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ORGANIZATION OF THIS BRIEF

This Reply brief will respond to the arguments made on behalf of Douglas Ray and the Estate of Irwin Jessen (the Sellers) joined in by Dean Maldonado; Mills End, LLC; Mills End Center, LLC; and DRKBG, LLC (collectively Mr. Maldonado). It will try not to repeat or reiterate points made in Plaintiff/Appellant's Brief. Any failure to address any particular point should be viewed as an indication that the matter was sufficiently discussed in Plaintiff/Appellant's Brief.

There are three distinct issues in this case. The first will be called the right of first refusal claim — BGP's claim that the Sellers violated the terms of the Right of First Refusal Provision contained in the Purchase and Sale Agreement between them (PSA). The second will be termed the seniority claim — BGP's assertion that its interest in the shopping center property is superior to that of Mr. Maldonado under the Reciprocal Easement Agreement. The third is the attorney's fee claim — the Seller's claim to an award of attorney's fees in the trial court. Each will be discussed in turn.

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REPLY ON THE RIGHT OF FIRST REFUSAL CLAIM

I. Introduction.

The Sellers never notified BGP of their intention to enter into the Reciprocal Easement Agreement as required by the Right of First Refusal Provision. They never told the Bankruptcy Court about that either. The Sellers failure to make these disclosures means that the November 1, 2005, order allowing the sale of the .5-acre parcel can have no preclusive effect. These key facts underlie all considerations.

II. Reply to Respondents' Statement of Facts.

When Battle Ground Plaza, LLC (BGP) learned that the Sellers intended to reduce the purchase price of the .5-acre parcel, it requested copies of all "cross parking agreements" which would include the Reciprocal Easement Agreement. In their brief at page 7, Sellers claim that the document was not provided because they had concluded that BGP had failed "to comply with the right of first refusal." But according to Timothy Dack, then attorney for the Jessen estate, the document was not provided because "at this point in time, (BGP) had no interest in the property and there was no reason to provide it to (BGP)" and "(BGP) had no interest in the property and had no reason to have a copy of it." (CP 485)

III. BGP's Suit Is an Independent Action That Can Set Aside an Order of Sale.¹

The Sellers argue that this case is an impermissible collateral attack on the November 1, 2005, Bankruptcy Court order, and that BGP has no remedy because it did not timely file a motion under FRCP 60(b). It is not a collateral attack, of course, because it raises other issues that could not have been decided by the Bankruptcy Court as will be discussed below.

Nonetheless, this suit is an altogether proper independent action that can set aside an order allowing the sale of property as allowed by FRCP 60(d)(1). *Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1016-1017 (7th Cir. 1988); *In re Brook Valley IV*, 347 B.R. 662 (8th Cir. BAP 2006). And such an independent action may be commenced in any court of competent jurisdiction at any time. 18 *Federal Practice and Procedure* §2868.²

The elements of an independent action are: 1) a judgment which ought not in equity and good conscience be enforced; 2) a good defense to
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¹ The arguments made in this section were presented to the trial court. (CP 456-459)

² A federal judgment may be collaterally attacked by a proceeding commenced in Washington courts. *Williams v. Steamship Mutual Underwriting Association*, 45 Wn.2d 209, 273 P.2d 803 (1954).

