

FILED

NOV 16 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 292657-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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DOUGLAS CAMPBELL and MICHELLE A. CAMPBELL, husband and  
wife, and ROBERT E. SUKERT II, an unmarried person,

*Appellants,*

v.

DONALD W. OAKLAND and CHERRIS J. OAKLAND, husband and  
wife,

*Respondents and Third-Party Plaintiffs,*

v.

PAUL D. INGRAM and JUDIE INGRAM, husband and wife, and  
INGRAM REALTY LLC, a Washington limited liability company,  
*Third-Party Defendants.*

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**OPENING BRIEF OF APPELLANTS**

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## **ASSIGNMENTS OF ERROR**

**Assignment of Error No. 1.** The trial court erred in granting summary judgment in favor of the Sellers.

**Issue:** Was the Sellers' misrepresentation of the zoning of the Property a genuine issue of material fact precluding summary judgment?

**Issue:** Was whether the Sellers' misrepresentation of the zoning of the Property was "material" a genuine issue of material fact precluding summary judgment?

**Issue:** Was the Buyers' reliance on the Sellers' misrepresentation of the zoning of the Property a genuine issue of material fact precluding summary judgment?

**Issue:** Was whether the Buyers' reliance on the Sellers' misrepresentation of the zoning of the Property was justified a genuine issue of material fact precluding summary judgment?

**Assignment of Error No. 2.** The trial court erred in failing to reduce the amount of the cash bond deposited by the Buyers after they dismissed their claim for specific performance and elected rescission and restitution as their remedy.

**Assignment of Error No. 3.** The trial court erred in failing to determine the supersedeas amount to stay enforcement of the money judgment pending appeal.

**Assignment of Error No. 4.** The trial court erred in ordering the clerk to disburse to the Sellers the amount of the money judgment entered against the Buyers out of the funds held in the registry of the court.

**Assignment of Error No. 5.** The trial court erred in awarding attorney's fees to the Sellers.

**Assignment of Error No. 6.** The trial court erred in calculating the amount of attorneys' fees and costs awarded to the Sellers.

## **NATURE OF THE CASE**

This is an action by the buyers to rescind a real estate contract based on the sellers' misrepresentation of the zoning of the property.

## **STATEMENT OF THE CASE**

On September 27, 2007, appellants Douglas Campbell, Michelle A. Campbell, and Robert E. Sukert II ["Buyers"] and respondents Donald W. Oakland and Cherris J. Oakland ["Sellers"] entered into a Real Estate Contract ["Real Estate Contract"] concerning a house on 2.18 acres ["Property"] in Cle Elum, Washington. At the time of the transaction, the Sellers and their agents represented that the Property was zoned "suburban" or "suburban II," when in fact, the Property had been rezoned two months earlier to "Rural Residential." CP 22-23.

The buyers received two different flyers before purchasing the Property. One flyer represented, "Potential for commercial zoning. Presently zoned Suburban II." The other flyer represented, "zoned Suburban." CP 22-23. In their Listing Agreement, the Sellers expressly authorized their agent, Paul Ingram, to market the Property as "Potential for Commercial Zoning. Presently zoned suburban 2." CP 30-34. The Listing Agreement provides in part as follows:

"Seller understands that Broker . . . will make representations to prospective buyers based on the Property information on the additional pages to this Agreement."

CP 33.

Prior to closing, the Buyers went to the Kittitas County Community Development Services office to verify the zoning. A staff person gave the Buyers a map showing that the Property was zoned “Suburban.” The staff person did not tell the Buyers that the Property had been rezoned to “Rural Residential” a couple of months earlier. Apparently, the County’s map had not yet been updated to reflect the rezone. CP 23.

The Buyers paid \$100,000 down, \$32,298 in interest, \$2,778 for property taxes, \$1,169 for insurance, \$45,687 for a new well, and approximately \$10,000 for remodeling. CP 24.

Two years later, when the Buyers attempted to obtain financing to cash-out the Real Estate Contract with the Sellers, they were told by their mortgage broker that the appraiser said the Property had been rezoned from “suburban” to “R-3,” and that the zoning change reduced the value of the Property by about \$100,000. As a result of the rezone and reduction in value, the Buyers were unable to obtain financing for the Property. CP 23.

