

NO. 40943-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL KERSCHNER, INC. et al,
Appellants/Cross Respondents,

v.

MORRIS MALONE AND VIOLA MALONE, et ux,
Respondents/Cross Appellants.

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DIVISION II
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STATE OF WASHINGTON
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RESPONDENTS/CROSS APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The Appellants/Cross-Respondents do not assign error to any of the trial court's Findings of Fact. As a result, all of the trial court's Findings of Fact are considered "verities" on appeal. "Unchallenged findings are verities on appeal." Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Black's Law Dictionary defines a verity as "Truth; truthfulness; conformity to fact." Black's Law Dictionary at 1562 (6th Ed. 1990).

The Appellants/Cross Respondents promised the trial court that they were not challenging any of the trial court's Findings of Fact, supplemental or otherwise and on that condition, the trial court did not require them to order and pay for a verbatim report of proceedings of the trial. They now appear to challenge some Findings of Fact which they should not be permitted to do.

At the end of the day, though, the verities support the trial court's conclusion and it is improper for the Appellants/Cross Respondents to re-argue the factual issues in the case.

Mr. and Mrs. Malone chose not to be victims of the Appellants/Cross Respondents' attempts to financially leverage them into a lower purchase price for the Malones' property by withholding monthly payments the Appellants/Cross Respondents were obligated to make. Mr. and Mrs. Malone did everything within their power to try and facilitate ultimate closing of the transaction but when it became apparent that the Appellants/Cross Respondents were not going to comply with their obligations and, in fact, orally terminated the REPSA to the Malones, the Malones were left with no choice but to terminate the REPSA via their letter on May 1, 2008, having previously provided notice to the

Appellants/Cross Respondents that their failure to make the payments on March 21, 2008, which Appellants/Cross Respondents had previously acknowledged they would not make.

The Malones respectfully request that this Court affirm the judgment of the trial court and award Mr. and Mrs. Malone their attorneys' fees and costs related to this appeal. Mr. and Mrs. Malone further request that this court reverse COL No. 8 and award Mr. and Mrs. Malone specific performance of the REPSA.

II. ASSIGNMENT OF ERROR

Mr. and Mrs. Malone's only assignment of error is that the trial court erred in dismissing Mr. and Mrs. Malone's Cross Claim for Specific Performance of the Real Estate Purchase and Sale Agreement ("REPSA") in this matter (Conclusion of Law No. 8).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court erred when it denied Mr. and Mrs. Malone's claim for Specific Performance of the REPSA when: (1) Appellants/Cross Respondents pled a claim to Specific Performance in their Complaint; (2) Mr. and Mrs. Malone "admitted" the Appellants/Cross Respondents' claim for specific performance in their Answer, Affirmative Defenses and Counterclaim; and (3) Appellants/Cross Respondents never moved the Court for an Order voluntarily dismissing their claim for specific performance; and (4) equity and the facts and circumstances of this case require specific performance of the REPSA.

IV. STATEMENT OF THE CASE

Mr. and Mrs. Malone are the owners of certain real property located at 9813 and 9273 90th Ave. East and 9020 96th Street, Puyallup, WA (hereinafter the, "Malone Property"). Michael Kerschner is a

neighbor of Mr. and Mrs. Malone and approached them about selling the Malone Property to Mr. Kerschner for the purposes of subdividing the property and developing it into smaller lots for subsequent re-sale.

On September 19, 2007, Mr. and Mrs. Malone executed a Real Estate Purchase and Sale Agreement (“REPSA”) drafted by Mr. Kerschner. Mr. and Mrs. Malone were the sellers and the buyers were denominated as, “Michael Kerschner, Inc., and Donald Gardner, Inc. dba Malone Addition Investors, LLC (a limited liability company to be formed.”¹ FOF 6. The purchase price the Appellants/Cross Respondents were to pay for the Malone Property was \$4,256,000.00. Id. Had the transaction closed and the Appellants/Cross Respondents paid the purchase price, Mr. and Mrs. Malone stood to make approximately \$1,870,000.00. FOF 36.

Between execution of the REPSA and the closing of the transaction, the Appellants/Cross Respondents were obligated to pay Mr. and Mrs. Malone a monthly payment sufficient to fully cover two mortgages covering the entire Malone Property and 50% of the mortgage on the parcel of property on which the Malone residence sits. FOF 7, 8.

The REPSA further provided that within 3 days of the Appellants/Cross Respondents “notifying Seller of the removal of the feasibility contingency, Seller shall record a Deed of Trust against the Property in favor of Buyer in the amount of \$284,155. FOF 9. On

¹ Mr. Kerschner and his wife own all of the shares of Michael Kerschner, Inc. Mr. Gardner and his wife own all of the shares of Donald Gardner, Inc. The Keschners and the Gardners recently filed for bankruptcy protection with the United States District Court for the Western District of Washington under Case Nos. 10-47916-PBS and 10-47903-BDL respectively. At each of their Meetings of Creditors, Mr. Kerschner and Mr. Gardner testified that it was their counsel in this matter that they have not directed their counsel in this matter to pursue this appeal. Mr. and Mrs. Malone will **shortly** be filing with this Court a motion to dismiss their appeal on that basis.

September 25, 2007 and although the Appellants/Cross Respondents had not notified Mr. and Mrs. Malone of the removal of the feasibility contingency, Mr. and Mrs. Malone signed a Deed of Trust that was also drafted by the Appellants/Cross Respondents. The Deed of Trust was recorded by the Appellants/Cross Respondents on September 25, 2007 (despite the fact that the REPSA is silent as to whether the Deed of Trust would be recorded). The Deed of Trust provided that it was to be returned after recording to Mr. Kerschner at a post office box that he controlled. FOF 13.²

Shortly after the REPSA was executed, the lender holding the mortgage on the Malone residence informed Mr. and Mrs. Malone that the interest rate on the mortgage was going to increase. This would have caused the Appellants/Cross Respondents' monthly payment to the Malones to also increase. Mr. and Mrs. Malone could have done nothing, abided by the increase and simply demanded more money from the Appellants/Cross Respondents each month.

However, beginning the next month (December, 2007), Mr. and Mrs. Malone began to seek refinancing with Countrywide. FOF 17. On February 1, 2008, Countrywide denied Mr. and Mrs. Malone's request for refinancing due to insufficient property value and "an inability to obtain

² It is worth noting that the beneficiary of the September 25, 2007 Deed of Trust was "Malone Addition Investors, LLC." At that time, Malone Addition Investors, LLC did not exist. In fact, at no time when the Deed of Trust was recorded did Malone Addition Investors, LLC actually exist. Malone Addition Investors, LLC was formed only immediately prior to the filing of the lawsuit on or about May 9, 2009 and was subsequently administratively dissolved by the Washington Secretary of State during the pendency of the lawsuit. Moreover, Michael Kerschner, Inc. and Donald Gardner, Inc. individually, not their corporations are the members of Malone Addition Investors, LLC. FOF 3. Malone Addition Investors, LLC has been administratively dissolved since September 1, 2009.

satisfactory lien validity or priority.” FOF 18. The Appellants/Cross Respondents then agreed to have the September 25, 2007 Deed of Trust in their favor reconveyed to them in order to assist the Malones’ ability to obtain refinancing. FOF 19.

One of the two main assertions of the Appellants/Cross Respondents Complaint was that Mr. and Mrs. Malone had breached the REPSA because, “for their refusal to record a deed of trust.” Complaint at 2.³ The Appellants/Cross Respondents alleged:

After MAI started making the loan payments, and Malone recorded a deed of trust, Malone requested that MAI temporarily remove its deed of trust so that Malone could refinance. MAI complied with the request. Malone did not refinance and refused to record a need deed of trust. When MAI stopped making payments on the loans due to Malone’s refusal, Malone terminated the REPSA.

Complaint at 2.

The trial court found that the Appellants/Cross Respondents, in fact, agreed to have the Deed of Trust Mr. and Mrs. Malone executed in their favor reconveyed in order to assist Mr. and Mrs. Malone’s ability to refinance the mortgage on their residence. FOF 19.

