

65664.3

65664.3

CASE NO. 65664-3-I

**Court of Appeals
of the State of Washington
Division I**

THOMAS ESPINOSA AND KARI
ESPINOSA, husband and wife,

Plaintiffs/Respondents,

v.

PROJECT SERVICES CORP.,
a Washington Corporation, and
GREGORY GLIEGE, a single man,

Defendants/Appellants.

Appellants' Amended Brief

B. Craig Gourley, WSBA # 14702
Law Office of B. Craig Gourley
Attorney for Appellants

Law Office of B. Craig Gourley
1002 Tenth Street/P.O. Box 1091
Snohomish, WA 98291
Telephone: (360) 568-5065
Facsimile: (360) 568-8092

2011 MAR 31 10:11:02

ORIGINAL

TABLE OF CONTENTS

| | PAGE NO. |
|--|----------|
| TABLE OF AUTHORITIES | ii-iv |
| ASSIGNMENTS OF ERROR | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 15 |
| 1. A specific performance decree was the only relief the Espinosas obtained, but their admittedly unjustified repudiation of it terminated the contract and their entitlement to a fee award. | 15 |
| 2. The trial court erred when in response to Gliege's request to reconsider the attorney fees awarded after trial, instead of only adjusting the fee award in Gliege's favor, it <i>sua sponte</i> created and imposed obligations on the parties that neither party sought. | 21 |
| 3. Espinosas failed to establish that the newly discovered evidence upon which their March 24, 2010 CR 60 Motion was based could not have been discovered within ten days of the order from which relief was sought, so the court erred in granting their motion. | 28 |
| 4. The court erred in awarding fees against PSC and Gliege for 'rescinding' the new legal obligation the court itself improperly created <i>sua sponte</i> . | 30 |
| 5. The court improperly penalized Gliege for not volunteering information to the court that was the Espinosas' obligation under the contract to ascertain themselves. | 36 |
| 6. To the extent the court's February 1, 2010 conditional fee award in favor of PSC and Gliege was intended to limit the award to the \$250 set forth in RCW 4.84.010, the court erred. | 41 |

| | |
|---|------------|
| 7. The court erred in imposing an award of attorney fees against Gliege personally, since he was not a party to the subject contract that provides for a fee award. | 43 |
| 8. The court erred in Finding of Fact 16 because finding that the Espinosas were entitled to another ten day extension of closing is not supported by the record. The court erred in Finding of Fact 18 and Conclusion of Law 8 that PSC should have signed the Reservation of Rights, because it went beyond reserving rights and instead created new rights for the Espinosas and exposed PSC to potential liability well beyond the fire damage. | 45 |
| CONCLUSION | 48 |
| Reservation of Rights | APPENDIX A |
| Findings of Fact | APPENDIX B |
| Trial Exhibit 1 | |

TABLE OF AUTHORITIES

| A. CASES | PAGE(S) |
|---|---------|
| 1. WASHINGTON STATE SUPREME COURT | |
| <u>Chelan Orchards v. Olive</u> , 134 Wash. 324; 235 Pac. 805 (1925) | 25 |
| <u>Fairbanks Steam Shovel Co. v. Holt & Jeffery</u> , 79 Wash. 361, 140 P. 394. (1914) | 24 |
| <u>Fancher v. Landreth</u> , 51 Wn.2d 297; P.2d 1066 (1957) | 25 |
| <u>In re Proceedings of King County</u> , 123 Wn.2d 197; 867 P.2d 605 (1994) | 22 |
| <u>Kennedy v. Weyerhaeuser Timber Co.</u> , 54 Wn.2d 766, 344 P.2d 1025 (1959) | 25 |
| <u>Liebergesell v. Evans</u> , 93 Wn.2d 881; 613 P.2d 1170 (1980) | 32 |

| | |
|--|----|
| <u>Lockwood v. A C & S, Inc.</u> 109 Wn.2d 235; 744 P.2d 605 (1987) | 18 |
| <u>Mackey v. United Civil Serv. Training Bureaus.</u> 188 Wash. 186; 61 P.2d 1311 (1936) | 25 |
| <u>Pape v. Armstrong.</u> 47 Wn.2d 480; 287 P.2d 1018 (1955) | 25 |
| <u>Poggi v. Tool Research & Eng'g Corp.</u> 75 Wn.2d 356; 451 P.2d 296 (1969) | 25 |
| <u>Russell v. Mutual Lumber Co.</u> 124 Wash. 109; 213 P. 891 (1923) | 24 |
| <u>Schaefco, Inc. v. Columbia River Gorge Comm'n.</u> 121 Wn.2d 366; 849 P.2d 1225 (1993) | 29 |
| <u>Topliff v. Topliff.</u> 122 U.S. 121, 30 L. Ed. 1110, 7 Sup. Ct. 1057 (1887) | 25 |
| <u>Watson v. Ingram.</u> 124 Wn. 2d 845, 881 P. 2d (1994) | 20 |

2. WASHINGTON STATE COURT OF APPEALS

| | |
|--|--------|
| <u>Baille Communications v. Trend.</u> 53 Wn. App. 77; 765 P.2d 339 (1988) | 45 |
| <u>Marassi v. Lau.</u> 71 Wn. App. 912, 916; 859 P.2d 605, 607 (1993) | 19, 20 |
| <u>Mitchell v. Straith.</u> 60 Wn. App 405; 695 P.2d 609 (1985) | 18, 31 |
| <u>Moore v. Wentz.</u> 11 Wn. App. 796; 525 P.2d 290 (1974) | 29 |
| <u>Nervik v. Transamerica Title Insurance Co.</u> 38 Wn. App 541; 687 P.2d 872(1984). | 34 |

| | |
|--|-----------------------|
| <u>Rowe v. Floyd</u> , 29 Wn. App. 532; 629 P.2d 925 (1981) | 19 |
| B. STATUTES AND LAW | |
| U.S. Constitution, Amendment XIV, §2.3 | 23 |
| RCW 4.84.010 | 1, 41, 42, 50 |
| C. COURT RULES | |
| CR 6(b) | 29 |
| CR 59 | 28, 29 |
| CR 60 | 1, 15, 28, 29, 30, 50 |
| ER 801 (d)(2) | 18 |

I. ASSIGNMENTS OF ERROR

Granting Respondents Thomas and Kari Espinosas' (Espinosas) Motion to Amend the February 22, 2010 Order, reinstating judgment against Appellants Project Services Corp. (PSC) and Gregory Gliege (Gliege) was legal error because:

1. A specific performance decree was the only relief the Espinosas obtained, but their admittedly unjustified repudiation of it terminated the contract and their entitlement to a fee award.
2. The trial court erred when in response to Gliege's request to reconsider the attorney fees awarded after trial, instead of only adjusting the fee award in Gliege's favor, it *sua sponte* created and imposed obligations on the parties that neither party sought.
3. Espinosas failed to establish that the newly discovered evidence upon which their March 24, 2010 CR 60 Motion was based could not have been discovered within ten days of the order from which relief was sought, so the court erred in granting their motion.
4. The court erred in awarding fees against PSC and Gliege for 'rescinding' the new legal obligation the court itself improperly created *sua sponte*.
5. The court improperly penalized Gliege for not volunteering information to the court that was the Espinosas' obligation under the contract to ascertain themselves.
6. To the extent the court's February 1, 2010 conditional fee award in favor of PSC and Gliege was intended to limit the award to the \$250 set forth in RCW 4.84.010, the court erred.
7. The court erred in imposing an award of attorney fees against Gliege personally, since he was not a party to the subject contract

that provides for a fee award.

8. The court erred in Finding of Fact 16 because finding that the Espinosas were entitled to another ten day extension of closing is not supported by the record. The court erred in Finding of Fact 18 and Conclusion of Law 8 that PSC should have signed the Reservation of Rights, because it went beyond reserving rights and instead created new rights for the Espinosas and exposed PSC to potential liability well beyond the fire damage.

II. STATEMENT OF THE CASE

On March 15, 2006 PSC as seller and the Espinosas as buyers entered into a “Vacant Land Purchase and Sale Agreement” (VLPSA) for a partially cleared wooded lot consisting of approximately 20 acres. (CP 544 Finding of Fact 1) Closing was initially scheduled for May 3, 2006. The ten-day extension provision of the VLPSA was invoked and the closing was re-scheduled for May 15, 2006. (CP 544 Finding of Fact 3) During the process of burning piles of wood from an agreed-upon tree clearing process on May 12, 2006, the fire accidentally spread, burning approximately one-half acre of land, most of which had been previously cleared. (CP 545, RP 520) Gliege and his neighbor were able to extinguish the fire using excavation equipment already on site. After the fire was extinguished, Gliege used his equipment to clean the area and return the soil to its original place. (CP 916-917)

In response to the fire, the Espinosas insisted as a condition of closing that PSC execute a document entitled "Reservation of Rights." (CP 546 Finding of Fact 3) This document was tendered to escrow on the day of closing after Gliege had already signed. (EX 14) The Reservation of Rights stated that in addition to the damage from the fire, Gliege buried debris and improperly re-graded the property. (EX 4) Thomas Espinosa verbally stated to Gliege that the debris allegedly buried included construction and demolition debris from another site, an allegation that was untrue and which the Espinosas abandoned and failed to prove at trial. (RP 384)

However, long before PSC acquired this property it had been logged and a logging road was constructed over it. Gliege reasonably believed that the language of the Reservation of Rights was so broad that it included virtually any fill, debris or grading that may have ever been done during the logging operations or before. (RP 381)

Thus, although Gliege did not bury any debris or improperly re-grade, (CP 545, Finding of Fact 10) this document unequivocally and falsely stated that he did. Gliege reasonably recognized that this document exposed PSC to potential liability significantly beyond the damage resulting from the fire and beyond the scope of the VLPSA.

Gliege testified at trial that because he had personal knowledge of the fire damage and how limited it was, he would have signed a reservation of rights limited to the fire damage, but he declined to sign this document because of its potential for creating liability beyond the fire damage. (RP 380-381) The Espinosas continued to insist that Gliege sign the document, and the transaction therefore failed to close. (EX 14)

In August 2006 on his accountants advice, PSC transferred the property to Gregory Gliege personally. (RP 394-395) Two months later in October 2006 the Espinosas filed suit against PSC, requesting specific performance or in the alternative damages. (CP 1196-1201) They also recorded a lis pendens. (CP 1194-1195) PSC filed a counterclaim for breach of contract and slander of title. (CP 1141-1193) Trial was scheduled for June 30, 2009. (CP 1066-1068)

According to PSC's expert real estate appraiser, by May 2009 the property was only worth \$295,000, compared to the 2006 purchase price of \$375,000. (CP 470-471) He also opined that three years after the fire, the fire was barely discernable and had no significant effect on the property's value, and the trial court so found. (CP 546, Finding of Fact 22)

Eleven days before trial, in response to Gliege's motion for default (CP 878-883), the Espinosas answered Gliege's counterclaim (CP 878-

883) and in their response requested for the first time in the alternative specific performance and damages or rescission. (CP 873-875 RP 4)

At trial but before impaneling a jury as the Espinosas requested, the court asked Espinosas to make an election between the mutually exclusive remedies of specific performance and damages on the one hand, and rescission on the other. The Espinosas declined to make the requested election. (RP 11-13, RP 19-21)

The court therefore bifurcated the trial and proceeded without a jury to address liability issues, presumably because a jury cannot grant equitable remedies such as specific performance or rescission. (RP 24)

At the conclusion of the initial or liability phase of this bifurcated trial, the court ruled that PSC had breached the contract due to the accidental fire. (RP 527) The court granted the Espinosas' request for specific performance, directed the Espinosas to close by November 30, 2009, and left the balance of the contract unchanged. The court denied the Espinosas' request for their preferred remedy of rescission. (RP 529-533)

The damages phase of the trial was scheduled for December 14, 2009. At the hearing the Espinosas advised the court that they would not present evidence of damages after all, but would instead rely on the record established during the liability phase of the trial. (537-538) After

argument as to damages based on the existing record, the court announced its verdict awarding no damages to the Espinosas on December 28, 2009. (RP 12/28/09, Pg. 12-13) Counsel for the Espinosas requested that the Espinosas be permitted to close three days later on December 31, 2009. (RP 12/28/09, Pg. 16) The court granted their request, directing the parties to close on or before December 31st. (CP 547, Conclusion of Law 2)

Thus, although the property was appraised at \$295,000 as of May 2009, the Espinosas were required to pay the full purchase price of \$375,000 without any compensation for the fire damage because they failed to prove any of the more than \$50,000 they originally claimed as damages.(CP 547, Conclusion of Law 2, CP 868)

The trial court nonetheless found this rather Pyrrhic victory sufficient to render the Espinosas the prevailing parties, and so awarded them attorneys fees pursuant to the contract's attorney fee provision. (CP 543) PSC objected to the award of fees at that time (December 28) as premature because, having failed to prove damages or obtain their preferred remedy of rescission, specific performance was the only remedy the Espinosas obtained, and it was uncertain that they actually intended to close the sale. (CP 560-579) The Espinosas themselves were not present in court that day to disclose their intentions. (RP 12/28/09, Pg. 1)

The Espinosas' 'victory' was so marginal that they simply rejected it, along with their prevailing party status. On December 31, 2009, counsel for the Espinosas sent to Defendants' counsel an e-mail message which stated in relevant part:

Dear Roy -

I received final word late yesterday from the Espinosas that they will not be closing on the property. Please send whatever form Preview Properties (assuming they still hold the earnest money) requires to release the earnest money to your client. We will promptly have our clients sign it. (CP 541)

On January 8, 2010, the Espinosas filed a writ of garnishment for the earnest money as "property belonging to PSC." (CP 461-465) The Espinosas asserted no claim that their failure to close was somehow justified. On the contrary, by stating their intent not to comply with the court's order to close on December 31, and by forfeiting their earnest money deposit (CP 541) and further by garnishing the earnest money as PSC's property, (CP 461-465) the Espinosas made binding judicial admissions that they were in breach of the contract. Of course the Espinosas also thereby violated the court's decree they sued to obtain.

Thus, the Espinosas obtained none of the relief they sued to obtain, neither the land, money damages nor their preferred remedy of rescission. Actually the Espinosas' net result of their lawsuit was a \$9,000 **liability**,

i.e., their acknowledged forfeiture of the earnest money. (CP 541)

The Espinosas were therefore no longer the prevailing parties. Instead, PSC was the substantially prevailing party since only PSC was entitled to any relief arising from the contract, and as demonstrated below, where neither party wholly prevails, contractual attorneys fees are awarded to the party who substantially prevails, a determination that is made in accordance with the relief actually obtained.

