

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

No. 42098-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FREDERICK BEAU GOULD and JULIE P. GOULD, husband and wife,

Respondents,

v.

HONG BIN IM and NANETTE MARIE IM a/k/a YOUNG B. IM, husband
and wife,

Appellants.

APPELLANTS IM'S OPENING BRIEF

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TABLE OF CONTENTS

I. OVERVIEW.....	- 1 -
II. ASSIGNMENTS OF ERROR AND RELATED ISSUES	- 7 -
A. Error Related To Summary Judgment /Liability.	- 7 -
B. Error Related To Damages Award.....	- 9 -
C. Error Related To The Court’s Finding Of Bad Faith And Willful Breach.....	- 9 -
D. Error Related To Gould’s Failure To Mitigate.	- 10 -
III. STATEMENT OF THE CASE.....	- 11 -
A. Appellant Im And The Im Property.	- 11 -
B. Respondent Gould And The Gould Property.....	- 12 -
C. The Im Home And The Gould Home Are Both Connected To The Unapproved Well On The Im Parcel 1.	- 12 -
D. The Well Maintenance Agreement.....	- 14 -
E. The Well Maintenance Agreement Which Purports To Burden Only The Vacant Im Parcel 2 Was Not Expressly Referenced In The Im Statutory Warranty Deed.....	- 17 -
F. The Gould Statutory Warranty Deed States That Gould’s Property Is “Subject To” The Well Maintenance Agreement.	- 20 -
G. The Dispute Between Im And Gould.	- 20 -
H. Gould Served Im With A Lawsuit in October 2007, But Did Not File Suit Or Pursue Judicial Intervention Until April 2009.....	- 24 -

- I. Regardless Of The Well Issue, Completion, Listing And Successful Sale Of The Home In 2007 Was Highly Uncertain.....- 28 -
- J. The Trial Court Reformed The Well Maintenance Agreement On Summary Judgment To Burden The Im Parcel 1 And Found, As A Matter Of Law, That Im Breached The Reformed Agreement.- 29 -
- K. Following Trial A Trial Limited To The Issues Of Damages And Willfulness, The Trial Court Entered Judgment Against Im In The Amount Of \$471,526.....- 31 -
- ARGUMENT.....- 33 -
- A. The Trial Court Improperly Reformed The Well Agreement On Summary Judgment.....- 33 -
 - 1. Standards of review.....- 33 -
 - 2. Whether a contract should be reformed to reflect the parties’ true intentions is a fact-intensive question which carries a high burden of proof.- 35 -
 - 3. The facts in this case do not support reformation, much less reformation on summary judgment.....- 38 -
 - 4. The court improperly found on summary judgment that Im knowingly breached the reformed Well Maintenance Agreement.- 43 -
 - 5. The trial court’s findings of fact and conclusions of law related to issue of liability decided on summary judgment are superfluous and with effect.....- 43 -
 - 6. This court should remand for a new trial on all issues.....- 44 -

B. The Damages Awarded Are Not A Reasonably Foreseeable Consequence Of Breach And Are Improperly Based On Speculation And Are Not Supported By The Substantial Evidence.- 46 -

1. Lost sale proceeds due to the economic downturn were not reasonably foreseeable when Daviscourt signed the Well Maintenance Agreement and are not recoverable for breach of contract.....- 46 -

2. Lost sale proceeds due to the economic downturn are improperly founded on speculation.- 48 -

CONCLUSION.....- 50 -

TABLE OF AUTHORITIES

CASES

<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995)	38
<i>Bingham v. Lechner</i> , 111 Wn. App. 118, 45 P.3d 562 (2002)	47
<i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 850 P.2d 1298 (1993)	34
<i>Cramer v. Bock</i> , 21 Wn.2d 13, 149 P.2d 525 (1944)	44
<i>Davis v. Dep't of Labor & Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980)	37
<i>Duckworth v. City of Bonney Lake</i> , 91 Wn.2d 19, 586 P.2d 860 (1978)	44
<i>Eastlake Constr. Co. v. Hess</i> , 102 Wn.2d 30, 686 P.2d 465 (1984)	46
<i>Holt v. Nelson</i> , 11 Wn. App. 230, 523 P.2d 211 (1974)	44, 45
<i>J.J. Welcome & Sons Const. Co. v. State</i> , 6 Wn. App. 985, 497 P.2d 953 (1972)	36
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 321 (1998).....	33
<i>Keierleber v. Botting</i> , 77 Wn.2d 711, 466 P.2d 141 (1970)	36, 37
<i>Kessinger v. Anderson</i> , 31 Wn.2d 157, 196 P.2d 289 (1948)	37
<i>Kincaid v. Baker</i> , 66 Wn.2d 550, 403 P.2d 888 (1965)	37
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677 (1964)	46
<i>Lahmann v. Sisters of St. Francis of Philadelphia</i> , 55 Wn. App. 716, 780 P.2d 868 (1989)	44
<i>Lewis v. Jensen</i> , 39 Wn.2d 301, 235 P.2d 312 (1951)	46
<i>Matter of Wahl's Estate</i> , 31 Wn. App. 815, 644 P.2d 1215 (1982) ...	43

<i>Maxwell v. Maxwell</i> , 12 Wn.2d 589, 123 P.2d 335 (1942)	4, 37, 43
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 519 P.2d 7 (1974)	33
<i>Myers v. Boeing Co.</i> , 115 Wn.2d 123, 794 P.2d 1272 (1990)	45
<i>Neal v. Green</i> , 71 Wn.2d 40, 426 P.2d 485 (1967)	4, 37
<i>Northwest Land & Inv., Inc. v. New West Federal Sav. and Loan Ass'n</i> , 57 Wn. App. 32, 786 P.2d 324 (1990)	46
<i>Owen v. Burlington N. & Santa Fe R.R.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	34
<i>Platts v. Arney</i> , 50 Wn.2d 42, 309 P.2d 372 (1957)	46
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960)	43
<i>Riverview Floral, Ltd. v. Watkins</i> , 51 Wn. App. 658, 754 P.2d 1055 (1988)	50
<i>Rolph v. McGowan</i> , 20 Wn. App. 251, 579 P.2d 1011 (1978)	36
<i>Schmitt v. Langenour</i> , 162 Wn. App. 371, 256 P.3d 1235 (2011).....	33
<i>Slater v. Murphy</i> , 55 Wn.2d 892, 339 P.2d 457 (1959)	4, 37
<i>Spokane Truck & Dray Co. v. Hoefler</i> , 2 Wash. 45, 25 Pac. (1891)	48
<i>Stenger v. State</i> , 104 Wn. App. 393, 16 P.3d 655 (2001)	34, 40
<i>Sunnyside Valley Irrigation Dist. V. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003)	35
<i>Tanner Elec. Coop. v. Puget Sound Power & Light Co.</i> , 128 Wn.2d 656, 911 P.2d 1301 (1996)	35
<i>Tiger Oil Corp. v. Yakima County</i> , 158 Wn. App. 553, 242 P.3d 936 (2010)	37
<i>Washington Hydroculture, Inc. v. Payne</i> , 96 Wn.2d 322, 635 P.2d 138 (1981)	35

<i>Washington Public Utility System v. Public Utility Dist. No. 1 of Clallam County</i> , 112 Wn.2d 1, 771 P.2d 701 (1989)	34, 40
<i>Wm. Dickson Co., v. Pierce County</i> , 128 Wn. App. 488, 116 P.3d 409 (2005)	35
<i>Young v. Key Pharms., Inc.</i> , 212 Wn.2d 216, 770 P.2d 182 (1989).....	33, 34

WASHINGTON ADMINISTRATIVE CODE

WAC 246-291-001.....	12
WAC 246-291-010.....	12
WAC 246-291-020.....	12
WAC 246-291-040.....	12
WAC 246-291-100.....	12
WAC 246-291-110.....	13
WAC 246-291-120.....	12
WAC 246-291-130.....	12

WASHINGTON STATE STATUTES

RCW 64.04.010	38
---------------------	----

WASHINGTON STATE CIVIL RULES

CR 56	34
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I. OVERVIEW

Respondents Frederick and Julie Gould (collectively "Gould") filed suit against Appellants Hong and Nanette Im (Collectively "Im") in April 2009. They claim that Im breached a Well Maintenance Agreement when, after receiving no response to a written notice, Im disconnected Gould's unoccupied home from a well located on Im's property. On summary judgment, the trial court held that Im was bound by and breached the Well Maintenance Agreement.

In a subsequent trial, which was exclusively for the purpose of determining the amount of damages proximately caused by this breach of contract, the trial court awarded Gould \$471,526. The substantial majority of the judgment (\$455,000) was based upon Gould's assertion that, had Im not disconnected the water in September 2007, Gould could have completed a remodel in progress and then listed, marketed and successfully sold the property in the balance of 2007 before the housing market correction that resulted from the economic downturn in 2008. After commencing a lawsuit in April 2009 to establish a right to connect to the well (a year and a half after the water was disconnected), Gould sold the property in 2010. The trial court accepted Gould's claim that they could have successfully sold

the home in 2007, beating the market change in 2008, and thus received \$455,000 more for the home. The trial court concluded that such damages were recoverable as consequential damages for breach of the Well Maintenance Agreement because they were foreseeable to Im when he disconnected the water.

