" in the rental property at issue. In that case, the purchasers refused to close because of the misrepresentation and the sellers' unwillingness to renegotiate the purchase price when the misrepresentation was discovered. The fact that the purchasers had not tendered the purchase price was of no concern to the Court.

The Sellers attempt to distinguish *Friebe v. Supancheck, supra*, on the basis that BGP did not tender the purchase price and that the Sellers were willing to convey. But in *Friebe v. Supancheck, supra*, the buyers obviously did not tender the purchase price and the sellers were willing to close if the buyers did pay the agreed purchase price. The transaction foundered because the property was not as represented. Our case is no different. They also claim a distinction because the opinion does not indicate whether the contract between the parties contained inspection provisions and whether conditions to closing were waived by the purchaser. As previously noted, BGP did not waive conditions to closing. Furthermore, the purchasers in *Friebe v. Supancheck, supra*, learned of the sellers' misrepresentation by a review of public documents. They obviously conducted an inspection or review regardless of the

presence or absence of any contractual provision. No viable distinction exists between our case and *Friebe v. Supancheck, supra*.

Parenthetically, it should be clear why BGP did not tender the purchase price in August of 2001. The parties envisioned in Paragraph 16 of the PSA that BGP would obtain financing for the purchase price. It could not do so, however, because the property was contaminated by hazardous chemicals contrary to the Sellers' representations. By contesting BGP's entitlement to damages, the Sellers clearly demonstrate that they desire to profit from their misrepresentation. This they may not do. *Saletic v. Stamnes*, 51 Wn.2d 696, 698, 321 P.2d 547 (1958).

c. The Sellers Have Forgotten the Claims BGP Made at Trial.

The Sellers argument misperceives BGP's theory of recovery at trial. BGP sought specific performance with abatement of the purchase price based on the Sellers' misrepresentation that the shopping center property was free from hazardous substances. There is no impediment to an award of damages if specific performance is unavailable for some reason.

When a seller misrepresents the character of property, the purchaser is entitled to an award of damages representing the benefit of the bargain or the difference between the property as represented and the value of the property as it actually was. *Dixon v. MacGillivray*, 29 Wn.2d

30, 185 P.2d 109 (1947); *Alexander Myers & Co., Inc. v. Hopke*, 88 Wn.2d 449, 565 P.2d 80 (1977); *Tennant v. Lawton*, 26 Wn.App. 701, 615 P.2d 1305 (1980); *Lyall v. DeYoung*, 42 Wn.App. 252, 258-59, 711 P.2d 356 (1985). This difference in value can be used to reduce the purchase price in a specific performance action. *Alexander Myers & Co. v. Hopke, supra*.

Wayne Hunsperger set out the methodology for determining the reduction based on the benefit of the bargain. The value of the property as represented was the agreed purchase price of \$3 million. The actual value was that purchase price less costs of remediation and the stigma factor as defined by Mr. Hunsperger. Brief of Respondent/Cross-Appellant, p. 36. BGP then submitted proof concerning the reductions for remediation expenses and related expenses. Mr. Hunsperger testified to the amount of the stigma factor. The total of these sums was well in excess of the purchase price. On that basis, and based on the Court's decision in *Streater v. White*, 26 Wn.App. 430, 613 P.2d 187 (1980), BGP asked the trial court to offset from these sums the amount of the purchase price; require the Sellers to convey the property; and award damages in the amount exceeding the purchase price. BGP advised that it would be subject to additional income tax obligations because the damages exceeded the purchase price. It indicated that it could calculate those damages once the trial court had established what they might be. It noted,

however, that there would be no tax liability if the Sellers did the remediation themselves. The trial court opted for the latter approach, thereby saving the Sellers responsibility for additional damages. Brief of Respondent/Cross-Appellant, pps. 7-8, 32.

In short, this case presents a textbook situation for damages based on the Sellers' misrepresentation of the property.

