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No. 34006-2-11

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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GARY PARDEE,

Respondent

vs.

WILLIS JOLLY,

Appellant

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COURT OF APPEALS

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BRIEF OF RESPONDENT

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- Key Design, Inc.*, 138 Wn.2d 875, 983 P.2d 653 (1999)
- Powers V. Hastings*; 93 Wn.2d 709, 612 P.2d 371
- Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316 (1999)

### **OTHER AUTHORITIES**

- The American Heritage Dictionary, New College Edition*, (1979)
- Washington Real Property Deskbook, 3d ed. (Wash. State Bar Ass'n 1996)*

## STATEMENT OF THE CASE

Except as noted below, Plaintiff Gary Pardee (hereinafter “Pardee”) does not dispute the facts set forth in Brief of Appellant by Defendant Willis Jolly (hereinafter “Jolly”).

### **Statement of Disputed Facts**

**A. There was a mistake in the agreement.**

Pardee, while making payments in advance of their due dates during 2004, RP at 28 and 38, opened negotiations with Jolly regarding the means by which the sale would close. Both parties understood that the financing option checked on the agreement was a mistake, leaving the means of closing ambiguous and subject to negotiation. RP at 36-43; RP 26, and RP 123-124.

**B. The written extension was proposed by Jolly.**

A written extension agreement was prepared in December 2004 by Pardee (RP at 140), but was initially suggested by Jolly (RP 81-82).

**C. The \$1,000.00 check was cashed at least two weeks after the December 21, 2004 meeting, sometime in January 2005.**

As explained in Brief of Appellant at page 9, a check in the amount of \$1,000.00 presented by Pardee in partial payment of the agreement was held by Jolly for too long and was refused for payment by Jolly’s bank. RP at 43. The trial court found that the check was re-issued “a couple of

weeks” after December 21, 2004, and Jolly alleges a complete lack of testimony to support this finding. However, beginning at line 17 of RP at 41, counsel questions Pardee regarding meetings with Jolly which occurred subsequent to their December 21, 2004 meeting, asking Pardee, “Now, again, a few weeks later you met again right after the holidays?” Pardee confirmed a meeting occurred a few weeks after the holidays. RP at 42. Regarding that meeting, counsel asked Pardee “Was there anything else that was in your discussion regarding a one-thousand dollar check that hadn’t been cashed?” RP at 43, line 3-5. Pardee testified that at that meeting, which took place a few weeks after the December 21, 2004 meeting, Jolly requested that Pardee assist him in cashing the \$1,000.00 check at issue because it was too late for Jolly to cash it at his bank. RP at 43, lines 6-14. While the trial court judge used the word “couple” in Finding of Fact 1.13 (CP 103) and the testimony was the word “few” to describe the number of weeks that had past, the difference is negligible – the parties clearly met again 2 –3 weeks after the December 21, 2004 meeting, at which time the \$1000.00 check was cashed. The only reference to this meeting taking place in December is in counsel’s question at RP 43, line 15, not in Pardee’s answer.

**D. According to Jolly, he felt the option did not expire until the last check was cashed.**

Jolly acknowledged that in his opinion, the option did not expire in November 2004 when Pardee mailed the last payment he mailed, but rather at the time the last check was cashed. RP 138 at lines 11-16.

**E. Pardee did not acknowledge that the contract required written exercise of the option “on or before” he made his final payment.**

While Pardee acknowledged the contract language when he was asked to review it (RP 70 at lines 19), the contract does not state “on or before.” Counsel’s interpretation of the language in his question is not evidence. See Exhibit 1 and RP 70 at line 25 – 71 at lines 1-4.

**F. The contract is silent on allocation of the value of the improvements.**

Pardee made significant and costly improvements to the property. RP 30-36. The contract is silent as to how the value of any improvements is to be allocated should the option fail. The contract is also silent as to whether Pardee retained the right to remove any fixtures or equipment he added to the property should the option fail. Exhibit 1.