The Buyers went to the Kittitas County Community Development Services and spoke with Planner Dan Valoff, who confirmed that the Property had been rezoned to “Rural Residential” as of July 17, 2007 –

two months before the Buyers purchased the Property. CP 23. Effective July 19, 2007, the County adopted the 2007 Development Code Update that resulted in the replacement of the Suburban zoning district with the Urban & Rural Residential zoning district. The zoning of the Property was “Suburban” prior to July 19, 2007 and became “Rural Residential” as of July 19, 2007. CP 23. Before the Code Update became effective on July 19, 2007, the maximum density in the Suburban zoning district was one unit per acre. After July 19, 2007, the maximum density in the Rural Residential zoning district was one unit per five acres. CP 23-24.

The Sellers and their agents did not disclose the rezone to the Buyers. CP 24. The Buyers would not have purchased the Property had they known that the Property had been rezoned to “Rural Residential” and was no longer zoned “Suburban.” CP 24. Appellant Bob Sukert owned land adjacent to the subject Property, which was zoned “Suburban” when he bought it and which he successfully got rezoned to “Commercial.” CP 24. Based on Mr. Sukert’s prior experience, the Buyers were optimistic that they could also get the subject Property rezoned from “Suburban” to “Commercial.” If not successful, then the Buyers’ “back-up plan” was to move another home onto the Property and use it as investment rental property. CP 24. However, with zoning change to “Rural Residential,” the Buyers were unable to implement either plan.

Due to the decline in value caused by the rezone of the Property, the Buyers were unable to refinance the Property in order to make the “balloon” payment due under the Real Estate Contract. On July 22, 2009, the Sellers recorded a Notice of Intent to Forfeit Real Estate Contract. The Buyers commenced this action and filed a motion to restrain the forfeiture. On October 19, 2009, the court entered an Order Restraining Forfeiture of Real Estate Contract, conditioned upon the buyers posting a bond in the amount of \$265,000 by October 23, 2009.<sup>1</sup> On October 28, 2009, the court amended its order to give the buyers until November 6, 2009, to post a bond, irrevocable letter of credit or cash bond. On November 5, 2009, the buyers posted a cash bond in the amount of \$265,000.

Initially, the Buyers sought specific performance of the contract with an abatement of the purchase price or rescission and restitution. Later, the Buyers dismissed their specific performance claim and sought only rescission and restitution, plus incidental damages, based on the Sellers’ misrepresentation concerning the zoning of the property.

On July 2, 2010, the court granted the Sellers’ motion for summary judgment dismissing the Buyers’ claim for rescission, dissolving the restraining order and awarding attorney’s fees to the Sellers. CP 86-88.

On July 6, 2010, the Sellers recorded a Declaration of Forfeiture.

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<sup>1</sup> The amount of the bond set by the court was based on the approximate amount owed by the buyers under the real estate contract after deducting the set-off claimed by them.

After the trial court granted summary judgment in the Sellers' favor, the Buyers moved the trial court to determine the supersedeas amount to stay enforce of the money judgment to be entered against the Buyers for the Sellers' attorney's fees and costs, conditioned upon the Buyers filing an appeal within ten days after final judgment. Because the Buyers sought only rescission and restitution, the Buyers did not seek to stay forfeiture of the real estate contract pending appeal. The trial court denied the Buyers' motion and ordered the clerk immediately to disburse the amount of the money judgment to the Sellers and refund the balance of the funds to the Buyers. CP 136-39.

On July 12, 2010, the trial court entered judgment in the Sellers' favor and awarded attorneys' fees and costs to the Sellers in the amount of \$25,318.25. CP 136-39.

The Buyers then filed this appeal.

### **ARGUMENT**

**1. The standard of review of the trial court's order granting summary judgment is de novo.**

“Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . When reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court, considering facts and reasonable inferences therefrom in the light most favorable to the nonmoving party and reviewing questions of law de novo.”

*Security State Bank v. Burk*, 100 Wn. App. 94, 97 (2000).

“Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper.”

*Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 295 (1987).

