

**FILED**

SEP 02 2011

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

No. 295508

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

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SCOTT YOUNG and GAYLENE YOUNG,

**Respondents/Cross Appellants,**

v.

BOB FRANK CONSTRUCTION, LLC, a Washington limited liability  
company,

**Appellant/Cross Respondents**

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**RESPONDENTS' / CROSS APPELLANTS' BRIEF**

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Appellants**

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## **I. INTRODUCTION**

Scott and Gaylene Young, by and through their attorney Matthew T. Ries of Stamper Rubens, P.S., ask this Court to affirm the Trial Court's rulings that: (1) a contract was never formed between the parties; (2) that specific performance is unwarranted; (3) that there is no basis for seeking a different measure of damages on appeal; and (4) that the trial court did not abuse its discretion in awarding the Youngs their attorney's fees and costs as the substantially prevailing party. The Youngs further cross appeal the Trial Court's award of damages to Bob Frank Construction, LLC premised upon a promissory estoppel theory. The Youngs also appeal the Trial Court's ruling that the Youngs were not entitled to obtain a property disclosure statement from the seller pursuant to RCW 64.06.010 et seq.

## **II. ASSIGNMENT OF ERRORS**

The Youngs are cross appealing three issues in which they believe the Trial Court erred:

1. Awarding Bob Frank Construction, LLC damages based upon the theory of promissory estoppel.
2. Concluding as a matter of law that the Youngs were not entitled to a Property Disclosure Statement from Bob Frank Construction, LLC as required pursuant to RCW 64.06.010, et seq.

3. Failing to award the Youngs money that they paid to Bob Frank Construction, LLC for improvement of the subject property.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Trial Court erred in entering Conclusions of Law Nos. 10, 12,13,14,15 and 16 in the May 17, 2010 Findings of Fact and Conclusions of Law, which all pertain to the elements of a promissory estoppel claim, as it is barred by the statute of frauds. (CP 2416).

2. The Trial Court erred in entering Conclusion of Law No. 17 in the May 17, 2010 Findings of Fact and Conclusions of Law, as it is the remedy premised upon the promissory estoppel theory, and which provides:

17. An appropriate remedy under the circumstances is to compensate defendant by allowing him to retain the \$50,000 payment received May 17, 2007, any materials/supplies provided by plaintiffs plus interest in excess of the \$50,000 retained that is incurred on the construction loan for the period beginning April 1, 2008 until September 30, 2010 or closing after sale of the house, whichever event occurs first.

(CP 2417).

3. The Trial Court erred in entering Conclusion of Law No. 2 in the May 17, 2010 Findings of Fact and Conclusions of Law, which provides:

2. A seller's disclosure statement was not required as there was no mutual acceptance of a written agreement

between buyer and seller for the purchase and sale of residential real property.

(CP 2416).

4. The Trial Court erred in entering Conclusion of Law No. 3 in the May 17, 2010 Findings of Fact and Conclusions of Law, which provides:

3. Defendant did not willfully or without legal justification deprive plaintiffs of the ownership of plaintiffs' money or property.

(CP 2416).

5. The Trial Court erred in entering Conclusion of Law No. 18 in the May 17, 2010 Findings of Fact and Conclusions of Law. The Youngs did prevail on their sixth (6<sup>th</sup>) cause of action in their complaint which sought a declaratory judgment that there was no enforceable contract for the purchase of real property entered into between the parties. (CP 9-10). The Trial Court's Conclusion of Law provides:

18. Plaintiffs have not met their burden on alleged issues of action and therefore no damages or relief is awarded.

(CP 2417).

6. The Trial Court erred when it entered the November 9, 2010, Judgment based on the order regarding the amount of damages awarded to Bob Frank Construction, LLC. (CP 2669-2670).

#### IV. STATEMENT OF THE CASE

In March 2007, Scott and Gaylene Young (“Youngs”) contacted Eric Eden, a realtor with Windermere-Real Estate/Valley, Inc., to show them a house located at 5117 S. Camus Lane in the Bella Vista neighborhood of Veradale, Washington. The 5117 S. Camus Lane house was completed by Bob Frank Construction, LLC. The advertised price for the home was \$759,700. (Ex. P-2). After the Youngs viewed the house at 5117 S. Camus Lane, the house was sold to other buyers. (Jan. 27, 2010, RP 9).

On March 21, 2007, the Youngs met with Mr. Eden, Bob Frank, and Pamela Frederick, the listing agent for Bob Frank Construction, LLC. Ms. Fredrick is a realtor with John L. Scott Realty, Inc. The Youngs learned that there was a lot available at 5206 S. Camus Lane, directly across the street from the 5117 S. Camus Lane home. The parties walked the property together at 5206 S. Camus Lane. Pamela Frederick suggested to the Youngs that they should sign a lot reservation agreement to hold the property because another potential buyer was interested in the lot. (Jan. 27, 2010, RP 9-10).

Because neither realtor present had a form to use as a lot reservation agreement, the realtors decided to use a Real Estate Purchase and Sale Agreement form and modify it so that it would serve the purpose

of a lot reservation agreement (hereinafter referred to as the “Lot Reservation Agreement”). (Ex. P-4; Jan. 25, 2010, RP 78-9).

By signing this Lot Reservation Agreement, the Youngs did not intend to buy the property or to build on the property. Instead, the Youngs wanted to hold the lot while Bob Frank determined how much it would cost to build the same house that sits at 5117 S. Camus Lane on the 5206 S. Camus Lane lot, and whether it was feasible. This intention was confirmed by all persons present at the meeting. (See Jan. 25, 2010 RP 78-79; Jan. 26, 2010 RP 208-209, 296-299; Jan. 27, 2010 RP 10-11).

**1. March 30, 2007 Meeting where Bob Frank proposes a price of \$880,000.**

Bob Frank arranged a second meeting with the Youngs on March 30, 2007, at Bob Frank Construction, LLC’s office. Pamela Frederick and Eric Eden were present at this meeting. (Jan. 27, 2010 RP 12-13). Bob Frank prepared a document entitled “Custom Construction Proposal” with a total bid amount of \$880,000. (Ex. P-5). This was the bid to build the same house located at 5117 S. Camus Lane, on the 5206 S. Camus Lane lot. Bob Frank represented to the Youngs that the reason for the increase in the price to \$880,000 from the \$759,700 price for the 5117 S. Camus Lane house, was due to the increased cost of the lot, and due to the increased construction cost of the subcontractors and trades. (Jan. 27, 2010, RP 13).

The Youngs' expert witness forensic accountant, Daniel Harper, CPA, testified that the reason for the significant increase was because Bob Frank Construction, LLC had a twenty-six percent (26%) gross profit margin in the \$880,000 price. (Jan. 27, 2010, RP 164-65; Ex. P-60).

The Youngs' realtor prepared an Addendum to the Lot Reservation Agreement that provided that the contingency period was extended until April 30, 2007, and that if the parties move forward they would enter into a subsequent contract. (Ex. P-5). There was no agreement between the parties to purchase the property, or build on the property. (Jan. 26, 2010 RP 209-210; Jan. 27, 2010 RP 13-14). Bob Frank nevertheless had the Youngs sign the Custom Construction Proposal of \$880,000 to indicate that they had both reviewed it with him. (Jan. 27, 2010, RP 13-14).

**2. Bob Frank Schedules a Meeting to Review the Plans Without the Realtors.**

After the March 30, 2007 meeting, Bob Frank worked with a designer to invert the house plan on the 5117 S. Camus Lane property for the 5206 S. Camus Lane lot. Bob Frank wanted this done so that the houses would appear different. (Jan. 27, 2010 RP 26). The Youngs requested a few minor changes to the design of the house. (Jan. 27, 2010, RP 18-26).

