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

JUBITZ CORPORATION, an Oregon corporation,

Appellant/Cross-Respondent,

v.

VANCOUVER HOSPITALITY PARTNERS, LLC, a Washington limited
liability company, Respondent; and

ROBERT HOLMSTROM and ELIZABETH HOLMSTROM, individuals,

Respondents/Cross-Appellants.

**RESPONDENTS/CROSS-APPELLANTS HOLMSTROMS'
COMBINED RESPONSIVE AND OPENING BRIEF**

Stephen G. Leatham, WSBA #15572
Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, P.S.
211 East McLoughlin Boulevard, Suite 100
Vancouver, WA 98663
(360) 750-7547

Attorneys for Respondents/Cross-Appellants
Robert and Elizabeth Holmstrom

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RESPONSIVE BRIEF

RESPONSE TO ASSIGNMENTS OF ERROR

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3. The trial court properly entered Conclusion of Law No 8 in July 2018, finding that the RPA is enforceable as between Jubitz and VHP, and that the document should be reformed to reflect the correct legal descriptions and tax parcel identification numbers.

4. The trial court properly entered Conclusion of Law No 6 in July 2018, finding that Salmon Creek Lodging, LLC ratified the actions of its promoters upon its creation, rendering the RPA effective.

RESPONSE TO ISSUES PRESENTED

1. The trial court properly concluded that the RPA was within the chain of title for the Vancouver Oil parcel where the legal description of that parcel was included within the broader legal description set forth in the RPA.

2. The trial court properly concluded that Jubitz had constructive notice of the RPA, which was within the chain of title.

3. The trial court properly concluded that the RPA should be reformed to correct the mutual mistake in the legal descriptions and to accurately reflect the intent of the parties to the RPA.

4. The trial court properly concluded that Salmon Creek Lodging ratified the RPA once it was officially formed as an entity shortly after the RPA was recorded.

I. STANDARD OF REVIEW

Reformation of an instrument is an equitable remedy. *See, e.g., Glepco, LLC v. Reinstra*, 175 Wn. App. 545, 560-561 (2013). The standard of review is abuse of discretion. *Id.* A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Bay v. Jensen*, 147 Wn. App. 641, 651 (2008). The party seeking reformation need only show that the parties agreed to an objective and the instrument at issue is insufficient to execute their intention. *See, e.g., Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 844 (2000). *See also Snyder v. Peterson*, 62 Wn. App. 522, 527 (1991) (an instrument may be reformed when a scrivener’s error leads to a deficient legal description). *In accord, Tenco v. Manning*, 59 Wn.2d 479 (1962).

The determination of whether a party has constructive notice may be a question of fact, or it may be a mixed question of law and fact. *See Collings v. City First Mortgage Services, LLC*, 177 Wn. App. 908, 937 (2013) (“...the evidence was sufficient to support a *finding* that U.S. Bank had constructive notice...”) (emphasis added). No Washington cases appear to report upon whether “chain of title” determinations are questions of fact. A finding of fact is sometimes described as, “...the assertion that a phenomenon has happened or is or will be happening independent of or interior to any assertion as to its legal effect.” *Miebach v. Colasurdo*, 35 Wn. App. 803, 814 (1983), *overruled on other grounds*, 102 Wn.2d 170 (1984). The trial court’s reformation of the RPA should be affirmed. If a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law. *Miebach*, 35 Wn. App. at 814, *citing Woodruff v. McClellan*, 95 Wn.2d 394, 396 (1980). Whether a party has “constructive notice” carries legal implications, but it could be based on a phenomenon of something that has happened such as whether water has been on the floor long enough to have been noticed by a supermarket, or whether a document of record can be found within a particular chain of title. Whether an item is or is not in a chain of title does not, by itself, carry legal implications. Other jurisdictions have ruled that chain of title determinations are questions of fact. *See, e.g., Porter v. Morrill*, 949 A.2d

526 (Conn. App. 2008); *Long v. Nadawah Lumber Co.*, 81 So. 25 (Ala. 1918). There is a presumption in favor of the trial court's findings, and the party claiming error must show that a finding of fact is not supported by substantial evidence. *See, e.g., Fisher Properties, Inc. v. Arden-May Fair, Inc.*, 115 Wn. 2d 364, 369 (1990). The appellate court will not substitute its judgment for that of the trial court even if it might have resolved the factual dispute differently. *See, e.g., Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-80 (2003).

Conclusions of law and questions of law are reviewed *de novo*. *See, e.g., Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880 (2003); *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 567 (2000). If the underlying facts are undisputed "and the parties dispute only the legal effect of those facts, the standard of review is . . . *de novo*." *Grundy, supra*, quoting *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 88 (2007).

Questions of waiver are treated as mixed questions of law and fact. *See, e.g., Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 440-41 (2008). If the facts are not disputed, the question of waiver is for the court and is reviewed *de novo*. *Id.* at 441.

When an award of attorney fees is under review, there can be two issues presented. Whether the party is entitled to legal fees at all is a

question of law that is reviewed *de novo*. *State v. Living Essentials, LLC*, 8 Wn. App. 2d 1, 37-38 (2019). The reasonableness of the fees awarded is reviewed under an abuse of discretion standard. *Id.* at 38.

II. STATEMENT OF THE CASE

In addition to the facts set forth in appellants' and in Vancouver Hospitality Partners' ("VHP") statements of the case, Holmstrom submits the following additional facts for the Court's consideration.^{1 2}

In December 2012, Holmstrom and Vancouver Oil closed a complex asset purchase and sale transaction with Jubitz. As part of that transaction, Jubitz leased the Vancouver Oil property from Holmstrom. Ex. 6. Jubitz also agreed to purchase the Vancouver Oil property, with the potential sale to close in 10 years, on January 6, 2023. Ex. 7.

