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#### **Treatis Authority**

*3A. Washington Practice, Rules of Practice*, CR 62, P. 262 (2012)

Restatement Contracts 2d Sec. 172(a)

Restatement Contracts 2d Sec. 172(1)(b)

WPI 303.06

I. ASSIGNMENTS OF ERROR

A. Whether the trial court erred in denying the Hills pre-trial motion to exclude Woods' witnesses and exhibits?

B. Whether the trial court erred in concluding that the parties entered into an enforceable integrated contract? (Findings of Fact (g)-(i), Conclusions of Law (b)-(m)?

C. Whether the trial court erred in failing to grant the Hills request to modify the contract?

D. Whether the trial court erred in applying the doctrine of caveat emptor and in concluding that the Hills had a duty to investigate prior to signing PSA? (Findings of Fact (g)-(i), Conclusions of Law (b)-(m).

E. Whether the trial court erred in finding that the subject van was in "good condition" (Finding of Fact (i)?

F. Whether the trial court erred in finding that the seller did not make misrepresentations regarding inspection of the subject van (Findings of Fact (j)?

G. Whether the trial court erred in finding that the Hills owed damages for back payments and attorney fees? (Findings of Fact (g) and (h), Conclusions of Law (j)-(k)?

H. Whether the trial court erred in concluding that the Hills breached the contract (Findings of Fact (g)-(h), Conclusions of Law (c), (j) and (k)?

I. Whether the trial court erred in concluding that Woods had no duty release his security interest in the subject van (Conclusions of Law (1)?)

J. Whether the trial court erred in concluding that it could not order Woods to release title to the subject van (Conclusions of Law (m)?)

K. Whether the trial court erred in concluding that Woods was entitled to judgment for back payments, interest, and attorney fees (Findings of Fact (g)-(h). Conclusions of Law (j) and (k)?)

L. Whether the trial court erred in failing to enter findings of fact and conclusions of law relating to the Hills affirmative defenses and counterclaims. (Finds of Fact (a) – (j), Conclusions of Law (a) – (m))

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the trial court abused its discretion when it denied the Hills PCLR 16(b) motion to exclude Mr. Woods' witnesses and exhibits, (Assignments of Error A)

B. Whether the trial court erred as a matter of law when it applied the doctrine of caveat emptor and concluded that the Hills did not have a right to rely on Mr. Woods' representations. (Assignment of Error B,C,D,G,H, and K)?)

C. Whether the trial court erred when it concluded that the PSA was an integrated agreement and that evidence of the parties verbal agreement could not be considered for purposes of modifying or contradicting the

PSA (Assignments of Error B,C,G,H,K, and L?

D. Whether the trial court erred in concluding that the parol evidence rule precluded modification or contradiction of the PSA?

(Assignments of Error B,C,G,H, and K)

E. Whether the trial court erred in finding and concluding that there was no fraud in the inducement? (Assignment of Error B,C,E,F,H, and K)

F. Whether the trial court erred in finding and concluding that Mr. Woods did not interfere with the Hills contractual performance? (Assignment of Error G, I,J, and K)

G. Whether the trial court erred in finding and concluding that Mr. Woods mitigated his damages? (Assignment of Error B,G,H,I,J, and K)

H. Whether the trial court erred in entering findings and conclusions of law?

## II. STATEMENTS OF THE CASE

### a. FACTUAL HISTORY

On July 1, 2006 Johnny and Malinda Hill entered into a purchase and sale agreement (PSA) with George Woods for the purchase of Mr. Woods Fed Ex route and accompanying delivery van. Ex. 12. The Hills, who were actually employed with Fed Ex at the time, were first-time buyers and had never owned a Fed Ex route or van or negotiated for the sale of the FedEx route before. RP 81:7-9; 143:1-3.

The PSA provided in pertinent part:

Purchaser shall accept the asset in the condition it is in on that date, subject to the Seller's warranties set forth herein. Other than the warranty of ownership and representations herein. Seller makes no express warranties. The purchaser takes the Vehicle as is.

Ex. 12 at 3 The PSA also provided:

This instrument embodies the entire agreement between the parties hereto with respect to the transactions contemplated herein and there have been and are no agreements, representations or warranties between the parties other than those set-forth or provided for herein. Id. at 6

Prior to signing the PSA, Mr. Woods represented to the Hills that the delivery van was in good condition, and that it was suitable for the Fed Ex route because of and based upon Fed Ex Inspection reports, which indicated that the vehicle was "operational." and had been cleared for sale. RP. 74, 3-7, 22-25

The PSA provided specifically that:

Purchaser shall accept the asset in the condition it is in on that date, subject to the Seller's warranties set forth herein, other than the

warranty of ownership and representations herein. Seller makes no express warranties. The purchaser takes the Vehicle as is.

The written PSA indicated in writing that the vehicle had 470,192 miles, RP. p. 149 lines 25; RP. P. 150 line 1 Rp. P. 150 lines 2-3; P 40 lines 12-16; P. 180 lines 20-25 and during meetings with the Hills prior to signing the PSA, Mr. Woods informed the Hills that maintenance records provided by Fed Ex indicated that the subject van had passed inspection, RP. P. 42 lines 7-9; P. 42 lines 19-20; P. 74 lines 3-7; P. 40 lines 12-16; P. 173 lines 1-4; 8-11; P. 181 lines 14-15; RP. P. 74 lines 3-7; RP P. 42 lines 19-20 and that deficiencies, if there were any, had been taken care of. RP. P.24 lines 7-10; P. 24, lines 13-25

The PSA further stated in writing that the contract was an “as is” deal, cite and during meetings with the Hills prior to the signing of the PSA, Mr. Woods clearly represented to the Hills that the PSA was an “as is” deal. RP. P. 186 line 14; 186 line 17 Mr. Woods made arrangements in order to aide the Hills in obtaining access to and review of maintenance records. RP. P. 26 lines 1-14 and tax records. RP. P. 28 lines 1-12; P. 30 lines 17-25; P. 31 lines 1-15 Mr. Woods did not, however, specifically inform the Hills of or provide an inspection report to the Hills’, which indicated that the van had “reached or exceeded its design intent.” RP. P. 147 lines 2-5 Prior to the signing of the PSA, Mr. Woods made the vehicle available to the Hills for personal observation and inspection, and directed their attention to what was described as a “dinged” bumper, RP. P. 175 lines 16-17 and Mr. Woods did inform the Hills about a the fact that the bumper had been damaged at an earlier time, although Mr. Woods did not provide intricate detailed

information as to the cause thereof. RP. P. 175 lines 15-17

Prior to the signing of the PSA, Mr. Woods took both the Johnny and Melinda Hill on “ride alongs” in the subject van in order to familiarize the Hills’ with the Fed Ex route, and the Hills also received training in operating Fed Ex routes from the agents of the Fed Ex company. RP. P. 7 lines 25; P. 88 lines 1-2; P. 88 lines 6-8; P. 23 lines 1-3; P. 83 lines 1-25; P. 97 lines 10-13; P. 114 lines 19-25; P. 115 lines 1-25; 164 lines 10-21

At the time of trial, Mr. Hills testified that he and his wife relied upon Mr. Woods’ representations regarding the condition of the van RP. P. 148 Lines 17-20 The party’s discussed vehicle inspection prior to contracting and thereafter, RP. P. 42 lines 7-9 however, the Hills did not have the van inspected prior to signing of the PSA. RP. P. 23 lines 1-3; P. 42 lines 7-9; 42 lines 16-18; 147 lines 11-12; 150 lines 7-8; 158 lines 21-25; 174 lines 3-5 The Hills agreed to the purchase of the van of the Fed Ex route and agreed to pay to Mr. Woods, the sum of \$85,000 plus interest. RP. P. 202 lines 19-20

