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NO. 65664-3-I

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

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THOMAS ESPINOSA AND KARI ESPINOSA, husband and wife,

Respondents,

v.

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

Appellants.

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BRIEF OF RESPONDENTS

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COURT OF APPEALS, DIVISION I

TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| Table of Authorities .....   | iii-v       |
| A. INTRODUCTION .....  | 1           |
| B. RESPONSE TO PSC’S ASSIGNMENTS OF ERROR .....  | 2           |
| C. COUNTERSTATEMENT OF THE CASE.....   | 3           |
| D. ARGUMENT IN RESPONSE.....   | 14          |
| (1) <u>Standards of Review</u> .....   | 14          |
| (2) <u>The Trial Court Did Not Err By Entering its<br/>        February 2010 Order On Reconsideration</u> .....                          | 15          |
| (a) <u>Attorney Fees</u> .....   | 15          |
| (b) <u>Extension of Closing Date</u> .....   | 19          |
| (3) <u>The Trial Court Did Not Err by Entering<br/>        Judgment Against Gliege Personally</u> .....                                  | 22          |
| (4) <u>The Trial Court Did Not Err in Considering<br/>        the Espinosas’ CR 60 Motion</u> .....                                      | 25          |
| (5) <u>The Trial Court Did Not Err by Entering<br/>        Findings of Fact Nos. 16 and 18 and<br/>        Conclusion of Law 8</u> ..... | 27          |
| (6) <u>PSC Is Not Entitled to Its Attorney Fees and<br/>        Costs on Appeal Even if It Prevails</u> .....                            | 29          |
| (7) <u>The Espinosas Are Entitled to their<br/>        Reasonable Attorney Fees and Costs on Appeal</u> .....                            | 30          |

|    |  |    |
|----|--|----|
| a. | <u>The contract permits an award of attorney fees to the Espinosas as the prevailing party</u> ..... | 30 |
| b. | <u>PSC’s appeal is frivolous</u> .....   | 31 |
| E. | CONCLUSION .....   | 32 |

Appendix

TABLE OF AUTHORITIES

|  | <u>Page</u> |
|--|-------------|
| <u>Table of Cases</u>  |             |
| <u>Washington Cases</u>  |             |
| <i>Am. Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1,<br>802 P.2d 784 (1991).....  | 22          |
| <i>Andersen v. Gold Seal Vineyards, Inc.</i> , 81 Wn.2d 863,<br>505 P.2d 790 (1973).....   | 17, 18      |
| <i>Blair v. Wash. State Univ.</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987) ....   | 17, 19      |
| <i>Burman v. State</i> , 50 Wn. App. 433, 749 P.2d 708 (1988) .....  | 18          |
| <i>Carlstrom v. Hanline</i> , 98 Wn. App. 780, 990 P.2d 986 (2000).....  | 14          |
| <i>Carpenter v. Folkerts</i> , 29 Wn. App. 73, 627 P.2d 559 (1981) .....   | 19-20       |
| <i>Dep't of Ecology v. Yakima Reservation Irrigation Dist.</i> ,<br>121 Wn.2d 257, 850 P.2d 1306 (1993).....                                       | 28          |
| <i>Edmonds v. John L. Scott Real Estate, Inc.</i> , 87 Wn. App. 834,<br>942 P.2d 1072 (1997), <i>review denied</i> ,<br>134 Wn.2d 1027 (1998)..... | 24, 25      |
| <i>Espinosa v. Project Servs. Corp.</i> , 144 Wn. App. 1025,<br>___ P.3d ___ (2008).....   | 4, 28, 31   |
| <i>Estate of Jordan v. Hartford Accident &amp; Indem. Co.</i> ,<br>120 Wn.2d 490, 844 P.2d 403 (1993).....   | 24          |
| <i>Federal Fin. Co. v. Gerard</i> , 90 Wn. App. 169,<br>949 P.2d 412, <i>review denied</i> , 136 Wn.2d 1025 (1998).....                            | 24          |
| <i>Forster v. Pierce County</i> , 99 Wn. App. 168,<br>991 P.2d 687, <i>review denied</i> , 141 Wn.2d 1010 (2000).....                              | 31          |
| <i>Hammack v. Hammack</i> , 114 Wn. App. 805, 60 P.3d 663,<br><i>review denied</i> , 149 Wn.2d 1033 (2003).....                                    | 29          |
| <i>Henry v. Russell</i> , 19 Wn. App. 409, 576 P.2d 908,<br><i>review denied</i> , 90 Wn.2d 1018 (1978).....                                       | 21-22       |
| <i>Herzog Aluminum, Inc. v. General American Window Corp.</i> ,<br>39 Wn. App. 188, 692 P.2d 867 (1984).....                                       | 24          |
| <i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 954 P.2d 290,<br><i>review denied</i> , 90 Wn. App. 533 (1998).....                            | 22          |
| <i>In re Marriage of Healy</i> , 35 Wn. App. 402,<br>667 P.2d 114, <i>review denied</i> , 100 Wn.2d 1023 (1983).....                               | 31          |
| <i>In re Santore</i> , 28 Wn. App. 319, 623 P.2d 702,<br><i>review denied</i> , 95 Wn.2d 1019 (1981).....  | 3           |

|   |        |
|---|--------|
| <i>Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC</i> ,<br>139 Wn. App. 743, 162 P.3d 1153 (2007).....   | 29     |
| <i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn. App. 706,<br>846 P.2d 550 (1993).....   | 3      |
| <i>Kleyer v. Harborview Med. Ctr. of Univ. of Wash.</i> ,<br>76 Wn. App. 542, 887 P.2d 468 (1995).....  | 14     |
| <i>Landmark Dev., Inc. v. City of Roy</i> , 138 Wn.2d 561,<br>980 P.2d 1234 (1999).....   | 14     |
| <i>Lawson v. Boeing Co.</i> , 58 Wn. App. 261, 792 P.2d 545 (1990),<br><i>review denied</i> , 116 Wn.2d 1021 (1991).....                              | 3      |
| <i>Litho Color, Inc. v. Pac. Employers Ins. Co.</i> , 98 Wn. App. 286,<br>991 P.2d 638 (1999).....  | 4      |
| <i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 662 P.2d 385 (1983).....  | 24     |
| <i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91,<br>829 P.2d 746 (1992), <i>cert. denied</i> ,<br>506 U.S. 1079 (1993).....               | 28     |
| <i>Mahoney v. Shinpoch</i> , 107 Wn.2d 679, 732 P.2d 510 (1987) .....   | 31-32  |
| <i>Marassi v. Lau</i> , 71 Wn. App. 912, 859 P.2d 605 (1993).....   | 18     |
| <i>McKelvie v. Hackney</i> , 58 Wn.2d 23, 360 P.2d 746 (1961).....  | 21     |
| <i>Miller Cas. Ins. Co. of Texas v. Briggs</i> , 100 Wn.2d 9,<br>665 P.2d 887 (1983).....   | 31     |
| <i>Nielson v. Spanaway Gen. Med. Clinic</i> , 135 Wn.2d 255,<br>956 P.2d 312 (1998).....  | 28     |
| <i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002) .....  | 3      |
| <i>Rowe v. Floyd</i> , 29 Wn. App. 532, 629 P.2d 925 (1981).....  | 17, 18 |
| <i>Rupert v. Gunter</i> , 31 Wn. App. 27, 640 P.2d 36 (1982).....   | 19     |
| <i>Silverdale Hotel Assocs. v. Lomas &amp; Nettleton Co.</i> ,<br>36 Wn. App. 762, 677 P.2d 773, <i>review denied</i> ,<br>101 Wn.2d 1021 (1984)..... | 18     |
| <i>State v. Santos</i> , 104 Wn.2d 142, 702 P.2d 1179 (1985) .....  | 27     |
| <i>State ex rel. Macri v. City of Bremerton</i> , 8 Wn.2d 93,<br>111 P.2d 612 (1941).....   | 30     |
| <i>Streater v. White</i> , 26 Wn. App. 430, 613 P.2d 187,<br><i>review denied</i> , 94 Wn.2d 1014 (1980).....   | 31     |
| <i>Sunnyside Valley Irrig. Dist. v. Dickie</i> , 149 Wn.2d 873,<br>73 P.3d 369 (2003).....  | 14     |
| <i>Watson v. Maier</i> , 64 Wn. App. 889, 27 P.2d 311,<br><i>review denied</i> , 120 Wn.2d 1015 (1992).....   | 32     |
| <i>Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.</i> , 134 Wn.2d 692,<br>952 P.2d 590 (1998).....   | 29     |

|  |    |
|--|----|
| <i>World Wide Video, Inc. v. City of Tukwila</i> , 117 Wn.2d 382,<br>816 P.2d 18 (1991), <i>cert. denied</i> , 503 U.S. 986,<br>112 S. Ct. 1672, 118 L.Ed.2d 391 (1992)..... | 14 |
| <i>Zastrow v. W.G. Platts, Inc.</i> , 57 Wn.2d 347, 357 P.2d 162 (1960) .....  | 20 |

Statutes

|                    |    |
|--------------------|----|
| RCW 4.84.330 ..... | 17 |
|--------------------|----|

Codes, Rules and Regulations

|                             |        |
|-----------------------------|--------|
| CR 52(b).....               | 8      |
| CR 59 .....                 | 26     |
| CR 59(a).....               | 26     |
| CR 59(b).....               | 26     |
| CR 60(b).....               | 26, 27 |
| CR 60(b)(3).....            | 26     |
| RAP 10.3(a)(4).....         | 2      |
| RAP 10.3(a)(5).....         | 3      |
| RAP 10.3(a)(6).....         | 22     |
| RAP 10.3(g) .....           | 2      |
| RAP 10.4(c) .....           | 4      |
| RAP 10.7.....               | 4      |
| RAP 18.1 .....              | 31, 34 |
| RAP 18.1(a) .....           | 30, 31 |
| RAP 18.1(b).....            | 29, 33 |
| RAP 18.9(a) .....           | 31, 32 |
| WAC 458-61A-211(2)(b) ..... | 23     |

## A. INTRODUCTION

This is the second appeal arising from a contentious and prolonged property dispute between Thomas and Kari Espinosa (collectively “the Espinosas”) and Project Services Corp. and Gregory Gliedge (collectively “PSC”) over the sale by PSC to the Espinosas of 20 acres of vacant land (“the property”) in Snohomish County. The sale is governed by a Vacant Land Purchase and Sale Agreement (“the contract”), which required PSC to maintain the property in the same condition as it was when the Espinosas first viewed it.