Significantly, neither Im nor Gould are parties to the Well Maintenance Agreement that provides the sole basis for the breach of contract damages award.¹ The Agreement was signed only by a predecessor owner of both properties, now deceased, 16 years before Im purchased their property. Even more significant, the Well Maintenance Agreement does not describe the Im property upon which the well is actually located. Instead, the Agreement legally describes a wholly separate, adjacent parcel that Im also owns as the property that is burdened by the Agreement. The Agreement likewise was not expressly referenced in the statutory warranty deed through which Im was conveyed his property. Finally, though the Agreement provides that the beneficiary of the Agreement (the Gould property) is required to “pay a monthly charge . . . to share in electrical cost for operation of the well pump,” Im never received any payments or contributions to their electrical costs, nor did Gould offer to contribute to the costs.

¹ The Well Maintenance Agreement is at Clerk’s Papers (“CP”) 290-92.) For convenient reference, a copy of the Agreement is attached as Appendix A.

Despite that reformation is an extraordinary equitable remedy that may only be invoked following proof by clear, cogent and convincing evidence that the language used in the Agreement is a product of a mutual mistake, the trial court reformed the Well Maintenance Agreement on summary judgment. Though the only party to the Agreement is now deceased and could not testify, the trial court concluded that it could determine the “true intentions” of that party as a matter of law. The trial court deemed the entire and only legal description of the burdened property to be a “simple scrivener’s error.” (Verbatim Transcript of Proceeding (“VT”) 15.) She thus reformed the Well Maintenance Agreement to add Im’s separate parcel that is improved with the well (as well as Im’s homes connected to that well).

Of course, on summary judgment, the trial court was obligated to squarely place the burden of proof on Gould as the plaintiff and moving party. The trial court was also obligated to construe all facts and reasonable inferences in the light most favorable to Im. Despite this obligation, the trial court placed the burden of proof on Im. The court concluded that, because the Im well “has always been providing water to the Gould’s property,” summary judgment for breach of the Well Agreement should be granted. (VT 2-3.) The trial court seemed to reason that, following her finding that the Gould property had long

been connected to the Im well and the longtime connection established rights to continued use of the well, it was incumbent on Im to present substantial evidence that those rights were not derived from the Well Maintenance Agreement. The trial court explained her summary judgment ruling:

[T]he case was initiated as a breach of contract for Im turning off the water to a well that Gould had rights to. In granting summary judgment, the Court found no substantial evidence that existed to rebut that the Gould's had rights in the well. And clearly and logically, the Court in reforming the agreement was to make consistent with the evidence that was presented to the Court.

(VT 28-29.)

The trial court's decision not only contravenes the well-established summary judgment rules, it is contrary to the law regarding reformation. "Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but upon certainty of error. *Neal v. Green*, 71 Wn.2d 40, 42, 426 P.2d 485 (1967), quoting *Slater v. Murphy*, 55 Wn.2d 892, 898, 339 P.2d 457 (1959). "Where any doubt exists as to the intent of the parties, reformation will not be granted." *Maxwell v. Maxwell*, 12 Wn.2d 589, 591, 123 P.2d 335 (1942) (emphasis added). The intentions of the original drafter of the Well Maintenance Agreement were not beyond doubt and certainly were not proven with sufficient

evidence to be established on summary judgment as a matter of law. Im is aware of no Washington case in which reformation was granted on summary judgment. This case should not be the first.

The trial court's error did not end with its summary decision on reformation. The court not only rewrote the Well Maintenance Agreement on summary judgment, it also concluded, as a matter of law, that Im had knowledge that they were contractually obligated to allow Gould to connect to their well. The trial court ultimately concluded on summary judgment that Im knowingly breached the Well Maintenance Agreement and only the amount of damages caused by that breach remained to be litigated at trial.

The trial court made clear that breach of contract was the sole grounds for a damages award:

[I]t's true that the Goulds could only ask for damages that are consistent with the reformation of the agreement. In reforming the agreement, the Goulds have a right to have water to the property. And any damages that incur must be based on that right and not on something else. Here they're asking for damages for property that was damaged when they didn't get access to water for a well that Im turned off. (Emphasis added.)

(VT 29-31.) Following the trial, the court found that the \$455,000 awarded for unrealized sale proceeds were damages consequential to

Im's breach of the reformed Well Maintenance Agreement because those damages were foreseeable to Im when he disconnected the well.

The fact that the Gould property had been connected to the well on the Im property for several years may give Gould rights to draw from the well on legal grounds other than the Well Maintenance Agreement. However, such other grounds, if any, were not litigated in this action and were not the basis of the Gould's damages claim. The fact that the Gould Property had long been connected to the Im well does not establish, as a matter of law, that the Well Maintenance Agreement must be reformed to burden the relevant Im property and that disconnecting the well constitutes knowing breach of the reformed Agreement. Summary judgment was improper.

Even if Gould had a viable breach of contract claim, the damages awarded for lost sale proceeds are based on pure speculation. Moreover, the damages are not properly awarded as damages consequential to a breach of the Well Maintenance Agreement. The awarded damages (which flow from a market correction) were not reasonably foreseeable to the actual parties to the Agreement when the Agreement was drafted, which is the correct point in time that the court must evaluate foreseeability. In this case, the trial court did not even determine if the awarded damages were

foreseeable to the parties signing the Well Maintenance Agreement in 1991. There are no findings in this regard. Rather, the trial court improperly limited its foreseeability inquiry to a determination of damages foreseeable to Im at the time Gould's property was disconnected from the well. The damages award is unsustainable.

The summary judgment and subsequent final judgment are founded upon substantial errors. The judgments should be reversed and the matter should be remanded for a new trial on all issues.

II. ASSIGNMENTS OF ERROR AND RELATED ISSUES

A. Error Related To Summary Judgment /Liability.

Assignments of Error

1. Im assigns error to the trial court's decision to reform the Well Maintenance Agreement on summary judgment and hold that Im knowingly breached the agreement as a matter of law.

2. Im assigns error to the trial court's Findings of Fact numbers 2 through 13 and 20, and assigns error to Conclusions of Law numbers 2 through 5 and 10 through 12 to the extent they may be deemed factual findings. These findings and conclusions relate to the issues of liability, to include Im's knowledge at the time he disconnected the well, which issues the trial court decided on summary judgment.

Issues

a. Was it error to reform the Well Maintenance Agreement on summary judgment when Gould failed to establish by clear, cogent and convincing evidence that there was a mutual mistake of fact when the Agreement was drafted and it could be inferred from the evidence that the Agreement was drafted as intended rather than by mistake?

b. Was it error to find, as a matter of law, that Im knowingly breached the reformed Well Maintenance Agreement, when Im testified that he did not have knowledge of an agreement regarding the private well connected to his own home, he believed that the Agreement did not burden his improved residential property and he was informed that there was no evidence in the public records that his private residential well was approved to serve multiple residences as required by state and local law?

c. Was it error for the trial court to enter detailed findings of fact and conclusions of law regarding liability issues, when those issues were decided on summary judgment based upon written declarations and the court ordered Im to limit the presentation at trial to evidence on issues regarding damages? Regardless of error, must all Findings of Fact and Conclusions of Law related to liability issues be deemed superfluous and without prejudicial affect against Im?

B. Error Related To Damages Award.

Assignments of Error:

1. Im assigns error to Findings of Fact numbers 13 through 15, 21,25, 27 through 29 and Conclusions of Law numbers 14 and 17 through 19 to the extent they may be deemed factual findings.

Issues:

a. Was the trial court's damages award for sale proceeds lost due to the economic downturn impermissibly based upon speculation rather than proof from the substantial evidence in the record?

b. Was it reasonably foreseeable to the original parties to the Well Maintenance Agreement in 1991 that a consequence of breach of the Agreement would be lost sale proceeds flowing from an economic downturn and corresponding market adjustment?

c. May consequential damages for breach of contract be awarded when the trial court failed to make a finding that the awarded damages were a consequence of breach that was reasonably foreseeable to the original parties to the 1991 Well Maintenance Agreement?

C. Error Related To The Court's Finding Of Bad Faith And Willful Breach.

Assignments of Error:

1. Im assigns error to Findings of Fact numbers 10, 17, 19 through 20, 33 and Conclusions of Law numbers 6, 8 through 9, 15, 20 to the extent they may be deemed factual findings.

2. Im assigns error to the trial court's order in limine precluding Im from presenting evidence at trial regarding the circumstances surrounding and reasons for his decision to disconnect Gould's property from the well, to include evidence regarding his knowledge at the time the water was disconnected.

Issue:

a. Did the trial court err in finding that Im breached the Well Maintenance Agreement willfully and in bad faith, when the Agreement had to be reformed to apply to his property, and the trial court refused to allow Im to testify regarding his knowledge at the time he disconnected the water, but instead relied on written testimony and her factual finding on summary judgment?