The Hills met with George Woods and were involved in negotiating the terms of the PSA and the preparation of the PSA, RP. P. 22 lines 18-25; 178 ;lines 17-24 and did sign the document, RP. P. 22 lines 18; P. 22 lines 18-25; P. 30 lines 9-12 P. 42 lines 16-18; P. 45 lines 7-10; P. 49 lines 20; P. 51 lines 5-20 but Johnny Hills indicated that he did not thoroughly read the document prior to signing the PSA. RP. P. 98 lines 24; 160 lines 17 During this process and prior to signing the PSA, changes with regard to the terms of the methods by which

payment would be made were facilitated and were explained to and understood by the Hills, and thereafter, the Hills then signed the PSA, though they were aware that certain letters were missing from particular terms contained in the PSA. RP. P. 22 lines 18-25; P. 45 lines 7-10; P. 49 line 20; P. 51 lines 5-20

As part of the PSA, the parties agreed that the title to the subject van was to be signed over to the Hills upon complete performance of the terms of the PSA. RP. P.108 lines 1-17; P. 183 lines 7-9 The Hills did not fulfill their obligations of performance in accordance with the PSA, RP. P. 38 lines 3-6 10, 20, 21; P. 42 lines 5; P. 58 lines 1-16; P. 58 lines 25; P. 59 line 7; 13=14; P. 60 line 12; P. 61 lines 3-4; P. 64 lines 15-16; P. 65 lines 17-25; P. 66 lines 7-9; 13-14; P. 82 lines 16-20 and transfer of title to the subject vehicle did not occur.

After taking over the route, the Hills discovered that, on occasion, they were required to deliver packages to a larger area that were not part of areas driven through by Mr. Woods during the course of "ride alongs" RP. P. 86 lines 7-12; P. 88 lines 11-28; P. 89 lines 1 While J. Hill testified the while riding along with Mr. Woods' Mr. Woods did not take him on rough roadways, RP. P. 135 lines 21-22, he testified at trial that he knew of agreements between contractors and management about extended routes based upon package type. RP. P. 116 lines 11-12.

Within several months, the Hills determined that the subject vehicle began to exhibit mechanical problems requiring maintenance. RP P. 67 Lines 1-6; P. 89 lines 6-16; P. 89 lines 17-23; P. 90 lines 1-3P. 121 lines 2-25; 122 lines 1=25; P.

123 lines 1-25; P. 124 lines 1-25

Johnny Hill reported the aforementioned problems to Mr. Woods and indicated to Mr. Woods that they wished to sale the subject vehicle and to purchase another vehicle in its place, RP. P. 89 lines 17-23 and the Hills sought Mr. Woods consent to make this sale. Mr. Woods responded by informing the Hills that, pursuant to and in accord with the terms of the PSA, that they agreed to and signed, release of title to the subject vehicle would not be facilitated unless and until the Halls had fulfilled their obligations consistent with the PSA. RP. P. 183 lines 7-9 At trial, Mr. Woods testified that the Hills had been delinquent in making payment and did not make payments in a manner consistent with the PSA, and due to the fact that the Hills had not performed consistent with the PSA and had not fulfilled the terms thereof, Mr. Woods refused the Hills request. RP. P. 38 lines 8, 18; P. 38 lines 10, 20, 21; P. 42 lines 5; P. 58 lines 1-16; P. 58 lines 25; P. 65 lines 14-16; P. 66 lines 7-9, 13-14

The Hills did eventually purchase another vehicle to take the place of or to assist the subject vehicle, and in the interim, the Halls did rent another vehicle during periods when the original vehicle was being serviced, RP. P. 94 lines 25; P. 95 lines 16-25 and the Hills had ceased making payment to Mr. Woods under the PSA. P. 66 lines 7-9, 13-14

## B. PROCEDURAL HISTORY

1. Procedural Facts Relating to the Hills Motion to Exclude Witnesses and exhibits

The case scheduling order herein was entered on September 16, 2011. CP 278. According to the case schedule, the parties were to exchange their lists of witnesses and exhibits no later than April 16, 2012. Id. The Joint Statement of Evidence was to be filed no later than April 22, 2012. Id. Trial was set to begin on June 4, 2012. Id.

On May 14, 2012, the Hills, by and through counsel, filed a motion to Exclude Mr. Woods witnesses and documents pursuant to PCLR 16(b)(2) and (4). CP 99-108. 176-179 and did so in reliance upon the holding of the court in *Allied Financial Services Inc. v. Mangum*, 72 Wn. App. 164, 167-69, 864 P.2d 1 (1993)

The hearing on the Hills motion was held on May 25, 2012.5/25/2012 RP 1-21. At the hearing, the Hills argued that Mr. Woods' failure to exchange his witnesses/exhibits list was without a showing of good cause and prejudiced their ability to adequately prepare for trial, and that a lesser sanction would not be adequate.

At the time of hearing, the Hills attorney indicated that, on September 7, 2011, and in response to a Motion To Compel filed with the trial court, the parties met and conferred regarding discovery matters. RP (motion) p. 4 lines 1-2 In October of 2011, Mr. Woods, by and through counsel did serve opposing counsel with a response to the Hills discovery request, and in November 2011, Mr. Woods, by and through counsel did complete and did provide answers to interrogatories propounded by the Hills attorney, identifying the names of potential witnesses to be called at the time of trial, RP. P. 5 lines 2-3 and discovery was represented as

being complete, RP. P. 10 lines 11-12 and the Hills attorney, at the time of trial indicated that she saw no need to depose those persons identified in answers to interrogatories. RP. P. 10 lines 9-11

In the days prior to the day of trial, Mr. Woods attorney filed a witness list with the trial court and caused the same to be served upon the Hills Attorney, which provided the names of the same individuals identified in answers to interrogatories. RP. P. 10 lines 11-12

Mr. Woods, by and through counsel did offer a reasonable justification that would rise to the level of “good cause” for alleged delay in following and in completing discovery consistent with the court’s scheduling order.

After hearing the court found that Mr. Woods conduct was “boarderline” willfulness, but was not the kind of conduct that warranted granting the Halls Motion for exclusion of witness or exhibits propounded by Mr. Woods attorney, and concluded that the lesser sanction of a monetary penalty was both legally authorized and justified. RP. P. 19 lines 24; 25 RP. P. 20 lines 3-5; P. 20 lines 3-5; RP. P. 20 lines 3-5, 12-13

2. Procedural Facts Relating to the Findings of Fact and Conclusions of law.

After the parties rested, the trial court gave its oral ruling. RP 242: 16-249:22, 251:6-17. While both of the parties testified that there were agreements with regard to methods of payment which were made outside the four corners of the PSA, the court concluded that the contract was, in fact, integrated and applied the parol evidence rule to preclude modification and/or contradiction of the PSA.

RP 107:16, 108:22; 187:11-19; 245:18-247:2.

The trial court specifically found that the Hills were not justified in relying upon representations made by Mr. Wood, as the contract required them to take the van “as is.” **RP. P. CITE**

After trial court’s oral ruling, Mr. Woods prepared a set of proposed findings of fact and conclusions of law. RP 251:4: 4-5. The Hills filed multiple objections to the findings and conclusions, and also proposed several additional findings and conclusions relating to the Hills defenses and counterclaims. CP 191-207.

On July 20, 2012, a hearing was held on the findings and conclusions and the Hills summarized their objections on the record. RP 1-12. The trial court ordered minor revisions to Mr. Woods proposed findings and conclusions, but did not hear findings and conclusions relating to the Hills defenses and counterclaims. CP 271-73 Findings and conclusions of law were entered on July 27, 2012. *Id.* A judgment was entered the same day. CP 274-75

### III. ARGUMENT

#### A. WHETHER THE COURT ABUSED ITS DISCRETION WHEN IT DENIED THE HILLS PCLR16(b) MOTION TO EXCLUDE MR. WOODS WITNESSES AND DOCUMENTS.

The court reviews a trial court’s decision to exclude witnesses for failure to follow a case scheduling order for abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Matheson v. Gregoire*, 139 Wn. App. 624, 634,

161 P.3d. 486 (2007) rev. denied at 163 Wn.2d. 1020, 180 P.3d 1292 (2008), cer. denied 555 U.S. 881, 129 S. Ct., 197, 172 L. Ed.2d 140 (2008) An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. Id.