On January 6, 2010, PSC and Gliege filed a timely motion for reconsideration of the court's award of attorney fees to the Espinosas. (CP 525-542) Significantly, in that motion neither Gliege nor PSC challenged any aspect of the court's judgment, other than the attorney fee award, and Espinosa filed no counter motion. Thus, all that was before the court was a request for reconsideration and reversal of the attorney fee award against PSC and Gliege, arguing that as the substantially prevailing party, PSC should be awarded its fees rather than the Espinosas.

By then, the litigation had been on-going for more than three years. During that time, Gliege was reluctant to make any changes to the property, particularly removing trees, even dead or damaged ones, since the Espinosas alleged but failed to prove at trial that Gliege cleared more trees from the property than the parties agreed to. (CP 868)

But after more than three years of forced inactivity the property was in need of maintenance, and in reliance on the Espinosas repudiation of the contract, Gliege began that needed maintenance. (CP 80-84)

Many trees had been damaged by heavy snowfalls in 2008, and were now blocking the property's access road. Saplings sprouted and grew during this litigation in previously cleared areas along the access road and its abutting drainage ditch. These new saplings, which were mere sprouts in 2006, created a risk of road damage. The saplings in the ditch created blockage, causing the road to flood and erode. (CP 94-96)

In reliance on the Espinosas' written refusal to close the transaction as they requested on December 31, and rightfully believing he was under no further obligation to the Espinosas, in mid January Gliege began clearing the fallen trees and removing trees that had died or were damaged. He also removed about twelve trees to enhance the Cascade mountain view, one of the property's most appealing features. (CP 80-84)

On February 1, 2010 Gliege's motion for reconsideration of the attorney's fee award was argued to the court. (CP 525-542) Immediately following argument, the court announced its decision for the record. The court found that an award of fees against Gliege, given the Espinosas' repudiation of the specific performance decree and rejection of the only

form of relief they obtained, was a “miscarriage of justice.” (RP 562)

The court then made the unexpected ruling that is at the heart of this appeal. The court announced, *sua sponte*, that the obligations of the repudiated contract would once again be imposed on the parties, with the only altered term being a new closing date of April 1, 2010. Thus, although neither party requested it, the court gave the Espinosas yet another chance to close the transaction and more importantly, an opportunity to be purged of their admitted breach of the contract and their repudiation of the court’s specific performance decree. In violation of PSC and Gliege due process right to notice and an opportunity to be heard, the court *sua sponte* gave the Espinosas the opportunity to strip PSC of its right to liquidated damages, which the Espinosas, through binding judicial admissions, acknowledged PSC was entitled to. (CP 461-465)

Although a court sitting in equity is accorded a great degree of discretion in fashioning **equitable remedies**, in this instance the court went beyond fashioning remedies and instead created and imposed on the parties entirely new legal obligations that at the time did not exist; obligations inconsistent with the parties’ post-December 2009 stated intentions and with their actions. The underlying contract, which provided that time was of the essence (EX 1, paragraph k), had expired on

December 31, 2009 with the Espinosas' admittedly unjustified refusal to perform the contract they sued to enforce. Likewise, the court's specific performance decree required, **as the Espinosas themselves requested**, performance by December 31, and was by its terms no longer in force.

Because neither party requested that new substantive obligations be created, or that old expired ones be resurrected, there was no opportunity in advance to address the suitability of such new obligations under the then current facts. Furthermore, before announcing its decision to create and impose new obligations on the parties, the court itself did not inquire whether there existed any facts or reasons why such new obligations should not be created. (RP 562-563)

The situation was further compounded by the apparent need of the Espinosas' counsel to leave the courtroom immediately after the court announced its decision, without remaining as is customary and as counsel for PSC and Gliege requested, to discuss and agree on the language of a written order to present to the judge for signature. (CP 347-348)

For the next several weeks the parties were unable to agree upon appropriate language of the order for the court's signature as reflected in the letter of PSC and Gliege's counsel to the court dated February 9, 2010. (CP 329) Ultimately, the order was finalized and signed by the trial court

on February 22, 2010. (CP 429-430)

Since the court resurrected the expired contract's obligations with the only change being the closing date, it was the obligation of the Espinosas pursuant to the contract's terms, specifically the feasibility addendum, to inspect the property to determine its suitability within 30 days of the contract's creation. (EX 1, Form 35F) In addition, the contract required the seller to maintain the property in its present condition at the date of the contract (EX 1, paragraph f), arguably the date the court imposed it upon the parties, February 1, 2010.

On March 7, 2010, more than 30 days after the court's decision on February 1, the Espinosas inspected the property. (CP 175) Prior to that date, no inquiry was made of Gliege about any changes to the property during January 2010, while no contract or court order was in effect regulating his activities on his property. (CP 345)

After finally inspecting the property, the Espinosas filed a motion to reconsider on March 24, asserting that, because of the trees removed in January, the new obligations the court created by its February 1, 2010 decision should be rescinded, and that Gliege should pay their attorney's fees, not just relating to post-verdict matters, but relating all the way back to the filing of their complaint for specific performance, which of course

they ultimately rejected. (CP 315-325) Although the Espinosas had rejected the property in December 2009 with the trees present, the court granted the Espinosas' request to rescind the judicially created and court imposed contract, and awarded fees from the start of the dispute. (CP 5-7)

In doing so, the court did not return the parties to the positions they held before these new judicially created 'contractual' obligations came into existence, which is the primary purpose of rescission. Rather, the court re-established its previously renounced, 'miscarriage of justice' that resulted from the combined effects of the attorney's fee award against Gliege and the Espinosas' repudiation of the agreed contract and the court's specific performance decree. This result coming, even though Gliege breached no obligation, either contractual or court-imposed, by his January 2010 tree removal. Furthermore, the court *sua sponte* afforded the Espinosas an opportunity to extinguish the liquidated damages to which Gliege was unquestionably entitled following the Espinosas' breach, without according him prior notice or an opportunity to be heard – in other words without due process. Hence, this appeal.

The following time line is for the benefit of the Court:

May 3, 2006 original closing date (extended) (CP 544, Finding of Fact 3)

May 12, 2006 small brush fire (CP 544, Finding of Fact 4)

May 15, 2006 extended closing date (CP 544, Finding of Fact 3)

May 15, 2006 PSC fully performs signing all closing documents. (EX 14)

May 15, 2006 Espinosa tenders “Reservation of Rights” refuses to close unless PSC signs (EX 14)

August 9, 2006 property transferred from PSC to Gliège (EX 21)

October 6, 2006 Espinosa files suit (CP 1196-1201)

June 19, 2009 Espinosa now requests rescission instead of specific performance (CP 873-875 RP 4)

June 30, 2009, July 1, 2009, July 6, 2009 trial (RP 1-281)

September 3, 2009 oral opinion of the court granting specific performance - November 30 closing date set (RP 533)

November 30, 2009 Espinosa fails to close

December 28, 2009 Court grants Espinosa’s request for December 31, 2009 close (12/28/09 RP, page 23-24)

December 28, 2009 Court awards zero damages to Espinosa (RP 547, Conclusion of Law 2)

December 31, 2009 Espinosa fails to close for the 4th time

January 6, 2010 Based on Espinosa’s refusal to close, Gliège files motion for reconsideration of the attorney fees award (CP 525-542)

January 8, 2010 Espinosa files writ of garnishment for the Earnest Money (CP 461-465)

Mid January, 2010 Gliège does long overdue maintenance on the property (CP 80-84)

February 1, 2010 Court *sua sponte* imposes the contract on the parties Sets April 1, 2010 closing date (RP 562-563, CP 429-430)

February 22, 2010 Order granting Defendants' Motion for reconsideration heard February 1, 2010 signed, filed by judge's law clerk on February 23, 2010. (CP 429-430)

March 24, 2010, Espinosas file untimely CR 60 motion (CP 419-426)

March 29, 2010 Court grants the Espinosas untimely motion for reconsideration, extending closing date to June 30, 2010. (CP 326-327)

June 10, 2010 Espinosas file a motion to amend February 22, 2010 Order asking court to rescind the *sua sponte* imposed contract. (CP 315-325)

June 24 2010 The Court enters order granting the Espinosa's request to rescind *sua sponte* imposed contract, grants the entire attorney fee award from the beginning of the case in 2006 to date to the Espinosas. (CP 1-4)

III. ARGUMENT

1. A specific performance decree was the only relief the Espinosas obtained, but their admittedly unjustified repudiation of it terminated the contract and their entitlement to a fee award.

Upon completion of this bifurcated trial, the court found, as a result of the accidental fire that occurred, PSC had materially breached the contract, by being unable to deliver the property in the same condition it was at the date of the contract. (CP 546, Finding of Fact 19)

With respect to remedies, the court ruled that the Espinosas failed to prove any damages, and the damages verdict was therefore zero. The court found that Espinosas were not entitled to their preferred remedy of

rescission, but it did grant the decree of specific performance they initially sought. (CP 547, Conclusion of Law 2) The Espinosas were directed to pay the full purchase price negotiated in 2006 of \$375,000 for a property now worth \$295,000 and which, the Espinosas alleged, suffered fire damage in excess of \$50,000. (CP 547, Conclusion of Law 2, CP 868)

Such a result is a rather Pyrrhic victory. The Espinosas' apparently thought so as well, since they ultimately rejected it on December 31, but not until **after** convincing the court that they could and would close as requested on December 31. (RP 12/28/09, Pg. 16) On December 28, the court found the specific performance decree a sufficient basis upon which to confer the Espinosas the status of prevailing parties, and awarded them attorney's fees pursuant to the contract for all fees requested except for \$7,500 the court allocated to their unsuccessful claim for money damages. (CP 547, Finding of Fact 5)

The Espinosas, who were not present in court on December 28, 2009, requested through counsel that the parties be directed to close the transaction three days later on December 31, and the court granted their request. (RP 12/28/09, Pg. 16, CP 547, Conclusion of Law 2)

PSC argued that an award of attorney's fees as of December 28 was premature because there were numerous indications that the

Espinosas might refuse to perform the obligations they sued to enforce.
(CP 562)

The court nonetheless awarded fees in favor of the Espinosas, finding it implicit in their request that the parties be directed to close on December 31 that the Espinosas could and would do so. (CP 542-549)

On the morning of December 31, counsel for the Espinosas notified Defendants' counsel in writing that the Espinosas "will not be closing on the property." He further requested that PSC forward the documentation needed to enable Preview Properties, which held the Espinosas' \$9,000 earnest money deposit, to release those funds to PSC. (CP 541) The contract provided for forfeiture of the Espinosas' earnest money as liquidated damages for the Espinosas' breach of the contract. (EX 1, paragraph o)

The Espinosas did not assert any claim that their refusal to close as directed by the court was justified. Rather, they acknowledged the forfeiture of their earnest money, in accordance with the contract's liquidated damages provision for the buyers' breach. (CP 541) Subsequently, on January 8 the Espinosas filed of record and served on Preview Properties a writ of garnishment which states in part, "The Garnishee has possession or control of personal property or effects

belonging to the Judgment Debtor . . . PSC Corp.” (CP 462)

Each of these documents, the December 31, 2009 e-mail from the Espinosas’ counsel and the writ of garnishment, contain binding admissions by the Espinosas’ attorney and agent clearly authorized to make them, that the Espinosas are liable for forfeiture of their earnest money deposit. See, Lockwood v. A C & S, Inc., 109 Wn.2d 235; 744 P.2d 605; (1987). ER 801 (d)(2). In particular, the writ of garnishment is a binding **judicial** admission filed of record in this case. In short, the Espinosas admit that their failure to close was unjustified.

The Espinosas’ breach of the contract they sued to enforce is clearly a material breach. A material breach is one that is sufficient in magnitude to excuse the other party's performance. Mitchell v. Straith, 60 Wn. App 405; 695 P.2d 609 (1985). Their refusal to tender the purchase price is clearly sufficient to excuse the obligation of Gliege to convey the property to them, and the Espinosas have not claimed otherwise.

Thus, as of January 1, 2010 the record reflected that both parties were in material breach of the contract. PSC’s breach was caused by the accidental fire as determined by the trial court, while the Espinosas established their own intentional breach as a matter of law through judicial admissions of liability for liquidated damages.

Where, as here, each party has achieved some measure of success (at least initially in the case of the Espinosas), whether by obtaining relief on a claim asserted as the moving party in the case of a plaintiff, or by successfully defending against a claim brought against him in the case of a defendant, Marassi v. Lau, 71 Wn. App. 912, 916; 859 P.2d 605, 607 (1993), neither party has wholly prevailed. In such situations Washington courts determine the **substantially** prevailing party for purposes of awarding attorneys fees pursuant to a contract.

“If neither party wholly prevails then the party who **substantially** prevails is the prevailing party, a determination that **turns on the extent of the relief afforded the parties.**” Marassi, v. Lau, 71 Wn. App. 912; 859 P.2d 605 (1993), citing Rowe v. Floyd, 29 Wn. App. 532, 535 n.4, 629 P.2d 925 (1981) (Emphasis added).

Because the determination of the substantially prevailing party "turns on the extent of the relief afforded the parties," the Espinosas no longer substantially prevailed once they rejected the only relief they obtained, because their rejection of that relief not only left them with no relief at all, and it admittedly triggered the forfeiture of their earnest money as liquidated damages. (EX 1, paragraph o)

The Espinosas obtained none of the relief they sought; not the land they sued to acquire, not the money damages they claimed and not their

preferred remedy of rescission. All they obtained from was a specific performance decree, but all they obtained from that decree was a **\$9,000 liability** for violating it. As far as actual relief is concerned, the Espinosas suffered a net loss.

PSC, on the other hand, successfully defeated the Espinosas' claim for money damages and their preferred but untimely claim for rescission. The specific performance decree ultimately resulted in a net gain of \$9,000 to PSC when the Espinosas refused to perform and forfeited their earnest money deposit.

It may be noted that the contract's liquidated damages clause does not somehow negate the contractual entitlement of PSC to an attorney fee award concerning its own damages claim. See Watson v. Ingram, 124 Wn. 2d 845, 881 P. 2d (1994), where the court found an attorney fee award to the seller proper where the buyer breached a real estate sales contract in which the seller, like here, elected forfeiture of the earnest money as liquidated damages. Washington law is clear that a party may prevail not only by succeeding on his own claims, but "the Defendant should be awarded attorney fees for those claims he **successfully defends.**" Marassi, v. Lau, 71 Wn. App. 912, 917; 859 P.2d 605 (1993).

(Emphasis added). Gliege and PSC were clearly the substantially prevailing parties as of January 1, 2010.

Accordingly, on January 6, 2006, Gliege filed a motion to reconsider the attorney fee aspect of the court's judgment (CP 525-542), since as the trial court itself later stated, it would be "a miscarriage of justice" to award fees to the Espinosas in light of their refusal to abide by the court decree they sued to obtain. (RP 562)

2. The trial court erred when in response to Gliege's request to reconsider the attorney fees awarded after trial, instead of only adjusting the fee award in Gliege's favor, it *sua sponte* created and imposed obligations on the parties that neither party sought.

