

NO. 34960-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT E. BENOIT,

APPELLANT,

Vs.

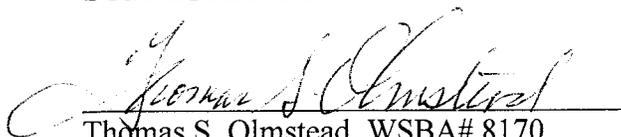
SHARON CARLSON,

RESPONDENT.

Appellants Opening Brief

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DIVISION II
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STATE OF WASHINGTON
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SUBMITTED BY:



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I. ASSIGNMENTS OF ERROR

A. The portion of the written order of Judge Frederick W. Fleming dated May 12th, 2006 stating that *"plaintiff's claims were dismissed by res judicata because plaintiff failed to perfect his claims in the prior action (05-2-08170-3) pursuant to RCW 61.30 et. Seq."* (CP 269, appendix G)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether RCW 61.30 specifically prohibits a purchaser of real estate from filing a breach of contract action for monetary damages against the seller, if the purchaser does not pursue an equitable action to enjoin foreclosure of the subject property?

B. Whether the order signed by Judge Culpepper on November 4th, 2005 dismissing Mr. Benoit's equitable claims to enjoin foreclosure of his property for failure to post a \$40,000.00 security bond constitutes a "final judgment on the merits" for the purposes of res judicata?

C. Whether Mr. Benoit's claims for equitable relief filed under Cause No. 05-2-08170-3 involved the same subject matter as the breach of contract action filed under Cause No. 05-2-14225-7 for the purposes of res judicata?

D. Whether Mr. Benoit's claims for equitable relief filed under Cause No. 05-2-08170-3 concerned the same causes of action as the lawsuit for breach of contract action filed under Cause No. 05-2-14225-7 for purposes of res judicata?

III. STATEMENT OF THE CASE.

Sharon Carlson and Robert Benoit entered into a real estate contract on June 4th, 1999, for the purchase of real property located at 5205 Sumner Heights Drive East, in Edgewood, Washington. (CP 10-16) On February 15, 2005 Sharon Carlson filed a notice of intent to forfeit the real estate contract under Pierce County Auditor's file number 200502150735. (CP 176-182) On June 1st, 2005 Ms. Carlson filed a declaration of

forfeiture under Pierce County Auditor number 200506010935 (CP 187-189).

Throughout the months of May and June, 2005, Mr. Benoit made multiple attempts to pay off the contract. Mr. Benoit made numerous attempts to obtain a payoff figure, but Ms. Carlson and her attorney Eugene Hammermaster, refused to provide Mr. Benoit with the payoff amount. See Declaration of Robert Benoit at p. 2. (CP 235) Because Ms. Carlson refused to provide Mr. Benoit with a payoff figure, on May 25th, 2005 Mr. Benoit filed a pro se complaint for equitable relief to stop the foreclosure of his property under Pierce County Superior Court Cause No. 05-2-08170-3. (CP 77-81) Shortly thereafter Mr. Benoit retained counsel and filed an amended complaint for equitable relief to enjoin foreclosure of the property. (CP 88-91) On July 29th, 2005 Commissioner David H. Johnson signed an order requiring Mr. Benoit to post a \$40,000.00 bond within ten days, in order to proceed with the

equitable action to enjoin the foreclosure. (CP 112, Appendix C) Mr. Benoit could not come up with the \$40,000 bond within the required timeframe, and as a result Mr. Benoit's amended complaint was dismissed with prejudice on September 20th, 2005. (CP 124-125, Appendix E).

On October 20th, 2005 Ms. Carlson's attorney filed a motion to clarify the earlier order of September 20th, 2005. (CP 138) On October 27th, 2005 Mr. Benoit's counsel filed a motion for permission to amend the complaint a second time, to add breach of contract claims. (CP 140-153). On November 4th, 2005 Judge Culpepper amended the earlier order of dismissal, ruling that

“the previous order of dismissal entered on September 20th, 2005 was intended and does hereby dismiss [sic] claims of plaintiff including the original complaint and the amended complaint filed by the Plaintiff. That all claims of the Plaintiff were dismissed with prejudice and this order clarifies the same. That plaintiff's motion to amend the amended complaint is denied, but it is not prejudiced from starting a new lawsuit for breach of contract.”