D. Error Related To Gould's Failure To Mitigate.

Assignments of Error

1. Im Assigns error to Conclusions of Law 8, 13, to the extent it may be deemed a factual findings.

Issue:

a. Did Gould mitigate the damages flowing from a delayed sale (and claimed lost sale proceeds associated with the economic downturn) when Gould served their lawsuit on Im in October 2007, but delayed filing the lawsuit until April 2009, and made no effort to obtain injunctive relief?

III. STATEMENT OF THE CASE

A. Appellant Im And The Im Property.

Hong and Nanette Im own two parcels of real property in Union, Washington located at 10972 and 10970 East State Route 106. They purchased the property in May 2007. (CP 228-29, 232-34.) (A copy of Im's statutory warranty deed is attached as Appendix B.) One of the parcels, referred to as "Parcel 1" on Im's deed, is improved with two homes that are both served by a well and well house located on the same parcel. (CP 227, 276-77.) The other parcel, referred to as "Parcel 2" on the Im deed, is vacant. (CP 227.) A stream or creek traverses across the vacant Im Parcel 2 and is connected underground by a vertical PVC pipe (approximately ten inches in diameter) that, in turn, is connected to a four inch PVC pipe. (CP 227.) The configuration has been identified as a surface water well. (CP 227, 276.) A long-time neighbor in the community confirmed that the creek has historically been a water source for homes in the area. (CP 251.)

B. Respondent Gould And The Gould Property.

Frederick and Julie Gould also owned improved real property in Union, Washington located at 10971 State Route 106. They purchased the property in February 2006 (CP 282, 285-87.) The Gould property is located north and west of the Im property, on the opposite side of State Route 106. (See CP 188.)

C. The Im Home And The Gould Home Are Both Connected To The Unapproved Well On The Im Parcel 1.

Again, both dwellings on the Im Parcel 1 are connected to and served by the well on Parcel 1. (CP 227.) The evidence in the record establishes that the Gould home is also connected to the well on the Im Parcel 1 and has been for many years. (CP 250, 258.) A map of the relevant parcels annotated to show the approximate locations of the Gould home, the Im's primary residence and the well is attached as Appendix C.

Since the Im Parcel 1 well is connected to more than one single family residence, it is considered under current Health Department regulations to be a public community well referred to in the regulations as Group B Public Water System. (CP 218, VT 229. See also, WAC 246-291-010.) Such public wells require approval by the Health Department to ensure that the well meets Health Department standards. See WAC 246-291-001; .020, .040, .100, .120, .130.)

Interestingly, there is no record of either well on Parcel 1 or the surface well in the State Department of Ecology public records or the Mason County public records. (CP 262-67.) Likewise, there is no record that the well on Im Parcel 1 was ever approved as a public well. (CP 219, VT 229, 231.) The well is thus nonconforming and considered by the Health Department to be out of compliance with both State and Mason County regulations. (VT 231, 237.) Like the well on Parcel 1, there is no record that the surface water well on Im's Parcel 2 was ever approved as a residential water source; and a Health Department official testified that the configuration on the Im Parcel 2 does not currently Health Department standards for a residential water source. (CP 219. *See also*, WAC 246-291-110.) Thus, both the Im Parcel 1 and Im Parcel 2 have wells; one well is connected to multiple residences and neither well is certified by the government for use as a public, community well.

Both the Gould property and the two Im parcels were once owned by M.C. and Florence Davis court. (CP 257-58, 297-98.) Both are now deceased. (CP 257.) While there is no evidence in the record that Davis court ever sought the requisite approvals to use the well on Im Parcel 2 as a shared or community well, it appears that Davis court was nonetheless informed that connection of the well to more than

one home required government approval. Daviscourt was informed in writing by the Mason County Health Department in 1977 that only a private well serving a single residence was exempt from state and local regulations requiring agency approval. (CP 281.)

D. The Well Maintenance Agreement.

On May 8, 1991, Daviscourt recorded with the Mason County Auditor a Well Maintenance Agreement under Auditor File No. 526118. The Agreement is signed only by M.C. and Florence Daviscourt. The purpose of the Agreement is described as follows:

WHEREAS: each party hereto, on his/her own behalf and on the behalf of his/her heirs, successors, or assigns desire to collectively provide for future use, maintenance and repair of the well location on Parcel "B"

(CP 290.) Significantly, the legal description of "Parcel B" does not describe the Im Parcel 1 which is improved with their home and the connected house. Instead, "Parcel B" – the property that is expressly subject to the Well Maintenance Agreement – describes the vacant Im Parcel B. There is no dispute that the description of Parcel B on the Well Maintenance Agreement does not describe the property upon which the well connected to the Gould home is located. Gould submitted a declaration of a title officer who confirmed this undisputed fact. (CP 296-98.) The undisputed fact was further confirmed by a

licensed surveyor (who also identified the surface well located on Im Parcel 2) in a declaration submitted on Im's behalf. (CP 226-27.)

The Gould property (then owned by Daviscourt) is described in the Well Maintenance Agreement. (CP 297.) The Agreement states:

WHEREAS: the owners of Parcel "B" wishes to assign the owners of Parcel "A", described as follows:

Parcel A:

Patricia Beach Tract 47-A and Tidelands.

(CP 290.)

The totality of the "Well Agreement" itself is as follows:

1. It is agreed that the owners will have the right to draw water from said well for residential purposes only, to include normal lawn and yard irrigation.
2. Neither part [sic] shall interfere with the use of the well by the other, and in the event that at any time the supply of water from the well is not adequate for the use being made of it by all parties, then the water shall be divided equally between them.
3. All owners using the well shall be equally responsible for cost of repairs, maintenance and general upkeep of the well.
4. All owners shall have access upon Parcel "B" for the purpose of maintaining the pipeline from the well to the existing utility easement, which will be their sole responsibility.
5. The owners agree to pay a monthly charge to the Committee to share in electrical cost for the operation of the well pump, this charge is subject

to increase as allowed by Washington State Utilities Commission.

6. The Easement, together with the rights and obligations respecting maintenance shall run with the land and shall inure to and be binding upon their heirs, personal representatives, and assigns of the parties hereto.

7. This agreement may be modified only by written agreement of a majority of all parties hereto, or their heirs and assigns.

(CP 291.)

As noted earlier, the record reflects that the Gould home has been connected to the well on Im Parcel for several years. Predecessor owners of the Gould and Im Parcels (Cox and Burke) confirmed this fact. (*See* CP 248-51.) Notably, while both said they knew the well was connected to the Im Parcel 1 well, neither predecessor owner testified that they knew about the Well Maintenance Agreement or that they believed they had any rights or obligations pursuant to any written agreement or easement. Rather they only testified to understandings based upon conversations and verbal arrangements. (*Id.*)

The predecessor owner to the Im property (Burke) presented no testimony that they received payment for electrical costs from the owner of the Gould property or that they believed they were entitled to recover costs of maintenance and operations of the well. (*See* CP 248-

49.) The prior owner of the Gould property (Cox) testified that, based upon a verbal arrangement with Daviscourt, they made monthly payments toward electrical costs to Daviscourt. (CP 250-51.) Cox did not testify that he continued the practice of tendering monthly payments to subsequent owners after Daviscourt sold the Im property. (*Id.*) No owners of either the Gould property or the Im property (or anyone else) testified about any Committee setting or collecting monthly charges amounts as required by the Well Maintenance Agreement. Again, not one of the respective property owners testified that they were even aware of the Well Maintenance agreement. Their stated understandings are based on no more than their knowledge that the Gould well was physically connected to the Im Parcel 1 well, verbal conversations, informal arrangements and anecdotal information.

E. The Well Maintenance Agreement Which Purports To Burden Only The Vacant Im Parcel 2 Was Not Expressly Referenced In The Im Statutory Warranty Deed.

The statutory warranty deed through which Im took title to both the improved Parcel 1 and the unimproved Parcel 2 (CP 232-34) is attached as Appendix B. Though the deed contains general language that “[t]his conveyance is subject to covenants, conditions, restrictions and easement, if any, affecting title which may appear in the public

record, including those shown on any recorded plat or survey,” the Well Maintenance Agreement is not expressly referenced anywhere in the deed. The deed does provide that, along with the actual parcels, Im was conveyed the benefit of a 1978 non-exclusive, 60-foot easement for ingress, egress and utilities. (CP 232-33.) However, no other easement is referenced. Once again, the Well Maintenance Agreement itself only purports to burden the unimproved Im Parcel 2. Thus, there is no well covenant or easement in the publicly recorded records that identify or describe the Im Parcel 1. Thus, the Well Maintenance Agreement is not a covenant or easement of record against the Im Parcel 1.

