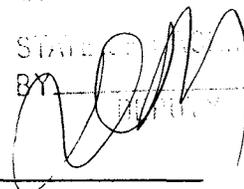


JUDICIAL CENTER  
COURT OF APPEALS  
DIVISION II  
03/22/12 PM 3:10  
STATE OF WASHINGTON  
BY: 

No. 39589-4-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

GEONERCO, INC. and/or assigns, n/k/a RIVERSIDE HOMES, INC., an  
Oregon corporation d/b/a Riverside Homes Vancouver,

Appellant

v.

GRAND RIDGE PROPERTIES IV LLC,  
an Oregon limited liability company,

Respondent.

---

BRIEF OF APPELLANT

---

GORDON THOMAS HONEYWELL LLP  
Attorneys for Appellant

BRADLEY A. MAXA  
WSBA No. 15198

1201 Pacific Avenue, Suite 2100  
P.O. Box 1157  
Tacoma, WA 98401-1157  
(253) 620-6500

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR..... 3

III. STATEMENT OF CASE..... 7

IV. ARGUMENT.....14

    A. THE TRIAL COURT DID NOT HAVE THE AUTHORITY UNDER CR 60(b) TO ORDER ENTRY OF A NEW JUDGMENT AGAINST RIVERSIDE AND IN FAVOR OF GRAND RIDGE.....14

        1. Background .....14

        2. The Standard of Review for Determining the Trial Court's Authority Under CR 60(b) Is De Novo. ....15

        3. The Express Language of CR 60(b) Limits the Trial Court's Authority to Granting Relief to the Judgment Debtor from the Requirements of an Existing Judgment.....16

        4. The Trial Court Did Not Have Authority to Award Affirmative Relief in Favor of Grand Ridge That Was Not Requested Either in the Original Lawsuit or in the CR 60(b) Motion.....18

    B. AS A MATTER OF LAW, GRAND RIDGE'S DAMAGES FOR RIVERSIDE'S FAILURE TO CLOSE ARE LIMITED TO THOSE ALLOWED IN THE REPSA'S LIQUIDATED DAMAGES PROVISION. ....20

    C. GRAND RIDGE WAS NOT IN A POSITION TO PERFORM UNDER THE REPSA, AND RIVERSIDE DID NOT WAIVE ITS ABILITY TO REQUIRE COMPLIANCE WITH THE TERMS OF THE REPSA.....23

        1. Grand Ridge Did Not Comply with the Trial Court's Order that It "Fully Cooperate in

	any Activities Necessary to Closing the Sale".....	23
2.	Riverside Did Not Waive Compliance with the Conditions and Requirements of the REPSA. ....	25
3.	Res Judicata Does Not Bar Riverside from Enforcing the Provisions of the REPSA.....	27
D.	RIVERSIDE DID NOT VIOLATE THE TERMS OF THE ORIGINAL JUDGMENT BY FAILING TO CLOSE UNDER THE REPSA. ....	28
E.	ONCE THE TRIAL COURT'S CR 60(b) ORDER IS REVERSED, THE AWARD OF ATTORNEY FEES TO GRAND RIDGE ALSO MUST BE REVERSED. ....	29
F.	RIVERSIDE IS ENTITLED TO RECOVER ITS ATTORNEY FEES IN THE TRIAL COURT AND IN THIS COURT UNDER THE ATTORNEY FEE PROVISION IN THE REPSA.....	29
V.	CONCLUSION.....	30

TABLE OF AUTHORITIES

WASHINGTON CASES

*Estate of Treadwell v. Wright*, 115 Wn. App. 238, 61 P.3d 1214 (2003).....15

*Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 146 Wn. App. 459, 191 P.3d 76 (2008) ..... 7, 9

*Luckett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 1144 (1999).....17

*Metropolitan Park District of Tacoma v. Griffith*, 106 Wn.2d 425, 723 P.2d 1093 (1986).....17

*Northwest Land and Investment, Inc. v. New West Federal Savings & Loan Association*, 64 Wn. App. 938, 827 P.2d 334 (1992).....15

*Pacific Security Co. v. Tanglewood, Inc.*, 57 Wn. App. 817, 790 P.2d 643 (1990).....17

*People's State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989).....17

*State v. Schwab*, 163 Wn.2d 664, 185 P.3d 1151 (2008).....16

*Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn.2d 881, 881 P.2d 1010 (1994).....21

OTHER CASES

*Adduono v. World Hockey Ass'n*, 824 F.2d 617 (8th Cir. 1987) .....17

*Delay v. Gordon*, 475 F.3d 1039 (9th Cir. 2007) .....17

*U.S. v. \$119,980*, 680 F.2d 106 (11th Cir. 1982).....17

STATUTES

RCW 64.04.005(1) ..... 2, 21-22, 31

OTHER AUTHORITIES

*12 Moore's Federal Practice* §60.25 (2004) ..... 17

COURT RULES

CR 60(b)..... Passim

## I. INTRODUCTION

This appeal presents two significant issues: (1) the scope of a trial court's authority under CR 60(b), and (2) the enforceability of a liquidated damages provision in a real estate purchase and sale agreement. The trial court committed error with regard to both issues, and this Court should reverse.