VHP allowed its guests to use the parking spaces on the Vancouver Oil Property as needed, and without incident, until spring 2016. In the spring of 2016, Jubitz began objecting to hotel guests parking on the Vancouver Oil Property, and actually towed the vehicles of several hotel

¹ Holmstrom adopts VHP's statement of the case as accurate.

² As a side note, the trial court committed manifest error in entering the sentence of Finding of Fact No. 4 on July 13, 2018, which states: "At that time, the Holmstroms continued to own the original parcel as a single property." CP 2119-20. This error is manifest as shown by Finding of Fact No. 2, which notes that the original parcel was divided into two as a result of the boundary line adjustment between Holmstrom and Krenzler Corporation.

guests. Ex. 49. The manager of the hotel referred Jubitz to the RPA, RP at 88, but in August of 2016, Jubitz towed more hotel guests' cars.

Both of the RPAs contain incorrect legal descriptions. RP at 328. Exs. 8 and 9. Exhibit "B" to both agreements purported to be the Hotel Property, since SCL is referred to as the owner of that property. However, the legal description attached as Exhibit "B" erroneously describes the Krenzler Property to the west. The purpose of Exhibit "A" is to describe the Vancouver Oil Property. Instead, however, Exhibit "A" references the undivided property owned by Holmstrom that contains both the Hotel Property (Tax Lot 2/13) and the Vancouver Oil Property (Tax Lot 91). Obviously a scrivener's mistake was made when the RPAs were created and recorded with the wrong legal description exhibits attached. Accordingly, Holmstrom and VHP executed and recorded a "Correction of Easement" on April 6, 2017. RP at 339-40. Ex. 15.

In the meantime, Jubitz had filed this lawsuit. On April 21, 2017, the trial court entered its Order for Preliminary Injunction, concluding among other things as follows:

The defendant [VHP] is likely to prevail on its claims of reformation and mutual mistake. It appears that the incorrect legal descriptions attached to both of the reciprocal parking easement agreements were the result of scrivener's error and/or mutual mistake on the part of the parties. The intended legal descriptions are contained in the correction of easement...

CP 459. Following a bench trial, the trial court concluded that the RPAs were within the chain of title of the Vancouver property, that Jubitz therefore had constructive notice of the existence of the RPAs, that the RPAs were enforceable as between Jubitz and VHP, and that the RPAs should be reformed so as to correct the mistake regarding the legal descriptions. CP 2118.

This case arose only because Jubitz's title company, First American, failed to find the RPA when it performed its pre-closing title search. Ex. 7, at 22. Holmstrom had obtained a title commitment which did reflect the RPA. RP at 334. Ex. 3. Every title policy or commitment that VHP has ever obtained similarly reflects the RPA. RP at 398. It was only First American who missed it. Unfortunately, the closing documents from the December 2012 complex commercial transaction included the title report from the First American Title document, which omitted the RPA, in the prospective purchase agreement between Holmstrom and Jubitz.

Several witnesses at trial testified that a reasonable search of the County records would reveal that the RPA was within the chain of title. Scott Hogan provided expert testimony regarding the results of his search of Clark County Auditor records. He was able to locate the RPA in the chain of title after searching the index of the names of the parties. RP at

262. Jerry Olson, an engineer who worked on the hotel project for Holmstrom, also testified that he was able to locate documentation reflecting that the Vancouver Oil property was approved for 13 parking spaces by searching the County's planning documents in the course of an on-line search of publicly available documents. RP at 133-135, 144-145, 525. Ex. 72. Ariel Marinetti also testified by deposition regarding the process she went through to see whether the RPA was of record. She also readily found the RPA. RP at 1895-98. In short, the trial court properly found that the RPA was within the chain of title and that Jubitz had constructive notice of it.

Other facts support the trial court's conclusions regarding constructive notice. Prior to closing, Jubitz had its attorneys review the County's site plan file. RP at 201. As Olson testified, the site plan file contains the condition regarding off site parking and shows the reciprocal parking between the two sites. RP at 139-40. Ex. 72. As the result of the review of the County file by Jubitz's attorneys, who were agents of Jubitz, Jubitz had notice and knowledge of the information contained in the County file.

Further, two employees who were employed by Vancouver Oil and then later by Jubitz testified about their knowledge prior to the deal with Jubitz. Todd Shaw testified that he knew that hotel guests parked on the

Vancouver Oil property before the deal with Jubitz closed. RP at 84. Kirk Haebe testified that he knew of the parking situation ever since the hotel was first constructed. RP at 218. The historical knowledge of these Jubitz employees should similarly be imputed to Jubitz.

As a matter of factual clarity, the property described in appellant's brief as "the Jubitz parcel" is owned by Holmstrom³. Jubitz is Holmstrom's lessee, and the prospective buyer of the property in 2023 under an executory and conditional real estate purchase agreement. Jubitz does not own the parcel. The two parcels to which the RPA applies are owned by Holmstrom on the one hand and VHP on the other. Those parties recorded a correction RPA with precise and accurate legal descriptions of the two parcels in 2017. Ex. 15.

A second phase of the bench trial subsequently occurred, with the issue being Jubitz's claim for monetary damages. The trial court concluded that the RPA breached Holmstrom's warranty of quiet enjoyment contained in the parties' commercial lease, that the RPA breached Holmstrom's warranty to provide plaintiff with clear title at the time of sale, awarded damages of \$295,000, and then awarded Jubitz prevailing party attorney fees and costs in the amount of \$270,927.81. CP 2139, 2192, 2400, 2403.