After all the pre-trial hearings and a trial to the bench, though, the trial court simply did not believe the allegation that the Appellants/Cross

³ The actual terms of the alleged oral modification of the REPSA asserted by Appellants/Cross Respondents assert are murky at best. Throughout these proceedings, they have never been able to specifically state what Mr. and Mrs. Malone were actually supposed to do in this regard. If the Malones were supposed to re-record the September 25, 2007 Deed of Trust which had been subsequently reconveyed to the Appellants/Cross Respondents in March, 2008, the Appellants/Cross Respondents never notified Mr. and Mrs. Malone in any manner that they were supposed to do that and never delivered that reconveyed Deed of Trust to Mr. and Mrs. Malone to re-record. If Mr. and Mrs. Malone were supposed to record a new Deed of Trust, there was no evidence to establish that Appellants/Cross Respondents ever notified Mr. and Mrs. Malone in any manner that they were supposed to do so and never provided Mr. and Mrs. Malone with any new Deed of Trust to execute and deliver to the Appellants/Cross Respondents.

Respondents' stopped the monthly payments they were required to make because "Malone did not refinance and refused to record a new deed of trust." In fact, nowhere in the record of this case is there a document (email or otherwise) from the Appellants/Cross Respondents to Mr. and Mrs. Malone addressing this issue prior the Appellants/Cross Respondents ceasing payments.

Instead, it was abundantly clear to the trial court that the reason why the Appellants/Cross Respondents stopped making payments was due to Addendum No. 5 – an addendum drafted and proposed by the Appellants/Cross Respondents in January, 2008 which, if signed by Mr. and Mrs. Malone, would have substantially lowered the purchase price under the REPSA. FOF 20, 41. "No mention was made by the Plaintiffs of the Deed of Trust issue on or around that date [March 21, 2008 when the March, 2008 supplemental payments were due]." FOF 25.

In fact, the Appellants/Cross Respondents were woefully late in making the February, 2008 monthly payment and did not present the final check for the February, 2008 payment until March 5, 2008 after repeated demands by Mr. and Mrs. Malone. FOF 22. This was prior to the Deed of Trust being reconveyed. The trial court continued:

- **"Plaintiffs alleged the stopped making the supplemental payments to the Defendants called for in the REPSA because the Defendants had not yet refinanced. However, the Defendants were in fact, still trying to get the refinance accomplished. The Defendants were turned down by their existing lender and by Countrywide. The Defendants were still trying to refinance when they sent the letter on May 1st terminating the REPSA."** FOF 40. (Emphasis added).
- "It is clear that after the Defendants [Malones] requested the payments that were due on March 21, 2008, the Plaintiffs [Appellants/Cross Respondents] stated they would not make such

payments until Addendum No. 5 was signed by the Defendants.” FOF 25.

- “The Plaintiffs were focused on making a certain profit on this development and that was foremost in their minds with respect to Addendum No. 5.” FOF 33.
- “[T]he evidence shows that the buyers wanted Addendum No. 5 to be signed as a condition of moving forward with the real estate deal and as a condition of making any further payments Plaintiffs were obligated to make under the REPSA.” FOF 39.
- “As a result, the Plaintiffs were demanding that Defendants sign Addendum No. 5 which would have guaranteed the Plaintiffs a particular profit and substantially lowered the purchase price under the REPSA. **Plaintiffs were withholding the payments called for in the REPSA until Plaintiffs’ proposed Addendum No. 5 was signed by Defendants.**” FOF 41. (Emphasis added).

In is undisputed that in February, 2008, the Appellants/Cross Respondents never objected to the use of email notifications. For example, when the Appellants/Cross Respondents failed to timely make the February, 2008 payment to Mr. and Mrs. Malone, Mr. and Mrs. Malone issued an email to them dated March 5, 2008. The email states in part:

Confirming our telephone conversation of yesterday, March 4, 2008, please let me know what time you will be bringing in the past-due payment today so I can plan my errand trip which includes getting these funds deposited to the bank TODAY.

....

In order to avoid any further complications with regard to payments being made in a timelier manner, I will direct Jo to not only e-mail you the monthly statements, but to also snail-mail a hard copy;

EX 17.

The Appellants/Cross Respondents never objected to the March 5, 2008 and, in fact, the evidence before the trial court shows that the

Appellants/Cross Respondents responded promptly and delivered the then-past-due amount of the February, 2008 payment on March 5, 2008 bringing their payments current. FOF 22.

The March, 2008 monthly payments were due on March 21, 2008. FOF 22. The sum total of the payments made by the Appellants/Cross Respondents as of March 5, 2008 was \$65,806.05. The September 25, 2007 Deed of Trust remained recorded as of March 13, 2008.

On March 13, 2008, the September 25, 2007 Deed of Trust executed by Mr. and Mrs. Malone was fully reconveyed. FOF 23. There can be no dispute that this reconveyance had to occur with the Appellants/Cross Respondents' approval. The trial court held:

The Plaintiffs could have structured the reconveyance of the Deed of Trust in several different ways. They had the full power to do that under the terms of the REPSA provision. Instead of just doing a full reconveyance, which is what happened, the Plaintiffs could have done a reconveyance that would be delivered at the time the refinance closed. The Plaintiffs could have done a partial reconveyance of the seller's residence parcel only. There were many ways the Plaintiffs could have restructured the reconveyance. Instead, the Plaintiffs authorized a full reconveyance of the Deed of Trust.

FOF 38.

Also in March, 2008 the Appellants/Cross Respondents has asked Mr. and Mrs. Malone to provide them with confirmation that property taxes on the Malone property had been paid. On March 20, 2008, Jo Miller, the secretary for Mrs. Malone's business and a witness at trial, emailed receipts to Michael Kercshner showing that the property taxes had been paid. FOF 24. Ms. Miller's email further stated:

As discussed, the Malone's [sic] are expecting your payment of the three loans as agreed, no later than the 21st of March, as stipulated in the Purchase Agreement (statements were submitted and receipt was acknowledged on March 6, 2008). Please bring the three payments to the office no later than Friday, March 21st.

FOF 24, Ex. 63.

Mr. Kerschner, on behalf of the Appellants/Cross Respondents emailed back directing Mr. and Mrs. Malone to talk to Mr. Gardner about the payments and further stating, "I'm sure Don will expect Morris' response to the Addendum as well." There was no objection to the email and no mention of the Deed of Trust by the Appellants/Cross Respondents – only Addendum No. 5. FOF 25.

On March 21, 2008, Ms. Miller emailed both Mr. Kerschner and Mr. Gardner, informed them that Addendum No. 5 had no bearing on the payments that were due that day and that had not been made on that day. EX. 63. What is further clear is that Mr. Kerschner then orally terminated the REPSA. Ms. Miller, again on behalf of Mr. and Mrs. Malone again emailed Mr. Kerschner and Mr. Gardner and requested that if they truly elected to terminate the REPSA that they provide a letter of rescission within ten (10) days. EX 63.

Within ten (10) days after March 21, 2008, the Appellants/Cross Respondents failed to make the March, 2008 payment. They also never made the April, 2008 payments. As the trial court found as a matter of fact, "Plaintiffs were withholding the payments called for in the REPSA until Plaintiffs' proposed Addendum No. 5 was signed by Defendants." FOF 41 (Emphasis added).

On May 1, 2008, after not receiving any monthly payments for March or April 2008 and after being told by the Appellants/Cross

Respondents that they would not make any further payments called for in the REPSA until Mr. and Mrs. Malone signed proposed Addendum No. 5, Mr. and Mrs. Malone faxed a letter to Mr. Gardner and Mr. Kerschner. The letter confirmed that on March 21, 2008, Mr. and Mrs. Malone told Mr. Kerschner and Mr. Gardner that the March, 2008 payments were due that day and that the response from Mr. Kerschner on March 21, 2008 was that the Appellants/Cross Respondents would not be making the March, 2008 payment or any other payment until such time as proposed Addendum No. 5 was executed and that the Appellants/Cross Respondents were terminating the REPSA. The Malones' letter further states:

Since more than ten (10) days have passed since that notification of default and your failure to cure this material breach of the Agreement on that date or since, we are retaining all your deposits and declaring the Agreement terminated.