**G. There is no evidence that a lease or rental agreement was ever contemplated by the parties and there is no credible evidence of the fair rental value of the property.**

The agreement, a boilerplate form entitled, "OPTION TO PURCHASE REAL ESTATE," is absolutely silent on the issue of a lease agreement. Exhibit 1. The sixteen thousand dollars (\$16,000.00) to be paid from Pardee to Jolly is clearly and unambiguously defined as "option money" in paragraph 2. Exhibit 1. There is no reference whatsoever regarding some portion of the option money being credited toward rent or lease payments. Paragraph 18, which gives Pardee the right to possession, does not address rent or lease payments, and there is no provision for a periodic tenancy of any kind should the option fail. Exhibit 1. Jolly testified that there were no lease payments contemplated. RP 132 at lines 8-12.

Jolly had a real estate license which he allowed to lapse in the 1980s. RP 125. Other than the subject property, Jolly has never owned property in Pierce County. RP at 128. Jolly testified that fair rental value is negotiated with a renter at the time a formal lease is executed. RP at 129. Jolly testified that the house, at the time of his agreement with Pardee, was not in rental condition. Jolly then guessed that, if he had a renter for the barn, he would ask \$750.00 per month. RP at 129. The

court found no evidence of a lease agreement and no evidence of the reasonable rental value of the residence located on the property.

CP at 105.

**H. As of January 2005, Pardee was ready, willing and able to close a cash sale of the property; as of October 2005 Pardee was ready, willing and able to close; he remains so today.**

The agreement provided in paragraph 12 that upon receipt of written notice that purchaser would exercise the option, seller was to provide a preliminary commitment for title insurance and, upon receipt of the preliminary commitment, purchaser was to have ten (10) days to close.

Exhibit 1. Pardee had financing available in January 2005 and Jolly acknowledged that he received a certified letter from Pardee in which Pardee exercised the option (RP 133; Exhibit 5), but Jolly refused to provide preliminary commitment or to proceed to closing on the transaction. RP 46 at 13. As of the date of trial, Pardee had funds available to close the transaction, and within thirty days of the verdict, had placed said funds in escrow. Jolly again refused to close on the transaction. RP 62 at lines 17-21.

## ARGUMENT

### I. THE AGREEMENT BETWEEN THE PARTIES INCLUDED THE ESSENTIAL ELEMENTS

#### A. The Statute of Frauds Does Not Defeat the Enforceability of the Agreement Between These Parties

##### 1. The Standard of Review for the Adequacy of the Legal Description is Abuse of Discretion

Whether a particular element of a contract, for example the legal description, is adequate, is a question of fact to be evaluated by the trial court pursuant to the standards set forth by Jolly, and subject to an *abuse of discretion* standard of review. In this case, the trial court judge found in Finding of Fact number 1.1:

The writing admitted as Exhibit 1 (“Option Agreement”) without objection was an option to purchase agreement signed by the parties on January 18, 2004 relating to real property located at the common address 24212 158<sup>th</sup> Street East, Buckley, WA and legally described as Parcel 3 of Pierce County Short Plat No. 8111120215 (hereinafter referred to as “the real property”). CP 101-102.

As Jolly does not assign error to Finding of Fact 1.1, it is a verity on appeal. “On review, unchallenged findings of fact are verities on appeal.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (Quoting *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). Although Jolly represents in Brief of Appellant at page 4 that Assignment of Error No. 1 is somehow related to the legal description issue, a review of the record is

clear that the question of the legal description was not raised in any form at the argument for summary judgment. RP 2-12.

**2. Defendant Should Be Estopped From Attacking the Legal Description for the First Time On Appeal**

Prior to appeal, Jolly had at least four opportunities to dispute the adequacy of the legal description in the agreement: (1) in the “Answer, Affirmative Defenses, and Counter-Claim to Second Amended Complaint,” filed October 7, 2005, CP 95-100; (2) during oral argument in support of his motion for summary judgment, RP 2-12; (3) at trial, RP 13-164; and (4) in his “Motion for New Trial and / or Reconsideration,” filed October 7, 2005 and argued October 21, 2005, CP 119-120, RP 165-175. RAP 9.12 specifies that on review of an order denying a summary judgment, as requested herein by Jolly, only evidence and issues called to the attention of the trial court will be considered. There is no evidence to be found in the record that Jolly ever once challenged the adequacy of the legal description and he is estopped from doing so for the first time on appeal.