When a fire caused by PSC damaged the property shortly before the closing, the Espinosas included a reservation of rights (“reservation”) with their closing documents. The sale did not close because PSC refused to recognize the reservation. The Espinosas sued for specific performance and damages. When the trial court improperly granted summary judgment to PSC and dismissed the Espinosas’ specific performance claim, this Court reversed.<sup>1</sup> Thus began a convoluted journey through two different trial courts on remand that concluded with a three-day bench trial in which the court found that PSC materially breached the contract and that the Espinosas were entitled to specific performance. Numerous post-trial motions by both parties followed. The case culminated in June 2010 with

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<sup>1</sup> A copy of the Court’s opinion is in the Appendix.

an amended final judgment ultimately rescinding the contract and awarding the Espinosas their attorney fees and costs as the prevailing party. The trial court granted rescission only after finding PSC *compounded* its earlier damage to the property by removing additional trees and performing more work.

PSC's inability to refrain from altering the property while its motion for reconsideration was pending and the property thus remained under contract to the Espinosas was a significant breach of the parties' contract; accordingly, the trial court properly rescinded the contract and awarded fees to the Espinosas. The findings of fact are supported by substantial evidence and clearly support the conclusions of law. This Court should affirm and award fees on appeal to the Espinosas.

#### B. RESPONSE TO PSC'S ASSIGNMENTS OF ERROR

PSC's assignments of error provide the Court with improper argument, but fail to address the errors allegedly committed by the trial court and the issues pertaining to those errors as required by RAP 10.3(a)(4).

PSC also fails to comply with RAP 10.3(g), which mandates that an appellant pinpoint in the brief's "assignment of error" section those findings that the trial court allegedly entered erroneously. PSC assigns error specifically to just *two findings of fact* (findings 16 and 18) and

*one conclusion of law* (conclusion 8) from the trial court's December 28, 2009 order. Br. of Appellants at 1-2.<sup>2</sup> It does not challenge the remaining findings and conclusions in that order or any of the findings and conclusions in the trial court's subsequent post-trial orders.<sup>3</sup> Instead, PSC baldly states its disagreement with certain findings without adequately arguing the issue by reference to the record. This is insufficient.

### C. COUNTERSTATEMENT OF THE CASE

The Espinosas must begin their counterstatement by pointing out the obvious: PSC's statement violates RAP 10.3(a)(5).<sup>4</sup> Despite this rule, PSC's statement is hopelessly entangled with inappropriate argument, making it challenging for this Court and the Espinosas to distinguish between them. These arguments are a far cry from the "fair recitation" required by the rules and place an unacceptable burden on the Espinosas and the Court. *See Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990), *review denied*, 116 Wn.2d 1021 (1991).

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<sup>2</sup> PSC's failure to assign error to the bulk of the findings renders them verities on appeal. *See Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). *See also, In re Santore*, 28 Wn. App. 319, 623 P.2d 702, *review denied*, 95 Wn.2d 1019 (1981) (unchallenged findings become the established facts of the case). Similarly, the unchallenged conclusions are the law of the case. *See King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993).

<sup>3</sup> Copies of the trial court's orders are in the Appendix.

<sup>4</sup> RAP 10.3(a)(5) requires a brief to contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument."

PSC also fails to comply with RAP 10.4(c), which requires a party to set out the material portions of a challenged finding of fact in the brief or an appendix. Although PSC specifically assigned error to findings of fact numbers 16 and 18 and conclusion of law 8, it failed to include the challenged findings by copy in the text of its brief or in an appendix to the brief. RAP 10.4(c).<sup>5</sup>

The Court is well-acquainted with the factual background of this case from its decision in *Espinosa v. Project Servs. Corp.*, 144 Wn. App. 1025, \_\_\_ P.3d \_\_\_ (2008) (“*Espinosa I*”). The Espinosas will not repeat those facts here. Instead, they submit the following additional facts arising since that decision for the Court’s convenience:

After this Court reversed the trial court order summarily dismissing the Espinosas’ specific performance claim, the case was remanded to the trial court for further proceedings. *Espinosa I*, Slip. Op. at \*4. On remand, the Espinosas amended their complaint to seek either specific performance or rescission. RP I:526<sup>6</sup>; CP 1137. They also added

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<sup>5</sup> Based on PSC’s blatant disregard for the appellate rules, this Court should strike PSC’s statement of the case and impose sanctions. RAP 10.7; *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999).

<sup>6</sup> “RP I” refers to the consecutively paginated verbatim reports of proceedings for the following hearings: June 30, 2009; July 1, 2009; July 6, 2009; August 26-27, 2009; September 3, 2009; December 14, 2009; February 1, 2010; March 29, 2010; and June 22, 2010. “RP II” will refer to the verbatim report of proceedings for the December 28, 2009 presentation hearing. The number appearing after the volume designation refers to the specific page where the testimony appears.

PSC's president, Gregory Gliege ("Gliege"), as a defendant since PSC had transferred ownership of the property Gliege and Gliege had become a party to the contract. CP 439, 442, 1135, 1137. They believed PSC transferred the property to Gliege to avoid its obligations under the contract. CP 1137. PSC answered and counterclaimed, claiming breach of contract and slander of title. CP 1069-78. The Espinosas later denied the counterclaim and again asked the court, among other things, to rescind the contract or in the alternative to award specific performance if possible. CP 873-75. The case was set for trial.

The Espinosas moved for summary judgment, arguing PSC's admitted failure to maintain the property as the contract required constituted a material breach of the contract. CP 905-14, 1025, 1027-52, 1202-12. They asked the trial court to rescind the contract and refund their earnest money. CP 1212. PSC opposed the motion, arguing among other things that whether PSC had performed its obligation to tender the property in the proper condition was a question of material fact precluding summary judgment and that rescission was not an appropriate remedy. CP 915-18, 950-64. The trial court, the Honorable Bruce Weiss, determined that PSC breached its obligations under the contract to maintain the property in the condition for which the Espinosas had bargained and granted summary judgment. CP 876-77. The court reserved the issues of

the appropriate remedy and the amount of attorney fees to which the Espinosas were entitled for a subsequent hearing or trial. CP 876-77.

The case was reassigned to the Honorable Ronald Castleberry, who bifurcated the issues of liability and damages for trial. RP I:23-24. Following a three-day bench trial on liability that concluded in August 2009,<sup>7</sup> the court issued an oral ruling finding that PSC materially breached the contract and that the Espinosas were within their rights to submit the reservation with respect to the damage that PSC caused to the property by its breach.<sup>8</sup> RP I:519, 528-29. The court concluded the Espinosas were entitled to an award of specific performance and attorney fees and costs as the prevailing party based on PSC's material breach; however, it determined the Espinosas did not carry their burden to prove damages.<sup>9</sup> RP I:529-30; RP II:8-13; CP 547-48. The amount of attorney fees to be awarded was reserved. RP I:543. The court dismissed with prejudice PSC's counterclaim for breach of contract and for slander of title. CP 548. At the conclusion of the hearing, the Espinosas requested and received an extension of the closing date to give them time to arrange

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<sup>7</sup> The trial was recessed briefly for mediation. RP 277-81.

<sup>8</sup> The court issued its oral ruling in September 2009; however, formal findings of fact and conclusions of law were not entered until December 2009. During that interim period, the parties unsuccessfully attempted to settle the case. RP I:546; RP II:16; CP 642.

<sup>9</sup> The parties eventually submitted the damages issue for trial on the record created during the liability phase. RP I:540-42.

the necessary financing. RP I:532. Closing was scheduled for November 30, 2009. RP I:533. All other conditions of the contract remained in effect. RP II:25.

In December 2009, PSC moved in limine to exclude the Espinosas' damages claim and/or any evidence thereof as a sanction for allegedly failing to engage in discovery with respect to that claim.<sup>10</sup> CP 647-56. The Espinosas responded, arguing they had pleaded their remedies in the alternative, that the requested discovery had been answered, and that their damages were established. CP 640-43. In addition to arguing the merits of the motion, the parties also discussed a new closing date. RP I:536-37, 545-46. The trial court denied PSC's motion and refused to change the closing date from the December 31, 2009 date the Espinosas intended to propose in the findings and conclusions yet to be entered. RP I:535-38; CP 626-27.

