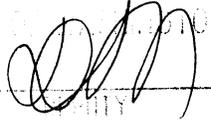


FILED
COURT OF APPEALS

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STATE OF WASHINGTON

BY  CLERK

NO. 33399-6-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

SOUTH KITSAP FAMILY WORSHIP CENTER, a Washington
corporation, A WASHINGTON GENERAL PARTNERSHIP
CONSISTING OF CUSTOM COMMUNITIES CORPORATION, INC., a
Washington corporation and JEH CORPORATION, INC., a Washington
corporation,

Plaintiffs/Appellants,

vs.

DAVID WEIR and JENNIFER H. SANSEN-WEIR, husband and wife,

Defendants/Respondents

APPELLANTS' REPLY BRIEF

Submitted by:

Steven W. Davies, WSBA #11566
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I. ARGUMENT

A. The Church and Developers Complied with RAP 10.3(g).

RAP 10.3(g) states in full:

A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will review a claimed error which is included in an assignment of error or clearly disclosed in the associated issues pertaining thereto.

(Emphasis added).

The church and developers clearly identified the claimed errors in the Assignment of Error and clearly disclosed such errors in the associated issues pertaining thereto. (See Appellants' Brief, pgs. 1 - 8). Further, the full text of the Findings of Fact and Conclusions of Law were attached to the Notice of Appeal, were included in the record on appeal (CP at pg. 1731), and are attached to the Appendix of Appellants' Reply Brief. In addition, excerpts from the language contained within

the Findings of Fact and Conclusions of Law and verbatim text were used to identify the assignments of errors and issues. (See Appellants' Brief, pgs. 1 -8, 28). Accordingly, RAP 10.3(g) was complied with and the Appellate Court should review all claimed errors.

Macey v. Employment Security, 110 Wn.2d 308, 311, 752 P.2d 372 (1988), relied upon by Weir, can be distinguished from this case in that the findings and conclusions were "nowhere set out" by the appellant. Also, *M/V La Conte, Inc. v. Leisure*, 55 Wn. App. 396, 401, 777 P.2d 1061 (1989), is easily distinguished in that the appellant failed to "set forth challenged findings". This is not the case here where claimed errors and associated issues were clearly disclosed.

The review by the Appellate Court of all claimed errors in this case is consistent with *State v. Estrella*, 115 Wn.2d 350, 798 P.2d 289 (1990), wherein the court stated:

The state did not make separate assignments of error for each finding in its brief. We have stated, however, that where the nature of the challenge is clear and the challenged finding is set forth in the appellate brief, the appellate court may consider the merits of the challenge. *Id*, at

355.

Further, in considering compliance of RAP 10.3(g), the court in *State v. Williams*, 96 Wn.2d 215, 634 P.2d 868 (1981), citing *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 592 P.2d 631 (1979) stated:

. . .[U]nder RAP 1.2(a), a technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review . . . *Id* at 220.

In this case, the nature of the challenges and related issues are clear and were fully disclosed. Justice would be served by reviewing all challenges. Therefore, a technical violation of the rules should not bar appellate review.

B. The Real Estate Purchase and Sale Agreement Does Not Supersede the Option Agreement.

Should this court affirm the trial court and find, consistent with Weir's arguments, that the REPSA is an enforceable, integrated agreement that does not contain an option, substantial evidence supports the trial court's finding that Weir intended that the REPSA not contain an option and that it supersede the sales agreement, and

that substantial evidence supports the trial court's finding that Morris understood that the REPSA did not contain an option, this would amount to constructive fraud and an unbargained-for windfall to Weir. The drafting of the purchase and sale agreement was entirely consistent with the parties' execution of the Sales Agreement. This was not, as argued by Weir, "two contracts . . . in conflict". (See Respondent's Brief, pg. 21, citing *Higgins v. Stafford*, 123 Wn.2d 160, 166, 866 P.2d 31 (1994)). Instead, the church and Weir executed the Sales Agreement and then the purchase and sale agreement so to effectuate the agreed-upon closing. Accordingly, the purchase and sale agreement could not, and was not, intended to supersede the option agreement.