Ex. 20.

Notably, the letter was also emailed to Mr. Kerschner and Mr. Gardner on May 1, 2008. Ex. 84. There was never any objection made to the email of the letter.

On May 8, 2008, almost two months after the Deed of Trust had been reconveyed to Appellants/Cross Respondents, Donald Gardner wrote to Mr. and Mrs. Malone and provides a much different story that was rejected by the trial court. Ex. 21. Notably, there was no objection in the May 8, 2008 letter to the previous email correspondence or that he received the letter via email.

On May 20, 2010, the Malones wrote back to Mr. Kerschner and Mr. Gardner. Ex 95. The Malones were hopeful of getting the agreement back on track and in their letter stated in part:

We appreciate your continued interest and our [sic] excited that you do not wish to terminate the contract. We certainly do not wish for the termination either. We look forward to receiving your information and discussing how you can get caught up on your payments.

Ex 95.

The Appellants/Cross Respondents did not respond and instead filed the instant lawsuit the next day and also filed a Lis Pendens on the Malone Property. The Complaint, notably, asked the Court for an order directing specific performance of the REPSA. Almost immediately after Mr. and Mrs. Malone filed an Answer, Affirmative Defenses and Counterclaim for Specific Performance, the Plaintiffs released the Lis Pendens and took the position that they were no longer seeking specific performance of the REPSA. The trial court ultimately concluded as a matter of law that Mr. and Mrs. Malone were not entitled to specific performance under the facts and the circumstances of this case. COL 8.

Mr. and Mrs. Malone appeal Conclusion of Law No. 8 on the basis that it is not supported by the Findings of Fact in this matter.

The crux of the Appellants/Cross Respondent's appeal though now seems to be less focused on whether Mr. and Mrs. Malone breached the REPSA by not recording a replacement deed of trust and seems to be solely focused on the allegation that Mr. and Mrs. Malone wrongfully terminated the REPSA through their May 1, 2008 letter because Mr. and Mrs. Malone did not allegedly give the Appellants/Cross Respondents a ten day notice of that which the Appellants/Cross Respondents already knew – that they would not make the monthly payments.

What is a matter of fact which can never be argued against in this case is that the Appellants/Cross Respondents affirmatively informed Mr.

and Mrs. Malone that they would be withholding any payments until Mr. and Mrs. Malone signed Addendum No. 5, that on the date the March, 2008 payments were due and had not been made, Mr. and Mrs. Malone provided written notice to the Appellants/Cross Respondents that their withholding of payments to pressure Mr. and Mrs. Malone into signing Addendum No. 5 was improper, (“As you are aware, this Addendum has no bearing on the three (3) loan payments tat are due and payable today, March 21, 2008”), that the Appellants/Cross Respondents never made the payments within ten (10) days of March 21, 2008 or anytime thereafter and that Mr. and Mrs. Malone gave further written notice and an opportunity to cure on May 20, 2010 which was further ignored.

V. ARGUMENT

A. Standard of Review

As noted above, unchallenged Findings of Fact are verities on appeal. The standard of review of conclusions of law is de novo. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). The Appellants/Cross Respondents agree that this Court considers the verities in determining whether the verities support the trial court’s Conclusions of Law. Br. of Appellant/Cross Respondent at 18.

B. Summary of Argument

The gravamen of this case is that the Appellants/Cross Respondents are upset that the trial court, after a full trial to the bench, did not believe their story and, instead, found (unchallenged now) that the Appellants/Cross Respondents wrongfully withheld monthly payments to Mr. and Mrs. Malone in an effort to extricate signatures from Mr. and Mrs. Malone on a document that would have substantially lowered the Appellants/Cross Respondents’ purchase price of the Malone property.

Mr. and Mrs. Malone had no incentive for this transaction not to go through. They stood to make a substantial profit and they gave the Appellants/Cross Respondents every opportunity possible to comply with their multiple requests to bring the monthly payments current. Instead, the Appellants/Cross Respondents engaged in a power play, hoping to choke off Mr. and Mrs. Malone's money supply for their mortgage payments until Mr. and Mrs. Malone caved and signed proposed Addendum No. 5.

Notably, when Mr. and Mrs. Malone did not cave, the Appellants/Cross Respondents sued Mr. and Mrs. Malone for money damages AND specific performance. Mr. and Mrs. Malone "admitted" their claim for specific performance and the Appellants/Cross Respondents immediately released the lis pendens.

No error appears to be assigned to Conclusion of Law No. 3 which states, "Plaintiffs materially breached the REPSA first by failing to continue the monthly payments to the Defendants." No error is apparently assigned to Supplemental Conclusion of Law No. 2 which states, "[t]he Plaintiffs waived any right to enforce any requirement of the REPSA that required Defendants to provide notice in a manner other than the notice that was provided by Defendants in this case." This Court should affirm the trial court's Judgment in this case and award Mr. and Mrs. Malone their attorney's fees and costs on that basis alone.

If this Court does not affirm on those bases, it is clear that the trial court should otherwise be affirmed. As more fully discussed below, paragraph 14(b) of the REPSA provides that, "[i]n the event of Buyer's Material Breach of this Agreement, any deposit paid to the Seller shall be forfeited to the Seller as their exclusive remedy." It does not state that the Seller has to give any notice whatsoever to the Buyer of its material

breach. EX 1. FOF No. 2 (unchallenged) states that the Appellants/Cross Respondents materially breached in this matter by failing to pay the March 2008 payment.

The Appellants/Cross Respondents essential complaint is that Mr. and Mrs. Malone's "notice" to them was insufficient and, therefore, Mr. and Mrs. Malone had no right to terminate the agreement. However, there is nothing in the REPSA that addresses "termination." There is no requirement in the REPSA that to terminate it, a party must give "notice" of that termination in any particular form or manner. In fact, the evidence in this matter shows that the Appellants/Cross Respondents orally terminated the REPSA on March 21, 2008; something they have never disputed.

The Court should affirm the trial court. If there was any error by the trial court, it was that it did not find that the REPSA should be specifically enforced and that Mr. and Mrs. Malone should be entitled to the profit they were supposed to receive if the Appellants/Cross Respondents would not have breached.

C. Conclusion of Law 5 is Supported by the Verities

Appellants/Cross Respondents' first attack COL No. 5. Br. of Appellants/Cross Respondents at 19. Conclusion of Law No. 5 states:

There is a notice provision in the REPSA and the notice provision tells people how they may provide notice. It does not specify that notice shall be in writing. Paragraph 15 of the REPSA provides that all notices provided in the REPSA "may be" and then lists a certain number of kinds but it does not say that the notices "must be" or "shall be" in writing. The Plaintiffs obtained the necessary notice to cure and chose not to cure the breach of failing to make the payments on March 21st, 2008 or the payments for April 2008.

EX 1.

In challenging COL No. 5, Appellants/Cross Respondents do not address any of the supporting verities or the evidence in this case and do not accurately point out other provisions in the REPSA. The trial court entered the following FOF nos. 20, 21, 25, 39, 40 and 41 all support COL No. 5. In particular, in FOF 39, the trial court states, “[t]he Plaintiffs stated they would not make payments until addendum number 5 was agreed to. The Defendants did not agree to Addendum No. 5.” FOF/COL at 9. In FOF 41, the trial court stated, “Plaintiffs were withholding the payments called for in the REPSA until Plaintiffs’ proposed Addendum No. 5 was signed by Defendants.” Id.