On December 28, 2009, the trial court heard argument on the Espinosas' damages claim based on the evidence previously presented in the liability phase, RP II:2-13. It also heard arguments on the proposed findings of fact and conclusions of law, RP II:13-22, and the Espinosas' request for attorney fees and costs. RP II:25-40; CP 552-625. The trial court entered extensive findings of fact regarding the fire and PSC's

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<sup>10</sup> The trial court declined to consider PSC's reply briefing. RP I:534; CP 626.

misconduct that supported a finding that PSC materially breached the contract.<sup>11</sup> CP 543-49. The trial court chose a new closing date of December 31, 2009 because there was some confusion about the closing date at the time of the court's oral ruling. RP II:22-24. The balance of the contract remained unchanged. RP II:25. The court also awarded the Espinosas \$93,796.62 in attorney fees and cost after reducing their fees by \$7,500, which the court attributed to the damages portion of the case. CP 543, 547; RP II:43-44.

On January 6, 2010, PSC moved for reconsideration and amendment of the judgment after the Espinosas were unable to close the transaction on December 31, 2009. CP 524-39. PSC also requested attorney fees and costs. CP 466-68. The Espinosas opposed the motion, arguing PSC's claims were post-judgment alleged breaches of the contract and were therefore not properly raised in the underlying action; in essence, reconsideration was not a vehicle for presenting a new claim or theory for recovery. CP 436-60. They also argued that PSC failed to file a motion to amend the findings and conclusions under CR 52(b), making them verities. CP 455. They explained to the court that they had not been able to close the sale because they had been unable to obtain the necessary

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<sup>11</sup> With the exception of findings 16 and 18, PSC does not assign error to the trial court's remaining findings and conclusions; consequently, they are verities on appeal. *Supra*.

financing in light of the current economic crisis and the more restrictive banking regulations flowing therefrom. CP 444; RP I:554-55.

The trial court issued an oral ruling on PSC's motion for reconsideration on February 1, 2010. RP I:556-63. Using its equitable authority, the court modified its earlier order by extending the closing date to April 1, 2010 in an attempt to put the parties back into the same position they had been in. RP I:562-63. All other contract provisions were to remain in effect. RP I:563. The court also modified its original attorney fee award to make it contingent on whether the sale actually closed. RP I:562-63. The court's ruling was reduced to writing on February 22, 2010. CP 429-30.

The Espinosas worked diligently to raise the required funds and were prepared to close the transaction as scheduled. CP 354, 412-18. Shortly before the new closing date, they visited the property and discovered additional damage caused by PSC. CP 354-55. In particular, they discovered that Gliege had removed a significant number of additional trees from the property, widened the driveway, and created more debris piles. CP 355, 358-410. They moved the court for relief from judgment under CR 60 based on this new evidence and asked that the closing be extended an additional 60 days to allow them to investigate. RP I:566-70; CP 355-56, 419-28. They also asked for permission to

submit additional briefing on the new damages so that the court could amend its earlier reconsideration decision if necessary. CP 420.

PSC opposed the motion, arguing it was untimely and that Gliege was merely trying to spruce up the property for sale because he believed the transaction with the Espinosas had expired on December 31, 2009. CP 330-46; RP I:573. It *conceded* that Gliege had removed the trees, but explained that he did so to maintain the property in the condition in which it existed as of the court's February 1, 2010 oral ruling. CP 331. It argued the contract was no longer in effect. CP 331.

During the hearing, the court was clearly troubled by Gliege's additional modifications to the property; in fact, the court accused him of perpetrating a fraud on the court or misrepresenting the condition of the property through his silence at the time of the February hearing. RP I:570-77. The court stated it would not have entered its order on reconsideration had it known that Gliege had significantly altered the property again. RP I:577. The trial court granted the Espinosas' motion and permitted the parties to engage in discovery. RP 578-79; CP 326-27. Closing was extended to June 30, 2010. RP 327. The court also stated that no further cutting or other work was to be done on the property without a court order. RP 578.

Following discovery on the further damage done to the property, the Espinosas moved the trial court for an order amending its February reconsideration order and awarding them additional attorney fees and costs. CP 8-16, 50-60, 175-77, 235-42, 315-25. Based on the gravity of the damage, they asked the court to rescind the contract and return their earnest money or alternatively, to award specific performance and reduce the purchase price. CP 319-22. They submitted the affidavit of a certified arborist to support their claim for damages based on the removal of the additional trees. CP 17-49, 316, 243-314. PSC opposed the motion, but *conceded* that the additional trees had been removed and the alterations had occurred. CP 80-84, 158-74. It presented its own arborist to oppose the damages estimate provided by the Espinosas' expert. CP 88-157.

The trial court heard the motion on June 22, 2010. RP I:582-96. The paramount concern during the hearing was not the amount of damages, but whether PSC compounded its earlier damage to the property by removing additional trees and performing more work. RP I:593. As the court noted, the property was to be maintained in its then-existing condition, not the condition PSC thought it should be in. RP I:593. The court reiterated that had it known what it knew back then in February when the parties' reconsideration arguments were presented to it, it would not have reconsidered its earlier decision; instead, the court would have let

the findings of fact and conclusions of law and the judgment stand. RP I:594. The court would not have put the Espinosas in the position of requiring them to buy the property had it known that the property had been altered again. RP I:594.

The court granted the Espinosas' motion to amend, rescinded the contract, and returned their earnest money based on the additional and significant modifications PSC performed on the property. CP 5-7. The court also reconsidered its conditional fee award and awarded attorney fees and cost to the Espinosas, including those incurred after February. CP 6. The court then entered a final judgment and amended its earlier findings of fact and conclusions of law to be consistent with its final order. This appeal followed.<sup>12</sup> CP 1-4.

On appeal, PSC makes no effort to address in its statement of the case the bulk of the findings of fact and conclusions of law that stand for purposes of this appeal because it declined to assign error to them in its opening brief. Many factual and legal matters are now beyond dispute in this case. For example:

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<sup>12</sup> Consistent with its manipulation of this litigation to avoid liability, PSC sought bankruptcy protection on August 31, 2010. The bankruptcy court lifted the bankruptcy stay on December 3, 2010 to allow PSC to file its opening brief. Plainly, PSC hopes to improve its position in the bankruptcy by depriving the Espinosas of their rights. It has a "free shot" at the Espinosas because it is highly likely any award of appellate fees to the Espinosas and against PSC by this Court necessitated by the present appeal will become but another claim against the bankruptcy's estate.

- PSC breached its obligations under the contract to maintain the property in the condition it was in when first viewed by the Espinosas and that breach was material; CP 877, 544 (findings 2, 4-5, 13-15, 19);
- The Espinosas did not breach the contract; requiring them to sign the closing documents as presented would have forced them to waive any rights to remediation or damages flowing from PSC's breach; CP 546 (findings 17, 20);
- The Espinosas were entitled to an award of specific performance and the closing date was extended to December 31, 2009; CP 547 (conclusion 2);
- The Espinosa are the prevailing party and are entitled to their attorney fees and costs pursuant to the contract in the amount of \$93,796.62 against PSC and Gliege; the trial court entered a final judgment awarding the Espinosas those fees and costs; CP 543, 547 (conclusions 2, 5);
- PSC's counterclaims for breach of contract and slander of title were dismissed with prejudice; CP 548 (conclusion 12);
- PSC substantially modified the condition of the property by removing a significant number of trees; accordingly, the trial court rescinded the contract; CP 6 (finding 2);
- The Espinosas are entitled to a full refund of their earnest money; CP 6 (finding 3);
- The Espinosas are awarded their attorney fees and costs arising since February 2010 in the amount of \$23,902.80; CP 6 (finding 4); and
- The trial court entered a final amended judgment on June 23, 2010 amending its previous findings and conclusions, rescinding the contract, and awarding the

Espinosas additional attorney fees and costs; CP 2-3 (findings 1-2).

D. ARGUMENT IN RESPONSE

(1) Standards of Review

PSC makes only a passing reference to the appropriate standards of review. The underlying case was initially tried to the bench; accordingly, this Court reviews the trial court's findings of fact to determine whether they are supported by substantial evidence<sup>13</sup> and, if so, whether those findings support the trial court's conclusions of law. *See, e.g., Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003); *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). This Court reviews a trial court's conclusions of law de novo. *See Carlstrom v. Hanline*, 98 Wn. App. 780, 784, 990 P.2d 986 (2000).

This Court reviews a trial court's ruling on a motion for reconsideration for a manifest abuse of discretion. *See, e.g., Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995).

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<sup>13</sup> Substantial evidence is evidence that would persuade a reasonable fact finder of the truth of the declared premise. *See, e.g., World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. denied*, 503 U.S. 986, 112 S. Ct. 1672, 118 L.Ed.2d 391 (1992).

(2) The Trial Court Did Not Err By Entering its February 2010 Order On Reconsideration

PSC appears to limit most of its arguments to the trial court's reconsideration order. PSC first argues with little authority that the relief afforded to the Espinosas was limited to specific performance and that their apparent repudiation of that remedy terminated the contract and thus their entitlement to fees. Br. of Appellants at 15-20. In short, PSC contends the trial court erred by failing to vacate its attorney fee award where there was no longer any basis for the award because the Espinosas did not specifically perform. PSC is mistaken.