## II. The Trial Court Erred by Failing to Award Damages for Loss of Use of the Property.

### a. BGP Is Entitled to Net Rentals.

The Sellers claim that BGP is not entitled to damages measured by the revenue the shopping center yielded less expenses because BGP has never tendered the purchase price. It recites the trial court's conclusion in its Memorandum of Opinion that allowing such relief would be a windfall to BGP. (CP 240) That conclusion was mistaken. By allowing the Sellers to retain the net revenues from the shopping center, the trial court granted a windfall to the Sellers and has allowed them to profit from their misrepresentation of the property.

In 2001, BGP had made arrangements to secure financing to complete the transaction. As the trial court found, it lost the ability to obtain this financing because the Sellers had misrepresented the property

by asserting that it was free from hazardous substances. (CP 459, FF 26) Nonetheless, the Amended Order of Specific Performance allows the Sellers to retain the profits from the shopping center while remediation proceeds. The Sellers therefore have no incentive to remediate the property in a prompt fashion. They have every reason to avoid measures that will promptly eliminate the contamination that is present. A more unjust result is hard to imagine.

The Sellers then claim that BGP did not reduce the amount of rents by the expenses incurred to operate the shopping center. Nothing could be further from the truth. BGP based its claim on the Sellers' own accounting ledgers. It calculated its claim by subtracting from gross rentals those expenses the Sellers actually incurred and that it would also have incurred if it would have been in possession of the shopping center. It did not allow for such things as litigation or remediation expenses and the Sellers' payment on loans they took out. Exhibit 39 makes this clear.

If anything, BGP's claim was far too generous to the Sellers. As the Court stated in *Chan v. Smider*, 31 Wn.App. 730, 644 P.2d 727 (1982), the purchaser is entitled to gross rentals less expenses. That totaled \$1,595,499.53 to the time of trial. (Ex. 39, p. 2) But BGP further reduced its claim by the difference between the debt service payments it would have had to make and the amount that those payments would have

reduced the principal of BGP's purchase money loan. As a result, BGP claimed \$687,747.10 rather than the \$1,595,499.53 to which it was entitled. (RP 1-24-2007, 261)

The trial court's conclusion cannot be justified on the basis that the Sellers were forced to use the net revenues from the shopping center to remediate the property. The Sellers have prevailed on others to do the remediation work as they are allowed to do by RCW 70.105D.080. The trial court first opted for excavation of the site, a remedy that would have been certain and timely. (CP 241) The Sellers then persuaded the trial court to allow Farallon Consulting to attempt cleanup with soil vapor extraction technology. State Farm Fire and Casualty Company, the insurer for the proprietor of Grace's Cleaners, agreed to pay the cost. (CP 841-42; CP 929-31). At trial, Farallon personnel indicated that they could not reliably indicate how long that technology might take to remediate the premises until after they had the opportunity to observe its performance. Their estimates of expense, however, allowed for at least two years of operation. (RP 2-6-2007, pps. 25-35) The Sellers have also retained

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claims against Scott Brothers Oil, Inc., (Scott Brothers) and Time Oil Company concerning the contamination at the Mini Mart site.<sup>1</sup>

b. The Sellers Cannot Claim Entitlement to Interest on the Purchase Price.

The Sellers claim in vague terms that they should receive interest on the purchase price to offset the net revenues that BGP is claiming. Once again, the Sellers are seeking to profit from their breach of the representations they made in the PSA. Allowing them interest would hardly be equitable under the circumstances.

Furthermore, the Sellers are seeking interest when BGP's duty to tender the purchase price has never accrued. Under the terms of the Addendum, BGP was obliged to close by August 1, 2001, but only if the Sellers were not in breach. As discussed above, the Sellers were in breach at that time. They had not remediated the property prior to the entry of the Amended Order of Specific Performance. Therefore, BGP was not obliged to tender the purchase price in August of 2001 or at any

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<sup>1</sup> The Sellers entered into a settlement agreement with Scott Brothers and Time Oil on the eve of trial. BGP was not a party to the settlement. The agreement required Scott Brothers and Time Oil Company to pay \$304,000.00 to the Sellers and to remediate the property through a method that the trial court rejected. The trial court's determination called the viability of the settlement into question. To BGP's understanding, these issues between the Sellers on the one hand and Time Oil Company and Scott Brothers on the other have not been resolved.

other time prior to judgment. The Sellers can recover interest only from when BGP was obliged to perform. Restatement (Second) of Contracts §354. Since under the terms of the parties' agreements, BGP has never been required to tender the purchase price, the Sellers are not entitled to interest at this time.