Appellants/Cross Respondents gloss over the preface language of paragraph 15 of the REPSA which the trial court reviewed. That language states:

15. **NOTICES** - All notices provided for herein **may be** telecopied, sent by recognized overnight courier, personally delivered or mailed by U.S. registered or certified mail, return receipt requested. The addresses to be used in connection with such correspondence and notices are noted below, or at such other address as a party shall stipulate from time to time.

Ex 1 (emphasis added).

Appellants/Cross Respondents further gloss over paragraph 17(j) of the REPSA of the REPSA specifically allows for facsimile transmissions and electronic mail. Paragraph 17(j) states quite specifically in part:

Each party (i) has agreed to permit the use, from time to time and where appropriate, of telecopied or electronic signatures in order to expedite the transaction contemplated by this Agreement; (ii) intends to be bound by its respective telecopied or electronic signature; (iii) is aware that they

other will rely on the telecopied or electronic signature; and (iv) acknowledges such reliance and waives any defenses to the enforcement of this Agreement based on the fact that a signature was sent by telecopy.

Ex 1.

Apparently, though, Appellants/Cross Respondents feel that the trial court was supposed to ignore the preface language in paragraph 15 and ignore paragraph 17(j) which clearly provides that the parties agreed to be bound by electronic mail and that the trial court should have ignored the manner in which the parties actually dealt with each other in this case (via email).

Moreover, Paragraph 14(b) is completely silent as to what is supposed to happen when, as in this case, the Buyer specifically tells the Seller [Mr. and Mrs. Malone] that it is refusing to provide the payment. What would be the purpose then of forcing the seller to turn around and write a letter and mail it to the buyer? It would be an exercise in futility for the seller to give the buyer notice of failure to receive a payment that the buyer already told the seller it was not going to make. The Appellants/Cross Respondents argument results in an absurd application of the REPSA, especially in light of the fact that the Appellants/Cross Respondents do not challenge the underlying Findings of Fact about the notice that the Appellants/Cross Respondents actually did receive when they failed to make the March, 2008 payment on March 21, 2008. Ex 63. Conclusion of Law No. 5 is supported by the verities and the underlying evidence in the case.

D. Supplemental Conclusion of Law 1 is Supported by the Verities

Appellants/Cross Respondents next attack Supplemental Conclusion of Law No. 1 for two reasons: (1) they argue the emails were sent too early to and (2) the REPSA does not allow contractual notices to be sent by email. Br. of Appellant/Cross Respondent at 21-28. As with their previous argument, the Appellants/Cross Respondents cite to no authority for their argument and they do not address the trial court's Findings of Fact.

Supplemental Conclusion of Law No. 1 was entered after the trial court entertained and denied the Appellants/Cross Respondents' Motion for Reconsideration (to which no error has been assigned). While Appellants/Cross Respondents detail what is stated in Exhibit 63, they fail to recognize how the trial court interpreted Exhibit 63 after hearing the testimony about the same.

In Supplemental Finding of Fact No. 1, states that the REPSA specifically allowed for email communication, that both parties treated email as a proper form of communication, that the Appellants/Cross Respondents never objected to Mr. and Mrs. Malones email communications and that, the trial court concluded, "[Mr. and Mrs. Malone's] email to Plaintiffs as set forth in exhibit 63 meets any requirement of written notice." This argument should be ignored by this court. Pursuant to an Order of the trial court in this matter, the Appellants/Cross Respondents were ordered to pay for a copy of the Verbatim Report of Proceedings in this matter unless they stated they would not challenge any of the trial court's findings of fact or supplemental findings of fact. See Br. of App./Cross Resp't at 5, fn 1. Appellants/Cross Respondents now go back on their word to the trial court

and to this court and refuse to acknowledge that Supplemental Finding of Fact No. 1 is a verity in this matter.

Appellants/Cross Respondents states, “payment of the March monthly payments would have been timely any time before midnight on March 21. . . .As a matter of law, those cannot be notice of a missed payment.” Br. of Appellants/Cross Respondents at 23. What the Appellants/Cross Respondents fail to recognize or address however, is their own role in what was occurring and what was found by the Court as a matter of fact. Namely, that they had specifically informed Mr. and Mrs. Malone that they were refusing to make any further payments until Mr. and Mrs. Malone signed Addendum No. 5 substantially lowering the purchase price. It does not state anywhere in the REPSA that, in the event that the Buyer identifies to Seller that Buyer is withholding payment, Seller has an obligation to notify Buyer of the same.

Even so, Exhibit 63 clearly sets forth Mr. and Mrs. Malone’s efforts to “notify” the Appellants/Cross Respondents that their withholding of the payments was wrongful, (i.e., “As you are aware, this Addendum has on bearing on the three (3) loan payments that are due and payable today, March 21, 2008, in accordance with the Purchase and Sales Agreement.” Ex. 63. The Appellants/Cross Respondents already KNEW that the March 2008 payment would not be made and when it was made clear to Mr. and Mrs. Malone that the payment was not going to be made, Mr. and Mrs. Malone “notified” the Appellants/Cross Respondents that it was wrongful for them not to deliver the payment.

Appellants/Cross Respondents complain that the March 21, 2008 emails, “did not alleged default” and “did not provide 10 days to cure[.]” Brief of Appellants/Cross Respondents at 23. However, there is nothing

in the paragraph 14(b) of the REPSA or anywhere else that dictates the terminology that any particular notice that is issued must contain. In fact, there is no “default” paragraph in the REPSA and paragraph 14(b) certainly does not state that Mr. and Mrs. Malone are supposed to tell the Respondents/Cross Appellants that they have 10 days to cure a missed payment or the failure to provide a notice that is required by the REPSA. Ex 1. By arguing about these deficiencies, the Appellants/Cross Respondents are attempting to re-draft their own agreement and mislead this Court as to what was actually required of Mr. and Mrs. Malone.

Mr. and Mrs. Malone also did not, “simultaneously demand that MAI comply with the terms of the agreement if MAI elected to terminate but then refuse to comply when [they] chose to terminate the REPSA on May 1, 2008.” Br. of Appellant/Cross Respondents at 24.

In sum, while the email exchange in Exhibit 63 started out as a “reminder” on the part of Mr. and Mrs. Malone that payment was due, it transitioned into something more after the Respondents/Cross Appellants confirmed that they were, in fact, withholding payment. “There is in every contract an implied duty of good faith and fair dealing.” Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 p.2d 365 (1991). Appellants/Cross Respondents were clearly violating their implied duty of good faith and fair dealing when they informed Mr. and Mrs. Malone they were going to withhold payments obligated under the REPSA until Mr. and Mrs. Malone executed Addendum No. 5 which would have substantially lowered the purchase price. Mr. and Mrs. Malone, on the other hand, complied with this implied duty of good faith and fair dealing and when the Appellants/Cross Respondents tried to hold Mr. and Mrs. Malone hostage, Mr. and Mrs. Malone told them that their obligation to

make the payments on the day they were due had nothing to do with Addendum No. 5. The Appellants/Cross Respondents provide no support for their theory that even though they notified Mr. and Mrs. Malone they would not make payments, Mr. and Mrs. Malone are still required to provide them with an additional notice that they, in fact, did not receive the payment they were notified they were not going to receive.

The REPSA does, actually, allow provide for notices via electronic mail and the Appellants/Cross Respondents cannot deny that these parties regularly used email as a method of communication.

Appellants again re-issue their challenge to Supplemental Finding of Fact No. 1 although they represented to the trial court and this court that they would not do so. In the face of those representations, Appellants re-style the challenge by arguing that Supplemental Finding of Fact No. 1 is a conclusion of law. This Court should not be led down this path. Appellants/Cross Respondents promised they would not challenge any of the findings of fact and are now reversing course.