(a) Attorney Fees

As the trial court's unchallenged findings of fact and conclusions of law make clear, the crux of this dispute was PSC's breach of the contract. The Espinosas successfully brought a breach of contract claim based on PSC's material breach, which it does not now dispute, and were awarded one of the alternative remedies they sought, namely, specific performance of the contract. They also successfully defended against PSC's slander of title and breach of contract claims. CP 547 (unchallenged conclusion 12). As the prevailing party, they were entitled under paragraph p of the contract to an award of attorney fees and costs:

Attorney's Fees. If Buyer or Seller institutes suit against the other concerning this Agreement, the

prevailing party is entitled to reasonable attorney's fees and expenses.

CP 1160.

The trial court considered the issue of the Espinosas' possible future nonperformance during the fee hearing, observing:

There are several intertwining issues, but the court would find that *the Espinosas were the prevailing parties under the lawsuit*. And defendants indicate that, well, they should only be prevailing parties if in fact they carry through with their specific performance. The court rejects that approach. The court may have been sitting as a court of equity in terms of presenting various relief, *i.e.*, rescission or specific performance, but having done so, the court then is required to follow the conditions of the contract. *And the contract in this case indicates that the prevailing party will be entitled to their attorneys' fees. It doesn't say, well you're only entitled to these fees in the event you in fact close this transaction.* It says, you're entitled to your attorneys' fees if you are successful at the lawsuit. The plaintiffs have been successful at the lawsuit.

RP II:40-41 (emphasis added). The court did not abuse its discretion by awarding the Espinosas their attorney fees and costs as the prevailing party after finding that PSC materially breached the contract.

PSC next argues both parties achieved some measure of success and that neither one wholly prevailed. Br. of Appellants at 19. Where the determination of the substantially prevailing party turns on the extent of the relief afforded, PSC claims the trial court erred in awarding fees to the

Espinosas where they rejected the only relief they obtained. *Id.* That the Espinosas did not avail themselves of the relief granted to them does not constitute a breach of the contract and thereby eliminate their fee award. They remain the prevailing party in the underlying lawsuit.

In general, a “prevailing party” is one who receives an affirmative judgment in his or her favor. *See, e.g.*, RCW 4.84.330; *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987); *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 865, 505 P.2d 790 (1973). If neither party wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties. *See, e.g.*, *Rowe v. Floyd*, 29 Wn. App. 532, 535 n.4, 629 P.2d 925 (1981). That the courts determine the prevailing party by looking at the relief granted rather than at the prevailing party’s subsequent actions in availing himself of that relief makes sense; otherwise, the courts would be forced to constantly revisit the issue. Consider, for example, a situation where a party prevails and secures a money judgment. If the prevailing party fails to enforce the judgment because he believes a collection action would not succeed, does he lose his prevailing party status and thus his entitlement to fees? Would the losing party then be permitted to seek attorney fees against the prevailing party simply because the prevailing chose not to avail himself

of the relief awarded? The answer to both questions is plainly “no.” No case has so held. But this is the relief that PSC now seeks from this Court.

Contrary to PSC’s insinuations, prevailing party status is not dependent upon the degree of success at different stages of the lawsuit. *See Andersen*, 81 Wn.2d. at 867. Based upon Washington’s definition of “prevailing party,” a party can be the prevailing party even if the amount ultimately recovered is far less than what was initially requested. *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 774, 677 P.2d 773, *review denied*, 101 Wn.2d 1021 (1984). A party need not even recover its entire claim to be considered the prevailing party. *Burman v. State*, 50 Wn. App. 433, 445, 749 P.2d 708 (1988).

PSC contends neither party prevailed, citing *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605 (1993) and *Rowe*, 29 Wn. App. at 535 n.4. Br. of Appellants at 19-20. Those cases are distinguishable because in each case, both parties received affirmative relief. Unlike *Rowe* and *Marassi*, PSC did not prevail on the underlying contract dispute here. It materially breached the contract and was awarded nothing. CP 546 (unchallenged finding 19). The Espinosas successfully defended against PSC’s counterclaims. CP 547 (unchallenged conclusion 12). The trial court ultimately rendered a final judgment in their favor. It did not render an affirmative judgment in favor of PSC. The Espinosas’ failure to close

the transaction at the end of December 2009 did not change the underlying fact that PSC materially breached the contract by significantly altering the property's condition. They succeeded in recovering their contract rights; accordingly, they prevailed. The trial court did not err in awarding them their attorney fees and costs.

Finally, PSC's challenge to the Espinosas' attorney fee award is limited to their entitlement to those fees rather than to the amount they were awarded. PSC does not challenge the amount of the award, the reasonableness of the fees or hours spent, does not claim the request was excessive, and does not raise any other factual challenge to the award. Consequently, this Court should affirm it.

(b) Extension of Closing Date

PSC next contends the trial court's decision to extend the closing date to April 1, 2010 created and imposed new legal obligations on the parties that they did not intend. Br. of Appellants at 21-27. PSC is mistaken.

As PSC admits, trial courts have broad discretionary power when fashioning an equitable remedy. *See Blair*, 108 Wn.2d at 564; *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). A trial court sitting in equity has broad discretion in such circumstances "to do substantial justice to the parties and put an end to litigation." *Carpenter v. Folkerts*, 29 Wn.

App. 73, 78, 627 P.2d 559 (1981). Once a court of equity has acquired jurisdiction over a controversy, it can and will grant whatever relief the facts warrant, including the granting of legal remedies. *Zastrow v. W.G. Platts, Inc.*, 57 Wn.2d 347, 350, 357 P.2d 162 (1960) (citations omitted). The purpose of this rule is to avoid a needless multiplicity of litigation. *Id.*

Here, the record is replete with evidence that the Espinosas wanted to purchase the property despite the significant damage caused to it by PSC. *See* RP I:558. Yet they were unable to obtain the necessary financing because the real estate market had plummeted and the property's value had diminished significantly. Likewise, there was significant evidence that PSC consistently opposed rescission.

The trial court, sitting in equity, had this undisputed evidence before it during the reconsideration hearing and determined it would be appropriate to condition the award of attorney fees on the sale of the property by allowing the judgment to be satisfied from only the sale proceeds. RP I:562. The court thus conditioned the award of attorney fees to either party on whether the sale actually closed. CP 430. To achieve this equitable result, the court ordered the sale to proceed and extended the closing by 60-days. CP 430; RP I:562-63. All other contract terms remained the same. If the sale did not close, PSC was entitled to its

liquidated damages and the fee award to the Espinosas would be vacated.  
CP 430.

The trial court did not abuse its discretion by granting the parties the relief the facts warranted. PSC itself had specifically asked the court to award fees as an offset against the contract price rather than as a judgment enforceable independently of their performance. CP 562-63. The trial court did as PSC asked.

Finally, PSC attempts to argue that the trial court was somehow “biased” against it and appeared “loath [sic] to see the Espinosas lose.” Br. of Appellants at 27. Along the same lines, it later argues that Gliege was improperly penalized for failing to volunteer at the February hearing that he had again performed significant alterations to the property. *Id.* at 36-40. But PSC offers no objective evidence that Gliege was penalized for his alleged misrepresentations rather than for his improper modifications to the property. Nor does it reveal how Gliege was penalized.<sup>14</sup> Instead PSC makes only simple and self-serving assertions about the court’s alleged bias and Gliege’s purported punishment.<sup>15</sup>

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<sup>14</sup> In fact, the trial court stated that whether the modifications were done fraudulently or were merely an oversight was irrelevant to the ruling. RP I:594.

<sup>15</sup> Gliege’s conduct was a fraud on the trial court. He is hardly in a position to ask the trial court for equitable relief where his hands were “unclean.” *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961) (citation omitted) (stating “equity disqualifies a plaintiff with unclean hands only where the inequitable behavior is in the very transaction concerning which he complains.”); *Henry v. Russell*, 19 Wn. App. 409,

These statements are insufficient to warrant review by this Court under RAP 10.3(a)(6). PSC fails to support its arguments with citations to legal authority. Its analyses do not contain a single case cite, nor reference to any legal authority. *See Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991) (“In the absence of argument and citation to authority, an issue raised on appeal will not be considered.”); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 90 Wn. App. 533 (1998) (“Passing treatment of an issue or lack of reasoned arguments is insufficient to merit judicial consideration.”). The Court should disregard these arguments.

(3) The Trial Court Did Not Err by Entering Judgment Against Gliege Personally

PSC next argues in the alternative that any fees granted in favor of the Espinosas should be imposed against PSC only and not against Gliege personally because he was not a party to the contract. Br. of Appellants at 43. It explains that Gliege was not a party to the contract because PSC transferred the property to him *after* PSC’s material breach but *before* the lawsuit was initiated. *Id.* On the contrary, both PSC and Gliege are parties to the contract. The trial court therefore did not err by imposing attorney fees and costs on PSC and Gliege jointly and severally.

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416, 576 P.2d 908, *review denied*, 90 Wn.2d 1018 (1978) (noting a court of equity may deny relief to a party with unclean hands).

PSC is correct that when the contract was first executed in March 2006, PSC was the only seller. CP 1156. But the contract was amended in May 2006 and Gliege was added as a party. CP 442. Moreover, although Gliege did not officially transfer the property to himself until August 2006, CP 439, he conceded under oath in the required Real Estate Tax Affidavit that the transfer was a “mere change in form of ownership” and that no taxes were due under WAC 458-61A-211(2)(b). CP 440. That regulation exempts a real property transfer from taxation if it consists of “a mere change in form or identity where no change in beneficial ownership has occurred.” WAC 458-61A-211(2)(b). By assuming personal control over the ownership of the property, Gliege became subject to the contract. He should not be permitted to personally gain from the tax exemption by saying to the Department of Revenue that the transfer was a mere change in ownership, but then be permitted to argue something distinctly different to this Court to avoid liability. Gliege is personally liable under the contract and subject to its attorney fee provision.