The underlying rationale of *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999), *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), and *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245 (2003), as they relate to contract interpretation, is that the court should be concerned with the parties' intent and the written contract, but not the parties' subjective intent. In this case, it

is Weir who signed the Sales Agreement and then later, unilaterally and subjectively, changed his mind without notice to the church. The church had every right to justifiably believe that the signing of the purchase and sale agreement was consistent with the language contained within the Sales Agreement, the payment of funds by Weir, and the option right retained by the church. The church had no way to discover and certainly, no reason to inquire about, Weir's "hidden agenda". It is Weir who took the inconsistent, unjustified, and subjective position. The only way in which the Sales Agreement could close was to have the parties execute a purchase and sale agreement, identify the necessary funds to pay the church's debts, appoint an escrow agent and office, and then arrange for the transfer of title to the real property. This is exactly what was done. Therefore, the purchase and sale agreement was a necessary and important part of this transaction and was not intended to supersede the Sales Agreement.

C. Weir's Arguments Regarding Conveyance By Statutory Warranty Deed and Merger of the Option Agreement Into the Deed, Ignore the Clear Intent of the Parties.

The conveyance by deed, as explained above, was an essential

term of the parties' overall agreement. It was what the Sales Agreement called for and what the purchase and sale agreement implemented. It was a temporary transfer and it was consistent with the language in the Sales Agreement, since Weir expressly agreed "not to sell the property before August 31, 2001", "to accept payment from South Kitsap Family Worship Center at 9% interest of the amount paid for the property", and to "transfer title back to South Kitsap Family Worship Center if financing and City approval came on or before August 31, 2001". The parties clearly intended that the church be allowed to repurchase the property. Obviously, such a repurchase by the church could not occur without first transferring title to Weir.

Further, the option did not merge into the deed since the doctrine of merger "does not apply where terms of a purchase and sale agreement are not contained in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent of the obligation to convey". *Brown v. Johnson*, 109 Wn. App. 56, 60, 34 P.3d 1233, 1235 (2001). In addition, "[T]he doctrine of merger does not apply when collateral requirements exist that are

not satisfied by the deed's execution". *Dunseath v. Hallauer*, 41 Wn.2d 895, 899, 253 P.2d 408, 411 (1953); *Reeves v. McClain*, 56 Wn. App. 301, 310, 783 P.2d 606, 610 - 11 (1989).

In this case, the church's option was intended to survive the deed transfer. The Sales Agreement required the transfer of title back to the church. Obviously, before this could occur, the church would first have to transfer by deed, the property to Weir. This was done. In its simplest terms, if the church failed to deed the property to Weir, there would be no option to exercise. Clearly, therefore, collateral requirements remained that were not satisfied by the deed's execution. Also, because the church's option was dependent upon the initial conveyance of title by the church to Weir, the church's option could not be inconsistent with the deed and obviously, was independent of the obligation to convey. As such, the option was intended to survive the deed transfer and the doctrine of merger does not apply.

D. An Option to Purchase, at the Time of Its Inception, Does Not Create an Interest in Land.

Weir relies heavily on *Manufactured Housing Communities*

of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000), for the proposition that an unexercised option creates a property interest. This is clearly wrong. Weir attempts, unsatisfactorily, to distinguish the holding in *Robroy Land Co. v. Prather*, 95 Wn.2d 66, 622 P.2d 367 (1980). The court in *Robroy* stated:

We reject the view that a preemptive contract of any duration, long or short, creates an interest in land at the time of its inception. Even in an ordinary option contract, until the option is exercised, the optionee acquires no equitable estate or interest in the optioned land. *Id.*, at 71.

In this case, the option was given voluntarily to the church for consideration. Further, the court in *Robroy* analyzed this question from the grantee's perspective. This mirrors the situation involved in this case. As such, consistent with the holding in *Robroy*, the church's option is not an interest in property until exercised and does not create an encumbrance on title violating the warranties inherent in a statutory warranty deed.

E. The Church Had Substantial Justification for Filing the Lis Pendens.

Weir attempts to argue that because an unexercised option fails to create a property interest, that this somehow means that the church was not substantially justified in filing the lis pendens. This position is not supported by Washington law.

The purpose of a lis pendens is to give notice of pending litigation that affects the title to real property and further, to give notice that anyone who subsequently deals with the affected property would be bound by the outcome of the action to the same extent if he or she were a party to the action. *United States Savings & Loan Bank v. Pallis*, 107 Wn. App. 398, 27 P.3d 629 (2001). This is precisely why the church filed the lis pendens in this case.