On April 25, 2007, Bob Frank emailed Scott Young and indicated

that the designer had completed some preliminary work on the house plans and that Bob Frank would like to get together to discuss the plans to review. (Ex. P-6). Bob Frank explained to Scott Young that there would be no need for the realtors at the meeting. (Ex. P-6). Bob Frank called the listing agent, Pam Fredrick, and told her that the realtors were not to be present at the upcoming meeting. (Jan. 26, 2010, RP 231). Scott Young did not know what the protocol and procedure was for involving the realtors. He had never been through the process of having a home built to purchase. (Jan. 27, 2010, RP 14-16).

**3. Bob Frank provides a proposal on May 17, 2007 to build the house for \$1,040,600.**

On May 17, 2007, Bob Frank met with the Youngs at Bob Frank Construction, LLC's office. As they walked into the conference room, Mrs. Young saw that neither realtor was present in the office and asked Bob Frank if the realtors needed to be present at the meeting. Bob Frank responded by telling her that there was no need to have realtors there. (Jan. 27, 2010 RP 194-197).

Bob Frank presented the Youngs with three documents. (Ex. P-9, P-10, P-11). The first document was again entitled "Custom Construction Proposal", and it provided a total bid amount of \$1,040,600. (Ex. P-9). Bob Frank next presented the Youngs with a document outlining

“Additional Costs.” This list included basic bullet point descriptions of the work to be performed. (Ex. P-10).<sup>1</sup> Mr. Frank went through each of the bullet point items on the document and represented to the Youngs that the reason the bid price had increased from \$880,000 to \$1,040,600, was due to the increase in Bob Frank Construction, LLC’s costs to complete the items.

At trial, Daniel Harper testified the reason for the significant increase in the bid was because Bob Frank Construction, LLC was attempting to collect 25.1% gross profit from the Youngs. (Jan. 27, 2010, RP 167-68; P-60). Had Bob Frank Construction, LLC’s asking price had the same profit margin as obtained on the 5117 S. Camus Lane property (11.4%), the price for the house should have been \$866,000. (Jan. 27, 2010, RP 168-69).

Bob Frank then presented a third document to the Youngs entitled, “Bob Frank Construction, LLC Addendum Spec Level.” (Ex. P-11). This document describes in very general terms the various specifications that are installed in a “Spec Level” house. This document again had the incomplete legal description, as it did not have the county or state. It also references on the first line of the first page that this addendum is

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<sup>1</sup> This document had the wrong name of the seller: “Bob Frank Homes, Inc.” The document had the incorrect street address. It further had the incorrect and incomplete legal description for the property. (Jan. 26, 2010 RP 309; Ex. P-10).

“Attached to and made part of the Purchase and Sale Agreement and Earnest Money Deposit, dated: 5/15/07 between Seller, Bob Frank Construction LLC and Buyer, Scott and Gaylene Young. . .” (Ex. P-11). Mr. Frank testified that there is no such Purchase and Sale Agreement and Earnest Money Deposit, dated 5/15/07. Instead he testified that the Custom Construction Proposal (Ex. P-9) and the Additional Cost bullet point document (Ex. P-10) were considered to be the “Purchase and Sale Agreement and Earnest Money Deposit” referenced in the document, and that it should have been dated 5/17/07 instead. (Jan. 26, 2010, RP 311-12).

Bob Frank directed the Youngs to sign the three documents indicating that they had reviewed them just as was done at the March 30, 2007 meeting. (Jan. 27, 2010, RP 30; Ex. P-9, P-10, & P-11). He also directed the Youngs to pay \$50,000 to a separate company, Greenstone Construction, LLC. On May 22, 2007, Scott Young obtained a cashier’s check made payable to “Greenstone Construction, LLC” as directed, and provided that to the Greenstone Corporation office. (Ex. D108; Jan. 27, 2010, RP 31-33).

Both Scott and Gaylene Young testified that after reviewing the proposal and other documents presented on May 17, 2007, that they did not believe they had signed a formal contract to purchase the property.

The last time they purchased a house there was a detailed contract drafted between the realtors for the sale. They expected that the paperwork would be reviewed, negotiated and signed at a subsequent meeting with the realtors. (Jan. 27, 2010, RP 28-31; Jan. 28, 2010, RP 275-76).

**4. Bob Frank Construction, LLC Knows at the Start of Construction that the Appraised Value is \$850,000.**

Bob Frank Construction, LLC obtains its construction financing from Greenstone Corporation. In July 2007, Greenstone Corporation obtain financing from Bank of America. As part of this process, Greenstone Corporation adds the properties being built by Greenstone entities as collateral for its line of credit with the bank. Greenstone listed 5206 S. Camus Lane as one of those properties. (Jan. 26, 2010, RP 330-31). On July 27, 2007, Berg Appraisal performed an appraisal for Bank of America on the 5206 S. Camus Lane property and concluded that the market value for the property once completed to be \$850,000. (Ex. P-54).

On August 1, 2007, Jennifer Frank Chaparro called and obtained a copy of the appraisal. (Jan. 26, 2010, RP 331-33). Despite knowing the huge discrepancy between the appraised value and the bid price, Ms. Chaparro, nor anyone else associated with Greenstone or Bob Frank Construction, LLC, ever disclosed this large disparity to the Youngs.

**5. The Youngs Received the Appraisal from their Lender in March, 2008.**

The Youngs were working with Scott Rudy at Wells Fargo Bank to obtain financing. In January, 2008, Mr. Rudy ordered an appraisal of the 5206 S. Camus Lane property. Appraiser Jim Ratay performed the appraisal of the property. On February 26, 2008, he signed his appraisal report and he also concluded that the market value of the house and property once completed would be \$850,000. (Ex. P-27).

Scott Rudy emailed a copy of the appraisal to Mr. Young. (Jan. 27, 2010, RP 50). Mr. Young in turn called Bob Frank and told him that the appraisal had come in significantly lower and that they had a problem. Bob Frank laughed it off, and asked for a copy of the appraisal. (Jan. 27, 2010, RP 49-51). Scott Young emailed a copy of the appraisal to Bob Frank on March 17, 2008. (Ex. 26). When Bob Frank received it, he testified that it was of no concern to him. That was the Youngs' problem, not his. (Feb. 1, 2010, RP 382-383).

The Youngs attempted to work with Bob Frank Construction, LLC to see if the transaction could be salvaged. (Ex. P-29). Bob Frank Construction, LLC, however, was unwilling to compromise. With the closing having not yet occurred, on April 8, 2008, the Youngs elected to rescind the transaction. (Ex. P-33).

**6. Trial Occurred on January 25, 2010, through February 1, 2010.**

During Bob Frank Construction, LLC's attorney's opening statement, she argued that the March 21, 2007 Lot Reservation Agreement was part of the alleged contract for the purchase of the property, and that Bob Frank Construction, LLC was attempting to enforce terms from that agreement to obtain specific performance and their attorneys fees pursuant the provision in the document. (Jan. 25, 2010, RP 116, 129).

This argument was consistent with how Bob Frank Construction, LLC pled their counterclaim. (CP 20, 30-36). Bob Frank Construction, LLC made this same type of argument in its summary judgment pleadings just before trial. (CP 145-151).

Bob Frank Construction, LLC continued to make this argument throughout the first day of trial. For example, Ms. Fulgham cross-examined Mr. Eden at length about provisions in the preprinted form used for the Lot Reservation Agreement. (Jan. 25, 2010, RP 97-103).