the alleged cause of action on which judgment is founded; 3) fraud, accident, or a mistake that prevented the defendant in the judgment from obtaining the benefit of his defense; 4) absence of fault or negligence on the part of the defendant; and 5) absence of any adequate remedy at law. *Bankers Mortgage Co. v. United States*, 423 F.2d 73 (5th Cir. 1970); Teglund *Civil Procedure* 15 Wash.Prac. §3915. Each of the elements is satisfied here. First of all, to the extent that this proceeding would be at odds with the prior Bankruptcy Court order, it should not be enforced because the Sellers breached the Right of First Refusal Provision by not disclosing the pendency of the Reciprocal Easement Agreement. Secondly, the Sellers' failure to disclose this term represents a good defense. Third, BGP was prevented from bringing this matter to the attention of the Bankruptcy Court by "fraud, accident, or a mistake." The Right of Refusal Provision required the Sellers to disclose all terms of sale to Mr. Maldonado including the Reciprocal Easement Agreement. BGP specifically asked the Sellers to disclose "cross parking agreements" in a letter dated October 25, 2005. The Sellers did not respond. They compounded the problem by seeking an order to shorten time to consider the issue. The Motion is dated October 19, 2005. (CP 624) The hearing was scheduled for November 1, 2005. BGP was given until October 28, 2005, to respond. (CP 623) There was no time for discovery. BGP was

diligent by making a request for information on October 25, 2005. Finally, if Sellers arguments are credited, BGP has no adequate remedy at law.

A judgment may also be attacked on the grounds that it involves fraud on the court. FRCP 60(d)(3). Fraud on the court exists when officer of the court perpetrates a fraud or when the fraud subverts the court's integrity or affects the decision making process. This can consist of misleading discovery responses or a failure to disclose relevant information. *In re Intermagnetics America, Inc.*, 926 F.2d 912, 917 (9th Cir. 1991); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995). A failure to disclose to the Bankruptcy Court also amounts to fraud on that court. *In re Levander*, 180 F.3d 1114, 1120 (9th Cir. 1999). Fraud on the court can invalidate a sale. *In re Intermagnetics America, Inc.*, *supra*.

Fraud on the Bankruptcy Court is present here. Neither BGP nor the Bankruptcy Court was told of the pendency of the Reciprocal Easement. Without this information, the Bankruptcy Court could not adequately rule on whether the Sellers had satisfied their obligations under the Right of First Refusal Provision. Furthermore, officers of the Court were involved. As the debtor in possession, Mr. Ray was an officer of the Court. 11 U.S.C. §1101; *In re Intermagnetics America, Inc.*, *supra*, 926

F.2d at 917. His attorneys were also officers of the Court. Someone chose not to inform BGP of the Reciprocal Easement Agreement.

As the discussion above shows, a genuine issue of material fact exists on all of the elements of an independent action at very least. The matter should be remanded for a hearing on those issues.

III. The November 1, 2005, Order Allowing the Sale Has No Preclusive Effect on BGP's Right of First Refusal Claim.

a. The Issue Must Be Analyzed in Terms of Res Judicata or Claim Preclusion.

The Sellers suggest that orders of sale under 11 U.S.C. 363(f) are not governed by and subject to the normal rules of res judicata or claim preclusion. That is simply not the case. The case upon which the Sellers primarily rely, *Matter of Met-L-Wood Corp.*, *supra*, states that orders issued under 11 U.S.C. §363(f) are preclusive based upon principles of res judicata.

b. Washington Res Judicata Rules Apply.

The Sellers then contend that federal res judicata rules apply as opposed to Washington rules. That is not correct. The Right of First Refusal Provision contained in the PSA required the Sellers to notify BGP of "all of the terms and conditions upon which Seller is willing to sell" the .5-acre parcel. (CP 119) The substantive issue presented here is

whether the Sellers breached that duty by failing to notify BGP of their intention to enter into the Reciprocal Easement Agreement. That is a contract issue. Contract claims are recognized as state law claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989); 1 Norton Bankruptcy Law & Practice 3d §4:28. When, as here, bankruptcy courts adjudicate a state law claim, state res judicata rules apply. (Opening Brief, pps. 17-18)

IV. In Any Event, the Right of First Refusal Claim Is Not Barred under Federal Res Judicata Rules.

a. There Is No Bar under Rules Similar to Washington's.