Im purchased both parcels from Frank and Elizabeth Burke. Burke provided a Seller’s Disclosure statement for the property that contained conflicting information. (CP 236-40.) In the section regarding title, Burke stated that there were no “rights of way, easements or access limitations that may affect Buyer’s use of the property.” (CP 236.) However, Burke stated that there are “written agreements for joint maintenance of an easement or right of way,” and notated by hand “Road, Well.” (*Id.*) In the section regarding water, Burke represented that that source of the water for the property is a “private well serving only the subject property.” (CP 237.) In response

to the form question “If shared, are there any written agreements?” Burke responded that he did not know. (*Id.*) Burke did not respond to the form question: “Is there an easement (recorded or unrecorded) for access and/or maintenance of the water source?” In the section addressing “common interests,” Burke wrote “Shared Well” in response to the form question “are there any shared ‘common areas’ (facilities such as walls, fences, landscaping, pools, tennis courts, walkways, or other areas co-owned in undivided interests with others)?” (CP 239.)

Burke’s disclosures were inconsistent and confusing. Perhaps the disclosures could have led to discovery of the Well Maintenance Agreement. That discovery, however, would have only confirmed Burke’s affirmative representation that the well on 1m Parcel 1 is a “private well serving only the subject property,” since the Well Maintenance Agreement described the 1m Parcel 2 as the property as the only property burdened by the Agreement. In any event, 1m testified that he was not aware of the Well Maintenance Agreement when he purchased his property. (VT 218.)

1m has never received payments from Gould or anyone else toward the electrical costs incurred to operate the well. (CP 230, VT 199.)

F. The Gould Statutory Warranty Deed States That Gould's Property Is "Subject To" The Well Maintenance Agreement.

The statutory warranty deed through which Gould received title to their property (CP 285-87) does not purport to convey a well easement. The deed does provide the described conveyed property is "subject to" certain expressly identified "special exceptions." Those special exceptions to title to the Gould property include the following:

7. Well Maintenance Agreement executed by and between parties therein named upon conditions therein provided, including its terms, covenants and provisions, dated May 8, 1991, recorded May 8, 1991, under Auditor File No. 526118

a. Said agreement includes, but is not limited to, sharing costs of maintenance and improvements.

(CP 287.) It does not appear that Gould was aware of the Well Maintenance Agreement or that it may confer him any rights, since he was not able to describe or produce it to Im until well after the dispute arose, and only then after requesting a realtor to research the issue. (See CP 283-85, 294-95.)

G. The Dispute Between Im And Gould.

Im did not discover that the Gould home was connected to his well until August 2007. When he did, he attempted to contact Gould. Gould did not occupy the home, but it was being remodeled and there were contractors on the site. (CP 283, 293.) Im approached Gould's

contractor on August 12, 2007 and expressed concerns “about paying the water bill for the Gould’s home.” (CP 293.) The contractor responded that he was “sure there was an easement” and promised to “look into it.” (*Id.*) Though Im provided the contractor with his phone number, neither the contractor nor Gould contacted Im to further address Im’s concern. (CP 293-94.) Thus, on August 14, 2007, Im wrote directly to Gould:

My name is Hong Im. I am the current owner of the lot directly across the street from your property on Highway 106. Mine is the fenced property with two blue houses. I have been trying to get hold of you through your workers without success. For the last three months, I have not been using our well house. However, I have been receiving an electric bill related to the use of the pump at our well house. I noticed that your water system is connected to our well. I went to Mason County to do a search for any type of maintenance agreement. What I found was that the well to which I am referring is a private well, not a community well. We are the only legal users of this well.

Please let me know as soon as possible how you would like to proceed. I am currently still paying for the upkeep and the electric bills. If I don’t hear from you by the end of August, I will shut off the connection to your home. (Emphasis added.)

(CP 289.) Im’s objective was to communicate directly with Gould to address the issue person-to-person. (VT 219, 261.) Im provided Gould with his contact information to facilitate that communication. (CP 289,

VT 219, 261.) Gould confirmed that he received the letter around the same date. (CP 283.)

Gould did not contact Im to respond to the letter, but instead discussed the letter with his contractor on August 20, 2007. (CP 294.) While the contractor assured Gould that he would be “researching the well issue,” the record does not reflect that either Gould or the contractor made any further contact with Im at that time. Gould did not contact Im before the end of August, even though Im had expressly advised that he intended to disconnect the well from Gould’s home in the absence of an acceptable response.² (VT 252, 216-17.)

On September 6, three and a half weeks after the contractor told Im he would “look into it,” the contractor finally contacted a real estate agent to investigate whether Gould had an easement to use Im’s well. (CP 294.) The contractor still had no answers at that time, but the realtor agreed to “pull title to see what easements were on the Im property and the Gould property regarding a water well.” (*Id.*)

² In the declaration submitted on summary judgment, Gould makes no mention of any efforts to even try to contact Im to address the issue. (*See* CP 282-83.) At the trial, Gould first testified that he was unaware that Im would disconnect the water if he did not pay for the well’s electrical bill and he never intentionally failed to pay for electrical costs. (VT 185-86, 191.) Only when confronted with his own sworn declaration (VT 192, Trial Ex. 8) to which he attached Im’s August 14, 2007 letter (attachment D) and in which he testified he received the letter (¶ 6), did Gould testify that he attempted to contact Im. Gould then testified that he believed he tried to contact Im several times, but did not “exactly remember correctly all the details.” (VT 198.) Gould acknowledged that he never spoke with Im until after the water was disconnected. (VT 198-99.)

Having received no response to his August 14, 2007 letter, Im disconnected the Gould's house from his well on or around September 10, 2007. (CP 284, 294, VT 261, 251.) Gould's contractor reconnected the water to the well and, on or around September 17, 2007, frustrated that the contractor reconnected the water without a response to his letter, Im once again disconnected the Gould's home and posted the following message on Gould's door.

Well across the street is private. See county records. Do not trespass on our property to access well house. Mason County Sheriff has been informed. Hong 253-532-xxx. I am taking legal action against the general contractor.

(CP 294.) Finally, the contractor responded and called Im. Im told the contractor that he disconnected the water because Gould failed to respond. (*Id.*) It was not until the next day that the contractor learned about and obtained a copy of the Well Maintenance Agreement. (CP 295.) At no time prior had Gould claimed a right to use the Im's well under the Well Maintenance Agreement.

Only after tensions came to a peak and the water was turned off, did Gould finally contact Im to respond. Frederick Gould is a lawyer and owns a property management and real estate investment company. (VT 184.) When he contacted Im, it was not for the purpose of discussing or considering Im's concerns. Rather, he called Im

merely to announce that he was lawyer and that his retained lawyer would contact Im in ten minutes. (VT 252, 264.) Gould's lawyer did call within ten minutes and threatened that, if Im did not reconnect the water they would file suit. (*Id.*) Gould's lawyer also sent a written communication to Im stating a lawsuit would be filed and temporary restraining order would be sought if Im did not reconnect the water. (Trial Ex. 9.) Im did not perceive these belated communications as an effort to cooperatively address the situation or to consider or even listen to his concern; he just felt he was being threatened. (VT 264.) The parties were at an impasse.

H. Gould Served Im With A Lawsuit in October 2007, But Did Not File Suit Or Pursue Judicial Intervention Until April 2009.

Gould served Im with a lawsuit on October 23, 2007. (CP 332.)

The action appeared to be more of a threat than an earnest effort, however – the year came to an end and the lawsuit still was not filed. The absence of further action by Gould created the appearance that he was abandoning pursuit of his claimed right to connect to the Im Parcel 1 well. Abandonment would be consistent with the fact the Well Maintenance Agreement upon which Gould relied to assert a legal right to connect the well on Im Parcel 1 did not describe the property as would be necessary for the Agreement to burden the property.

Abandonment of the claim would also be consistent with the fact that the well did not have the requisite community well approvals.

On April 20, 2009, eighteen months after the dispute arose and the Summons and Complaint was served, Gould finally filed the lawsuit. (CP 322, VT 203.) Quickly thereafter, on June 15, 2009, Gould filed a motion for partial summary judgment. (CP 313, VT 203.) Gould's delay in filing suit is remarkable, since the bulk of the damages claimed at trial were based on Gould's assertion that, if he had the opportunity to reconnect with the well sooner, he would have sold the house in 2007 and received a substantially higher sales price (\$455,000) than he did when he finally sold the house in 2010. (See CP 23, Findings 21, 31, Conclusion 19.) He claimed he could have listed and sold the home for \$1.6 million in 2007. (VT 189, 150.) Without listing or marketing the property on the open market, Gould sold the home in 2010 for \$1.1 million. (VT 140.)

When it was brought to Mr. Gould's attention that, despite serving Im with a Summons and Complaint, he did file the suit or seek an injunction after he reached an impasse with Im in September 2007, Gould responded:

Well I hired a lawyer. And so I would say he never asked for an injunction.

(VT 203.) Notably, Gould also testified that he was not personally involved in efforts to obtain alternative water sources. He left that to the contractor and others to address the issue for him. (VT 201.) It would appear that it is Gould's normal practice to hire others, to include attorneys, to address issues and represent his interests, rather than address issues directly. (VT 206.)