Appellants argue that the trial court relied on unsupported facts, because it had no evidence of “good cause”, and, to the extent the trial court relied on *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), the trial court applied the wrong legal standard.

Appellant’s are correct that the court in *Allied Financial Services v. Mangum*, 72 Wn. App 164, 864 P.2d 1 (1993) did hold that violation of a case scheduling order without reasonable excuse is deemed willful, and that prejudice is not a prerequisite to a court’s exclusion of witnesses as a sanction for a party’s failure to submit a witness list.

It is Mr. Woods position that the trial court’s decision denying Appellant’s Motion to exclude witnesses for delay in following a case scheduling order was supported by sufficient facts, that the court took a view that a reasonable person would take, that its decision was manifestly reasonable and exercised on tenable grounds, that the court applied the correct legal standard, and its ruling was not based on an erroneous view of the law and it decision did not constitute an abuse of discretion.

Here, the Hills attorney indicated that, on September 7, 2011, and in response to a Motion To Compel filed with the trial court, the parties met and conferred regarding discovery matters, RP. P. 4 lines 1-2 which is consistent with and actually required under the provisions of CR 37 and CR 26(I)

CR 37(1) provides that:

“The rules encourage counsel to meet and confer, in an effort to resolve disputes without judicial involvement.”

“CR 26(i) requires counsel to meet and confer in an effort to resolve discovery disputes before submitting them to the Court.”

The motion brought by the Appellants at trial was a Motion for Sanctions for alleged failure to comply with the scheduling order, and while the rule is not entirely clear whether the meet and confer requirement applies to a motion for sanctions, after the opposing party has allegedly resisted discovery without good cause, the Court in *Rudolf v. Empirical Research Systems, Inc.*, 107 Wn. App. 861, 28 P.3d 813 (2001) did hold that the meet and confer requirement did apply to Motions for Sanctions.

Cr 37(12) also provides that:

“The court *may* exclude specified evidence as a sanction for failure to allow discovery with respect to that evidence, or for other forms of discovery abuse. As a general rule, evidence may be excluded only if the failure to allow discovery is intentional.” *Alpine Industries, Inc., v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981) Willful or intentional nondisclosure is defined as including nondisclosure without a reasonable excuse.”

CR 37(12) further provides that:

“Evidence should not be excluded as a sanction for a discovery violation if less severe sanctions would accomplish the intended purpose.”

At the time of hearing, the Appellant's attorney confirmed that the names of the persons identified in Wood's witness list were the very same as those provided in answers to interrogatories. RP. P. 10 lines 21-22

At the time of hearing, the trial court inquired of the Halls attorney whether a continuance to depose witnesses would be appropriate. In response, the Halls attorney informed the trial court that she had what was needed, and she rejected the court's request. RP. P. 10 lines 9-11

One remedy to resolve discovery disputes is set forth in the provisions of CR 37 and provides the court with discretion to grant an order for the taking of depositions and to grant an order of Continuance for that purpose.

The relevant provisions of CR 37 (2) provides in relevant part that:

"Motions for continuance and reconsideration are matters within the discretion of the trial court. In exercising its discretion to grant or deny a motion for continuance, the court may properly consider the necessity of reasonably prompt disposition of the litigation, the needs of the moving party, the possible prejudice to the adverse party, and any other matters that have a material bearing upon the exercise of the discretion vested in the court."

Also, Mr. Woods, by and through counsel did offer a reasonable justification that would rise to the level of "good cause" for alleged delay in following and in completing discovery consistent with the court's scheduling order.

At the time of hearing, attorney for Mr. Woods informed the court that compliance with the scheduling order was complicated based upon the fact that not only did Mr. Woods reside out of state, and that bankruptcy proceedings and

other serious financial difficulties experience by Mr. Woods deprived Mr. Woods of the ability to maintain communication with his attorney and from obtaining transportation to the state of Washington. RP. P. 11 lines 5-7 Here, when discovery issues cropped up, the parties met and conferred regarding discovery matters. RP. P. 4 lines 1-2

As indicated, in October of 2011, Mr. Woods, by and through counsel did serve opposing counsel with a response to the Hills initial discovery request, RP. P. 5 lines 2-3 and in November 2011, Mr. Woods, by and through counsel did complete and did provide answers to interrogatories propounded by the Hills attorney, identifying the names of potential witnesses to be called at the time of trial. RP. P. 8 lines 14, 22 Discovery was represented as being complete, RP. P. 10 lines 11-12 and the Hills attorney, at the time of trial indicated that she saw no need to depose those persons identified in answers to interrogatories. RP. P. 10 lines 9-11

And, albeit in the days just prior to the day of trial, Mr. Woods attorney did, in fact, file a witness list with the trial court and did cause the same to be served upon the Hills Attorney, which provided the names of the very same individuals identified in answers to interrogatories. . RP. P. 8 lines 14, 22; P. 10 lines 11-12; RP. P. 10 lines 11-12

After hearing the court found that Mr. Woods conduct was “boarderline” willfulness, but was not the kind of conduct that warranted granting the Halls Motion for exclusion of witness or exhibits propounded by Mr. Woods attorney,

and concluded that the lesser sanction of a monetary penalty was both legally authorized and justified. RP. P. 19 lines 24; 25 RP. P. 20 lines 3-5; P. 20 lines 3-5; RP. P. 20 lines 3-5, 12-13

Here, as indicated, Mr. Woods, by and through counsel did, in fact, provide the Hills attorney with a witness list, albeit it was served upon them some ten days prior to trial.

The point being, is that, there were discovery issues, and the parties did meet and confer in an attempt to resolve those issues, and they acted in a manner consistent with the civil court rules. Mr. Woods did answer to the interrogatories propounded by the opposing party, which provided the names of potential witnesses, and while untimely, Mr. Woods attorney did file a witness list with the trial court, and did serve their witness list upon the opposing party's attorney, and that list contained the names of the very same individuals as named in the interrogatories, thus there was no surprise on the part of the opposing party regarding potential witnesses. And, as indicated, at the time of trial, the court inquired of the Hills' attorney wished to have the opportunity to depose the witnesses identified in the interrogatories and in the witness list, and that, in response, the Hills attorney indicated that she did not need to depose the witnesses identified and that she had what she needed.

In October of 2011, Mr. Woods, by and through counsel did serve opposing counsel with a response to the Hills discovery request, and in November 2011, Mr. Woods, by and through counsel did complete and did provide answers

to interrogatories propounded by the Hills attorney, identifying the names of potential witnesses to be called at the time of trial. Discovery was represented as being complete, and the Hills attorney, at the time of trial indicated that she saw no need to depose those persons identified in answers to interrogatories.

And, albeit in the days just prior to the day of trial, Mr. Woods attorney did, in fact, file a witness list with the trial court and did cause the same to be served upon the Hills Attorney, which provided the names of the very same individuals identified in answers to interrogatories.

This is not an example of “intentional” or “willful” conduct, which would necessitate imposition of the type of sanction sought by the Appellants, and Mr. Woods did present evidence sufficient to support a finding of “good cause”.

The Appellants again point to PCLR 16(b), and argue, as controlling authority the court must order exclusion of witnesses and exhibits, however, local rules do not flatly bar the testimony of an undisclosed expert. “In *Goehl v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 1 P.3d 579 (2000) the court **may** exclude an witness testimony, or the court may allow the witness testimony subject to conditions or restrictions.

B. WHETHER THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF CAVEAT EMPTOR AND CONCLUDING THAT THE HILLS DID NOT HAVE THE RIGHT TO RELY ON MR. WOODS REPRESENTATIONS?

Justifiable reliance:

Here, the trial court determined that the Hills did not have a right to rely on Mr. Woods representations. RP 247,:17-248:9. Appellants argue that the trial

court erred in applying the doctrine of caveat emptor, and in finding that the Hills did not have the right to rely on Mr. Woods representations.

In support thereof, the Appellants argue essentially that, they were first-time buyers of the Fed Ex route and van, and that the buyer and seller were not in equal bargaining positions, that they were not of comparable skill and knowledge, and that the Hills were not in a position to protect themselves in the transaction, and that they could not be expected nor were required to fact-check Mr. Woods statements regarding condition of the van or the size and nature of the route before signing the PSA.

