

71036-2

71036-2

No. 71036-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LESLIE BLAKEY SPENCER, an individual, and TAMMY S.
BLAKEY, an individual,

Appellants,

vs.

NANCY BLAKEY, as Personal Representative of The Estate of
Gregory B. Blakey, and GLENDA BLAKEY, an individual,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY YU

BRIEF OF APPELLANTS

SMITH GOODFRIEND, P.S.

MILLS MEYERS SWARTLING

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

By: Bruce A. Winchell
WSBA No. 14582

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

1000 Second Ave., Suite 3000
Seattle, WA 98104
(206) 382-1000

Attorneys for Appellants

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR - 2 PM 1:23

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR 4

IV. STATEMENT OF THE CASE 6

A. Factual Background..... 6

1. Bruce Blakey gifted equal shares in industrial property to his four children Leslie, Tammy, Greg, and Glenda. Each sibling signed a Co-Tenancy Agreement governing their ownership of the property and appointing Greg as Managing Tenant and attorney-in-fact for the other cotenants. 6

2. Greg’s crab and fish processing company, Snopac, occupied the property from 1987 to 2008 without written leases or any other protections ensuring that Snopac would maintain the building..... 9

3. Greg sued his sisters in order to redeem their minority interests in Snopac. During that suit, the court found that Greg lied under oath about Snopac’s value.....10

4. Without any advance notice Greg caused Snopac to vacate the property in 2008. Without Leslie’s or Tammy’s approval, Greg then had Snopac reenter the property a year later despite his earlier assertions that it was too dangerous to occupy.12

B.	Procedural History	16
1.	Leslie and Tammy brought suit against Greg and Glenda based on their breaches of the Co-Tenancy Agreement.	16
2.	The trial court approved the sale of the property to Manson based on its finding that Leslie and Tammy could not match Manson’s \$1.7 million dollar indemnity for possible environmental cleanup costs.	17
3.	After finding that “[t]he record is filled with disputed facts” the trial court reversed itself and dismissed Leslie and Tammy’s damages claims on summary judgment.....	18
V.	ARGUMENT	20
A.	The trial court properly found “disputed facts” that prevented summary judgment. Its subsequent decision to grant summary judgment must be reversed.	20
1.	Greg and Glenda breached the Co-Tenancy Agreement in bad faith by refusing to lease the property causing Leslie and Tammy to lose 53 months in rent.....	23
a.	Greg and Glenda refused to allow Leslie and Tammy to lease the property so that Snopac could secretly use the property without making the repairs or providing the indemnity Greg and Glenda insisted were necessary to lease the property.	23

b.	Greg’s and Glenda’s refusal to allow Leslie and Tammy to lease the property denied them fair market rent for 53 months.	28
2.	After vowing to “destroy” Leslie financially, Greg in bad faith caused Snopac to vacate the property in order to undermine Leslie’s and Tammy’s ability to defend his Snopac lawsuit.....	32
3.	Greg violated his fiduciary duties as Managing Tenant and was grossly negligent in failing to require Snopac to execute commercially reasonable leases.....	34
4.	Greg and Glenda’s ill-advised “fire sale” of the property to Manson was in bad faith and denied Leslie and Tammy the opportunity to sell the property for its actual market value.	38
B.	The trial court erred by denying Leslie and Tammy their rights of first refusal.	41
VI.	CONCLUSION	45

TABLE OF AUTHORITIES

STATE CASES

<i>C 1031 Properties, Inc. v. First Am. Title Ins. Co.</i> , 175 Wn. App. 27, 301 P.3d 500 (2013)	29
<i>Cherberg v. Peoples Nat. Bank of Washington</i> , 88 Wn.2d 595, 564 P.2d 1137 (1977).....	24-26
<i>Crafts v. Pitts</i> , 161 Wn.2d 16, 162 P.3d 382 (2007)	42
<i>DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.</i> , ___ Wn. App. ___, 317 P.3d 543 (2014)	28
<i>Dullanty v. Comstock Dev. Corp.</i> , 25 Wn. App. 168, 605 P.2d 802 (1980)	42
<i>Eagle Point Condo. Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000).....	29
<i>Frank Coluccio Const. Co., Inc. v. King Cnty.</i> , 136 Wn. App. 751, 150 P.3d 1147 (2007).....	23-24
<i>Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.</i> , 160 Wn. App. 728, 253 P.3d 101 (2011).....	29
<i>Hetrick v. Smith</i> , 67 Wash. 664, 122 P. 363 (1912)	35
<i>In re Estate of Mumby</i> , 97 Wn. App. 385, 982 P.2d 1219 (1999).....	24, 32
<i>In re Estate of Palmer</i> , 145 Wn. App. 249, 187 P.3d 758 (2008)	34
<i>In re Washington Builders Ben. Trust</i> , 173 Wn. App. 34, 293 P.3d 1206, rev. denied, 177 Wn.2d 1018 (2013)	35

<i>Lewis River Golf, Inc. v. O.M. Scott & Sons</i> , 120 Wn.2d 712, 845 P.2d 987 (1993)	29
<i>Lokan & Associates, Inc. v. Am. Beef Processing, LLC</i> , 177 Wn. App. 490, 311 P.3d 1285 (2013)	20-21
<i>Nist v. Tudor</i> , 67 Wn.2d 322, 407 P.2d 798 (1965).....	37
<i>Obert v. Enuvtl. Research & Dev. Corp.</i> , 112 Wn.2d 323, 771 P.2d 340 (1989).....	35
<i>Spradlin Rock Products, Inc. v. Public Utility District No. 1 of Grays Harbor County</i> , 164 Wn. App. 641, 266 P.3d 229 (2011)	31
<i>United Sav. & Loan Bank v. Pallis</i> , 107 Wn. App. 398, 27 P.3d 629 (2001)	44
<i>Valentine v. Dep't of Licensing</i> , 77 Wn. App. 838, 894 P.2d 1352, <i>rev. denied</i> , 127 Wn.2d 1020 (1995).....	35
<i>Voorde Poorte v. Evans</i> , 66 Wn. App. 358, 832 P.2d 105 (1992).....	30
<i>Wilkins v. Lasater</i> , 46 Wn. App. 766, 733 P.2d 221 (1987)	35
<i>Wm. Dickson Co. v. Pierce Cnty.</i> , 128 Wn. App. 488, 116 P.3d 409 (2005).....	23

STATUTES

Comprehensive Environmental Responsibility Compensation and Liability Act of 1980 (CERCLA), § 107(a) (42 U.S.C. 9607(a))	39
RCW 70.105D.040	39
RCW ch. 23B.13	11

RULES AND REGULATIONS

CR 56.....21
RAP 12.8..... 44

OTHER AUTHORITIES

Restatement (Second) of Contracts § 360
(1981)..... 42
WPI 10.07..... 37

I. INTRODUCTION

Pursuant to a “Co-Tenancy Agreement,” appellants Leslie Blakey Spencer and Tammy Blakey shared equal interests in industrial property with their siblings, respondents Greg Blakey and Glenda Blakey. The Co-Tenancy Agreement appointed Greg “Managing Tenant” and attorney-in-fact for the other cotenants. For 21 years, Greg’s corporation, Snopac, was the property’s only tenant. Greg did not require Snopac to execute written leases.