The motion to reconsider filed by Gliege and PSC on January 6, 2010 challenged **only** the contractual attorneys fee award against them based on the Espinosas' failure to close on December 31. (CP 525-542) The Espinosas opposed the motion but did not file any counter-motion of their own. (CP 443-460) The only issues before the court were whether the fee award in favor of the Espinosas should be reversed, and a fee award granted in favor of PSC instead.

Certainly, a court sitting in equity has broad discretion in fashioning equitable remedies. But all discretion has its limits, and the authority of a trial court to fashion equitable remedies is reviewed under

an abuse of discretion standard. In re Proceedings of King County, 123 Wn.2d 197, 204; 867 P.2d 605, 609 (1994). The court below abused its discretion in several distinct ways.

First, when the remedy under consideration by the court is one the parties themselves bargained for and set out in their written agreement, i.e. attorney's fees, the court's discretion in fashioning its remedy should be exercised consistently with the parties' agreement rather than in contravention of it. Here, the parties specifically agreed to three material terms of particular relevance:

- a) Liquidated damages for a buyers' breach;
- b) An award of attorneys fees in favor of the prevailing party in litigation; and
- c) Time is of the essence of the contract.
(EX 1, paragraphs o, p, and k)

The court's *sua sponte* decision on February 1, 2010 to create new legal obligations neither party requested, including a new closing date of the court's choosing, had the effect of nullifying rather than effectuating each of these material terms the parties themselves negotiated.

Rather than simply adjusting the fee award as the motion before it sought, the court below *sua sponte* gave the Espinosas an opportunity to nullify PSC' right to liquidated damages which the Espinosas themselves acknowledged of record PSC was entitled to. PSC' right to these

liquidated damages was a property right that may not be properly taken away without prior notice and an opportunity to be heard, in other words without due process. (U.S. Constitution, Amendment XIV, §2.3). But that is exactly what the court below did.

By its February 1 decision (and February 22 order) the court also *sua sponte* nullified the right of PSC, again without due process, to an award of attorneys fees under the contract the court below created or resurrected. (CP 429-430) Following the Espinosas' breach on December 31, 2009, Gliege and PSC were the only parties with any pretense of being the substantially prevailing parties after they successfully defended against all claims, except for specific performance which the Espinosas themselves repudiated and turned into a liability with a gain to PSC.

Second, that order purports to limit PSC to 'statutory fees' in the event it substantially prevailed, but awarded the Espinosas all their fees, except for \$7,500 allocated to their damages claim, if they prevailed.

Also by that order, the court disregarded the last closing date, December 31, 2009, established pursuant to the parties' actual agreement in which time is of the essence. Consistent with that provision, the parties themselves treated their agreement as terminated as of January 1, 2010,

but the court *sua sponte* created a new contract and even imposed its own new closing date of April 1, 2010. (CP 429-430)

Where the parties themselves bargain for certain remedies in the event of a breach, they should receive the benefits (and obligations) of their bargain rather than a court's own notion of what the consequences of a breach should be. The court's discretion in fashioning **remedies** does not extend to creating entirely new legal obligations the parties neither intended, bargained for nor sought from the court. In matters of contract, the intent of the parties is a paramount consideration, and the court is not free to write the parties a new agreement or impose new legal obligations the parties themselves neither agreed to nor asked the court to impose.

The court in Russell v. Mutual Lumber Co., 124 Wash. 109; 213 P. 891 (1923), stated:

"The duty of courts, when construing questioned contracts, to search out the intention of the parties, is well established, but that duty arises out of an ambiguity or omission that demands the reception of testimony to illustrate their intent, or to harmonize apparent conflicts. There is a presumption of finality which attends all written contracts and courts will not deliberately raise doubts or conjure ambiguities for the mere pleasure of construing them. Fairbanks Steam Shovel Co. v. Holt & Jeffery, 79 Wash. 361, 140 P. 394 (1914). Nor will the fact that a party has made a hard or improvident bargain warrant the court in binding the other party to terms raised by construction or implication."

The court in Poggi v. Tool Research & Eng'g Corp., 75 Wn.2d 356, 364; 451 P.2d 296, 300-301 (1969) stated,

“The interpretation put upon an ambiguous or doubtful contract by the parties through their conduct or own interpretation of it is entitled to great, if not controlling, weight,” citing Fancher v. Landreth, 51 Wn.2d 297, 317 P.2d 1066 (1957); Kennedy v. Weyerhaeuser Timber Co., 54 Wn.2d 766, 344 P.2d 1025 (1959); Topliff v. Topliff, 122 U.S. 121, 30 L. Ed. 1110, 7 Sup. Ct. 1057 (1887). “And the courts, under the guise of construing or interpreting a contract, should not make another or different contract for the parties,” citing Chelan Orchards v. Olive, 134 Wash. 324, 235 Pac. 805 (1925); Mackey v. United Civil Serv. Training Bureaus, 188 Wash. 186, 61 P.2d 1311 (1936).

Of course, under appropriate circumstances a court may **imply** the existence of a contract based on the actions of the parties, where for instance, a written agreement has expired but the parties continue to perform as though the agreement remains in effect.

The court in Pape v. Armstrong, 47 Wn.2d 480; 287 P.2d 1018 (1955), overruled on other grounds, stated:

“It is often said that the only difference between an express contract and a contract implied in fact is that in the former the parties arrive at their agreement by words, whether oral or written, sealed or unsealed, while in the latter, their agreement is arrived at by a consideration of their acts and conduct, and that in both of these cases there is, in fact, a contract existing between the parties . . . An implied contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such a contract . . . The difference between an express and implied promise is in the mode of proof. **There must be a mutual manifestation of assent in either case . . .**” (Emphasis added).

Here, there is clearly no manifestation of assent to perform beyond December 31 reflected in the parties' conduct from which to imply a contract. On the contrary, the Espinosas plainly stated their refusal to close for the record, and in reliance on their statement Gliege thereafter treated the property as his own, which of course it was.

The court's imposition of new substantive obligations after December 31 is not consistent with the parties' stated intent, nor with their post-December 31, 2009 actions, nor with the parties' agreement that time is of the essence. Thus, the court's imposition of new obligations cannot be justified as a contract inferred or implied from the parties' actions.

Third, the court's *sua sponte* decision to grant the Espinosas another chance to close and thereby purge themselves of the consequences of their admitted breach, gave them an opportunity to destroy the right of PSC to liquidated damages, without either prior notice or an opportunity to be heard, in other words without due process.

Finally, by *sua sponte* granting the Espinosas an opportunity to avoid their admitted breach and its consequences, the court below showed improper favoritism to the Espinosas, to the substantial prejudice of Gliege and PSC. By way of additional background relevant to this point, when the trial court announced its verdict as to liability on September 3,

2009, the Espinosas requested a closing date of December 31, while PSC and Gliege argued in favor of a closing by November 30. The court stated on the record that the closing should be by November 30. (RP 533)

Subsequently, when the Espinosas failed to close by November 30 or to request an extension, PSC and Gliege asserted in their response to the Espinosas' motion for attorney fees that the Espinosas were in breach. (CP 560) The court disagreed, stating that it merely suggested rather than directed a closing date of November 30. (RP 12/28/09, Pg. 22-23)

On December 28, the Espinosas requested a new closing date of December 31 which the court granted. (RP 12/28/09, Pg. 15-16, CP 547, Conclusion of Law 2) Yet even after the Espinosas flatly refused to close on the date of their own choosing, with no claim of justification for that refusal, the court *sua sponte* gave them yet another chance to close, and to thereby defeat PSC's admitted entitlement to its liquidated damages as well as its status as prevailing party for attorney's fee purposes.

It certainly appeared from Gliege's perspective that the court below was loathe to see the Espinosas lose this case, even when their unconscionable repudiation of the decree they sued to obtain demanded such a result. Because the court took such extraordinary measures *sua sponte*, it went beyond the limits of its discretion and demonstrated a bias

in the Espinosas' favor. It committed palpable error that should be reversed.

3. Espinosas failed to establish that the newly discovered evidence upon which their March 24, 2010 CR 60 Motion was based could not have been discovered within ten days of the order from which relief was sought, so the court erred in granting their motion.

The order of the court below resurrecting the expired contract was dated February 22 and was entered on February 23, 2010. (CP 429-430) Of course, that decision was verbally announced in court on February 1, 2010, so the parties had actual notice of the specifics of that decision for three weeks before the written order was actually entered. (RP 556-565)

Pursuant to CR 60 (b)(3), a motion for relief from a judgment or order may be based on "Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)." CR 59 governs requests for a new trial, reconsideration and the amendment of judgments, and requires that such a motion be filed within ten days from the entry of the judgment.

Thus, newly discovered evidence can support a CR 60 motion only where such evidence could not have been discovered within ten days of the judgment using due diligence. The Espinosas inspected the property on March 7, 2010 (CP 175), more than ten days after entry of the order

from which they sought relief on February 23, 2010. (CP 429-430)

Indeed, their inspection was 34 days after they received actual notice of the court's verbal decision on February 1, 2010. (RP 556-565)

The Espinosas, who reside in Snohomish (RP 43), made no request to inspect pursuant to the discovery rules, CR 34, but instead simply inspected the property at a time of their own choice, with no prior notice to PSC or Gliège. They failed to establish, or even allege, that the newly discovered evidence upon which they relied could not have been discovered through due diligence within ten days from the order as required by CR 59, and which is incorporated into CR 60 (b)(3).

Even after making their inspection on March 7, they waited **fourteen more days** to file their CR 60 motion on March 24. (CP 419-426)

Our Supreme Court in Schaeferco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366; 849 P.2d 1225 (1993) stated:

“A motion for reconsideration is timely only where a party both files and serves the motion within 10 days of the order's entry. CR 59(b). **A trial court may not extend the time period for filing a motion for reconsideration**”. CR 6(b); Moore v. Wentz, 11 Wn. App. 796, 799, 525 P.2d 290 (1974). (Emphasis added.)

PSC objected to the consideration of the Espinosa's untimely motion (CP 330-351), but the court ignored the Espinosa's violation of the court rules and granted their untimely motion. (CP 326-327) Because they failed to establish that the newly discovered evidence upon which their CR 60 motion was based could not have been discovered within ten days from the entry of the order, and further because the trial court may not extend that ten day period, the court below erred in considering and granting that motion.

4. The court erred in awarding fees against PSC and Gliege for 'rescinding' the new legal obligation the court itself improperly created *sua sponte*.

The court below erred by abusing the discretion it is vested with in fashioning relief when it *sua sponte*, and without notice or opportunity to be heard created new legal obligations and imposed them on the parties. The court compounded its error when in response to the Espinosas' complaints that Gliege altered the property by removing mostly dead and damaged trees during January 2010 when it was undeniably his right to do so (CP 88-157), the court 'rescinded' the new obligations it should not have created in the first place, and imposed new remedies against PSC and Gliege for having to do so.

It should first be noted that eliminating these judicially-created obligations was itself appropriate, but only in the sense that they should not have been created in the first place. But the court's 'rescission' of its own judicially created obligations is not rescission in the conventional sense, because true rescission requires a **material breach** of the contract being rescinded. Mitchell v. Straith, 40 Wn.App. 405, 410; 698 P.2d 609 (1985.) Neither Gliege nor PSC breached **any** obligation after December 31, 2009, materially or otherwise, since no such obligations existed after December 31, 2009. Furthermore, the 'contract' being rescinded was not an agreement negotiated by the parties or even one properly implied based on the parties' actions. It was instead a purely judicial creation.

The only basis for an award of attorney's fees in this case is contractual. But the conduct complained of, Gliege's removal of trees during January 2010, occurred when no contract existed. (CP 80-87) The parties' contract expired on December 31 and the 'contract' the trial court purported to create came into existence, if at all, on February 1 at the earliest after the trees had been removed. It necessarily follows that since the court rescinded the new obligations it created because of the tree removal in January, when no contract or court order was in effect, there is no basis for the award of **any** fees against PSC and Gliege.

Furthermore, the court's order dated February 22 states that in the event the transaction fails to close by April 1, 2010 through no fault of Gliege, then PSC is entitled to the Espinosas' earnest money deposit and the attorney's fee award against PSC and Gliege will be vacated. (CP 429-430) The transaction in fact failed to close through no fault of PSC or Gliege. Gliege's removal of trees in January breached no obligation to refrain from doing so because no contract or court order imposing any such obligations existed at the time.

Furthermore, Gliege reasonably relied on the Espinosas' unequivocal statement that they refused to close on December 31, even when the trees subsequently removed were present, so that the Espinosas should be estopped from complaining about their removal. Liebergesell v. Evans, 93 Wn.2d 881, 889-890; 613 P.2d 1170, 1175 (1980).

Paragraph 'f' of the new 'contract' requires the seller to maintain the property **in its present condition**. (EX 1) The Court's order does not, nor could it, purport to retroactively prohibit activities that already occurred and which were altogether proper at the time they occurred. This provision of the contract can only mean under the current circumstances that the seller must maintain the property in the condition it was in when the obligation was created on either February 1 or 23. Either way, PSC

complied with this term by making no further changes to the property after January 2010. Ultimately, the new obligations created by the court on February 1 were terminated not because they were breached, but rather because they were not appropriate to begin with given the changes properly made to the property while it was out of contract.

In fact, this case demonstrates the dangers of courts *sua sponte* creating new legal obligations under the guise of fashioning equitable remedies, particularly obligations that are no longer consistent with the parties' intentions or actions, or with the current facts. The result was that the dispute was exacerbated rather than alleviated, and an entirely new layer of this already-protracted litigation was created. The court below erroneously penalized PSC and Gliege for having to undo its own error in improperly creating new obligations *sua sponte*.

Certainly the trial court has the inherent authority to correct its own errors. But it does not have the authority to impose a purely contractual remedy (attorney's fees) where the 'contract' is a fiction erroneously created, *sua sponte*, by the court itself rather than by the parties, and the fictional 'contract' was not breached in any event.

Furthermore, the goal in rescinding a contract is to return the parties as nearly as possible to the positions they held before the contract

was created, Nervik v. Transamerica Title Insurance Co., 38 Wn. App 541, 547; 687 P.2d 872, 876 (1984). In this instance, that would mean a return to their positions just prior to February 1, 2010.