The Sellers entitlement to interest can only begin from the date the trial court set for closing. There is no other closing date. In our case, the parties agreed in the Addendum to a closing date of July 1, 2001, or August 1, 2001, but only if the Sellers were not in default or breach. They did not set a closing date if the Sellers were in default or breach although they did agree that the Sellers could not terminate the contract. As a result, the Court was required to set a closing date. It did so in the Amended Order of Specific Performance. That date is sixty (60) days after the trial court determines that the property has been properly remediated and that the environmental warranty has been satisfied. (CP 537)

When the parties' agreement does not have an operative closing date and the trial court sets the closing date, interest can run only from the closing date the trial court sets. The Court so held in *Paris v. Allbaugh*, 41 Wn.App. 717, 704 P.2d 660 (1985). In that case, the purchase and sale agreement between the parties did not have a specific

closing date. The seller refused to close. The trial court granted specific performance to the purchaser and set a closing date. It required the seller to account to the purchaser for rentals received less expenses incurred. It also allowed the seller interest on the purchase price from the date the purchaser had filed a *lis pendens* on the property. The Court stated that the trial court's ruling had impermissibly allowed the seller to profit from his failure to close. It held that the trial court's running of interest from the date of the filing of the *lis pendens* as opposed to the closing date the trial court had ordered was an abuse of discretion. It is clear, therefore, that in our case the Sellers can only have interest from the closing date the trial court ultimately fixes.

The Sellers point to the Court's decision in *Chan v. Smider, supra*, to support their interest claim. BGP relied heavily on that case in the Brief of Respondent/Cross-Appellant. In that case, the trial court granted specific performance; and reduced the purchase price by the net rentals that the sellers had received together with interest. If the Sellers are entitled to interest on the purchase price, therefore, BGP should receive interest on the net rentals.

Also in *Chan v. Smider, supra*, Mr. Chan had deposited a down payment into the registry of the court. It had accrued interest. The trial court allowed the Smiders to recover the interest on the down

payment. Mr. Chan protested the award of interest, but the Court of Appeals affirmed.

In our case, BGP tendered \$30,000.00 in earnest money. It is now held in escrow by First American Title Insurance Company. Under the terms of the Amended Order of Specific Performance, the Sellers are entitled to the interest on the earnest money but that interest serves to reduce the purchase price. (CP 536) In *Chan v. Smider, supra*, the Court ruled that an award of net rentals to the purchaser would be congruent with an award of interest on the down payment to the seller. For that reason, BGP must concede that the purchase price should not be reduced by the accrued interest on the earnest money should it be allowed to recover the net rentals from the shopping center property.

c. Conclusion.

In summary, it is hard to imagine a more inequitable result than one that allows the Sellers to retain the profits from the shopping center when their misrepresentation deprived BGP of the financing necessary to pay the purchase price. The trial court erred by so holding. On that basis, the Amended Order of Specific Performance should be reversed and remanded with directions to require the trial court to further reduce the purchase price BGP must pay by the amount of the rental revenue from the shopping center less operating expenses incurred.

III. The Trial Court Erred by Granting the Order Granting Defendants' Motion for Relief from Order Re: UST's.

a. Factual Rejoinder.

On May 20, 2008, *The Columbian*, Vancouver's primary daily newspaper, published an article in its business section. The article indicates that Scott Brothers Oil Co. (Scott Brothers) had ceased commercial and residential fuel sales. (CP 1652)

The Amended Order of Specific Performance was entered on May 30, 2008. (CP 535-40) Sellers moved for relief concerning the underground storage tanks (UST's) on July 2, 2008, more than ten days after the entry of the Amended Order of Specific Performance. (CP 973)

b. Argument.