**3. Pardee Was Prepared to Proceed Without a Seller-Financed Contract, Therefore the *Hubble v. Ward* Analysis is Irrelevant**

Jolly raises on page 13 of Brief of Appellant that pursuant to *Hubble v. Ward*, 40 Wn.2d 770, 246 P.2d 468 (1952) there are thirteen

material terms that must be provided in a real estate contract financed by the seller. Both parties testified under oath that the checking of the real estate contract box on the agreement was a mistake. RP 26, 123-124. Consequently, the thirteen *Hubble v. Ward* factors alluded to in Brief of Appellant add nothing to the analysis of whether the legal description is adequate.

#### **4. The Legal Description Is Adequate**

The legal description contained in the agreement meets the standard articulated in Brief of Appellant at pages 11-12.

In the introductory paragraph to the agreement, it is set forth that the agreement is for real property “located in Pierce County, State of Washington.” Exhibit 1. In paragraph 1 of the agreement, the property is legally described as “Parcel #3 of short Plat – 8111120215 (7.37 Acres) Section 24 Twp 19N Range 5E.” Exhibit 1. Although the agreement refers to an attached legal which does not appear in the record, the information contained in the agreement is adequate to satisfy the *Key Design, Inc. v. Moser* standard (see *Key Design, Inc.*, 138 Wn.2d 875 at 881, 983 P.2d 653 (1999)). Although not every legal description contains a block number or addition, the intent of the *Key Design* court is clear:

“We do not apologize for the rule. We feel that it is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not

be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties.” (Quoting *Martin v. Seigel*, 35 Wn.2d 223 at 228, 212 P.2d 107 (1949).

The legal description contained in paragraph 1 when read in conjunction with the reference to Pierce County in the introduction to the agreement clearly provides adequate information to identify the parcel without reference to extrinsic evidence.

**B. The Required Notice Terms of the Contract Were Satisfied**

**1. The Required Manner of Notice Was Satisfied When Pardee Exercised the Option in Writing**

The manner of notice, as set forth in Brief of Appellant, is governed by the language of the agreement unless the agreement is silent on the issue. Paragraph 3 of the agreement specifies that the option must be exercised in writing. Exhibit 5, admitted at trial without objection, is clear, unequivocal evidence that Pardee exercised his option to purchase in writing by certified mail on January 13, 2005. See also RP 44-45. Jolly acknowledged that he received notice prior to January 18, 2005. (Exhibit 5; RP 133 at lines 8-9)).

**2. The Required Time of Notice Was Satisfied When Pardee Exercised the Option Contemporaneously With Jolly Receiving the Final Option Payment**

**a. Whether or not Pardee exercised the option in a timely manner is a question of fact and the standard of review is abuse of discretion.**

The parties agree that the question of whether or not Pardee exercised the option in a timely manner is reviewed under an abuse of discretion standard. Brief of Appellant at 4. Under an abuse of discretion standard, the trial court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (Quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Although Jolly contends in his statement of the case that there were no factual grounds for the trial court judge to have found that the exercise of the option happened contemporaneously with the receipt of the final payment, the evidence found in the record clearly supports her finding.

**b. Jolly testified that the option did not expire until after he cashed the final check.**

First, is the testimony of Jolly himself, when he admits that he did not consider the option expired in November 2004, when Pardee mailed the last check, but rather at the time he received the last \$1,000.00 payment with Pardee's assistance. RP 138 at lines 7-18:

Q (by Geiersbach) That's fine. When you hadn't cashed some of his checks nine months later was he cooperative with you in getting those checks cashed?

A (by Jolly) Yeah.

(The Court) I have a question. When you were getting him to assist you in getting those checks cashed at the end of the summer, did you think at that time that his option had run out?

(Jolly) Definitely when the last check was cashed, yes.

(The Court) Did you tell him that?

(Jolly) No.

Any new assertion by Jolly that the option expired in November 2004 is lacks credibility and inconsistent with his own understanding at the time he was accepting payments from Pardee.