³ It was also, historically, referred to as the "Vancouver Oil" property, because that was where Holmstrom's company, Vancouver Oil, had its headquarters.

III. SUMMARY OF ARGUMENT

The central flaw in Jubitz's case against the RPA is that the RPAs were of record. They were recorded. They were within the chain of title to the property Jubitz occupies under the lease, as shown by the unrefuted testimony of Scott Hogan and abundant circumstantial evidence. Jubitz therefore had constructive notice of the RPAs in 2012 when it entered into the transaction with Holmstrom and Vancouver Oil, and takes whatever interest it has or later may have in the Holmstrom property subject to the RPAs.

Jubitz is not a bona fide purchaser. The trial court had abundant evidence supporting its finding that the RPA was **of record in the chain of title**, and supporting its reformation of the RPA. This Court should uphold the trial court's judgment, modify the trial court's award of attorney fees and damages to Jubitz as argued in Holmstrom's cross-appeal, and award Holmstrom attorney fees on their response to this appeal by Jubitz.

IV. ARGUMENT

A. Reformation of the Original RPA was Proper.

This is a quiet title case, which makes it a matter of equity.

The trial court's judgment reforming the RPA was rendered on reasonable grounds. As the Court said in *Kirk v. Tomulty*, 66 Wn. App. 231, 238 (1992):

If there is any ambiguity as to the existence of an easement, we determine the intention of the parties by examining such factors as the construction of the pertinent language, the circumstances surrounding the transaction, the situation of the parties, the subject matter, and the subsequent acts of the parties involved.

The error in the legal description of the hotel parcel and overbroad description of the Vancouver Oil parcel were obvious scrivener errors. There is no question but that the creation of a reciprocal easement was intended in 1999. RP at 345. As made clear in the record, the reciprocal parking arrangement was required by Clark County as a condition of the development of the hotel property.

The fact that several parties acted pursuant to and in reliance on the RPA for 17 years, without incident, is also telling. And, while the RPA was always therefore subject to reformation for mutual mistake, the RPA has been re-recorded with the legal descriptions to the Vancouver Oil parcel and the hotel parcel by the owners of those parcels, and without containing any new terms. Ex. 15. This act is a further indication of the original parties' intentions since Holmstrom participated both in the original 1999 RPA and in the 2017 re-recording.

Jubitz's citation to a case allegedly indicating that a document cannot be reformed as against a subsequent purchaser at page 17 of its

brief,⁴ is not relevant to this case. There, the court found the complaining party to be a bona fide purchaser. As noted *infra*, Jubitz cannot avail itself of the bona fide purchaser doctrine because it had constructive notice of the RPA. Thus, the original RPA has indeed been valid all these years, as intended and used. The trial court's reformation of the RPA should be affirmed.

B. The RPA is Binding on Jubitz Because Jubitz Had Constructive Notice of It.

1. Jubitz is not a bona fide purchaser.

Jubitz asserts that it should not be bound by the RPAs under the bona fide purchaser doctrine. The determination of whether a party is a bona fide purchaser is a mixed question of law and fact. *Miebach v. Colasurdo*, 102 Wn.2d 170 (1984). The determination is reviewed *de novo* insofar as to how the law applies to the facts; the appellate court does not, however, reweigh factual evidence such as evidence of credibility or demeanor. See *Franklin Cnty. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330 (1982); see also *Rasmussen v. Employment Security Dep't*, 98 Wn.2d 846, 849-50 (1983); *State v. Samalia*, 186 Wn.2d 262, 269 (2016).

Plaintiff cannot avail itself of the bona fide purchaser doctrine since it had actual or constructive notice of the RPA at the time of entering into

⁴ *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436 (1956).

the transaction with Holmstrom. *See, e.g., Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 346 (1988). In other words, the absence of notice is a predicate fact on which the legal conclusion of bona fide purchaser status is based. Similarly, established law of easements holds that a successor in interest to the servient estate, here the possessory interest to which Jubitz succeeds Holmstrom under the lease of property subject to the hotel's parking easement, takes its interest subject to the easement if that successor has actual, constructive, or implied notice of the easement. *Mahon v. Haas*, 2 Wn. App. 560, 561 (1970) (cited with approval in *Kirk v. Tomulty*, 66 Wn. App. 231, 240 (1992)). The trial court correctly found that Jubitz had constructive notice of the RPA at the time it entered into the transaction, so Jubitz is not a bona fide purchaser and cannot hold its interests free of the RPA.

2. The trial court's finding of constructive notice.

Jubitz assigns error to the trial court's paragraph No. 4 under its Conclusions of Law entered July 16, 2018. CP 2118. Some language in that paragraph and in No. 5 constitute findings of fact. The determination of whether a party has constructive notice can be a question of fact. *See, e.g., Collings v. City First Mortgage Services, LLC*, 177 Wn. App. 908, 937 (2013). The label applied to a finding of fact or conclusion of law is not important; the appellate court "will treat it for what it really is." *Nguyen v.*

City of Seattle, 179 Wn. App. 155, 163 (2014) (quoting *Para-Med. Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397 (1987)).

It matters not whether this Court considers the “chain of title” issue a finding of fact or a conclusion of law, because at trial there was substantial evidence that the RPA was of record and within the chain of title of the Vancouver Oil property. Scott Hogan, a licensed attorney and manager of a title company with many years of experience examining real property titles, provided expert testimony about how he searched the Clark County real property indices and found the 1999 RPA to be in the chain of title for the Vancouver Oil property. RP at 251-62. Jerry Olson, a very experienced property development engineer, testified about how the legal description of the RPA encompasses the legal description of the Vancouver Oil parcel. RP at 133-135, 144-145, 525. Another title company employee, Ariel Marinetti, testified about how she found the 1999 RPA to affect the Vancouver Oil parcel. RP at 1895-98.