In 2008, Greg caused Snopac to vacate the property without advance notice. For the next four years, Greg and Glenda refused to allow Leslie and Tammy to lease the property unless they funded \$200,000 in repairs Greg and Glenda alleged were necessary to make the property safe or, alternatively, indemnified Greg and Glenda from all liability arising from a lease. In fact, Greg and Glenda refused to lease the property so that Snopac could secretly reoccupy it without paying rent, without performing any repairs, and without obtaining the consent of Leslie or Tammy, as required by the Co-Tenancy Agreement.

Leslie and Tammy sued Greg and Glenda for breaching the Co-Tenancy Agreement. Greg and Glenda eventually forced a “fire sale” of the property, and the trial court refused to allow Leslie and

Tammy to exercise their rights of first refusal granted by the Co-Tenancy agreement because Leslie and Tammy could not match the primary consideration for the sale – an “indemnification” for environmental remediation costs that the cotenants were not liable for as a matter of law because they did not pollute the property.

The trial court then refused to grant Greg and Glenda summary judgment on Leslie and Tammy’s claims for breach of the Co-Tenancy Agreement recognizing that “[t]he record is filled with disputed facts regarding each of the parties’ actions.” But the trial court reversed itself and dismissed Leslie and Tammy’s claims in a subsequent summary judgment order, concluding that they “have been unable to establish with a degree of certainty the amount of damages . . . as a result of any alleged breach.”

The trial court erred by denying specific performance of Leslie’s and Tammy’s rights of first refusal because they could not “match” an illusory indemnity for environmental remediation. The trial court further erred by ignoring numerous genuine issues of material fact regarding Greg’s and Glenda’s breaches of the Co-Tenancy Agreement. This court should remand with instructions to allow Leslie and Tammy to exercise their rights of first refusal and for a trial on their breach claims.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its February 24, 2012, Order Granting Defendants' Motion For Summary Judgment And Denying Plaintiffs' Motion For Summary Judgment. (CP 504-06)

2. The trial court erred in entering its February 28, 2012, Order Regarding Sale To Manson. (CP 507-09)

3. The trial court erred in entering its June 8, 2012, Order Denying Plaintiffs' Motion To Return On The Order To Show Cause And Vacate/Set Aside Summary Judgment Based On New Evidence And Misinterpretation. (CP 815-16)

4. The trial court erred in entering its June 8, 2012, Order Granting Defendants' Motion To Authorize Greg And Glenda Blakey To Execute Closing Documents. (CP 817-19)

5. The trial court erred in entering its July 3, 2012, Order On Reconsideration. (CP 933)

6. The trial court erred in "granting partial summary judgment on Plaintiffs' damages related to selling the property to Manson for 'below market value,'" and otherwise limiting Leslie and Tammy's claims as set forth in its January 3, 2013, Order Granting Partial Summary Judgment To Dismiss Remaining Damage Claims. (CP 1520-23)

7. The trial court erred in entering its September 13, 2013, Order Granting Defendant Greg Blakey's Motion For Summary Judgment Dismissing Claims Asserted In Plaintiffs' First Amended Complaint. (CP 2018-21)

8. The trial court erred in entering its September 13, 2013, Order Granting Defendant Glenda Blakey's Motion For Summary Judgment. (CP 2022-24)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1a. Whether Greg and Glenda acted in bad faith and breached the Co-Tenancy Agreement by refusing to allow Leslie and Tammy to lease the property so that Snopac could secretly use the property without Leslie and Tammy's approval and without making the repairs or providing the indemnity Greg and Glenda insisted were necessary to lease the property?

1b. Whether Greg's and Glenda's refusal to lease the property caused Leslie and Tammy damages by denying them the opportunity to obtain market rent for the property for over four years?

2. Whether Greg, after vowing to destroy Leslie financially, in bad faith caused Snopac to vacate the building without notice in an attempt to cut off cash flow Leslie and Tammy were using to pay

legal fees in a separate suit Greg brought against his sisters to redeem their minority interests in Snopac?

3. Whether Greg breached his contractual and fiduciary duties as Managing Tenant of the property and attorney-in-fact for the other cotenants by failing to require that Snopac execute commercially reasonable written leases that required Snopac to insure and maintain the building, remain in the building for a specific term of years, provide adequate notice of termination, and leave the property in good condition at the end of the lease?

4. Whether Greg and Glenda acted in bad faith or gross negligence by pushing through a sale of the property for a value drastically below its market value based on a patently erroneous assessment of the parties' liability for environmental remediation?

5. Whether Leslie and Tammy were required to "match" an indemnity for environmental remediation costs on the property — based on an erroneous environmental report that greatly overstated the extent of remediation costs — that was ultimately valueless because the cotenants did not pollute the property and thus could not, as a matter of law, be liable for environmental remediation costs after they sold the property?

IV. STATEMENT OF THE CASE

The following statement of the case is based on the summary judgment record before the trial court and recites the facts in the light most favorable to Leslie and Tammy, the nonmoving parties:

A. Factual Background

1. **Bruce Blakey gifted equal shares in industrial property to his four children Leslie, Tammy, Greg, and Glenda. Each sibling signed a Co-Tenancy Agreement governing their ownership of the property and appointing Greg as Managing Tenant and attorney-in-fact for the other cotenants.**

In 1993, Bruce Blakey granted equal shares in industrial property to his four children, Leslie, Tammy, Greg, and Glenda. (CP 81, 602, 1331-32.) The property, located at 5053 East Marginal Way South in Seattle (CP 80, 1331), contains a 24,000 square foot warehouse, which has 2,600 square feet of office space, and a large gravel parking lot. (CP 385, 1321)

On January 15, 1993, each sibling signed a “Co-Tenancy Agreement” that “govern[ed] the relationship of the Tenants among themselves as to any and all interests which they now have or may hereafter acquire in and to the Property.” (CP 80) The purpose of the tenancy was “to acquire, own, hold for investment, and sell” the property. (CP 81) Under the Co-Tenancy Agreement each tenant

would share the profits and expenses of the property, including its maintenance, according to their percentage interest in the property. (CP 81-82) It also provided that “No Tenant shall permit waste, damage or injury to the Property.” (CP 102)

Greg was appointed as “Managing Tenant,” and could be replaced only by a vote of tenants owning more than fifty percent of the property and “deliver[y] of notice thereof to all of the other Tenants.” (CP 83) As Managing Tenant, Greg served as attorney-in-fact for the other tenants and had “complete, absolute and exclusive power and authority to manage the business and affairs of the Tenancy,” although he could not sell or lease the property by himself. (CP 83-84) No written notice replacing Greg as Managing Tenant was ever executed. (CP 1328, 1332, 1876-77)

Lease of the property required “approval by Tenants owning more than fifty percent” of the property. (CP 102) Section 13 of the Co-Tenancy Agreement provided a special mechanism for selling the property. (CP 97-100) If any tenant should “receive a bona fide offer (the ‘Purchase Offer’) in writing to purchase the Property, such Tenant shall promptly deliver a copy of the Purchase Offer . . . to each of the other Tenants.” (CP 97) “If Tenants owning more than fifty percent (50%) of the total Undivided Interests fail to

reject the Purchase Offer . . . the Purchase Offer shall be deemed accepted by the Tenancy.” (CP 98) Thus, unless rejected by at least three of the four cotenants, any offer would be deemed accepted.