**c. The final check was not cashed until January 2005.**

Pardee explained at trial that he and Jolly had met on December 21, 2004 (RP 39 at lines 12-14), at which time they continued negotiating the terms of financing the transaction and, at which time, Pardee assisted Jolly in cashing a \$10,000.00 check (the initial option money payment

from January 2004), which Jolly had failed to cash. RP 40 at line 13 – 41 at line 16. The parties then, at the conclusion of the December 21, 2004 meeting, agreed to meet “a few weeks later.” RP 41 at line 24. At that meeting, which occurred “a few weeks” after December 21, 2004, Pardee assisted Jolly in cashing a check for \$1,000.00, which he had sent to Jolly in May 2004 and which Jolly had not cashed in a timely fashion. RP 43 at lines 6-9. The trial court found that the check was re-issued “a couple of weeks” after December 21, While the trial court judge used the word “couple” in Finding of Fact 1.13 (CP 103) and the testimony was the word “few” to describe the number of weeks that had elapsed, the difference is negligible – the parties clearly met again 2 –3 weeks after the December 21, 2004 meeting, at which time the \$1,000.00 check was cashed.

One week consists of seven days. The plain meaning of “a couple” is a quantity of two. Two weeks, or fourteen days, would put the cashing of the \$1,000.00 check at least fourteen days after December 21, 2004, or approximately January 3, 2005. Pardee’s testimony was that the cashing of the check occurred “a few” weeks after December 21, 2004, which could have extended the time frame approximately another week, if the plain meaning of “a few” is applied.

The trial court judge noted in Finding of Fact 1.13 that Jolly’s testimony was vague in terms of the exact date of the meeting at which the

\$1,000.00 check was cashed. CP 103. Jolly's testimony, was, however, consistent with Pardee's that there was a second meeting "after the holidays." RP 122 at line 9. Notably, the repeated references to "after the holidays" might also have been reasonably interpreted by the trial court judge to mean after New Year's Day.

**d. The cashing of the final check was reasonably found to be contemporaneous with the exercise of the option.**

Contemporaneous is commonly defined as meaning "originating, existing or happening during the same period of time." *The American Heritage Dictionary, New College Edition*, (1979). The contract provided that the option was to be exercised at the time of the last option payment (Exhibit 1), not on a specific date or time. In the context of the on-going negotiations between the parties (as set forth in Brief of Appellant, page 8, Brief of Respondent, and RP 36-37, RP 39-42, RP 118-120) , as well as Jolly's own admission that he did not consider the option to have expired until January 2005, RP 138, the trial court judge did not abuse her discretion in finding a contemporaneous exercise of the option.

**e. Jolly should be estopped from taking the position that the trial court abused its discretion by considering the conduct of the parties because Jolly facilitated on-going negotiations and modification of terms.**

By agreeing in September 2004 to continue negotiations in December (RP 119), Jolly modified the terms of the original agreement. Because of Pardee's consistent practice of making the option payments two months at a time in advance of the due date for each payment (RP 28-29), Jolly knew or should have known that the final payment would be tendered prior to Jolly's proposed December discussion. Jolly further modified the time frame for exercising the option by postponing further discussions until after the final payment was expected, but before the full twelve months of the contract had expired.

**f. The trial court judge was permitted to consider the context of the on-going negotiations between the parties.**

(1) The parties admitted a mistake affected the agreement.

How a sale will be financed is an important element of an option contract. A purchaser may or may not choose to exercise the option based on the method of financing. Jolly and Pardee have both acknowledged that the financing option checked on the agreement was a mistake in the document made at the time the agreement was signed. RP at 36-43; RP 26, and RP 123-124. That mistake left the means of financing ambiguous

and subject to negotiation. Pardee opened negotiations with Jolly in September 2004 when he contacted Jolly about clarifying the mistake in the agreement – namely the method of financing. RP 36, line 36 – 37, line 7. Jolly participated in those negotiations (at subsequent meetings in late December, RP 39, and January, RP 42) without ever shutting down discussions and, by his own admission above (RP 138), considered the date to exercise the option fluid given the context of the negotiations and his own failure to negotiate the payments made by Pardee.

(2) The mistake frees the court to look beyond the document.

Given the admitted mistake in the agreement, the trial court was free under *Berg v. Hudesman*, 115 Wash. 2d 657, 801 P.2d 222 (1990) to consider facts outside the four corners of the document. *Berg* permits the court to consider extrinsic evidence to determine whether the writing was fully integrated. Under *Berg*, where the parties admit the agreement was affected by a mistake, parol evidence is admissible to the question of whether the document was fully integrated; clearly, given the evidence of the behavior of the parties, this agreement was not. The trial court judge acted within her discretion in evaluating the entirety of the testimony before the court in determining whether, given the facts and circumstances described by these parties, the option had been timely exercised.