On the second day of trial, the Youngs' counsel questioned Bob Frank about the March 21, 2007 Lot Reservation Agreement. Contrary to the extensive questioning and argument by his counsel, Bob Frank confirmed what the remaining witnesses all testified to, that Plaintiffs'

Exhibit 4 was only a Lot Reservation Agreement. (Jan. 26, 2010, RP 296-297). Bob Frank did not consider the Lot Reservation Agreement to be a contract. (Jan. 26, 2010, RP 297). It was certainly not intended to be a contract for the purchase of the 5206 S. Camus Lane property. (Jan. 26, 2010, RP 297). Rather, the Lot Reservation Agreement was drafted on a Real Estate Purchase and Sale Agreement form because that is the only form that the realtors had at the time. The Lot Reservation Agreement was simply used to give Bob Frank time to do a feasibility study. (Jan. 26, 2010, RP 297-98).

Bob Frank testified in response to questioning from the Youngs' counsel, that the only documents that he considered to be the purchase and sale agreement are the three May 17, 2007 documents. (Ex. P-9, P-10, and P-11; Jan. 26, 2010, RP 311-12). In the aftermath of Bob Frank's testimony, Bob Frank Construction, LLC's counsel dropped the argument that the Lot Reservation Agreement was somehow part of a contract for the purchase of the property. (Jan. 28, 2010, RP 287). During Bob Frank Construction, LLC's closing argument, the position shifted again and thus only Plaintiffs' Exhibit 9 constituted the parties' contract. (Feb. 1, 2011, 458-459). There was substantial confusion by Bob Frank Construction, LLC itself as to what documents it believed constituted the alleged contract.

**7. The Court Enters Findings of Fact and Conclusions of Law and Judgment.**

Judge Leveque ultimately entered the Court's Findings of Fact and Conclusions of Law on May 24, 2010. (CP 2413-2417). The Trial Court ruled that there never existed a binding contract for the purchase of property. The Court nevertheless awarded Bob Frank Construction, LLC the interest that had accrued from April 1, 2008, through September 30, 2010, under the theory of promissory estoppel. The Court awarded this interest at \$2,725.05 per month until September 30, 2010, unless the house sold and closing occurred before that date. The Court offset from this award the \$50,000 deposit amount that the Youngs previously paid. (CP 2413-2417). On November 9, 2010, the Court signed and filed the judgment for Bob Frank Construction, LLC in the amount of \$31,751.50. (CP 2669-2670).

On January 28, 2011, the Court heard oral argument for the competing motions for attorneys fees, and granted the Youngs' motion. (Jan. 25, 2010, RP 116). Facing an impending judgment, Bob Frank Construction, LLC on February 9, 2011, began to systematically convey all of the property from Bob Frank Construction, LLC to Greenstone Construction, LLC. This included conveying the property in question at 5206 S. Camus Lane, Parcel No. 44021.2724. (CP 4128, 4147-4152).

On April 11, 2011, and April 20, 2011, the Court entered its Findings of Fact and Conclusions of Law, and Judgment awarding the Youngs \$158,676.01 in attorney's fees and costs. (CP 4092-102).

On June 22, 2011, the Court issued an order granting the Youngs' motion to enjoin the conveyance of the transferred property pending the outcome of the supplemental proceedings, and to join Greenstone Construction, LLC as a party to the proceedings for the fraudulent conveyance of the property. (CP 5458-61).

On June 23, 2011, Bob Frank Construction, LLC and Greenstone Construction, LLC obtained and recorded a supersedeas bond. (CP 5462-65). This was done so that 5206 S. Camus Lane could proceed to closing with a third party buyer on Friday, June 24, 2011. The house is therefore no longer owned by Greenstone Construction, LLC.

## V. ARGUMENT

### A. Standard of Review.

When the trial court has weighed the evidence, the appellate court reviews the trial court's factual findings for substantial evidence to support them. The appellate court then determines whether the findings of fact support the conclusions of law and judgment. Brin v. Stutzman, 89 Wn. App. 809, 824, 951 P.2d 291 (1998). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the

declared premise.’ “ Brin, 89 Wn. App. at 824 (quoting Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992)). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden–Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). The appellate court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). And an appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. Goodman v. Boeing Co., 75 Wn. App. 60, 82–83, 877 P.2d 703 (1994). In determining the sufficiency of evidence, this court need only consider evidence favorable to the prevailing party. Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). The appellate court reviews legal issues de novo. Goodman v. Goodman, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). Unchallenged findings of fact are verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); see also RAP 10.3(g).

**B. Bob Frank Construction, LLC Cannot Seek the Remedy of Specific Performance as it No Longer Owns the Property.**

Bob Frank Construction, LLC no longer owns the property at issue in this lawsuit. The remedy of specific performance is therefore no longer available. Carson v. Isabel Apartments, Inc., 20 Wn. App. 293, 298, 579 P.2d 1027 (1978) (a non-party to an agreement could not be ordered to specifically perform the sale of real property). It is further illogical for Bob Frank Construction, LLC to continue to seek specific performance. The Youngs cannot be forced to pay \$1,040,600 to Bob Frank Construction, LLC as the Youngs would receive nothing in return since Bob Frank Construction, LLC no longer owns the property.

**C. Bob Frank Construction, LLC Cannot Seek A Different Remedy than What it Requested and Presented at Trial.**

Bob Frank Construction, LLC is improperly attempting to introduce two different theories and measures of damages that were never presented, briefed, requested, nor argued at the time of trial. First, Bob Frank Construction, LLC argues that it is entitled to be paid the cost to build the house. The second is the alleged “carrying costs” that were supposedly incurred by Bob Frank Construction, LLC prior to the sale of the house, beyond the interest that the Trial Court already awarded. The supposed proof for the alleged “carrying costs” is based upon evidence in

affidavits that was submitted for the first time after the trial in post trial motions. The Court should disregard these arguments entirely.

**1. There is no support for seeking the entire cost of construction of the sold house.**

At the time of trial, Bob Frank Construction, LLC only asked for two forms of relief: (1) specific performance that the Youngs be required to purchase the property for \$1,040,600; and (2) for damages for the interest that accrued since April 2008 through the time of trial. Mr. Frank testified at trial that although he did not have any documents to base a number, he testified that he had heard from the Chief Financial Officer for Greenstone Corporation that the amount of interest would be \$60,000. (Feb. 1, 2010, RP 375-77). Over the multiple objections by the Youngs' counsel, the oral testimony was allowed as a basis for Bob Frank Construction, LLC's damages. (Feb. 1, 2010, RP 375-77). That was the only evidence that Bob Frank Construction, LLC referenced to support its damages claim. These two forms of relief were the only relief requested during the closing argument by Bob Frank Construction, LLC's counsel. (Feb. 1, 2010, RP 458, 466-67).

It is well established that a party is not free to simply request new and different measures of damages for the first time on appeal. Cordell v. Stroud, 38 Wn. App. 861, 866-67, 690 P.2d 1195 (Div.III, 1984), rev.

denied 103 Wn.2d 1015 (1985) (“[W]e will not address the alternate theories of damages because they were not raised at trial.”); Capper v. Callahan, 39 Wn.2d 882, 886-87, 239 P.2d 541 (1952) (the court would not allow an alternative measure of damages on appeal then what was presented at trial, as there was no testimony offered at the trial court level on the theories of damages that were being urged by the appellant); Eikenbary v. Calispel Light & Power Co., 132 Wn. 255, 257, 231 P. 946 (1925). Bob Frank Construction, LLC cannot argue a new theory for the first time on appeal. See RAP 2.5(a); Carlson v. Lake Chelan Community Hospital, 116 Wn. App. 718, 744, 75 P.3d 533 (2003).