The Co-Tenancy Agreement also gave the cotenants who dissented from a decision to sell a right of first refusal. (CP 98-100) Dissenting cotenants could purchase the accepting cotenants’ rights in the property by making a payment “equivalent in amount and method of payment to the amount and method which would have been received by such Acceptor . . . had the Purchase Offer been accepted.” (CP 100) However, “if part or all of the consideration to be paid for the Property as stated in the Purchase Offer is other than money, the Rejectors shall have the right to substitute money equivalent to the fair market value of such property in the calculation of the purchase price to be paid.” (CP 100)

The Co-Tenancy Agreement also stated that “[n]o tenant shall be liable under this Agreement to any other Tenant for the performance of any act or the failure to act so long as such Venturer was not guilty of fraud, gross negligence or bad faith in such performance or failure.” (CP 101) Section 12 of the Co-Tenancy Agreement authorized cotenants to purchase the interest of another cotenant “[i]n the event of any default or breach” by that cotenant.

(CP 94-97) The rights granted by the Co-Tenancy Agreement were “not a waiver of nor in lieu of any other rights” and authorized a cotenant to “take any other action or resort to any other remedy to which he may be entitled at law or equity.” (CP 96)

2. Greg’s crab and fish processing company, Snopac, occupied the property from 1987 to 2008 without written leases or any other protections ensuring that Snopac would maintain the building.

Bruce Blakey also gifted seventy percent of his crab and fish processing company, Snopac, to Greg. (CP 1291, 1328, 1331-32) He gave the remaining 30% in equal shares to Glenda, Leslie, and Tammy. (CP 1291, 1328, 1331-32) Greg served as Snopac’s president beginning in 1989 and he sold the company in 2012 for over \$20 million. (CP 160, 1328, 1336)

Snopac became the property’s tenant in 1987 and continued as the property’s only tenant through 2008. (CP 1328, 1331-32) In 2008, Snopac paid \$12,500 in monthly rent based on a comprehensive evaluation of the property and other nearby properties by Snopac’s CFO Stewart Terry, in which he concluded that the property “work[s] pretty well for us” and that based on current market conditions the market rate for the property’s office space was between 75 to 85 cents per square foot and between 45 to

55 cents per square foot for its warehouse space. (CP 1328, 1332, 1339-40)

Although he was Managing Tenant, Greg did not secure written commercial leases from Snopac. (CP 1254, 1384) Commercial leases normally require renewal well in advance of the lease's expiration so that the landlord can find a new tenant should the current tenant vacate. (CP 1384) A commercial lease also normally requires that the tenant maintain and insure the building, indemnify the property owners, and pay advance rent and damage deposits. (CP 1384)

In 2001, the warehouse suffered damage from the Nisqually earthquake. (CP 1281, 1855-56) The damage was not structurally significant and could have been repaired for \$10,000. (CP 1856-58) Neither Greg nor Snopac repaired the damage or submitted an insurance claim for the damages, and Snopac continued to use the building following the earthquake. (CP 1384)

3. Greg sued his sisters in order to redeem their minority interests in Snopac. During that suit, the court found that Greg lied under oath about Snopac's value.

Starting in 2006, Leslie and Tammy questioned Greg's management of Snopac after its profitability significantly

decreased. (CP 1296, 1328, 1333) In response, Greg vowed to “financially destroy Leslie” and contacted an accountant to find out how he could dilute the value of his sisters’ minority interests in Snopac and force them out of the business. (CP 1287, 1296, 1328, 1333) Consistent with this goal, Greg “reduced the value of Snopac’s overall equity” through “poor business decisions,” including loading Snopac with over \$17 million in debt, “push[ing] Snopac to the brink of bankruptcy.” (CP 1294, 1303)

In February 2008, Greg sued his sisters under RCW ch. 23B.13 to redeem their minority interests in Snopac. (CP 1290-1304, 1328, 1333) The central issue in that suit was the value of Snopac and its main asset, a fish processing vessel named the M/V Snopac Innovator. (CP 1295-1304) Based on a two-hour appraisal valuing the Innovator at \$3 million, Greg argued that Snopac’s liabilities exceeded its assets and thus his sisters’ shares had no value. (CP 1297-98) Greg had also continued to increase Snopac’s indebtedness “result[ing] in the highest debt-load in Snopac’s history one month prior to the redemption date.” (CP 1304)

Following trial, the superior court in Greg’s redemption suit found that Greg had misrepresented the Innovator’s value by failing to disclose appraisals valuing the Innovator at \$9.1 million and

\$16.7 million. (CP 1295-1301) When asked at his deposition “whether there were other appraisals of the Innovator other than the . . . appraisal of \$3 million,” Greg answered that there were not any. (CP 1301) Greg repeatedly used the \$9.1 million and \$16.7 appraisals to obtain financing and insurance for Snopac, and expressly warranted on insurance applications that these values were the “fair market value” of the Innovator. (CP 1299-1301) The superior court found that Greg’s sisters had met their burden of proving Greg’s “misconduct reduced the value of their stock” and “oppression of minority shareholders.” (CP 1303-04)

- 4. Without any advance notice Greg caused Snopac to vacate the property in 2008. Without Leslie’s or Tammy’s approval, Greg then had Snopac reenter the property a year later despite his earlier assertions that it was too dangerous to occupy.**

In early 2008, shortly after Greg filed the Snopac lawsuit, Greg caused Snopac to vacate the property without any advance notice to his cotenants. (CP 1242, 1246-47, 1328, 1332) Greg claimed Leslie and Tammy had demanded a rent increase and that the building had become dilapidated. (CP 1242, 1246-47, 1262-64, 1328, 1332) In fact, Glenda had demanded the rent increase, not Leslie and Tammy. (CP 1277-78, 1328, 1332, 1684-85, 1690)

Leslie and Tammy attempted to re-lease the building following Snopac's unannounced departure. (CP 1328, 1334-35, 1345, 1670, 1777) Greg and Glenda refused to allow the building to be leased unless Leslie and Tammy either paid \$200,000 – Greg and Glenda's estimate of the cost to repair structural damage they alleged was caused by the earthquake – or Leslie and Tammy indemnified Greg and Glenda for any liability arising from a lease of the building and disclosed the alleged damage to potential lessees. (CP 1249-50, 1255-60, 1328, 1334-35, 1343-44, 1350) According to Greg, the building was in such disrepair that “[i]f inspected, the building will be condemned.” (CP 1344) When Tammy posted a “For Lease” sign on the property, Greg removed it and instructed the property's real estate agent not to lease the building. (CP 1328, 1334, 1344) Greg and Glenda refused to fund any of the repairs they insisted were necessary to lease the building. (1249, 1328, 1334, 1343-44)

Nonetheless, in September 2009, Greg, with Glenda's permission, caused Snopac to reoccupy the property without obtaining the approval of at least three of the four cotenants as required by Section 19 of the Co-Tenancy Agreement. (CP 102, 235-36, 246-47, 370, 385-96, 1328, 1333-34, 1891, 1920) Snopac used

over 9,000 square feet of the warehouse to store Snopac equipment. (CP 385) Greg did not provide any notice to Leslie and Tammy that Snopac was using the property. (CP 1328, 1333-34) Neither Greg nor Snopac performed any repairs on the property before Snopac reoccupied it and neither Greg nor Snopac indemnified any of the cotenants. (CP 1328, 1334)