Prior to February 1, 2010 the Espinosas' position was that they were admittedly in breach of the court's decree and the contract by refusing to close on December 31. They were entitled to no relief, and were indeed admittedly subject to a \$9,000 liability by forfeiting their earnest money deposit. (CP 541) By losing their earnest money deposit and gaining nothing, the Espinosas were no longer prevailing or even substantially prevailing parties, and were therefore no longer entitled to an award of fees and costs. Such an award would be, as the court below described it, a miscarriage of justice under such circumstances. (RP 562)

On the other hand, as of February 1, 2010 PSC and Gliege had successfully defeated the Espinosas' preferred claim of rescission and their claim for money damages. The specific performance decree initially imposed against them was repudiated by the Espinosas, who thereby forfeited their \$9,000 earnest money deposit to PSC. (CP 429-430) Thus, PSC became the substantially prevailing party since it was the only party entitled to any relief arising from the contract.

But rather than returning the parties to their pre-February 2010 positions as outlined above, the court placed PSC and Gliege in a position that was far worse than the position they held on January 31, 2010.

First, the court summarily enabled the Espinosas to nullify Project Service's entitlement to the liquidated damages and attorney fees without affording PSC any prior notice or opportunity to be heard.

Worse yet, the court inexplicably reinstated the **entire** fee award against PSC and Gliege, all the way back to the inception of this dispute, as though the Espinosas' repudiation of the court's specific performance decree never happened. (CP 5-7)

The lower court's logic in this regard is impossible to grasp. The Espinosas refused to perform. That refusal rendered a fee award in favor of the Espinosas a miscarriage of justice according to the court below. In **reliance** on the Espinosas' refusal to perform, Gliege removed trees that were dead, damaged, or blocking the property's access road, drainage ditch or its view. Gliege breached no contract or court-ordered obligation in doing so.

Then, in addressing what it described as a miscarriage of justice resulting from its fee award to the Espinosas in light of their repudiation of the specific performance decree, the court, *sua sponte* and without

affording PSC and Gliege due process, gave the Espinosas an unrequested and undeserved chance to purge themselves of their breach by imposing new obligations on PSC **and** Gliege, who was not a party to the contract.

So, in order to finally obtain the rescission they most wanted but were not entitled to, the Espinosas balked at closing on the property because trees were removed, just as they did when these trees were **present**. And even though Gliege removed the trees in reliance on the Espinosas' repudiation of the court's decree, was not in violation of any obligation and had done so **before** the court resurrected the contract, rather than finding the Espinosas were estopped from complaining about these trees, the court responded by **creating rather than eliminating** the miscarriage of justice it previously recognized. The court below erred in so doing.

5. The court improperly penalized Gliege for not volunteering information to the court that was the Espinosas' obligation under the contract to ascertain themselves.

The only suggestion of any wrong-doing by Gliege after December 31 is that he failed to **volunteer** that he had properly maintained the property when the court announced its unexpected decision on February 1 to *sua sponte* impose upon the parties new obligations to close the sale.

In fact, the trial court excoriated Gliege at subsequent argument, strongly intimating that Gliege's silence that day in court and in the days that immediately followed constituted a fraud upon the court. ¹ (RP 570-578)

But the only matter before the court on Feb. 1 was **the contractual fee award**. The property itself was not the subject of the motion, nor was it the subject of any contract or court order as of January 1. Because neither party requested that the court resurrect the expired contract, the court's decision to do so could not have been anticipated by the parties.

Thus, because the post-December 31 condition of the property was not the subject of the proceedings or relevant to them, **no one addressed it; not the parties, not counsel and not the court.** (RP 548-565)

It is true that as soon as the court announced its altogether unexpected decision to resurrect the contract, Gliege did not volunteer that, in reliance on the Espinosas' refusal to close on December 31, he had caught up on long-overdue maintenance of the property during January 2010 by removing trees that were dead, damaged and blocking the

¹ The only fraud perpetuated on the court below was the Espinosas' insistence on **December 28** that they were entitled to attorney's fees based on the specific performance decree **they promptly rejected** once they obtained their fee award.

property's access road and its drainage ditch, and improved the property by removing a dozen trees that were blocking the mountain view.

It is equally true, however, that counsel for the Espinosas directed no such inquiries to Gliege in court that day **or at any time afterward.**

Nor did the court make any inquiries about any changes to the property before announcing its surprise decision. The court was of course in the best position to raise such inquiries before ruling because the judge was presumably the only person in court that day having any idea that a new obligation to deliver the property to the Espinosas was about to be imposed.

The situation was exacerbated when immediately following the announcement of the court's decision, counsel for the Espinosas left the courtroom rather than remain as is customary and requested by PSC's attorney, to approve language for a proposed order setting forth the court's decision. (CP 347-348), making further dialog in court that day impossible.

Because what the court purported to do was resurrect the parties' expired contract, the question of whether it is the seller's obligation to volunteer or the buyers' obligation to inspect the property's condition is a matter of contract, which places the obligation on the buyers.

The resurrected contract contains a feasibility addendum placing the responsibility to inspect to determine the property's suitability squarely on the buyers. Indeed, it states that the buyers **should not rely** on any representations by the seller about the property and its suitability, but should instead make their own investigation, which they must complete within thirty days of "mutual acceptance." (EX 1, Form 35F)

The starting date of feasibility period set forth in the parties' actual contract is perfectly clear – the date of mutual acceptance, when both parties have executed the written agreement. But when a nearly four year old, expired contract is unexpectedly resurrected, provisions that were clear four years earlier may no longer be. Exactly what is the date of 'mutual acceptance' when the parties did not mutually accept at all, but rather new obligations were unexpectedly thrust upon them? We submit that the closest thing to a date of mutual acceptance is February 1, when the parties received actual notice that they were now bound to a new obligation to close the sale by a date certain, April 1. (RP 563)

But the Espinosas did not inspect the property until March 7, well beyond the 30 day feasibility period and less than four weeks before the new closing date. (CP 175) The Espinosas will undoubtedly argue that the contract's feasibility period should begin to run not when the court

verbally announced its decision on February 1, but rather when the court signed its written order on February 22. (CP 429-430) Such a result, however, would improperly reward the Espinosas' dilatory conduct in failing to cooperate in presenting an agreed-upon proposed order to the court below for signature on Feb. 1. The delay in obtaining the final order was due solely to the Espinosas intransigence. (CP 347-349)

This point also serves to further illustrate the danger when a court, in the name of exercising equitable discretion, creates entirely new substantive obligations the parties neither sought nor intended, especially in a contract case where the parties' intentions should be the paramount consideration.

The court below apparently expected Gliege to immediately assess the many ramifications of a decision of the court he could not possibly have anticipated, and volunteer that he took such mundane actions as clearing fallen trees from the access road and removing 12 of this property's over 12,000 trees to enhance the view (CP 101) when he had no obligation to refrain from doing so.

Should Gliege in effect be penalized more than \$117,000 for not volunteering this information that, until that very moment, had no relevance to the matter at hand, and where it is the contractual obligation

of the buyers to inquire rather than the seller's obligation to volunteer?

The court below answered that question in the affirmative, and in doing so, we submit, erred.

6. To the extent the court's February 1, 2010 conditional fee award in favor of PSC and Gliege was intended to limit the award to the \$250 set forth in RCW 4.84.010, the court erred.

Up until December 31, 2009, the Espinosas were deemed the substantially prevailing parties. Aside from the \$7,500 it allocated to their unsuccessful damages claim, the court awarded the Espinosas every penny of the attorney's fees and costs they claimed, even including \$1,100 for five hours to research the effects of their intended breaching of the court's decree and fees for preparing instructions for a jury they ultimately decided not to impanel for a damages claim they chose not to present. (CP 600)

But when the Espinosas repudiated the contract and the court's decree by refusing, without any claim of justification, to perform on December 31, thereby forfeiting their earnest money deposit in the process, Gliege and PSC became the substantially prevailing parties. Indeed, the court below remarked that it would be a 'miscarriage of justice' to award fees to the Espinosas given their repudiation of the only relief they obtained in this law suit. (RP 562)

However, the court stated in its order dated Feb 22 that if the Espinosas failed to close on April 1, 2010 through no fault of Gliege and PSC, then Gliege and PSC were entitled as substantially prevailing parties to “**statutory**” fees and costs, ordinarily deemed to be the \$250 provided by RCW 4.84.010. (CP 430)

However, this statute, RCW 4.84.010, also states that where the parties enter into an agreement containing a provision for an award of attorneys fees to a prevailing party in litigation, the statutory fee award shall include those fees the parties provided for in their agreement.

“The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties. . .”

Thus, the court’s award of statutory fees in favor of PSC in its February 22 order must be construed consistently with the statute. A plain reading of the statute cited in the court’s order specifically provides that those fees to which the parties agreed should be included in the award.

If the court’s award of ‘statutory’ fees is construed otherwise, that is if ‘statutory’ fees are deemed to be limited to \$250, such an interpretation would reflect a clear bias in favor of the Espinosas and against Gliege and PSC. It cannot be that the Espinosas are entitled to

over \$117,000 in fees when they substantially prevailed, but that Gliege and PSC are entitled to only \$250 when they subsequently achieved substantially prevailing party status.

Certainly, the court's order of February 22 must be interpreted as being consistent with the statute rather than in violation of it. Likewise, the order must be interpreted in accordance with the language of the contract, and not in such a way to favor one party over the other.

7. The court erred in imposing an award of attorney fees against Gliege personally, since he was not a party to the subject contract.

As set forth above, there is no proper basis upon which to award any fees to the Espinosas. In the alternative, however, should this court determine that the Espinosas are entitled to some fee award, it should be assessed against PSC only, and not against Gregory Gliege in his individual capacity. Gliege was not a party to the contract. His corporation, PSC, was the contracting party. (EX 1) **After** the acts complained of occurred, **prior** to filing this law suit, the subject property was conveyed from PSC to Gliege on August 9, 2006. (EX 21)

There was no evidence produced at trial, or even an allegation, that Gliege acted in his individual capacity with respect to any liability-producing conduct, and the trial court made no such finding. Furthermore,

the Espinosas did not seek to 'pierce the corporate veil.' They introduced no evidence in support of such a notion at trial, and the court made no finding that the corporate veil should be pierced. Finally, there was no evidence produced at trial, and the court made no finding that the transfer of the property from PSC to Gliege was in any way improper. (CP 544-548)

Had the Espinosas not violated the court's specific performance decree, Gliege would have been required by that decree to sign the deed conveying the property to the Espinosas, nothing more. But once the Espinosas refused to comply with the court's specific performance decree, Gliege no longer had even that limited role.² The only basis for an award of attorneys fees is the contract. Thus, even with respect to the trial court's *sua sponte* decision to resurrect the contract following the Espinosas' repudiation of the court's decree, Gliege is no more a proper party to the resurrected contract than he was to the real one. There is no proper basis for awarding fees against Gliege individually, and the court below erred in doing so.

² Gliege did file a slander of title counterclaim in his own name, but of course that was only because he was the property's owner when the Espinosas filed their law suit and lis pendens.

8. The court erred in Finding of Fact 16 because finding that the Espinosas were entitled to another ten day extension of closing is not supported by the record. The court erred in Finding of Fact 18 and Conclusion of Law 8 that PSC should have signed the Reservation of Rights, because it went beyond reserving rights and instead created new rights for the Espinosas and exposed PSC to potential liability well beyond the fire damage.

This entire case stems from the Espinosas' demand that PSC sign a document that contained falsehoods and materially altered the original agreement. (EX 4) If the Court finds in favor of the appellant in this matter all other assignments of error become moot.

Plaintiffs' insistence that PSC execute the so-called 'Reservation of Rights' document improperly prevented the transaction from closing, thereby causing the contract to expire by its terms. (EX 14, page 3) The contract called for the original closing to be held on May 3, 2006 with a 10 day extension of that date at the option of the buyer. Espinosa chose to extend the date and closing was rescheduled for May 15, 2006. Espinosa was not entitled to any additional extensions under the contract.

Washington law accorded PSC an opportunity to cure any defects the fire caused to the property within a reasonable period of time. Baile Communications v. Trend, 53 Wn. App. 77, 81; 765 P.2d 339, 342 (1988). Gliege in fact substantially cured the defects resulting from the fire before

the scheduled closing and he requested that the Espinosas meet him at the property on the day before closing to inspect, but the Espinosas refused .
(CP 917, CP 745)

Instead of inspecting the results of Gliege's remediation work as Gliege requested, the Espinosas had their attorney prepare the document entitled 'Reservation of Rights,' and insisted that PSC sign it as a new condition of closing. This document was presented on the day of closing **after** Gliege had signed all documents necessary to close.(CP 917)

However, the Espinosas could have produced a document that simply reserved their rights regarding any changes in the condition of the property arising from the fire. (RP 525) Gliege testified that since he had personal knowledge of the damage caused by the fire he would have signed a document reserving for the Espinosas any claims they had relating to the fire. (RP 380-381).

Instead, the Espinosas insisted that Gliege sign a document containing false statements of wrongdoing which exposed PSC to potential liability for possible unknown defects beyond the fire damage and well beyond the liability imposed by the initial contract. (EX 4)
These allegations included 'burning debris,' which is not in fact prohibited

by the contract, and was a means of eliminating the slash from felled trees that PSC was **required** by the contract to remove. (EX 1, Form 34) The Espinosas were aware that burning was utilized to remove debris from clearing operations when they initially signed the contract, and the contract does not prohibit it. (RP 168)

The document also falsely states that PSC engaged in burying debris and other unknown items and improperly re-graded the property. (EX 4) Mr. Espinosa advised Gliege verbally that the debris complained of included construction debris including lumber and insulation from some other site.(RP 752) No such construction debris was brought to the site, and the trial court so found. (CP 545, Finding of Fact 10) These false statements that Espinosa demanded PSC admit to exposed PSC to potential liability beyond the fire damage, and since this property had been previously logged and a logging road was built on it, that potential liability was a significant risk clearly beyond what the parties negotiated and agreed upon. (RP 381) PSC had fully performed its obligations by signing and tendering to escrow all documents necessary to close the transaction on the closing date. (EX 14) This transaction failed to close based solely on Espinosa's demand that as a condition of closing PSC agree to new material contract terms. Indeed, the court itself stated during

its opinion after trial that if the Reservation of Rights “had been more narrowly drafted we probably wouldn’t have had this lawsuit.” (RP 530)

By insisting that PSC execute a document reserving for the Espinosas claims for defects beyond any created by the fire, and beyond what the parties bargained for, the Espinosas were proposing a new agreement which PSC was within its rights in declining to enter. The document clearly stated that it was an amendment to the Escrow instructions, which by their terms require the signatures of both buyer and seller. The court below therefore erred in ruling that PSC materially breached the parties’ agreement by declining to further extend the closing date or agree to such new terms.

CONCLUSION

The ruling of this Court on each of the assigned errors will affect the relief sought. Thus, the relief requested will be dependant upon the Courts findings on specific errors. The appellant asks the Court to find:

1. Reservation of Rights: (A) As a matter of law, the document entitled Reservation of Rights was a material change in the terms of the contract between the parties requiring PSC to admit to acts it had not committed and exposing PSC to liability beyond that contained in the original contract and that PSC was not obligated to sign the document.