These alternative theories and measures of damages were never briefed, nor requested prior to, or at the time of the trial. There was no testimony offered requesting such measure of damages. Bob Frank Construction, LLC cites to no legal authority that would allow for the Court of Appeals to award a whole new amount of damages that is not based on any evidence or testimony at trial. Bob Frank Construction, LLC has cited to no legal authority that would allow Bob Frank Construction, LLC to be paid for the entire cost of the house, where the house has already been sold, and for which the Youngs would receive nothing in return. Failing to cite to legal authority alone fails to comply with RAP 10.3(a)(6), and the Court should disregard the conclusory and unsupported

argument. State v. Logan, 102 Wn. App. 907, 911 n. 1, 10 P.3d 504 (2000) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities but may assume that counsel, after diligent search, has found none.”).

**2. The Court should reject the belated “carrying costs” damages claim.**

The Court should further reject Bob Frank Construction, LLC’s attempt to obtain an award of “carrying costs” as an alternative measure of damages. The proof that Bob Frank Construction, LLC cites to and relies upon are affidavits filed for the first time after the trial in support of post trial motions. The affidavits attach documents that were never introduced into evidence at the time of trial. (App Brief pg. 36 citing CP 2495-2600). “CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.” Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Although a legal theory can, in limited circumstances, be raised in a non jury trial on motion for reconsideration, it is only when that theory is not dependent upon new facts. Reitz v. Knight, 62 Wn.App. 575, 581, 814 P.2d 1212 (1991). The testimony in the affidavit and the documents attached to it are all new evidence and new facts that were never presented at the time of trial.

The Supreme Court has repeatedly held that it is inappropriate for the Court of Appeals to engage in fact finding based upon evidence that was not presented at the time of trial and considered by the trial court. Matter of Saltis, 94 Wn.2d 889, 897, 621 P.2d 716, 720 (1980) (quoting Casco Co. v. Public Util. Dist. No. 1, 37 Wn.2d 777, 784-85, 226 P.2d 235 (1951)). The Court correctly observed that the ambiguous “evidence” attached to affidavit, and the lack of an opportunity or a mechanism to present rebutting “testimony” demonstrate the wisdom of prohibiting the appellate court from making a factual determination itself. Matter of Saltis, 94 Wn.2d at 897. There is further no opportunity to cross examine the witnesses. For these reasons, it is entirely inappropriate for Bob Frank Construction, LLC to ask this Court to make an award on evidence that was never admitted at the time of trial. Bob Frank Construction, LLC could have sought to reopen the trial and admit evidence. It could have sought permission to try to supplement the evidence through the procedure of RAP 9.11. It has not done so, presumably because Bob Frank Construction, LLC recognizes that it cannot meet the strict six elements necessary to seek additional evidence.

As addressed above, the remedy of specific performance is no longer available to Bob Frank Construction, LLC since the property is now sold to a third party. The Trial Court has further already awarded

Bob Frank Construction, LLC in excess of the \$60,000 in damages it sought at trial. The Court's award amounted to \$81,751.50, when adding the \$50,000 payment the Youngs made to Greenstone Construction, LLC, to the judgment amount of LLC in the amount of \$31,751.50. (CP 2413-2417, 2669-2670). There is nothing further for Bob Frank Construction, LLC to appeal regarding its award of damages as they obtained from the Trial Court what they requested.

**D. Bob Frank Construction, LLC's Newly Raised Argument That There Existed an "Implied In Fact Contract" Should Be Disregarded.**

Bob Frank Construction, LLC attempts to argue for the first time on appeal a new theory that there existed an "implied in fact contract" that justifies an order of specific performance. This argument and theory was never pled, briefed, nor argued at the trial court level, and it must not be considered by the Court of Appeals. See RAP 2.5(a); Carlson, 116 Wn. App. at 744.

At the trial court level, Bob Frank Construction, LLC consistently argued that there existed an express contract between the parties for the purchase of the real property. (See CP 20, 30-36 answer and counterclaim; CP 145-151 summary judgment pleadings; and Jan. 25, 2010, RP 116, 129, 97-103 for arguments made during opening statement).

A party cannot simultaneously argue that there is an express contract and an implied contract covering the same subject matter. Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 604, 137 P.2d 97 (1943). The Court should disregard Bob Frank Construction, LLC's new contradictory "implied in fact contract" theory.

Even if the Court does consider this newly raised argument, Bob Frank Construction, LLC is misapplying the legal theory. The implied in fact contract theory looks simply at the conduct of the parties to determine the terms of the alleged agreement and not from the written documents. Caughlan v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn.2d 656, 660, 328 P.2d 707 (1958). The burden of proving a contract exists, whether express or implied, rests with the party asserting it and must prove each element of a contract, including existence of mutual intent. Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957). A party claiming a contract to pay for services must support the claim with evidence that is "clear, cogent, and convincing." Johnson, 50 Wn.2d at 91.

Bob Frank Construction, LLC has completely changed its legal theory on appeal because it recognizes that there was never an express contract formed between the parties in any of the documents. Now Bob Frank Construction, LLC wants this Court to disregard the documents and simply to look at the conduct of the parties. No authority is cited for this

novel theory that would justify enforcing a million dollar real estate transaction on conduct alone. Common examples of an implied in fact contract include “services performed at ones home, such as plumbing, telephone services, lawn care.” See 25 David K. DeWolf & Keller W. Allen, Wash. Practice: Contract Law §1:9, at 15 (2d Ed. 2007).

As will be discussed further later in this brief, Bob Frank Construction, LLC’s new and unsupported legal theory runs contrary to the Supreme Court’s holding in Berg v. Ting, 125 Wn.2d 544, 558-61, 886, P.2d 564 (1995), that requires the terms of the contract for the purchase of real property to be proven in order to satisfy the statute of frauds. It is not enough to simply look at the conduct of the parties.

**E. Part Performance Alone is Insufficient to Enforce Alleged Contract with Undefined and Undetermined Terms.**

Bob Frank Construction, LLC acknowledges that an agreement to convey an estate in real property must be in writing pursuant to the statute of frauds. RCW 64.04.010-020. “Our courts have repeatedly held that ‘in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony.’” Firth v. Lu, 103 Wn. App. 267, 271, 12 P.3d 618, 622 (2000) (quoting Martinson v. Cruikshank, 3 Wn.2d 565, 567, 101 P.2d 604, (1940)).

In this case, the three May 17, 2007 documents had incomplete and conflicting legal descriptions. Plaintiffs' Exhibit 10, in addition to having the wrong name on the document, "Bob Frank Homes, Inc.", had the incorrect street address. It further had the incorrect and incomplete legal description for the property. (Jan. 26, 2010 RP 309; Ex. P-10). Plaintiffs' Exhibit 11 likewise had the incomplete legal address for the property. Oral testimony would certainly have been necessary to locate the property to be sold, and thus the documents do not satisfy the statute of frauds.

Bob Frank Construction, LLC nevertheless argues that "specific performance will be granted where the acts allegedly constituting the part performance point unmistakably and exclusively to the existence of the claimed agreement." (App. Brief. pg. 21 citing Miller v. McCamish, 78 Wn.2d 821, 826, 479 P.2d 919 (1971)). That is incorrect.