### CR 60(b)

CR 60(b) grants a trial court very specific authority – to relieve a judgment debtor of the obligations imposed by a judgment or order. However, CR 60(b) does not authorize a trial court to go beyond the terms of the existing judgment and enter a new judgment against the judgment creditor. For example, nothing in CR 60(b) would allow a trial court to vacate a default judgment against a defendant and at the same time enter a judgment for damages against the plaintiff in favor of the defendant.

That essentially is what the trial court did in this case. Earlier in the litigation, the trial court entered a judgment in favor of Riverside ordering Grand Ridge to specifically perform under a real estate purchase and sale agreement (REPSA), and Grand Ridge sought relief from that judgment under CR 60(b). The trial court granted that relief, but also entered a new order against Riverside (1) finding that Riverside had breached the REPSA, (2) ordering that Riverside

specifically perform the REPSA, and (3) directing an entry of judgment for damages against Riverside if the REPSA was not performed. The order went far beyond the scope of the trial court's authority. This Court should reverse the trial court's order, and reaffirm a trial court's limited authority under CR 60(b).

*Liquidated Damages Provision*

Liquidated damages provisions in contracts are well recognized and enforceable, particularly with regard to real estate purchase and sale agreements. In fact, RCW 64.04.005(1) expressly provides that liquidated damages provisions in REPSAs are "valid and enforceable regardless of whether the other party incurs any actual damages". The REPSA Riverside and Grand Ridge executed contains a liquidated damages provision stating that the sole and exclusive remedy available to the seller (Grand Ridge) for the buyer's (Riverside's) breach is retention of the buyer's earnest money deposit.

Even if the trial court had authority to order a judgment for damages against Riverside in the context of Grand Ridge's CR 60(b) motion, the liquidated damages provision in the REPSA should have limited any damages award to the amount of Riverside's earnest money deposit. But the trial court without explanation refused to enforce the liquidated damages provision, and awarded damages without limitation. This Court should reverse the trial court's damages

award, and reaffirm that a trial court cannot re-write the parties' contract and disregard a Washington statute when enforcing a REPSA.

## II. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The trial court erred in entering the Findings of Fact and Conclusions of Law and Order dated June 18, 2009 (CP 443).

2. The trial court erred in entering an order granting affirmative relief to Grand Ridge against Riverside in the context of Grand Ridge's CR 60(b) motion.

a. The trial court erred in ruling that Riverside breached the REPSA by failing to close when Grand Ridge tried to tender performance (Conclusion of Law 7).

b. The trial court erred in ordering Riverside to specifically perform the REPSA by a date certain (Order, ¶ 1).

c. The trial court erred in ruling that Grand Ridge was entitled to a judgment for damages if Riverside failed to close on the REPSA and Grand Ridge resold the property (Order, ¶ 3).

3. The trial court erred in granting relief to Grand Ridge that Grand Ridge did not request either in the original lawsuit or in the CR 60(b) motion.

4. The trial court erred in entering the Order Regarding Plaintiff's Motion for Partial Reconsideration dated June 18, 2009 (CP 460), which denied Riverside's motion for reconsideration.

5. The trial court erred by failing to limit Grand Ridge's damages to the amount of Riverside's earnest money deposit as set forth in Paragraph 15(b) of the REPSA.

6. The trial court erred in finding that Riverside breached the REPSA when it refused to close because Grand Ridge had not complied with the requirements of the REPSA.

a. The trial court erred in adopting the first sentence of Finding of Fact 10, which reads as follows:

In accordance with the Court's Order, Grand Ridge was ready, willing, and able to close and convey the property on or before the February 20th deadline.

b. The trial court erred in ruling that Grand Ridge had fully satisfied its obligations under the REPSA and the court's judgment (Conclusion of Law 5).

c. The trial court erred in ruling that Riverside waived any defects in the condition of the property and was legally barred from requiring Grand Ridge to make further improvements to the property (Conclusions of Law 1).

d. The trial court erred in ruling that Riverside was precluded from requiring Grand Ridge to make further improvements

to the property as required in the REPSA under the doctrines of judicial estoppel (Conclusion of Law 2) and res judicata (Conclusion of Law 3).

e. The trial court erred in ruling that it would be inequitable for Riverside not to close under the REPSA (Conclusion of Law 4).

f. The trial court erred in finding that Riverside had breached the REPSA by failing to close (Conclusion of Law 7).

7. The trial court erred in ruling that Riverside – in addition to Grand Ridge – had an obligation to close on the REPSA under the Order and Subjoined Judgment on Motions for Summary Judgment entered on June 29, 2007 (CP 256-259).

a. The trial court erred in adopting the first sentence of Finding of Fact 7, which reads as follows:

On June 29, 2007, the Court entered a Final Judgment ("Final Judgment") ordering the parties to close on the REPSA within 35 days.

b. The trial court erred in ruling that Riverside had failed to satisfy the Court's final judgment because Riverside did not close under the REPSA (Conclusion of Law 6).

c. The trial court erred in adopting Finding of Fact 11, which reads as follows:

Riverside's failure to close in accordance with the final judgment has caused Grand Ridge to suffer damages.

d. The trial court erred in holding that Riverside's failure to close as required by the final judgment caused Grand Ridge to suffer damages (Conclusion of Law 8).