Again, Appellants/Cross Respondents focus on paragraph 15(b) of the REPSA, not the preface language of Paragraph 15 which clearly does not mandate any particular form of notice. Moreover, Appellants/Cross Respondents drafted the agreement and although paragraph 17(g) states that ambiguities in the REPSA should not be construed against them, it also states, “the Agreement shall be given a reasonable interpretation in accordance with the plain meaning of its terms and the intent of the parties based solely upon the express provisions of the Agreement.” Additionally, the preface language in paragraph 15 also sets forth that the addresses for the notices “are noted below, or at such other address as a party shall stipulated from time to time.” Ex 1. As the trial court noted in

Supplemental FOF No. 1, “the evidence shows that both plaintiffs and defendants treated email as a proper form of communication. Plaintiffs never objected to Defendants email communications.” Clearly, the Appellants/Cross Respondents and Mr. and Mrs. Malone agreed that email was sufficient in addition to the plain language of Paragraph 17(j) which sets forth this exact stipulation.

The Appellants/Cross Respondents argue that paragraph 17(j) “does not address email.” Br. of Appellants/Cross Respondents at 27. The plain language of the REPSA states otherwise. Paragraph 17(j) acknowledges that “each party” agrees to use electronic signatures in order to expedite the transaction, “intends to be bound” by documents containing electronic signatures, “is aware that the other will rely on the . . . electronic signature” and, most importantly, “waives any defenses to the enforcement of the documents effecting the transaction contemplated by this Agreement based on the fact that a signature was sent by telecopy.” Keeping in mind paragraph 17(e)’s directive that the REPSA is to be given “a reasonable interpretation in accordance with the plain meaning of its terms and the intent of the parties”, and the undisputed verity that the parties used email and treated it as a proper mode of communication, it is obvious that the Appellants/Cross Respondents waived any defense based on the fact that they received their notice via email and not regular mail. If Mr. and Mrs. Malone had printed out the email and faxed it, would the Appellants/Cross Respondents be making the same argument? There was no injury to the Appellants/Cross Respondents because they received the March 21, 2008 notice via email instead of fax or regular mail.

E. Conclusion of Law No. 2 is Supported by the Verities herein.

The Trial Court's Conclusion of Law No. 2 states:

The Plaintiffs committed the first material breach in this matter by failing to pay the March 2008 Supplemental Payments called for in the REPSA when due on March 21, 2008. The Plaintiffs' material breach justified suspension of performance of any of the contractual obligations of the Defendants.

COL 2.

Appellants/Cross Respondents do not dicker with the conclusion that their failure to make the March 2008 payment or the April 2008 payment constituted material breaches of the REPSA. Appellants/Cross Respondents COL No. 2 not aimed at eliminating what they describe as "the contractual requirement to provide notice and an opportunity to cure." Br. of Appellant/Cross Respondent at 29-30. A "material breach" of a contract is often defined as, "one that substantially defeats the purpose of the contract." Mitchell v. Straith, 40 Wn. App. 405, 410, 689 P.2d 609 (1985) (citing 17 Am.Jur.2d *Contracts* § 504 at 981 (1964)).

Typically, whether a breach is material or not is a question of fact and the trial court may consider, among other factors, the extent to which the injured party will be deprived of a benefit which he or she reasonably expected. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 209, 165 P.3d 1271 (2007). The Bear Creek Shopping Center opinion lists other factors that may be considered by the trial court in determining whether a breach is material or not. Id., at footnote 8. Our courts have held that a failure to make even the first installment payment of an earnest money provision in the REPSA is a material breach which entitled the seller to terminate the contract. Vacova Co. v. Farrell, 62 Wn. App. 386, 814 P.2d 255 (1991).

However, the Appellants/Cross Respondents provide no analysis whatsoever on this issue and do not assign error to Conclusion of Law No. 3 or Supplemental Conclusion of Law No. 2. As a result, it is clear that the Appellants/Cross Respondents agree that their self-professed failure to make the March, 2008 payment as well as their bravado in informing Mr. and Mrs. Malone that no payments would be made until Addendum No. 5 was signed was a material breach, that they were first to materially breach the contract and that they waived any right to demand a notice in a form that was any different than the notice which they received from Mr. and Mrs. Malone.

Furthermore, to be abundantly clear, there is no contractual obligation on Mr. and Mrs. Malone's part to have told the Appellants/Cross Respondents that they had ten days to make the payment they already said they were not going to make. It is further very clear under Washington law that even an anticipatory breach would have relieved Mr. and Mrs. Malone from any obligation to perform under the REPSA. Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 897, 881, P.2d 1010 (1994).

Wallace involved a situation similar to this case. In Wallace, the buyer of certain real property informed the seller sent a letter which the trial court and courts of appeal ultimately determined was an "anticipatory breach" of the Purchase and Sale Agreement. That is similar to the buyers in this case identifying to Mr. and Mrs. Malone that they would withhold all payments until Mr. and Mrs. Malone signed a proposed addendum substantially lowering the purchase price. The Court defined an anticipatory breach in this context as a positive statement or action by the promisor, "indicating distinctly and unequivocally that he either will not

or cannot substantially perform his contractual obligations.” Id., at 898 (quoting Olsen Media v. Energy Sciences, Inc. 32 Wn. App. 579, 648 P.2n 493 (1982)).

To the extent this Court were to find that there was a contractual requirement on the Malones’ part to provide a “notice” to the Appellants/Cross Respondents *in a particular form that the Malones did not provide*, the Malones assert that such a requirement was suspended by the Appellants/Cross Respondents’ anticipatory breach by stating their admitted refusal to perform and then their subsequent material breach of the REPSA by not making the payments.

Moreover, Appellants/Cross Respondents do not dispute that further communications from Mr. and Mrs. Malone gave the Appellants/Cross Respondents additional time to “cure” and even Mr. and Mrs. Malone’s “admission” in their Answer and Affirmative Defenses that specific performance should be found by the trial court provided a similar opportunity. Appellants/Cross Respondents assert that there is no other written notice in the record from Mr. and Mrs. Malone that could possibly be the “necessary notice under section 14(b) of the REPSA.” Br. of Appellants/Cross Respondents at 29. They must ignore, then, the letter sent by Mr. and Mrs. Malone in response to the May 8, 2008 letter to Mr. and Mrs. Malone by Appellants/Cross Respondents. In that letter, Mr. and Mrs. Malone provided further opportunity to the Appellants/Cross Respondents to provide the funds. The Appellants/Cross Respondents chose not to do so and to sue Mr. and Mrs. Malone.

The only **conclusion** that can be drawn from these circumstances is that the Appellants/Cross Respondents are artfully attempting to convert their own anticipatory breach and material breach to come up with a

reason as to why Mr. and Mrs. Malone should be forced to return the deposit.

Appellants/Cross Respondents also ignore the first sentence in paragraph 14(a) of the REPSA which states, “[i]n the event of Buyer’s Material Breach of this Agreement, any Deposit paid to Seller shall be forfeited to the Seller as their exclusive remedy.” Ex 1. It does not state that this remedy is available to Mr. and Mrs. Malone “only if” they provide appropriate “notice” of the Buyer’s material breach. In fact, there is no requirement in the REPSA that Mr. and Mrs. Malone provide the Appellants/Cross Respondents with any notice of their material breach of the REPSA nor is there any requirement that Mr. and Mrs. Malone provide any notice, let alone any particular form of notice to the Appellants/Cross Respondents of termination of the REPSA.

Bailie Communications, Ltd. v. Trend Business Systems, 53 Wn. App. 77, 765 P.2d 339 (1988), quoting the Restatement (Second) of Contracts § 241 comment (e), held, “[a] material failure by one party gives the other party the right to withhold further performance as a means of securing his expectation of an exchange of performances.” Id. at 81. The Court further held, “[a] material breach suspends the injured parties duties until the breaching party cures the default.” Id.

Under this analysis and under the plain language of the first sentence of paragraph 14(b), there was no requirement that Mr. and Mrs. Malone even notify Appellants/Cross Respondents of their material breach of the REPSA and the Appellants/Cross Respondents provide no authority for the proposition that, in the face of being informed of a breach by the breaching party itself, they continue to have a duty to turn around and

provide a notice back to the breaching party of what the breaching party told them.