The Washington Supreme Court explained that part performance is merely the first step. The party seeking to specifically enforce the alleged contract must further prove the terms of the contract. "[W]here specific performance of the agreement is sought, the contract must [still] 'be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character and existence of the contract.'" Berg v. Ting, 125 Wn.2d at 556-57 (citing Miller v. McCamish, 78 Wn.2d at

829.). “The ‘clear and unequivocal’ evidence standard applies where specific performance is sought but a lesser standard applies where damages are sought.” Berg v. Ting, 125 Wn.2d at 556-57 (citing Powers v. Hastings, 93 Wn.2d at 713-17, 612 P.2d 371, 375 (1980)).

The Court in Berg v. Ting further considered and rejected the same type of argument being made by Bob Frank Construction, LLC in this case. The Bergs argued that the fact that the Tings withdrew their opposition to the subdivision proposal in exchange for an easement was sufficient part performance to show that there existed a contract. The Court disagreed because the performance alone provided no evidence as to the terms of the contract. Berg v. Ting, 125 Wn.2d at 558.

In this case, part performance reveals nothing about the character or terms of any contract between the parties. That is the major deficiency in Bob Frank Construction, LLC’s analysis. The Court cannot order specific performance where the existence and the terms of a contract have not been proven by clear and unequivocal evidence. A contract is not subject to specific performance “unless the precise act sought to be compelled is clearly ascertainable.” Emrich v. Connell, 105 Wn.2d 551, 558, 716 P.2d 863 (1986). Nor can the Court award damages where Bob Frank Construction, LLC has not proven, nor attempted to prove, the

terms of the supposed contract between the parties. “[N]egotiation, not litigation, is the proper method for agreeing upon these vital terms.” Sea-Van Invs. Assocs. v. Hamilton, 125 Wn.2d 120, 129, 881 P.2d 1035 (1994).

**F. Bob Frank Construction, LLC has Failed to Establish the Material Terms for a Real Estate Contract.**

The reason why Bob Frank Construction, LLC has shifted to an entirely new theory of implied in fact contract on appeal is because Bob Frank Construction, LLC’s purported contract documents lack the necessary material terms for a contract to purchase real estate. A real estate contract must contain thirteen (13) material terms:

- (a) [T]ime and manner for transferring title;
- (b) procedure for declaring forfeiture;
- (c) allocation of risk with respect to damage or destruction;
- (d) insurance provisions;
- (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities;
- (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use;
- (g) time and place for monthly payments;
- and (h) indemnification provisions.

Sea-Van Investments Associates, 125 Wn.2d at 128.

Bob Frank Construction, LLC recognizes that it has the burden to prove that there was a meeting of the minds as to these necessary terms of the contract. That is why Bob Frank Construction, LLC tried throughout the lawsuit, and for the first two days of trial, to argue that Plaintiff’s Exhibit 4 was in fact a fully binding contract for the purchase of real

property. During the opening statement, Bob Frank Construction, LLC's attorney, Michelle Fulgham, argued:

After the Lot Reservation Agreement is reviewed, the Youngs signed it and this form became the foundation and they kept doing addendums to this. **The agreement fulfills all of the material terms necessary for a contract, Your Honor.** Because they kept signing addendums some of these **original provisions for attorneys' fees**, that the parties agreed to pay cash, that the buyer has the right – the seller has the right of specific performance if there's a breach, a lot of these terms from the original purchase and sale agreement which was amended carry through.

(Jan. 25, 2010 RP 116) (emphasis added).

This argument was consistent with how Bob Frank Construction, LLC pled their counterclaim. (CP 20,30-36). Bob Frank Construction, LLC made this same type of argument in its summary judgment pleadings just before trial. (CP 145-151). During trial, Ms. Fulgham cross-examined Eric Eden at length about boilerplate language in the document. (Jan. 25, 2010 RP 97-103, Ex. P-4). Bob Frank Construction, LLC and its counsel only gave up on the theory once Bob Frank testified under direct examination by the Youngs' counsel, that Plaintiff's Exhibit 4 was only a Lot Reservation Agreement. (Jan. 26, 2010 RP 296-297). Bob Frank did not consider the Lot Reservation Agreement to be a contract. (Jan. 26, 2010 RP 297). He certainly did not intend it to be a contract for the purchase of the property at 5206 S. Camus Lane. (Jan. 26, 2010 RP 297).

Bob Frank testified in response to questioning from the Youngs' counsel, that the only documents that he considered to be the purchase and sale agreement are the three May 17, 2007 documents. (Ex. P-9, P-10, and P-11; Jan. 26, 2010 RP 311-12).

In the aftermath of Bob Frank's testimony, Bob Frank Construction, LLC's counsel regrouped and shifted its strategy and story. During Bob Frank Construction, LLC's closing argument, its position changed again and now the only document that constituted the parties' contract was Plaintiff's Exhibit – 9. (Feb. 1, 2011, 458-459). Bob Frank Construction, LLC has now even abandoned that theory on this appeal as it argues that no documents constitute an express contract between the parties.

There is nothing set forth in any of the May 17, 2007 documents, which specifies or addresses anything about how payment is to be made towards the purchase of the property. (Ex. P-9, P-10, P-11; Jan. 26, 2010, RP 313). There is nothing about paying of taxes, insurance, or addressing liens. (Jan. 26, 2010, RP 312-313). There is nothing concerning how the water and other utilities will be paid. There is nothing concerning the possession of the property. There is nothing identifying who maintains possession, or when that would change. There is nothing about making payments into escrow. There was nothing in the documents that addresses

the Youngs' \$1,250 payment or the \$50,000 installment payments. (Ex. P-9, P-10, P-11; Jan. 26, 2010, RP 312-313). There is nothing that addresses how the property will ever be conveyed to the Youngs. It does not specify whether it will be by a quitclaim or a warranty deed. It does not specify when it will be conveyed. (Ex. P-9, P-10, P-11; Jan. 26, 2010, RP 312-313).

Given the uncertainty and Bob Frank Construction, LLC's shifting story as to what documents, if any, constituted the alleged contract, and the complete uncertainty as to what those terms of the alleged contract are, and when that alleged contract formed, the Trial Court was entirely correct in its finding of fact number thirty one (31) that "None of the documents signed by the parties were real estate purchase and sale agreements." (CP 2415). The Trial Court was also correct in its Conclusion of Law No. 5 that "The parties never reached mutual assent on essential terms of the purchase and sale of the subject real property." (CP 2416). Bob Frank Construction, LLC does not challenge Conclusion of Law No. 7 that "A real estate purchase and sale agreement never existed as essential terms were never mutually agreed upon." (CP 2416).

**G. Agreements to Agree are Unenforceable.**

Bob Frank Construction, LLC's claims also fail because under Washington law, agreements to agree are unenforceable. Keystone Land

& Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 176, 94 P.3d 945 (2004). An intention to do something “is evidence of a future contractual intent, not the present contractual intent essential to an operative offer.” Keystone, 152 Wn.2d at 179. The terms of a contract must be sufficiently definite. 16<sup>th</sup> Street Investors, LLC v. Morrison, 153 Wn. App. 44, 55, 223 P.3d 513 (2009). “If an offer is so indefinite that a court cannot decide just what it means and fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement.” 16<sup>th</sup> Street Investors, LLC, 153 Wn. App. at 56. Specific performance is therefore not appropriate. Id.