In the federal system, res judicata bars a subsequent action if there is identity of claims; a final judgment on the merits; and privity between the parties. *Headwaters, Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1052 (9th Cir. 2005). This formulation is not materially different from the identities required under Washington law — an identity of subject matter; cause of action; person and parties; and identity of the quality of persons for or against whom the claim is made. (Opening Brief, pps. 18-19)

The same considerations are used to determine the identity of claim in the federal system and the identity of cause of action in Washington. These are whether the rights or interests established and the

prior judgment would be destroyed or impaired by prosecution of the second action; whether where substantially the same evidence is presented in the two actions; whether the two suits involved infringed upon the same rights; and whether the two suits arise out of the same transactional nucleus of facts. Compare *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982), with *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997). Preclusion is also not warranted under both federal and Washington if the new matter involves different evidence. *Sidhu v. Flecto Co., Inc.* 279 F.3d 896, 899 (9th Cir. 2002).

BGP's right of refusal claim involves different evidence than was brought before the Bankruptcy Court in November of 2005 because neither BGP nor the Bankruptcy Court knew about the Reciprocal Easement Agreement and the Sellers' intention to enter into it. (CP 274-285, 347-49) There will also be evidence at the trial of this matter concerning Mr. Maldonado's development and utilization of the property. This will assist the trial court in determining whether specific performance should be granted, and, if not, the extent of BGP's damages.

The "transactional nucleus of facts" is also different. It revolves around the Sellers' deeding the .5-acre parcel to Mr. Maldonado without advising BGP of their intention to enter into the Reciprocal Easement Agreement and the facts surrounding the appropriate remedy for

breach of the right of first refusal provision. These are different from what was presented to the Bankruptcy Court in November of 2005.

The Sellers cannot argue preclusion just because there is some factual relationship between what the Bankruptcy Court decided and what is at issue in BGP's suit. That is illustrated by *Hells Canyon Preservation Council v. U.S. Forest Service*, 403 F.3d 683 (9th Cir. 2005), plaintiff in the first action claimed that the Forest Service had violated the National Environmental Protection Act by relocating a stretch of trail without filing an environmental impact statement. In the second suit, the same plaintiff asserted that parts of the trail should remain inside the wilderness after relocation and the Forest Service's failure to display a map. The Court held that the second suit was not barred by res judicata since it involved a different "transactional nucleus of facts." 403 F.3d at 683.

b. The Sellers' Breach Occurred after the Entry of the November, 2005, Order.

In a larger sense, the "transactional nucleus of facts" is different because the Sellers' ultimate breach of the Right of First Refusal Provision occurred after the November 1, 2005, order approving the sale. The deed conveying the property was recorded on November 30, 2005. The Sellers breached the Right of First Refusal Provision at that time.

Prior to that time, the Sellers could have always notified BGP of the Reciprocal Easement Agreement and allowed it to meet what Mr. Maldonado had offered. Claims that finally accrue after the entry of the order in question are not precluded. See e.g., *Gonzalez-Pina Rodriguez*, 407 F.3d 425 (1st Cir. 2005).³

This rule is best illustrated by a case conceptually close to ours, *Board of Trustees of Trucking Employees of New Jersey Welfare Fund v. Centra*, 983 F.2d 495 (3rd Cir. 1992). In that case, a trucking firm named Mason-Dixon trucking firm did not pay contributions to a union pension fund. It filed for Chapter 11 Bankruptcy protection. The parties ultimately entered into a settlement agreement of the Fund's claim. The agreement was then approved by the Bankruptcy Court. Unbeknownst to the Fund, stock in Mason-Dixon had been sold to Centra shortly before the Bankruptcy filing. This point was critical because Centra would have been a potential source of payment of the obligation. The Fund then sued Centra to collect contributions it claimed were owed. Centra relied on the release provisions contained in the settlement agreement and argued that the agreement had res judicata effect because it had been approved by the Bankruptcy Court. The Court did not agree. It stated:

³Washington follows the same rule. *Mellor v. Chamberlain*, 100 Wn.2d 643, 647, 673 P.2d 610 (1983).