Alternatively, PSC assigned its rights and obligations under the contract to Gliege thereby making him personally liable. Even assuming PSC was the only party to the contract, the contract did not prohibit PSC from assigning its rights and obligations to a non-party. Generally, a

contract may be freely assigned unless forbidden by statute or rendered ineffective for public policy reason. *Federal Fin. Co. v. Gerard*, 90 Wn. App. 169, 177, 949 P.2d 412, *review denied*, 136 Wn.2d 1025 (1998) (citations omitted). An assignee of a contract “steps into the shoes of the assignor, and has all of the rights of the assignor.” *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993). Here, it is clear that PSC had to have assigned its contractual rights and obligations to Gliege. Otherwise, it would not have been able to perform the contract because it no longer had title vested in its name. But even if Gliege was not affirmatively liable for PSC’s nonperformance, he took subject to the defenses assertable against PSC. *See Lonsdale v. Chesterfield*, 99 Wn.2d 353, 359, 662 P.2d 385 (1983).

In any event, Gliege took title to the property subject to the Espinosas’ contract rights. Their personal claim against him was an “action on the contract” and the relief they sought flowed from and was governed by that contract. An “action on a contract” is broadly construed and encompasses any action in which it is alleged that a person is liable on a contract. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 192, 197, 692 P.2d 867 (1984). An action is “on a contract” if it arises out of the contract and the contract is central to the dispute. *See, e.g., Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn.

App. 834, 837, 942 P.2d 1072 (1997), *review denied*, 134 Wn.2d 1027 (1998).

Here, the Espinosas sued both PSC and Gliege to protect their contractual rights. The duty of PSC and Gliege to maintain the property in its then-existing condition was created under, and defined by, the parties' contract. The Espinosas' breach of contract claim against Gliege was based on his significant alterations to the property while it remained under contract to the Espinosas due to the motion for reconsideration. Therefore, the terms of the contract and the contractual relationship created by the contract were central to the Espinosas' claims, rendering them claims "on a contract." Accordingly, the trial court did not err in imposing attorney fees and costs against Gliege personally. *See Edmonds*, 87 Wn. App. at 837 (upholding fee award for breach of fiduciary duty claim against broker who was not a party to the purchase and sale agreement containing the fee provision because the claims arose from the contract).

(4) The Trial Court Did Not Err in Considering the Espinosas' CR 60 Motion

PSC next argues the trial court erred in granting the Espinosas' CR 60 motion because it was untimely when they failed to establish their newly discovered evidence could not have been discovered within 10 days

of the court's February order as required by CR 59. Br. of Appellants at 28. PSC essentially argues that because CR 59(b) is incorporated into CR 60(b)(3), the 10-day deadline established in CR 59(b) applies to the Espinosas' motion. PSC conflates the time limits in CR 59(b) with those in CR 60(b). The Espinosas' motion was timely.

CR 60(b)(3) permits the court to relieve a party from a final judgment, order, or proceeding 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)." It further provides that the motion "shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken." By contrast, CR 59(a) governs motions for a new trial, reconsideration, and amendment of judgments. It requires that a motion for new trial or for reconsideration be filed not later than 10 days after entry of the judgment or order under review. CR 59(b). The timing of a CR 60(b) motion is not dependent on the 10-day deadline established in CR 59(b).

Here, the trial court granted reconsideration on February 22, 2010 and extended the closing date to April 1, 2010. CP 429-30. Shortly before that new closing date, the Espinosas visited the property and discovered additional damage caused by PSC. CP 354-55. They moved the court for relief from judgment under CR 60(b)(3) based on this new

evidence. RP I:566-70; CP 355-56, 419-28. Pursuant to CR 60(b), their motion was timely where it was brought within a reasonable time after entry of that order and not more than one year after entry of that order. The trial court did not abuse its discretion in considering it. *See State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985).

(5) The Trial Court Did Not Err by Entering Findings of Fact Nos. 16 and 18 and Conclusion of Law 8

PSC's last challenge is to the only two findings (findings 16 and 18) and single conclusion of law (conclusion 8) to which it assigns error.<sup>16</sup> Br. of Appellants at 45-48. But rather than arguing substantial evidence does not support the findings and the findings do not support the conclusion, as it should, PSC resurrects its argument that the Espinosas' insistence on the reservation of rights improperly prevented the transaction from closing because it created new material contract terms. Br. of Appellants at 45, 47-48. According to PSC, a favorable decision from the Court on this point renders all other issues moot. *Id.* at 45. PSC forgets that this Court already considered and rejected those specific arguments when it interpreted both the contract and the reservation in *Espinosa I*. The trial court's challenged findings and conclusion comport with that decision.

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<sup>16</sup> Copies of the trial court's findings of fact and conclusions of law are in the Appendix.

In *Espinosa I*, PSC contended the Espinosas were not entitled to a second 10-day extension of the original closing. *Espinosa I*, Br. of Appellants at 19. It also argued the reservation was an amendment to the contract that it was justified in rejecting. *Espinosa I*, Slip Op. at \*3. Since it did not agree to the reservation, it contended no contract existed. *Id.* This Court disagreed, acknowledging instead that the reservation was meant to ensure that the Espinosas received the land they had contracted to buy in the condition for which they bargained. *Id.* The Court concluded the reservation was an attempt to preserve existing rights under the contract rather than assert new rights or responsibilities for the parties. *Id.* Likewise, the Court concluded the contract provided for a ten day extension. *Id.*

PSC did not seek further review of the Court's determinations; accordingly, they constitute the law of the case. *See Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993) ("law of the case" refers to "the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand."). *See also, Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 290, 850 P.2d 1306 (1993) (elements of res judicata); *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 956 P.2d 312 (1998) (elements of collateral estoppel). The

trial court abided by this Court's decision on remand when it entered the challenged findings and conclusion; consequently, PSC cannot challenge the 10-day extension or the reservation.

(6) PSC Is Not Entitled to Its Attorney Fees and Costs on Appeal Even if It Prevails

Pursuant to RAP 18.1(b), a party seeking attorney fees on appeal must devote a section of the opening brief to a request for such fees. A party who fails to comply with this procedure is not entitled to an award of attorney fees. *See, e.g., Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007).

PSC did not request an award of attorney fees and costs on appeal as RAP 18.1(b) requires. Br. of Appellants at 3, 49. Instead, it makes a bald request for attorney fees on appeal in its conclusion. *Id.* at 49. This is insufficient to support an award of fees on appeal. *See* RAP 18.1(b); *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998) (noting request for attorney fees made in the last line of the conclusion in a brief is insufficient to support an award); *Hammack v. Hammack*, 114 Wn. App. 805, 812, 60 P.3d 663, *review denied*, 149 Wn.2d 1033 (2003) (denying award of attorney fees where the request was stated in the last sentence of the conclusion). PSC is not entitled to an award of fees and costs on appeal even if applicable law or the parties'

contract grants it the right to recover such fees because it failed to request them in its opening brief.

(7) The Espinosas Are Entitled to their Reasonable Attorney Fees and Costs on Appeal

a. The contract permits an award of attorney fees to the Espinosas as the prevailing party

RAP 18.1(a) permits an award of attorney fees and costs on appeal if granted by applicable law. Under the American Rule on attorney fees, the parties bear their own legal expenses unless a statute, contract, or recognized equitable exception to that rule authorizes the recovery of fees. *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941).

Here, paragraph p of the contract provides for the award of attorney fees and costs to the prevailing party:

Attorney's Fees. If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorney's fees and expenses.

CP 1160.

Based on the Court's prior determination that an award of fees under the contract must await entry of a final judgment based upon who ultimately prevails, the Espinosas are entitled to their reasonable attorney

fees and costs as the prevailing party where they ultimately prevail. *Espinosa I*, Slip. Op. at 4.

b. PSC's appeal is frivolous

The Court may award terms and compensatory damages for a frivolous appeal or for a party's failure to comply with the rules of appellate procedure. RAP 18.9(a); RAP 18.1. *See also, In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *review denied*, 100 Wn.2d 1023 (1983) (noting an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees).

The concept of a frivolous appeal has been established for more than 30-years. *Streater v. White*, 26 Wn. App. 430, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). An appeal is frivolous when it presents no debatable issues and is so devoid of merit that there is no possibility of reversal. *Id.* at 434. *See also, Miller Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (adopting the same standard). "A lawsuit is frivolous when it cannot be supported by an[y] rational argument on the law or facts." *Forster v. Pierce County*, 99 Wn. App. 168, 183, 991 P.2d 687, *review denied*, 141 Wn.2d 1010 (2000).

In the instance of a frivolous appeal, an award of attorney fees under RAP 18.9(a) is appropriate. *See Mahoney v. Shinpoch*, 107 Wn.2d

679, 692, 732 P.2d 510 (1987); *Watson v. Maier*, 64 Wn. App. 889, 901, 27 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992).

The issues PSC presents on appeal are so devoid of merit as to be frivolous and advanced without reasonable cause. PSC wastes this Court's time and the parties' time with meritless arguments and arguments already rejected by the Court. It also fails to appropriately challenge the trial court's findings and conclusions, making them verities on appeal. *Supra*. Even resolving all doubt in favor of PSC, it raises no debatable issues upon which reasonable minds could differ.