“The summary judgment procedure is intended to dispose of useless trials on formal issues that have no evidentiary basis, or which, even if factually supported, could not as a matter of law lead to a favorable result for the opposing party.” WASHINGTON CIVIL PROCEDURE BEFORE TRIAL DESK BOOK § 39.30 (WASH. STATE BAR ASS'N 1981). “A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.” *Preston v. Duncan*, 55 Wn.2d 678, 681 (1960). “A court will grant summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Hansen v. Friend*, 118 Wn.2d 476, 485 (1992). “A material fact is one upon which the outcome of the litigation depends.” *Eriks v. Denver*, 118 Wn.2d 451, 456 (1992). “One who moves for summary judgment has a burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent would, at the time of trial, have the burden of proof on the issue concerned.” *Preston v. Duncan*, 55 Wn.2d 678, 682 (1960). “The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved

against the moving party.” *Atherton Condominium Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). “Facts and all reasonable inferences therefrom are considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 518 (1992). “It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, *et cetera*, a summary judgment would not be warranted.” *Preston v. Duncan*, 55 Wn.2d 678, 681-82 (1960). “A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.” *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

**2. The trial court erred in granting summary judgment in the Sellers' favor.**

In this case, there were several genuine issues of material fact precluding summary judgment:

- a. Did the Sellers misrepresent the zoning of the Property?
- b. Was the Sellers' misrepresentation of the zoning of the Property “material”?
- c. Did the Buyers rely on the Sellers' misrepresentation of the

zoning of the Property?

- d. Was the Buyers' reliance on the Sellers' misrepresentation of the zoning of the Property justified?

**3. The Sellers' misrepresentation of the zoning of the Property constitutes grounds to rescind the Real Estate Contract.**

To be entitled to rescission and restitution on the grounds of misrepresentation, the Buyers must show merely that (1) the misrepresentation was material; (2) the Buyers relied on the misrepresentation; and (3) the Buyers' reliance was justified. Unlike a claim for *damages*, the Buyers are not required to prove fraud in order to *rescind* the contract. All of the cases cited by the Sellers in support of their motion for summary judgment involve claims for *damages* and are not on point. CP 35-44.

“In *Kruger v. Redi-Brew Corp.*, 9 Wn. App. 322, 511 P.2d 1405 (1973), this court stated:

‘A material innocent misrepresentation is a sufficient representation on which to base a claim for rescission. It is unnecessary for the purpose of affording the remedy of rescission to find that the representation is fraudulent. *See Anthony v. Warren*, 28 Wn.2d 773, 184 P.2d 105, 190 P.2d 88 (1947); *Algee v. Hillman Inv. Co.*, 12 Wn.2d 672, 123 P.2d 332 (1942); RESTATEMENT OF CONTRACTS § 470, 476 (1932); 12 S. WILLISTON, CONTRACTS § 1500 (3d ed. 1970). The court found and concluded plaintiff made a timely rescission . . .

“In *Ross v. Harding*, 64 Wn.2d 231, 391 P.2d 526 (1964),

the court found a mutual mistake justifying rescission, where the seller failed to secure the consent of the lessor in assigning the leasehold interest in which the store was located to the purchaser and it was established both parties had relied on securing such consent.

“In *Ross*, the court stated on pages 239-40, 391 P.2d on page 532-33:

‘The trial court expressly found that ‘except as to the above lease there was no evidence of fraud or misrepresentation by anyone.’ This does not amount to a finding that there were fraudulent misrepresentations concerning the existence of a lease. But, absent fraud, the undenied misrepresentation would at least necessarily have to be characterized as a mutual mistake of fact. Where there is a clear bona fide mutual mistake regarding material facts, equity will grant a rescission. . . .

“That such an equitable principle has long been a part of the common law is demonstrated by the opinion in *Allen v. Hammond*, 11 Pet. 63, 36 U.S. 63, 71, 9 L.Ed. 633 (1837), in language appropriate to the facts of this case:

‘In 1 Fonbl.Eq. 114, it is laid down, that where there is an error in the thing for which an individual bargains, by the general rules of contracting, the contract is null, as in such a case, the parties are supposed not to give their assent. And the same doctrine is laid down in Puffendorff’s Law of Nature and Nations, b. 1, c. 3, § 12. The law on this subject is clearly stated, in the case of *Hitchcock v. Giddings*, Daniel’s Exch. 1 (s.c. 4 Price 135); where it is said, that a vendor is bound to know that he actually has that which he professes to sell . . .’

*Enrico v. Overson*, 19 Wn. App. 483, 576 P.2d 75 (1978).

“General contract principles permit a party to avoid an obligation if assent has been induced by misrepresentation. Misrepresentation, either fraudulent or non-fraudulent, ‘is

an assertion that is not in accord with the facts.’  
RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981). A statement intended to be truthful may nonetheless be a misrepresentation because of ignorance or carelessness. RESTATEMENT, *supra*, § 159 comment a. A material innocent misrepresentation is sufficient upon which to base a claim for rescission. . . .