Snopac paid no rent to the cotenants. (CP 1328, 1333-34) Instead, Greg allowed Snopac to use the property in exchange for Snopac's payment of monthly property taxes of \$1,554 per month in 2010 and \$1,682 per month in 2011. (CP 163, 253-54, 593) Snopac also paid other fees, including utilities, which Leslie had shut off after Snopac vacated the property in 2008. (CP 163, 253-54, 1311) In total, Snopac paid roughly \$40,000 in taxes and fees associated with the building between September 2009 and May 2011. (CP 163)

Without informing Leslie or Tammy, Greg allowed Snopac to sublease the property to a competitor, Double E Foods. (CP 168, 248-49, 253-60, 1328, 1333) Greg signed the sublease with Double E Foods in his capacity as President of the "Landlord" "Snopac Products, Inc." (CP 260) Double E did not pay rent to the cotenants, but to Snopac. (CP 163) Greg and Glenda later authorized a neighbor, Manson Construction, to park cars on a

portion of the property, again without any notice to Leslie and Tammy. (CP 237, 248, 265-66 (“Site Access Agreement” signed by Glenda), 1328, 1333) Manson had offered to pay \$20,000 annually to use this portion of the property in 2007, but Greg and Glenda allowed Manson to use it in exchange for performing environmental testing of the property. (CP 265-66, 460, 1923)

Upon discovering Snopac’s use of the property in the spring of 2011, Leslie and Tammy sent Greg written notice that he was in breach of the Co-Tenancy Agreement and demanded that he pay back rent for Snopac’s use of the property based on the rent Snopac previously paid the cotenants, \$12,500 per month. (CP 268-69, 271, 1328, 1334) Double E Foods vacated the property in April 2011 and Greg later caused Snopac to vacate the property. (CP 164, 402, 455) Even though Snopac, Double E, and Manson had used the property for nearly two years, Greg and Glenda still refused to allow Leslie and Tammy to lease the property unless they made repairs, or provided “full disclosure of the problems” to potential lessees and granted Greg and Glenda “waivers for any liability whatsoever.” (CP 1350)

B. Procedural History

1. Leslie and Tammy brought suit against Greg and Glenda based on their breaches of the Co-Tenancy Agreement.

On September 2, 2011, Leslie and Tammy brought this action against Greg and Glenda seeking specific performance of the right to purchase Greg's and Glenda's interest in the property under the Co-Tenancy Agreement's "Default" provision in Section 12, and for damages caused by Greg's and Glenda's breaches of the Co-Tenancy Agreement. (CP 1-8)

On December 1, 2011, Manson offered to purchase the property for \$1 million. (CP 284-300) Greg and Glenda submitted a counteroffer to Manson asking that "Manson assume[] full environmental responsibility" for "costs that may result from the properties [sic] inclusion in the Duwamish Superfund Program." (CP 302-03) Greg and Glenda claimed that the cotenants would be liable for \$1.7 million in environmental remediation costs based on the environmental testing that Greg and Glenda had authorized Manson to perform. (CP 64-67) Manson accepted the counteroffer. (CP 120-36)

Leslie and Tammy opposed the sale to Manson. They believed the property was worth substantially more than \$1 million

and that the environmental indemnity provided by Manson was illusory because Greg and Glenda had drastically overestimated the parties' potential liability for environmental remediation. (CP 67, 346-47, 366, 369, 645-47) Leslie and Tammy offered to match Manson's offer under their right of first refusal. (CP 451)

2. The trial court approved the sale of the property to Manson based on its finding that Leslie and Tammy could not match Manson's \$1.7 million dollar indemnity for possible environmental cleanup costs.

Greg and Glenda answered Leslie and Tammy's complaint, denying liability, and seeking specific performance of the sale to Manson. (CP 9-15) On cross-motions for summary judgment (CP 16-147, 327-44), King County Superior Court Judge Mary Yu ("the trial court") dismissed Leslie and Tammy's claim for specific performance and ordered specific performance of the sale to Manson "unless Tammy [and] Leslie elect to match the offer [and] proceed to provide proof of actual ability to do so as one would be required to do in any other bona fide offer." (CP 504-06) In order to demonstrate their ability to match Greg's and Glenda's portion of the Manson offer, Leslie and Tammy provided proof of \$500,000 in conditionally approved loans along with the collateral for the loans,

\$500,000 in liquid assets, and total assets worth over \$2,450,000. (Sub. No. 55-57, Supp. CP __; CP 869-70)

On February 28, 2012, the trial court entered an order allowing Greg and Glenda to close the sale to Manson and denying Leslie's and Tammy's request to purchase Greg's and Glenda's interests "because the evidence shows that they are unable to match the offer." (CP 507-09) On March 2, 2012, Leslie and Tammy filed a lis pendens on the property. (CP 2178-95) The trial court denied Leslie and Tammy's motions for reconsideration and entered an order on June 8, 2012, "authorize[ing] Greg and Glenda Blakey to execute closing documents." (CP 815-19, 933) The sale to Manson closed in June 2012. (CP 1014) Both the February 24 and 28 order "reserved for future proceedings" the "[c]laims for damages between the parties." (CP 505, 509)

3. After finding that "[t]he record is filled with disputed facts" the trial court reversed itself and dismissed Leslie and Tammy's damages claims on summary judgment.

In August 2012, Greg and Glenda moved for summary judgment dismissal of Leslie and Tammy's damages claims. (CP 934-1010, 1079-1197) On January 3, 2013, the trial court dismissed Leslie and Tammy's claim for damages for selling the property for

“below market value,” but denied summary judgment on Leslie’s and Tammy’s other claims, including damage claims for “1) alleged lost rents . . . from 2008 to 2012; 2) alleged damages . . . from allowing Greg as a co-tenant to store Snopac’s equipment between September 2009 and May 2011; 3) and alleged damages . . . for allowing Manson to park 15 employee cars on the property.” (CP 1520-23) According to the trial court “[t]he record is filled with disputed facts regarding each of the parties’ actions and speculation as to the [sic] each of the parties’ motives . . . [and] granting full summary judgment would require making findings of fact based on credibility. Making such determinations of credibility and deciding whether the facts override the ‘no liability’ standard in paragraph 17 cannot be done on summary judgment.” (CP 1522)

Leslie and Tammy filed an amended complaint asserting breach of contract, unjust enrichment, bad faith, gross negligence, and breach of fiduciary and quasi-fiduciary duties. (CP 1524-34) On September 13, 2013, the trial court reversed its earlier decision and granted Greg’s and Glenda’s renewed motions for summary judgment (CP 1564-1619, 1696-1711), dismissing Leslie and Tammy’s remaining claims because “Plaintiffs have been unable to establish with a degree of certainty the amount of damages to which

they might be entitled as a result of any alleged breach.” (CP 2018-21) The trial court also concluded that “Greg or the other co-tenants had no obligation to agree to lease as a co-tenant” and that “Plaintiffs have not shown how the failure to lease, refusal to lease, or the use of the premises by one Tenant has caused actual damage to the other.” (CP 2019-20)

The trial court entered separate orders dismissing all remaining claims against Greg (CP 2018-21) and Glenda (CP 2022-24), as well as an order striking evidence relied on by Greg and Glenda (CP 2025-26). The trial court also denied Greg’s requests for attorney’s fees. (CP 2148-49) Leslie and Tammy timely appealed. (Sub. No. 281, Supp. CP __)

V. ARGUMENT

A. The trial court properly found “disputed facts” that prevented summary judgment. Its subsequent decision to grant summary judgment must be reversed.