In order to be substantially justified in filing a lis pendens, one must have a defensible interest in the subject real property. *Richau v. Rayner*, 98 Wn. App. 190, 988 P.2d 1052 (1999). This is exactly the standard followed by the church in this case in that it had a defensible interest. Such a defensible interest in property as a requirement for the filing of a lis pendens, is far different than the interest created, or not created, because of an unexercised option. Further, the church

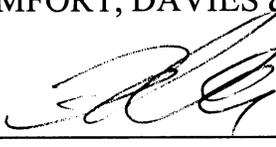
attempted to exercise its option and was ready, willing, and able to close. It is Weir who unjustly refused to close. Clearly, this established a defensible interest in the property and based upon its option rights, the church was substantially justified in filing the lis pendens.

II. CONCLUSION

The parties clearly intended when the Sales Agreement was executed that the church was to have an option and that it would be allowed to repurchase the property. It was only because of Weir's "hidden agenda" and his failure to disclose to the church that he had unilaterally changed his mind, that this did not occur. Even the trial judge openly wondered "who would want to do this to a church just as a human being?" (RP 1/6/05, pgs. 28 - 29). This question has yet to be answered. Every aspect of the church's conduct in signing the purchase and sale agreement, accepting funds from Weir to pay its debts, closing, and then temporarily transferring the property to him, was based upon its good faith belief that the option was enforceable. Any other outcome is not supported by the evidence.

Respectfully submitted this 30th day of May, 2006.

COMFORT, DAVIES & SMITH, P.S.

By:  _____

STEVEN W. DAVIES, WSBA# 11566
Of Attorneys for Plaintiffs/Appellants

APPENDIX

Findings of Fact Conclusions of Law are attached (also included in CP at pg. 1731 and attached to Notice of Appeal).

The Honorable Beverly Grant
Visiting Judge

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DAVID W PETERSON

SUPERIOR COURT OF WASHINGTON IN AND FOR KITSAP COUNTY

SOUTH KITSAP FAMILY WORSHIP)
CENTER, a Washington corporation, A)
WASHINGTON GENERAL PARTNERSHIP)
CONSISTING OF CUSTOM COMMUNITIES)
CORPORATION, INC., a Washington)
corporation and JEH CORPORATION, INC., a)
Washington corporation,)

No. 01-2-02540-8

COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Plaintiffs,)

v.)

DAVID WEIR and JENNIFER H. SANSEN-)
WEIR, husband and wife,)

Defendants.)

The Court having considered the testimony of all witnesses and the evidence admitted at trial as set forth in the record of proceedings, hereby finds as follows:

1. A bench trial was conducted in this action on December 6, 2004 through December 9, 2004, the Honorable Beverly G. Grant, Visiting Judge from Pierce County Superior Court, presiding. The plaintiff called the following witnesses: Pastor Stan Morris, Ron Warter, Geoffrey Clark, John Hertzberg, Lyn Fosse, Tracy Flood, Isaac Anderson and Donald F. Heischman. The defendant called the following witnesses: David Weir, Steve Coupe, and Jo Yvonne Schaefer.

Exhibits admitted by the plaintiff:

1. January 3, 1996 Appraisal by Donald F. Heischman, MAI

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1—Draft 1,
March 14, 2005, 7:52 p.m.

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1 2. Vacant Land Purchase and Sale Agreement dated October 20, 2000 and
2 Addendum/Amendment to Purchase and Sale Agreement dated October 20, 2000

3 3. Vacant Land Purchase and Sale Agreement dated December 4, 2000; Financing
4 Addendum to Purchase & Sale Agreement; Addendum/Amendment to Purchase and Sale
5 Agreement; Vacant Land Purchase and Sale Agreement General Terms

6 4. Sales Agreement dated January 11, 2001

7 5. Real Estate Purchase and Sale Agreement dated January 01, 2001

8 6. Statutory Warranty Deed dated February 8, 2001

9 7. Settlement Statement dated February 12, 2001

10 8. Email from Stan M. Morris to David Weir dated August 14, 2001

11 9. Email from David Weir to Stan M. Morris dated August 17, 2001

12 10. Email from Stan M. Morris to David Weir dated August 17, 2001

13 11. Transaction Commitment for Title Insurance dated August 22, 2001

14 12. Email from David Weir to Stan Morris dated August 23, 2001

15 13. Correspondence from attorney Isaac A. Anderson to attorney Richard Shattuck
16 dated August 27, 2001

17 14. Correspondence from Geoff Clark to Buskirk Law Offices dated August 28, 2001

18 15. Correspondence from attorney Bruce A. Buskirk to attorney Richard Shattuck dated
19 August 29, 2001

20 16. Correspondence from Geoff Clark to Buskirk Law Offices dated August 29, 2001

21 17. Correspondence from attorney Bruce A. Buskirk to attorney Richard Shattuck dated
22 August 30, 2001

23 18. Earnest Money Receipt and Real Estate Purchase and Sale Agreement Land Only
24 August 30, 2001 from Custom Communities Corp. and JEH Corp.