“RESTATEMENT (SECOND) OF CONTRACTS § 164 provides that a contract is voidable because of a misrepresentation

‘(1) If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying[.]’

“Thus, a party seeking relief on the basis of an innocent misrepresentation must demonstrate (1) that the misrepresentation was material; (2) that he relied on it; and (3) that his reliance was justified. . . .

*Skagit State Bank v. Rasmussen*, 43 Wn.App. 178 (1986), *reversed on other grounds*, 109 Wn.2d 377, 745 P.2d 37 (1987).

a. **The Sellers’ misrepresentation was material.**

“It has been said that the true test as to materiality is whether the contract would have been entered into had there been no mistake. *Lindeberg v. Murray*, [117 Wash. 483, 201 P. 759 (1921)]. As was said in *Lindeberg*, we are clear that there was such a mistake here. That a valid lease with approximately 3 years to run plus a 5-year renewal option is a material and substantial part of the consideration for the agreement to purchase the grocery business is self-evident.”

*Enrico v. Overson*, 19 Wn. App. 483, 576 P.2d 75 (1978).

The Buyers would not have purchased the Property had they known it had been rezoned to “Rural Residential.” The rezone

substantially diminished the value of the Property, prevented the Buyers from obtaining financing, destroyed the chances of getting the zoning changed to “Commercial,” and defeated the purpose of the transaction. Whether the Sellers’ misrepresentation of the zoning was “material” is a genuine issue of material fact precluding summary judgment.

**b. The Buyers relied on defendants’ misrepresentation.**

The Sellers misrepresented the zoning of the Property as “Suburban,” when in fact, the Property had been rezoned to “Rural Residential” two months prior to the sale. The Buyers were not aware at the time of the sale that the Property was not zoned “Suburban.” The Buyers relied upon the Sellers’ representation that the Property was zoned “Suburban.” Whether the Buyers relied on the Sellers’ misrepresentation of the zoning is a genuine issue of material fact precluding summary judgment.

**c. The Buyers’ reliance upon the Sellers’ misrepresentation was justified.**

“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.

“The comment to this section explains:

“[T]he mere fact that [the recipient of the misrepresentation] could, by the exercise of reasonable care, have avoided the mistake caused by the

misrepresentation does not bar him from relief. The rule is similar to that applicable to mistake in general (§ 157), and its justification is particularly strong since here the recipient's mistake is the result of a misrepresentation.... The recipient's fault makes his reliance unjustified only in extreme cases where he has failed to act in good faith and in accordance with reasonable standards of fair dealing.”

*Skagit State Bank v. Rasmussen*, 43 Wn.App. 178 (1986), *reversed on other grounds*, 109 Wn.2d 377, 745 P.2d 37 (1987).

It is no defense that the Buyers could have learned the true zoning of the Property, in light of the Sellers' affirmative misrepresentation.

“The rule is followed at the present time in practically all American jurisdictions, in respect of transactions involving both real and personal property, that one to whom a positive, distinct, and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved. This rule is a corollary to the broad principle of a general right of reliance upon positive statements. Under this rule it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and misled the complaining party. Under such circumstances, it is immaterial that the means of knowledge are open to the complaining party, or easily available to him, and that he may ascertain the truth by proper inquiry or investigation.”

*Cunningham v. Studio Theatre, Inc.*, 38 Wn.2d 417, 424-5, 229 P.2d 890 (1951) (quoting 23 AM. JUR. 970, FRAUD AND DECEIT, § 161).

The difference in the value of the Property zoned “Suburban” as compared with “Rural Residential” is at least \$100,000. The undisclosed rezone of the Property defeats the purpose of the transaction and precludes the Buyers' intended use of the Property. Whether the Buyers' reliance

upon the Sellers' misrepresentation was justified is a genuine issue of material fact precluding summary judgment.

4. **The trial court erred in failing to reduce the amount of the cash bond deposited by the Buyers after they dismissed their claim for specific performance and elected rescission and restitution as their remedy.**

CR 65(c) provides in part as follows:

**“Security.** Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”

“The amount of an injunction bond is within the trial court’s discretion.” *Jensen v. Torr*, 44 Wn. App. 207, 211, 721 P.2d 992, *review denied*, 107 Wn.2d 1004 (1986). The amount of the bond is intended to compensate the defendants if the court finds at trial that plaintiffs were not entitled to the injunction.