A recipient's Reliance on misrepresentations must be justified in order to entitle him to avoidance or reformation. *Graff v. Geisel* 39 Wn.2d 131 (1951); 234 P.2d 884m (1951) He is not entitled to relief if his reliance was unreasonable in the light of his particular circumstances. *Restatement Contracts 2d Sec. 172(a)*

A recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

*Restatement Contracts 2d Sec. 172(a)*

In determining whether the recipient of a misrepresentation has conformed to the standard of good faith and fair dealing, account is taken of his peculiar qualities and characteristics, including his credulity and gullibility, and the circumstances of the particular case. *Restatement Contracts 2d Sec. 172(1)(b)*

Mr. Woods argues that the Hills reliance was unjustified under the circumstances and that the Hills were expected or were required to fact-check statements regarding the condition of the van or the size and nature of the route before signing the PSA.

The circumstances of the particular case here show the following:

For the ten (10) years leading up to this agreement, and prior to and at the time of the signing of the PSA the Hills were employed with the Fed Ex company. RP p. 105 line 6; P. 162 lines 19-25; 163 lines 1-10. Prior to signing of the PSA., the Hills also received training in operating a Fed Ex route and package policies and procedures, RP P. 87 lines 25; 88 lines 1-2; P. 88 lines 6-8 and the Hills also rode along in the subject van with Mr. Woods while he made his deliveries. RP. P. 83 lines 1-25; P. 97 lines 10-18; P. 164 lines 10-21; P. 114 lines 19-25 Prior to signing the PSA, Mr. Woods represented to the Hills that the delivery van was in good condition, and that it was suitable for the Fed Ex route because of and based upon Fed Ex Inspection reports, which indicated that the vehicle was “operational.” and had been cleared for sale. RP. 74, 3-7, 22-25

The written PSA indicated that the vehicle had 470,192 miles, RP. P. 40 lines 7-9 and during meetings with the Hills prior to signing the PSA, Mr. Woods informed the Hills that maintenance records provided by Fed Ex indicated that the subject van had passed inspection. The PSA further stated in writing that the contract was an “as is” deal, and during meetings with the Hills prior to the signing of the PSA, Mr. Woods clearly represented to the Hills that the PSA was

an “as is” deal. RP. P. 186 line 14, P. 186 lines 17 Prior to the signing of the PSA, Mr. Woods also informed the Hills that the van had passed Fed Ex inspections, RP. P. 42 lines 7-9; P. 42 lines 19-20; P. 74 lines 3-7; P. 40 lines 12-16; P. 173 lines 1-4; 8-11; P. 181 lines 14-15; RP. P. 74 lines 3-7; RP P. 42 lines 19-20 although Mr. Woods did not specifically inform the Hills that a inspection report indicated that the van had “reached or exceeded its design intent. RP. P. 147 lines 2-5 Mr. Woods did, however, offer to make arrangements to aide the Hills in obtaining access to and review of maintenance records prior to the signing the PSA.

Prior to the signing of the PSA, Mr. Woods made the vehicle available to the Hills for their personal observation and inspection. At that time Mr. Woods directed the Hills attention to what was described as a “dinged” bumper, and informed the Hills that the bumper had been damaged at an earlier time, although Mr. Woods did not provide intricate detailed information as to the cause thereof, and did not have a inspection report at hand regarding the “dinged bumper” and had no reference maintenance reports showing that the van had “reached or exceeded its design intent” prior to the signing of the PSA. RP. P. 175 lines 16-17

In spite of the fact that maintenance records were not made available at the time, and in spite of the fact that representations had been made by Mr. Woods that the vehicle had been damaged at an earlier time, the Hills, nevertheless, relied upon Mr. Woods’ representations regarding the condition of the van and did not have the van inspected prior to signing of the PSA. RP. P. 42 lines 7-9 however,

the Hills did not have the van inspected prior to signing of the PSA. RP. P. 23 lines 1-3; P. 42 lines 7-9; 42 lines 16-18; 147 lines 11-12; 150 lines 7-8; 158 lines 21-25; 174 lines 3-5

The Hills met with George Woods and were involved in negotiating the terms of the PSA and the preparation of the PSA, and did sign the document, although, Mr. Hill indicated that he did not thoroughly read the document prior to signing the PSA. A fundamental principle of Washington contract law is that a party to a contract, which he has signed will not be heard to declare that he did not read it, or was ignorant of its contents. *Washington Federal Sav. & Loan Ass'n v. Alsager*, 266 P.3d 905

While certain changes were made during this process and prior to signing the PSA, changes were only made with regard to the terms regarding the methods by which payment would be made. RP. P. 19 lines 12-15 These changes were also known to both parties and were understood by the Hills, RP. P. 48 lines 8-22 and thereafter, the Hills then signed the PSA. RP. P. 49 lines 4-12; 20-21 P. 49 lines 25; P. 50 lines 1-5 even though certain letters were missing from particular terms contained in the PSA. While the court in *Sackman Orchards, Mountain View*, 56 Wn. App. 705, 784 P.2d 1308 (1990) held that mistakes in grammar, spelling, or punctuation should not be permitted to alter, contravene, or vitiate the manifest intention of the parties as gathered from the language employed, there is no showing that the grammatical imperfections in the body of the PSA in any way

did or could have altered, contravened, or vitiated the manifest intention of the parties.

The PSA was a “as is contract.” RP P. 186 lines 14 These terms were clearly identified within the body of the contract, and were made clear to the Hills during the course of negotiation and preparation prior to signing the PSA. RP P. 186 lines 17 This was not a misrepresentation of material fact.

An “as is” clause in a purchase and sale agreement means that the buyer purchases the property in its present state or condition. The term “as is” implies that the property is taken with whatever faults it may possess and that the seller is released from any obligation to reimburse the purchaser for losses or damages that result from the condition of the property. *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 114 P.3d 664 (2005); *Olmsted v. Mulder*, 72 Wn. App. 169, 176, 183 P.2d 1355 (1993)

To be effective it must be explicitly negotiated or bargained for and it must set forth with particularity what is being disclaimed. *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 146 Wn. 2d 428, 438, 47 P.3f 940 (2002)

The “as is” clause calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty. RCW 62A.2-316(3)(a) And, while there may be uncertainty as to the effect of an “as is” clause, the plaintiff is put on notice that there might be latent defects in the vehicle, and that reliance on the defendant’s representations or nondisclosure as to the condition of the vehicle may not be justified without further inquiry. *Leavitt v. Stanley*, 132 NH 727, 571 A.2d 269 (1990); 5 COA 2D 899 (2012)

Here, prior to signing the parties met and reviewed the contract together and were put on notice of the above-mentioned fact. RP P. 178 lines 17-24.

However, Mr. Hill testified that he did not read the contract thoroughly. RP. P. 98 lines 4-12, and indicated that he neither talked to nor sought the advise of anyone else about this agreement, and he did not have anyone else review this PSA prior to signing. RP. P. 148 lines 17-20; 160 lines 7-8

Mr. Hill clearly testified that they relied solely upon Mr. Woods information as a basis for entering into the PSA. RP P. 148 lines 17-20; P. 160 lines 7-8.

Parties have a duty to read the contracts they sign. *Nishikawa v. U.S. Eagle High, LLC*, 158 P.3d 505 A fundamental principle of Washington contract law is that where a party has an opportunity to examine the contract prior to his agreement, and where such agreement is not induced through fraud or coercion, he may not claim that he was ignorant of its contents. *Washington Federal Sav. & Loan Ass'n v. Alsager*, 266 P.3d 905

While Johnny Hill testified that Mr. Woods made representations to them regarding condition and quality of the van RP P. 106 lines 1-16; 17-25, Melinda Hill actually denied that Mr. Woods made representations regarding condition or quality of the subject van. RP P. 88 lines 13-14.

Once again, the van in question had 147,000 miles on it, RP p. 180 lines and this was a fact that the Hills were made fully aware of. RP P. 180 lines 20-25.