(B) Espinosa's refusal to close the transaction without PSC signing the "Reservation of Rights" in the over reaching manner that it was drafted, was a material breach of the contract. (C) The case be remanded to the trial court for a determination of damages for the Appellants, including the Appellants claims for slander of title and an award of attorney fees to the Appellants in accordance with the contract and as allowed by law.

2. In the event that this Court rules PSC was obligated to sign the "Reservation of Rights," (A) When Espinosa repudiated the award of specific performance and breached the contract on 12/31/2009 that they were not the prevailing party. (B) The case be remanded to the trial court for an award of attorney fees, including those incurred in this appeal to Appellants in accordance with the contract.

3. The trial court abused its discretion and exceeded its authority when at the 02/01/2010 hearing, it *sua sponte* imposed a contract on the parties that neither party requested, and that the order of 02/22/2010 and those subsequent be stricken and the matter be remanded consistent with number 2 above.

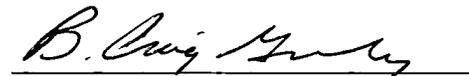
4. If this Court determines the trial court did not exceed its authority in *sua sponte* imposing a contract on the parties, that

Respondent's 03/24/2010 CR 60 motion be stricken as untimely and the matter be remanded with the direction that the subsequent rescission of that ruling by the trial court place the parties in the same position as they were prior to the 02/01/2010 hearing and subject to Appellants relief request.

5. An award of attorney fees against Gliege personally is invalid as he is not a party to the contract and any award to the Espinosas under the contract be the responsibility of PSC only.

6. If the Appellants are awarded attorney fees pursuant to the order of 02/22/2010 that such award be consistent with RCW 4.84.010 and fees be awarded, including for this appeal, per the terms of the contract and not limited to the statutory amount of \$250.

Respectfully Re-Submitted this 30th day of March, 2011.



B. Craig Gourley WSBA#14702
Attorney for Appellants

May 15 2006 11:45 PM

RESERVATION OF RIGHTS

TO: Seller: Project Services, Corp., Gregory Glege, Manager, and

TO: Escrow Agent: Stewart Title of Snohomish County

This Reservation of Rights ("Reservation") is related to that certain Voluntary Land Purchase and Sale Agreement dated March 15, 2006, including all addenda and amendments thereto (herein the "Agreement") by and between Project Services, Corp. ("Seller"), a Washington corporation, and Thomas and Kari Espinosa ("Buyer"), husband and wife, relating to the real property with common address at 73000 Marc Rd. Lot I, #Lot L, Snohomish, Snohomish County, Washington, tax parcel number 28070800400200 (the "Property") with closing set for today, May 15, 2006.

Buyer has discovered certain facts which may result in Seller being in breach of the terms of the Agreement and Seller's obligations thereunder. Seller has refused to delay the closing of the purchase and sale of the Property to permit Buyer to further investigate such facts to determine the extent of any breach, thus Seller is forced to close the transaction today. Buyer hereby reserves all rights under the Agreement which shall survive the closing of the transaction, and is closing based upon this reservation of rights and the survival of all obligations of the parties under the Agreement, and Buyer further reserves all rights and remedies related thereto.

The facts referenced above include that Seller has altered the condition of the Property prior to closing by burning debris, burying debris and other unknown items, grading and/or re-grading the Property due to the burning of debris and burial without Buyer's permission, without obtaining all required permits or licenses for burning and/or grading.

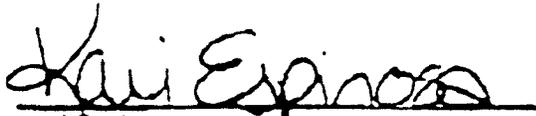
This Reservation amends the Addendum to Closing Agreement and Escrow Instructions (the "Closing Addendum") and Buyer has executed such Closing Addendum subject to the terms of this Reservation.

Dated: May 15, 2006.

Dated: May 15, 2006.



Thomas Espinosa



Kari Espinosa

Appendix A

FILED

2010 JUN 24 11:33

SNOHOMISH COUNTY CLERK
SNOHOMISH CO. WASH



CL14265645

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

THOMAS ESPINOSA and KARI ESPINOSA,
husband and wife,

The Honorable Ronald L. Castleberry

Plaintiffs/Judgment Creditors,

No. 06-2-11794-6

v.

AMENDED FINAL JUDGMENT

PROJECT SERVICES CORP., a Washington
corporation, GREGORY GLIEGE,

Defendants/Judgment Debtors.

JUDGMENT SUMMARY

- 1. Judgment Creditor: Thomas Espinosa and Kari Espinosa
- 2. Attorney for Judgment Creditor: Rodrick J. Dembowski
1111 Third Ave, Suite 3400
Seattle, WA 98101
(206) 447-4400
- 3. Judgment Debtors: Project Services Corp. &
Gregory Gliege, jointly and severally
- 4. Principal Judgment Amount: NA - See Judgment Below
- 5. Attorneys' Fees, Costs & Expenses: \$117,699.42
- 6. **TOTAL JUDGMENT AMOUNT:** \$117,699.42
- 7. The Total Judgment Amount shall bear interest at 12% per annum.

AMENDED FINAL JUDGMENT- 1

ORIGINAL

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

51079521.2

158

Appendix B

1 **FINAL JUDGMENT**

2 This matter came on regularly for trial on June 30, 2009, recessed for mediation, and
3 then re-commenced between August 26, 2009 and August 27, 2009. The Court bifurcated the
4 trial, hearing testimony in order to determine whether there was a breach and the appropriate
5 remedy, and to resolve the counterclaims, and reserving trial on damages to plaintiffs for phase
6 2. The Court heard closing arguments on August 27, 2009 and the Court issued its oral opinion
7 on September 3, 2009 and entered its Findings of Fact, Conclusions of Law and Final Judgment
8 on December 28, 2009. On February 22, 2010, the Court entered its Order on Motion for
9 Reconsideration and Amendment of Judgment and for Attorney Fees and Expenses. On March
10 29, 2010, the Court entered its Order Granting Plaintiff's Motion for CR 60 Relief from Order.
11 On June 22, 2010, the Court entered its Order Granting Plaintiff's Motion to Amend February
12 22, 2010 Order and Awarding Fees and Costs.

13 The Court incorporates herein its findings and conclusions in the June 22, 2010 Order
14 Granting Plaintiff's Motion to Amend February 22, 2010 Order and Awarding Fees and Costs,
15 and incorporates herein its findings and conclusions made on the record at the hearing on June
16 22, 2010, and hereby amends the Findings of Fact, Conclusions of Law and Final Judgment
17 entered on December 28, 2009 consistent with the June 22, 2010 Order and the Findings and
18 Conclusions on the record at the June 22, 2010 hearing.

19 Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED THAT:

20 1. To the extent they conflict with the following findings and conclusions, the
21 December 28, 2009 Findings of Fact, Conclusions of Law and Final Judgment are amended as
22 follows:

- 23 a. The VLPSA is rescinded.
24 b. The earnest money, totaling \$9,000, is to be returned to the Espinosas.
25 c. The Espinosas are the prevailing party and are awarded their additional
26 incurred fees and costs under paragraph p of the VLPSA. The Court finds that the additional

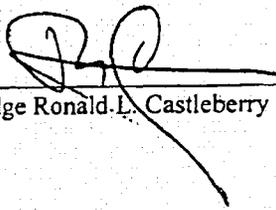
AMENDED FINAL JUDGMENT- 2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

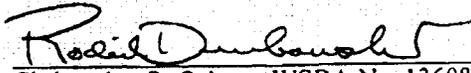
1 fees and costs were necessarily incurred and are reasonable. The Court therefore amends the
2 prior judgment to award additional costs of \$3,359.30 and fees of \$20,543.50. Added to the
3 December 2009 Judgment for fees and costs of \$93,796.62, the amended final judgment amount
4 against the defendants is \$117,699.42.

5 2. This Amended Final Judgment is hereby ordered entered.

6 SIGNED AND ENTERED this 23 day of June 2010.

7
8 
9 _____
10 Judge Ronald L. Castleberry

11 Presented by:
12 FOSTER PEPPER PLLC

13 
14 Christopher R. Osborn, WSBA No. 13608
15 Rodrick J. Dembowski WSBA No. 31479
16 Attorneys for Plaintiffs

17 Copy Received, Form Approved:
18 Law Offices of B. Craig Gourley

19 See Attached Approval
20 Roy T J Stegena, WSBA No. 36402
21 Attorney for Defendants
22
23
24
25
26

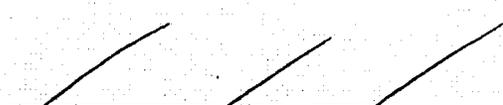
AMENDED FINAL JUDGMENT- 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

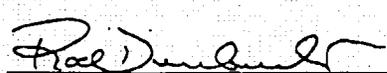
1 fees and costs were necessarily incurred and are reasonable. The Court therefore amends the
2 prior judgment to award additional costs of \$3,359.30 and fees of \$20,543.50. Added to the
3 December 2009 Judgment for fees and costs of \$93,796.62, the amended final judgment amount
4 against the defendants is \$117,699.42.

5 2. This Amended Final Judgment is hereby ordered entered.

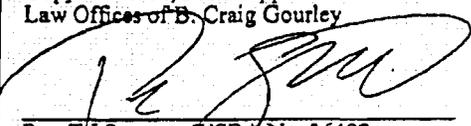
6 SIGNED AND ENTERED this 22nd day of June 2010.

7
8
9 
10 Judge Ronald L. Castleberry

11 Presented by:
12 FOSTER PEPPER PLLC

13 
14 Christopher R. Osborn, WSBA No. 13608
15 Rodrick J. Dembowski WSBA No. 31479
16 Attorneys for Plaintiffs

17 Copy Received, Form Approved:
18 Law Offices of B. Craig Gourley

19 
20 Roy T/J Stegena, WSBA No. 36402
21 Attorney for Defendants

22
23
24
25
26 AMENDED FINAL JUDGMENT- 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700



FILED

2010 JUN 22 AM 9:53

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

THOMAS ESPINOSA and KARI ESPINOSA,
husband and wife,

Plaintiffs,

v.

PROJECT SERVICES CORP., a Washington
corporation, GREGORY GLIEGE,

Defendants.

The Honorable Ronald L. Castleberry

No. 06-2-11794-6

ORDER GRANTING PLAINTIFFS'
MOTION TO AMEND FEBRUARY 22,
2010 ORDER AND AWARDED
ATTORNEYS' FEES AND COSTS

[Proposed]

Plaintiffs' Motion to Amend February 22, 2010 Order came on for hearing before the
above entitled court on this 22 day of June 2010. The Court reviewed the following pleadings:

1. Plaintiffs' Motion to Amend February 22, 2010 Order;
2. Declaration of Thomas Espinosa in Support of Plaintiffs' Motion to Amend
February 22, 2010 Order;
3. Declaration of Patrick See in Support of Plaintiffs' Motion to Amend February
22, 2010 Order;
4. Defendants' Response to Plaintiffs' Motion to Amend February 22, 2010 Order;
5. Declaration of Gregory Gliege;
6. Affidavit of Roy T.J. Stegena in Support of Defendants' Request for Attorney
Fees and Expenses;
7. Declaration of Ken Vanassche;
8. Declaration of Warren Anderson;

ORDER GRANTING PLAINTIFFS' MOTION TO
AMEND FEBRUARY 22, 2010 ORDER AND
AWARDING FEES AND COSTS - [Proposed] - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

COPY

156

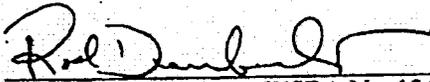
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
SIGNED AND ENTERED this 22 day of June, 2010.



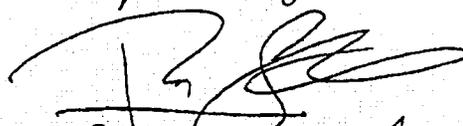
Judge Ronald L. Castleberry

Presented by:

FOSTER PEPPER PLLC



Christopher R. Osborn, WSBA No. 13608
Rodrick J. Dembowski WSBA No. 31479
Nicole M. Guerrero, WSBA No. 40811
Attorneys for Plaintiffs

Agree as to form:


ROY STEGENA

ORDER GRANTING PLAINTIFFS' MOTION TO
AMEND FEBRUARY 22, 2010 ORDER AND
AWARDING FEES AND COSTS [Proposed] - 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

1 9. Reply in Support of Plaintiffs' Motion to Amend February 22, 2010 Order and
2 for Attorneys' Fees and Costs;

3 10. Declaration of Patrick See in Support of Plaintiffs' Reply Brief;

4 11. Declaration of Rod Dembowski in Support of Plaintiffs' Reply Brief.

5 The Court deems itself fully advised, it is therefore:

6 ORDERED, ADJUDGED AND DECREED that:

7 1. Plaintiff's Motion to Amend February 22, 2010 Order is hereby GRANTED;

8 2. The Court finds that the Defendant has substantially modified the condition of
9 the Property by removing a significant number of trees that provided privacy that was important
10 to the Plaintiffs. Accordingly, the Vacant Land Purchase and Sale Agreement between Thomas
11 Espinosa and Kari Espinosa as buyers and Project Services Corp. as seller shall be rescinded;

12 3. The Espinosas are entitled to a full refund of the earnest money paid to Project
13 Services Corp.; and

14 4. The Espinosas are hereby awarded their attorneys' fees and costs since February
15 22, 2010, in the amount of \$23,902.80, plus prior fees and costs totaling \$93,796.62, for a total
16 of \$117,699.42.

17 *[OR]*

18 ~~2. The Vacant Land Purchase and Sale Agreement between Thomas Espinosa and
19 Kari Espinosa as buyers and Project Services Corp. is modified to reduce the price by the value
20 of the trees taken, and the cost to remove additional debris at the property since this Court's
21 final judgment entered on December 28, 2009. The purchase price shall be reduced by \$72,080,
22 and attorneys' fees and costs awarded to the Espinosas in the amount of \$23,902.80, in addition
23 to the prior fee award of \$93,796.62, may also be applied as a further credit against the purchase
24 price, as provided in this Court's February 22, 2010 order, for a total credit of \$189,779.42.~~

25 4. The Espinosas are hereby awarded their attorneys' fees and costs.

26
ORDER GRANTING PLAINTIFFS' MOTION TO
AMEND FEBRUARY 22, 2010 ORDER AND
AWARDING FEES AND COSTS [Proposed] - 2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



CL13960138

FILED

2009 DEC 28 PM 4:15

SUHYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

THOMAS ESPINOSA and KARI ESPINOSA,
husband and wife,

Plaintiffs,

v.

PROJECT SERVICES CORP., a Washington
corporation, GREGORY GLIEGE,

Defendants.