Regardless, the Appellants/Cross Respondents essentially provide no argument on this issue and do not challenge Conclusion of Law No. 3 or Supplemental Conclusion of Law No. 2 which holds that they waived any right to receive a notice in a form that was not made by Mr. and Mrs. Malone.

F. There was no breach by Mr. and Mrs. Malone to provide any notice and opportunity to cure. It is well settled Washington law that the issue of whether a party has breached a contract is a question of fact.

“Whether a party has breached a contract is a question of fact.” Frank Collucio Const Co., Inc. v. King County, 136 Wn. App. 751, 762, 150 P.3d 1147 (2007) (citing Palmiero v. Spada Distrib. Co., 217 F.2d 565 (9th Cir. 1954) (holding, in turn, “the question of breach of any contract, oral or written, is a question of fact, left to be left to the trier of fact”). As noted above, the Appellants/Cross Respondents do not challenge any of the trial court’s Findings of Fact. Unfortunately, the approximate six pages of their brief that Appellants/Cross Respondents make argument on this issue are unwarranted. Appellants/Cross Respondents should be prevented from re-arguing issues of fact if they are not going to challenge any of the Findings of Fact. Even more unfortunate is that Mr. and Mrs. Malone are forced to respond to these arguments in case this Court decides to consider the arguments.

Appellants/Cross Respondents first rely on the case of Gray v. Gregory, 36 Wn.2d 416, 218 P.2d 307 (1950) which they acknowledge is a case involving a landlord and a tenant and which they must also admit

contains a lease provision which contains substantively different language than the REPSA involved in this case. Moreover, Appellants/Cross Respondents provide no analysis as to how the case at bar is to be compared to the situation in the Gray v. Gregory. Perhaps most importantly, it was not admitted in Grey v. Gregory that the breaching party, in fact, specifically represented to the non-breaching party that the breaching party was unjustifiably doing that which caused the breach.

Additionally, the language of Clause X significantly differs from paragraph 14(b) in this case and Appellants/Cross Respondents' quote from the Court's opinion in Grey v. Gregory but notably insert ellipses (. . .) for a significant portion of the quote which states:

The procedural requirement of clause X of giving notice of default, was deliberately not followed by the appellant because to have done so would have permitted a cure of the default and thus her stated purpose of forfeiting the lease would have been defeated.

Id. at 418 (emphasis added).

In this case, it is clear that there was no deliberate attempt by Mr. and Mrs. Malone not to follow the procedures for notifying the Appellants/Cross Respondents of what the Appellants/Cross Respondents already refused to do – to make any further monthly payments. Mr. and Mrs. Malone made every attempt to allow the Appellants/Cross Respondents to tell them that withholding the payments was wrongful and then to allow them to catch up on their payments in May, 2008 and even after this litigation was filed. As the trial court in this case found as a matter of fact, Mr. and Mrs. Malone had no incentive for this transaction not to go through as they stood to make a significant profit.

Appellants/Cross Respondents next rely on another landlord-tenant case, Tacoma Rescue Mission v. Stewart, 155 Wn. App. 250, 228 P.3d 1289 (2010), where, in March 2010, after the trial in this case, this Court held that a landlord's failure to comply with a lease requirement was insufficient to allow the landlord to maintain an unlawful detainer action against the tenant.⁴ This case is distinguishable on many fronts. First and foremost, the Appellants/Cross Respondents only assert that this Court relied on the Grey v. Gregory opinion and they provide no analysis of the Court's opinion as it applies to this case.

Again, the contract at issue was a lease for an apartment in a federally subsidized housing complex. The court held, "[p]owers of termination must be exercised strictly in the manner provided by the termination clause." Id., (citing 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 6.76 at 437 (2nd ed. 2004)). The lease itself dictated some very specific language that was to be set forth in the termination notice including the date the tenancy shall terminate, "the reasons for such termination with enough specificity to enable the resident to understand the grounds for termination" and the "dates, times, locations, and the tenants alleged victims so that the tenant

⁴ It is unclear whether Tacoma Rescue Mission opinion is of precedential value. It appears that the original opinion at 154 Wn. App. 1034 was unpublished. There was a subsequent order to publish which resulted in the opinion at 155 Wn. App. 250. However, that opinion also states, "[a] majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." RCW 2.06.040, in turn, states, in part, "[a]ll decisions of the court having precedential value shall be published as opinions of the court." Counsel for Mr. and Mrs. Malone simply does not know whether an opinion that is filed for public record but not printed in the Washington Appellate Reports equates to being "published" and therefore undertakes the following analysis if the Court considered the opinion to have precedential value.

can prepare a rebuttal to the landlord's accusations." Id (citations to federal case law importing the last requirement omitted).

There is no termination clause in this REPSA and neither paragraph 14(b) nor paragraph 15 nor any other paragraph state any sort of similar specific language that is to be in a "notice." Appellants have also not alleged any legal requirements for such notice that fall outside of the express provisions of the REPSA. If anything, according to paragraph 17(e), the REPSA is to be given a "reasonable interpretation in accordance with the plain meaning of its terms and the intent of the parties[.]" Tacoma Rescue Mission simply does not apply to the instant case.

Appellants/Cross Respondents next rely on Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 78 P.3d 161 (2003), another non-REPSA case. The contract at issue in this particular case was a construction contract and involving claims by a contractor for additional compensation arising out of two separate sewer installation contracts with Spokane County. Id. at 376. Like the lease in Tacoma Rescue Mission, but unlike any paragraph in the REPSA in this case, the contracts at issue in Mike M. Johnson contained "mandatory notice, protest, and formal claim procedures for claims for additional compensation[.]" Id. at 379-380. "At a minimum, MMJ was required to submit 10 items of specific information to support a claim, including a notarized statement of to the project engineer swearing to the truth and veracity of the submitted claim." Id. There is no specific requirement of any language in particular in any provision of the REPSA in the case at bar. Like the previous cases, Appellants/Cross Respondents provide no analysis of this case to the case at bar. In Mike M. Johnson, our State Supreme Court undertook a full-

throttle analysis to compare the contractor's letter to the specific requirements of the contract.

In this case, there are no specific requirements of the language that is to be in the "notice" described in paragraph 14(b) other than the Seller is to notify the Buyer of a failure to receive a payment. This is not a situation where the REPSA sets forth one or more mandatory items that must be in a notice and those items were not included. Moreover, Appellants/Cross Respondents specifically informed Mr. and Mrs. Malone that Mr. and Mrs. Malone would "fail to receive" all payments until they signed Addendum No. 5.

Appellants/Cross Respondents rely most extensively on Bausch & Lomb v. Bressler and Sonomed, an opinion from the Second Circuit Court of Appeals in 1992. This was a dispute between a distributor of medical instruments against a manufacturer for breach of contract where the Court analyzed New York law, not Washington law. Aside from the fact that this case was interpreting New York Commercial Code and is not binding on this Court, the Court's actual holding supports Mr. and Mrs. Malone's position. The Court held, "Sonomed committed a material breach by terminating the Agreement upon two days' notice to B&L in contravention of § 8.02's 30 day notice period and by refusing to accept B&L's timely withdrawal of its alleged repudiation." Id. at 727. As this Court reviews the Second Circuit's opinion in the case, though, it will note that the contract at issue contained some very specific provisions about when termination could occur in that the aggrieved party could only cancel the contract on 30-days notice during which the breaching party could attempt a cure. Id. The contract also contained specific contractual language (not

applicable here) that stated that the notice provisions applied to “material breaches.” Id.

More importantly, the Second Circuit’s opinion actually supports Mr. and Mrs. Malone’s position in this case when the Second Circuit distinguished two cases relied upon by Sonomed:

Sonomed cites two cases from other jurisdictions in which courts found that aggrieved parties were not under a duty to abide by contractual notice provisions when cancelling contracts in response to repudiations [citations omitted]. Both, however, are inapposite. **In each case, the repudiating party expressly disavowed any further duties under the contract at issue, in effect declaring the contract at an end. Because it would have been futile for the aggrieved parties in Solitron and Digital to provide the breaching parties with opportunities to cure their repudiations, the courts found that the failures to provide notice and opportunity to cure were excused.**

Id., (Emphasis added).