As indicated, prior to and at the time of the signing of the PSA, the Hills had been employed with the Fed Ex company for a period of some ten years, and were employed with the Fed Ex company up to and at the time of signing the PSA. RP p. 105 line 6; P. 162 lines 19-25; 163 lines 1-10. As indicated, the Hills also received training in operating a Fed Ex route and package policies and procedures, RP P. 87 lines 25; 88 lines 1-2; P. 88 lines 6-8 and the Hills also rode along with Mr. Woods at least five times when he made his deliveries using subject vehicle, and did so prior to signing of the PSA. RP. P. 83 lines 1-25; P. 114 lines 19-25

These circumstances at the very least suggest that the Hills had knowledge or ability to acquire knowledge and information regarding the operations of Fed Ex contractors and route operations.

Mr. Woods told the Hills of the maintenance which had been done on the subject vehicle prior to the signing of the agreement, and, also offered to provide or to make available all inspection reports for the subject van, and in no way stood in the way of the Hills having their own inspection of the van conducted. However, in spite of these facts, the Hills declined or failed to have any further evaluation or inspection of the van conducted.

The Hills testified that after signing the PSA, they discovered that, on occasion, they were required to deliver packages to a larger area that were not part of areas driven through by Mr. Woods during the course of "ride alongs", and which took longer periods of time to complete than that represented by Mr. Woods during the course of ride alongs. RP p. 105 line 6; P. 162 lines 19-25; 163

lines 1-10. Mr. Woods testified that he never left off parts of the route, and that he simply followed the route required based upon the type of packaging being delivered on those occasions. RP. P. 170 lines 15-17 While Mrs. Hill testified that Mr. Woods did not take the Hills to certain areas during the course of the ride along, RP. P. 86 lines 6-12 Mr. Woods testified that the Fed Ex routes were set by management based upon what types of packaging to be loaded, RP/ P. 170 lines 11; RP. P. 170 lines 17-18, and that Fed Ex management set the hours of route operation. RP. P. 171, lines 13-19

Mr. and Mrs. Hill had been employed with the Fed Ex. Corporation for a lengthy period of time prior to and at the time of contracting, and also received training in operating a Fed Ex route and package policies and procedures, RP P. 87 lines 25; 88 lines 1-2; P. 88 lines 6-8 and they also went on ride alongs with Mr. Woods.

While the Hills may not have had the skill or knowledge, comparable to that of Mr. Woods, these were facts that persons in the Hills' position and with their knowledge and experience could have known or should have known and they could have had or did have access to resources necessary to verify the facts being represented. With respect to any failure on Mr. Woods' part to reveal specific details regarding an accident involving the van, the Hills had information indicating that the van had somehow been damaged previously thereto, and they, again, choose not to have the van inspected prior to entering into the purchase and sale agreement.

In *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 114 P.3d 664 (2005); the court found that the Plaintiffs in that case had ample opportunity to inspect and because the Plaintiffs failed to do so prior to signing a purchase and sale agreement for real property, the Plaintiffs had no right to rely upon the representations of the Respondent, and that because the contractual language was clear, the court ruled that it could not rewrite the clear agreement of the parties.

Here, the Hills entered into a purchase and sale agreement, whereby they agreed to purchase the property in its present “as is” condition, and the Hills do not assert that they were either unaware of the “as is” clause or that they stood in a position of bargaining power which was grossly disproportionate to Mr. Woods.

While Mr. Woods drafted the PSA, RP. P. 48 lines 8-25 there was a meeting of the minds. The parties did meet and they did have opportunity to review the PSA, and there were discussions between the parties as to the terms of the agreement, RP. P. 49 lines 20, despite the fact that Mr. Hill testified that he did not read the contract thoroughly, RP. P. 49 lines 4-12; 20-21; P. 49 lines 35; P. 50 lines 1-5 P. 98 lines 4-12, and indicated that he neither talked to nor sought the advise of anyone else about this agreement, and he did not have anyone else review this PSA prior to signing. RP. P. 148 lines 17-20; 160 lines 7-8 and they did so prior to signing, thus the negotiation element is satisfied.

Here, there was no intentional deception by Mr. Woods, and there was no misrepresentation of a material fact. Once again, while the Hills may not have had the skill or knowledge comparable to that of Mr. Woods, however, being employees of Fed Ex, and having received training from Fed Ex in package

policies and procedures and contracting for a route, RP. P. 11 lines 24-25; P. 42 lines 19-25; P. 12 lines 18-25; P. 23 lines 1-3 the Hills either were in a position to know of procedures and policies regarding route operation, or were in a position to gain access to the resources necessary to obtain information necessary to verify the representations alleged to have been made, but again, they choose not to do so.

The Hills were put on notice of matters, which either did or should have placed them on notice of things requiring further investigation. The Hills had ample opportunity to inspect and again, they failed to do so prior to signing a purchase and sale agreement

The Doctrine of Caveat Emptor does not apply in cases where there has been misrepresentation of material fact.

Mr. Woods, by and through counsel argues that trial court did not err in applying the doctrine of caveat emptor, and did not err in finding that the Hills did not have the right to rely on Mr. Woods representations.

The Doctrine of Caveat Emptor does not apply in cases where there have been misrepresentations of material fact.

Here, statements allegedly made by Mr. Woods to the Hills regarding the condition of the van were not misrepresentations, they were representations made based upon inspection reports by Fed Ex. expert mechanics indicating that the Van was operational and fit for sale.

Statements allegedly made by Mr. Woods to the Hills regarding the

geographic aspect of the Fed Ex route operation and the hours of operation were not misrepresentations, but were representations made based upon rules and regulations, policies and procedures established by management personnel of the Fed Ex company.

As to any statements made by Mr. Woods to the Hills regarding release of title to the subject van, these alleged statements were also not misrepresentations, but were representations made based upon written terms contained in the PSA. The agreement clearly identified in the writing of the PSA provided that the parties agreed that the title to the subject van was to be signed over to the Hills upon complete performance of the terms of the PSA.

C. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE PSA WAS AN INTEGRATED CONTRACT?

An integrated contract is one where the parties intend a written document to be a final expression of their agreement. Whether the parties intended an integrated contract generally is a question of fact. Boilerplate integration clauses are strong evidence of integration. *King v. Rice*, 145 Wn. App. 662, 191 P.3d 946 (2008)

The Appellants argue that the trial court erred in concluding that the PSA was an integrated contract based upon the allegation that the parties made agreements that were not contained within the four corners of the PSA, which consisted of an agreement to sign over the title to the van and methods by which the Hills would make payment, and based upon the allegation that the contract was essentially boilerplate, and that there was not a meeting of the minds of the

parties.

The PSA between the parties provided in relevant part that:

“This instrument embodies the entire agreement between the parties hereto with respect to the transactions contemplated herein and there have been and are no agreements, representations or warranties between the parties other than those set-forth or provided for herein.” Id. at 6

Here, contrary to the Hills allegation, there was a meeting of the minds between the parties. In fact, the parties all testified that, prior to signing, the parties met in person, together, and that all parties were involved in negotiating the terms of the PSA and the preparation of the PSA, RP. P. 178 lines 8-10 and that the Hills did sign the document. RP. P. 45 lines 7-10 And, once again, they did so in spite of the fact that Mr. Hill did not thoroughly read the document prior to signing the PSA. RP. P. 160 lines 17

While certain changes were made during this process and prior to signing the PSA, the language was clear, and the parties testified that changes were only made with regard to the terms of the methods by which payment would be made. RP. P. 187 lines 11-25 These changes were also acknowledged by the parties and were understood by the Hills, and thereafter, the Hills then signed the PSA, even though certain letters were missing from particular terms contained in the PSA. RP. P. 48 lines 8-25; P. 49 lines 4-12; 20-21-25; P. 50 lines 1-5

Testimony indicates that the only thing that was agreed upon, and that was not within the four corners of the PSA, was an agreement regarding the method or procedures by which the Hills would make payment. RP. P. 187 lines 11-25

The language of the contract was clear, albeit there was indication of slight grammatical imperfections, there was no indication that those imperfections or mistakes in grammar, punctuation or spelling in any way altered, contravened or vitiated the manifest intent of the parties as gathered from the language employed. And, again, Mr. Hill did not even review the document thoroughly.