**II. JOLLY IS NOT ENTITLED TO RENT FOR THE PERIOD OF TIME THE PARDEE OCCUPIED THE PREMISES AFTER JANUARY 18, 2005**

This case is to be distinguished from any case in which the parties contemplate a lease or rental agreement or enter into a landlord-tenant relationship. These parties never intended this to be a rental or lease agreement of any kind. The agreement, a boilerplate form entitled “OPTION TO PURCHASE REAL ESTATE,” is absolutely silent on the issue of a lease agreement. Jolly testified that there were no lease payments contemplated. RP 132 at lines 8-12. The sixteen thousand dollars (\$16,000.00) to be paid from Pardee to Jolly is clearly and unambiguously defined as “option money” in paragraph 2. There is no reference whatsoever regarding some portion of the option money being credited toward rent or lease payments. Paragraph 18, which gives Pardee the right to possession, does not address rent or lease payments, and there is no provision for a periodic tenancy of any kind should the option fail. Exhibit 1. This issue arises only because Jolly refused to close the transaction in January 2005 when Pardee timely exercised his option to purchase and stood ready, willing, and able to close a cash-out transaction. RP 46. Washington law does not permit a seller to create the opportunity to generate rental income, where no agreement otherwise exists, by breaching a contract to sell real property.

**A. This is Not a Tenancy-at-Will Case Because Pardee Asserts a Right of Ownership and Does Not Possess the Property with Permission**

“A tenancy-at-will may be defined as a leasehold having no specified duration that is terminable at the will of either party.”

*Washington Real Property Deskbook, 3d ed. (Wash. State Bar Ass’n 1996)*, Vol. II, Chapter 27, Section 27.3(4)(a), William B. Stoebuck (Professor Emeritus, Univ. of WA School of Law). A tenancy-at-will must be permissive and lack an express or implied agreement as length of term. *Washington Real Property Deskbook, id.* At 27.3(4)(b). Pardee’s possession of the property during the time following Jolly’s refusal to close has not been a permissive occupancy terminable at the will of Jolly. Pardee possesses the property pursuant to his claim of ownership and his position that Jolly has breached the contract by refusing to close.

**B. This is Not a Tenancy-at-Sufferance Case Because a Tenancy-at-Sufferance, According to RCW 50.04.050 Requires that the Occupant Obtain Possession Without Consent**

This is not a tenancy-at-sufferance case. The language cited in Brief of Appellant on page 19 is virtually identical to that of RCW 50.04.050 which defines tenancy-at-sufferance as occurring “(w)henever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession...” The plain language of the statute is clear and unambiguous. The statute

requires that a tenant-at-sufferance must have obtained possession of the premises without the consent of the owner. “If the language is unambiguous, the court must give effect to that language alone and end its inquiry for the legislature is presumed to say what it means.” *In Re Estate of Black*, 153 Wn.2d 152, 176, 102 P.3d 796 (2004) (quoting *State v. Salavea*, 151 Wn.2d 133, 142, 86 P.3d 125 (2004)).

The facts are undisputed that Pardee obtained possession of the subject property pursuant to the agreement between the parties. RP 29. There is no evidence in the record that Jolly at any time, either verbally or in writing, demanded that Pardee relinquish possession of the property. There is no evidence in the record that Pardee has, at any time, relinquished possession of the property and then re-claimed possession without Jolly’s consent. Pursuant to the plain language of the statute in effect at the time of this agreement Pardee is not a tenant-by-sufferance.

**C. Before The Court Reaches the Issue of Reasonable Rent, Jolly Must Establish the Basis Upon Which He is Entitled to Rent**

The facts as set forth are not in dispute: there is no legal basis upon which Jolly can establish a right to collect rent. Absent a showing that under Washington law sellers have or should have the right to generate rental income by refusing to close, Jolly has provided no evidence that he is entitled to any rent whatsoever.