Mr. and Mrs. Malone wish to make clear that they do not argue that they did not provide adequate notice to the Appellants/Cross Respondents. They only argue that in the alternative if this Court were to differ with the trial court as to the adequacy of their notice that payment was not received that they were not required to provide the notice now asserted by the Appellants/Cross Respondents because to do so would be futile. The case law provided by the Appellants/Cross Respondents supports that position. Other courts have supported Mr. and Mrs. Malone’s position. For example, in DuVal Weidemann, LLC v. InfoRocket.com, Inc. 620 F.3d 496, (C.A. 5, 2010), the Fifth Circuit Court of Appeals analyzed a contractual provision that had an actual termination provision where InfoRocket could terminate the contract on 60 days prior

written notice to DuVal. DuVal argued that language was a condition precedent to termination (just like the Appellants/Cross Respondents argue here). The Court disagreed, holding, “[w]e cannot agree. . . . the Termination Provision contains no conditional language, and literal performance was therefore not required.” *Id.*, at 502.

Moreover, it is also worth analyzing paragraph 14(a) of the REPSA which states in part, “[i]n the event that the Buyer fails to receive any notice or documentation required herein, Buyer shall so notify Seller and Seller shall then have ten (10) days to cure performance.” Ex. 1. Notably, the Appellants/Cross Respondents never provided a “notice” to Mr. and Mrs. Malone that they (Appellants/Cross Respondents) that Mr. and Mrs. Malone’s notice to them was somehow insufficient nor did they provide Mr. and Mrs. Malone an opportunity to cure the now-alleged deficient notice set forth in Exhibit 63. Instead, Appellants/Cross Respondents simply sued Mr. and Mrs. Malone. Clearly, that was another action taken by the Appellants/Cross Respondents disavowing any further duties under the REPSA. Even after they were sued, Mr. and Mrs. Malone still admitted the Appellants/Cross Respondents’ claim for specific performance providing yet another opportunity to complete the transaction.

G. Appellants/Cross Respondents Waived Any Alleged Requirement of a Written Notice by Mail or Fax

Putting aside, for a moment, that the Appellants/Cross Respondents do not dispute the facts giving rise to what occurred in this case, the evidence further shows that to the extent this Court were to find a requirement in the REPSA that Mr. and Mrs. Malone should have

provided a written notice in a form other than an email that should have been delivered to Appellants/Cross Respondents by fax or regular mail instead of email, the Appellants/Cross Respondents clearly waived any enforcement of such a provision by the terms of Paragraph 17(j) and by the manner in which they conducted their correspondence in this case.

Paragraph 14(a) specifically states that, “Buyer, at its option, may elect to waive the performance of any condition, contingency, or provision in Buyer’s favor set forth in this Agreement[.]” Ex. 1. The sum total of Appellants/Cross Respondents’ argument in this regard is, “[t]his is ridiculous” and “absurd.” Br. of Appellant/Cross Respondent at 39. Despite the Appellants/Cross Respondents’ feelings on the matter, though, contractual provisions can be waived as discussed *supra* and when such waiver is implied in the conduct of the party against whom the waiver is asserted, that is a question of fact for the trial court to decide. In this case, the trial court decided as a matter of fact that a waiver did occur based on the Appellants/Cross Respondents’ statements to Mr. and Mrs. Malone and their behavior and, of course the Appellants/Cross Respondents fail to provide this court with a Verbatim Report of Proceedings for review.

Appellants/Cross Respondents cite to no case law for their assertions in this regard and fail to address the language from paragraph 14(a) of the REPSA that states quite clearly that if they fail to receive “any notice or documentation required herein Buyer shall so notify Seller and Seller shall then have ten (10) days to cure performance.” Ex. 1 (Emphasis added). Aside from the trial court’s unchallenged Findings of Fact that the Appellants/Cross Respondents did waive the right to receive any notice other than the notice they received, (see also the language from Paragraph 17(j) addressing waiver of defenses), there is no evidence

which shows that the Appellants/Cross Respondents complied with paragraph 14(a) prior to initiating suit against Mr. and Mrs. Malone. They cannot now be heard to argue that Mr. and Mrs. Malone's notice was insufficient when, upon receipt of the same, they failed to invoke the provisions of the REPSA for their own benefit.

Either party to a contract may waive any provisions of the contract made for that party's benefit. Reynolds Metals Co. v. Electric Smith Const. & Equipment Co., 4 Wn. App. 695, 483 P.2d 880 (1971). Such waiver may be implied from the party's conduct. Id. As noted above, though, this is a question of fact for the trier of fact and one that the trier of fact in this case answered affirmatively and which is now a verity on appeal.

The Appellants/Cross Respondents assert that there is no finding of fact to support the waiver conclusion. Aside from the fact that Appellants/Cross Respondents incorrectly assume that the determination of waiver is not a question of fact, FOF nos 25 ("Plaintiffs stated that they would not make such payments until Addendum No. 5 was signed by the Defendants. Defendants did not sign Addendum No. 5 and had no obligation to do so"). FOF 39, 40 and 41 all further support this conclusion. As in the DuVal case, the Appellants/Cross Respondents made perfectly clear that they did not intend to ever comply with the REPSA again until Addendum No. 5 was signed. Furthermore, Ex 63 confirms that the Appellants/Cross Respondents orally terminated the REPSA on March 21, 2008, thereby declaring the contract at an end and making it futile for Mr. and Mrs. Malone to do anything further. Contracts are to be given a practical and reasonable interpretation – not

one that leads to absurd results. Cook v. Evanson, 83 Wn. App. 149, 920 P.2d 1223 (1996).

For example, there is no requirement in Paragraph 14(b) of the REPSA that if the Buyers tell the Sellers they are refusing to make payment that the Sellers must “notify” the Buyers of the fact that the Buyers actually did not make the payment. While that is the interpretation of the REPSA urged by the Appellants/Cross Respondents in this matter, it results in an absurd interpretation. This places a requirement on the Malones that does not exist in the REPSA – notifying the Buyer of its self professed failure to perform. Nowhere is that requirement stated in the REPSA

There is also no contractual requirement in paragraph 14(b) of the REPSA or anywhere else that obligated the Malones to notify the Appellants/Cross Respondents of a ten (10) day opportunity to cure their breach. Paragraph 14(b) of the REPSA states that the Buyers have ten (10) days to “cure performance” but it does not state that the Sellers are obligated to inform the Buyers that the Buyers have ten days to “cure performance.” Again, the Appellants/Cross Respondents misinterpret their own contract and urge this Court to reverse the decision of the trial court, after a trial and based on their misinterpretation of their own contract.

The trial court examined Exhibit 63, heard the testimony and found as a matter of fact that the Appellants/Cross Respondents had informed Mr. and Mrs. Malone they refused to make the March, 2008 payment or any payment thereafter until such time as Mr. and Mrs. Malone signed Addendum No. 5. As a result, the Malones may obviously be considered to be “failing” to receive any payment and they “notified” the

Appellants/Cross Respondents that their stated bases for their refusal to make payment (i.e., their failure to make payment) were incorrect.

The Appellants/Cross Respondents complain about Mr. and Mrs. Malone's statement in Exhibit 63 that Mr. and Mrs. Malone, "demanded that if MAI wanted to terminate the REPSA, it had to follow 'the terms of the agreement' and provide written notice." Br. of Appellants/Cross Respondents at 24. This is another mischaracterization. The Court should note that the Malones first expressed regret of the decision made by the Appellants/Cross Respondents and orally related to the Malones but if the Appellants/Cross Respondents desired to proceed with the termination, the Malones notified the Appellants/Cross Respondents of their desire to receive a letter of rescission within ten (10) days. This issue has nothing to do with the case at bar because, as we know, the Appellants/Cross Respondents never issued a letter, email, postcard or anything else terminating the REPSA. In sum, it has no bearing on the issues raised by the Appellants/Cross Respondents.