When the contractual language is clear, the court not only should not, but cannot rewrite the clear agreement of the parties. *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 114 P.3d 664.

However, as to the release of title to the van, Mr. Woods clearly testified that the terms regarding release of title were, in fact, contained in the body of the PSA, that the parties signed. And again, although the parties testified that there were some terms that were grammatically incorrect, Mr. Hill testified that he failed to properly review the document. Therefore, even if there may have been grammatical imperfections, Mr. Hill admittedly did not read the contract. As a result, he cannot now claim ignorance of the contents thereof, and is not in a position to complain that the same in any way was altered, contravened, or vitiated the agreement of the parties.

The contractual language was clear, despite slight grammatical imperfections. The agreement embodied the entire agreement between the parties thereto with respect to the transactions contemplated therein.

there were no agreements, representations or warranties between the parties other than those set-forth or provided for therein, and the Hills did not

assert that they were either unaware of the integration clause or that they were in a position of bargaining power which was grossly disproportionate to Mr. Woods.

An integrated writing is one adopted by the parties as the final and complete expression of the agreement. Generally, parties have the right to make their agreements partly oral and partly in writing or entirely oral or entirely in writing. *Lopez v. Reynoso*, 129 Wn. App. 165, 118 P.3d 398 (Div. 3 2005)

If the court finds that the parties intended the writing to be a final expression of the terms that it contains, but not a complete expression of all the terms agreed upon, i.e., partial integration, all conversations, contemporaneous negotiations, and parol agreements between the parties to a prior written agreement are merged therein. *James S. Black & Co., v. P. & R Co.*, 12 Wn. App. 533, 530 P.2d 722 (Div. 3 1975) However, prior parol agreements cannot be given in evidence for the purpose of changing a written agreement or an understanding different from that expressed therein. *McGregor v. First Farmers Merchants Bank & Trust Co.*, 180 Wash. 440 P.2d 144 (1935)

WHETHER THE TRIAL COURT ERRED IN CONCLUDING  
THAT THE PAROL EVIDENCE RULE PRECLUDED  
MODIFICATION OR CONTRADICTION OF THE PSA?

Appellants argue that the trial court improperly concluded that the PSA was an integrated agreement and did not consider evidence of the parties oral agreements for purposes of modifying or contradicting the PSA, that the court

erred in concluding that the parol evidence rule precluded modification or contradiction of the PSA, and that evidence of verbal agreements should have been considered for purposes of modifying and/or contradicting the PSA.

The PSA between the parties provided in relevant part that:

“This instrument embodies the entire agreement between the parties hereto with respect to the transactions contemplated herein and there have been and are no agreements, representations or warranties between the parties other than those set-forth or provided for herein.” *Id.* at 6

Mr. Woods argues once again that, the contractual language was clear, despite slight grammatical imperfections, and the agreement embodied the entire agreement between the parties thereto with respect to the transactions contemplated therein. The only agreement, representation or warranty between the parties other than those set-forth or provided for therein, consisted of agreement regarding method of payment. The Hills also did not assert that they were either unaware of the integration clause or were in a position of bargaining power which was grossly disproportionate to Mr. Woods. Where the contractual language of a PSA is clear, the court not only should not, but it cannot, rewrite the clear agreement of the parties. *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 114 P.3d 664 (2005); *Frickel v. Sunnyside Enters, Inc.*, 106 Wn.2d 714, 721; 725 P.2d 422 (1986)

While it is true that the parol evidence rule is inadmissible to vary the terms of a written contract when a defense of fraud, illegality or want of

consideration is made, *Kristzer v. Moffat*, 136 Wn.. 410, 417, 240 P. 355 (1925)

the trial court in this case did not find that Mr. Woods committed fraud in inducing the Hills into entering into the PSA.

I. WHETHER THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS NO FRAUD IN THE INDUCEMENT?

Appellants argue that the trial court erred in finding and concluding that there was no fraud in the inducement.

The Appellants argue specifically that, Mr. Woods committed fraud in representing the time necessary to service the Fed Ex route, that Mr. Woods committed fraud when he failed to disclose information about the accident involving the van, and in representations regarding the condition and/or quality of the van. The Appellants properly set forth the elements of proof necessary to establish a case of fraud.

To prove fraud, a party must present clear, cogent, and convincing evidence of the following: (1) representation of existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it be acted upon by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom the representation is addressed; (7) the latter's reliance on the truth of the representation; (8) the right to rely upon it, and (9) consequent damage. *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d 157, 166, 273 P.3d 965 (2012)

While it is alleged that Mr. Woods did make certain representations of fact which were material regarding the route operation, and about the condition and quality of the subject van, Mr. Woods did not do so with knowledge of their falsity, Mr. Woods did not intend that representations to be relied or acted upon by the person to whom they were made, and the Hills claims of ignorance of the falsity thereof are unfounded, and the Hills did not have a right to rely upon the same.

(1) representation of existing fact:

Once again, it should be noted that, while Johnny Hill testified that Mr. Woods made representations to them regarding condition and quality of the van RP P. 106 lines 1-16; 17-25, Melinda Hill actually denied that Mr. Woods made representations regarding condition or quality of the subject van. RP P. 88 lines 13-14.

Prior to signing the PSA, the Halls allege that Mr. Woods committed fraud when Mr. Woods represented to them that the delivery van was in good condition, and that the van was suitable for the Fed Ex route. Mr. Wood testified any such representations made by him were based upon Fed Ex Inspection reports, which indicated that the vehicle was "operational." and had been cleared for sale. RP. 74, 3-7, 22-25

While this may have been a representation of a material fact, this statement was not, in fact, false; and Mr. Woods did not make the statement knowing it was false.

Mr. Woods testified that he made the representations based upon and in reliance upon inspection reports received from expert mechanics of Fed Ex. **RP. P. cite** And, while said inspection report had not been provided the Hills prior to signing the PSA, Mr. Woods did make every attempt possible to facilitate the release of inspection and maintenance reports to the Hills, however, Fed Ex. refused to do so. RP. P. 218 lines 1-12; 17-25 Mr. Woods may have made the statement with the intent that it be acted upon by the Hills, and though they may have been ignorant of its truth or falsity at the time, the fact that the Hills had knowledge regarding the excessive mileage, and the fact that they had information indicating that the vehicle had been damaged prior thereto, and the fact that the Hills failed to have the van inspected renders their reliance thereon, unjustified.

Here, while Mr. Woods did take the Hills on what is referred to as “ride alongs” which did not include areas the Hills indicated that they were later required to cover, there was no indication that Mr. Woods knew or believed that any representations made or inferred as a result of those ride alongs were, in fact, false.

For instance, while Mr. Woods testified that he did not take the Hills to certain areas during the course of a ride along, Mr. Woods testified that the Fed Ex routes were set by management based upon the types of packaging to be loaded, RP. P. 170 lines 11; RP. P. 170 lines 17-18 and that Fed Ex management set the hours of route operation. RP. P. 171, lines 13-19 Mr. Woods also testified that he never left off parts of the route, and that he simply followed the route

required based upon the type of packaging being delivered on those occasions.

RP. P. 170 lines 15-17,

Additionally, the Hills received training in operating a Fed Ex route and package policies and procedures, RP P. 87 lines 25; 88 lines 1-2; P. 88 lines 6-8 and the Hills were and had been employees of Fed Ex, and had received training from Fed Ex in package policies and procedures and contracting for a route. Thus, the Hills were either in a position to know of procedures and policies regarding route operation, or were in a position to access the resources necessary to obtain information regarding such matters. Hence, any argument that they were ignorant of the falsity of such a representation is without merit, and the fact that they choose not to have the van inspected or to take measures to follow-up on information regarding maintenance records renders the Appellants alleged reliance thereon unjustified. Although Mr. Woods did not specifically inform the Hills of or provide an inspection report regarding the “dinged bumper” and did not reference maintenance reports showing that the van had “reached or exceeded its design intent” prior to the signing of the PSA, Mr. Woods made the vehicle available to the Hills for personal observation and inspection, and directed their attention to what was described as a “dinged” bumper, and Mr. Woods did inform the Hills about the fact that the bumper had been damaged at an earlier time, although Mr. Woods did not provide intricate detailed information as to the cause thereof.