**D. There is No Evidence in the Record of the Fair Rental Value of the Residence Located on the Property**

Jolly admits that at the time of his agreement with Pardee, the property was not in rental condition. RP 129 at lines 20-21. He admits that other than the property at issue, he had never owned or rented other property in Pierce County. RP 128 at lines 12-14. Jolly further testified that he did not inspect the property at issue even periodically and that the only improvement he could recall making to the property between 1989 and 2005 was to put a roof on the barn. RP 136, line 8 – 137, line 1. Yet Jolly offered the opinion that the rental value of the barn would be \$750.00 per month. RP 129, line 19.

The fair rental value of property is a question of fact subject to a review for abuse of discretion as set forth above. The trial court judge did not abuse her discretion by finding no testimony regarding reasonable rental value of the residence located on the property either at the time of the agreement or at the time of trial. CP 104, paragraph 1.16.

**III. THE AGREEMENT SPEAKS FOR ITSELF THAT ATTORNEY FEES AND COSTS SHOULD BE AWARDED TO THE PREVAILING PARTY**

Paragraph 21 of the agreement provides for the award of reasonable attorney fees and costs (including those for appeals) to the prevailing party. Exhibit 1. The trial court judge awarded reasonable

attorney fees and costs to Pardee as he prevailed on the agreement and the Court of Appeals ought to award fees and costs similarly.

#### **IV. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR RECONSIDERATION AND / OR NEW TRIAL**

Jolly's Motion for New Trial and/or Reconsideration filed October 17, 2005, CP 119-120, was based solely on an attempt to use CR 59 to take a second bite at the apple. Whether a new trial should be granted or denied is within the discretion of the trial court and the trial court's discretion should not be disturbed absent manifest abuse. *Getzendaner v. United Pac. Ins. Co.*, 52 Wash.2d 61, 322 P.2d 1089 (1958). The trial court judge did not abuse her discretion in denying Jolly's motion.

##### **A. There Was No "Newly Discovered" Evidence**

CR 59(a)(4) provides that one justification for reconsidering a decision is "(n)ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial."

Exhibit A to the Supplemental Declaration of David C. Hammermaster was offered in this motion as "newly discovered" evidence on the issue of the negotiation of the \$1,000.00. CP 116-117 The document was not produced in discovery or identified in any pre-trial disclosures of witness or evidence by Jolly. The two-page photocopy was

never authenticated. There was no plausible explanation offered by Jolly as to why “he could not with reasonable diligence have discovered and produced at trial,” as required by CR 59, a document which Jolly was obviously able to obtain in the few weeks that elapsed between the day of trial and the filing of the Motion for Reconsideration. Even in his attempt to re-argue the issue of newly discovered evidence on appeal, Jolly provides absolutely no explanation as to why this evidence was not offered at trial so that testimony could be heard and the trial court judge would have the opportunity to assess the significance of the evidence in the context of the trial.

Additionally, even if the document were to be considered, it does not negate Defendant’s own testimony that he was unable to negotiate the instrument at issue on his own and that, without the assistance of Mr. Pardee, he would have been unable to obtain those funds. As the instrument purports to have been negotiated on January 11, 2005, it is consistent with the Court’s finding that it was negotiated contemporaneously with Pardee’s exercise of the option in writing.

**B. There Was No Error in the Assessment of the Amount of Recovery**

CR 59(a)(6) provides for correction of an error in the assessment of the amount of recovery, not another opportunity to argue a theory of

liability. Jolly is not alleging an error in the assessment of damages; rather, he is contesting the finding that there was no lease or rental agreement justifying recovery of damages. The existence, or not, of a lease or rent agreement, and the measure of fair rental value upon the finding of such an agreement, are questions of fact for the trial court judge. As argued above, as Jolly has provided no theory of recovery and no credible evidence, there is no basis for a determination that the trial court judge abused her discretion.

**C. Substantial Justice Demands Affirmation of the Trial Court's Order that Jolly Close on the Sale of the Subject Property**

Pardee paid \$16,000.00 in option payments prior to the end of the contract period. The evidence was never refuted that he made substantial and expensive improvements to a residence that was uninhabitable at the time of the agreement. He maintained exclusive possession and control of the property and was ready, willing, and able to close in January 2005 pursuant to the terms of the agreement. Substantial justice demands only that this transaction close as soon as possible.