The Honorable Ronald L. Castleberry

No. 06-2-11794-6

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT

JUDGMENT SUMMARY

- 1. Judgment Creditor: Thomas Espinosa and Kari Espinosa
- 2. Attorney for Judgment Creditor: Rodrick J. Dembowski
1111 Third Ave, Suite 3400
Seattle, WA 98101
(206) 447-4400
- 3. Judgment Debtors: Project Services Corp.
Gregory Gliege
- 4. Principal Judgment Amount: NA - See Judgment Below
- 5. Attorneys' Fees: \$86,257.25
- 6. Costs and Expenses: \$ 7,539.37
- 7. TOTAL JUDGMENT AMOUNT: \$93,796.62
- 8. The Total Judgment Amount shall bear interest at 12% per annum.

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT- 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

1
2 **FINAL JUDGMENT**

3 This matter came on regularly for trial on June 30, 2009, recessed for mediation, and
4 then re-commenced between August 26, 2009 and August 27, 2009. The Court bifurcated the
5 trial, hearing testimony in order to determine whether there was a breach and the appropriate
6 remedy, and to resolve the counterclaims, and reserving trial on damages to plaintiffs for phase
7 2. The Court heard closing arguments on August 27, 2009 and the Court issued its oral opinion
8 on September 3, 2009. Having heard the evidence, and the argument of counsel, the Court
9 makes the following findings of fact and conclusions of law:

10 **I. FINDINGS OF FACT**

11 1. Plaintiffs as buyers and Defendant Project Services Corp. as seller entered into a
12 vacant land purchase and sales agreement (the "VLPSA") on March 15, 2006. The subject
13 property, containing approximately 20 acres, is commonly known as 7300 Mero Road, Lot L, in
14 Snohomish, Washington (the "Property").

15 2. The VLPSA required Defendant Project Services Corp. to maintain the Property
16 in the condition it was in when first viewed by the Espinosas until the Espinosas were entitled to
17 possession, and an addendum to the VLPSA required the cutting and removal of certain marked
18 trees.

19 3. The VLPSA was to close on May 3, 2006. The closing date was extended to
20 May 15, 2006 by agreement of the parties because the plaintiff asked for and was given, a ten-
21 day extension from the first closing date.

22 4. On Friday, May 12, 2006, a fire occurred at the Property. Debris brought to the
23 Property by the Defendants was put too close to a smoldering existing fire, and the debris then
24 caught fire and damaged surrounding standing trees. The fire was extinguished using heavy
25 excavating equipment.
26

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT- 2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

1 5. The Defendants improperly altered the Property by bringing materials on to the
2 Property, allowing a fire to burn unmonitored resulting in a forest fire, which, along with
3 grading to extinguish the fire, damaged other surrounding areas approximately one-half an acre
4 in size four days prior to closing.

5 6. In addition to the addendum that provided that Project Services Corp. would
6 remove certain marked maple trees, there was a general understanding that there would be a
7 certain degree of clearing necessary to prepare the property for a home building site and other
8 outbuildings.

9 7. The exact clearing and the clearing area was never specified.

10 8. Neither plaintiff voiced any complaint about the Defendants' clearing activities
11 that occurred prior to the fire.

12 9. All of Defendants' clearing prior to the fire "was within the normal activities that
13 would occur in the sale of this type of property."

14 10. None of the debris that was brought onto the property by the Defendants
15 contained any toxic materials. It did not contain any refuse. It did not contain any building site
16 debris or construction site materials.

17 11. The purpose of bringing this material on was to use it as fuel in the ignition of
18 the fire for the stumpage type of debris that was on the vacant property.

19 12. According to the testimony of Mrs. Espinosa, the plaintiff planned to construct a
20 shop type of outbuilding within the burned area, and specifically within the area from which
21 Defendants removed dirt to extinguish the fire.

22 13. The debris was put too close to a smoldering existing fire and the debris then
23 caught fire and damaged surrounding trees, which was not intended by the Defendants.

24 14. The defendant was called to the scene by a neighbor who saw the fire. The
25 defendant and this neighbor put out the fire by using heavy equipment, covering it with dirt as
26 rapidly as they could.

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT- 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

1 15. The improper alterations made by Defendants to the Property constituted a
2 significant impact to the Property.

3 16. The Espinosas contacted Defendants about their concerns. The VLPSA provided
4 for a ten day extension of closing. Project Services Corp. refused to delay closing to allow the
5 Espinosas time to investigate the nature and extent of the damage to the Property.

6 17. The closing documents required the Espinosas to agree that Seller had
7 maintained the Property in compliance with the VLPSA. This would essentially force the
8 Espinosas to waive any rights to remediation or damages flowing from the breach.

9 18. The Espinosas were within their rights by executing a Reservation of Rights with
10 respect to the damages caused by the fire and grading and entering the document into escrow.

11 19. Defendants' breach of the VLPSA covenant to maintain the condition of the
12 Property as when first seen, was material.

13 20. There was no breach of the VLPSA by the Espinosas.

14 21. At the commencement of this lawsuit, the Espinosas filed a *lis pendens*. The
15 filing of the *lis pendens* was not done with malice, the Espinosas had no knowledge of any other
16 pending sales, and was otherwise proper.

17 22. The Court finds that the property was not diminished in value as a result of the
18 fire, but was diminished in value because of a change in the economy.

19 23. The witnesses' testimony of the estimated number of trees burned in the fire
20 varied widely, from Greg Gliege's estimate of three to four small trees to Ron Simmons'
21 estimate of 20 trees to Thomas Espinosa's estimate, from big to small, upwards of 75 to 100
22 trees in that immediate area.

23 24. The Court finds that the estimate of Ron Simmons, a non-litigant witness, to be
24 credible, and therefore finds that approximately 20 trees were burned in the fire.

25
26
[PROPOSED] FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT- 4

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
Phone (206) 447-4400 Fax (206) 447-9700

1 6. Given the nature of the materials brought onto the site by the Defendants and the
2 intended use of the materials, this in and of itself, would not be a breach of the VLPSA.

3 7. Prior to the fire, the Defendants had not breached the contract.

4 8. Plaintiffs were within their rights in terms of presenting Exhibit No. 4 (the
5 reservation of rights document) and it was not a breach of the contract for them to do so.

6 9. Plaintiffs did not carry their burden of proving entitlement to recover damages
7 for excessive clearing of trees before the fire, nor for their claim of excessive clearing of trees
8 after the fire.

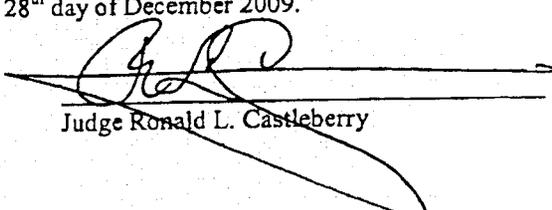
9 10. Accordingly, no damages are awarded to plaintiffs for excessive pre-fire or post-
10 fire clearing of trees and Defendants prevailed on those claims.

11 11. Pursuant to Marassi v. Lau, 71 Wn.App 912, 917 (1993), the Court will
12 apportion fees with respect to the damages claims, and has reduced those fees by \$7,500.00 to
13 account for that issue.

14 12. The Defendants' counterclaims for breach of contract and slander of title are
15 dismissed with prejudice.

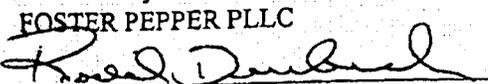
16 13. Final judgment is hereby ordered entered.

17 SIGNED AND ENTERED this 28th day of December 2009.

18 
19 _____
20 Judge Ronald L. Castleberry
21

22 Presented by:

23 FOSTER PEPPER PLLC

24 
25 Christopher R. Osborn, WSBA No. 13608
26 Rodrick J. Dembowski WSBA No. 31479
Attorneys for Plaintiffs

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT- 6

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3199
Phone (206) 447-4400 Fax (206) 447-9700



VACANT LAND PURCHASE AND SALE AGREEMENT
SPECIFIC TERMS

- 1. Date: March 15, 2006 MLS No.: 26009683
- 2. Buyer: Thomas & Kari Espinosa
- 3. Seller: Project Services Corp
- 4. Property: Tax Parcel Nos.: 28070800400200 (Snohomish County)
Street Address: 73000 Mero Rd Lot L #Lot L, Snohomish Washington 98290
Legal Description: see attached
- 5. Purchase Price: \$375,000.00
- 6. Earnest Money: (To be held by Selling Broker Closing Agent)
Personal Check: \$9,000.00
Note: _____
Other (_____): _____
- 7. Default: (check only one) Forfeiture of Earnest Money Seller's Election of Remedies
- 8. Title Insurance Company: Stewart Title & Escrow
- 9. Closing Agent: a qualified closing agent of Buyer's choice _____
- 10. Closing Date: May 3 2006
- 11. Possession Date: on Closing _____ calendar days after Closing _____
- 12. Offer Expiration Date: 03/17/2006
- 13. Counteroffer Expiration Date: _____
- 14. Addenda: 22A(Financing) 22D(Opt. Clauses) 23(Earnest Mon.) 42(Agency Disc.)
34(Addendum) 35F(Feasibility) 25_PP#1
- 15. Agency Disclosure: Selling Licensee represents Buyer Seller both parties neither party
Listing Agent represents Seller both parties
- 16. Subdivision: The Property is subdivided must be subdivided on or before _____
 is not legally required to be subdivided
- 17. Feasibility Contingency Expiration Date: 30 days after mutual acceptance. _____

[Signature] 3-15-06
Buyer's Signature Date
Kari Espinosa 3-15-06
Buyer's Signature Date
3113 219th Ave SE
Buyer's Address
Snohomish, WA, 98290
City, State, Zip
360-568-7337
Phone Fax
thomas@holdown.com
Buyer's E-mail Address
Preview Properties, Inc. 7430
Selling Broker MLS Office No.
Bill Mahoskey
Selling Licensee (Print)
425-239-0149 425-347-7762
Phone Fax

[Signature] PRE 3-15-06
Seller's Signature Date

Seller's Signature Date

Seller's Address
Snohomish Wa
City, State, Zip
425-754-3141
Phone Fax

Seller's E-mail Address
Preview Properties, Inc. 7430
Listing Broker MLS Office No.
Bill Mahoskey
Listing Agent (Print)
425-239-0149 425-347-7762
Phone Fax

Vacant Land Client Detail Report

Listings as of 12/12/06 at 8:05am

| | | | | | |
|---------------------------|-------------------------------|----------|------------------------|------------|-----------|
| Lot: L | 73000 Mara Rd Snohomish 98290 | | Snohomish | | |
| Status | Active | Acres | 19.650 | List Price | 375,000 |
| Listing | 26009683 | Lot Size | 856984 | Sold Price | |
| County | Snohomish | | approx. 1300ft x 660ft | | |
| No Photo Available | | Style | 41-Res - 1 Acre + | Area | 750 |
| Project | | Zoning | Forestry, Residential | Community | Snohomish |
| | | | | Map: | 419 |
| | | | | Grid: | A-3 |
| School Information: | | | Assessment Fee: | | |
| School District | Snohomish | | Tax Year | 2005 | |
| Elementary | | | Annual Taxes | 1745 | |
| Jr. High | | | Sr. Exemption | Yes | |
| High School | | | Assessment | Road | |

Property Details

| | |
|------------------|---|
| Gas | Not Available |
| Electric | Available |
| Sewer | Not Available |
| Water | Gravel Well, Private Well |
| Topography | Level, Sloped |
| Docs Available | CCRs, Well Agreement, Wetland Delineation |
| Restrictions | CC&R, NO Manufactured Homes |
| View | Mountain, Territorial |
| Lot Details | Open Space, Private |
| Improvements | |
| Waterfront | |
| Terms | Cash Out, Conventional, FHA |
| Road Information | Access Easement, Gravel, Privately Maintained |

Waterfront Footage

Septic Information

| | | | |
|--------------------------|-----|---------------------------|--|
| Septic System Installed | | Septic Design Applied For | |
| Septic Apprv No. Bedrms. | | Septic Design Apprv Dt | |
| Soils Feasibility Avail. | Yes | Septic Design Expire Dt | |
| Soil Test Date | | Septic System Type | |

Directions: HW 2 east. Left on Washick. Right on Dubuque. Right on Storm Lake. Left on Mara. Wood River Approx. 1.75 mi. on left.

Features: Evergreens, Lightly Treed, CRV Trails, Partially Cleared, Recreational, Riding Trails

Marketing Remarks: The gravelled driveway sets the tone for this 20 acre site. Winding through overhanging trees opening up to a beautifully cleared homesite! Gorgeous unobstructed views of the Cascades and undeveloped federal lands. Includes an onsite well, and access to miles of natural trails. Enjoy your getaway in a private but very open setting. CC&R's will protect and enhance your investment for the future. What a great place to start a new life!

Presented By: Bill Mahoney / Preview Properties, Inc.
 Lot Sizes And Square Footage Are Estimates.
 Information From Reliable Sources, But Not Guaranteed.

EXHIBIT "A"

The South half of the Northwest quarter of the Southeast quarter of Section 8, Township 28 North, Range 7 East, W.M., records of Snohomish County, Washington;

(ALSO KNOWN AS Parcel L of Declaration of Segregation recorded under Snohomish County Recording No(s). 9011060200).

Situate in the County of Snohomish, State of Washington.