25 19. Conversation and escrow documents from Transaction Title Company

26 20. Appraisal dated December 6, 2002 by Donald F. Heischman, MAI

27 Exhibits admitted by the defendant:

54. Lis Pendens between Weir and South Kitsap Family Worship dated 9/5/01;

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2—Draft 1,
March 14, 2005, 7:52 p.m.

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1 66. Appraisal Report dated 7/20/01;

2 71. Real Estate Purchase & Sale Agreement dated 1/17/01;

3 73. Judgment Directing Issuance of Writ of Restitution dated 10/24/00;

4 76. Plaintiff's Answers dated 12/28/01; and

5 77. Declaration of Ronald Warter.

6 2. Plaintiff South Kitsap Family Worship Center ("Center") was the owner of real
7 property located at 451 Tremont in Port Orchard, Washington (the "Property"), legally
8 described as follows:

9 That portion of the west 290 feet of the East 1076.00 feet of the
10 Northeast quarter of the Southeast quarter of Section 34, Township 24
11 North, Range 1 East, W.M., in Kitsap County, Washington. Lying
12 Northerly of existing Alder Road, except that portion thereof described
13 as follows:

13 Commencing at the East one quarter corner of said Section 34 which
14 bears North 0 49' 12" East from the Southeast corner of said Section 34;
15 thence North 88 16' 19" West 786.00 feet along the North line of said
16 Northeast quarter of the Southeast quarter; thence South 0 49' 12" West
17 568.45 feet to the True Point of Beginning; thence South 84 22' 12" West
18 140.68 feet; thence South 0 49' 12" West 296.64 feet to the North margin
19 4.16 feet to the beginning of a curve to the right whose radius point bears
20 South 26 47' 30" East 2895.60 feet; thence Northeasterly along said
21 curve 155.74 feet to a point that bears South 0 49' 12" West from the
22 True Point of Beginning; thence North 0 49' 12" East 243.83 feet to the
23 True Point of Beginning.

24 3. On January 11, 2001, the Center entered into a one-page Sales Agreement with
25 defendant, David Weir by which the Center agreed to sell the Property to Weir ("Sales
26 Agreement"). The Sales Agreement was admitted into evidence as trial exhibit 4.

27 4. On January 11, 2001, the Center was in financial straits. It owed money to Kitsap
Bank, another personal loan to a church member and a judgment in the principal amount of
\$189,080.35 had been entered against it in October, 2000, in a Kitsap County Superior Court
action bearing cause number 00-2-02785-2 (the "Judgment"). Accordingly, the Center began
negotiations for the sale of a real property asset that had sufficient value to satisfy the center's

1 debts. (Exhibits 1, 2, 3). Enforcement procedures jeopardized the Center's operations and
2 assets at the time the Sales Agreement was entered into.

3 5. Weir was a member of the Center's congregation. Weir had been a financial
4 supporter of the congregation.

5 6. The Sales Agreement was drafted by Tracy Flood, an attorney chosen by the Center
6 who was then a member of the Center's congregation. The Sales Agreement was presented to
7 Weir at a meeting on January 11, 2001 with the Center's President and Pastor, Stan Morris
8 ("Morris") and the Center's Secretary, Alan Kelly. Weir signed the Sales Agreement at the
9 meeting without making any changes.

10 7. The Sales Agreement contained an option entitling the Center to re-purchase the
11 property under specified conditions (the "Option", Exhibit 4). The deadline for exercise of the
12 Option was August 31, 2001

13 8. In the weeks following the signing of the Sales Agreement, Weir became
14 disillusioned with what he perceived to be financial mismanagement by Morris. As a result,
15 Weir decided to purchase the Property from the Center in order to provide it with the funds
16 necessary to pay the Judgment, but decided to sever continuing financial relations with the
17 Center and, specifically, not to grant the Center an option on the Property.