8. The trial court erred in awarding Grand Ridge attorney fees for bringing its CR 60(b) motion.

*Issues Pertaining to Assignments of Error*

1. Whether a trial court's authority under CR 60(b) is limited to providing relief from the terms of an existing judgment, and does not include granting a new order directing entry of judgment against the judgment creditor. (Assignments of Error 1, 2, 2a, 2b, 2c).

2. Whether a trial court has authority to grant a new order entering judgment against the judgment creditor under CR 60(b) when the moving party did not request that relief either in the original lawsuit or in the CR 60(b) motion. (Assignment of Error 3).

3. Whether a liquidated damages provision in a real estate purchase and sale agreement must be applied to limit damages awarded by the trial court for breach of the REPSA. (Assignments of Error 4-5).

4. Whether a party to a REPSA is entitled to require the other party to satisfy contract requirements before agreeing to close the transaction without violating the REPSA. (Assignments of Error 6, 6a, 6b, 6c, 6d, 6e, 6f).

5. Whether a party who sues for specific performance does not violate the specific performance judgment when it chooses not to close because the other party had not complied with the contractual requirements of closing. (Assignments of Error 7, 7a, 7b, 7c, 7d).

6. Whether an attorney fee award to the prevailing party must be reversed when the trial court's ruling is reversed. (Assignment of Error 8).

### III. STATEMENT OF CASE

This case previously was before this Court, and was the subject of a published decision in *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 146 Wn. App. 459, 191 P.3d 76 (2008). A more detailed statement of the facts of the underlying case can be found in that decision, which also was made part of the factual record in the trial court. (CP 352-363). The statement of facts in that decision is incorporated here.

On June 13, 2002 respondent Grand Ridge Properties IV, LLC ("Grand Ridge") and appellant Geonerco, Inc. nka Riverside Homes, Inc. ("Riverside") entered into a real estate purchase and sale agreement with regard to certain undeveloped property. Under the REPSA, Grand Ridge had an obligation to create "finished lots" - subdivide the property through a county-approved, recorded

subdivision plat and install the necessary infrastructure to create building lots. Following final plat approval, Riverside was obligated to purchase the resulting "finished lots" for a fixed price. (CP 324-345).

After substantial development work, Clark County approved the final plat and it was recorded on March 30, 2006. (CP 354). Grand Ridge had not yet performed all the work required by the REPSA to create "finished lots". (CP 311). Nevertheless, at that time Riverside was willing to waive the remaining conditions if Grand Ridge would close the transaction. (CP 354). In a clear breach of the REPSA, Grand Ridge refused to complete the transaction unless Riverside agreed to increase the purchase price. (CP 354-355). Riverside was forced to file a lawsuit for specific performance in 2006. (CP 1).

In its answer, Grand Ridge admitted to entering into the REPSA. (CP 39). However, it opposed specific performance and denied that it was obligated to sell the property. Grand Ridge argued that the REPSA was void because it violated the statute of frauds, and counterclaimed for a declaration that the REPSA was not enforceable. (CP 39, 41). Grand Ridge also alleged that Riverside had made an oral agreement to increase the purchase price because of unanticipated development costs, and counterclaimed for reimbursement of those costs. (CP 40, 41-42). Grand Ridge did not allege that Riverside had breached the

REPSA and did not seek damages for any such breach or request specific performance.

The trial court granted summary judgment in favor of Riverside, holding that Grand Ridge's statute of frauds defense was inapplicable and that there was no agreement to increase the purchase price. (CP 253-255). The court awarded specific performance in favor of Riverside, and ordered Grand Ridge to close on the sale.

Defendant is ordered to sell to Plaintiff, and to fully cooperate in any activities necessary to closing the sale . . . .

(CP 258). The trial court's judgment did not impose any affirmative obligations on Riverside.

Grand Ridge appealed the summary judgment order. (CP 260). Because of the pending appeal, the trial court entered an order of stay extending the time of closing until 35 days after final resolution of Grand Ridge's appeal. (CP 280). This Court affirmed the grant of summary judgment. *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 146 Wn. App. 459, 191 P.3d 76 (2008). Grand Ridge filed a petition for review in the Supreme Court, but ultimately dismissed that petition. This Court terminated appellate review on January 16, 2009. (CP 280).

Grand Ridge then informed Riverside that it was ready to proceed with closing the transaction. (CP 283-284). However, Grand

Ridge was not in a position to close. It still had not performed all the work necessary to create "finished lots" as defined in the REPSA. In response to Grand Ridge's tender, Riverside identified at least nine separate violations of specific REPSA provisions. (CP 311-312). Riverside received estimates showing that it would cost over \$190,000 to perform some of the unfinished work required under the REPSA. (CP 312). Accordingly, Riverside informed Grand Ridge that because the lots were not in compliance with the requirements of the REPSA, Grand Ridge could not properly tender the property for closing. (CP 288). As a result, the transaction did not close. (CP 281).