The bankruptcy proceeding arose from Mason–Dixon's withdrawal from the Pension Fund and its resulting debt for its portion of the unfunded vested liability. The factual predicates for the matter now before us are allegations that Mason–Dixon's misconduct induced the Fund to sign the agreement and that the Fund properly rescinded the settlement due to Mason–Dixon's breach of its contractual obligations. At the time the bankruptcy court approved the settlement agreement, the Fund was unaware of Mason–Dixon's alleged misrepresentations or of its own mistake concerning material facts. Unless the Fund was clairvoyant, it could not foresee that Mason–Dixon would breach the agreement. Yet Centra insists that the Fund should have brought to the court's attention claims of which it was completely unaware and claims based on conduct that had not yet occurred. Centra's argument is indefensible.

983 F.2d at 504-505. In the same way, BGP could not predict that the Sellers would ultimately sell the .5-acre parcel without providing notice of all the terms under which they intended to do so — including the Reciprocal Easement Agreement.

V. *Norris v. Norris* Is Not Applicable.

In support of their allegation that the right of first refusal claim is precluded by Washington's res judicata rules, the Sellers refer to *Norris v. Norris*, 95 Wn.2d 124, 622 P.2d 816 (1980). That case is not helpful. In *Norris v. Norris, supra*, a married couple executed wills and a community property agreement. Under the wills, Mr. Norris received a life estate in a ranch that couple owned with the remainder going to a son and a grandson. The community property agreement would have given Mr.

Norris fee simple title to that land. When the wife died, the husband chose to probate her will to obtain certain tax advantages. The will was admitted to probate; he was appointed personal representative; the property was distributed according to the will; and the Estate was closed. The husband subsequently decided that his interests were better served by relying on the community property agreement so that he could have a fee simple interest in the ranch. He commenced a quiet title action to that end. The Court held that his claims were barred by the probate action and his decision to probate the will. It focused on the choices the husband had made in becoming personal representative and accepting the benefits of the will. It also recognized that there was no evidence of fraud that would prevent reliance on what came out of the probate proceedings. 95 Wn.2d at 132-34.

Our case is critically different. BGP did not make any knowing decisions based on all the facts. That is precisely the problem here. The Sellers did not disclose the pendency of the Reciprocal Easement Agreement to BGP. *Norris v. Norris, supra*, is not helpful for that reason.

In any event, a probate judgment obtained without necessary disclosures has been held not to have preclusive effect. *Rosenberg v. Rosenberg*, 141 Wash. 86, 250 P. 947 (1926), discussed at Plaintiff/Appellant's Brief, pps. 26-27.

VI. The Sellers are Guilty of Fraud.

Res judicata or “claim preclusion” will not preclude a judgment obtained through fraud. (Opening Brief, pps. 26-28) This is a well-recognized rule that is recognized in the federal system. Restatement (Third) *Judgments* §26, comment j; *McCarty v. First of Georgia Insurance Co.*, 713 F.2d 609 (1983).

The Sellers claim that they did not engage in fraud because they disclosed the Purchase and Sale Agreement between them and Mr. Maldonado and that paragraph 3 of the agreement states that Mr. Maldonado’s obligation to purchase is conditioned on “(r)evue and acceptance of the Reciprocal Easement Agreements.” (Brief of Respondents, p. 29) This argument is not well taken.

First of all, the agreement does not say what Sellers claim that it says. The term “Reciprocal Easement Agreement” is not in the contract between Mr. Maldonado and the Sellers. Paragraph 3 states that the duty to close is conditioned on review and acceptance of “cross parking agreements.” (CP 317) The use of the words “cross parking agreement” in paragraph 3 is important because paragraph 5 requires the Sellers to provide Mr. Maldonado with “cross easement for access and parking” to the extent that such documents are “now in existence” and “within Seller’s possession or control.” (CP 318) These provisions must be read together

because the parties' intentions must be determined by reading the contract as a whole and each part should be given the same meaning. *Fardig v. Reynolds*, 55 Wn.2d 540, 544, 348 P.2d 661 (1960). Taken together, the two paragraphs require the Sellers to furnish Mr. Maldonado with any existing "cross easement for access and parking," and that he can refuse to close if he is not satisfied with its terms. They do not require the Sellers to enter into the Reciprocal Easement Agreement or any similar agreement. They also do not advise what the terms of any Reciprocal Easement Agreement might be.