In this case, the paperwork is preliminary and incomplete. As such they amounted to, at most, simply agreements to agree at a later date which are unenforceable. The Trial Court correctly recognized this in its Conclusions of Law numbers 1, 5, 6, and 9 that Bob Frank Construction, LLC challenges in its Appellate Brief. There is no dispute that the March 21, 2007 Lot Reservation Agreement (Ex. P-4) was never intended to be a contract for the purchase of real property. It is equally undisputed that the March 30, 2007, Addendum to that document which included the Bid from Bob Frank Construction, LLC for the bid amount of \$880,000, was simply a preliminary document that was never intended to be part of any contract. Even though it was only a bid, Bob Frank insisted that the

Youngs sign the document to indicate that they had reviewed it. (Jan. 27, 2010 RP 13-14).

This sets the stage for the May 17, 2007 meeting between the Youngs and Bob Frank, where he presents the three documents (Ex. P-9, P-10, and P-11). Bob Frank instructed his realtor, Pam Fredrick, to not attend the meeting. (Jan. 26, 2010, RP 231). Without the realtors present, Bob Frank again presented the Youngs with another Custom Construction Proposal with the “Total Bid” of \$1,040,600. (Ex. P-9). Bob Frank directed the Youngs to sign the document as they had done before on the March 30, 2007 proposal to show that the Youngs had reviewed it. The Youngs did not understand nor intend by signing the proposal that they were entering into a contract for the purchase of the property. (Jan. 27, 2010 RP 27-28).

Likewise, Bob Frank presented the Youngs with Plaintiffs’ Exhibit 10 during this meeting. It had the wrong name of Bob Frank Homes, Inc. It had the wrong and incomplete legal description and street address. This document purported to be the justification for the increase in the bid amount from the previous amount of \$880,000. The Youngs signed it at Bob Frank’s insistence to again indicate that they had reviewed it. (Jan. 27, 2010 RP 29-30).

Finally, the Youngs were presented with the Plaintiff’s Exhibit 11

at this meeting. This document was presented as a document describing in general terms the description of items that would be included in a spec level house. On the first line of the first page it provided that that this addendum is “Attached to and made part of the Purchase and Sale Agreement and Earnest Money Deposit, dated: 5/15/07 between Seller, Bob Frank Construction LLC and Buyer, Scott and Gaylene Young. . .” (Ex. P-11). Mr. Frank testified that there is no such Purchase and Sale Agreement and Earnest Money Deposit, dated 5/15/07. Instead he testified that the Custom Construction Proposal (Ex. P-9) and the Additional Cost bullet point document (Ex. P-10) were considered to be the “Purchase and Sale Agreement and Earnest Money Deposit” referenced in the document, and that it should have been dated 5/17/07 instead. (Jan. 26, 2010, RP 311-12). Bob Frank’s testimony was suspect. This is inconsistent with a standard addendum form that he customarily uses in transactions as attachments to full and completed purchase and sale agreements. (See Ex. P-37 which includes the paperwork for the real estate transaction with separate customers that used the same addendum).

Both Scott and Gaylene Young testified that after reviewing the proposal and other documents presented on May 17, 2007, that they did not believe they had signed a formal contract to purchase the property.

The last time they purchased a house there was a detailed contract drafted between the realtors for the sale. They expected that the paperwork would be reviewed, negotiated and signed at a subsequent meeting with the realtors. (Jan. 27, 2010, RP 28-31; Jan. 28, 2010, RP 275-76). The Youngs then made a \$50,000 payment to a separate entity, Greenstone Construction, LLC. (Ex. D-108, CP 2415).

Looking at the preliminary, inconsistent, and incomplete documents; and considering how the manner in which they were presented to the Youngs; there is clearly substantial evidence for the Trial Court to reasonably conclude that: “the parties never reached mutual assent on essential terms of the purchase and sale of the subject real property.” (Conclusion of Law No. 5 CP 2416). There is further substantial evidence to support the Trial Court’s Conclusion of Law No. 6 that “[t]he parties’ initial agreements rose only to the level of agreements to agree and nothing more.” (CP 2416). There is likewise substantial evidence to support Conclusion of Law No. 9 that “Agreements that may have been reached, did not rise to the level of agreements that required specific performance.” (CP 2416).

**H. The Court Was Correct that Price Was Never Firmly Determined or Agreed Upon.**

Bob Frank Construction, LLC’s argues that the undefined contract

should nevertheless be enforced because the price was purportedly agreed upon. Price alone is insufficient to allow for the enforcement of a purported contract. Sea-Van, 125 Wn.2d at 129 (contract was found to be unenforceable because there was no meeting of the minds as to any material term except the price).

The purported price was set forth in a document entitled “Custom Construction Proposal” and it is referenced as a “Total Bid: \$1,040,600.00”. (Ex. 9). By the language of the document, it was only a bid. The document also provided that the bid amount and ultimate price would be increased or decreased depending on the actual costs of various items in construction, and that the final price would not be determined until the conclusion of the construction.

Appellants acknowledge that the price was never firmly fixed at \$1,040,600. They argue that it would be some amount in excess of that amount to be determined in the future. (App. Brief pg. 11). The ultimate price could be higher, or it could be lower depending on the cost at the end of the construction. The Youngs were in fact being charged additional amounts throughout the construction. (See e.g. Ex. P-22, Jan. 27, 2010, RP 44-45). The Youngs were informed that the retaining walls had been more expensive than anticipated which they would have to pay the

additional cost once it is determined. Bob Frank further told the Youngs that they should expect to pay somewhere between 5-7% more than the proposed bid. (Ex. P-23, Jan. 27, 2010, RP 46-47). There is substantial evidence to support the Trial Court's Findings of Fact No. 32 and 34, that the selling price of the house and property had never been firmly determined.

**I. Promissory Estoppel Cannot be the Basis for Enforcing a Real Estate Transaction.**

The Washington Supreme Court has rejected the argument that promissory estoppel can be used as a basis to enforce an otherwise unenforceable contract that fails to comply with the Statute of Frauds. Berg v. Ting, 125 Wn.2d at 559 (Court refused to adopt the Restatement (Second) of Contracts §129 (1981) which would allow enforcement based upon promissory estoppel). The Supreme Court explained that the Court of Appeals was inappropriately attempting to substitute the traditional part performance test with promissory estoppel. Section 129, and comment *d* of the Restatement as applied by the Court of Appeals, requires none of the three factors which have consistently been recognized as evidence of part performance. Berg, 125 Wn.2d at 560.

Bob Frank Construction, LLC argues that “Washington Courts have applied promissory estoppel to *specifically enforce promises* where

the alleged contract failed for lack of essential terms and certainty. Seattle First National Bank, N.A. v. Siebol, 64 Wn. App. 401, 824 P.2d 1525 (1992); see also Luther v. National Bank of Commerce, 2 Wn.2d 470, 484, 98 P.2d 667, 673 (1940).” (App. Brief, pg. 23-24.) (emphasis added). Neither of these cases support Bob Frank Construction, LLC’s argument.

The Siebol case was not dealing with a statute of frauds for the sale of real property; nor did it address specifically enforcing the alleged agreement. The court in Luther followed the rule that an oral contract to devise property can be maintained if the evidence of its terms are “conclusive, definite, certain beyond all legitimate controversy, and there has been sufficient performance to remove the bar of the statute of frauds.” Luther, 2 Wn.2d at 477. The only brief mention of promissory estoppel in the opinion was in the context of determining if there was sufficient consideration. The court did not hold that promissory estoppel by itself would be sufficient for specific performance or a real estate transaction. See Jennings v. D’Hooghe, 25 Wn.2d 702, 725, 172 P.2d 189 (1946) (explaining the holding and classification of Luther).