On March 17, 2009 Grand Ridge filed an ex parte motion for an order directing Riverside to appear and show cause as to why the court should not grant the following relief:

- 1) Determine that Grand Ridge has satisfied the Specific Performance portion of the Final Judgment;
- 2) Determine that, because it failed to close as ordered by the Court, Riverside no longer has any legal interest in the Property; and
- 3) Strike the award of attorney's fees and costs awarded to Plaintiff due to Riverside's failure to close in accordance with the Final Judgment.

(CP 292). The sole basis for the motion to show cause was CR 60(b).

Grand Ridge's primary argument was that the specific performance judgment had been "satisfied" under CR 60(b)(6) when

Grand Ridge offered to close and Riverside refused. Grand Ridge further argued that Riverside had no basis for failing to close because it had waived Grand Ridge's compliance with the REPSA terms earlier in the litigation, and that the doctrine of res judicata precluded Riverside from requiring that Grand Ridge complete the "finished lots". (CP 302-305). [Grand Ridge also attempted to vacate the trial court's prior award of attorney fees to Riverside, but the trial court denied this motion (CP 416, 446) and Grand Ridge has not appealed this ruling.]

Riverside opposed the CR 60(b) motion on several grounds: (1) CR 60(b) did not apply because that rule does not allow a court to grant new, affirmative relief on an issue that was not addressed in the existing judgment; (2) the judgment had not been satisfied because Grand Ridge had not completed the "finished lots" and therefore was not in a position to close; (3) Riverside did not waive compliance with the conditions and requirements of the REPSA, and (4) res judicata did not apply because Riverside was only seeking to enforce the express provisions of the REPSA, and enforcement of these provisions was not inconsistent with the court's judgment. (CP 372-377).

In oral argument the sole remedy Grand Ridge requested was that the trial court find that it had satisfied the judgment and extinguish Riverside's interest in the property, so Grand Ridge could go out and refinance or sell the property. (RP at 14:1-10). But the trial

court surprised the parties with an "off-the-wall" question, asking Grand Ridge's counsel whether he should just order Riverside to purchase the property. (RP 14:21-22). Mr. Andersen responded:

If that's a -- you're hitting me with a question I hadn't even thought about, Your Honor, so I'm going to -- I'm going to take a minute and think about that.

(RP 15:3-6).

In rebuttal, Mr. Andersen provided his answer to the trial court, specifically stating on three separate occasions that Grand Ridge was not asking the court to order that Riverside purchase the property:

However, one thing I will agree with Mr. Maxa on, and I think this answers your question. We are not asking you to require them to specifically perform.

(RP 32:5-7).

We're not asking at this point -- because I haven't filed a contempt motion or to enforce it because it would be a different rule than 60(b)(6) -- I'm not asking for an enforcement of your order. What I'm asking for is that when you look at rule 60(b) is to find that it would no longer be equitable that the Judgment should have prospective application.

(RP 34:15-22).

So, Your Honor, what we're asking for is for you -- and you look at the rule -- it would no longer be equitable, citing to the rule, that the Judgment should have prospective application.

Yes, could we ask you to enforce the Judgment and make them close on this thing? I guess we could. **We're not asking for that.**

(RP 35:11-17) (emphasis added).

The trial court ignored Grand Ridge's position and issued a Memorandum of Decision compelling Riverside to purchase the property. The court also ruled that if Riverside failed to close its interest in the property would be terminated. (CP 415). Termination of Riverside's interest is what Grand Ridge had requested. However, the trial court went further, stating that if Riverside failed to close, Grand Ridge would be entitled to a judgment for damages against Riverside for the difference between the REPSA purchase price and the amount Grand Ridge could obtain from another buyer, plus interest and incidental costs. (CP 415). This decision ultimately was incorporated into the Findings of Fact and Conclusions of Law and Order entered on June 18, 2009. (CP 443-447).

Riverside filed a motion for partial reconsideration of the trial court's Memorandum of Decision. Riverside pointed out that Grand Ridge did not request the remedy the court had granted, and that CR 60(b) does not authorize the award of affirmative relief beyond the terms in the original judgment. (CP 426-427). More significantly, Riverside pointed out that the trial court's award of damages was contrary to Paragraph 15(b) of the REPSA. That paragraph is a liquidated damages provision that limits the seller's remedy for breach of the REPSA to the amount of the buyer's earnest money deposit. (CP

427-428). The trial court summarily denied Riverside's motion for reconsideration, also on June 18, 2009. (CP 441).

Riverside filed a timely notice of appeal of the court's Memorandum of Decision (and Supplemental Memorandum of Decision), the Findings of Fact and Conclusions of Law and Order entered by the trial court, and the trial court's order denying the motion for partial reconsideration. (CP 448).

#### IV. ARGUMENT

##### A. THE TRIAL COURT DID NOT HAVE THE AUTHORITY UNDER CR 60(b) TO ORDER ENTRY OF A NEW JUDGMENT AGAINST RIVERSIDE AND IN FAVOR OF GRAND RIDGE.

###### 1. Background

The trial court ruled that Grand Ridge was released from its obligation to sell the property to Riverside, and that if Riverside failed to close its interest in the property would terminate. Although Riverside believes that this ruling was erroneous (see Section C below), Riverside acknowledges that the trial court had the authority under CR 60(b)(6) to grant Grand Ridge this "relief from a final judgment".