This Court has the authority to sanction PSC or its counsel by awarding the Espinosas's their reasonable attorney fees and costs on appeal. RAP 18.9(a). They respectfully request this appropriate sanction.

#### E. CONCLUSION

PSC's inability to refrain from altering the property while it was under contract with the Espinosas was a significant breach of the parties' contract. PSC admits as much by failing to properly challenge the trial court's findings of fact and conclusions of law relating to that breach. Even if it did, substantial evidence supports the trial court's findings.

The Espinosas were entitled under the contract to their attorney fees and costs as the prevailing party. That they did not avail themselves of the relief originally granted to them does not eliminate their fee award.

Where they succeeded in recovering their contractual rights and defeated PSC's counterclaims, they prevailed. Both PSC and Gliege were parties to the contract; accordingly, the trial court did not err by imposing attorney fees and costs against them jointly and severally. For these reasons, the Court should affirm the Espinosas' attorney fee award.

The trial court did not abuse its discretion by granting the parties the relief the facts warranted on reconsideration. PSC itself specifically asked the court to award fees as an offset against the contract price rather than as a judgment enforceable independently of their future performance. The trial court did as PSC asked.

The trial court did not err in considering the Espinosas' CR 60(b) motion for relief from judgment. The motion was timely where it was brought within a reasonable time after entry of the trial court's February reconsideration order and not more than one year after entry of that order.

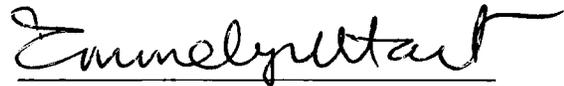
Finally, this Court considered and rejected PSC's argument that the reservation of rights created new material contract terms when it interpreted both the contract and the reservation in *Espinosa I*. The trial merely conformed to this Court's decision on remand by entering the only findings of fact and conclusion of law that PSC now challenges on appeal.

PSC should not recover attorney fees and costs on appeal because it failed to comply with RAP 18.1(b).

The Court should affirm in all respects. Attorney fees and costs on appeal should be awarded to the Espinosas as the prevailing party pursuant to RAP 18.1 and the parties' contract.

DATED this 1<sup>st</sup> day of March, 2011.

Respectfully submitted,



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# APPENDIX

Not Reported in P.3d, 144 Wash.App. 1025, 2008 WL 1934847 (Wash.App. Div. 1)  
(Cite as: 2008 WL 1934847 (Wash.App. Div. 1))

NOTE: UNPUBLISHED OPINION, SEE RCWA  
2.06.040

Court of Appeals of Washington,  
Division 1.  
Thomas ESPINOSA and Kari Espinosa, husband  
and wife, Appellants,  
v.  
PROJECT SERVICES CORP., a Washington cor-  
poration, Respondent.

No. 60326-4-I.  
May 5, 2008.

Appeal from Snohomish Superior Court; Honorable  
Anita L. Farris, J.  
Christopher Robert Osborn, Rodrick Dembowski,  
Foster Pepper PLLC, Seattle, WA, for Appellants.

Roy T.J. Stegena, Law Offices of B. Craig Gourley,  
Snohomish, WA, for Respondent.

APPELWICK, AGID and COX, JJ.

UNPUBLISHED OPINION  
PER CURIAM.

\*1 The Espinosas entered into an agreement to purchase vacant land from Project Services. The contract included a provision requiring Project Services to maintain the property in the same condition as it was at execution of the agreement. The Espinosas became concerned that Project Services had significantly altered the property, and included a reservation of rights in the closing documents. Since Project Services refused to recognize the reservation, the sale did not close. The Espinosas sued for specific performance and damages. The trial court granted summary judgment for Project Services on the specific performance claim. We reverse.

*FACTS*

Thomas and Kari Espinosa entered into a purchase and sale agreement with Project Services to buy undeveloped residential land. As part of the vacant land purchase and sale agreement (VLPSA), Project Services agreed to maintain the property in the same condition as when initially viewed by the Espinosas, except for the removal of some designated maple trees. The original closing date was May 3, 2006. The parties then agreed to extend the closing to Monday, May 15, 2006 conditioned upon prepayment of \$20,000.

On Friday, May 12, 2006, the Espinosas tendered all funds to escrow. The next day, they visited the site and became concerned that the property had not been maintained. According to Mr. Espinosa, the property had been significantly altered.

A massive clearing and grading of the property had been done. There appeared to be damage to a sloped area on the property. Also, a fire had occurred that burned approximately 100 feet x 150 feet of land. The property was still smoldering. It appeared to me that debris had been buried at the property by heavy excavation equipment. My investigation led me to believe that the seller, or someone on seller's behalf, brought debris from another demolition site and burned it on the property I was buying.

The Espinosas contacted the Seller about their concerns. The contract provided for a ten day extension of closing. "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." But, Project Services refused to delay closing to allow the Espinosas time to investigate.

The Espinosas received the signed closing documents. The closing documents included language suggesting that completing the transaction would preclude assertion of claims related to the changed condition of the property. "Buyer and Seller acknowledge and agree that all terms, conditions, and

Not Reported in P.3d, 144 Wash.App. 1025, 2008 WL 1934847 (Wash.App. Div. 1)  
 (Cite as: 2008 WL 1934847 (Wash.App. Div. 1))

contingencies of the Purchase and Sale Agreement and any and all addendums thereto, have been met and are acceptable to their satisfaction.” The Espinosas were concerned that Project Services had not complied with the maintenance requirement of the VLPSA. To protect their interests, the Espinosas had their attorney prepare a reservation of rights. The reservation of rights states, in part, that

\*2 Buyer has discovered certain facts which may result in Seller being in breach of the terms fo 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 regarding 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.

After the Espinosas signed the closing documents and included the reservation of rights, Project Services refused to sign the reservation. The transaction failed to close. The Espinosas brought suit against Project Services requesting specific performance of the VLPSA and alleging breach of contract, fraud, and misrepresentation. Project Ser-

vices filed a motion to dismiss under civil rule (CR) 12(b)(6), with an alternative request for summary judgment. The trial court denied the motion to dismiss but granted partial summary judgment for Project Services on the Espinosas' claims for specific performance and fraud. The trial court allowed the breach of contract and damages action to proceed. The Espinosas moved for reconsideration, which the trial court granted in part by making the dismissal of the fraud claim without prejudice. In that letter, the court reiterated its position on the specific performance claim. “I remain persuaded that plaintiff imposed a condition upon the closing of the transaction that the defendant did not have to accept, and was not unreasonable in not accepting, and plaintiff did not withdraw that condition in time to close.”

When the trial court did not reconsider its dismissal of the claim for specific performance, the Espinosas requested certification under CR 54(b) to bring an immediate appeal of the partial summary judgment. The trial court granted the motion. A court commissioner reviewed the findings and certification and determined the interlocutory appeal could proceed.

#### DISCUSSION

The appellate court reviews summary judgment de novo, engaging in the same inquiry as the trial court. *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 833, 906 P.2d 336 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears this burden of proof. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). A material fact is one upon which the outcome of the litigation depends. *Barrie v. Hosts of Am, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). All facts and inferences are considered in the light most favorable to the nonmov-

Not Reported in P.3d, 144 Wash.App. 1025, 2008 WL 1934847 (Wash.App. Div. 1)  
(Cite as: 2008 WL 1934847 (Wash.App. Div. 1))

ing party. *Ashcraft v. Wallingford*, 17 Wn.App. 853, 859, 565 P.2d 1224 (1977).

\*3 Specific performance is an equitable remedy for breach of contract available if legal remedies are not adequate. *Egbert v. Way*, 15 Wn.App. 76, 79, 546 P.2d 1246 (1976). The court may use its equitable powers to order specific performance of land contracts, because land is unique and difficult to value. *Crafts v. Pitts*, 161 Wn.2d 16, 26, 162 P.3d 382 (2007). A claim for specific performance can only arise from a valid contract. *Id.* at 24. The breaching party cannot enforce specific performance of a contract. *Ferris v. Blumhardt*, 48 Wn.2d 395, 402, 293 P.2d 935 (1956).

The trial court granted partial summary judgment for Project Services and dismissed the Espinosas' claim for specific performance. The Espinosas appeal, claiming they timely performed all requirements of the contract and Project Services breached the VLPSA by altering the property. However, Project Services contends that the reservation of rights constituted an amendment to the VLPSA, which it justifiably declined to accept. Since Project Services did not agree to the reservation of rights, it contends no contract existed. The trial court agreed that the reservation of rights added a new condition to the contract.

The VLPSA states "Until possession is transferred to Buyer, Seller agrees to maintain the Property in the same condition as when initially viewed by Buyer." The provision reflects the seller's promise to the buyer—a contractual obligation to maintain the property. Project Services incurred the obligation to maintain the land when the parties entered into the VLPSA. The agreement entitled the Espinosas to take possession of land in the same condition as at execution of the VLPSA, except for the tree removal.

Whether Project Services had performed its obligation of tendering the property in the proper condition was legitimately in question. Project Services declined to delay closing to resolve the issue

though the contract provided for a ten day extension. The closing documents required the Espinosas to agree that Project Services had maintained the land in compliance with the contract. "Buyer and Seller acknowledge and agree that all terms, conditions, and contingencies of the Purchase and Sale Agreement and any and all addendums thereto, have been met and are acceptable to their satisfaction." If Project Services had failed to maintain the condition of the land, this clause essentially forced the Espinosas to waive that term and any rights to remediation or damages flowing from the breach. This waiver was not part of the original bargain. Therefore, if Project Services did not maintain the property in its original condition, it also breached the VLPSA by requiring this waiver.