In this trial, there was substantial evidence that the RPA was of record and within the “chain of title” of the Holmstrom property. The trial court’s findings should not be disturbed.

The trial court properly found and concluded that Jubitz had constructive notice of the RPA. The recording of an instrument is constructive notice of its contents. *E.g., Kendrick v. Davis*, 75 Wn.2d 456

(1969); *Lazov v. Black*, 88 Wn.2d 883, 886 (1977). The RPA, each time it was recorded in 1999, contained a legal description that encompassed and included the Vancouver Oil parcel. The legal description for "Exhibit 1," referring to the Holmstrom parcel in the 1999 RPA, states:

The West one half of the Southwest one quarter of the Northeast one quarter of the Northwest one quarter of Section 26, Township 3 North, Range 1 East of the Willamette Meridian, Clark County, Washington.

EXCEPT therefrom that portion conveyed to the State of Washington by deed recorded in Book D-47, Page 556-B, records of Clark County, Washington.

Compare that to the legal description for the property in the Jubitz lease, which begins, "A parcel of property *situated in* the West half of the Southwest quarter" (emphasis added).

The Auditor creates an eight column index for recorded documents.⁵ The first two columns contain the identity of the "grantor" and "grantee." The seventh column contains the "description of property" and the eighth column contains the "tax parcel or account number."

When real property is described, the index and the recorded document impart notice as to matters within the "chain of title".⁶ The definition of chain of title is as follows:

[A]ny instrument purporting to encumber or convey an interest in a sufficiently described tract of land executed by

⁵ RCW 65.04.050. There is a direct and an inverted index.

⁶ *Koch v. Swanson*, 4 Wn. App. 456, 459 (1971).

a person having an interest therein, as disclosed by other prior instruments within the chain of title, is within the chain of title.⁷

In this case: i) In 1999 Holmstrom owned Parcel 91 by virtue of the previously recorded conveyance deeds; ii) Holmstrom executed the RPA; iii) the RPAs purported to grant an interest, i.e. a parking easement, in Parcel 91; and iv) the legal description, which included Parcel 91, was sufficiently described. The RPAs are quite clearly within the chain of title for Parcel 91.

An imperfect or inaccurate index is sufficient to impart notice if the contents are sufficient to lead a prudent person to examine the record.⁸ *Malbon v. Grow*⁹ involved a mortgage priority dispute. The property owner had recorded a mortgage prior to recording a second mortgage in favor of the appellant. The first mortgage was ambiguous in the way the legal description indexing information had been written. Read one way, it described a certain block within a certain section, and read another way it described an entire section within a certain township. The Washington Supreme Court found that the index furnished information to “at least suggest” the prior mortgage in that if it was construed to be a township and section, it “must be construed to give notice of the same or any portion of

⁷ *Jones v. Berg*, 105 Wash. 69, 77 (1919).

⁸ *Id.* at 75-76.

⁹ 15 Wash. 301 (1896).

any such section or township...”.¹⁰ The Court found support for its decision in the rule that the “greater includes the less”.¹¹

While the legal description of the Vancouver Oil Property in the RPA may have included other property besides Parcel 91, the legal description most certainly did include Parcel 91; *i.e.*, the “greater includes the less.” The trial court properly concluded, as did the *Malbon* court, that a person would not ignore the overbroad legal description as irrelevant, but rather would be put on notice of the contents of the RPA, after finding it through a search under Holmstroms’ name.

In *Jones, supra*, the claim was that the legal description in the index was insufficient to impart notice. The legal description in the index stated “part of Lots 5 and 6, Block 56, Kilbourne's Supplemental Lake Union”. The property at issue in *Jones* was part of Lot 6. The Supreme Court found the index and recorded documents sufficient to impart notice.

Professor Stoebuck describes the process of searching the index.¹² In order to search the record for Parcel 91, a person would begin with the deeds putting Holmstrom into title. The person would then run Holmstrom's name in the direct index, examining each instrument executed by

¹⁰ *Id.* at 304-305.

¹¹ *Id.* at 305.

¹² Washington Prac., Vol 18, 2d ed., Chapter 14.

Holmstrom that transferred an interest in Parcel 91.¹³ This is what Hogan did, and he was readily able to locate the RPA.

The recorded RPA expressly stated that a reciprocal parking easement existed. The RPA was recorded. Parcel 91 was within the legal description in the RPA. Jubitz had notice of more than sufficient facts to put an ordinarily prudent person on inquiry. A reasonably diligent inquiry would have revealed the parking easement. The Court should affirm the trial court's conclusion that Jubitz had constructive notice.

3. The RPA is Valid and Enforceable and Has Been From Its Inception.

The RPA was originally recorded in 1999 (twice) with the Clark County Auditor. Each time it contained a legal description referring to the property occupied now by Jubitz as "Exhibit 1." That legal description covered more land than that property, but included that property and therefore burdened that property. In 2012 Jubitz became a lessee and prospective purchaser under an executory agreement to buy the property, but had constructive notice of the recorded RPA and cannot evade it. The RPA has now been rerecorded with accurate legal descriptions, still burdens the property, and is enforceable against Jubitz.

¹³ In point of practice, the search would begin with the inverted index to confirm when Holmstrom came into title. The search would include non-consensual liens such as judgment liens and mechanics liens. A complete abstract/search would require review and identification of each prior owner's instruments.