A party seeking relief from a judgment on the basis of CR 60(b)(3), must meet two requirements. First of all, the evidence in question must exist at the time the judgment was entered. *In Re Marriage of Knudson*, 114 Wn.App. 866, 872, 60 P.3d 681 (2003). Secondly, the party seeking relief must set out specific facts showing that he or she could not have discovered and produced the evidence in question in time to move for a new trial, within ten days of the entry of the judgment. CR 59(b). *Vance v. Offices of Thurston County Commissioners*, 117 Wn.App. 660, 671, 71 P.3d 680 (2003). If the evidence is available in time to

request a new trial or reconsideration, that party is not entitled to relief under CR 60(b)(3). *Wagner Development, Inc. v. Fidelity and Deposit Company of Maryland*, 95 Wn.App. 896, 906-7, 977 P.2d 639 (1999).

The Sellers attempt to meet the first requirement — that the evidence was in existence prior to the entry of the Amended Order of Specific Performance — by reference to the article in *The Columbian*. The article is obviously hearsay if it is introduced for the truth of the matters asserted and cannot be considered. ER 801(c); ER 802. As a number of courts have held, relief under rules equivalent to CR 60(b) cannot be based upon affidavits containing hearsay. *Mendoza v. City of Rome*, 872 F.Supp. 1110, 1124 (N.D.N.Y. 1994); *Rand International Products, Ltd. v. TekSource, L.C.*, 1998 W.L. 372356 (E.D.N.Y. 1998); *Ross v. Global Business School, Inc.*, 2002 W.L. 31433609 (S.D.N.Y. 2002); *New Industries, Inc. v. Rice*, 603 S.2d 895, 897 (Ala. 1992); *Greater Canton Ford Mercury, Inc. v. Lane*, 997 S.2d 198, 205 (Miss. 2008). Since the only evidence as to when Scott Brothers may have stopped pumping gas consists of inadmissible hearsay, Sellers have not submitted sufficient evidence to show that Scott Brothers did in fact stop dispensing gasoline prior to the entry of the Amended Order of Specific Performance.

If the article in *The Columbian* is sufficient to show that gasoline was not being dispensed at the Mini Mart prior to judgment, it also demonstrates that Sellers did not exercise due diligence in bringing the matter to the trial court's attention either prior to the entry of judgment or in time to make a motion for a new trial under CR 59. The newspaper article shows that Scott Brothers' discontinuing sales of gasoline was a matter of common and public knowledge in Clark County. If Sellers had simply read the newspaper, or even visited their own property, they would have known what Scott Brothers was doing in time to make a motion for a new trial. Since they made no such motion, they are not entitled to relief under CR 60(b)(3) if in fact gasoline sales were discontinued prior to judgment.

Sellers also hint that they should be entitled to relief under CR 60(b)(11). That rule allows a court to relieve a party from the final judgment for "any other reason justifying relief from the operation of the judgment." However, the use of CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of CR 60(b). A party cannot rely on CR 60(b)(11) if that party fails to meet the requirements of CR 60(b)(3). *State v. Keller*, 32 Wn.App. 135, 140, 647 P.2d 35 (1982); *In Re: Marriage of Yearout*, 41 Wn.App. 897, 707 P.2d 1367 (1985); *Lane v. Brown & Haley*, 81 Wn.App. 102, 107,

912 P.2d 1040 (1989); *In Re: Marriage of Thurston*, 92 Wn.App. 494, 499-500, 963 P.2d 947 (1998); *Friebe v. Supancheck*, *supra*; *Summers v. Department of Revenue*, 104 Wn.App. 87, 93, 14 P.3d 902 (2001); *Welfare of M.G.*, 148 Wn.App. 781, 792-93, 201 P.3d 354 (2009).<sup>2</sup> The Sellers claim relief under CR 60(b)(3) on the basis of the unavailability of evidence. Since they have failed to meet the requirements of that rule, they cannot rely on CR 60(b)(11).