Here, the trial court originally set the amount of the bond at \$265,000, based on the balance due under the Real Estate Contract (approximately \$365,000), less the amount of the set-off claimed by the Buyers due to the Sellers’ misrepresentation of the zoning (approximately \$100,000).

However, when the Buyers abandoned their claim for specific performance, and instead, elected to pursue only their claim for rescission and restitution, together with incidental damages and attorney's fees, the Buyers filed a motion to reduce the cash bond on the grounds that the damages the Sellers would incur if the Real Estate Contract forfeiture were found to have been wrongfully restrained would have been limited to the fair market rental value of the property for the period between the earliest date the Sellers could have declared a forfeiture of the real estate contract (October 20, 2009) and the date set for trial (July 13, 2010). The fair market rental value of the property was approximately \$900.00 per month. Therefore, the amount of the bond should have been reduced from \$265,000.00 to approximately \$8,100.00 (nine months times \$900.00 per month). The trial court should have directed the clerk of the court to release to the Buyers the difference between the original cash bond (\$265,000.00) and the reduced cash bond (\$8,100.00), or \$256,900.00. Without explanation, the trial court denied the Buyers' motion and required the entire cash bond to remain on deposit until trial.

Although this issue is moot, as the Buyers' have no meaningful remedy for the trial court's error, this court should consider the issue in order to give guidance to trial courts and prevent future litigation on the same issue.

“[A]n issue is moot if a court can no longer provide effective relief to a party on the issue. *In re Pers. Restraint of Mines*, 146 Wn.2d 279, 283, 45 P.3d 535 (2002). Any issue concerning the summary suspension is technically moot because even if the suspension could be undone, the revocation of the license would still stand and prevent Islam from operating the center. However, in order to give guidance to the department and licensees, and to prevent future litigation on these issues, we will consider the summary suspension. *See Mines*, 146 Wn.2d at 285.”

*Islam v. State, Dept. of Early Learning*, No. 63362-7-I (Div. I, August 23, 2010).

5. **The trial court erred in failing to determine the supersedeas amount to stay enforcement of the money judgment pending appeal and in ordering the clerk to disburse to the Sellers the amount of the money judgment entered against the Buyers out of the funds held in the registry of the court.**

The trial court should have determined the supersedeas amount and ordered the supersedeas amount to be withheld from the cash bond already on file and the balance of the funds to be refunded to the Buyers.

RAP 8.1 provides in relevant part as follows:

**“(b) Right to Stay Enforcement of Trial Court Decision.**  
... Any party to a review proceeding has the right to stay enforcement of a money judgment ... pending review. ...

**“(1) Money Judgment.** Except when prohibited by statute, a party may stay enforcement of a money judgment by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4).

...

**“(c) Supersedeas Amount.** The amount of the supersedeas bond, cash or alternate security required shall be as follows:

**“(1) Money Judgment.** The supersedeas amount shall be the amount of the judgment, plus interest likely to accrue during the pendency of the appeal and attorney fees, costs, and expenses likely to be awarded on appeal.”

Under RAP 8.1, a party may stay enforcement of a money judgment *as a matter of right*. RAP 8.1 contemplates that a party file a supersedeas bond or cash and the burden is on the other party to object to the form or amount of the bond. The trial court has discretion to determine the supersedeas amount, if the other party objects to the amount posted. RAP 8.1(e).

Here, the Buyers previously posted a cash bond of \$265,000, as a condition of the order restraining the forfeiture. The restraining order was dissolved and a declaration of forfeiture was recorded. The only judgment entered against the Buyers was a money judgment for the Sellers’ attorney’s fees and costs. The amount of the supersedeas cash bond “shall be the amount of the judgment, plus interest likely to accrue during the pendency of the appeal and attorney fees, costs, and expenses likely to be awarded on appeal.” RAP 8.1(c)(1). That amount should have been held in the registry of the court to stay enforcement of the money judgment pending appeal.

Interest on judgments currently accrues at 12% per annum. RCW 4.56.110(4). Appeals to Division III of the Court of Appeals typically take about one year to be decided. Therefore, one year of interest should be added to the judgment to determine the supersedeas amount.