18 9. Weir's attorney, Richard B. Shattuck, prepared a four page Real Estate Purchase
19 and Sale Agreement governing the sale of the Property ("REPSA") in late January 2001

20 10. The Center and Weir entered into the REPSA in early February 2001. Weir's then-
21 wife Jennifer Sansen-Weir ("Sansen-Weir") was also a party to the REPSA. The REPSA was
22 admitted into evidence as trial exhibits 5 and 71. She did not sign the earlier Sales Agreement.

23 11. Weir paid \$221,500 plus settlement charges of \$5,656.78 for the Property, for a total
24 sales price of \$227,156.78. (Exhibit 7).

25 12. The REPSA is a fully integrated agreement and does not contain an option entitling
26 the Center to re-purchase the Property under specified conditions, or any other provision
27 granting the Center the right to re-purchase the Property.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4—Draft 1,
March 14, 2005, 7:52 p.m.

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1 13. Weir intended that the REPSA not contain an option and that it supersede the Sales
2 Agreement.

3 14. The REPSA contains an integration clause that provides that it supersedes all prior
4 agreements by the parties regarding the Property.

5 15. By signing the REPSA, the Center agreed to convey the Property to Weir and
6 Sansen-Weir in fee simple by Statutory Warranty Deed. There was no mention of an option in
7 the REPSA.

8 16. Although the Option contained in the earlier Sales Agreement was null and void
9 because the Sales Agreement fails to satisfy the statute of frauds, even if it had satisfied the
10 statute of frauds, it would have become of no legal effect once the REPSA was executed.

11 17. The Center conveyed fee simple title to the Property to Weir and Sansen-Weir by
12 Statutory Warranty Deed recorded on February 12, 2001, without reservation or exception for
13 any limit on alienability (the "Deed")(trial exhibit 6). In particular, the Deed does not provide
14 the Center with an option to repurchase the Property.

15 18. Morris executed the Sales Agreement and the REPSA on behalf of the Center, along
16 with Alan Kelly, the Center's Secretary. Morris read the REPSA at the time that he executed it.
17 He understood that it did not contain an option for the Center to repurchase the Property. He
18 also reviewed the Deed and understood that it too did not contain an option for the Center to
19 repurchase the Property.

20 19. The Center does not allege that Weir engaged in fraudulent or other inequitable
21 conduct intended to induce the Center to enter into the REPSA and to issue the Deed. The
22 evidence is that he did not engage in fraudulent or inequitable conduct causing the Center to
23 enter into the REPSA and to issue the Deed.

24 20. Subsequently, the Center attempted to assign the claimed Option to plaintiff
25 partnership comprised of Custom Communities Corporation., Inc. and JEH Corporation, Inc.
26 (collectively, the "Developers") on August 30, 2001 by and through an Earnest Money Receipt

1 and Real Estate Purchase and Sale Agreement entered into by the Center and the Developers on
2 that date (the "Assignment"). The Assignment was admitted into evidence as trial exhibit 18.

3 21. On September 6, 2001, the Developers caused the Center to commence this action
4 and to file a lis pendens (the "Lis Pendens"). The Lis Pendens was admitted into evidence as
5 trial exhibit 54. The Developers and the Center intended the Lis Pendens to prevent Weir from
6 selling or developing the Property.

7 22. Thereafter, the marital community comprised of Weir and Sansen-Weir was
8 dissolved and all rights and interests in the Property or any recovery in this action belonging to
9 Sansen-Weir were transferred to Weir.

10 23. The Developers were joined as plaintiffs in an Amended Complaint. They asserted
11 a right to title to the Property pursuant to the Assignment and the claimed Option in the Sales
12 Agreement.

13 24. The REPSA superseded the Sales Agreement.

14 25. At no time after the Deed was executed by Morris and Alan Kelly on behalf of the
15 Center on February 8, 2001, was the Center or the Developers vested with any ownership
16 interest in the Property.

17 26. The Lis Pendens should be stricken and title to the Property quieted in favor of
18 Weir.

19 27. Weir is the prevailing party in this action.

20 28. Before August 31, 2001, Weir offered to sell the property back to the Center.
21 (Exhibits 8, 9, 10, 12). Weir demanded \$265,028.98. This is more money than Weir loaned to
22 the Center and more money than the option agreement called for. Therefore, the Center
23 refused to pay the inflated figure.