The trial court correctly recognized that summary judgment cannot be granted where the record presents “disputed facts regarding each of the parties’ actions ...[and] granting full summary judgment would require making findings of fact based on credibility.” (CP 1522; see *Lokan & Associates, Inc. v. Am. Beef*

Processing, LLC, 177 Wn. App. 490, ¶ 10, 311 P.3d 1285 (2013) (a trial court should grant summary judgment only when “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law”) (citing CR 56(c)). But it later disregarded this standard by dismissing Leslie and Tammy’s claims on summary judgment. (CP 2018-24) This court reviews the trial court’s summary judgment order de novo. *Lokan*, 177 Wn. App. at ¶ 10. It should reverse and remand for a trial because the record contained disputed evidence on whether Greg and Glenda breached the Co-Tenancy Agreement, whether Greg breached his fiduciary duties, and whether those breaches caused Leslie and Tammy damages.

Properly viewed in the light most favorable to Leslie and Tammy, the record is rife with disputed issues of material fact that bar summary judgment. A jury could have found for Leslie and Tammy on any or all of the following claims:

First, Greg and Glenda acted in bad faith and breached the Co-Tenancy Agreement by refusing to allow Leslie and Tammy to lease the property so that Snopac could secretly use the property without Leslie’s or Tammy’s approval, as required by the Co-Tenancy Agreement, and without making the repairs or providing

the indemnity Greg and Glenda insisted were necessary to lease the property. Greg's and Glenda's refusal to allow Leslie and Tammy to lease the property denied them the opportunity to obtain market rent for over four years.

Second, Greg in bad faith caused Snopac to vacate the property without notice as part of his effort to "destroy Leslie financially" and in an attempt to cut off cash flow Leslie and Tammy were using to pay legal fees in his suit to redeem his sisters' shares in Snopac.

Third, Greg breached his contractual and fiduciary duties as Managing Tenant of the property and attorney-in-fact for the other cotenants by failing to require that Snopac execute commercially reasonable written leases that required Snopac to insure and maintain the building, remain in the building for a specific term of years, provide adequate notice of termination, and leave the property in good condition at the end of the lease.

Fourth, Greg and Glenda acted in bad faith or at a minimum with gross negligence by pushing through a sale of the property for a value dramatically below its market value based on a patently erroneous assessment of the parties' liability for environmental remediation.

This court should remand for a trial of Leslie and Tammy's claims that Greg and Glenda breached the Co-Tenancy Agreement and that Greg breached his fiduciary duties.

1. **Greg and Glenda breached the Co-Tenancy Agreement in bad faith by refusing to lease the property causing Leslie and Tammy to lose 53 months in rent.**
 - a. **Greg and Glenda refused to allow Leslie and Tammy to lease the property so that Snopac could secretly use the property without making the repairs or providing the indemnity Greg and Glenda insisted were necessary to lease the property.**

Greg and Glenda refused to lease the property so that Greg's company Snopac could use the property without paying rent. Their reliance on earthquake damage was purely pretextual. The trial court erred by granting summary judgment in the face of Greg's self-dealing. *Frank Coluccio Const. Co., Inc. v. King Cnty.*, 136 Wn. App. 751, 762, ¶ 19, 150 P.3d 1147 (2007) ("Whether a party has breached a contract is a question of fact."); *Wm. Dickson Co. v. Pierce Cnty.*, 128 Wn. App. 488, 116 P.3d 409 (2005) (reversing summary judgment because whether defendant breached contract by permitting third parties to deposit fill on plaintiff's land was a genuine issue of material fact).

The Co-Tenancy Agreement, as well as the common law, imposes a duty on the cotenants to refrain from acting or failing to act based on “fraud, gross negligence or bad faith.” (CP 101; *Frank Coluccio Const.*, 136 Wn. App. at 764, ¶ 22 (“There is an implied duty of good faith and fair dealing in every contract.”)) The duty of good faith “obligates the parties to cooperate with one another so that each may obtain the full benefit of performance.” *Frank Coluccio Const.*, 136 Wn. App. at 764, ¶ 22. Thus, even if Greg and Glenda had no general “obligation to agree to lease as a co-tenant” (CP 2019), they did have a duty not to authorize or refuse to authorize a lease in bad faith.

Parties act in bad faith where they commit “actual or constructive fraud” or “neglect or refus[e] to fulfill some duty” based on “some interested or sinister motive.” *In re Estate of Mumby*, 97 Wn. App. 385, 394, 982 P.2d 1219 (1999); *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 564 P.2d 1137 (1977). In *Cherberg* for example, lessees sued their landlord alleging that it in bad faith breached a commercial lease. During construction on adjacent property, the outside wall of the leased building was designated unsafe and the landlord refused to repair it. Instead, the landlord terminated the lease and stated that it

would post the building as unsafe, although it never did so. The trial court denied the landlord's motion for a directed verdict based on evidence that the landlord had in bad faith tried to use the condition of the building as an excuse to force the lessees to vacate and that its true motive was "to regain control of the premises as soon as possible in order to demolish the existing structure on the property and erect a new building which [it] felt might be more profitable." 88 Wn.2d at 599. A jury found for the lessees and the landlord appealed.

The Supreme Court affirmed because there were "a number of facts from which an inference of a bad faith motive for breach might be drawn." 88 Wn.2d at 606. The Court emphasized that the landlord contradicted itself by "assert[ing] that it would be posting the building as unsafe" and then failing to do so, and "that repair of the wall was feasible and was in fact accomplished at considerably lower cost than the [landlord]'s original estimates." 88 Wn.2d at 606. The Court also highlighted the "close ties" between the landlord and the owner of the adjacent property and that it "would have been of substantial economic benefit" to both of them to have the leased building demolished during the construction on the adjacent property. 88 Wn.2d at 599. The Supreme Court

concluded that a jury could find that the landlord acted in bad faith by using the condition of the building to conceal its true motive of demolishing the building:

[T]he jury could have inferred the [landlord] used the condition of the wall as a means to oust the petitioners and gain possession of the leased premises in order that the [landlord] might put those premises to a different and perhaps considerably more profitable use. Proof of a breach based upon such a motive demonstrates a failure to make a good faith effort to meet obligations under the lease. . . .