BGP was interested in seeing what the existing parking and access arrangements were. It requested information in its letter of October 25, 2005. The Sellers did not respond. They also did not advise BGP or the Bankruptcy Court of the pendency of the Reciprocal Easement Agreement.

Mr. Maldonado was free, of course, to waive his approval of "cross parking agreements" and close anyway. When the Sellers did not disclose the pendency of the Reciprocal Easement Agreement, BGP could only conclude that Mr. Maldonado had chosen to follow that course. Since it was also concerned with parking, it also concluded that Mr. Maldonado had not made a good business decision by buying the .5-acre parcel.

The evidence is clear that the necessary fraud or non-disclosure is present here. At very least, however, a genuine issue of material fact is presented.

VII. The Sellers Violated the Right of First Refusal Provision.

The Sellers acknowledge that they did not move for summary judgment on the basis that they had complied with the Right of First Refusal Provision. Nonetheless, they ask the Court to find that they complied as a matter of law. Their request is at odds with the procedural rules on summary judgment. (Plaintiff's/Appellant's Brief, pps. 14-16) Out of an abundance of caution, however, BGP will address the substance.

The Right of First Refusal Provision states:

Seller grants to Purchaser a "Right of First Refusal" with respect to the land owned by Seller (consisting of approximately a half acre) that is immediately adjacent to the Property Purchaser is buying from Seller pursuant to this contract. This Right of First Refusal means that Seller may not sell or become contractually obligated to sell the adjacent parcel without giving written notice to Purchaser of all of the terms and conditions upon which Seller is willing to sell the adjacent property and giving Purchaser the opportunity to buy the adjacent land on those terms. Purchaser shall have seventy-two (72) hours from receipt of any such written notice within which to accept Seller's offer by serving a written and signed acceptance upon Seller. If Purchaser fails to communicate acceptance of the offer within 72 hours of receipt, then Purchaser's Right of First Refusal shall lapse as to the particular offer and Seller may sell it upon the stated terms to someone else. In the event that Seller then fails to sell and close escrow upon the adjacent lot within six months upon the stated terms or in

the event that Seller becomes willing to sell upon terms that are different than those contained in the original notice, then Purchaser's Right of First Refusal shall again apply and must be satisfied (including a new notice) before sale or voluntary transfer of the adjacent property to any other party.

(Emphasis added) (CP 119) This provision required the Sellers to notify BGP of “all of the terms” under which they were going to sell the .5-acre parcel to Mr. Maldonado and give a new notice if the terms changed or if there were new terms. The phrase “all of the terms” is not complicated. It must be given its ordinary meaning. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). That meaning refers to each and every term under which the sale is to be made. One of the terms of sale was the execution of the Reciprocal Easement Agreement. That means that BGP was entitled to know of it and each and every one of its terms. Also, if the terms of sale were to change or if any new terms are added to an existing arrangement, BGP was entitled to notice of those as well. The Sellers apparently recognized this because BGP was given notice when the parties agreed to reduce the purchase price. The Sellers did not comply because they did not notify BGP of their intention to enter into the Reciprocal Easement Agreement or all of its terms.

The Sellers contend that they did comply because the agreement between them and Mr. Maldonado that they did furnish contained Paragraphs 3 and 5, which read respectively, as follows:

3. Conditions to Purchase. Buyer's obligation to purchase the Property is conditioned on the following: []none [x]and/or Review and acceptance of the cross parking agreements and satisfactory Level 1 Environmental Survey and/or [x]Buyer's approval of the results of its property inspection described in Section 4. below. If Buyer has not given written waiver of those conditions, or stated in writing that these conditions have been satisfied, by written notice given to Seller within 60 days after the Execution Date (defined below), the Agreement shall be terminated, and the Earnest Money shall be promptly returned to Buyer.