Bob Frank Construction, LLC did not plead promissory estoppel as a cause of action in its counterclaim. (CP 12-48). In fact, the theory of promissory estoppel was only raised for the first time in a memorandum prior to trial when it recognized that the express contract theory had

serious problems. The Youngs ask this Court to reverse the Trial Court's ruling and conclusion of law, and judgment and order the return of the \$50,000 paid by the Youngs, as well as the \$31,751.50 judgment amount paid by the Youngs, and the applicable interest. (CP 2413-2417, 2669-2670). See Pixton v. Silva, 13 Wn. App. 205, 211, 534 P.2d 135, 139 (Div. III, 1975).

**J. The Youngs Should Be Returned their Money Due Pursuant to RCW 64.06.010 et seq.**

The Youngs properly rescinded the alleged contract, and voided the transaction, based upon Bob Frank Construction, LLC's failure to provide a seller property disclosure statement as required under RCW 64.06.010 et seq. On April 8, 2008, the Youngs elected to rescind the transaction. (Ex. P-31 and P-33). Prior to that date, Bob Frank Construction, LLC had never provided a property disclosure statement to the Youngs, or for the subject property. (Jan. 26, 2010 RP 335-336). Sellers of residential property are required to provide a statutory disclosure statement for both improved and unimproved property. RCW 64.06.015 and RCW 64.06.020. These statutes are broadly worded to require them in all residential transactions unless there is a written waiver by the buyer<sup>2</sup>, or the property is exempt pursuant to one of the

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<sup>2</sup> Bob Frank Construction, LLC was familiar with the property disclosure laws. In its standard bundle of paperwork that Greenstone provides to Bob Frank Construction, LLC

special categories in RCW 64.06.010. None of the exemptions apply in this case, and thus the disclosure is required.

The duty to disclose was not simply a one-time obligation, but rather the seller was under a continuing duty to provide disclosures to the buyer up and until the closing of the transaction. RCW 64.06.040(1). There are two different time requirements for providing the disclosure statement. The first requires that the seller provide the potential buyer with the disclosure statement “not later than five business days or as otherwise agreed to, after mutual acceptance of a written agreement between a buyer and a seller for the purchase and sale of residential real property.” RCW 64.06.030. The second timing provision for providing the disclosure statement is set forth in RCW 64.06.040(3), which provides that if seller fails to provide a disclosure statement as required under the chapter, the buyer’s right to rescind the purchase of the property until three days after the disclosure statement is provided, or three days after closing. RCW 64.06.040(3). Once the potential buyer issues a notice of rescission, the buyer is entitled to the immediate return of all deposits and other considerations paid to the

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to use when the transaction is handled with realtors present and according to the normal process, is a document entitled “NEW CONSTRUCTION TRANSFER DISCLOSURE STATEMENT”. This document provides a limited disclosure, and has the buyers waive their rights to a Transfer Disclosure Statement under RCW 64.06.020. (See pg. 7 to Ex. P-37; Jan. 26, 2010 RP 322-323).

seller, and the agreement for purchase and sale shall be void. RCW 64.06.030.

Prior to the case being assigned to Judge Leveque, Judge Tompkins ruled that the Youngs' right to rescind continued until three days past the date of closing under RCW 64.06.040(3). (Nov. 13, 2008, RP 8-9). Again, "[b]ecause the facts here are not disputed that at the time the Youngs provided the written rescission notice there had not been a statement provided and closing hadn't occurred, that right of rescission that is afforded by the statute still existed and continued to exist through three day after closing." (Nov. 13, 2008, RP p.9, ll.14-19.) Judge Tompkins further clarified that RCW 64.06.040(3) "raises this duty, the duty is effective within the language of Sub-Section (3) of Section .040, and if the buyer does provide a notice of rescission, then they have exercised the right that is spelled out in that section, subsection." (Nov. 13, 2008, RP, p.15, ll.15-19.) Judge Tompkins again explained when ruling on Bob Frank Construction, LLC's motion for reconsideration, that public policy favors buyers having the right to know what they are buying, and thus they should have a right to receive a property disclosure statement. Potential buyers likewise have the right to rescind the transaction until three days after the date of closing if they are not provided a seller disclosure statement. (Dec. 12, 2008, RP, p.7-

9.) Here, the Youngs properly rescinded within the allotted statutory timeframe.

Judge Leveque repeatedly acknowledged and adopted the Judge Tompkins' interpretation of the statute. (CP 115-116; Jan. 28, 2010 RP p. 314; May 13, 2011, RP pg. 6). Although Judge Leveque recognized that the duty to provide a disclosure statement continues until three (3) days after closing, he concluded that because a written agreement was never formed or mutually entered into between the parties, that the duty to provide a disclosure statement never arose. (See Conclusion of Law No. 2, CP 2416). This is a misinterpretation of the statute, and which this Court reviews de novo. Goodman, 128 Wn.2d at 373.

The language of RCW 64.06.040(3) focuses on whether a property disclosure statement is required under the chapter of the statute. As explained above, RCW 64.06.015 and RCW 64.06.020 broadly require that a seller provide a disclosure statement on both improved and unimproved residential property. The disclosure statement is required under the chapter; the question is only when it is to be provided. Under RCW 64.06.040(3), the Youngs would have the right to the disclosure statement up until the time of closing. There can be no dispute that if this matter proceeded to closing, the Youngs would be entitled to a

property disclosure statement, and would have the corresponding right to rescind. It is illogical to conclude that the Youngs would have to wait to exercise their rights to rescind and void the transaction between the time of closing, and three days thereafter. If the Youngs have the right to rescind all the way up until three days after closing, there should be no logical reason why the Youngs' rescission before that time is somehow ineffective. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes should be construed to give effect to their manifest purposes and to avoid absurd results).

The Youngs respectfully ask this Court to apply RCW 64.06.030 and to require Bob Frank Construction, LLC to return the Youngs' money, and reimburse them for the improvements made to the property in the amount of \$56,831.04. This includes \$1,250 the Youngs paid to Bob Frank Construction, LLC on March 21, 2007, as a lot reservation fee. (Ex. P-4). This includes the \$50,000 that was paid on May 22, 2007. (Ex. D 108). This includes the \$1,825.04 that the Youngs paid for electrical items and equipment for the house. (Ex. P-21, Jan. 27, 2010 RP 47-48, 54). This includes \$3,756.00 that the Youngs paid for the cabinets that were installed in the subject house at the direction of Bob Frank Construction, LLC. (Ex. P-21, Jan. 27, 2010 RP 36-37, 53-54). The Youngs further request that the Court reverse the Trial Court's

award of damages, and order Bob Frank Construction, LLC to pay the Youngs the \$31,751.50 judgment amount paid by the Youngs, and the applicable interest. (CP 2413-2417, 2669-2670). The Youngs request that the Court award the Youngs an additional \$56,831.04 in damages, plus applicable interest, costs and attorneys fees, which will be addressed later.

**K. The Trial Court Correctly Awarded the Youngs their Attorneys' Fees and Costs.**

**1. The Youngs substantially prevailed in this lawsuit.**

The Trial Court correctly recognized in its findings of fact and conclusions of law that the Youngs substantially prevailed by successfully defending Bob Frank Construction, LLC's attempt to have the Court order the Youngs to specifically perform the Lot Reservation Agreement and pay \$1,040,600 for the house and property in question, and the attorneys fees pursuant to the attorney fee provision in that document. (CP 4092-100, Ex. P-4). The Trial Court appropriately based its award on the equitable mutuality of remedy theory set forth in Kaintz v. PLG, Inc., 147 Wn. App. 782, 785, 197 P.3d 710, 712 (2008). The Court of Appeals reviews the reasonableness of an award of attorney fees for an abuse of discretion. Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

Bob Frank Construction, LLC argues that this Court should vacate the Judgment for attorneys fees and costs because the Youngs did not prevail on its affirmative claims against Bob Frank Construction, LLC. (App. Brief pg. 40). The Trial Court was justified on basing its award of attorneys fees on the Youngs' successful defense of Bob Frank Construction, LLC's claims to force the Youngs to purchase the subject property for an amount in excess of \$1,040,600. The Youngs also prevailed on the sixth cause of action which sought a declaratory judgment that there was no enforceable contract for the purchase of the property. (CP 9-10; May 13, 2011, RP pg. 5-7).