88 Wn.2d at 605.

Similarly, here, a jury could find that Greg's and Glenda's reliance on earthquake damage was pretextual and concealed their true motive to allow Greg's then wholly-owned corporation to use the property without paying rent and without obtaining the approval of at least three of the four cotenants as required by the Co-Tenancy Agreement. (CP 102) Greg and Glenda repeatedly asserted that the building was dangerous because of damage caused by the 2001 Nisqually earthquake, even going so far as to say it should be condemned, and they refused to allow Leslie and Tammy to lease it unless they spent \$200,000 to repair the alleged earthquake damage or indemnified them for any liability. (CP 1249-50, 1255-60, 1262, 1328, 1333-35, 1343-44)

Greg and Glenda then secretly allowed Snopac to use the property for nearly two years without performing any repairs or requiring that Snopac indemnify any of the cotenants. (CP 235-36, 246-47, 370, 385-96, 1328, 1333-34, 1891, 1920) Greg and Glenda each also authorized third parties to use the property, again without requiring any repairs or indemnity. (CP 168, 237, 248-49, 253-54, 256-60 (Double E lease signed by Greg), 265-66 (Manson lease signed by Glenda), 1328, 1333) Greg and Glenda also steadfastly refused to contribute to any repairs they demanded of Leslie and Tammy, despite the Co-Tenancy Agreement's requirement that each cotenant contribute to the property's expenses. (CP 81-82, 1249, 1328, 1334, 1343-44, 1350) Even after Leslie and Tammy confronted Greg and Glenda regarding Snopac's secret use of the property they still refused to allow anyone else to lease the property without substantial repairs or "full disclosure" and "waivers for any liability whatsoever." (CP 1350)

A jury should have considered Leslie's and Tammy's expert testimony that the actual cost of repairing the earthquake damage to the building was \$10,000, not \$200,000 as Greg and Glenda alleged. (CP 1856-58) Indeed, although Glenda asserted that she had obtained a \$200,000 estimate to repair the damage, the

estimate she obtained was in fact \$37,386. (*Compare* CP 380 with 1343) Snopac used the building for *nearly a decade* after the earthquake without performing any repairs whatsoever. A jury – not the trial court sitting on summary judgment – should have resolved whether Greg and Glenda acted in bad faith.

b. Greg’s and Glenda’s refusal to allow Leslie and Tammy to lease the property denied them fair market rent for 53 months.

The trial court erred in concluding that Leslie and Tammy failed to establish with “a degree of certainty the amount of damages.” (CP 2019) Washington law did not require Leslie and Tammy to establish their damages with “certainty,” particularly on summary judgment. They were required only to provide a reasonable basis for a jury to calculate their damages.

Damages on a breach of contract claim should place the injured party “in the same economic position it would have occupied had the breach not occurred.” *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, ___ Wn. App. ___, ¶ 56, 317 P.3d 543 (2014). “Evidence sufficiently proves damages when it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture.” *Harmony at*

Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc., 160 Wn. App. 728, 737, ¶ 19, 253 P.3d 101 (2011) (quotation omitted). “A party who has established the fact of damage will not be denied recovery on the basis that the amount of damage cannot be exactly ascertained.” *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 703, 9 P.3d 898 (2000); *see also Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (“the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage.*”) (quotation omitted) (emphasis in original). “[D]amages are questions of fact left for the jury to decide unless reasonable minds could not differ.” *C 1031 Properties, Inc. v. First Am. Title Ins. Co.*, 175 Wn. App. 27, 34, ¶ 16, 301 P.3d 500 (2013) (affirming denial of summary judgment on damages because evidence showed “widely divergent measures of damage”).

Leslie and Tammy lost their share of market rent due to Greg's and Glenda's bad faith breach of the Co-Tenancy Agreement. Snopac's CFO calculated the fair market monthly rent for the property at roughly \$12,500 based on its square footage and potential uses. (CP 1339-40; *see also* CP 1321 (email from Dan Whitaker, a commercial real estate expert, to a Manson

Construction representative suggesting that Manson offer to rent the property for \$12,317)) But for Greg's and Glenda's refusal in bad faith to lease the property, Leslie and Tammy would have received \$331,250 in rent for the 53 months between when Snopac vacated the property and it was sold to Manson.¹ Moreover, had Greg and Glenda not insisted on selling the property in bad faith (see § V.A.4), Leslie and Tammy would have been able to rent the property for the past two years.

At a minimum, Leslie and Tammy should be paid the full market value of Snopac's unauthorized use of the property. *Voorde Poorte v. Evans*, 66 Wn. App. 358, 363, 832 P.2d 105 (1992) (plaintiff may recover damages "proximately caused by the trespasser's conduct"). Snopac used the property for 20 months in exchange for paying the property's taxes and other minimal expenses that averaged roughly \$2,000 per month – \$10,000 less per month than it was paying just a year prior. (CP 163, 253-54, 593) Likewise, Leslie and Tammy should be paid the market value

¹ This number is calculated by multiplying 53 months by the monthly rent of \$12,500 and dividing by 2 (to reflect Leslie's and Tammy's share of rents ((53 x \$12,500)/2 = \$331,250)). Even accounting for the \$40,000 in "rent" Snopac paid during the 20 months it secretly used the property, Leslie and Tammy still suffered over \$310,000 in damages.

for Double E Foods and Manson's unauthorized subleases of the property, or at the very least their share of the sublease rents paid to Snopac instead of the cotenants. Indeed, in 2007 Manson offered to pay \$20,000 annually to rent the space Greg and Glenda allowed it to use in exchange for an erroneous environmental report. (CP 265-66, 460, 1923) A jury had more than a "reasonable basis" to calculate Leslie and Tammy's damages.

Moreover, to the extent there is uncertainty in Leslie and Tammy's damages that uncertainty falls on Greg and Glenda. *See Spradlin Rock Products, Inc. v. Public Utility District No. 1 of Grays Harbor County*, 164 Wn. App. 641, 664, ¶ 45, 266 P.3d 229 (2011) ("Washington courts abide by the principle that the wrongdoer shall bear the risk of the uncertainty which its own wrong has created.") (internal quotation omitted). Greg's and Glenda's bad faith conduct cannot be excused simply because it made it more difficult to calculate Leslie and Tammy's damages. The trial court erred by dismissing Leslie and Tammy's claims because they failed to establish their damages with "certainty" on summary judgment.

2. After vowing to “destroy” Leslie financially, Greg in bad faith caused Snopac to vacate the property in order to undermine Leslie’s and Tammy’s ability to defend his Snopac lawsuit.

Greg also acted in bad faith when he caused Snopac to vacate the property as part of his effort to “financially destroy Leslie.” Greg’s self-dealing deprived the cotenancy of a paying tenant for 53 months. The trial court erred by dismissing Leslie and Tammy’s claims for this reason as well.