## CONCLUSION

### *The Summary Judgment Motion was Appropriately Denied*

The trial court judge heard argument on Jolly's motion for summary judgment and, in viewing the evidence in the light most favorable to the non-moving party, found genuine issues of material fact. The pages of testimony in which the parties describe the expensive and significant improvements to the property made by Pardee, the on-going negotiations regarding seller-financing after Pardee made Jolly aware he had financing to close a cash transaction, and the means by which Jolly manipulated Pardee into helping him cash \$11,000.00 in checks after the final payment had been mailed, are evidence of the necessity of trial. The trial court judge did not abuse her discretion in denying Jolly's motion for summary judgment.

The complete and adequate legal description in the agreement is challenged for the first time on appeal. The parties admit to a mistake in a in the agreement, which both lead to their lengthy negotiations and allowed the trial court judge to consider extrinsic evidence in making the factual determination that the admitted written exercise of the option by Pardee was contemporaneous with Jolly's request that Pardee aid him in cashing that \$1,000.00 check in January 2005. The facts and

circumstances best evaluated by the trier of fact, support her decision and there is no manifest abuse of discretion on this issue.

*The Trial Court Judge Did Not Err in Denying Jolly's Request for Rent*

The trial court judge further appropriately exercised her discretion in finding that Jolly, who had no legal theory to support his claim for rent, no evidence in the record to support any theory of rental or lease negotiations, and no credible evidence regarding fair rental value, was not entitled to rent for the period of time that has elapsed since Jolly refused to close the sale.

*The Trial Court Judge Did Not Err in Denying Jolly's Request for Reconsideration or a New Trial*

Finally, it was an appropriate exercise of discretion to deny the motion for reconsideration and/or new trial. CR 59(a) is not in place to give unsuccessful parties a second chance to re-try the case.

With regard to the CR 59(a)(4), more than nine months elapsed between the January 2005 origination of this dispute and the September trial. At no time did Jolly produce the "new evidence" or argue its significance. Within a few weeks following an adverse trial decision, however, the evidence was suddenly available. Jolly did not proffer any explanation as to why it could not have been discovered using reasonable diligence during the preceding nine months nor why it had not been

presented at trial to be considered in the context of the other evidence. This does not meet the CR 59 standard for “newly discovered evidence” and the refusal of the trial court to reconsider the issue or set a new trial must be upheld. Similarly, CR 59(a)(6) is not an excuse to re-argue a finding that there is no liability under a contract, merely a mechanism for recalculating damages where liability been found. As the trial court judge found no basis in fact or law for rent to be paid, it was appropriate to refuse to re-open the issue in any way under CR 59(a)(6).

Finally, if the interests of substantial judgment are to be considered under CR 59(a)(9), the trial court judge clearly and rightly found in favor of Pardee. The record is clear that Pardee never wavered in his commitment to buy this property and that Jolly, well aware that Pardee was making payments in advance of their due date, agreed to structure the negotiations so that the talks would resume in December, following the date the final payment would be mailed in November. Jolly, having sold this same property on a similar option contract before (RP 139), likely knew that by extending negotiations into December he was laying the groundwork to take the property back a second time.

#### *Alternate Theories of Recovery*

The trial court did not reach Pardee’s alternate theories: first, that even if the contract were invalid, Pardee’s position is supported by the

Doctrine of Part Performance, as set forth in; *Powers V. Hastings*; 93 Wn.2d 709, 612 P.2d 371; or second, if the court is disinclined to order specific performance of the cash closing, pursuant to *Hubbell v. Ward*, 40 Wash. 2d 779, 246 P.2d 468 (1952), Pardee is entitled to recover in quantum meruit for the expensive improvements he made to the property the value and ownership of which are not allocated in the contract.

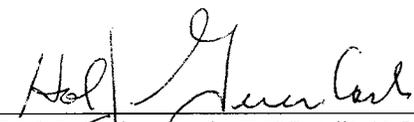
*Request for Relief*

If this Court declines to affirm the ruling of the trial court, Pardee respectfully requests that the case be remanded for rulings on the part-performance and quantum meruit issues.

DATED this 10<sup>th</sup> day of May, 2006.

Respectfully Submitted:

LAW OFFICE OF HAL J. GEIERSBACH

  
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