VACANT LAND PURCHASE AND SALE AGREEMENT
GENERAL TERMS
(continued)

- a. **Purchase Price.** Buyer agrees to pay to Seller the Purchase Price, including the Earnest Money, in cash at Closing, unless otherwise specified in this Agreement. Buyer represents that Buyer has sufficient funds to close this sale in accordance with this Agreement and is not relying on any contingent source of funds or gifts, except to the extent otherwise specified in this Agreement. 1-4
- b. **Earnest Money.** Buyer agrees to deliver the Earnest Money within 2 days after mutual acceptance of this Agreement to Selling Licensee who will deposit any check to be held by Selling Broker, or deliver any Earnest Money to be held by Closing Agent, within 3 days of receipt or mutual acceptance, whichever occurs later. If the Earnest Money is held by Selling Broker and is over \$10,000.00 it shall be deposited into an interest bearing trust account in Selling Broker's name provided that Buyer completes an IRS Form W-9. Interest, if any, after deduction of bank charges and fees, will be paid to Buyer. Buyer agrees to reimburse Selling Broker for bank charges and fees in excess of the interest earned, if any. If the Earnest Money held by Selling Broker is over \$10,000.00 Buyer has the option to require Selling Broker to deposit the Earnest Money into the Housing Trust Fund Account, with the interest paid to the State Treasurer, if both Seller and Buyer so agree in writing. If the Buyer does not complete an IRS Form W-9 before Selling Broker must deposit the Earnest Money or the Earnest Money is \$10,000.00 or less, the Earnest Money shall be deposited into the Housing Trust Fund Account. Selling Broker may transfer the Earnest Money to Closing Agent at Closing. If all or part of the Earnest Money is to be refunded to Buyer and any such costs remain unpaid, the Selling Broker or Closing Agent may deduct and pay them therefrom. The parties instruct Closing Agent to: (1) provide written verification of receipt of the Earnest Money and notice of dishonor of any check to the parties and licensees at the addresses and/or fax numbers provided herein; and (2) commence an Interpleader action in the Superior Court for the county in which the Property is located within 30 days of a party's demand for the Earnest Money (and deduct up to \$250.00 of the costs thereof) unless the parties agree otherwise in writing. 5-21
- c. **Condition of Title.** Buyer and Seller authorize Selling Licensee, Listing Agent or Closing Agent to insert, attach or correct the Legal Description of the Property. Unless otherwise specified in this Agreement, title to the Property shall be marketable at Closing. The following shall not cause the title to be unmarketable: rights, reservations, covenants, conditions and restrictions, presently of record and general to the area; easements and encroachments, not materially affecting the value of or unduly interfering with Buyer's reasonable use of the Property; and reserved oil and/or mining rights. Monetary encumbrances not assumed by Buyer shall be paid by Seller on or before Closing. Title shall be conveyed by a Statutory Warranty Deed. If this Agreement is for conveyance of a buyer's interest in a Real Estate Contract, the Statutory Warranty Deed shall include a buyer's assignment of the contract sufficient to convey after acquired title. If the Property has been short plotted, the Short Plat number is in the Legal Description. 22-30
- d. **Title Insurance.** Seller authorizes Buyer's lender or Closing Agent, at Seller's expense, to apply for a standard form owner's policy of title insurance, with homeowner's additional protection and inflation protection endorsements if available at no additional cost, from the Title Insurance Company. The Title Insurance Company is to send a copy of the preliminary commitment to both Listing Agent and Selling Licensee. The preliminary commitment, and the title policy to be issued, shall contain no exceptions other than the General Exclusions and Exceptions in said standard form and Special Exceptions consistent with the Condition of Title herein provided. If title cannot be made so insurable prior to the Closing Date, then as Buyer's sole and exclusive remedy, the Earnest Money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to the Buyer, less any unpaid costs described in this Agreement, and this Agreement shall thereupon be terminated. Buyer shall have no right to specific performance or damages as a consequence of Seller's inability to provide insurable title. 31-40
- e. **Closing.** This sale shall be closed by the Closing Agent on the Closing Date. "Closing" means the date on which all documents are recorded and the sale proceeds are available to Seller. If the Closing Date falls on a Saturday, Sunday, or legal holiday as defined in RCW 1.16.050, the Closing Agent shall close the transaction on the next day that is not a Saturday, Sunday, or legal holiday. 41-44
- f. **Possession.** Buyer shall be entitled to possession at 9:00 p.m. on the Possession Date. Seller agrees to maintain the Property in its present condition, normal wear and tear excepted, until the Buyer is entitled to possession. 45-46
- g. **Closing Costs and Prorations.** Seller and Buyer shall each pay one-half of the escrow fee. Taxes for the current year, rent, interest, and lienable homeowner's association dues shall be prorated as of Closing. Buyer agrees to pay Buyer's loan costs, including credit report, appraisal charge and lender's title insurance, unless provided otherwise in this Agreement. If any payments are delinquent on encumbrances which will remain after Closing, Closing Agent is instructed to pay them at Closing from money due, or to be paid by, Seller. 47-51

Initials: BUYER: KE DATE: 3-15-06 SELLER: Colb DATE: 3-18-06
BUYER: KE DATE: 3-15-06 SELLER: _____ DATE: _____ 53

VACANT LAND PURCHASE AND SALE AGREEMENT
GENERAL TERMS
(continued)

- h. Sale Information.** The Listing Agent or Selling Licensee is authorized to report this Agreement (including price and all terms) to the Multiple Listing Service that published it and to its members, financing institutions, appraisers, and anyone else related to this sale. Buyer and Seller expressly authorize all Closing Agents, appraisers, title insurance companies, and others related to this Sale, to furnish the Listing Agent and/or Selling Licensee, on request, any and all information and copies of documents concerning this sale. 54-58
- i. FIRPTA - Tax Withholding at Closing.** The Closing Agent is instructed to prepare a certification (NWMLS Form 22E or equivalent) that Seller is not a "foreign person" within the meaning of the Foreign Investment in Real Property Tax Act. Seller agrees to sign this certification. If Seller is a foreign person, and this transaction is not otherwise exempt from FIRPTA, Closing Agent is instructed to withhold and pay the required amount to the Internal Revenue Service. 59-62
- j. Notices.** In consideration of the license to use this and NWMLS's companion forms and for the benefit of the Listing Agent and the Selling Licensee as well as the orderly administration of the offer, counteroffer or this agreement, the parties irrevocably agree that unless otherwise specified in this Agreement, any notice required or permitted in, or related to, this Agreement (including revocations of offers or counteroffers) must be in writing. Notices to Seller must be signed by at least one Buyer and shall be deemed given only when the notice is received by Seller, by Listing Agent or at the licensed office of Listing Agent. Notices to Buyer must be signed by at least one Seller and shall be deemed given only when the notice is received by Buyer, by Selling Licensee or at the licensed office of Selling Licensee. Receipt by Selling Licensee of a Real Property Transfer Disclosure Statement, Public Offering Statement and/or Resale Certificate shall be deemed receipt by Buyer. Selling Licensee and Listing Agent have no responsibility to advise of receipt of a notice beyond either phoning the party or causing a copy of the notice to be delivered to the party's address shown on this Agreement. Buyer and Seller must keep Selling Licensee and Listing Agent advised of their whereabouts in order to receive prompt notification of receipt of a notice. 63-74
- k. Computation of Time.** Unless otherwise specified in this Agreement, any period of time stated in this Agreement shall start on the day following the event commencing the period and shall expire at 9:00 p.m. of the last calendar day of the specified period of time. Except for the Possession Date, if the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.18.050, the specified period of time shall expire on the next day that is not a Saturday, Sunday or legal holiday. Any specified period of 5 days or less shall not include Saturdays, Sundays or legal holidays. Time is of the essence of this Agreement. 75-80
- l. Facsimile or E-mail Transmission.** Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original. At the request of either party, or the Closing Agent, the parties will confirm facsimile transmitted signatures by signing an original document. E-mail transmission of any document or notice shall not be effective unless the parties to this Agreement otherwise agree in writing. 81-84
- m. Integration.** This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller. 85-87
- n. Assignment.** Buyer may not assign this Agreement, or Buyer's rights hereunder, without Seller's prior written consent, unless provided otherwise herein. 88-89
- o. Default.** In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then the following provision, as identified in Specific Term No. 7, shall apply: 90-91
- i. Forfeiture of Earnest Money.** That portion of the Earnest Money that does not exceed five percent (5%) of the Purchase Price shall be forfeited to the Seller as the sole and exclusive remedy available to Seller for such failure. 92-93
- ii. Seller's Election of Remedies.** Seller may, at Seller's option, (a) keep the Earnest Money as liquidated damages as the sole and exclusive remedy available to Seller for such failure, (b) bring suit against Buyer for Seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies available at law or equity. 94-97
- p. Attorneys' Fees.** If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses. 98-99
- q. Offer.** Buyer agrees to purchase the Property under the terms and conditions of this Agreement. Seller shall have until 9:00 p.m. on the Offer Expiration Date to accept this offer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is actually received by Buyer, by Selling Licensee or at the licensed office of Selling Licensee. If this offer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer. 100-103

Initials: BUYER: VE DATE: 3-15-06 SELLER: GG DATE: 3-18-06
BUYER: VE DATE: 3-15-06 SELLER: _____ DATE: _____ 105

PP181
Revised 1/24/04

ADDENDUM TO PURCHASE AND SALE AGREEMENT



The following is part of the Purchase and Sale Agreement dated MARCH 15 2006,
Between THOMAS & KARI ESPINOSA ("Buyer")
and PROTECT SERVICES CORP ("Seller")
concerning 7300 MERO RD "LOT 1" WOODRIDGE TERRACE ("The Property")

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

1. NOTICE TO BUYERS AND SELLERS: Preview Properties, Inc., and its agents ("Preview" herein) are not licensed to practice law nor to provide legal or tax advice. Buyer and Seller acknowledge they have not relied on any opinions, statements, or representations made by Preview regarding the tax or legal consequences of this transaction, the specific terms and provisions of any promissory note, deed of trust or contract, the property's condition, location, zoning or development possibilities, surrounding noise, view, other environmental concerns or qualities or any other information or data concerning the property and its systems. Buyer and Seller agree to verify all matters that are material to them to their own satisfaction and to rely solely upon their independent inspection, testing and analysis.

2. AFFILIATED BUSINESS RELATIONSHIP: Preview has ownership interest in Pro Escrow, Inc., and Federal Direct Mortgage, Inc. Preview has not required the use of either of these service providers.

3. RECOMMENDATIONS AND REFERRALS: Preview may assist Buyer or Seller with locating, selecting, or scheduling service providers, such as home inspectors, contractors and lenders. Preview cannot guarantee, ensure or be responsible for the quality or performance of the services or to the financial responsibility of third parties. Other vendors are available, and the price and quality of such services is competitive. Buyers and Sellers agree to exercise their own judgment regarding such service providers, escrow agencies and mortgage brokers.

4. EARNEST MONEY: Buyer and Seller are advised that as parties to this transaction they have the right to deposit the Buyer's earnest money with any third party agency such as a title company, Escrow Company, attorney or any "closing agent" other than Preview. Buyer and Seller are further advised that if a dispute arises over the release, disbursement or forfeiture of earnest money deposited with such third party or entity, then:

- a. The third party depository may bring an interpleader lawsuit in the Superior Court for the State of Washington to determine the rightful owner and in such suit the third party depository may seek and recover out of the earnest money, its filing fees, attorney expenses and other costs ordered by the court which may result in the reduction of the disputed earnest money.
- b. An earnest money deposit held by Preview in its trust account that is then interpleaded into the superior court will not be reduced for filing fees and attorney expenses provided that Preview is released from all further involvement in such interplead lawsuit.
- c. Any costs, including attorney fees incurred by Preview because of an interpleader lawsuit filed by a third party depository will be reimbursed by Seller and Buyer who here agree to be jointly liable for same.

5. DATE OF CLOSING: "Date of closing," means the date upon which all necessary documents are recorded and the proceeds of sale are available for disbursement to Seller. If for any reason this transaction should fail to close within the designated time, Buyer and Seller agree to extend closing date up to 10 days.

6. SELLER DISCLOSURE STATEMENT: The Seller Disclosure Statement (SDS) is information shared by the Seller with Buyer and is not part of this Purchase and Sale Agreement. Buyer and Seller acknowledge that Preview has played no role nor provided any information in the preparation of the SDS.

- has been provided to the buyer
- is to be provided to the Buyer within _____ days. (5 business days if not filled in) of mutual acceptance.
- is not available. Buyer waives right to receive Seller's (SDS)
- is not required (exempt transaction under RCW 64.06).

Whether an SDS is being provided to Buyer, Seller acknowledges Seller's obligation to provide full disclosure of all material facts concerning the property.

7. ENTIRE AGREEMENT: Buyer and Seller agree that this Addendum supersedes, where inconsistent, conflicting or uncertain, any other provision of the Purchase and Sale Agreement and any other addenda to the Agreement. In all other respects, the Agreement and Addenda thereto are ratified. Buyer and Seller acknowledge that Preview is not and shall not be responsible for any representations, promises, understandings or agreements not contained in this Addendum and to which Preview is expressly made a party. Furthermore, that this Addendum and the Agreement are intended to fully incorporate all prior negotiations, discussions, understandings and promises whether between or involving Buyer, Seller, Preview or any other party or parties hereto.

Buyer [Signature] Date 3-15-06 Seller [Signature] Date 3-18-06
Buyer Kari Ann Espinosa Date 3-15-06 Seller _____ Date _____

VACANT LAND PURCHASE AND SALE AGREEMENT
GENERAL TERMS
(continued)

- r. **Counteroffer.** Seller agrees to sell the Property under the terms and conditions of this Agreement. If Seller makes a counteroffer, Buyer shall have until 9:00 p.m. on the Counteroffer Expiration Date to accept that counteroffer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is actually received by Seller, by Listing Agent or at the licensed office of Listing Agent. If the counteroffer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer. If no expiration date is specified for a counteroffer, the counteroffer shall expire at 9:00 p.m. 2 days after the counteroffer is signed by the last party making the counteroffer, unless sooner withdrawn.
- s. **Agency Disclosure.** Selling Broker represents the same party that Selling Licensee represents. Listing Broker represents the same party that the Listing Agent represents. If Selling Licensee and Listing Agent are different salespersons affiliated with the same Broker, then both Buyer and Seller confirm their consent to that Broker representing both parties as a dual agent. If Selling Licensee and Listing Agent are the same salesperson representing both parties then both Buyer and Seller confirm their consent to that salesperson and his/her Broker representing both parties as dual agents. All parties acknowledge receipt of the pamphlet entitled "The Law of Real Estate Agency."
- t. **Commission.** Seller and Buyer agree to pay a commission in accordance with any listing or commission agreement to which they are a party. The Listing Broker's commission shall be apportioned between Listing Broker and Selling Broker as specified in the listing. Seller and Buyer hereby consent to Listing Broker or Selling Broker receiving compensation from more than one party. Seller and Buyer hereby assign to Listing Broker and Selling Broker, as applicable, a portion of their funds in escrow equal to such commission(s) and irrevocably instruct the Closing Agent to disburse the commission(s) directly to the Broker(s). In any action by Listing or Selling Broker to enforce this paragraph, the prevailing party is entitled to court costs and reasonable attorneys' fees.
- u. **Feasibility Contingency.** It is the Buyer's responsibility to verify before the Feasibility Contingency Expiration Date identified in Specific Term No. 17 whether or not the Property can be platted, developed and/or built on (now or in the future) and what it will cost to do this. BUYER SHOULD NOT RELY ON ANY ORAL STATEMENTS concerning this made by the Seller, Listing Agent or Selling Licensee. Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry should include, but not be limited to: building or development moratoriums applicable to or being considered for the Property; any special building requirements, including setbacks, height limits or restrictions on where buildings may be constructed on the Property; whether the Property is affected by a flood zone, wetlands, shorelands or other environmentally sensitive area; road, school, fire and any other growth mitigation or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or a building permit; sufficient water, sewer and utility and any service connection charges; and all other charges that must be paid.
- Buyer and Buyer's agents, representatives, consultants, architects and engineers shall have the right, from time to time during the feasibility contingency, to enter onto the Property and to conduct any tests or studies that Buyer may need to ascertain the condition and suitability of the Property for Buyer's intended purpose. Buyer shall restore the Property and all improvements on the Property to the same condition they were in prior to the inspection. Buyer shall be responsible for all damages resulting from any inspection of the Property performed on Buyer's behalf.
- If the Buyer does not give notice to the contrary on or before the Feasibility Contingency Expiration Date identified in Specific Term No. 17, it shall be conclusively deemed that Buyer is satisfied as to development and/or construction feasibility and cost. If Buyer gives notice, this Agreement shall terminate and the Earnest Money shall be refunded to Buyer, less any unpaid costs.
- v. **Subdivision.** If the Property must be subdivided, Seller represents that there has been preliminary plat approval for the Property and this Agreement is conditioned on the recording of the final plat containing the Property on or before the date specified in Specific Term 18. If the final plat is not recorded by such date, this Agreement shall terminate and the Earnest Money shall be refunded to Buyer.
- w. **Property Condition Disclaimer.** Real estate brokers and salespersons do not guarantee the value, quality or condition of the Property. Some properties may contain building materials, including siding, roofing, ceiling, insulation, electrical, and plumbing materials, that have been the subject of lawsuits and/or governmental inquiry because of possible defects or health hazards. In addition, some properties may have other defects arising after construction, such as drainage, leakage, pest, rot and mold problems. Real estate licensees do not have the expertise to identify or assess defective products, materials, or conditions. Buyer is urged to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the Property.