In addition, if the Sellers prevail on appeal, then they may be entitled to attorney's fees and costs on appeal. Because the case was decided on summary judgment, there was no transcript of the proceedings and the appeal is limited to legal issues. The Sellers' counsel's additional work will entail filing an appellate brief on issues previously briefed and presenting oral argument. The Buyers believe that the Sellers' additional attorney's fees will be less than \$5,000. Estimating that the Sellers incurred \$20,770.82 in awardable attorney's fees, the supersedeas amount should have been:

Judgment amount:	\$20,770.82
Interest pending appeal:	\$2,492.50
Attorney's fees on appeal:	\$5,000.00
<b>Total supersedeas amount:</b>	<b>\$28,263.32</b>

Therefore, the trial court should have ordered approximately \$28,263.32 to be withheld from the \$265,000 then on deposit with the court as the Buyers' supersedeas cash bond, and the balance of \$236,736.68 to be refunded and disbursed to the Buyers. Instead, the trial court ordered the clerk immediately to disburse the amount of the money

judgment to the Sellers and refund the balance of the funds to the Buyers.

CR 62(a) provides as follows:

“Except as to a judgment of a district court filed with the superior court pursuant to RCW 4.56.200, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Upon the filing of a notice of appeal, enforcement of judgment is stayed until the expiration of 14 days after entry of judgment.”

By ordering the clerk *immediately* to disburse the funds held in court, the Sellers in effect were permitted to enforce their money judgment *immediately* upon entry, in direct contravention of CR 62(a).

**6. The trial court erred in awarding attorney’s fees to the Sellers.**

“In actions under RCW 61.30.110 and 61.30.120, the court *may* award reasonable attorneys’ fees and costs of the action to the prevailing party.” (Emphasis added.) RCW 61.30.130(2). The word “may” means “discretionary,” whereas “shall” would mean “mandatory.” In interpreting similar language in the mechanic’s lien statute, the supreme court held that the attorney fee language in the mechanics lien statute was “not mandatory, but, by its terms, permissive, leaving the matter of allowing attorneys’ fees . . . to the discretion of the superior court.” *Forrester v. Craddock*, 51 Wn.2d 315, 323-24, 317 P.2d 1077 (1957). Therefore, the court has discretion whether to award any attorney’s fees to the Sellers. In light of the undisputed fact that the Sellers misrepresented the zoning of

the property to the Buyers, the trial court should not have awarded any attorney's fees to the Sellers.

**7. The trial court erred in calculating the attorney's fees awarded to the Sellers.**

If the trial court was correct in awarding any attorney's fees to the Sellers, the trial court should have segregated the fees relating to enforcement of the Real Estate Contract, for which fees are authorized, from fees relating to other claims, for which fees are not authorized.

“In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity. *Mellor v. Chamberlin*, 100 Wash.2d 643, 649, 673 P.2d 610 (1983). When a party recovers both on claims for which attorney fees are authorized and claims for which there is no such authorization, it is proper to limit the fee award to the legal services provided on the former claims. *See Nuttall v. Dowell*, 31 Wn.App. 98, 105, 639 P.2d 832 (1982) (affirming a fee award limited to only that portion of plaintiff's action which was cognizable under a statute authorizing attorney fees). . . .

“Fisher contends that its claims for commissive waste and breach of the lease were so interrelated that it would be difficult to apportion the time its attorneys spent on each. However, it would be unjust to allow Fisher to recover virtually all of its attorney fees because of complexity. Such an award would be inconsistent with the rule requiring authorization for fee awards, since most of Fisher's judgment was not based on a claim for which fees were authorized. If the only issue in this case had been Arden's liability for commissive waste, Fisher's attorneys would have spent considerably less time than they actually spent. Surely some of their efforts concerned the

construction of the lease with respect to other issues. We direct the trial court to determine what portion of Fisher's attorneys' services would have been provided had only the commissive waste claim been raised, and to award only those fees attributable to those services.”

*Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).

“Time spent developing theories essential to the . . . claim [on which fees are recoverable] must be segregated from time spent on legal theories relating to other causes of action.” *Sign-O-Lite Signs v. DeLaurenti Florist*, 64 Wn. App. 553, 566 (1992). “[F]ees awarded under the statute at issue here, RCW 19.86.090, ‘should only represent the reasonable amount of time and effort expended which should have been expended for the *actions* of [the defendant] which constituted a Consumer Protection Act violation.’” *Travis v. Horsebreeds*, 111 Wn.2d 396, 410 (1988) (quoting *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735 (1987)).

Next, the trial court should have determined the reasonable amount of attorney’s fees incurred and relating to enforcement of the Real Estate Contract.