24 29. The value of the Property was \$239,000 as of July, 2001 (Exhibit 66).

25 30. The Center and the Developers are jointly and severally liable to Weir for the
26 damages that he suffered as a result of the filing of the Lis Pendens.

27 31. Weir is entitled to an award of damages.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6—Draft 1,
March 14, 2005, 7:52 p.m.

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1 As explained in the Defendant Weir's Post-Trial Memorandum in Support of
2 Application for Damages and Attorneys' fees and Cost (at pages3-4), Weir testified to three
3 different ways of calculating his damages, as follows:

4 1 The Court's draft finding No. 11 indicates that Weir paid \$227,156.78
5 for the Property. Calculating the lost use of that money, at 12%, from
6 September 6, 2001 to may 6, 2005 (precisely three and two-thirds years),
7 yields the amount of \$100,039.85 ($\$227,156.78 \times 12\% \times 3.67 =$
8 $\$100,069.85$).

9 2. Weir has been unable to implement plans to develop the Property. He
10 calculated profits of \$440,000. The loss of the use of that \$440,000 for a
11 period of 1.5 years from the date the development would have been
12 completed would yield damages of \$79,200 ($\$440,000 \times 12\% \times 1.5$
13 $\text{years} = \$79,200$).

14 3. Weir took out a loan from Timberland Bank secured by the Property in
15 July of 2001 since he did not have access to the funds used to pay for the
16 Property. Weir has been making monthly interest payments of \$1,258.38
17 on the loan since then. Between September 6, 2001 and May 6, 2005,
18 exactly 44 months will have passed. Thus, he will be out of pocket
19 \$55,368.72 in loan payments necessitated by the cloud on title resulting
20 from the lis pendens.

21 **32. The Court should remove the lis pendens because plaintiffs have no legal**
22 **interest in the Property.**

23 Finally, after previously stipulating to removal of the lis pendens, plaintiffs now ask
24 the Court to continue the lis pendens while they appeal. They cite no authority authorizing
25 such relief and the request makes no sense. RCW 4.28.328 recognizes that a lis pendens has
26 "the effect of clouding title to real property." Yet, plaintiffs ask to be allowed to continue to
27 cloud Weir's title to the Property even after the Court finds that they lack any interest in the

1 Property. If plaintiffs wish to seek a stay or other interim relief, they should seek appropriate
2 relief from the Court of Appeals after bonding an appeal. For three and a half years, plaintiffs
3 have wrongly clouded Weir's title. They have no legal title to the Property. Therefore, there is
4 no substantial justification to allow the continuation of the lis pendens. To do so would only
5 add to Weir's damages.

6 The Court makes the following Conclusions of Law:

7 1. To the extent that the foregoing findings of fact contain Conclusions of Law, they
8 shall be deemed to be incorporated herein by reference thereto.

9 2. The Sales Agreement is legally deficient. It fails to satisfy the statute of frauds for
10 real property transactions. Among other things, the Sales Agreement does not specify the sales
11 price and the price cannot be determined without resort to parol evidence. As a result, the
12 Option is null and void.

13 3. The REPSA is an integrated agreement that supersedes the Sales Agreement.

14 4. Even if the Option were not otherwise null and void, it was rendered unenforceable
15 because the Sales Agreement was superseded by the REPSA. The REPSA does not contain an
16 option entitling the Center to re-purchase the Property under specified conditions, or any other
17 provision granting the Center the right to re-purchase the Property.

18 5. By entering into the REPSA, the Center agreed to convey the Property to Weir and
19 Sansen-Weir in fee simple by Statutory Warranty Deed.

20 6. The Center conveyed fee simple title to the Property to Weir and Sansen-Weir by
21 Statutory Warranty Deed recorded on February 12, 2001, without reservation or exception or
22 any limit on alienability. The Deed complied with the requirements of RCW 64.04.030.

23 7. The Deed is a statutory warranty deed. Pursuant to RCW 64.04.030, a statutory
24 warranty deed conveys a fee simple estate unless additional language in the deed clearly and
25 expressly limits or qualifies the interest conveyed. No such limitation or qualification appears
26 in the Deed. Through the Deed, the Center warranted that Weir and Sansen-Weir were entitled
27

1 to the Property free of all encumbrances and that they were entitled to quiet and peaceable
2 possession of the Property.