If Project Services had improperly altered the land, it had breached the VLPSA. While such a breach would excuse Espinosa's performance, they also retained the right to demand performance under the VLPSA as bargained for. However, if Project Services had not altered the property, it did not breach, and the Espinosas should have acknowledged that the seller satisfied the terms of the VLPSA. Through the reservation of rights the Espinosas sought to ensure that they received the land they had contracted to buy in the condition they bargained for. The reservation was an attempt to preserve existing rights under the contract rather than assert new rights or responsibilities for the parties. However, adding a reservation of rights in the absence of breach by Project Services would itself be a breach by Espinosa, and they would be ineligible for specific performance.

\*4 Whether summary judgment was proper depends upon which party breached the agreement. The answer to the question of who breached requires determination of a question of material fact—whether Project Services failed to maintain the property in the expected condition. The Espinosas did not rely on speculation. They presented testimony that they had observed the remains of a fire and evidence of grading. On summary judgment

Not Reported in P.3d, 144 Wash.App. 1025, 2008 WL 1934847 (Wash.App. Div. 1)  
(Cite as: **2008 WL 1934847 (Wash.App. Div. 1)**)

they are entitled to all inferences from that evidence. The reasonable inferences from their eyewitness account establish a prima facie case that the land had been improperly altered given the contractual maintenance obligation. Because a question of material fact remains, the trial court erroneously entered summary judgment for Project Services on the claim for specific performance.

Though the Espinosas prevail on appeal, the award of fees and costs contemplated by the VLPSA will be determined by the trial court upon entry of final judgment based upon who ultimately prevails.

We reverse and remand for proceedings consistent with this opinion.

Wash.App. Div. 1,2008.  
Espinosa v. Project Services Corp.  
Not Reported in P.3d, 144 Wash.App. 1025, 2008  
WL 1934847 (Wash.App. Div. 1)

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FILED  
2009  
SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

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.

No. 06-2-11794-6

ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT

THIS MATTER came on for hearing before this Court on Plaintiffs Thomas Espinosa and Kari Espinosa's motion for summary judgment. The Court considered the records and files contained herein, including the following:

1. Plaintiffs' Motion for Summary Judgment.
2. Declaration of Thomas Espinosa in Support of Plaintiffs' Motion for Summary Judgment.
3. Declaration of Nicole M. Guerrero in Support of Plaintiffs' Motion for Summary Judgment.
4. Defendants' Response to Plaintiffs' Motion for Summary Judgment.
5. Declaration of Gregory Gliege.
6. Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment.

ORDER GRANTING PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT - 1

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SUNYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH



CL14032745

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 DENYING DEFENDANT'S  
MOTION IN LIMINE TO EXCLUDE  
PLAINTIFFS' CLAIMS FOR  
DAMAGES AND/OR ANY EVIDENCE  
THEREOF AS SANCTIONS FOR  
PLAINTIFFS' FAILURE TO MAKE  
DISCOVERY

[PROPOSED]

Defendant's Motion In Limine to Exclude Plaintiffs' Claims for Damages and/or Any Evidence Thereof as Sanctions for Plaintiffs' Failure to Make Discovery came on for hearing before the above entitled court on this 14<sup>th</sup> day of December, 2009. The Court reviewed the following pleadings:

1. Defendant's Motion In Limine to Exclude Plaintiffs' Claims for Damages and/or Any Evidence Thereof as Sanctions for Plaintiffs' Failure to Make Discovery; and
2. Espinosas' Response to Defendants' Motion In Limine;

The Court deems itself fully advised and after entering its judgment finding that Plaintiffs are entitled argue their claims for damages and submit evidence thereof, it is therefore:

//

ORDER DENYING DEFENDANT'S MOTION IN LIMINE  
TO EXCLUDE PLAINTIFFS' CLAIMS FOR DAMAGES  
AND/OR ANY EVIDENCE THEREOF AS SANCTIONS  
FOR PLAINTIFFS' FAILURE TO MAKE DISCOVERY - 1

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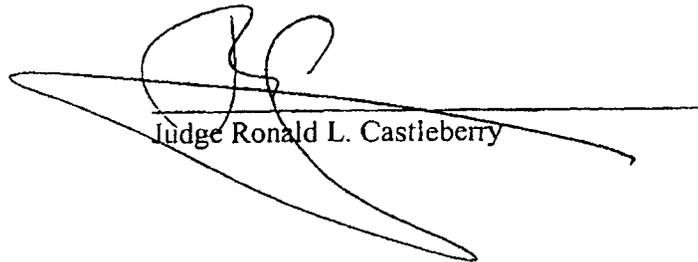
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ORDERED, ADJUDGED AND DECREED that:

Defendant's Motion In Limine to Exclude Plaintiffs' Claims for Damages and/or Any Evidence Thereof as Sanctions for Plaintiffs' Failure to Make Discovery is hereby denied.

SIGNED AND ENTERED this 24 day of December, 2009.



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

Copy received:

LAW OFFICES OF B. CRAIG COURLEY



Roy T. J. Stegena, WSBA No. 36402  
Attorneys for Defendants

ORDER DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' CLAIMS FOR DAMAGES AND/OR ANY EVIDENCE THEREOF AS SANCTIONS FOR PLAINTIFFS' FAILURE TO MAKE DISCOVERY - 2

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**FILED**

DEC 28 2009

SONYA KRASKI  
SNOHOMISH COUNTY CLERK  
EX-OFFICIO CLERK OF COURT

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

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**FINAL JUDGMENT**

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

**I. FINDINGS OF FACT**

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

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

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

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

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

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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

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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.



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.

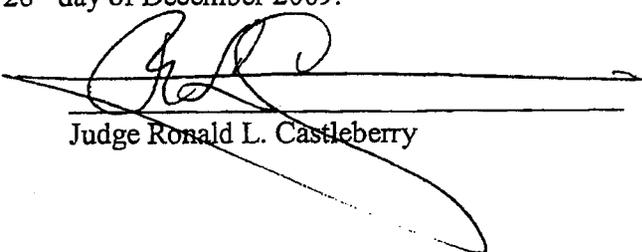
9           10.      Accordingly, no damages are awarded to plaintiffs for excessive pre-fire or post-  
10 fire clearing of trees and Defendants prevailed on those claims.

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.

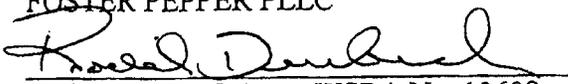
14          12.      The Defendants' counterclaims for breach of contract and slander of title are  
15 dismissed with prejudice.

16          13.      Final judgment is hereby ordered entered.

17          SIGNED AND ENTERED this 28<sup>th</sup> 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

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1 Copy Received:  
2 Law Offices of B. Craig Gourley

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4 Roy T J Stegena, WSBA No. 36402  
5 Attorney for Defendants

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[PROPOSED] FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL JUDGMENT- 7

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY

|   |  |
|---|--|
| <p>THOMAS ESPINOSA AND KARI<br/>ESPINOSA, husband and wife,<br/>Plaintiffs,<br/>v.<br/>PROJECT SERVICES CORP., a Washington<br/>Corporation, and Gregory Gliedge, a single<br/>man,<br/>Defendants.</p> | <p>NO. 06-2-11794-6<br/><br/><b>ORDER ON MOTION FOR<br/>RECONSIDERATION AND<br/>AMENDMENT OF JUDGMENT AND<br/>FOR ATTORNEY FEES AND<br/>EXPENSES</b></p> |
|---|--|

This court, having heard Defendants' Motion for Reconsideration and to Amend Judgment and for attorneys fees and expenses, Plaintiffs' response thereto, and Defendants' reply thereto, and being otherwise fully advised on the merits, now, hereby:

**ORDERS, ADJUDGES AND DECREES**

1. Defendants' Motion for Reconsideration pursuant to CR 59 and CR 60 is granted, as more specifically set forth below.
2. Defendants' Motion for Attorney Fees and Expenses is granted only insofar as specifically set forth below.
3. The Court's decree by which it directed specific performance of the subject contract (VLPSA) is modified so that the parties shall close and otherwise complete the transaction for conveyance of the subject real estate on or before April 1, 2010. Except for the change in the closing date, all other terms of the VLPSA shall remain unchanged and in effect.

ORDER ON MOTION FOR RECONSIDERATION AND TO  
AMEND JUDGMENT AND FOR ATTORNEY FEES 1

*Law Offices of*  
**B. CRAIG GOURLEY**  
*Attorney at Law*  
P.O. Box 1091/1002 Tenth Street  
Snohomish, Washington 98290  
(360) 568-5065; fax (360) 568-8092

1 4. The Judgment of this Court dated December 28, 2009, by which Plaintiffs were awarded  
2 attorney fees and expenses totaling \$93,796.62, is hereby modified as set forth below.

3 5. In the event the transaction successfully closes as directed herein:

4 a. there shall be deducted from or credited against the purchase price the amount  
5 of \$93,796.62, which represents the amount of this Court's judgment dated  
6 December 28, 2009, no other amount shall be due to Plaintiffs; and

7 b. the earnest money currently on deposit with Preview Properties shall be applied  
8 to the purchase price in partial satisfaction thereof.