Unfortunately, the trial court was not content to free Grand Ridge from its obligations under the judgment. In a clumsy attempt to "do justice", the trial court decided to enter judgment against Riverside – the judgment creditor – based on a finding that Riverside had

breached the REPSA by failing to close. The court entered an affirmative order against Riverside and in favor of Grand Ridge (1) directing Riverside to perform under the REPSA by a certain date, and (2) ordering the entry of a judgment for damages in favor of Grand Ridge if Riverside failed to close.

The trial court's order was obvious error for two reasons. First, CR 60(b) makes no provision for granting an affirmative award in favor of the moving party. A trial court's authority is limited to providing relief from an existing judgment. Second, Grand Ridge had never requested in the underlying lawsuit or in its CR 60(b) motion either specific performance or damages. Further, Grand Ridge's attorney repeatedly told the trial court that Grand Ridge was not seeking an order requiring Riverside to perform under the REPSA, only what was allowed under CR 60(b) – relief from the judgment. A trial court does not have authority under CR 60(b) to grant relief that has never been requested.

2. **The Standard of Review for Determining the Trial Court's Authority Under CR 60(b) Is De Novo.**

In general, the standard of review for motions to vacate or for relief from a judgment is abuse of discretion. *E.g., Estate of Treadwell v. Wright*, 115 Wn. App. 238, 249, 61 P.3d 1214 (2003); *Northwest Land and Investment, Inc. v. New West Federal Savings & Loan Association*, 64 Wn. App. 938, 942, 827 P.2d 334 (1992). However,

whether the trial court has the legal authority under CR 60(b) to enter a new judgment against Riverside is an issue of law. Therefore, the standard of review for that issue is de novo. *E.g., State v. Schwab*, 163 Wn.2d 664, 671, 185 P.3d 1151 (2008) (de novo review for questions of law, including interpretation of court rules).

3. **The Express Language of CR 60(b) Limits the Trial Court's Authority to Granting Relief to the Judgment Debtor from the Requirements of an Existing Judgment.**

CR 60(b) states as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or a proceeding for the following reasons: . . .

(Emphasis added.) This rule could not be more clear. The trial court is authorized to relieve a party from the obligations imposed by a judgment. Nothing in the rule states, suggests or even hints that a trial court under CR 60(b) can grant new, affirmative relief – including the entry of a judgment for damages – against the judgment creditor.

No Washington court has specifically addressed this issue. However, it is well settled in the federal courts and in other jurisdictions that CR 60(b) does not allow a trial court to grant affirmative relief in addition to setting aside the existing judgment.

Rule 60(b) is available only to set aside a prior order or judgment; a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment.

12 *Moore's Federal Practice* § 60.25 (2004). See also *Delay v. Gordon*, 475 F.3d 1039, 1044-45 (9th Cir. 2007); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir. 1987); *U.S. v. \$119,980*, 680 F.2d 106, 107-08 (11th Cir. 1982). This federal authority is persuasive because Washington courts routinely look to federal cases interpreting the federal counterpart when considering CR 60. *E.g.*, *Luckett v. Boeing Co.*, 98 Wn. App. 307, 311-12, 989 P.2d 1144 (1999); *People's State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989).

The language of CR 60(b)(6) – the only possible basis for the trial court's ruling – also indicates that only relief from an existing judgment is authorized. Under this subsection, the trial court can declare that the judgment has been satisfied, released or discharged or that it is no longer equitable that the judgment should have prospective application. CR 60(b)(6) focuses on whether it remains appropriate to enforce the existing judgment. *E.g.*, *Metropolitan Park District of Tacoma v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986); *Pacific Security Co. v. Tanglewood, Inc.*, 57 Wn. App. 817, 820, 790 P.2d 643 (1990). The language of CR 60(b)(6) gives no indication that this subsection can be a vehicle for actually entering a new judgment against the judgment creditor.

In this case, the original judgment ordered Grand Ridge "to fully cooperate in any activities necessary to closing the sale" and to close the sale within a specific period of time. (CP 258). Under CR 60(b), the trial court's authority was limited to relieving Grand Ridge of the requirements of that judgment – ruling that Grand Ridge no longer had an obligation to specifically perform under the REPSA. All other relief in the trial court's order must be vacated.

**4. The Trial Court Did Not Have Authority to Award Affirmative Relief in Favor of Grand Ridge That Was Not Requested Either in the Original Lawsuit or in the CR 60(b) Motion.**

As stated above, CR 60(b) did not authorize the trial court's order directing Riverside to perform under the REPSA and ordering entry of a judgment for damages. Further, the trial court had no authority to grant this relief because Grand Ridge never requested specific performance or an award of damages for breach of the REPSA in either the original lawsuit or in the CR 60(b) motion.

Grand Ridge did not request specific performance in the original lawsuit. In fact, Grand Ridge's counterclaim requested exactly the opposite – rescission of the REPSA based on violation of the statute of frauds and other technical defects. In addition, in the original lawsuit Grand Ridge never requested damages based on an alleged breach of the REPSA by Riverside. The only damages Grand Ridge sought were

for additional expenses that had been incurred above the purchase price.

