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I. INTRODUCTION

Appellant's Reply will focus on two aspects of Respondent's Brief.

Issue One will address incorrect statements concerning testimony in the record and Issue Two will attempt to serve the purpose of clarifying the distinction between the transactional documents, virtually all prepared by Respondent, and Respondent's attempt to direct the Court's attention away from the significance of those documents by focusing ad nauseum on the term "net proceeds".

a. References to the record which are incorrectly stated in Respondent's Reply Brief.

Respondent states at page two of their introduction that Nunn was aware of the underlying mortgage debt "before he invested in the property". There is nothing in the record to justify that statement. In fact, Nunn testified that at the time he signed the Residential Real Estate Purchase Agreement he did not recall reading a Title Report

nor have any knowledge of any underlying encumbrances, RP 16 line 3.

Nunn signed the RESPA October 29, 2003 (Ex-6). The Title Commitment issued no earlier than October 30, 2003 (Ex-93) and there is no proof it was delivered to Nunn rather than simply sit in a closure file until the deed issued. Therefore (F.F. 4) Nunn knew in advance of signing the RESPA is not supported by the evidence.

Likewise, there is nothing in the Statutory Warranty Deed issued by Ms. Creagan to Mr. Nunn which would have tipped him off to the existence of the underlying encumbrance in that the document drafted by Ms. Creagan, RP 16 lines 10 & 11, contained no standard language that the Deed was subject to underlying encumbrances or had any reservations including even restrictions as to public records. The Deed was dated December 23, 2003. Of interest may be the fact the trial court agreed with Nunn's position

there was nothing in the deed making Nunn's one-third interest subject to any obligation (C.O.L. 10).

Respondent's statement that Mr. Nunn knew about the underlying encumbrances "before he invested into the property" is false and not supported by the record. Furthermore the record is vague, at best, as to when Mr. Nunn eventually did learn of the underlying encumbrances and the fair assumption is that it was not until after he entered into the Real Estate Purchase Agreement, Ex-6, and received the Deed, Ex-8.

b. The "Net Proceeds" Argument

Respondent goes on to emphasize for the Court their belief that Nunn personally instructed the Title Company to insert language in the payment vouchers that he was to receive net proceeds. The exhibits do nothing to support that argument. The net proceeds vouchers constitute nothing more than attachments to First American

Title letters being exhibits 54, 55 and 56 which were transmittal cover letters which contained attachments being a Demand for Full Payment for Lot 6 (Ex-79), Lot 5 (Ex-80) and Lot 4 (Ex-81). While Respondent would like to characterize those as an express instruction to the title company concerning net proceeds, they are nothing more than routine Title Company transmittal documents which were not prepared by Nunn or Creagan, but only signed by them. Each document, Ex-79, 80 and 81, all contained at the bottom, the names of Title Company employees who presumably are the individuals who prepared the documents. None of the writing filling in the documents matches the signatures of Nunn or Creagan.

It should also be noted that Exhibits 79 and 80 were dated in February of 2007 and Exhibit 81 apparently in May of 2007. These dates were long after Nunn entered into the Real Estate Purchase and Sale Agreement and received his Deed from Creagan.

II. REBUTTAL ARGUMENT

a. HOW THE DOCUMENTS SHOULD BE REASONABLY INTERPRETED

The critical documents in this case are not the three simple transmittal vouchers as urged by Appellant. There are three other documents of much greater significance to discerning the parties' intent.

The first is (trial exhibit 6) being the Real Estate Purchase and Sale Agreement. It was drafted by Creagan (RP 14, Lines 10 and 11) and claims no reference to any underlying document or whether or not Mr. Nunn would be getting one-third of all of the proceeds received once the property was developed or one-third less Creagan's pre-existing debt which Nunn had nothing to do with the creation of and apparently did not know about until later.

The second significant document (trial exhibit 8), the Statutory Warranty Deed. Again, apparently drafted by Creagan based on the testimony. It also bears her signature only. It does nothing to alert Nunn as to how the proceeds will be split either net or gross but could have easily been drafted to include the fact the property was subject to underlying encumbrances of Creagan and normally would have been by an experienced real estate professional which we know Creagan was, based on the uncontroverted testimony of Mr. Nunn (RP 15, lines 15-20).

The third document that controlled this transaction was (trial exhibit 61), being the Real Estate Contract between Creagan / Nunn as seller and Ellsworth Springs Estate LLC as purchasers. That document at paragraph 6 on page 2 for the first time refers to first and second mortgages however the language was not drafted by Nunn or Creagan and uses the word, “seller’s” first and second mortgage. This can only be construed as a misconception on the part of the buyer because Nunn as a seller had not entered into a first or

second mortgage regarding the property. Paragraph 6 also has language to the effect that “sellers” remain obligated to their lender to pay off those balances in full. Nunn, of course, had no obligation to any lender to pay off any balance. He simply had an absolute right to receive one-third of the purchase price promised by the Ellsworth Springs Group.

b. REGARDING THE \$5,757 QUESTION OF NUNN’S LABOR.

Respondent argues and the court found that because there was no written agreement concerning Nunn’s labor that he was not entitled to be reimbursed.