9 6. In the event the transaction does not successfully close as directed herein, and if such  
10 failure to close is not the result of any fault by Defendants, then:

11 a. the VLPSA shall be deemed terminated;

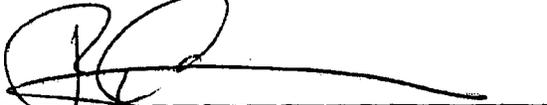
12 b. the earnest money deposit in the amount of \$9,000 held by Preview Properties  
13 shall be released to Defendants;

14 c. Defendants shall be entitled to recover statutory attorney fees and costs pursuant  
15 to RCW 4.84.010; and

16 d. The monetary judgment shall be stricken upon application to this court.

17 7. Except as set forth in connection with the decree of specific performance outlined above,  
18 all other proceedings to execute, enforce or otherwise satisfy the monetary judgment of this  
19 court, including but not limited to the recently filed Writ of Garnishment, are hereby stayed.

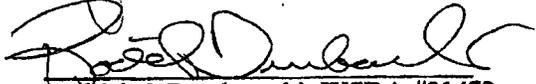
20 Done this 22 day of Feb, 2010.

21  
22   
23 The Honorable Ronald Castleberry  
24 Snohomish County Superior Court of the State of Washington

25 Presented by:

26 *AS TO FORM* *RAU*  
27 Agreed; Copy Received; Notice of  
28 Presentation Waived:

25   
26  
27 Roy T. J. Stegena, WSBA #36402  
28 Attorneys for Defendant

25   
26  
27 Rodrick J. Dembowski, WSBA #31479  
28 Attorneys for Plaintiffs

ORDER ON MOTION FOR RECONSIDERATION AND TO  
AMEND JUDGMENT AND FOR ATTORNEY FEES 2

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(360) 568-5065; fax (360) 568-8092

FILED

MAR 29 2010

ROY T. STEGENA  
SNOHOMISH COUNTY CLERK  
EX-OFFICIO CLERK OF COURT

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 FOR ORDER TO SHORTEN  
TIME AND MOTION FOR CR 60  
RELIEF FROM ORDER

Plaintiffs' Motion for CR 60 Relief from Order came on for hearing before the above entitled court on this 29<sup>th</sup> day of March 2010. The Court reviewed the following pleadings:

1. Plaintiffs' Motion for CR 60 Relief from Order;
2. Declaration of Kari Espinosa In Support of Plaintiffs' Motion for CR 60 Relief from Order;
3. Plaintiffs' Motion for Order to Shorten Time to Hear Emergency Motion;
4. Defendants' Response to Plaintiffs' CR 60 Motion for Relief from Order;
5. Declaration of Gregory Gliege; and
6. Declaration of Roy T.J. Stegena, Counsel for Defendants.

The Court deems itself fully advised, it is therefore:

ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's Motion to Shorten Time to Hear Emergency Motion is hereby granted;
2. Plaintiff's Motion for CR 60 Relief from Order is hereby GRANTED;

ORDER GRANTING PLAINTIFFS' MOTION FOR CR  
60 RELIEF FROM ORDER - 1

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

1 3. The Vacant Land Purchase and Sale Agreement entered into by Thomas  
2 Espinosa and Kari Espinosa as buyers and Project Services Corp. as seller shall be amended to  
3 have a June 30, 2010 closing date;

4 4. The parties shall be permitted to submit additional briefing to provide evidence  
5 to the Court detailing the additional damage to the Property so that the Court may amend its  
6 February 23, 2010 Order if it deems necessary.

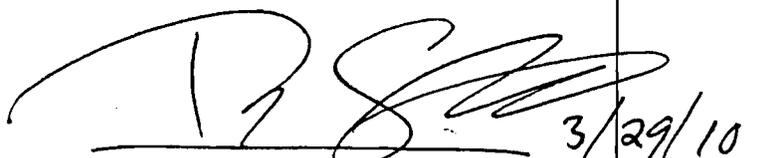
7 5. The Espinosas shall be entitled to discovery to determine <sup>the</sup> ~~the extent of the~~ <sup>re</sup>  
8 ~~alterations to the property and the surrounding circumstances.~~ <sup>disposition and/or sale of any timber alleged to have been taken.</sup> This includes the right to issue  
9 third party subpoenas, and to conduct first party discovery on defendants, which shall be  
10 answered in 15 days, for any discovery that otherwise is due 30 days after service.

11 <sup>6) \*</sup> SIGNED AND ENTERED this 29 day of MARCH, 2010.

12  
13   
14 \_\_\_\_\_  
15 Judge Ronald L. Castleberry

16 Presented by:  
17 FOSTER PEPPER PLLC

18  
19   
20 Christopher R. Osborn, WSBA No. 13608  
21 Rodrick J. Dembowski WSBA No. 31479  
22 Nicole M. Guerrero, WSBA No. 40811  
Attorneys for Plaintiffs

18  
19  3/29/10  
20 ROY STEGEMA  
21 COUNSEL FOR DEFENDANT

23 \* 6) Δ shall be allowed to remove  
24 from the property live equipment,  
25 electrical conduit, & blocks. No further  
26 clearing and/or cutting timber shall  
be permitted without further order of  
court

ORDER GRANTING PLAINTIFFS' MOTION FOR CR  
60 RELIEF FROM ORDER - 2

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Phone (206) 447-4400 Fax (206) 447-9700

FILED  
2010

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

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]**

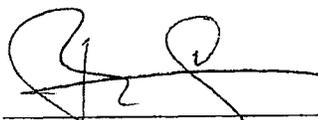
18           ~~2.     The Vacant Land Purchase and Sale Agreement between Thomas Espinosa and  
19 Kari Espinosa as buyers and Project Services Corp. is modified to reduce the price by the value  
20 of the trees taken, and the cost to remove additional debris at the property since this Court's  
21 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 SIGNED AND ENTERED this 22 day of June, 2010.

2  
3 

4 Judge Ronald L. Castleberry

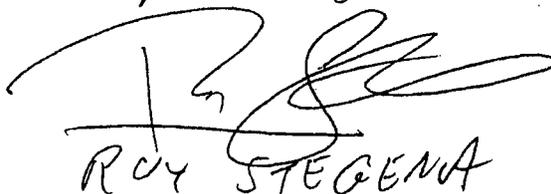
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6 Presented by:

7 FOSTER PEPPER PLLC

8 *Agree as to form:*

9 

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

14   
15 ROY STEGENA

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

FOSTER PEPPER PLLC  
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SEATTLE, WASHINGTON 98101-3299  
Phone (206) 447-4400 Fax (206) 447-9700

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SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

THOMAS ESPINOSA and KARI ESPINOSA,  
husband and wife,

Plaintiffs/Judgment Creditors,

v.

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

Defendants/Judgment Debtors.

The Honorable Ronald L. Castleberry

No. 06-2-11794-6

AMENDED 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, 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

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

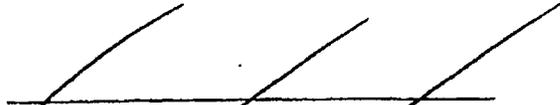
AMENDED FINAL JUDGMENT- 2

**FOSTER PEPPER PLLC**  
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SEATTLE, WASHINGTON 98101-3299  
Phone (206) 447-4400 Fax (206) 447-9700

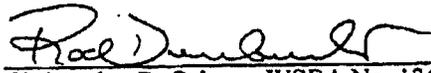
1 fees and costs were necessarily incurred and are reasonable. The Court therefore amends the  
2 prior judgment to award additional costs of \$3,359.30 and fees of \$20,543.50. Added to the  
3 December 2009 Judgment for fees and costs of \$93,796.62, the amended final judgment amount  
4 against the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

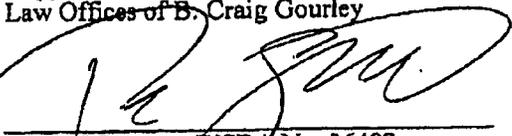
5 2. This Amended Final Judgment is hereby ordered entered.

6 SIGNED AND ENTERED this 22<sup>nd</sup> 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  
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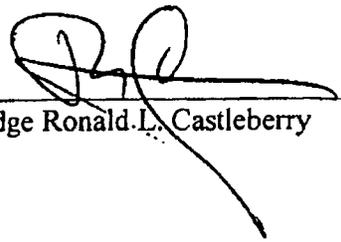
AMENDED FINAL JUDGMENT- 3

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Phone (206) 447-4400 Fax (206) 447-9700

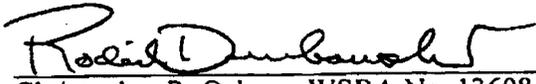
1 fees and costs were necessarily incurred and are reasonable. The Court therefore amends the  
2 prior judgment to award additional costs of \$3,359.30 and fees of \$20,543.50. Added to the  
3 December 2009 Judgment for fees and costs of \$93,796.62, the amended final judgment amount  
4 against the 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 \_\_\_\_\_  
15 Christopher R. Osborn, WSBA No. 13608  
16 Rodrick J. Dembowski WSBA No. 31479  
17 Attorneys for Plaintiffs

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

20 See Attached Approval  
21 \_\_\_\_\_  
22 Roy T J Stegena, WSBA No. 36402  
23 Attorney for Defendants

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

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Brief of Respondents in Court of Appeals Cause No. 65664-3-I to the following:

B. Craig Gourley  
Law Office of B. Craig Gourley  
PO Box 1091  
Snohomish, WA 98291

Original filed with:

Court of Appeals, Division I  
Clerk's Office  
600 University Street  
Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 1, 2011, at Tukwila, Washington.



---

Christine Jones  
Talmadge/Fitzpatrick