When questioned about the delay by his own attorney, Gould testified:

Q Mr. Gould, with your history and experience, do you ever rush into court?

A No.

* * *

Q And – and is it fair to say that you – you have a busy life, and your attention was not focused on the Highway 106 property?

A Yes.

(VT 189.) Later Gould testified on the issue:

I was very busy. I was dealing with some pretty serious health issue for myself. My wife was very sick, my mother was very sick.

* * *

As I said, I was dealing with – I had some pretty serious health problems. My wife was very sick. My mother was very sick. And I was dealing with a recession. Like all business owners, I was scrambling to find ways to retain my employees and I was very busy in my professional life.

(VT 206.) Gould offered no explanation why those factors would interfere with his lawyer acting on his behalf to seek injunctive relief, but would have not interfered with his ability to pursue completion of the remodel and listing and marketing the home for sale.

Gould testified by declaration in the summary judgment proceeding that he retained the contractor to start the remodel in June 2007 and ready the home for sale that year. (CP 283.) The contractor submitted testimony and invoices at trial, however, for the purpose of establishing that Gould invested approximately \$875,000 to remodel this vacation home over and above the 2006 \$960,000 purchase price.³ (VT 69, 71, 199-200, Trial Ex. 10, CP 282, 285.) That testimony established that, in reality, the project had commenced much earlier, in February 2006. (VT 69, Trial Ex. 10.) The landscaper similarly testified that he began work around February 2006. (VT 98.) Thus, by the time the dispute arose with Im in September 2007, the project had extended over a period of 19 months. Again, Gould testified that he had “a busy life” and his “attention was not focused on the Highway 106 property.” (VT 189.) That testimony and the true pace of the remodel belie Gould’s claim that the only obstacle to marketing the home in 2007 was the water dispute with Im.

³ (VT 199-200).

I. **Regardless Of The Well Issue, Completion, Listing And Successful Sale Of The Home In 2007 Was Highly Uncertain.**

When Im disconnected the water on September 17, 2007, the remodel was not complete and the Gould home was not ready to market for sale. (VT 93.) The contractor testified that, until the water was disconnected on September 17, it was his goal to have the remodel construction complete by the end of September. (VT 93-94.) The invoices submit at trial, however, establish that the goal would not have been achieved. The Gould home was reconnected to the Im well after the summary judgment order was entered by the court in 2009. (CP 215-17; Trial Ex. 10 (11/25/09 invoice.) Assuming the well was reconnected the same month as the invoice, the subsequent invoice reveals that the contractor's work was not completed until approximately two months after the well was reconnected. (Trial Ex. 10 at 11/25/09 invoice and 1/27/10 invoice.) Of course, if the well was reconnected prior to the invoice month, the evidence establishes that it took even longer for the contractor to complete the remodel. Perhaps the remodel would have been completed and ready for listing by yearend. The evidence cannot support a conclusion that the home would have been completed, listed, marketed and sold in 2007.

J. The Trial Court Reformed The Well Maintenance Agreement On Summary Judgment To Burden The Im Parcel 1 And Found, As A Matter Of Law, That Im Breached The Reformed Agreement.

Shortly after the lawsuit was filed, Gould moved for partial summary judgment. (CP 313.) Gould's claim that they are entitled to connect to and draw from the Im well was exclusively founded on the Well Maintenance Agreement. They did not assert or present evidence to establish rights in the Im well on any other theory. (CP 301-12.)

Though not until the end of their motion, Gould admitted that the legal description of the property to be burdened by the Well Maintenance Agreement did not describe the Im Parcel one where the well is located. (CP 310-11, 297.) Thus, court revision of the Well Maintenance Agreement through reformation to make the Agreement actually apply to the Im well was an absolute prerequisite to prevailing on the breach of contract claim.

The trial court granted the summary judgment. (CP 215-17.) When the ruling was announced, the court stated that the evidence it found "particularly critical" was the evidence that the Gould home had been connected to the Im well for a long time and the seller disclosure statement, which stated on one of the pages that there was a shared well. (VT 1-3.) Based on this evidence, the trial court granted summary judgment, reformed the Well Maintenance Agreement and

held that only the amount of damages from the breach of contract would be determined at trial. (VT 3.)

In a later proceeding, the trial court clarified that it determined that incorrect legal description in the Well Maintenance Agreement was a “simple scrivener’s error” and exercised its “inherent equitable powers” to reform the Agreement. (CP 15.) The court explained its analysis of the evidence presented and ultimate conclusion:

[T]he case was initiated as a breach of contract for Im turning off the water to a well that Gould had rights to. In granting summary judgment, the Court found no substantial evidence that existed to rebut that the Gould’s had rights in the well. And clearly and logically, the Court in reforming the agreement was to make consistent with the evidence that was presented to the Court.

(VT 28-29.)

Finally, the Court explained the effect of this ruling on the scope of recoverable damages.

[I]t’s true that the Goulds could only ask for damages that are consistent with the reformation of the agreement. In reforming the agreement, the Goulds have a right to have water to the property. And any damages that incur must be based on that right and not on something else. Here they’re asking for damages for property that was damaged when they didn’t get access to water for a well that Im turned off.

(VT 29-31.)

K. Following Trial A Trial Limited To The Issues Of Damages And Willfulness, The Trial Court Entered Judgment Against Im In The Amount Of \$471,526.

At the start of trial, in response to a motion in limine by Gould to narrowly limit the testimony to be presented at trial (CP 145-48), the court further clarified the breadth of its summary judgment ruling. For the first time, the court advised that it not only found that Im breached the reformed Well Maintenance Agreement, after “reconciling all the evidence, it also found that Im knowingly breached the Agreement:

So in making its order for summary judgment, the Court included the issues of knowledge on behalf of Mr. Im and would have had to when you look at the entire case. It's not logical no to have looked at it. And the Court did in fact look at it. And in fact in reconciling all the evidence the Court remembers distinctly getting the seller disclosure and remembers that in the seller disclosure form...

So in looking at all the evidence, the Court obviously looked at the issue of knowledge.

(VT 57-58.)

The trial court thereafter held that it would not allow Im to present evidence that might be deemed in the scope of evidence or redundant with the factual subject matter considered on summary judgment, to include evidence regarding Im's knowledge at the time he disconnected the water. The trial court stated that whether Im willfully breached the Well Maintenance Agreement was still an issue before

the court; and it would entertain evidence on that issue. However, even if relevant to willfulness, the court would not entertain testimony if it was redundant in any way within evidence it “heard” on the summary judgment motion. (VT 54, 58, CP 135-36.) The court stated: “As to damages being willful, some of the evidence the Court I believe has already heard in regards to its motion.” (VT 58.)

For example, though testimony from Burke regarding the conflicting information on seller’s disclosure statement and information communicated to Im would be relevant to whether Im willfully breached the Agreement, the trial court stated that it would not allow testimony regarding the seller’s disclosure statement because it already considered the disclosure statement on summary judgment. (VT 54, 58.) The trial court thus would not even allow Im to call Burke as a witness. (VT 54, 58, CP 135-36.) In effect, if declaration testimony regarding a topic was presented in the summary judgment proceeding, the trial court considered the matter closed. Even though evidence may be relevant to issues other than liability, the court did not want testimony at trial if the court already “heard” the evidence through the summary judgment written testimony.

Following the trial, the court awarded Gould damages in the amount of \$471,526. The damages are comprised of \$455,000 for

the difference between the expected sale price in 2007 and the actual sale price in 2010, \$15,928 for replaced landscaping and \$598 for the cost to reconnect the well. (CP 27, Conclusion 19.)

ARGUMENT

A. The Trial Court Improperly Reformed The Well Agreement On Summary Judgment.

1. Standards of review.

Though the summary judgment standards are well-known to this Court, they are central to this appeal and worthy of discussion.

An appellate court reviews an order granting summary judgment de novo and engages in the same inquiry as the trial court. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Schmitt v. Langenour*, 162 Wn. App. 371, 404, 256 P.3d 1235 (2011). “A ‘material fact’ is one on which the outcome of the litigation depends, in whole or in part.” *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974).

A defendant moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young v.*

Key Pharms., Inc., 112 Wash.2d 216, 225, 770 P.2d 182 (1989). Under CR 56(e), affidavits and declarations must set forth facts admissible in evidence that are made on personal knowledge. *Stenger v. State*, 104 Wn. App. 393, 409, 16 P.3d 655 (2001). Thus, the affidavits that do not state specific facts, make conclusory statements, or are based on hearsay or speculation cannot support a summary judgment; and such statements in summary judgment affidavits must be discarded as surplusage. *Id.*; *Washington Public Utility System v. Public Utility Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 18, 771 P.2d 701 (1989).