Grand Ridge also did not request specific performance or damages in its CR 60(b) motion. It sought only a finding that the specific performance portion of the judgment had been satisfied, and that Riverside no longer had any legal interest in the property. (CP 292). And Grand Ridge's counsel repeatedly told the trial court that Grand Ridge was not seeking affirmative relief against Riverside.

The general rule is that "a court has no jurisdiction to grant relief beyond that sought in the complaint." *In Re Marriage of Leslie*, 112 Wn.2d 612, 617-618, 772 P.2d 1013 (1989). Because Grand Ridge did not request specific performance or damages based on the failure to close in its original complaint, the trial court had no authority to award that relief.

Further, CR 60(e) specifically provides that a CR 60(b) motion must "state the grounds upon which relief is asked". This directive implies that a party making a CR 60(b) motion is limited to the relief expressly requested. Here, Grand Ridge's motion requested that the court find that the specific performance judgment was satisfied and extinguish Riverside's rights in the property. The trial court's authority necessarily was limited to that relief.

The reason a trial court has no authority to grant relief not requested is to comply with a party's procedural due process rights. *E.g., Leslie*, 112 Wn.2d at 617-18. A party must be given proper notice and the opportunity to be heard before judgment can be entered. In this case, the trial court's order of specific performance and damages against Riverside violated Riverside's due process rights and was beyond the trial court's jurisdiction and authority.

**B. AS A MATTER OF LAW, GRAND RIDGE'S DAMAGES FOR RIVERSIDE'S FAILURE TO CLOSE ARE LIMITED TO THOSE ALLOWED IN THE REPSA'S LIQUIDATED DAMAGES PROVISION.**

In the REPSA the parties agreed that Grand Ridge (Seller) would not be entitled to actual damages if Riverside (Buyer) failed to close on the transaction. Paragraph 15(b) of the REPSA is a liquidated damages provision, which provides:

Seller's Remedies - In the event Buyer fails, without legal excuse, to complete the purchase of the Property, any Earnest Money deposit(s) paid to Seller shall be forfeited to the Seller as the sole and exclusive remedy available to the Seller for such failure. This limitation shall include any claims for attorneys' fees, interest and actual or consequential damage. It is agreed that the Earnest Money shall represent the reasonable estimate by the parties of the amount of damages that Seller would suffer by reason of Buyer's default under this Agreement. Seller hereby waives any other remedy it may have.

(CP 332) (emphasis added).

The language of this provision could not be more clear. If Riverside fails to close, Grand Ridge's exclusive remedy is the amount of Riverside's earnest money deposits. Further, the provision specifically states that this limitation includes any claims for actual or consequential damages. Finally, the provision states that Grand Ridge waives any other remedy it may have.

This type of liquidated damages provision has been expressly approved by the Washington Legislature. RCW 64.04.005(1) provides as follows:

A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable regardless of whether the other party incurs any actual damages. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.

(Emphasis added). In addition, Washington courts strongly support the enforcement of liquidated damages provisions entered into between sophisticated parties. *E.g., Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn.2d 881, 886, 881 P.2d 1010 (1994).

In this case, even if the trial court had the authority to order entry of a judgment against Riverside, there is no question that Paragraph 15(b) of the REPSA is a fully enforceable liquidated

damages provision. However, the trial court completely ignored this provision, in violation of the language of the REPSA and RCW 64.04.005(1). Further, the trial court's disregard of the liquidated damages provision made no sense. The court enforced Grand Ridge's rights under the REPSA by forcing Riverside to complete the transaction or pay damages, yet at the same time refused to enforce Riverside's rights under the same contract.

The liquidated damages provision also precludes the trial court's order that Riverside specifically perform the REPSA. As with the amount of damages, Grand Ridge waived "any other remedy" besides forfeiture of the earnest money deposit, which would include the remedy of specific performance.

Paragraph 15(b) must be applied as written. Application of the provision means that any judgment allowed against Riverside - including the award of interest and damages - must be limited to the amount of the earnest money deposit. The trial court's order requiring specific performance, awarding a significant amount of interest and allowing the entry of an unlimited damages award must be reversed on this basis.

**C. GRAND RIDGE WAS NOT IN A POSITION TO PERFORM UNDER THE REPSA, AND RIVERSIDE DID NOT WAIVE ITS ABILITY TO REQUIRE COMPLIANCE WITH THE TERMS OF THE REPSA.**

In addition to ordering entry of judgment against Riverside, the trial court did grant Grand Ridge relief from the specific performance judgment – it held that the judgment had been satisfied and that Riverside's rights in the property must be terminated. Riverside does not dispute that the trial court had the authority to make this ruling, because it relieved Grand Ridge from the obligations of the judgment as contemplated in CR 60(b). However, as a matter of law the trial court erred in granting that relief.

The trial court ruled that the judgment had been satisfied because Riverside refused to close when Grand Ridge attempted to tender performance. However, the court refused to recognize that Grand Ridge was not in a position to close because it had not satisfied the requirements of the REPSA, and that Riverside had not waived its right to enforce those requirements.