The Sellers did not present sufficient evidence to justify relief under the terms of CR 60(b)(3). The trial court erred in granting them relief under the terms of that rule.

#### IV. Attorneys' Fees.

##### a. The Sellers Cannot Complain about the Specificity of the Trial Court's Opinion and Order.

The Sellers continue to argue that the trial court's letter opinion and the Order on Attorney's Fees were not sufficiently explicit or particularized to allow for review. Their argument is difficult to understand. The trial court set out its conclusions in a detailed letter

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<sup>2</sup> Relief under CR 60(b)(11) is typically limited to cases involving changes in the law. The rule has been applied to revisit dissolution decrees where division of military pensions were at issue. *See, e.g., Flannagan v. Flannagan*, 42 Wn.App. 214, 709 P.2d 1247 (1985).

ruling. (CP 549-51) The letter ruling was sufficient. *Banuelos v. TSA Washington, Inc.*, 134 Wn.App. 607, 616, 141 P.3d 652 (2006). Nonetheless, the trial court also entered the Order on Attorneys' Fees. (CP 574-75) The presentation concerning time spent by BGP's attorneys was quite detailed. It is also apparent that the trial court carefully considered what was presented because it reduced substantially what BGP claimed. In such a circumstance, there can be no finding that the trial court abused its discretion. *Beckman v. Wilcox*, 96 Wn.App. 355, 368, 979 P.2d 890 (1999).

Sellers contend that the trial court's conclusions concerning the rate it allowed for the services of Ralph Palumbo was sufficient. The trial court's comment in its letter decision was limited to the following:

I have also calculated the hourly rate to that prevailing in Clark County with adjustments to the specialty/expertise of the field involved. . .

Palumbo: (hourly rate reduced to \$295) — \$55,283

(CP 550) In Paragraph 1 of the Order on Attorneys' Fees, the trial court stated:

Ralph Palumbo, attorney at law, reasonably spent 187.4 hours in connection with this matter. Notwithstanding the fact that his normal hourly rate was \$395, a reasonable hourly rate for his time was \$295 per hour. The total of attorney's fees for Mr. Palumbo's services is \$55,283.

(CP 575) The trial court also stated in conclusory fashion that the time spent by Curtis Welch should be reduced by half because he spent time dealing with issues related to Mr. Ray's bankruptcy action. (CP 550) The Sellers have no complaint about the specificity of the findings for Mr. Palumbo and Mr. Welch even though they are no more detailed than the trial court's other findings. Sellers cannot have it both ways. They cannot rely on a somewhat conclusory finding when it benefits them and yet complain about the specificity of the trial court's other findings.

Precisely what would satisfy the Sellers is not clear. Hopefully, they would not require the trial court to specifically approve or disapprove each and every entry made in the voluminous affidavits BGP submitted to justify the award of attorney's fees.

The specificity of BGP's presentation and the trial court's letter opinion and order on attorney's fees was sufficient. There should be no remand on this issue.

b. The Trial Court Improperly Determined Mr. Palumbo's Hourly Rate.

The trial court's finding concerning Mr. Palumbo's rate is incorrect because his normal rate of \$395.00 is a reasonable rate. *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 597, 675 P.2d

193 (1983). The trial court also erred in reducing Mr. Palumbo's rate because there was no factual basis for its conclusion.