5. Seller's Documents. Within ten (10) days after the Execution Date, Seller shall deliver to Buyer, at Buyer's address shown below, legible and complete copies of the following documents and other items relating to the ownership, operation, and maintenance of the Property, to the extent now in existence and to the extent such items are within Seller's possession or control: Cross easement for access and parking, rules for shopping center, management and advertising.

(Emphasis added) (CP 509-10) In paragraph 5, Mr. Maldonado wanted to review "cross parking" agreements as a part of normal due diligence. In paragraph 3, he conditioned his duty to close on his approval of any cross parking agreements. As discussed above, the language of these provisions does not require the Sellers to enter into any sort of "cross parking agreement" or the Reciprocal Easement Agreement. They do not preclude

a closing in the absence of some sort of parking easement. Mr. Maldonado was always free to waive the condition to closing set out in Paragraph 3 and close anyway.

Most importantly, precise terms of the Reciprocal Easement Agreement are not spelled out anywhere in paragraphs 3 and 5. These include critical terms that were contained in the Reciprocal Easement Agreement such as exactly which parts of the shopping center property would be subject to parking by users of Mr. Maldonado's building; whether there was mutual maintenance responsibilities; the term of any such easement; and indemnification and insurance responsibilities to name but a few. The extent of shopping center property that could be used is critical. That dictates what portions of the shopping center property can be used for ingress and egress—as well as for parking—by persons using Mr. Maldonado's building. (CP 576-79)

Mr. Maldonado was concerned about parking on the shopping center property as shown by paragraphs 3 and 5. BGP's knowledge of Mr. Maldonado's concern did not, however, relieve the Sellers of their obligation under the Right of First Refusal Provision to disclose all the terms of the Reciprocal Easement.

The Sellers finally contend that BGP was not entitled to learn of the Reciprocal Easement Agreement because it did not match Mr.

Maldonado's offer. That argument makes no sense. BGP's entitlement to match is triggered only after all terms are disclosed. Once again, there was no disclosure of the Reciprocal Easement Agreement.

The evidence is clear. The Sellers didn't comply with the provisions of the right of first refusal provision. At worst, a genuine issue of material fact is presented precluding summary judgment.

REPLY ON SENIORITY CLAIM

I. The Issue is Ripe.

Relying on *Kahin v. Lewis*, 42 Wn.2d 897, 259 P.2d 420 (1953), the Sellers contend that the case is not justiciable or "ripe" because BGP has not yet closed the transaction for the shopping center property and there are no "present aspects" to the issue. In *Kahin v. Lewis, supra*, the landlord had the option to terminate a lease and pay the tenant twice its cost for constructing a building on the premises less depreciation. The tenant assigned its interest in the lease to a third party and warranted the cost of construction. The assignee sought a construction of the warranty provision. The Court held that the matter was not justiciable because there was no present controversy — the issue could be determined when and if the landlord exercised its option to terminate the lease. It rejected the assignee's argument that the controversy affected the sale of the leasehold.

In our case, there are “present aspects” to the controversy. BGP intends to obtain financing to close its purchase of the shopping center property. It intends to use the shopping center property as security for that loan. The value of the shopping center is, of course, affected by the presence of any encumbrances. The Reciprocal Easement Agreement is just an encumbrance. BGP must eliminate this encumbrance for that reason to increase the value of the property so that financing may be more easily attainable.