“[T]he determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful can bill. In such a case as this one, . . . there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case. Therefore, the trial court, instead of merely relying on the billing records of the plaintiff’s attorney, should make an independent decision as to what

represents a reasonable amount for attorney fees. The amount actually spent by the plaintiff's attorney may be relevant, but it is in no way dispositive.”

*Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 745 (1987).

“The lodestar approach was first adopted in this jurisdiction for use under the Consumer Protection Act. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 597-99, 675 P.2d 193 (1983). A lodestar award is arrived at by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. *Fetzer I*, 114 Wn.2d at 124, 786 P.2d 265. ‘In principle, it is grounded specifically in the market value of the property in question—the lawyer's services.’ DAN B. DOBBS, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 467 (1986).

“Although the foundation of the award is built upon objective criteria, adjustments to the award are permitted to account for a number of subjective factors, *Fetzer I*, 114 Wn.2d at 124, 786 P.2d 265. *See also Bowers*, 100 Wn.2d at 597-99, 675 P.2d 193. Traditionally, these factors include:

‘the time expended, the difficulty of the questions involved, the skill required, customary charges of other attorneys, the amount involved, the benefit resulting to the client, the contingency or certainty in collecting the fee and the character of the employment.’

*Fetzer I*, 114 Wn.2d at 124, 786 P.2d 265 (*quoting Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967)). However, many of these factors, such as the time expended or the customary fees, are included in, and cannot be considered separately from, the initial lodestar determination. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 898-900, 104 S.Ct. 1541, 1548-49, 79 L.Ed.2d 891 (1984) (novelty and complexity of issues, skill of attorney, and results obtained subsumed in determination of reasonable fee under lodestar method).

“What is particularly obvious in this case is the gross disparity between the amount requested, and even the amount actually awarded by the trial court, when compared to the amount in controversy. While some of the factors listed above tend to imply an upward adjustment of the fee award, a lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment. As Justice Dimmick has previously pointed out, “[t]he lodestar method, having no relation to the amount involved, may lead to an attorney's fee which is equal to or exceeds the judgment recovered....” *Bowers*, 100 Wn.2d at 607, 675 P.2d 193 (Dimmick, J., concurring in part, dissenting in part). While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness.

“*Bowers* outlined generally how a court should determine “reasonable hours”:

‘The trial court must determine the number of hours reasonably expended in the litigation. To this end, the attorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.). The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.’

*Bowers*, 100 Wn.2d at 597, 675 P.2d 193. In adjudging ‘reasonable hours’ under the long-arm statute, courts should attempt to determine the amount of time that it would take a competent practitioner to recognize the jurisdictional issue, research the relevant law, discover the pertinent facts, and then prepare, file and prevail upon a CR 12(b)(2) motion.

“The burden of proving the reasonableness of the fees requested is upon the fee applicant. *Blum*, 465 U.S. at 897, 104 S.Ct. at 1548. Dwight's attorneys have provided extensive documentation of their efforts in this case. While this documentation forms the starting point under the lodestar method, it is not dispositive on the issue of the reasonableness of the hours. *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 744, 733 P.2d 208 (1987). ‘[T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees.’ *Tampourlos*, at 744, 733 P.2d 208.”

*Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-51, 859 P.2d 1210 (1993).

“These facts are mainly uncontested, yet Dwight's declaration of war leads to an incredible claim of \$180,913.79 in fees and costs. Dwight's was awarded \$116,785.54 in the trial court and seeks \$33,919.42 in the Court of Appeals and \$30,206.83 in this court.

“This action was filed in July 1986; in October 1986, Dwight's filed an 88-paragraph, 21-page answer, including one paragraph alleging lack of jurisdiction. Not until the second trial date (the first trial date was stricken on Dwight's motion), February 9, 1987, did Dwight's file a motion to dismiss for lack of jurisdiction.

This single transaction took place over several days, yet this uncomplicated set of facts has produced 410 pages of clerk's papers and a 200-plus-page transcript. Dwight's Texas counsel claims in the trial court include \$11,125 in fees for taking depositions, \$14,375 for briefing, and \$11,875 in preparation for trial. These figures represent only minimum amounts, limited to those where the affidavit clearly identifies those categories. Incredibly, Texas counsel sought at least another \$14,400 for briefing on appeal to the Court of Appeals solely on the issue of jurisdiction. Likewise, I am astonished at a claim of at least an additional \$8,650 for briefing on the single-issue petition for review even though no new citations or theories

arose from the Court of Appeals decision. These claims are exorbitant.”