The Sellers urge that the trial court was authorized to impose a local rate for Mr. Palumbo's services. However, that rate would necessarily have to be based upon what Clark County lawyers having expertise in matters involving environmental contamination would charge. No evidence of such a rate was put forward by any party because there are no attorneys with offices in Vancouver who specialize in dealing with such matters. This is best demonstrated by the fact that while all the parties retained attorneys with expertise in environmental contamination, none of those attorneys have offices in Vancouver. Mr. Palumbo and the environmental specialists engaged by the Sellers and by Scott Brothers all have offices in Seattle. Time Oil Co. engaged an environmental attorney with offices in Portland, Oregon. Therefore, the trial court's reduction was necessarily not based upon any evidence and thus amounts to an abuse of discretion

When specialized knowledge of any attorney is needed and there are no attorneys in the locale with that expertise, the hourly rate of any attorney with that specialized knowledge is reasonable notwithstanding the fact that it may be higher than the rates charged by local attorneys. The United States Court of Appeals came to that

conclusion in *Chrapliwy v. UniRoyal, Inc.*, 67 F.2d 760, (7<sup>th</sup> Cir. 1982), cited with favor in *Bowers v. Transamerica Title Insurance Company*, *supra*, 100 Wn.2d at 597. In that case, the plaintiff engaged attorneys from Washington, D.C., to assist them in a civil rights action pending in South Bend, Indiana. The attorneys from Washington, D.C., had a regular hourly rate of \$175 while the prevailing rate in South Bend was \$85 per hour. The Court allowed attorneys' fees based only on the prevailing local rates. The Court of Appeals reversed. It stated:

If a high priced, out of town attorney renders services which local attorneys could do as well and there is no other reason to have them performed by the out of town attorney, trial court, in its discretion, might allow only an hourly rate which the local attorneys would have charged for the same service. On the other hand, there are undoubtedly services which a local attorney may not be willing or able to perform. The complexity and specialized nature of a case may mean that no attorney with the required skills is available locally.

Attorneys with specialized skills in a narrow area of law, such as admiralty law, patent law, or antitrust and other complex litigation, tend to be found in large cities, where an attorney may have a greater opportunity to focus on a narrow area of law. As a specialist, the attorney will usually charge more for performing services in his area of expertise than a general practitioner will charge for performing similar services. Furthermore, the costs of practicing law will vary from city to city, and such costs will be reflected in the rates of the attorneys. . .

If . . . a party does not find counsel readily available in that locality with whatever degree of skill may reasonably be required, it is reasonable that the party go elsewhere to find an attorney, and the court should make the allowance on the basis of the chosen attorney's billing rate unless the rate customarily charged in that attorney's locality for truly similar services is deemed to require an adjustment.

670 F.2d at 768-69. Accord, *Maceira v. Pagan*, 698 F.2d 38, 40 (1<sup>st</sup> Cir. 1983); *National Wildlife Federation v. Hanson*, 859 F.2d 313, 317-18 (4<sup>th</sup> Cir. 1988); *Hadix v. Johnson*, 65 F.3d 532, 535 (6<sup>th</sup> Cir. 1995); *Ihler v. Chisholm*, 298 Mont. 254, 995 P.2d 439 (2000).

The sum of \$395 per hour is Mr. Palumbo's normal hourly rate. It was necessary to retain his services because of his expertise in matters involving environmental compensation and the lack of similar expertise by BGP's lead counsel. The trial court erred in awarding fees based on his services at less than his normal hourly rate.

#### CONCLUSION

The Sellers' assignments of error should be rejected. However, the matter should be remanded to the trial court for a determination of the amount of net rentals that should be credited to BGP. The Order on Attorney's Fees and Supplemental Judgment should also be reversed to allow BGP fees for Ralph Palumbo at the rate of \$395.00 per hour. The

Order Granting Defendants' Motion for Relief from Order Re: USTs  
should be reversed. Finally, BGP should be awarded its attorney's fees on  
appeal.

RESPECTFULLY SUBMITTED this 30 day of Nov.,  
2009.

  
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BEN SHAFTON, WSB #6280  
Of Attorneys for Battle Ground Plaza, LLC

NO. 37791-8  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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BATTLE GROUND PLAZA, LLC,

Plaintiff, Respondent/ Cross-Appellant,  
vs.

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

Defendants, Appellants/Cross-Respondents,

and

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

Third-Party Defendants.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE JOHN F. NICHOLS

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AFFIDAVIT OF MAILING

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