The van in question had 147,000 miles on it, RP p. 180 lines and this was a fact that the Hills were made fully aware of. RP P. 180 lines 20-25.

Mr. Woods did not intend that the alleged representations be relied upon by the Hills. In fact he told the Hills of the maintenance which had been done on the subject vehicle prior to the signing of the agreement, and Mr. Woods made the vehicle available for the Hills to observe, **RP P. (fill in)** and he also offered to provide or to make available all inspection reports for the subject van, RP. P. 218 lines 1-12; 17-25 and in no way stood in the way of the Hills having their own inspection of the van conducted, thereby providing the Hills with information necessary to obtain access to a means by which to either confirm or dispel the truth or falsity of the representations made, if there were any. However, in spite of these facts, the Hills declined to or failed to have any further evaluation or inspection of the van conducted. Reliance will not be justified if the plaintiff had an opportunity make inquiries about and inspect the vehicle but failed to do so through no fault of the defendant. *Turner v. Landmark Chevrolet Inc.*, 514 So.2d 1337 (Ala 1987)

One who seeks to avoid a contract, which he has been induced to enter by fraudulent representations, must act with reasonable promptness on discovering the fraud or the right to rescission will be waived. *Graff v. Geisel*, 39 Wn.2d 131 (1951) In the case of *Oats v. Taylor*, 31 Wn.2d 898, 904, 199 P.2d 924 the court held that while the lack of business experience of the vendee is a factor to be considered, it further determined that a vendee "cannot be permitted to say that he

was taken advantage of, if he had the means of acquiring the information, or if, because of his business or his prior dealings with the other, he should have acquired further information before he acted.”

The Hills testified that they were first time buyers of a Fed Ex, route or van associated therewith, RP. P. 8 lines 17 however, they were not so entirely lacking in business experience that they were placed at a disadvantage cannot be permitted to say that they were taken advantage of, as they had the means and ample time to acquire information and they chose not to do so.

Defendants knowledge of falsity

The appellants argue that evidence that Mr. Woods had spent approximately \$11,000.00 in maintenance on the subject van is evidence that Mr. Woods knew that his representations regarding the condition and quality of the van were false.

While Mr. Woods did not deny this fact, the Appellants assertion is pure speculation. In fact, this evidence is indicative of the fact that these expenditures were made by an individual who was very cognizant of the need to maintain the vehicle in good condition, and were made by an individual who took all measures necessary to maintain the vehicle in a good condition.

There was substantial evidence in the record to support the trial court’s finding that the van was in good condition. All nine elements of fraud in the inducement were not satisfied at trial. There was no fraud in the inducement, and the trial court did not have authority to reform the contract to provide equitable

relief.

“A party to a contract is not entitled to reformation of the contract.

The trial court did not err in concluding that there had been fraud, and that it could not order Mr. Woods to release his security interest in the van and turn over title to the Hills. Based thereon, Mr. Woods respectfully request that the Findings of Fact (g) – (i), Conclusions of Law (b) – (m) and the judgment in favor of Mr. Woods be affirmed.

K. WHETHER THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT MR. WOODS DID NOT INTERFERE WITH THE HILLS CONTRACTUAL PERFORMANCE

The appellants’ assert that the trial erred in finding and concluding that Mr. Woods did not interfere with the Hills’ contractual performance. The Appellants’ argue specifically that the van’s poor condition, combined with Mr. Woods’ failure to show the Hills the complete route, and Mr. Woods refusal to release title prevented the Hills from being able to use the van in a cost-effective manner, RP 127:7 – 128:3 – 143:25 and that the same interfered with the Hills ability to perform their obligations under the contract.

Mr. Woods showed the Hills the Fed Ex routes, which were set by management based upon the types of packaging to be loaded, RP. P. 170 lines 11; RP. P. 170 lines 17-18 and did so for the periods of time that Fed Ex management set. RP. P. 171, lines 13-19 Mr. Woods never left off parts of the route, and he simply followed the route required based upon the type of packaging being delivered on those occasions. RP. P. 170 lines 15-17.

The Hills, as indicated, received training in operating a Fed Ex route and package policies and procedures, RP P. 87 lines 25; 88 lines 1-2; P. 88 lines 6-8 and the fact that the Hills were and had been employees of Fed Ex, and had received training from Fed Ex in package policies and procedures and contracting for a route, RP. P. 87 lines 25; P. 88 lines 11-28; P. 89 line 1 the Hills were either in a position to know of procedures and policies regarding route operation, or were in a position to access the resources necessary to obtain information regarding such matters, thus any argument that this somehow interfered with their ability to perform is without merit.

As far as the condition of the subject van, the Hills had knowledge regarding the excessive mileage, RP. P. 20 lines 21-22; and that the contract specifically indicated this fact. RP. P. 40 lines 12-16 they had information indicating that the vehicle had been damaged prior thereto, and that Mr. Woods had had many maintenance procedures performed on the van, and the Hills failed to have the van inspected and they failed to follow-up on the inspection reports.

As far as the release of title to the van is concerned, the PSA was clear that the title to the van would be released upon the Hills completion of performance of the terms of the agreement, **RP. P. cite** and testimony indicates that the Hills failed to comply with and to complete performance under and consistent with the PSA. Testimony in this case also indicated that on numerous occasions, Mr. Woods made good faith attempts to meet with the Hills to provide the Hills with a release of title to the Van, this, despite the fact that the Hills had not complied

with or completed performance consistent with the terms of the PSA, and that the Hills refused to meet with Mr. Woods. RP. P. 38 lines 13-17; P. 39 lines 15-16, P. 43 lines 18-25; P. 43 lines 9-13, 44 lines 1-18

L WHETHER THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT MR. WOODS MITIGATED HIS DAMAGES

Appellants argue that Mr. Woods failed to mitigate his damages by failing to release title to the subject van. The Appellants charge that Mr. woods never made such a request of the Hills, that he insisted that the Hills continue to use the subject van, and that based thereon, he failed to take action to minimize his losses.

It is true that, a plaintiff who sustains damage as a result of a defendant's breach of contract has a duty to minimize his loss, and that a plaintiff is not entitled to recover for any part of the loss that he could have avoided with reasonable efforts, and that the defendant has the burden to prove plaintiff's failure to use reasonable efforts to minimize his loss, and the amount of damages that could have been minimized or avoided. WPI 303.06; *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840, 100 P. 3d 791 (2004); *City of Puyallup v. Hogan*, 168 Wn. App. 406, 422-23, 277 P.3d 49 (2012); *Transalta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825-26, 142 P.3d 209 (2006); rev. denied 161 Wn.2d 1013, 166 P.3d 1218 (2007).

Here, the PSA clearly indicated that the title to the van was to be released upon the Hills completion of performance of the terms of the agreement. **RP. P. cite** The Hills failed to comply with and to complete performance under and

consistent with the PSA. As far as the allegations by the Appellants' that Mr. Woods never made such a request of the Hills, and that he insisted that the Hills continue to use the subject van, those allegations are simply untrue. Mr. Woods did, in fact, use reasonable efforts to minimize his loss. In fact, uncontraverted testimony in this case indicates that on numerous occasions, Mr. Woods made good faith attempts to meet with the Hills to provide the Hills with a release of title to the Van, despite the fact that the Hills had not complied with or completed performance consistent with the terms of the PSA, and that the Halls refused to meet with Mr. Woods. RP. P. 38 lines 13-17; P. 39 lines 15-16, P. 43 lines 18-25; P. 43 lines 9-13, 44 lines 1-18

M. WHETHER THE TRIAL COURT ERRED IN ENTERING  
FINDINGS AND CONCLUSIONS THAT WERE  
INSUFFICIENT

Appellants' argue that the Findings of Fact and Conclusions of Law entered did not set forth all material facts that were controverted at trial and were not sufficient to inform an appellate court of the basis for the trial court's decision. CP 191-207. Appellants in this case argue specifically that, the trial court erred in refusing to add findings relating to the Hills' affirmative defenses and counterclaims, and that findings of fact and conclusions of law that were entered by the court were insufficient.