On summary judgment, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). Questions of fact may only be determined as a matter of law when reasonable minds could reach but one conclusion. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). If reasonable minds can differ, the question of fact is reserved for the trier of fact and summary judgment is not appropriate. *Id.*

2. **Whether a contract should be reformed to reflect the parties' true intentions is a fact-intensive question which carries a high burden of proof.**

Of course, the most basic tenant of contract interpretation is that the court should construe the words actually used in the written agreement. Evidence outside the written agreement should only be considered if the language in the agreement is ambiguous. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Extrinsic evidence should not, however, be applied to change or modify the terms of the written contract. *Id.* In interpreting a contract, the court must determine and give effect of the intent of the parties. As a general rule, the parties' intentions are considered questions of fact. *Wm. Dickson Co., v. Pierce County*, 128 Wn. App. 488, 491, 116 P.3d 409 (2005). A court may only interpret contract terms as a question of law when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable interpretation can be drawn from the extrinsic evidence used. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Where intent is unclear, summary judgment is improper. *Washington Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 329, 635 P.2d 138 (1981).

In light of the basic rule that the words used in a contract should be interpreted, but not changed, it is understandable that courts deem the remedy of judicial reformation – judicial rewriting of a contract – an extraordinary remedy.

“Reformation is an equitable remedy which permits the court to correct errors and thereby make an instrument truly express the real intention of the parties thereto.” *J.J. Welcome & Sons Const. Co. v. State*, 6 Wn. App. 985, 988, 497 P.2d 953 (1972) (citing *Keierleber v. Botting*, 77 Wn.2d 711, 466 P.2d 141 (1970)).

In order to entitle a party to a contract to a reformation thereof, based upon mistake of fact, there must have been either a mutual mistake of the parties, or a mistake on the part of the one entrusted with reducing the contract to writing (sometimes classed as a mutual mistake), or a mistake on the part of one party and fraud or inequitable conduct on the part of the other party.

Id. “The court may reform a contract so that it expresses the real intention of the parties if it finds that the parties were mutually mistaken in their understanding of a material term or that one of the parties was mistaken and the other party acted fraudulently or inequitably.” *Rolph v. McGowan*, 20 Wn. App. 251, 255, 579 P.2d 1011 (1978).

The party seeking reformation has the burden of proving the mutual mistake and must show clearly that the parties to the transaction have an

identical intention as to the terms to be embodied in the deed or instrument and that the deed or instrument is materially at variance with that identical intention.

Keierleber v. Botting, 77 Wn.2d 711, 715-16, 466 P.2d 141 (1970) (emphasis added).

“Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error.” *Neal v. Green*, 71 Wn.2d 40, 42, 426 P.2d 485 (1967) (quoting *Slater v. Murphy*, 55 Wn.2d 892, 898, 339 P.2d 457 (1959)). “The evidence of the mistake must be clear, cogent and convincing.” *Id.* (citing *Kessinger v. Anderson*, 31 Wn.2d 157, 168, 196 P.2d 289 (1948); *Kincaid v. Baker*, 66 Wn.2d 550, 403 P.2d 888 (1965)). “Clear, cogent, and convincing evidence is a quantum of proof that is less than ‘beyond a reasonable doubt,’ but more than a mere ‘preponderance.’” *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 562, 242 P.3d 936 (2010) (quoting *Davis v. Dept’t of Labor & Indus.*, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980)). “Where any doubt exists as to the intent of the parties, reformation will not be granted.” *Maxwell v. Maxwell*, 12 Wn.2d 589, 591, 123 P.2d 335 (1942) (emphasis added).

3. The facts in this case do not support reformation, much less reformation on summary judgment.

In this case, Gould asserts that, though the Well Maintenance Agreement describes the burdened property as the Im Parcel 2, DAVISCOURT did not intend to burden the property actually described. Instead, Gould argues that DAVISCOURT intended the Agreement to burden a wholly different parcel of property that is not described anywhere in the Agreement. Gould asked the trial court, as a matter of law, to rewrite the Well Maintenance Agreement to place a heavy burden on the Im parcel 1.⁴

To support the request for reformation, Gould submitted declarations of prior owners of the Im and Gould property (Cox and Burke) as well as two neighbors (Harm). (*See*, CP 248-55.) Though all of these witnesses testified that they knew the Gould well was connected to the Im well, not one of these witnesses testified that they were even aware that the Well Maintenance Agreement existed, much less that they had any personal knowledge of the DAVISCOURTS' intent when the Agreement was signed in 1991. *Id.*

⁴ The legal description of the property burdened by an easement is not an insignificant term of an easement agreement. To satisfy the statute of frauds, an easement must describe a specific subservient estate. *Berg v. Ting*, 125 Wn.2d 544, 549, 886 P.2d 564 (1995); RCW 64.04.010. This requirement is absolute. *Id.* The legal description must be sufficiently definite to locate the property without recourse to oral testimony. *Id.* at 551. Without a complete description of the burdened property, a written easement agreement will be deemed void and unenforceable. *Id.*

Gould also presented a declaration of Daviscourt's son, John Daviscourt. (See CP 257-58.) He too testified that he was aware that the Gould home was connected to the Im well. He further summarily testified: "it was always my parent's plan and intention that the well now on the Im's property be a source of water for both the Gould and Im properties." (CP 258) Beyond his knowledge that the Gould home was connected to the Im well, J. Daviscourt did not testify how he knew about any "plan" or demonstrate that his understanding was based on personal knowledge of any actual "plan," as opposed to his mere assumption that his parents had a plan with regard to future use of the well. More significant, however, is the complete absence of testimony that J. Daviscourt had any knowledge whatsoever of the Well Maintenance Agreement before this dispute, much less when it was written and recorded in 1991.

J. Daviscourt's testimony with regard to the Agreement itself is very limited. He testifies that the date of the Well Maintenance Agreement coincides with the time his parents decided to sell the Gould property. (CP 258.) He also testifies that he is certain that the signatures on the Well Maintenance Agreement are those of his parents. (*Id.*) J. Daviscourt does not testify that he was previously aware that his parents prepared any written agreements regarding the

Im well at all, much less this particular Agreement. It would appear (or at the very least it is reasonable to infer from the testimony) that, like the previous property owners, J Daviscourt was aware of no more than the fact that the Gould home was connected to the well.

J. Daviscourt had no knowledge of the Agreement at the time it was written and perhaps was even without knowledge of the Agreement until this dispute arose. J. Daviscourt certainly does not demonstrate sufficient personal knowledge to attest to his parents' intent when they wrote and signed this Well Maintenance Agreement, much less that the legal description his parents chose to place on the Well Maintenance Agreement was a simple scrivener's error.

The declarations submitted by J. Daviscourt, the prior owners (Cox and Burke) and the neighbors (Harm) are riddled with hearsay and conclusory statements that are without a foundation to establish that the statements are made on personal knowledge; the conclusory statement are certainly not supported by specific facts. (*See* CP 248-58.) As such, the testimony does not qualify for consideration on summary judgment and be discarded as surplusage. *Stenger*, 104 Wn. App. at 409; *Washington Public Utility System*, 112 Wn.2d at 18. Even if considered, the declarations lack testimony of knowledge of the Well

Maintenance Agreement that is at the core of Gould's claim. Their testimony cannot support reformation.

Goulds evidence to support their claim that Davis court intended something other than was actually written is no more than the following. The Well Maintenance Agreement describes the Gould property as the benefited property. The Gould property has long been connected to the Im Well. It should thus be inferred that Davis court did not intend to describe the Im Parcel 2 as the burdened property, but simply made a mistake, a scrivener's error. The evidence is insufficient to establish Davis court's "true intent" and an associated drafting mistake by clear, cogent and convincing evidence and certainly insufficient to establish that reformation is warranted as a matter of law.

It may reasonably be inferred from the evidence that the Well Maintenance Agreement was written exactly as intended. The Agreement itself, which very clearly and accurately describes the Im Parcel 2, evidences an intent contrary to the one Gould advocates. Evidence was also presented by a licensed surveyor that the Im Parcel 2 contains a surface well. (CP 227.) Though not currently approved

for connection,⁵ there is no evidence that it could not have been approved for connection in 1991 or that Davis court did not pursue such an approval. Pursuit of an alternate water source for the Gould property would certainly be consistent with the testimony that the water draws from the Gould property sometime caused insufficient water to serve the homes on the Im Parcel. (CP 255.)

That Cox (the former owner of the Gould property that took title directly from Davis court) was not aware of the Well Maintenance Agreement is also evidence that the Agreement was not intended to apply to the Im Parcel 1 well. Cox testified that he contributed to the well's electrical costs based on an informal verbal arrangement with Davis court, and makes no mention of the Well Maintenance Agreement. (CP 251-52.) He offered no testimony that he continued payments after Davis court sold the Im property, or that subsequent owners claimed a right to payments pursuant to the Agreement. It can be inferred from all this evidence, that the Well Maintenance Agreement was not intended to perpetually burden the Im Parcel 1, but intended to address a potential connection to a well on the Im Parcel 2. Such a connection may not have come to bear, but one cannot conclude with certainty from the evidence that Davis court intended to

⁵ Recall that the well on Im Parcel 1 also does not have the requisite government approval to serve as a shared community well.

describe the Im Parcel 1 in the Well Maintenance Agreement. Again “[w]here any doubt exists as to the intent of the parties, reformation will not be granted.” *Maxwell*, 12 Wn.2d at 591.