Jubitz's arguments that the RPE is "void" or violates the Statute of Frauds are not on point. The "flat statement" in *Howell v. Inland Empire Paper Co.*¹⁴ that an agreement containing an inadequate legal description is void and not subject to reformation was criticized in *Berg v. Ting*¹⁵ as an incomplete rule. Where mutual mistake or scrivener error leads to a deficient legal description, the contract may be reformed. *Berg*, 125 Wn.2d at 554; *Snyder v. Peterson*, 62 Wn. App. at 527. Under such circumstances, the document is not subject to a test for its compliance with the Statute of Frauds until it has been reformed to meet the parties' intent. *Tenco v. Manning*, 59 Wn.2d 479, 485 (1962).

C. The RPA is Valid and Not "Void."

Jubitz also contends the RPA is void because it was executed before SCL was formed. The RPA recorded under Clark County Auditor's file number 3138611 was recorded August 6, 1999. Ex. 9. Formal formation of SCL occurred on August 31, 1999. Ex. 10. The RPA became effective upon the formation of SCL. As the court stated in *John Davis & Co. v. Cedar Glen # 4, Inc.*, 75 Wn.2d 214, 220-221 (1969):

A deed to a corporation made prior to its organization, is valid between the parties. Title passes when the corporation is legally incorporated. This is particularly true as against one who does not hold superior title when the corporation goes into existence.

¹⁴ 28 Wn. App. 494 (1981).

¹⁵ 125 Wn.2d 544, 554 (1995).

That is also the true holding in the case cited for the opposite conclusion by Jubitz at page 18 of its Opening Brief, *In re Corporate Dissolution of Ocean Shores Park, Inc.*, 132 Wn. App. 903 (2006). The sentence quoted by Jubitz, “A deed to a corporation made before its organization is valid between the parties but void when asserted against third parties,” is dicta and was not the court’s holding.

In *Ocean Shores, supra*, a deed was executed by the Jordans in 1983 conveying real property to a corporation known as Ocean Shores Park. The Jordans were also shareholders of Ocean Shores Park, along with Rawson-Sweet. However, unbeknownst to the Jordans, Rawson-Sweet did not file the articles of incorporation for Ocean Shores Park until nearly ten years after the deed was executed. The Jordans later attempted to argue that the conveyance to Ocean Shores Park, Inc. was invalid because “they intended to pass title immediately to OSPI when they executed the deed in 1982” and because OSPI did not yet exist, “the transfer was not fulfilled and their intent to transfer ‘died in utero and the conveyance died along with it.’” *Id.* at 914. The court disagreed, and applied the rule from *John Davis & Co., supra*, that title passes when the corporation is legally incorporated, even though 10 years had passed between the deed and the incorporation. *Ocean Shores*, 132 Wn. App. at 915.

Here, SCL was formed less than a month after the execution of the August 1999 RPA. It received the deed to the hotel parcel in 1999, long before Jubitz acquired an interest in the Vancouver Oil property in 2012. As in *Ocean Shores*, the Court should uphold the RPA despite the fact that there was a delay of several days in formally forming SCL.

RESPONDENTS' OPENING BRIEF ON CROSS-APPEAL

RESPONDENTS' ASSIGNMENTS OF ERROR

RESPONDENTS' FIRST ASSIGNMENT OF ERROR

The trial court erred in entering its Conclusion of Law No. 4,¹⁶ finding that the existence of the RPA breached the warranty of quiet enjoyment and possession in the parties' commercial lease.

ISSUES PERTAINING TO RESPONDENTS' FIRST ASSIGNMENT OF ERROR

1. Whether the existence of the RPA did not breach the warranty for quiet enjoyment and possession where an easement does not constitute a possessory interest in leased property?

2. Whether plaintiff waived any right it had to seek monetary damages under the lease where it bargained for and agreed to a sole and exclusive remedy, that remedy being termination of the lease?

¹⁶ These Assignments of Error refer to the trial court's second Findings of Fact and Conclusions of Law following phase two of the trial, dated February 4, 2019. CP 2179.

RESPONDENTS' SECOND ASSIGNMENT OF ERROR

The trial court erred in entering Conclusion of Law No. 5 and finding that respondents breached a warranty in the purchase and sale agreement to provide plaintiff with clear title at the time of sale.

ISSUES PERTAINING TO RESPONDENTS' SECOND ASSIGNMENT OF ERROR

1. Whether there was no breach of the warranty to provide plaintiff with clear title where the existence of the RPA had no material effect on title to the property or plaintiff's use of the property?

2. Whether plaintiff waived any right it had to pursue monetary damages under the purchase and sale agreement where it contractually agreed to either terminate the purchase option or waive any issues with title within five days after notice of an adverse development concerning title?

3. Whether the trial court erred in awarding present damages that were not limited to Jubitz's later potential ownership of the property?

RESPONDENTS' THIRD ASSIGNMENT OF ERROR

The trial court erred in granting an award of attorney fees, expenses, and costs to plaintiff and then entering a supplemental judgment in favor of plaintiff.

**ISSUES PERTAINING TO RESPONDENTS'
THIRD ASSIGNMENT OF ERROR**

1. Whether the court improperly concluded that plaintiff was the prevailing party for purposes of an attorney fee award where respondents substantially prevailed during phase one of the trial?

2. Whether the amount of fees and expenses awarded to plaintiff was unreasonable given the issues on which Holmstrom prevailed?

I. ARGUMENT

A. The Existence of the RPA Did Not Breach the Warranty of Quiet Enjoyment and Possession.

The trial court erroneously concluded that Holmstrom breached a warranty regarding possession in the parties' lease because hotel guests have parked on the Jubitz property pursuant to the RPA. Holmstrom contends that mere parking rights do not result in a breach of any warranty in the lease.