Greg acted in bad faith and with a “sinister motive” when he caused Snopac to vacate the property without any notice at the same time he sued his sisters to redeem their Snopac interests. *In re Estate of Mumby*, 97 Wn. App. 385, 394, 982 P.2d 1219 (1999). Greg’s stated reasons for moving Snopac were demonstrably false. For instance, Greg alleged that he moved Snopac after Leslie and Tammy demanded a rent increase. (CP 1242, 1246-47, 1328, 1332) Glenda, however, demanded the rent increase, not Leslie and Tammy. (CP 1277-78, 1328, 1332, 1684-85, 1690) Snopac paid more monthly rent at its new premises and was required to invest substantial money in tenant improvements when it moved. (CP 1328, 1333)

Likewise, Greg's own actions refute his assertion that he moved Snopac because the condition of the property made it untenable. (CP 1242, 1246-47, 1262-64) Just a year after moving Snopac, Greg moved Snopac back onto the property and subleased it without making any repairs. (CP 246-47, 370, 385-94, 1328, 1333-34) Moreover, just a year before vacating the property, Snopac's CFO concluded that "our present space does work pretty well for us" and that "perhaps the best solution would be for Snopac to stay here." (CP 1339-40) If in fact the property was as dilapidated as Greg alleged, that would only confirm that he breached his duties as Managing Tenant by failing to have Snopac execute leases requiring it to maintain the property. (*See* § V.A.3)

Greg moved Snopac to deny his sisters the funds necessary to defend his lawsuit to acquire their interests in Snopac and to retaliate against them for questioning his management of Snopac. (CP 1328, 1332-33) Greg moved Snopac at the same time he brought his suit against his sisters and declared that he would "financially destroy Leslie." (CP 1287, 1328, 1332) Greg demonstrated his conviction to financially ruin his sisters by repeatedly lying – including under oath – about the value of Snopac's assets and purposefully attempting to decrease the value

of their shares in Snopac by loading Snopac with millions in debt.
(CP 1294-1304)

Greg deprived the cotenancy the continued rent from its paying tenant of 21 years. At the time Snopac vacated the property it was paying \$12,500 in monthly rent. (CP 1328, 1332, 1339-40)

3. Greg violated his fiduciary duties as Managing Tenant and was grossly negligent in failing to require Snopac to execute commercially reasonable leases.

Greg breached his duties as Managing Tenant and attorney-in-fact for the other cotenants by failing to have Snopac execute written leases that provided any of the normal protections afforded to a property owner in a commercial lease, including provisions requiring the tenant to provide advance notice before vacating the property, and maintain and insure the property. The trial court erred by dismissing on summary judgment Leslie and Tammy's claims that Greg violated his fiduciary duties and was grossly negligent.

An attorney-in-fact is "a fiduciary who is bound to act with the utmost good faith and loyalty." *In re Estate of Palmer*, 145 Wn. App. 249, 263, ¶ 30, 187 P.3d 758 (2008). "The burden of proof is on the fiduciary to demonstrate no breach of loyalty has been

committed.” *Wilkins v. Lasater*, 46 Wn. App. 766, 777-78, 733 P.2d 221 (1987) (citing *Hetrick v. Smith*, 67 Wash. 664, 667-68, 122 P. 363 (1912)). A fiduciary must disgorge any profits obtained through a breach of its duties. *Obert v. Ecnvl. Research & Dev. Corp.*, 112 Wn.2d 323, 338, 771 P.2d 340 (1989); *In re Washington Builders Ben. Trust*, 173 Wn. App. 34, 81, ¶ 88, 293 P.3d 1206, *rev. denied*, 177 Wn.2d 1018 (2013). “Whether a party has breached a [fiduciary] duty owed to another is generally a question of fact.” *Valentine v. Dep’t of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352, *rev. denied*, 127 Wn.2d 1020 (1995); *see also Washington Builders Ben. Trust*, 173 Wn. App. at 77-78, ¶ 77 (reversing summary judgment in favor of fiduciaries because whether fiduciaries’ expenditures of trust funds complied with trust’s terms was a genuine issue of material fact).

Greg was at all times the property’s Managing Tenant and attorney-in-fact for the other cotenants and thus owed the other cotenants fiduciary duties. (CP 83 (Greg had “complete, absolute and exclusive power and authority to manage the business and affairs of the Tenancy”), 1328, 1332, 1876-77) Greg violated his fiduciary duties by imposing false lease conditions on Leslie and Tammy so that Snopac could secretly use the property, and to

further his stated goal of ruining Leslie financially and retaliating against his sisters for questioning his management of Snopac. (See § V.A.1-2)

Greg also violated his duties as Managing Tenant, and his duty not to commit waste (CP 102), by refusing to obtain from Snopac written leases containing the normal protections for a property owner, including requiring the tenant to provide advance notice of renewal, maintain and insure the building, indemnification, and advance rent and damage deposits. (CP 1254, 1384) Greg obtained these protections for Snopac when he subleased the property to Double E Foods as President of the “Landlord” “Snopac Products, Inc.” (CP 256-60 (Double E Foods required to return property “in as good a condition as when delivered,” maintain property and liability insurance, give 60 days notice of renewal, and indemnify Snopac)) Greg failed to require Snopac to insure the property, failed to insure it himself, leaving the resulting earthquake damage unaddressed throughout Snopac’s tenancy. (CP 1384-85)

Greg benefited directly from not requiring Snopac to execute a commercially reasonable lease. Greg could operate Snopac without the normal obligations a commercial tenant must consider

when running a business. Snopac did not have to pay insurance premiums, maintenance costs, advance rent and damage deposits, and it was not required to bear the risk of indemnifying the cotenants.

Greg's failure to obtain any of these protections directly damaged Leslie and Tammy. Had Snopac given advance notice of its departure rather than leaving abruptly on Greg's direction, and had Greg and Glenda not refused to lease the property in bad faith (§ V.A.1), a replacement tenant could have been found instead of the property sitting vacant. Had Greg required Snopac to provide advance rent or a damage deposit, the cotenancy could have at least partially mitigated its damages. (CP 1384)

Greg's management of the property was also grossly negligent, i.e., he failed to exercise even slight care. *Nist v. Tudor*, 67 Wn.2d 322, 330, 407 P.2d 798 (1965); WPI 10.07. Any reasonable person charged with "complete, absolute and exclusive power and authority to manage" a commercial property would have understood the need to obtain the basic protections Greg neglected to obtain from Snopac. (CP 1383-85) Whether Greg breached his fiduciary duties or was grossly negligent, and whether his actions damaged Leslie and Tammy should have been determined by a fact-

finder after a full trial involving live testimony – not by the trial court on summary judgment.

4. Greg and Glenda’s ill-advised “fire sale” of the property to Manson was in bad faith and denied Leslie and Tammy the opportunity to sell the property for its actual market value.

Greg and Glenda forced the sale of the property for an amount dramatically below its market value based on potential environmental remediation costs that the cotenants could not be liable for *as a matter of law*. In doing so, Greg and Glenda acted in bad faith or at a minimum with gross negligence, and denied Leslie and Tammy the opportunity to sell the property for its true market value of at least \$2.7 million. Should this court decline to award specific performance of Leslie’s and Tammy’s rights of first refusal (*See* § V.B), it should reverse the trial court’s dismissal of Leslie and Tammy’s damage claim for selling the property for below market value. (CP 1520-23)

Greg and Glenda acted in bad faith, or at the very least with gross negligence, by insisting that the property be sold for an illusory indemnity that constituted over sixty percent of the purchase price without seeking any legal advice on the cotenants’ potential liability for cleanup costs. (CP 1267) Had they sought

advice, they would have learned that the cotenants in fact faced no liability as a matter of law. Under both the Comprehensive Environmental Responsibility Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601-9675 and the Washington State Model Toxics Control Act, RCW ch. 70.105D, former owners of property have no liability for cleanup costs unless they actually contributed to pollution on the site or in the area. CERCLA § 107(a) (42 U.S.C. 9607(a)); RCW 70.105D.040(1). As Greg himself acknowledged, Snopac did not pollute while it occupied the property (CP 1267) and no regulatory agency has named the cotenants or Snopac as a party that would be required to contribute to environmental remediation costs (CP 847, 1371-72).