Courts have long recognized that a prevailing party can be a defendant who successfully defends off multiple claims but nevertheless in the end has a minor judgment entered against the defendant. This was first established in the case of Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993). Where an extraordinary amount of attorney's fees are incurred in successfully defending a majority of the claims, and where the plaintiff only prevails on a few minor claims it is appropriate to apply the proportionality test. Marassi has been followed by multiple courts, including JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 7-9, 970 P.2d 343 (1999), and Transpac Development, Inc. v. Oh, 132 Wn. App. 212, 130 P3d 892 (2006).

Bob Frank Construction, LLC also advocated for being awarded its attorneys fees and costs under the substantially prevailing party theory, and cited to Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wn. App. 64, 68, 975 P.2d 532, 535 (Div. 3, 1999). (CP 5097). It also argued that the award was mandated. (CP 5091-5100) (emphasis in original). Bob Frank Construction, LLC's tune has changed during this appeal and the law it cites, now that it realizes that it cannot be awarded its attorneys fees and costs.

“The proportionality approach in *Marassi* is consistent with the general trend in Washington law toward establishing more specific standards for awarding attorney fees, thus facilitating more meaningful appellate review.” Transpac Development, Inc. v. Oh, 132 Wn. App. at 219-220 (distinguishing older cases such as Rowe v. Floyd, 29 Wn. App. 532, 535-36, 629 P.2d 925 (1981)). There is no dispute that this is the type of case in which the proportionality approach should be applied. It involves multiple distinct claims, and each side was afforded relief.

2. **The mutuality of remedy theory is clearly applicable.**

Bob Frank Construction, LLC attempts to argue that the mutuality of remedy theory is not applicable because this case is factually different than the cases that have applied the theory. Kaintz v. PLG, Inc., 147 Wn.

App. at 785; Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P. 3d 791 (2004); Hertzog Aluminum, Inc. v. Gen.Am.Window Corp., 39 Wn. App. 188, 197, 692 P. 2d 867 (1984); see also Park v. Ross Edwards, Inc., 41 Wn. App. 833, 706 P. 2d 1097 (1985). The only attempted distinction of these cases is that the party who prevailed in the cases establishing that there was no enforceable contract against the defending party did not have any damages awarded against them on a non-contract theory. This is a distinction without a difference. The Trial Court awarded Bob Frank Construction, LLC \$31,751.50 in damages under the last minute, non contract theory of promissory estoppel. Even if there was a limited award under a non contract theory, it would do nothing to change the underlying rationale for the mutuality of remedy theory. Bob Frank Construction, LLC spent substantial resources in this lawsuit trying to have the Court find that there was an enforceable contract which would allow Bob Frank Construction, LLC to recover against the Youngs the \$1,040,600 for the purchase of the house, plus nearly \$300,000 in attorneys fees and costs. (CP 5099). If ever a case warranted the mutuality of remedy theory, it is this case.

**3. Bob Frank Construction, LLC had 69 days of notice of the form of the proposed judgment.**

Finally, Bob Frank Construction, LLC's challenge that it did not have the five (5) days notice of the form of the judgment is likewise without merit. Bob Frank Construction, LLC not only had the full five (5) days to see the proposed form of the judgment per CR 54(f), but Bob Frank Construction, LLC had from February 10, 2011, until April 20, 2011 to review the proposed form of the Judgment. (CP 4132-4137). The only difference between the form of the judgment that the Youngs filed on February, 10, 2011, and the Judgment ultimately entered by the Court on April 20, 2011, is the dollar amount of the judgment. (CP 4101-102). The Trial Court was well within its authority to determine the final number for the judgment. (May 13, 2011 RP 8, 9, 12- 13).

On April 11, 2011, the Court signed the Findings of Fact and Conclusions of Law awarding the Youngs \$158,676.01 in attorneys fees and costs. (CP 40 92-4100). Although the Youngs filed their proposed judgment with their proposed findings of fact and conclusions of law back in February, 2011, the judgment had inadvertently not been signed by the Court at the same time as the findings of fact and conclusions of law that were entered on April 11, 2011. The Youngs' counsel contacted the Court's Judicial Assistant regarding the status of the judgment. Although, it was the same form, the Youngs' counsel changed the dollar amount to reflect the awarded amount from the findings of fact and conclusions of

law, and emailed it to the Court's Judicial Assistant so that it would not have to be retyped. This was copied to Bob Frank Construction, LLC's counsel. (CP 4128-4198). There was never a response or any type of objection to the form of the judgment.

The bottom line is that the Defendants had over two months to review the form of the judgment which more than satisfies the CR 54(f) requirements. In that two month time period Bob Frank Construction, LLC never attempted to add any additional language. The Court should therefore reject Bob Frank Construction, LLC's procedural challenge to the entry of the April 20, 2011 judgment.

**L. The Youngs Should Be Awarded their Attorneys Fees on Appeal.**

The Youngs further request that they be awarded their attorneys fees and costs on appeal pursuant to the mutuality of remedy theory set forth in Kaintz v. PLG, Inc., 147 Wn. App. 782, 786-87, 197 P. 3d 710 (2008), and the attorney fee clause referenced in the Lot Reservation Agreement. (Pg. 4 of 5 to Ex. P-4). The Appellant has continued to try to argue that there existed an alleged contract between the parties on this appeal. Moreover, the Youngs have had to incur the attorneys fees and costs of defending the Trial Court's award of attorneys fees and costs on appeal, which was premised on the mutuality of remedy theory.

Accordingly, the Youngs respectfully request that the Court of Appeals award them their attorneys fees and costs incurred on appeal.

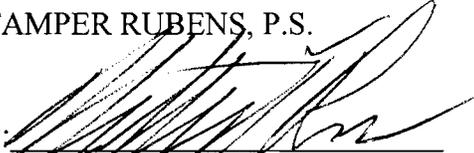
**V. CONCLUSION**

For the reasons stated above, the Youngs respectfully request that this Court deny the Bob Frank Construction, LLC's appeal in this case as its legal arguments are all without merit. The Youngs respectfully request that Court grant their cross appeal, and reverse the judgment entered against the Youngs.

RESPECTFULLY SUBMITTED this 2 day of September 2011.

STAMPER RUBENS, P.S.

By:

  
MATTHEW F. RIES

WSBA #29407

Attorney for Respondents/Cross  
Appellants Scott and Gaylene  
Young

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2 day of September 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Trevor R. Pincock	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
Lukins & Annis, P.S.	<input checked="" type="checkbox"/>	Hand Delivered
717 W. Sprague Ave., Suite 1600.	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input type="checkbox"/>	Telecopy (Facsimile)
	<input type="checkbox"/>	Email

Mischelle R. Fulgham	<input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid
Lukins & Annis, P.S.	<input type="checkbox"/>	Hand Delivered
601 E. Front Ave., Ste. 502	<input type="checkbox"/>	Overnight Mail
Coeur d'Alene, ID 83814	<input type="checkbox"/>	Telecopy (Facsimile)
	<input type="checkbox"/>	Email