II. BGP Is Senior to Mr. Maldonado.

The Sellers, joined by Mr. Maldonado, first argue that if BGP is found to be senior to Mr. Maldonado, he will be deprived of rights granted in the sale of the property and under 11 U.S.C. §363(f). That is not correct. First of all the Bankruptcy Court did not rule on any effect that the Reciprocal Easement Agreement since the pendency of that agreement was never presented to it. Even if it had been, the Bankruptcy Court could not have allowed the sale free of any rights that BGP may have in the shopping center property. The statute states in pertinent part:

The trustee may sell property. . .free and clear of any interest in such property of an entity other than the estate. . .

(Emphasis added) The use of the phrase “such property” means that a sale order can eliminate interests only in the property being sold—not some

other property. The Sellers point to no contrary authority. Since Mr. Maldonado was not purchasing shopping center property, the Bankruptcy Court could not grant him rights in the shopping center property free of BGP's interest.

The Sellers' argument that the PSA does not preclude them from encumbering the property prior to closing misses the point. The issue here is not whether the Sellers violated the PSA by making the encumbrance. The question is whether Mr. Maldonado's knowledge of BGP's interest in the property renders the Reciprocal Easement Agreement junior to BGP.⁴

REPLY ON THE ATTORNEY'S FEES CLAIM

I. Remand Is Necessary.

In response to BGP's argument that the trial court did not make an adequate record on attorney's fees, the Sellers point out that formal Findings of Fact and Conclusions of Law are not necessary in every case. They are not needed when, for example, the trial court issues a detailed letter of opinion as to its method of calculation as in *Banuelos v. TSA Washington, Inc.*, 134 Wn.App. 607, 616, 141 P.2d 652 (2006); when the trial court issues a comprehensive oral opinion as in *Johnson v. Jones*, 91

⁴ After BGP closes, it may have a breach of warranty claim against the Sellers based upon the Reciprocal Easement Agreement if its interest in the shopping center property is not found senior to that of Mr. Maldonado. Its knowledge of the defect does not waive the warranties of the deed. *Edmonson v. Popchoi*, 172 Wn.2d 272, 283-284, 256 P.3d 1223 (2011).

Wn.App. 127, 136, 955 P.2d 826 (1998);⁵ or when there is testimony in the record that the trial court adopts as in *In re Marriage of Obaidi*, 154 Wn.App. 609, 618, 226 P.3d 787 (2010). On the other hand, the record must show that all relevant factors have been considered and reasons sufficient for review must be given. *Absher Construction Company v. Kent School District #415*, 79 Wn.App. 841, 848, 917 P.2d 1086 (1995).

In our case, the trial court did not give the reasons for its award. It gave a round number—\$90,250.00—when the claim made by the Bullivant Houser Bailey and Ater Wynne firms included costs of \$4,467.52 (CP 1396). The award was also greater than what had been claimed. Under these circumstances, we have no way of knowing what the trial court’s thought processes were and every reason to believe that an error may have occurred. Remand is necessary for that reason.

The Sellers attempt to get around this problem by stating that this was simply a “mathematical error” that could easily be corrected by a motion to correct a clerical error under CR 60(a). “Mathematical errors” can be corrected if the trial court’s intention is apparent. *Foster v. Knutson*, 10 Wn.App. 175, 177, 516 P.2d 786 (1973); *Marchel v. Bunger*, 13 Wn.App. 81, 84, 533 P.2d 406 (1975). We would have a “mathematical

⁵ BGP will not mention *Fawn Lake Maintenance Commission v. Abers*, 149 Wn.App. 318, 202 P.3d 1019 (2009), cited at Brief of Respondents, p. 41, *fn.* 62, because the statement cited was raised in the unpublished portion of the Court’s decision.

error” if the trial court had said what hours were reasonably incurred and what proper rates were but there was some error in calculation. That is not what happened here. All we know is that the trial court intended to award \$90,250.00 for efforts of Bullivant Houser Bailey and Ater Wynne and we don’t know why.