Appellant submits the Court failed to analyze this issue consistently and the opinion is not supported by the record. The Court had no trouble recognizing that Nunn’s contribution of more than his one-third share of the interest in the property of \$7,924.96 in costs were for upgrading and development costs. Nunn testified the

heating system for the house had been condemned (RP 12, Lines 16 & 17) and it needed some maintenance. He carefully itemized his labor associated with those repairs and maintenance, Ex-52, and they were clearly in line with his testimony of the type of maintenance necessary to bring the house up to a level that it could be later sold as part of the transaction to the developers. Logic dictates that without that labor the house would have remained substandard and maybe unsaleable. It also became an integral part of the overall transaction with the buyers because it would be hard to believe that what is referred to as the sale to Mr. and Mrs. Surface on March 2, 2007 (Ex-53) could have been made if the house was left in the same condition as found by Nunn when he entered into his agreement with Creagan. The LLC used the sale of the house to satisfy \$257,175.88 (Ex-53 The Surface HUD Statement) of the overall purchase price they were obligated to under their Sale's Agreement with Nunn and Creagan.

It is also interesting to note that Ex-53 (The Surface Hud Statement) sheds some light on what people normally consider to be net proceeds in typical real estate transactions. That exhibit contains numerous deductions other than payments on the underlying debt of Creagan. There are charges for taxes, adjustments for earnest money and a notation at line 504 that there was a pay off of the first mortgage for Erin Creagan. There are also settlement charges at line 502 which presumably were charges for excise tax, title costs and closing costs with the title company.

c. THE TRIAL COURT REFUSED TO ALLOW NUNN \$3,300 THAT NUNN TESTIFIED HE CONTRIBUTED ON CREAGAN'S BEHALF FOR A SIDE VENTURE BEING THE ELK VIEW ESTATES.

The Court summarily dismissed this claim as being not related to the transaction. This however is not born out by the pleadings or the record if one looks at Respondent's Answer and

Counter-Claims (CP 12). Creagan, in her Answer, at page 3, alleged numerous Affirmative Defenses, one of those being off-sets and / or set-offs. It was necessary for Nunn to show that Creagan had no off-sets to the \$10,000 Note or to any other claims she made regarding the house improvements. The record provides no evidence by Creagan to rebut Nunn's claim that he had to equalize the shares on the Elk View Estates project by putting in money on Creagan's behalf and apparently his sister's as well (RP 14 lines 14-24 and RP 52 lines 4-24). Respondent's response in the record is wholly inconsistent on the Elk View matter. At RP 42, lines 10-12, they admit they are basing their case on off-sets and then go on at RP 43 claiming the amount Nunn paid for Elk View was paid back, RP 43, line 8. The Court correctly recognized the issue of off-sets should be litigated in the present action, RP 43, lines 21-25 and RP 44, lines 2 & 3, however failed to recognize that once Nunn put on his evidence of payment that Creagan failed to rebut that during her testimony. At RP 46, the Judge agrees with Nunn that he can put on the proof for the \$3,700 and that Creagan can dispute that amount, as the Court

put it. Nunn put on substantial evidence in the form of Exhibits 37 – 51 being forced to prove that he had repaid Creagan \$30,000 that she invested in the Elk View project plus some additional money (RP 49, lines 4-10 and RP 52 lines 4-24). He also offered written evidence of that in the form of Exhibit 37, none of which was rebutted by Creagan, therefore Nunn should be awarded those additional funds because they were directly related to his need to defend against Creagan’s claim of off-sets including the Elk View off-sets and her rather vague pleading of off-sets in her Affirmative Defenses portion in her Answer.

III. ATTORNEY’S FEES

Somehow Respondent believes they are entitled to attorney’s fees. The fact is that Nunn is entitled to a remand for additional attorney’s fees.

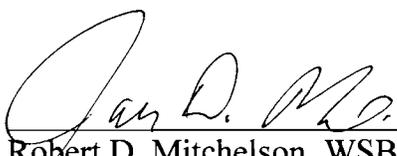
The original REPSA (Ex-6) provides at paragraph q, for attorney's fees to the prevailing party in a dispute over the REPSA. In this case even though the Court denied Nunn's additional \$83,000 he still awarded an additional \$7,924.96 for Creagan's breach of the REPSA in her failure to pay her full two-thirds of the development costs, which resulted in the \$580,000 sale to Ellsworth LLC.

The Court should find that additional attorney's fees are appropriate. Nunn was forced to incur those fees to meticulously prove what he had overpaid and what he overpaid on the Elk View Estate off-set while Creagan sat back and made unsubstantiated claims that she had made equal contributions and yet the trial exhibits and clerk's papers bear no evidence that she did so.

Nunn should be awarded all of his costs and attorney's fees incurred in this case pursuant to RAP 18.1 and it also should be noted that Respondent did not file a cross-appeal concerning the

award of the \$7,924.96 in development costs and excess contributions made by Nunn to the project and under REPSA (Ex-6).

Respectfully submitted this 12th day of January, 2012 by:



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Attorney for Appellant

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

FINAL

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

ROBB NUNN,)

**APPEALS CASE NO. 41787-1-II
SUPERIOR CT CASE NO. 08-2-06191-8**

Plaintiff/Appellant,)

PROOF OF SERVICE

vs.)

ERIN E. CREAGAN,)

Defendant/ Respondent.)

STATE OF WASHINGTON)

ss.
COUNTY OF CLARK)

I state under penalty of perjury under the laws of the State of Washington that I am competent to be a witness and over the age of twenty-one (21) years; that on January 12, 2012, I mailed a true copy of the Appellant Nunn's Response to Respondent's Brief via UPS to each party/attorney listed below.

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