There are only two potentially applicable warranties in the lease. Section 10(1) warrants, somewhat conditionally, the tenant's quiet enjoyment of the premises, and in Section 5(c)(iv) of the lease, Holmstrom warranted that:

To the Knowledge of Landlord, no Person, other than Landlord and the Respective Seller, has a present or future right to possession of all or any part of the Premises.

The existence of the RPA cannot result in a breach of this possession warranty because an easement does not constitute a possessory interest in the leased property. "Possession" is a term of art in real property nomenclature that means more than a nonexclusive right to use part of the property. It is well settled in real estate law that easements do not constitute possession. *Restatement of Property 3rd*, § 1.2(1) ("An easement creates a nonpossessory right to enter and use land in the possession of another"); *Picardi v. Zimmond*, 2005 S.D. 24, 693 N.W.2d 656, 663 (2005) ("The grant of an easement does not dispossess the landowner"); *Burleson v. Kinsey-Cartwright*, 302 Mont. 141, 13 P.3d 384, 2000 MT 278 (2000) ("An easement is a nonpossessory interest in land; a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon the land"); *Leach v. Anderl*, 218 N.J.Super. 18, 526 A.2d 1096 (1987) ("At common law an easement is defined as a nonpossessory incorporeal interest in another's possessory estate in land, entitling the holder of the easement to make some use of the other's property."); *Restatement of Property*, § 450 (com. b). See also *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324 (1983) (in tort law, "[a] possessor of land is 'a person who is in occupation of land with intent to control it.'").

The RPA does not constitute "possession," as might a competing leasehold, so it is not a violation of Section 5(c)(iv) of the lease. Moreover,

to the extent plaintiff may contend that the occasional parking under the RPA is a breach of the warranty of quiet enjoyment, that claim also fails. Since an easement does not constitute possession, the RPA cannot constitute a breach of any warranty of quiet enjoyment, for quiet enjoyment is a warranty of assurance that one's *possession* of leasehold real property will not be disturbed. *Brown v. Johnston*, 85 P.3d 422 (Wyo. 2004). See *Roe v. Klein*, 2 Wn. App.2d 326, 335-336 (2018):

The warranty of quiet possession is alternatively known as the warranty of quiet enjoyment....The warranty of quiet possession is breached when the buyer of land is actually or constructively evicted by one who holds a paramount title that existed at the time of the conveyance.

See also Brown v. Johnston, 85 P.3d 422 (Wyo. 2004). There is no breach of quiet enjoyment without a disturbance of possession. *See also Black v. Barto*, 65 Wash. 502 (1911) (no violation of quiet enjoyment without actual disturbance in possession); *Foley v. Smith*, 14 Wn. App. 285 (1975) (the warranty guarantees only that the possessor “shall not, by force of paramount title, be evicted from the land or deprived of its possession”). Axiomatically, since there is no affront to the tenant's possessory rights by the existence of the RPA, then there is no quiet enjoyment breach.

B. Plaintiff Waived Any Right It May Have Had to Seek Monetary Damages for a Purported Breach of the Lease.

Plaintiff is a sophisticated party, and the transaction between plaintiff, Vancouver Oil, and Holmstrom was extremely complicated. In the commercial lease for the Vancouver Oil property, Holmstrom made limited representations and warranties. Ex. 8, at 5(c). The lease then goes on to provide, in section 5(d), as follows:

No Other Representations. Except as provided in this Lease, no representations, statements, or warranties, express or implied, have been made by or on behalf of either party in respect to the Premises and the Improvements. Tenant warrants that it has had full and adequate opportunity to make all inspections and tests of the Premises (including tests of environmental, subsurface, and soil conditions) Tenant believes are appropriate, and accepts the Premises as fully suitable for all of Tenant's intended purposes AS-IS, and in their present condition. **Tenant's sole and exclusive remedy for landlord's breach of any representation or warranty in this lease will be to terminate this lease.** (Emphasis added.)

Plaintiff is bound by the terms of the lease it agreed to. “It is black letter law of contracts that the parties to a contract shall be bound by its terms.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344 (2004). The parties to a contract are free to agree to an exclusive remedy. *See Graoch Associates No. 5 Limited Partnership v. Titan Construction Corp.*, 126 Wn. App. 856, 865 (2005), quoting *Board of Regents v. Wilson*, 326 N.E.2d 216, 220 (Ill. App. 1975):

It is a basic principle of contract law that parties by an express agreement may contract for an exclusive remedy that limits their rights, duties, and obligations. The contract, however, must clearly indicate that the intent of the parties was to make the stipulated remedy exclusive.

Accord Shepler Construction, Inc. v. Leonard, 175 Wn. App. 239, 246 (2013). Here, it is abundantly clear that the parties' intent was to provide that plaintiff's sole remedy for the breach of any representation or warranty was to terminate the lease. Thus, this lease meets the requirement that "the contract must clearly indicate the parties' intent to make the stipulated remedy exclusive." *Id.*

Moreover, the parties agreed to a merger clause in the lease.

Section 10(m) provides:

Entire Agreement. This Lease (including exhibits) sets forth the parties' complete, entire, and exclusive understanding and agreement about the subject matter of this Lease and supersedes any and all prior understandings and agreements, whether written or oral, between the parties about the subject matter.

Ex. 8, at 22. The parties' agreement should be upheld, precluding plaintiff from recovering any monetary damages for an alleged breach of any representation or warranty in the lease. The trial court erred in ruling to the contrary.