4. The court improperly found on summary judgment that Im knowingly breached the reformed Well Maintenance Agreement.

The trial court not only reformed the Well Maintenance Agreement on summary judgment, but it also summarily found that Im knew that the Agreement applied to the Im Parcel 1 well and knowingly breached the reformed Agreement when he disconnected the water. (VT 57-58.) Of course, Im’s testimony was that the Agreement applied only to his vacant Parcel 2. The factual issue of knowledge was disputed. Summary judgment is improper where, even though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts, such as intent or knowledge or good faith. *Matter of Wahl's Estate*, 31 Wn. App. 815, 817, 644 P.2d 1215 (1982); *Preston v. Duncan*, 55 Wn.2d 678, 681-682, 349 P.2d 605 (1960). The court’s summary decision on this issue was error.

5. The trial court’s findings of fact and conclusions of law related to issue of liability decided on summary judgment are superfluous and with effect.

Though the court decided all issues of liability on summary judgment, to include that Im’s breach was knowing, it entered detailed

Findings of Fact and Conclusions of Law on those issues. (See, CP 15-28, Findings 2-13, 20, Conclusions 2-5, 10, 12.) The function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. It is not, as appears to have happened here, to resolve issues of fact or to arrive at conclusions based thereon. *Duckworth v. City of Bonney Lake* 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978). Consequently, the findings of fact and conclusions of law entered on liability issues are superfluous and may not be considered to the prejudice of the Im. *Id.*

6. This court should remand for a new trial on all issues.

Im argues below that, separate from the court's improper summary judgment ruling, the damages awarded are improper. Regardless of the this court's ruling on the damages issues, if the summary judgment is reversed, the matter should be remanded for a new trial on all issues, to include damages.

A limitation of issues on retrial should only be imposed where the issue to be retried is so distinct and separable from the other issues that a trial of that issue alone can take place without injustice or complication. *Lahmann v. Sisters of St. Francis of Philadelphia*, 55 Wn. App. 716, 724, 780 P.2d 868 (1989); *Cramer v. Bock*, 21 Wn.2d 13, 17-18, 149 P.2d 525 (1944); *Holt v. Nelson*, 11 Wn. App. 230,

243, 523 P.2d 211 (1974). When a theory of liability is yet unresolved, and the evidence to establish the theory will explore other relevant issues a partial remand is not appropriate. *Id.*

In this case, the issues of liability and damages are not clearly and fairly separable, especially since the trial court held that its decision on damages would be influence by its findings on willfulness or bad faith. (VT 57-58.) The trial court also indicated that it would rely on written summary judgment declarations, without allowing additional oral testimony, with regard whether Im's breach of the reformed Well Maintenance Agreement was knowing. (VT 54, 57-58. CP 135-36.) This alone renders the trial court's trial findings on willfulness and bad faith improper, because the court refused to allow Im to present testimony on this issue, but instead relied on abbreviated written testimony where assessment of witness credibility is not feasible. In any event, where culpability and damages are interwoven, bifurcation is not appropriate. *Myers v. Boeing Co.*, 115 Wn.2d 123, 146, 794 P.2d 1272 (1990). This court should reverse the summary judgment order and remand for a new trial on all issues.

B. The Damages Awarded Are Not A Reasonably Foreseeable Consequence Of Breach And Are Improperly Based On Speculation And Are Not Supported By The Substantial Evidence.

1. Lost sale proceeds due to the economic downturn were not reasonably foreseeable when Davis court signed the Well Maintenance Agreement and are not recoverable for breach of contract.

Generally, the measure of damages for breach of contract is that the injured party is entitled to recovery of all damages naturally accruing from the breach, and to be put in as good a position as he would have been in had the contract been performed. *Northwest Land & Inv., Inc. v. New West Federal Sav. and Loan Ass'n*, 57 Wn. App. 32, 43, 786 P.2d 324 (1990); *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984). Said more simply, the plaintiff is entitled to the benefit of his bargain, that is, whatever net gain he would have achieved. *Northwest Land & Inv.*, 57 Wn. App. at 43; *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957). "Damages for breach of contract in this state can be recovered only for such losses as were reasonably foreseeable by the party to be charged, at the time the contract was made." *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 6, 390 P.2d 677 (1964). *See also*, *Lewis v. Jensen*, 39 Wash.2d 301, 235 P.2d 312 (1951).

Here there is no evidence in the record to support a finding that the extraordinary damages flowing from an economic down turn that occurred very soon after the water was disconnected were reasonably foreseeable to Daviscourt when they signed the Well Maintenance Agreement. Such an inquiry is particularly important here, where Im was not even a party to this Agreement that was written 16 years before he purchased the property. The critical inquiry was not made at trial, however. The court did not even address the parties' expectations at the time of contract in the Findings of Fact and Conclusions of Law. (See CP 15-28.) There are findings and conclusions regarding what was foreseeable to Im at the time he disconnected the well in light of the ongoing remodel, but none with regard damages foreseeable to Daviscourt in 1991. (*Id.*)

Conclusions of law are reviewed *de novo* to determine if they are supported by the findings of fact. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002). There are no findings on the requisite element of foreseeability. The trial court's conclusions that Gould is entitled to recover "expectation interests and consequential damages as a result of defendant's breach" (CP 27, Conclusion 17), to include lost proceeds flowing from the economic downturn (Conclusion 19), are not supported by required findings. Even if there were

findings with regarded damages foreseeable to Davis court at the time of contract, there is no evidence in the record to support them.

Finally, at the start of trial, the court also stated that it deemed willfulness to be relevant to its damages determination. (VT 57-58.) It is unclear why the court would consider willfulness relevant to the measure of consequential contract damages, when such damages should be based upon the parties' expectation at the time of contract, rather than the motives, expectations or behavior at the time of breach. Of course it has long been the rule in Washington that punitive damages are not allowed unless authorized by statute. *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 Pac. (1891).

The trial court's findings regarding willfulness and bad faith flowed from improper consideration of and reliance upon incomplete written summary judgment testimony, rather than live testimony at trial, and are improper. Regardless, the trial court should not have allowed its perception of the nature of Im's conduct influence the amount or type of damages awarded. The damages award is not supported by the facts or the law and improperly focuses on Im's motives rather than consequences of breach foreseeable at the time of contract.

2. **Lost sale proceeds due to the economic downturn are improperly founded on speculation.**

The trial court awarded Gould \$455,000 for “the difference between the \$1,555,000 expected sale price in 2007 and the \$1,110,000 sale price in 2010.” (CP 27 at Conclusion 19.) This award is based upon testimony from realtors that there was “a bit of a fever going on in 2007” that allowed for a greater number of sales at higher prices in 2007. (VT 174.) That fever was dissipated in 2008. Realtor testimony was presented that in 2005 the Hood Canal area had one \$1 million-plus waterfront home sale, two in 2006, seven in 2007, one in 2008, none in 2009 and one in 2010 (Gould’s home). (CP 22 Finding 25, VT 173-74.) Thus, 2007 was an anomaly year for such home sales in the Hood Canal area.

Gould essentially argues that Im’s breach of the reformed Well Maintenance Agreement deprived Gould of the benefit of that anomaly year. The damages are based on the testimony of Gould’s realtor testified that, based on the sales experience in 2007, he was reasonably certain that he could have sold the Gould home for \$1.6 million in the fall of 2007. (VT 150.) Setting aside that such damages would not be a consequence of breach reasonably foreseeable at the time of contract in 1991, the damages are impermissibly speculative.

Im disconnected the water on September 17, 2007, near the end of this extraordinary anomaly year. At that time, the remodel was

not yet complete and, as explained earlier, would not likely not have been completed for another two months. It is highly speculative that the house could have been completed, listed, marketed and sold before the close of 2007, much less that it could have been sold for \$1.6 million.

Lost profits are recoverable only when (1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach, and they are proved with reasonable certainty. *Riverview Floral, Ltd. v. Watkins*, 51 Wn. App. 658, 663, 754 P.2d 1055 (1988); *Golf Landscaping, Inc. v. Century Construction Co.*, 39 Wn. App. 895, 903, 696 P.2d 590 (1984). A claim for lost profits will be denied if the profits remain speculative. *Id.* The damages were impermissibly speculative.

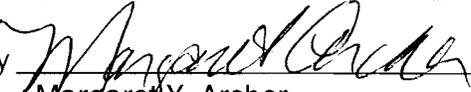
CONCLUSION

This court should reverse the trial court's summary judgment order and remand the matter for a new trial on all issues.