*Scott Fetzer Co., Kirby Co. Div. v. Weeks*, 114 Wn.2d 109, 126, 786 P.2d 265 (1990)(J. Brachtenbach, concurring).

Therefore, the trial court erred by failing to segregate fees relating to enforcement of the Real Estate Contract, to determine the reasonable amount of attorney’s fees, and then to deduct for unproductive, duplicative, or unnecessary services.

**8. The trial court erred in calculating statutory costs awarded to the Sellers.**

RCW 4.84.010 limits statutory costs to the following expenses:

“(1) Filing fees;

“(2) Fees for the service of process by a public officer, registered process server, or other means, as follows:

“(a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

“(b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;

“(3) Fees for service by publication;

“(4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;

“(5) Reasonable expenses, exclusive of attorneys’ fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;

“(6) Statutory attorney and witness fees; and

“(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.”

Only those expenses specifically enumerated in RCW 4.84.010 are recoverable as costs. The Sellers requested items not recoverable as statutory costs. “Costs have historically been very narrowly defined, and RCW 4.84.010, which statutorily defines costs, limits that recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743 (1987). Photocopying, telephone expenses, secretarial expenses, computer research services and messenger services are not proper costs. *Id.*

Although witness fees are proper costs, fees paid to expert witnesses are not proper costs. *Fiorito v. Goerig*, 27 Wn.2d 615 (1947); *Andrews v. Burke*, 55 Wn. App. 622 (1989).

Specifically, the Sellers’ Cost Bill includes a “clerk’s fee” of \$230

for filing the third-party complaint against Paul Ingram and a “service fee” of \$160 for serving Ingram. Neither of these costs are recoverable from the Buyers.

With respect to depositions, deposition expenses are not recoverable as costs except to the extent that they are used *at trial*. RCW 4.84.010 (7). Here, there was no trial, such that deposition expenses are not recoverable at all. Even if depositions used in a motion for summary judgment were recoverable, only the following portions of the depositions were used:

<b>Deponet:</b>	<b>Portion used:</b>	<b>Excess charges:</b>
Robert Sukert II and Douglas Campbell (not segregated)	4 out of 63 pages (6%) and 3 out of 104 pages (3%)	\$810.41
David Taylor and Rick Winters (not segregated)	5 out of at least 40 pages (13%) and 3 out of at least 35 pages (9%)	\$242.44
<b>Total:</b>		<b>\$1,052.85</b>

Regarding the Sellers’ request for attorneys’ fees, the following charges should not have been awarded against the Buyers:

<b>Description:</b>	<b>Amounts:</b>
1. Duplicative time spent by Mr. Slothower	\$742.50

reviewing work done by Mr. Wheeler	
2. Time spent investigating claim against Paul Ingram	\$416.25
3. Time spent attending hearing on tenant's petition for protective order	\$112.50
4. Time spent researching and preparing third-party complaint	\$236.25
5. Time spent on unsuccessful motion to strike portions of Sukert's declaration	\$230.00
6. Time spent by legal assistant, Heather Hazlett	\$1,106.00
7. Time spent by legal assistant, Julie Johnson	\$98.00
8. Telephone, postage, facsimile and photocopy charges	\$128.13
<b>Total</b>	<b>\$3,069.63</b>

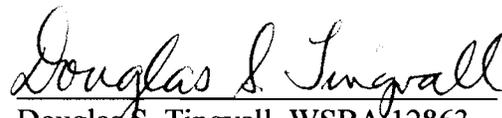
Therefore, if the trial court should have awarded any attorneys' fees to the Sellers, the trial court should have reduced the Sellers' attorneys' fees to \$20,353.42 and should have reduced the total cost bill, including attorneys' fees, to \$20,770.82. CP 109-29.

### CONCLUSION

There are genuine issues of material fact as to whether the Sellers

misrepresented the zoning of the Property, whether the misrepresentation was material, whether the Buyers relied upon the misrepresentation and whether the Buyers' reliance upon the misrepresentation was justified. Accordingly, the trial court should have denied the Sellers' motion for summary judgment.

Respectfully submitted on November 8, 2010.

  
Douglas S. Tingvall, WSBA 12863  
Attorney for Appellants

**DECLARATION OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that I successfully emailed and mailed a copy of this document to respondents' attorneys of record on November 8, 2010, at Newcastle, Washington.