C. There Was No Breach of the Warranty in the Purchase and Sale Agreement to Provide Plaintiff With Clear Title.

The trial court erred in concluding that Holmstrom is liable for a breach of warranty under Section 7.5 of the Purchase and Sale Agreement (Ex. 9, at 6). That section provides:

Seller represents and warrants to Buyer that Seller owns fee title to the Property, free and clear from all encumbrances except those disclosed on the Title Commitment approved by Buyer pursuant to Section 3.2 above. Except for encumbrances approved by Buyer pursuant to Section 3.2, the Property will be transferred to Buyer pursuant to this Agreement free and clear of all mortgages, deeds of trust, security interests, liens, pledges, charges, encumbrances, claims, liabilities or debts of any kind or nature.

Section 3.2 of the Purchase and Sale Agreement places a qualitative limitation on what can constitute a breach of warranty. That section provides, in relevant part:

On and after the date of this Agreement, the Sellers shall not encumber (voluntarily or involuntarily) the property with any mortgages, pledges, security interests, deeds of trust, liens, claims, or other encumbrances or restrictions of any nature (“lien”) **materially affecting** title to, or Buyer’s intended use of, the Property. (Emphasis added.)

Id. at 2-3. A fair reading of this section reveals that the parties intended that the property would not be **financially encumbered** other than as reflected

in the First American Title Commitment, such as by a new deed of trust.¹⁷ Given that intent, it cannot reasonably be concluded that occasional parking by hotel guests “materially” affects plaintiff’s prospective title to or use of the property. In addition, there has been no discernable impact by the RPA upon plaintiff’s use of the property as an oil distribution center and office. Absent such a material effect, there is no breach of Section 3.2 and, accordingly, Section 7.5.¹⁸

D. Plaintiff Waived Any Right It May Have Had to Seek Monetary Damages for the Claimed Breach of Warranty in the Purchase and Sale Agreement.

Plaintiff may also not recover damages under the purchase and sale agreement because Holmstrom provided contractual notice of an adverse development and plaintiff thereafter elected to close on the purchase and sale transaction. Per the terms of the agreement, that election cures any breach of warranty and waives any claim for damages.

Section 7.6 of the Purchase and Sale Agreement (Ex. 9) allows Holmstrom to give notice of adverse developments, and gives the plaintiff the choice whether to then terminate the agreement or proceed to closing. Section 7.6 provides:

¹⁷ This is consistent with the rule that the intent of the parties to an agreement “may be discovered from the actual language of the agreement.” *Martinez v. Miller Industries, Inc.*, 94 Wn. App. 935, 943 (1999).

¹⁸ Section 7.5 is also consistent with the conclusion that the parties intended to preclude financial encumbrances.

Notice of Developments. The Sellers will give prompt written notice to the Buyer of any adverse development occurring after the Effective Date which would result in a Closing Date Representation and Warranty being materially inaccurate effective as of the Closing Date. If any Closing Date Representation and Warranty will be inaccurate due to any adverse development between the Effective Date and the Closing Date, the Buyer shall have no obligation to consummate the Closing, but (provided that the Sellers have properly notified the Buyer pursuant to this Section 7.6), if the Buyer elects to waive (or is deemed to waive) the inaccuracy of the Closing Date Representation and Warranty, the Closing Date Representation and Warranty shall be deemed to be amended, qualified, supplemented and corrected by the information contained in the notice for purposes of the Closing Date Representations and Warranties. Within five (5) business days of receipt of notice from any of the Sellers of any event resulting in any Closing Date Representation and Warranty of the Seller becoming inaccurate, the Buyer must either elect to terminate this Agreement, or the Buyer will be deemed to have waived the inaccuracy of such Closing Date Representation and Warranty for all purposes. If any Effective Date Representation or Warranty is inaccurate as of the Effective Date and the Closing Date, the Buyer shall have no obligation to consummate the Closing, but if the Buyer elects to consummate the Closing, the Buyer will not be deemed to have waived the inaccuracy of such Effective Date Representation and Warranty and may pursue any remedy available under applicable law.

Holmstrom provided notice under this section on May 21, 2018 (Ex. 69).

Plaintiff responded by confirming “that Jubitz Corporation intends to consummate the Closing of all of the parcels that were the subject of its acquisition of Vancouver Oil, including the headquarters property.”

Ex. 113.

Pursuant to the express terms of Section 7.6, Holmstrom's warranty is now deemed to be amended and corrected so as to include the RPA, and plaintiff is deemed to have waived any inaccuracies in Holmstrom's representations and warranties regarding the RPA. The trial court erred in concluding to the contrary.

E. The Trial Court Erred in Awarding Present Damages That Were Not Limited in Effect to Later Potential Ownership of the Property by Jubitz.

Jubitz's expert testified the RPA had negative consequences upon the Holmstrom property to the tune of \$295,000 but did not apportion that sum between damages to Jubitz during its leasehold, which may continue until early January 2023, and ownership of fee title. The expert's report (Ex. 112) stated, at 2:

...it is my opinion and conclusion that the economic impact of the RPEA to the Jubitz (sic) property was approximately \$295,000 retrospective to December 1, 2012... ...[t]he market value impact does not recognize the additional monetary impact of rent over-payment over the duration of the lease.

Jubitz is not the owner at present. If conditions are met (see section 5 of the purchase and sale agreement, Ex. 7), Jubitz might purchase the property and become the fee title owner in January of 2023. It is error as a matter of law to have awarded any damages to Jubitz under its leasehold, *supra*, and

Jubitz's own expert seems to have excluded damages accruing during the leasehold so there is no proof of them, either.