3 8. Even if the Option had survived the REPSA, the Sales Agreement and Option
4 therein merged into the Deed. The Option, which would have affected Weir's right to
5 disposition of the Property, was a real property interest that was not collateral to the Deed.

6 9. Weir and the Center never shared a common understanding and intent that the
7 Option survives the REPSA and Deed. The Center does not allege, and the evidence does not
8 support a finding, that Weir engaged in fraudulent or other inequitable conduct in inducing the
9 Center to enter into the REPSA and to issue the Deed. Absent any finding of fraud or other
10 inequitable conduct by Weir, any claimed unilateral mistake by the Center is insufficient to
11 support the rescission of the REPSA.

12 10. Weir is entitled to have title to the Property quieted in his favor.

13 11. The Center and the Developers are jointly and severally liable to Weir, pursuant to
14 RCW 4.28.328(3), for actual compensatory damages proximately caused by the filing of the Lis
15 Pendens in the amount of \$55,368.72 plus 12% statutory interest from September 6, 2001.

16 12. Weir is the prevailing party in this action.

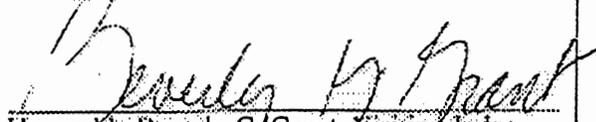
17 13. The Center and the Developers are also jointly and severally liable to Weir pursuant
18 to ¶17 of the REPSA and RCW 4.84.330, as the prevailing party, as well as pursuant to RCW
19 4.28.328(3) for his attorneys' fees and costs reasonably and necessarily incurred in successfully
20 defending this action in the amount of \$102,664.90.

21 14. The attorney fee provision in paragraph 17 of the REPSA did not merge into the
22 Deed.

23 15. During the pendency of this action, the marital community comprised of Weir and
24 Sansen-Weir was dissolved and all rights and interests in the Property or any recovery in this
25 action belonging to Sansen-Weir were transferred to Weir.

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4 16. The Center's and Developers' claims asserted in the Amended Complaint are
5 hereby dismissed with prejudice.

6 DONE IN OPEN COURT this 6th day of May, 2005

7
8 
9 Honorable Beverly G. Grant, Visiting Judge

10 Presented by:

11 KELLER ROHRBACK L.L.P.

12
13 By 
14 Rob J. Crichton, WSBA #20471
15 Attorneys for Defendant
16 David Weir

17 Approved as to form;
18 Notice of presentation waived.

19 COMFORT, DAVIES & SMITH, P.S.

20 By 
21 Steven W. Davies, WSBA #11566
22 Attorneys for Plaintiffs
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FILED
COURT OF APPEALS

05 MAY 31 PM 1:57

Supreme Court No.
Court of Appeals No. 33399-6-II

THE SUPREME COURT
OF THE STATE OF WASHINGTON

BY



SOUTH KITSAP FAMILY WORSHIP CENTER, a Washington
corporation, A WASHINGTON GENERAL PARTNERSHIP
CONSISTING OF CUSTOM COMMUNITIES CORPORATION, INC., a
Washington corporation and JEH CORPORATION, INC., a Washington
corporation,

Plaintiffs/Appellants,

vs.

DAVID WEIR and JENNIFER H. SANSEN-WEIR, husband and wife,

Defendants/Respondents

CERTIFICATE OF SERVICE

Steven W. Davies, WSBA #11566
Attorneys for Appellant
COMFORT, DAVIES & SMITH, P.S.
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(253) 565-3400

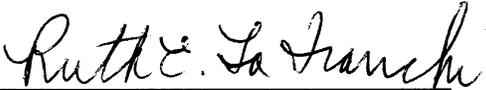
I, Ruth E. LaFranchi, declare and certify as follows:

1. I am over the age of majority and am competent to testify regarding the matters stated herein.
2. On May 31, 2006, I caused to be delivered by ABC-LMI, a copy of Appellants' Reply Brief to:

**ROB J CRICHTON ESQ
KELLER ROHRBACK LLP
1201 THIRD AVE STE 3200
SEATTLE WA 98101-3052**

Executed this 31st day of May, 2006, at Tacoma, Washington.

I declare under the penalty of perjury of the laws of the state of Washington that the foregoing statement is true and correct.



Ruth E. LaFranchi