Even assuming the cotenants could be liable for environmental remediation costs, the report relied on by Greg and Glenda to estimate costs contained glaring errors that were additional evidence of their bad faith. (CP 1370-72) The report did not consider the allocation of cost to any other parties, including the four parties primarily responsible for pollution on the Lower Duwamish (Boeing, the Port of Seattle, the City of Seattle, and King County), who “will bear the majority of the costs.” (CP 746, 847, 1370-72) The report also used an outdated cleanup cost estimate

and assumed that the most expensive cleanup method would be used, when in fact a less expensive option was likely to be used. (CP 1371-72) As Leslie and Tammy's expert stated, "it is impossible to know what these costs ultimately will be" and "[a]ny attempt to assess or estimate costs attributable to a specific property . . . is nothing more than speculation." (CP 1372; *see also* CP 848)

The sale price was in fact immaterial to Greg and he insisted the building be sold, not because he thought the sale represented a fair value, but because he wanted to further retaliate against Leslie and Tammy for questioning his management of Snopac. (CP 1328, 1336) Glenda also acted in bad faith by steadfastly supporting Greg's efforts to push through a sale of the property, even on unfavorable terms. (CP 1328, 1334-36, 1343-44, 1350)

A jury should decide whether Greg and Glenda acted in bad faith and whether Leslie and Tammy could have sold the property for its true market value. Greg and Glenda asserted throughout these proceedings that Manson's offer purportedly worth \$2.7 million represented the property's "fair value." (CP 29, 431, 438) In 2008, Glenda stated that the property was worth \$3,000,000. (CP 1343) The property's assessed value was \$1.78 million in 2012. (CP 535) A jury could have reasonably calculated Leslie and

Tammy's damages as the difference in what they actually received from the sale to Manson and what they would have received had the property been sold for its true market value.

At a minimum, Greg and Glenda were grossly negligent in not following standard practice for the sale of property with potential environmental liability, in which the buyer deposits a portion of the sale price into an escrow account, with the balance turned over to the seller after environmental liabilities are determined. (CP 1372) Had Greg and Glenda done so, they would have ensured that the cotenants actually received the \$1.7 million dollars in "indemnity" that represented over sixty percent of the purchase price.

The trial court erred by refusing to allow a jury to decide whether Greg's and Glenda's insistence that the property be sold primarily for an illusory indemnity was in bad faith or at the very least was grossly negligent.

B. The trial court erred by denying Leslie and Tammy their rights of first refusal.

The trial court erroneously denied Leslie and Tammy their contractual right to purchase the cotenancy property because they could not "match" Manson's offer. (CP 504-09, 815-19, 933) Leslie

and Tammy did in fact match Manson's offer, because they had secured \$500,000 in loans and had total assets valued over \$2,450,000 of which \$500,000 were in liquid assets. Moreover, Manson's \$2.7 million offer consisted of \$1 million in cash and an indemnity purportedly worth \$1.7 million that was in fact worthless.

"It is well established that a court may use its equitable powers to order a party to convey land" through an order of specific performance. *Crafts v. Pitts*, 161 Wn.2d 16, 25-26, ¶ 11, 162 P.3d 382 (2007) (citing Restatement (Second) of Contracts § 360 cmt. e (1981) ("Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance.")). Whether a party is entitled to specific performance is a question of law reviewed de novo. *Dullanty v. Comstock Dev. Corp.*, 25 Wn. App. 168, 171, 605 P.2d 802 (1980).

The trial court erred by concluding that Leslie and Tammy did not offer a payment "equivalent in amount" to Manson's offer and thus could not exercise their rights of first refusal granted by the Co-Tenancy Agreement. (CP 100, 504-09) Leslie and Tammy could undisputedly match Greg's and Glenda's portions of the \$1 million cash payment from Manson (\$250,000 each), either with

\$500,000 in conditionally approved loans, which were approved shortly after the trial court's February 28 order, or with their \$500,000 in liquid assets. (Sub. No. 55-57, Supp. CP ___; CP 869-70)

The trial court denied Leslie's and Tammy's right of first refusal not because they could not match Manson's \$1 million cash payment, but because it believed they could not match Manson's \$1.7 million "indemnity." (2/28/12 RP 63 ("Having cash available and indemnification, you know those are two different realities.")) But the trial court erred by valuing that indemnity at \$1.7 million based on the erroneous environmental report submitted by Greg and Glenda, and prepared by Manson. (See § V.A.4) Regardless, the indemnity was in fact worthless because the cotenants did not pollute the property and thus could not be liable for any remediation costs as a matter of law after they sold the property. (See § V.A.4) The trial court erred in concluding that Leslie and Tammy could not match the illusory "indemnity" for overstated environmental remediation costs.

Even if Manson's "indemnity" was actually worth \$1.7 million, Leslie and Tammy still matched Manson's offer because they had total assets worth over \$2,450,000. (Sub. No. 55-57,

Supp. CP __; CP 869-70) The trial court also failed to acknowledge that Leslie and Tammy could secure any indemnity by borrowing against the property itself, which all parties agreed was worth at least \$2.7 million.

Because Manson had actual knowledge of Leslie and Tammy's claims to the property it is not a bone fide purchaser. Under RAP 12.8, a party who acquires an interest in property "under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision" only if the party is "a purchaser in good faith." A "good faith purchaser for value" is one "who is without actual or constructive notice of another's interest in the property purchased." *United Sav. & Loan Bank v. Pallis*, 107 Wn. App. 398, 407-08, 27 P.3d 629 (2001). Here, Manson undisputedly had actual knowledge of Leslie and Tammy's claims as it stated in its purchase and sale agreement with Greg and Glenda. (CP 617-21 ("Seller's execution of the Agreement by less tha[n] all of the parties comprising Seller is undertaken pursuant to that certain Order Regarding Sale to Manson dated February 28, 2012."; *see also* CP 442) Leslie and Tammy then confirmed that the entire world had notice of their claims by filing a *lis pendens*. (CP 2178-95) This court should reverse the trial

c r
court's orders authorizing the sale to Manson and remand with instructions to allow Leslie and Tammy to purchase Greg's and Glenda's interests in the property.

VI. CONCLUSION

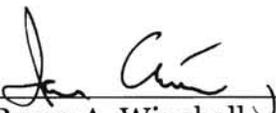
The trial court erred by denying specific performance of Leslie's and Tammy's rights of first refusal and by dismissing their damages claims on summary judgment. This court should remand with instructions to allow Leslie and Tammy to exercise their rights of first refusal and for a trial on their damages claims.

Dated this 6th day of March, 2014.

SMITH GOODFRIEND, P.S.

MILLS MEYERS SWARTLING

By: 
Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

By:  for
Bruce A. Winchell
WSBA No. 14582

Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 6, 2014, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Bruce A. Winchell Mills Meyers Swartling 1000 Second Ave., 30th Floor Seattle, WA 98104-1064	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Robert E. Rohde Rohde & Van Kampen PLLC 1001 4th Ave Ste 4050 Seattle, WA 98154-1000	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Lawrence R. Cock Cable Langenbach Kinerk & Bauer 1000 2nd Ave Ste 3500 Seattle, WA 98104-1086	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 6th day of March, 2014.



Victoria K. Vigoren