**1. Grand Ridge Did Not Comply with the Trial Court's Order that It "Fully Cooperate in any Activities Necessary to Closing the Sale".**

The trial court's summary judgment order specifically provides as follows: "Defendant is ordered to sell to plaintiff, and to fully cooperate in any activities necessary to closing the sale, the property at issue in this proceeding . . . ." (CP 258). Grand Ridge does not and

cannot dispute that it has failed to satisfy multiple conditions and requirements of closing set forth in the REPSA. As a result, unless a waiver has occurred (discussed in subsection 2 below), Grand Ridge failed to comply with the trial court's order.

The REPSA unequivocally requires that the transaction cannot close until Grand Ridge has delivered "finished lots" as defined in Paragraph 12. The evidence submitted to the trial court demonstrated that Grand Ridge had not come close to providing finished lots. Most significant was the fact that the lots were covered with mounds of dirt and/or fill extending up to ten feet high. The lots had not been graded for building sites as required. It would have been impossible to build anything on these lots without significant excavation and grading. Riverside estimated that this additional work would cost approximately \$95,000. (CP 310-312).

Further, in Addendum 7 Grand Ridge agreed to construct certain retaining walls on the property in exchange for an increase of the sale price. Although this Addendum was signed in March 2003, Grand Ridge still has not constructed these retaining walls. Riverside prepared an estimate for this work in the amount of \$95,596.82. (CP 311-312).

The trial court ordered specific performance, but performance could not occur because Grand Ridge had not upheld its side of the

bargain. As a result, Riverside was well within its rights under the trial court's order – as well as under the REPSA – to refuse to close the transaction. For this reason alone, granting relief from the judgment under CR 60(b) was inappropriate. There has been no satisfaction of the specific performance portion of the judgment.

2. **Riverside Did Not Waive Compliance with the Conditions and Requirements of the REPSA.**

The trial court ruled that when Riverside offered to close in 2006, it waived Grand Ridge's obligation to comply with the conditions and requirements in the REPSA. This holding ignores the express provisions of the REPSA (1) preventing such a waiver unless signed in writing by both parties, and (2) preventing a continuing waiver even if some waiver did occur in 2006. In any event, all Riverside did in 2006 was offer to waive all conditions and requirements in exchange for closing the transaction. Grand Ridge rejected that offer by refusing to close.

a. **REPSA Provisions**

Paragraph 21(a) of the REPSA specifically provides as follows: "This Agreement cannot be changed or modified other than by a written agreement executed by both parties." (CP 333). Obviously, a waiver of all conditions and requirements of the REPSA would constitute a change or modification of the agreement. There was no

written agreement executed by both parties in 2006 that all remaining conditions and requirements would be waived. Accordingly, the trial court's finding of waiver violates Paragraph 21(a).

If the transaction had closed in 2006, both Riverside and Grand Ridge would have signed documents providing for the waiver of all outstanding conditions and requirements and Paragraph 21(a) would have been satisfied. However, Grand Ridge refused to close and no such documentation was executed.

Even if a waiver did occur in 2006, Paragraph 21(o) of the REPSA specifically provides that no waiver shall constitute a continuing waiver. (CP 335). Riverside offered to waive all outstanding conditions and requirements in 2006 for the specific purpose of closing the transaction. When the transaction did not close, any such "waiver" necessarily disappeared. The trial court's ruling is directly inconsistent with Paragraph 21(o).

The trial court essentially re-wrote the clear, unambiguous provisions of the REPSA that preclude any oral waiver and any continuing waiver. However, a trial court must enforce contracts as written, and cannot "overrule" contract language. The trial court erred in finding a waiver.

**b. Offer to Waive**

Even if the non-waiver provisions were not contained in the REPSA, there still was no waiver in 2006 as a matter of law. Riverside only offered to waive all outstanding conditions and requirements in exchange for Grand Ridge's agreement to close the transaction. Grand Ridge can provide no evidence that Riverside intended to waive the conditions and requirements in the abstract, independent of closing. Riverside was willing in 2006 to purchase the property "as is". But it would make no sense to convert that offer into a legal requirement that Riverside purchase the property "as is" three years later.

In 2006 Grand Ridge could have closed the transaction without complying with all the conditions and requirements of the REPSA. However, Grand Ridge rejected Riverside's offer to close on those terms. Instead, Grand Ridge attempted to modify the REPSA and then invalidate it completely based on questionable factual and legal arguments. This rejection terminated Riverside's offer, and reinstated Riverside's ability to demand compliance with the REPSA provisions before the transaction could be closed. The trial court erred in treating Grand Ridge's offer to waive as a continuing waiver.

**3. Res Judicata Does Not Bar Riverside from Enforcing the Provisions of the REPSA.**

The trial court also ruled that Riverside cannot enforce compliance with the REPSA provisions under the doctrine of res

judicata. Although this ruling is somewhat confusing, the trial court apparently decided that because the parties did not address Grand Ridge's failure to comply with the REPSA conditions and requirements in earlier proceedings, Riverside no longer could enforce those provisions and requirements.

This ruling makes no sense. Riverside is only seeking to enforce the express provisions of the REPSA. Enforcement of these provisions is in no way inconsistent with the trial court's judgment. The judgment provided for a specific performance of the REPSA. That is all Riverside is attempting to do – require Grand Ridge to specifically perform all the conditions and requirements in the REPSA. Res judicata clearly has no application in this situation.