It was also premature to award any damages to Jubitz for an owner's interest in the property. As a matter of judicial economy, it may have been prudent to adjudicate future prospective damages at the same time as damages during the leasehold, but it was error to award damages to Jubitz as though it was presently the owner, rather than awarding those damages prospectively, such as by an offset to the price, to take effect if and when Jubitz closes on the purchase of the property.¹⁹

F. Because Plaintiff Was Not the Prevailing Party, It Should Not Have Been Awarded Attorney Fees At All.

The trial court erred in concluding that plaintiff was the prevailing party for purposes of an attorney fee award. It also erred in awarding the fees and litigation expenses it did award, given the issues on which Holmstrom prevailed. The general rule that applies where both parties prevail on substantial issues was summarized in *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 217 (2006):

...a prevailing party is the party in whose favor final judgment is rendered. If neither party wholly prevails then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties. If both parties prevail on major issues, it is appropriate to let each bear their own costs and fees.

¹⁹ Holmstrom argued this point to the trial court in its supplemental trial memorandum. CP 2042.

See also Rowe v. Floyd, 29 Wn. App. 532, 535 n.4 (1981) (“...the determination as to who substantially prevailed turns on the substance of the relief accorded the parties.”). In *Hawkins v. Diel*, 166 Wn. App. 1, 10 (2011), Division II of the Court of Appeals similarly concluded that there may be no single prevailing party: “When both parties prevail on a major issue, there may be no prevailing party for attorney fee purposes.”

In this case, both plaintiff and Holmstrom prevailed on major issues. In the first phase of the trial, Holmstrom (and VHP) successfully contended that the RPA was valid, enforceable, and binding upon plaintiff.²⁰ Despite that fact, the trial court bizarrely concluded that plaintiff was the prevailing party on that issue because establishing the validity of the RPA proved plaintiff’s breach of warranty claim. Had plaintiff obtained a ruling that the RPA was invalid and unenforceable, would Holmstrom then have been deemed the prevailing party on that issue? Hardly. Under the trial court’s flawed reasoning, there was no result that could have made Holmstrom the prevailing party for the first phase of trial.

In the second phase of the trial, plaintiff successfully contended that it was entitled to a monetary damage award due to the existence of the RPA. Given that each party prevailed on major issues, and in accordance with the

²⁰ Jubitz also lost the pretrial motion for preliminary injunction, which Holmstrom supported in a special appearance prior to filing an answer.

foregoing authorities, the Court should determine that neither party is the prevailing party, and therefore that each party should bear its own attorney fees and costs.

While Holmstrom contends that neither party should be declared the prevailing party, the alternative for the Court is to apply the proportionality approach of *Marassi v. Lau*, 71 Wn. App. 912 (1993), *overruled on other grounds* by *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481 (2009). Under this approach, the Court should undertake “a more detailed consideration of what actually happened in the litigation.” *Transpac*, 132 Wn. App. at 219. The Court should then award each party fees for the claims each prevailed on. *Id.* at 218.

Here, virtually all of the fees claimed by plaintiff through phase one of the trial were for tasks directed to issues challenging the validity and enforceability of the RPA. Holmstrom prevailed on those issues at the first phase of trial. Consequently, Holmstrom should be awarded attorney fees under the proportionality approach for work performed through phase one. Those fees total \$144,731. CP 2270.

Plaintiff then prevailed on its damage claims at the second phase of the trial. Looking to plaintiff’s own breakdown of the fees incurred²¹

²¹ Plaintiff’s Motion, CP 2266, at 2-3.

plaintiff's fees should be limited to the sum of not more than \$20,864. CP 2266.

The Court should find that there was no single prevailing party and decline to award either plaintiff or Holmstrom attorney fees. If the Court utilizes the proportionality approach, it should award plaintiff attorney fees of not more than \$20,864, and award Holmstrom attorney fees of \$144,731. Offsetting those two amounts, Holmstrom should be awarded attorney fees in the amount of \$123,907.

For the reasons set forth above, this Court should reverse the trial court's award of attorney fees and litigation expenses in favor of plaintiff because plaintiff was not the prevailing party. Should the Court disagree with that position, any fees and litigation expenses awarded should be limited to those incurred in connection with phase two of the trial, given that Holmstrom (and VHP) were the prevailing parties in phase one.

III. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's rulings in connection with phase one of the trial, and should reverse the trial court's rulings in connection with phase two.

RESPECTFULLY SUBMITTED this 23rd day of December, 2019.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondents/Cross-
Appellants Robert and Elizabeth Holmstrom

CERTIFICATE OF SERVICE

I certify that I caused the foregoing RESPONDENTS/CROSS-APPELLANTS HOLMSTROMS' COMBINED RESPONSIVE AND OPENING BRIEF to be served on the following:

Katie Jo Johnson
J. Kurt Kraemer
McEwen Gisvold LLP
1100 SW Sixth Ave Ste 1600
Portland OR 97204
E-Mail: katiejoj@mcewengisvold.com; kurtk@mcewengisvold.com
Of Attorneys for Jubitz Corporation

Denise J. Lukins
Law Office of Denise J. Lukins
800 NE Tenney Rd Ste 110-115
Vancouver, WA 98685
E-Mail: dlukins@lukinslaw.com
Of Attorneys for Vancouver Hospitality Partners, LLC

Zachary Stoumbos
Landerholm Law Firm
PO Box 1086
Vancouver, WA 98666
E-mail: zachs@landerholm.com
Of Attorneys for Vancouver Hospitality Partners, LLC

by delivery of a true copy via electronic mail to the foregoing on the 23rd day of December, 2019.



Stephen G. Leatham

HEURLIN, POTTER, JAHN, LEATHAM, HOLTMANN & STOKER, PS

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