Dated this 14 day of October, 2011.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 
Margaret Y. Archer
Attorneys for Appellants Im
WSBA No. 21224

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 14th day of October, 2011, I did
serve via ABC Legal Messengers (or other method indicated below),
true and correct copies of the foregoing by addressing and directing for
delivery to the following:

Richard T. Hoss, WSBA No. 12976
Hoss & Wilson-Hoss, LLP
236 West Birch Street
Shelton, WA 98585
TEL: 360.426.2999//FAX: 360.426.6715
Email: rhoss@hctc.com
VIA EMAIL AND U.S. MAIL

Evan Loeffler
LAW OFFICE OF EVAN L. LOEFFLER, PLLC
2033 Sixth Avenue, Suite 1040
Seattle, WA 98121-2527
TEL: 206.443.8678//FAX: 206.443.4545
Email: eloeffler@loefflerlegal.com
VIA EMAIL AND U.S. MAIL

Justin D. Bristol
8253 South Park Avenue
P O Box 12053
Tacoma, WA 98412
TEL: 253.272.2206//FAX: 253.276.4005
Email: jdbristol@piercecoun tylaw.com
VIA EMAIL AND U.S. MAIL


Cheryl M. Koubik, PLS
Legal Assistant to Margaret Y. Archer

APPENDIX A

526118

WELL MAINTENANCE AGREEMENT

WHEREAS: the parties hereto are the owners, contract purchasers, or have and interest in the certain parcels of land as described.

WHEREAS: each party hereto, on his/her own behalf and on the behalf of his/her heirs, successors, or assigns desire to collectively provide for future use, maintenance and repair of the well located on Parcel "B", described as follows:

PARCEL B:

That portion of Government Lot 1, Section 25, Township 22, Range 3 West, W.M. Commencing at the Southwest corner of said Government Lot 1; thence South 87° 24' 23" East 236.0' to the point of beginning; thence continuing South 87° 24' 23" East 403.34'; thence North 00° 03' 28" West 528.69'; thence North 59° 45' 05" West 144.16'; thence North 77° 10' West 282.71'; thence South 15° 22' 10" East 264.84'; thence South 10° 31' 17" West 397.15' to the point of beginning. Together with a nonexclusive easement for ingress, egress and utilities over, under and across a 60' strip of land described in instrument recorded August 8, 1978 under Auditor's File No. 349352. Situate in Mason County, Washington.

WHEREAS: the owners of Parcel "B" wishes to assign to the owners of Parcel "A", described as follows:

PARCEL A:

Patricia Beach Tract 47-A and Tidelands.

REQUEST OF: M.C. Davis court
91 MAY -3 AM 11:21 2410 91st Pl. N.E.
Bellevue, Wa.
98004

AFFIDAVIT
No. _____
W.M. REAL ESTATE
EXCISE TAX
EXEMPT

MAY 8 1991

DORENE RAB
Treas., Mason County

EXHIBIT "E"

WELL AGREEMENT

1. It is agreed that the owners will have the right to draw water from said well for residential purposes only, to include normal lawn and yard irrigation.
2. Neither part shall interfere with the use of the well by the other, and in event that at any time the supply of water from the well is not adequate for the use being made of it by all parties, then the water shall be divided equally between them.
3. All owners using the well shall be equally responsible for cost of repairs, maintenance and general upkeep of the well.
4. All owners shall have access upon Parcel "B" for the purpose of maintaining the pipeline from the well to the existing utility easement, which will be their sole responsibility.
5. The owners agree to pay a monthly charge to the Committee to share in electrical cost for the operation of the well pump, this charge is subject to increase as allowed by Washington State Utilities Commission.
6. The Easement, together with the rights and obligations respecting maintenance shall run with the land and shall inure to and be binding upon the heirs, personal representatives, and assigns of the parties hereto.
7. This agreement may be modified only by written agreement of a majority of all parties hereto, or their heirs and assigns.

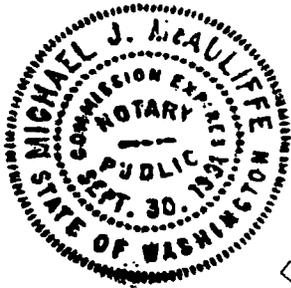
DATED this 8th day of May 1991

M.C. Davis court

Florence J. Davis court

STATE OF WASHINGTON)
COUNTY OF KING) SS

On this day personally appeared before me M.C. Davis court and Florence J. Davis court to me known to be the individuals described in and who executed the same as their free and voluntary act and deed for the purposes therein mentioned.



Given under my hand and seal this 8th day of May 1991

Michael J. McAuliffe

Notary Public in and for the State of Washington, residing in Seattle.

UNOFFICIAL

APPENDIX B



AFTER RECORDING MAIL TO:

Hong B. Im
10970 & 10972 E State Route 106
Union, WA 98592

AFFIDAVIT
No. 89688
WA R.E. EXCISE TAX
MAY 01 2007
PAID 10680.00
LISA FRAZIER
Treas., Mason County

Filed for Record at Request of:
First American Title Insurance Company

Space above this line for Recordors use only

STATUTORY WARRANTY DEED

File No: 4231-994134 (KL)

Date: March 27, 2007

Grantor(s): ³⁴ Frank Burke and Elizabeth Burke

Grantee(s): Hong B. Im and Young B. Im

Abbreviated Legal: LOTS 1 AND 2 OF SURVEY VOLUME 4, PAGE 80, PORTION OF SECTION 25, TOWNSHIP 22, RANGE 3

Additional Legal on page:

Assessor's Tax Parcel No(s): 322257600010 and 322257600020

THE GRANTOR(S) Frank Burke and Elizabeth Burke, husband and wife for and in consideration of Ten Dollars and other Good and Valuable Consideration, in hand paid, conveys, and warrants to Hong B. Im, a married man and Young B. Im, an unmarried man, each as their separate estate, the following described real estate, situated in the County of Mason, State of Washington.

PARCEL 1A:

LOT 1 OF SURVEY RECORDED SEPTEMBER 29, 1978, VOLUME 4 OF SURVEYS, PAGE 80, UNDER AUDITOR'S FILE NO. 351492 AND BEING A PORTION OF GOVERNMENT LOT 1 OF SECTION 25, TOWNSHIP 22 NORTH, RANGE 3 WEST, W.M., RECORDS OF MASON COUNTY, WASHINGTON, AND A PORTION OF TRACT 47 OF PATRICIA BEACH AS RECORDED IN VOLUME 3 OF PLATS, PAGE 14, RECORDS OF MASON COUNTY, WASHINGTON. EXCEPTING ROADS RIGHTS OF WAY.

TOGETHER WITH TIDELANDS OF THE SECOND-CLASS FORMERLY OWNED BY THE STATE OF WASHINGTON, LYING IN FRONT OF, ADJACENT TO OR ABUTTING UPON THE ABOVE DESCRIBED UPLANDS AND EXTENDING TO THE LINE OF MEAN LOW TIDE.

PARCEL 1B:

TOGETHER WITH A NON-EXCLUSIVE EASEMENT, 60 FEET IN WIDTH, FOR INGRESS, EGRESS AND UTILITIES AS SET FORTH IN DOCUMENT RECORDED AUGUST 18, 1978, UNDER AUDITOR'S FILE NO. 349352.

PARCEL 2A:

LOT 2 OF SURVEY RECORDED SEPTEMBER 29, 1978, VOLUME 4 OF SURVEYS, PAGE 80, UNDER AUDITOR'S FILE NO. 351492 AND BEING A PORTION OF GOVERNMENT LOT 1 OF SECTION 25, TOWNSHIP 22 NORTH, RANGE 3 WEST, W.M., RECORDS OF MASON COUNTY, WASHINGTON, AND A PORTION OF TRACT 47 OF PATRICIA BEACH AS RECORDED IN VOLUME 3 OF PLATS, PAGE 14, RECORDS OF MASON COUNTY, WASHINGTON.

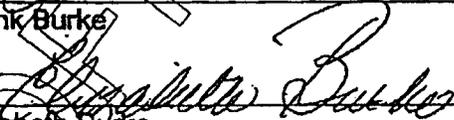
PARCEL 2B:

TOGETHER WITH A NON-EXCLUSIVE EASEMENT, 60 FEET IN WIDTH, FOR INGRESS, EGRESS AND UTILITIES AS SET FORTH IN DOCUMENT RECORDED AUGUST 18, 1978, UNDER AUDITOR'S FILE NO. 349352.

Subject To: This conveyance is subject to covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey.



Frank Burke



Elizabeth Burke

APN: 322257600010

Statutory Warranty Deed
- continued

File No.: 4231-994134 (KL)
Date: 03/27/2007

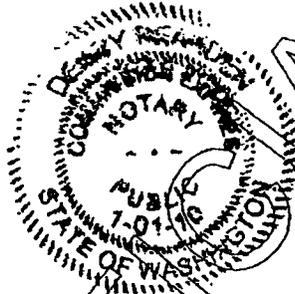
STATE OF Washington)
COUNTY OF KITSAP)-ss
)

I certify that I know or have satisfactory evidence that **Frank Burke and Elizabeth Burke**, is/are the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument and acknowledged it to be his/her/their free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: 4/6/07

Debby Bearden

Debby Bearden
Notary Public in and for the State of Washington
Residing at: Port Orchard
My appointment expires: 1-1-10



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APPENDIX C