**D. RIVERSIDE DID NOT VIOLATE THE TERMS OF THE ORIGINAL JUDGMENT BY FAILING TO CLOSE UNDER THE REPSA.**

As discussed above, the trial court erroneously ruled that Riverside breached the REPSA when it failed to close. However, the trial court also ruled that Riverside's failure to close also violated the court's summary judgment order. This finding was obvious error.

The summary judgment order unambiguously required Grand Ridge to specifically perform the REPSA. (CP 258). However, the trial court failed to recognize that the judgment did not require Riverside to specifically perform. This may seem like semantics, but the summary

judgment order is clear and unambiguous. The language of the order must be enforced as written.

Further, in the original proceedings, the trial court could not have ordered Riverside to specifically perform the REPSA. Grand Ridge never requested that Riverside be ordered to specifically perform the REPSA. Quite the contrary, Grand Ridge did everything it could to invalidate the REPSA and argued vigorously that neither party should be required to perform. Without any pleading requesting the trial court to order Riverside to specifically perform, the summary judgment order could not lawfully include such a requirement.

**E. ONCE THE TRIAL COURT'S CR 60(b) ORDER IS REVERSED, THE AWARD OF ATTORNEY FEES TO GRAND RIDGE ALSO MUST BE REVERSED.**

Because the trial court granted Grand Ridge's motion, the court also awarded Grand Ridge its attorney fees under ¶ 21(q) of the REPSA. Assuming that this Court reverses the trial court, Grand Ridge no longer will be the prevailing party in the trial court and therefore the trial court's award of attorney fees to Grand Ridge must be vacated.

**F. RIVERSIDE IS ENTITLED TO RECOVER ITS ATTORNEY FEES IN THE TRIAL COURT AND IN THIS COURT UNDER THE ATTORNEY FEE PROVISION IN THE REPSA.**

Paragraph 21(q) of the REPSA states that if either party brings any action arising out of the Agreement, "The prevailing party in any such action shall be entitled to an award of reasonable attorney fees

and courts costs incurred in such action or proceeding." (CP 335). Because the trial court ordered specific performance of the REPSA and damages based on an alleged violation of the REPSA, this attorney fee provision is fully applicable.

Assuming that this Court reverses the trial court, Riverside will be the prevailing party on appeal and is entitled to its attorney fees both on appeal and in the trial court.

#### V. CONCLUSION

CR 60(b) does not authorize a trial court to "do justice", by rearranging the obligations of the parties. Instead, a trial court's authority under the rule is narrow – to relieve a judgment debtor from the requirements of an existing judgment. CR 60(b) clearly does not support the grant of new, affirmative relief against the judgment creditor and in favor of the judgment debtor.

In this case, the trial court had the authority to find that the specific performance order had been satisfied and to extinguish Riverside's interest in the property. But it had no authority to go further and find that Riverside had breached the REPSA, order Riverside to specifically perform, or direct the entry of a judgment against Riverside. Further, the trial court had no authority to grant this affirmative relief because Grand Ridge had never requested that relief,

either in the original lawsuit or in the CR 60(b) motion. Those portions of the trial court's order must be reversed.

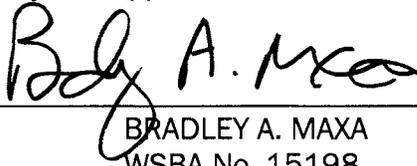
Regardless of questions of authority, the trial court's award of a judgment for damages against Riverside was misguided because the court did not limit the amount of the award. The REPSA contained a liquidated damages provision, which under RCW 64.04.005(1) was valid and enforceable. Even if the trial court's judgment is allowed to stand, that judgment must be limited to forfeiture of Riverside's earnest money deposit. Under the plain language of the liquidated damages provision, Grand Ridge specifically waived any other remedy. The trial court's order must be reversed to the extent that it allows an award of damages for a higher amount.

Finally, the trial court's finding that Riverside breached the REPSA (and violated the court's judgment) by failing to close the transaction is not supported by the evidence and is inconsistent with the terms of the REPSA. There could be no breach because Grand Ridge was not in a position to tender performance, and the REPSA expressly precluded Riverside's oral waiver or a continuing waiver of Grand Ridge's obligations under the terms of the REPSA.

For the reasons stated above, appellant Geonerco, Inc. n/k/a Riverside Homes, Inc. respectfully requests that this Court reverse the trial court's CR 60(b) order.

Respectfully submitted this 22 day of December, 2009.

GORDON THOMAS HONEYWELL LLP  
Attorneys for Appellant

By:   
\_\_\_\_\_  
BRADLEY A. MAXA  
WSBA No. 15198

DECLARATION OF SERVICE

I declare that I sent out for delivery on this 22<sup>nd</sup> day of December, 2009 a true and correct copy of the BRIEF OF APPELLANT on the following at the address and in the manner described below:

By email and U.S. mail

Bradley W. Andersen  
Phillip J. Haberthur  
Schwabe, Williamson & Wyatt, P.C.  
700 Washington Street, Suite 701  
Vancouver, WA 98660

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

  
JENNIFER MILSTEN-HOLDER