Initials: BUYER: FE DATE: 3-15-06 SELLER: CC DATE: 3-18-06
BUYER: FE DATE: 3-15-06 SELLER: _____ DATE: _____

FEASIBILITY CONTINGENCY ADDENDUM

The following is part of the Purchase and Sale Agreement dated March 15, 2006
between Thomas & Kari Espinosa ("Buyer")
and Project Services Corp ("Seller")
concerning 73000 Meru Rd Lot L #Lot L, Snohomish, WA 98290 ("the Property")

Feasibility Contingency. Buyer shall verify within 30 days (10 days, if not filled in) after mutual acceptance (the "Feasibility Contingency Expiration Date") the suitability of the Property for Buyer's intended purpose including, but not limited to, whether the Property can be platted, developed and/or built on (now or in the future) and what it will cost to do this. Buyer should not rely on any oral statements concerning feasibility made by the Seller, Listing Agent or Selling Licensee. Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry shall include, but not be limited to: building or development moratoria applicable to or being considered for the Property; any special building requirements, including setbacks, height limits or restrictions on where buildings may be constructed on the Property; whether the Property is affected by a flood zone, wetlands, shorelands or other environmentally sensitive area; road, school, fire and any other growth mitigation or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or a building permit; sufficient water, sewer and utility and any services connection charges; and all other charges that must be paid.

Buyer and Buyer's agents, representatives, consultants, architects and engineers shall have the right, from time to time during the feasibility contingency, to enter onto the Property and to conduct any tests or studies that Buyer may need to ascertain the condition and suitability of the Property for Buyer's intended purpose. Buyer shall restore the Property and all improvements on the Property to the same condition they were in prior to the inspection. Buyer shall be responsible for all damages resulting from any inspection of the Property performed on Buyer's behalf

This Feasibility Contingency SHALL CONCLUSIVELY BE DEEMED SATISFIED (WAIVED) unless Buyer gives notice of disapproval on or before the Feasibility Expiration Date. If Buyer gives a timely notice of disapproval, then this Agreement shall terminate and the Earnest Money shall be refunded to Buyer.

Initials: BUYER: TE DATE: 3-15-06 SELLER: KE DATE: 3-18-06
BUYER: KE DATE: 3-15-06 SELLER: _____ DATE: _____

FINANCING ADDENDUM
PURCHASE & SALE AGREEMENT

The following is part of the Purchase and Sale Agreement dated March 15, 2006
between Thomas & Kari Espinosa ("Buyer")
and Project Services Corp ("Seller")
concerning 73000 Meru Rd Lot L #Lot L, Snohomish, WA 98290 ("the Property")

1. **DOWN PAYMENT/LOAN APPLICATION.** This Agreement is contingent on Buyer obtaining a Conventional VA FHA purchase loan. Buyer agrees to pay 20% down, and to make written application and pay the application fee, if required, for the subject Property within _____ days (5 days if not filled in) after mutual acceptance of this Agreement or if this Agreement is conditioned on the sale of Buyer's property, within _____ days (5 days if not filled in) after Buyer satisfies or waives that contingency ("Satisfaction and Waiver"), for a loan to pay the balance of the purchase price. If Buyer fails to make application for financing within the agreed time, then the financing contingency contained herein shall be deemed waived.
2. **FINANCING TIMELINES/LETTER OF LOAN COMMITMENT.** Unless Buyer has given notice waiving this financing contingency, no later than 21 days (30 days if not filled in) after (a) mutual acceptance of the Agreement or (b) Satisfaction and Waiver, if selected above, Buyer shall provide to Seller a letter of loan commitment from Buyer's lender which states the date of loan application, the current status of Buyer's loan application, and any conditions that remain for loan approval. A letter from the lender generated or dated at or prior to mutual acceptance shall not constitute a letter of loan commitment which complies with this paragraph. NWMLS Form 22AR may be used to provide notice of waiver or to transmit the letter of loan commitment. For purposes of this Addendum, "lender" means the party funding the loan.
3. **REVIEW OF LETTER OF LOAN COMMITMENT/TERMINATION.** Within 3 days after the earlier of Seller's receipt of the letter of loan commitment or the date it was due, Seller may give notice of Seller's election to terminate this Agreement. If, within 3 days after Seller's notice, Buyer does not waive this financing contingency by notice, this Agreement shall terminate. NWMLS Form 22AR may be used for the parties' notices.
4. **UPDATED LETTERS OF LOAN COMMITMENT.** If Seller does not elect to terminate this Agreement as authorized in paragraph 3, Seller may request updated letters of loan commitment every 5 days after the date the previous letter of loan commitment was due. Buyer shall provide any updated letter of loan commitment within 3 days of such notice and Seller shall have the review and termination rights set forth in paragraph 3.
5. **EARNEST MONEY.** If Buyer has not waived this financing contingency, and is unable to obtain financing after a good faith effort then, on Buyer's notice, this Agreement shall terminate and the Earnest Money shall be refunded to Buyer after Buyer delivers to Seller written confirmation from Buyer's lender confirming the date Buyer's loan application for the subject property was made, that Buyer possessed sufficient funds to close and the reasons Buyer's application was denied. If Seller terminates this Agreement, the Earnest Money shall be refunded without need for such confirmation from Buyer's lender.
6. **INSPECTION.** Seller agrees to permit inspections required by Buyer's lender, including but not limited to structural, pest, heating, plumbing, roof, electrical, septic, and well inspections. Seller is not obligated to pay for such inspections except as otherwise agreed.
7. **APPRAISAL LESS THAN SALE PRICE.** If Buyer's lender's appraisal of the value of the Property is less than the Purchase Price, Buyer may, within 3 days after receipt of a copy of lender's appraisal, give notice of Buyer's election to terminate this Agreement unless Seller, within 10 days after receipt of such notice, delivers to Buyer either:
 - (a) (i) If this Agreement is contingent on FHA financing, a reappraisal by the same appraiser, at Seller's expense, in an amount not less than the Purchase Price or (ii) If this Agreement is contingent on non-FHA financing, reappraisal, at Seller's expense, by the same appraiser or another appraiser acceptable to the lending institution in an amount not less than the Purchase Price; or
 - (b) Written consent to reduce the selling price to an amount not more than the amount specified in the appraisal or reappraisal, whichever is higher. (Not applicable if this Agreement is conditioned on FHA financing. FHA does not permit the Buyer to be obligated to buy if the Seller reduces the Purchase Price to the appraisal value. The Buyer, however, has the option to buy at the reduced price.)If such reappraisal or consent to reduction of Purchase Price is not so delivered, this Agreement shall terminate and the Earnest Money shall be refunded to Buyer. To permit the parties the foregoing times for notices, the Closing Date shall be extended accordingly.

Initials: BUYER: [Signature] DATE: 3-15-06 SELLER: [Signature] DATE: 3-18-06
BUYER: [Signature] DATE: 3-15-06 SELLER: _____ DATE: _____

OPTIONAL CLAUSES ADDENDUM TO
PURCHASE & SALE AGREEMENT
(continued)

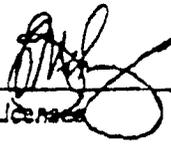
| | |
|---|--|
| 7. <input type="checkbox"/> Insulation - New Construction. If this is new construction, Federal Trade Commission Regulations require the following to be filled in. If insulation has not yet been selected, FTC regulations require Seller to furnish Buyer the information below in writing as soon as available: | 31 32 39 |
| WALL INSULATION: TYPE: _____ THICKNESS: _____ R-VALUE _____ | 40 |
| CEILING INSULATION: TYPE: _____ THICKNESS: _____ R-VALUE _____ | 41 |
| OTHER INSULATION DATA: _____ | 42 |
| 8. <input type="checkbox"/> Selling Broker's Commission. If there is no written listing agreement, Seller agrees to pay Selling Broker a commission of _____ % of sales price or _____ If the Earnest Money is retained as liquidated damages, any costs advanced or committed by Selling Broker shall be reimbursed or paid therefrom, and the balance shall be divided equally between Seller and Selling Broker. | 43 44 45 46 |
| 9. <input type="checkbox"/> Leased Property. Buyer hereby acknowledges that Seller leases the following items of personal property, possession of which shall pass to Buyer on Closing: | 47 48 |
| <input type="checkbox"/> propane tank <input type="checkbox"/> security system <input type="checkbox"/> satellite dish <input type="checkbox"/> other _____ | 49 |
| Buyer shall assume the lease for the items selected, perform all of the obligations of the lease, and hold Seller harmless from and against any further obligation, liability, or claim arising from the lease. | 50 51 |
| 10. <input type="checkbox"/> Other. | 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 |

Initials: BUYER: [Signature] DATE: 3-15-06 SELLER: [Signature] DATE: 3-18-06
BUYER: [Signature] DATE: 3-15-06 SELLER: _____ DATE: _____ 85

RECEIPT FOR EARNEST MONEY

This Receipt is for Earnest Money received as part of the Purchase and Sale Agreement dated March 15, 2006
between Thomas & Kari Espinosa ("Buyer")
and Project Services Corp ("Seller")
concerning 73000 Meru Rd Lot L Lot L, Snohomish, WA 98290 ("the Property")

On 03/15/2006, the undersigned received earnest money from Buyer in the amount
of \$9,000.00 by personal check cashier's check promissory note cash
 other (_____).



 Selling Licensee
 Selling Broker
 Closing Agent
 Other _____

NOTE: If the Earnest Money is cash, you must deposit it or deliver it not later than the first banking day following receipt, regardless of the terms of the Agreement.

THOMAS ESPINOSA
KARI ANN ESPINOSA
PO BOX 1072
WOODINVILLE WA 98072

6173

3/25/08

Project Properties \$1000
NINETEEN HUNDRED Dollars

BOEING EMPLOYEES CREDIT UNION
2000 1st Street, Woodinville, WA 98072
Phone: (206) 765-1234

Kari Espinosa

⑆ 3 2508 1403 ⑆ 357026 1433 ⑆ 06 173

ADDENDUM/AMENDMENT TO PURCHASE AND SALE AGREEMENT

The following is part of the Purchase and Sale Agreement dated March 15, 2006
between Thomas & Kari Espinosa ("Buyer") 2
and Project Services Corp ("Seller") 3
concerning 73000 Mero Rd Lot L #Lot L, Snohomish, WA 98290 (the Property) 4

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS: 5

3.20.06
CEC
SELLER WILL TAKE DOWN ~~THE~~ LARGE MAPLE
TREES ON NE SIDE OF PROPERTY.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged. 41

AGENT (COMPANY) Preview Properties, Inc. 42

BY: *[Signature]* 43

INITIALS: BUYER: *[Signature]* DATE: 3.15.06 SELLER: *[Signature]* DATE: 3/18/06
BUYER: *[Signature]* DATE: 3.15.06 SELLER: _____ DATE: _____ 45

05/13/2006 07:13 FAX 3607445003

002

HOWLAND Form 34
Addendum/Amendment 2, 3 & 5
Rev. 8/04
Page 1 of 1

©Copyright 1918
Northern Multiple Listing Service
ALL RIGHTS RESERVED

ADDENDUM/AMENDMENT TO PURCHASE AND SALE AGREEMENT

The following is part of the Purchase and Sale Agreement dated March 16 2006 1
between Thomas & Keri Fepkase (Buyer) 2
and Forest Services Inc. Greg Guse (Seller) 3
concerning Wood River Humans lot L (The Property) 4

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS: 5

- SELLER Will Have Well Installed Within 90 Days. Winter Quality & Flow To Meet Snohomish County Requirements. 6-14
- SELLER Agrees To Provide A \$20,000 Hold-Back for J.K.A Well Drilling To Facilitate The Installation. 15-25

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged. 26-38

AGENT (COMPANY) Forest Services Inc 39
BY: [Signature] 40-42

INITIALS: BUYER: [Signature] DATE: 5-15-06 SELLER: [Signature] DATE: 5-12-06 43
BUYER: [Signature] DATE: 5-15-06 SELLER: [Signature] DATE: _____ 44

KN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

THOMAS ESPINOSA and KARI
ESPINOSA, husband and wife,

Plaintiffs/Respondents,

v.

PROJECT SERVICES CORP., a Washington
corporation, and Gregory Gliege, a single
man,

Defendants/Appellants.

No. 65664-3-I

PROOF OF SERVICE

2011 MAR 31 AM 11:32

KN

TO: Clerk of the Court,

AND TO: Respondents THOMAS ESPINOSA AND KARI ESPINOSA

I, Tracy Swanlund, declare and state on oath and under penalty of perjury as follows:

1. I am over 21 years of age and otherwise competent to testify to the matters set forth.

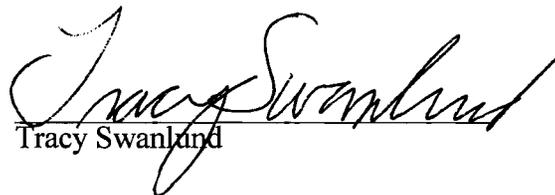
2. On the 30th day of March, 2011, I did cause to be served by messenger service, for delivery by March 31st, pre-paid, the following documents on designated counsel:

Appellants' Amended Brief and Appellants' Reply Brief

To: Philip Talmadge Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630

THE FOREGOING IS TRUE AND BASED ON MY PERSONAL KNOWLEDGE.

DATED: March 30, 2011


Tracy Swanlund