H. The Proper Remedy is to Affirm

Appellants/Cross Respondents next assert that the "proper remedy" in this case is to reverse the trial court and remand the case for entry of a judgment in favor of them. This result is not called for under Washington law and the Appellants/Cross Respondents cite to no case authority for that proposition. Mr. and Mrs. Malone respectfully request that the Court affirm the trial court's holding and award Mr. and Mrs. Malone their attorney's fees on appeal pursuant to the REPSA provision for attorney's fees and pursuant to RAP 18.

If this Court were to reverse the trial court's holdings and enter judgment in favor of the Appellants/Cross Respondents, it would be reversing all of the trial court's Findings of Fact to which there were no challenges and it would have to

find, as a matter of fact that Mr. and Mrs. Malone breached the REPSA. As noted above, the issue of breach of a contract is a matter of fact and this Court is not a fact finding court. In Wold v. Wold, 7 Wn. App. 872, 877, 503 P.2d 118 (1972), the Court of Appeals held it would be improper for an appellate court to “ferret out a material finding of fact from the evidence presented” because doing so “would place the appellate court in the initial decision making process instead of keeping it to the function of review.” Id. This case was decided after a trial on the issue of breach, not summary judgment or other motion practice and there is no appeal of the trial court’s rulings on any pre-trial motion.

I. If this Court finds any error by the trial court, it should find that the trial court erred in entering COL No. 8 that Mr. and Mrs. Malone were not entitled to specific performance of the REPSA.

The underlying facts and circumstances of this case have been fully set forth above. Based on all of those Findings of Fact, the trial court should have also found that Mr. and Mrs. Malone were entitled to specific performance of the REPSA. Notably, the Appellants/Cross Respondents asserted specific performance as a legal claim against Mr. and Mrs. Malone. Mr. and Mrs. Malone answered that legal claim by admitting specific performance in their Answer and Affirmative Defenses. Appellants/Cross Respondents never sought to voluntarily dismiss that claim.

In Dean v. Gregg, 34 Wn. App. 684, 663 P.2d 502, (1983), the Court of Appeals held that the purchasers in a REPSA were entitled to specific performance because, “we find defendant’s excuse for nonperformance so woefully deficient that justice demands reversal in this case.” In that case, the seller’s excuse for non-performance was that he had entered into a bad bargain. Id. at 503. The same can be said for this case where the trial court found as a matter of fact that the Appellants/Cross Respondents had breached the REPSA

simply in an effort to try and coerce Mr. and Mrs. Malone into accepting different terms which would have substantially lowered the purchase price. At its very essence, the Appellants/Cross Respondents no longer liked the terms of the contract as the real estate market began to decline. The trial court found as a matter of fact that the Appellants/Cross Respondents had their own profit as their focus. FOF 36. The trial court further found that the risk of the market was borne by the Appellants/Cross Respondents. FOF 41:

The Plaintiffs were having issues about pricing and the Plaintiffs were not making a profit on this transaction like they thought would work out. As a result, the Plaintiffs were demanding that Defendants sign Addendum No. 5 which would have guaranteed the Plaintiffs a particular profit and substantially lowered the purchase price under the REPSA. Plaintiffs were withholding the payments called for in the REPSA until Plaintiffs' proposed Addendum No. 5 was signed by Defendants.

FOF 41 is a verity on appeal and it supports Mr. and Mrs. Malone's right to specific performance.

V. CONCLUSION

The Appellants/Cross Respondents specifically told Mr. and Mrs. Malone that they would not deliver the March payment (i.e., that Mr. and Mrs. Malone would fail to receive the payment(s)). Rather than Mr. and Mrs. Malone notifying the Appellants/Cross Respondents that a payment had not been received, the Appellants/Cross Respondents affirmatively told Mr. and Mrs. Malone that payment would not be forthcoming.

After Appellants/Cross Respondents specifically told Mr. and Mrs. Malone they would not deliver the March payments and that they were withholding the payments until Mr. and Mrs. Malone signed Addendum No. 5 substantially lowering the purchase price of the property, Mr. and

Mrs. Malone emailed the Plaintiffs notifying the Appellants/Cross Respondents of their disagreement with the Appellants/Cross Respondents' position;

After Appellants/Cross Respondents received the email notifying them that Mr. and Mrs. Malone disagreed with their stated refusal to pay, the Appellants/Cross Respondents again orally reaffirmed that they would not make the March payment or any other payment;

After the Appellants/Cross Respondents reaffirmed that they would not make the March payment or any other payment and were terminating the REPSA, Mr. and Mrs. Malone again emailed the Appellants/Cross Respondents to confirm the conversation, asked them to reconsider their decision to terminate the REPSA and gave the Plaintiffs ten (10) days to confirm their position in writing so that the Malones could pursue other options;

No payment was made by the Appellants/Cross Respondents within that ten (10) days or anytime thereafter;

On May 1, 2008, Mr. and Mrs. Malone wrote an additional letter to the Appellants/Cross Respondents informing them that more than ten (10) days had passed since the Mr. and Mrs. Malone informed the Appellants/Cross Respondents that they disagreed with their decision to withhold payments and that Appellants/Cross Respondents had not made any payments, the Malones were terminating the REPSA;

On May 8, 2008, the Appellants/Cross Respondents wrote to Mr. and Mrs. Malone and admitted that they had withheld the March, 2008 payment;

That on May 20, 2008, Mr. and Mrs. Malone wrote back to the Appellants/Cross Respondents and specifically told them that they were

willing to discuss how they could get caught up with their payments (i.e., giving them even more time to cure their breach) and no payment was made.

It is under these facts that the Court must weigh the Appellants/Cross Respondents' argument that receiving an email from Mr. and Mrs. Malone on March 21, 2008 that they disagreed with the Appellants/Cross Respondents' self-professed decision to make no further payments and confirming the Appellants/Cross Respondents decision to terminate the REPSA did not comply with paragraph 14(b)'s statement that the Malones were to notify the Appellants/Cross Appellants that a payment had not been received.

Mr. and Mrs. Malone chose not to be victims of the Appellants/Cross Respondents' attempts to financially leverage them into a lower purchase price by withholding monthly payments the Appellants/Cross Respondents were obligated to make. Mr. and Mrs. Malone did everything within their power to try and facilitate ultimate closing of the transaction but when it became apparent that the Appellants/Cross Respondents were not going to comply with their obligations and, in fact, orally terminated the REPSA to the Malones, the Malones were left with no choice but to terminate the REPSA via their letter on May 1, 2008, having previously provided notice to the Appellants/Cross Respondents that their failure to make the payments on March 21, 2008, which Appellants/Cross Respondents acknowledged they would not make.

The Malones respectfully request that this Court affirm the judgment of the trial court and award Mr. and Mrs. Malone their attorneys fees and costs related to this appeal. Mr. and Mrs. Malone further request

that this court reverse COL No. 8 and award Mr. and Mrs. Malone specific performance of the REPSA.

DATED this 30 day of November, 2010

EISENHOWER & CARLSON, PLLC

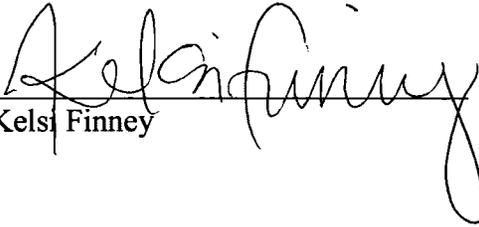
By: 

Stuart C. Morgan WSBA #26368
Of Attorneys for Respondent/Cross
Appellant

Certificate of Service

I certify that on the 31 day of November 30, 2010, I served the parties listed below with a true and correct copy of the foregoing Respondents/Cross Appellant's Opening Brief by depositing the same in the mails of the United States, postage prepaid, in an envelope addressed to:

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Kelsi Finney

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II