In all actions tried upon the facts without jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law. *City of Spokane v. Department of Labor and Industries*, 34 Wn. App. 581, 663 P.2d 843 (1983) 42

Customarily, the attorney for the prevailing party drafts an appropriate set of findings and submits them to the court for adoption. CR 52 In this case, Mr. Woods, as the prevailing party, did prepare a set of proposed findings of fact and conclusion of law after the trial court's oral ruling. RP P. 251 lines 4-5.

Counsel for the opposing party may appear and object to the proposed findings and conclusions, and may prepare, serve, and present counter-proposals. CR 52(6)

Here, the Hills filed objections to the findings of fact and conclusions of law, and also proposed additional findings and conclusions' relating to the Hills affirmative defenses and counterclaims, CP 191-207 and a hearing with respect thereto was held on July 20, 2012.

The Hills filed objections to the findings of fact and conclusions of law, and also proposed additional findings and conclusions relating to the Hills affirmative defenses and counterclaims. CP 191-207

A hearing was held on July 20, 2012, and at the time of that hearing, the Appellants summarized their objections on the record. RP. P. 1-12. Thereafter, and based thereon, the court ordered minor revisions to Mr. Woods proposed findings and conclusions, but refused to add findings and conclusions relating to the Hills' defenses and counterclaims. CP 271-73. The findings of fact and conclusions of law were finally entered on July 27, 2012. *id.* A judgment was entered the same day. CP 274-75

At the time of that hearing, the Appellants summarized their objections on the record. RP. P. 1-12. Thereafter, and based thereon, the court ordered minor revisions to Mr. Woods proposed findings and conclusions, but refused to add findings and conclusions relating to the Hills' defenses and counterclaims. CP 271-73.

When the trial court makes no express finding regarding a material fact, it is considered that the finding is adverse to the party in whose favor the finding would have been made. *City of Spokane v. Department of Labor and Industries*, 34 Wn. App. 581, 663 P.2d 843 (1983) Thus, a material fact is treated as if found against the party having the burden of proof when the trial court makes no express finding regarding that fact, unless the fact is supported by uncontroverted evidence in the record. *Pacesetter Real Estate Inc., v. Fasules*, 53 Wn. App. 463, 767 P.2d 961 (1989); *Lobdell v. Moon*, 48 Wn. App. 647, 739 P.2d 1157 (1987)

When a court makes no finding regarding an affirmative defense, the court is deemed to have decided against the establishment of the defense. *Jacobson v. Lawrence*, 9 Wn. App. 786, 514 P.2d 1396 (1973)

Here, the Hills were afforded a hearing an opportunity to present their objections on the record. At that time, the Hills presented their proposed findings and conclusion. The court took notice of the Hills objections and reviewed the record and the findings and conclusions proposed by the Hills, and only after a full review thereof, did the court refuse to add to the findings related to the Hills affirmative defenses and counterclaims.

Findings of fact and conclusions of law are sufficient if they enable the appellate court to determine what questions were decided and the conclusions reached by the trial judge upon such questions. CR 52; *LeMaine v. Seals*, 47 Wn.2d 259, 287 P.2d 305

Mr. woods argues that the facts in this case were and are sufficient to inform the appellate court of the basis for the trial court's decision, and that the court's refusal to add findings relating to the Hills counterclaims and affirmative defenses was not in error.

An appellate court occasionally finds a way or a reason to review a case without sufficient findings without remanding the case back for additional findings. 3A. *Washington Practice, Rules of Practice*, CR 62, P. 262 (2012)

For instance, even in the absence of a specific finding, the trial court's memorandum decision may be sufficient to allow the reviewing court to discern what questions the trial court decided and the theory for the outcome: an appellate court may look to the trial court's memorandum opinion, or even an oral opinion, to support a general finding. *Backlund v. University of Washington* 137 Wn.2d 651, 975 P.2d 950 (1999)

Additionally, the Appellants' in this case brought and had a hearing on a pre-trial motion for Sanctions for Mr. Woods' alleged failure to comply with the scheduling order. It is uncertain whether the Appellants argument on the issue of Findings of Fact and Conclusions of Law includes or relates to hearings on the Motion for sanctions for alleged discovery violations, but Findings of Fact and

Conclusions of law are not necessary on decisions of motions under rules 12 or 56 or any other motion, CR 52 (c)(5)(B) except as provided in rules 41(b)(3) and 55 (b)(2). CR 52 (B)(5) Thus, if that be the case, the Appellate court should not entertain any argument regarding issues surrounding the entry or sufficiency of finding of fact or conclusions of law arising out of a motion hearing.

GEORGE WOODS REQUESTS AN AWARD OF  
ATTORNEY FEES AND COSTS ON APPEAL

RAP 18.1 provides in pertinent part:

“If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of appeals or the Supreme Court, the party must request the fees or expenses as provided in this rule unless a statute specifies that the request is to be directed to the trial court. RAP 18.1(a). When the terms of a contract between the parties allows for an award of fees and costs to the prevailing party, such an award can be granted under RAP 18.1 See *Floor Exp. Inc. v. Daly*, 138 Wn. App. 750, 757, 158 P.3d 619 (2007) (attorney fees awarded to prevailing party in appeal arising out of breach of contract claim).

Here, the PSA contained the following term:

“In the event any controversy or claim arises under this Agreement, the **prevailing party** shall be entitled to its **reasonable costs, disbursements, and, (sic) attorney fees**, including attorney fees incurred in enforcing or executing upon any judgment rendered, together with all expenses which it may reasonably incur, including, but not limited to, costs incurred in searching records, expert witness and consultant fees, discovery depositions whether or not introduced into evidence in the trial, hearing or other proceeding and travel expenses in any arbitration, trial or **other proceeding**, including any proceeding brought to enforce an award or judgment, **and any and all appeals taken there from**. Ex. 12 at 6 (emphasis added).

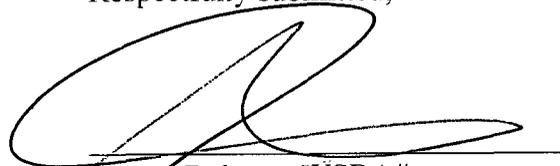
Accordingly, if the court should find that Mr. Woods is the prevailing party in this appeal, Mr. Woods respectfully requests an award of their attorney's fees and costs incurred herein. Pursuant to RAP 18.1(c) please find attached a Affidavit of Financial Need and Affidavit of Fees and Expenses.

**V. CONCLUSION**

The trial court did not commit errors of law, and its findings are supported by substantial evidence. The Woods respectfully request that the Court Affirm the trial court as indicated above, and affirm the judgment in favor of Mr. Woods.

Dated this 28 day of January 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven Bobman", written over a horizontal line.

Steven Bobman WSBA#  
Attorney for Respondent

FILED  
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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

GEORGE WOODS,  
Plaintiff/Respondent,

v.

JOHNNY HILL and MALINDA  
HILL, husband and wife,  
Respondent/Appellant.

Appeal No. 43824-1-II

Certificate of Mailing

I am the assistant for Steven M. Bobman, Attorney at Law, and on the 29<sup>th</sup> day of January, 2013, I sent by U.S. Mail and ABC Legal Messenger a true and correct copy of the Plaintiff/Respondent's Declaration of Financial Need and Responsive Brief of Respondent addressed to the following parties at their last known addresses, to-wit.

(ABC LEGAL MESSENGER)

(U.S. MAIL)

Shelly K. Speir  
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Tacoma, WA 98466

George Woods  
Plaintiff/Respondent  
41327 East Village Green Blvd  
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Canton, MI 48187

I make this declaration under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: January 29, 2013

By:   
\_\_\_\_\_  
Kayde Enos, Assistant to  
Steven M. Bobman, WSB No. 9,045