II. The Trial Court Abused Its Discretion.

The parties agree that an award of attorney’s fees is within the trial court’s discretion. We know that discretion was abused primarily because the trial court ordered more than the Sellers requested for work by Bullivant Houser Bailey and Ater Wynne. Since its award was more than what was requested, it necessarily included items that shouldn’t have been awarded. The improper amounts included time spent on the seniority claim notwithstanding the trial court’s recognition that it should not award such time; unproductive time spent in bankruptcy court; duplicative time; time spent on the companion case; time spent on the unsuccessful motions for attorney’s fees based on RCW 4.84.185 and CR 11; and time spent on the first attorney’s fee motion that the Sellers had to amend and restate. (Plaintiff/Appellant’s Brief, pps. 35-36, 39-45)

The Sellers claim that BGP did not specify the entries that caused it concern. This simply is not accurate. BGP presented its arguments to the trial court in great detail. (CP 1402-1428)

Should respondents prevail on the substance of this appeal, the matter must still be remanded to compute another attorney's fee award because the existing award was an abuse of the trial court's discretion.

III. BGP Is Entitled to an Offset.

BGP was entitled to an offset for the attorney's fees it incurred in litigation before the Bankruptcy Court because that court lacked jurisdiction and because the Sellers joined in the motion that persuaded the trial court to remand the matter to the Bankruptcy Court. The Sellers acknowledge that an offset may be appropriate when several claims are made and a party is not successful on all of them. (Brief of Respondents, pps. 43-44) One of the claims was whether the Bankruptcy Court had jurisdiction. BGP prevailed on that claim. Therefore, it is entitled to the offset.

Allowing an offset recognizes that a party's attorney's fee entitlement should be limited to the matters on which that party prevails. It also recognizes that a party who prevails on some but not all claims should pay attorney's fees for work of the other party on unsuccessful matters. The offset rule encourages parties to limit claims and actions to matters that will succeed. It is consistent with the philosophy behind fee shifting—to discourage weak cases; encourage settlements; and restore a wronged party to its original position. *Marassi v. Lau*, 71 Wn.App. 912,

918, 859 P.2d 605 (1993), abrogated on other grounds in *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). *Marassi v. Lau*, *supra*, the seminal case on attorney's fee offsets, involved distinct contract claims. There is no principled distinction to be made between contract claims and jurisdictional issues. Both require the party who ultimately prevails to spend time and effort to contest jurisdiction. BGP objected to Bankruptcy Court jurisdiction from the outset and was ultimately vindicated on that point. It spent a good deal of time getting that result. It should receive an offset from any attorney's fee award for that time.

CONCLUSION

The Sellers' arguments should be rejected. The decisions of the trial court should be reversed, and the case should be remanded for further proceedings to determine the Sellers' compliance with the Right of First Refusal Provision and the relief to which BGP is entitled and the relative seniority in the shopping center property between Mr. Maldonado and BGP. BGP should also receive an award of attorney's fees on appeal. At very least, and if the substantive issues are affirmed, the matter must be remanded for further consideration of an award of attorney's fees.

RESPECTFULLY SUBMITTED this 17 day of May, 2013.



BEN SHAFTON, WSB #6280
Of Attorneys for Battle Ground Plaza, LLC

STATE OF WASHINGTON)
)
County of Clark) ss.

THE UNDERSIGNED, being first duly sworn, does hereby depose
and state:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On May 14, 2013, I deposited in a Federal Express receptacle, a copy of the PLAINTIFF/APPELLANT'S REPLY BRIEF to the following person(s):

MS DEBORAH CARSTENS
BULLIVANT HOUSER BAILEY
1700 7TH AVE STE 1810
SEATTLE, WA 98101-1397

3. On May 14, 2013, I hand delivered (via Xpress Legal Services) a copy PLAINTIFF/APPELLANT'S REPLY BRIEF to the following person(s):

MS DENISE LUKINS
LAW OFFICE OF DENISE J. LUKINS
10000 NE SEVENTH AVE STE 403A
VANCOUVER, WA 98685-4548

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 14th day of May, 2013.


LORRIE VAUGHN