(CP 155-156, Appendix F). Because Mr. Benoit was unable to procure a \$40,000.00 bond within the required timeframe and because he was unable to obtain a payoff amount from Ms. Carlson, his

property went into foreclosure.

On November 30th, 2005, Mr. Benoit filed another lawsuit against Ms. Carlson for her breach of the real estate contract under Pierce County Superior Court Cause No. 05-2-14225-7. (CP 4-16) The new complaint asserted claims solely for breach of contract, and did not request any type of equitable or injunctive relief relating to the forfeiture proceedings. On January 12th, 2006 Ms. Carlson filed an answer, affirmative defenses and additional counterclaims against Mr. Benoit for alleged Waste and contamination upon the subject property. (CP 26-33)

On April 7th, 2006 Ms. Carlson filed a motion for summary judgment, requesting that all claims of plaintiff be dismissed, "as they are barred under the doctrine of Collateral Estoppel and/or Res Judicata and/or CR 12(b)(6), failure to state a claim upon which relief can be granted". (CP 196-197) The motion for Summary Judgment also requested Summary Judgment as a

matter of law with respect to her waste counterclaims. (CP 268-270) On May 12th, 2006 after hearing oral argument from counsel, Judge Fleming made the following oral decision:

The Court: I think it's res judicata that your client didn't perfect the cause of action the way they were supposed to. And I'm going to grant defendant's Summary Judgment and dismiss the claim. In reference to the waste issue, I think there is factual issues both as to liability and as to damages.

Mr. Gray: And in the basis – the basis – I just want to – he didn't perfect his claim under the statute, correct?

The Court: Under the statute.
(5/12/06 Tr., pp. 16-17) That same day, Judge Fleming signed an order dismissing Mr. Benoit's breach of contract claims, but denied Ms. Carlson's motion for Summary Judgment as to her Waste Counterclaims. Judge Culpepper inserted the following handwritten language into the order:

Plaintiff's claims were dismissed by res judicata because plaintiff failed to perfect his claims in the prior action (05-2-08170-3) pursuant to RCW 61.30 et. Seq.
(CP 269, Appendix G) Mr. Benoit filed a timely appeal of that order on June 8th, 2006, (CP 273-277) and on July 7th, 2006 Ms. Carlson voluntarily dismissed her waste counterclaims without

prejudice. (CP 280-281) Neither party offered a transcript of the November 4, 2005 hearing before Judge Culpepper in their summary judgment pleadings for Judge Fleming to consider. Appellant's counsel filed a motion to supplement the record before this court with the 11/4/05 transcript of Judge Culpepper's ruling, but the motion was denied.

IV. LEGAL ARGUMENT

- A. The Real Estate Contract Forfeiture Act does not expressly require a purchaser of real estate to pursue an equitable action to enjoin foreclosure of their property as a condition precedent to filing a breach of contract action against the seller (Issue A)**

This appeal may present an issue of first impression to this court. Namely, whether the Washington Legislature intended the Real Estate Contract Forfeiture Act (codified at RCW 61.30) to prohibit a purchaser of real estate from filing a breach of contract action against the seller for the seller's breach of the Real Estate Contract, if the purchaser does not pursue an equitable action to enjoin foreclosure of the

subject property under RCW 61.30.110. Neither party briefed this issue before the trial court, and the Appellant could find no reported Washington case addressing this particular question.

The difficulty seems to arise from two potentially conflicting portions of the Real Estate Contract Forfeiture Act, namely RCW 61.30.020(1) and RCW 61.30.100(2). RCW 61.30.020(1) provides as follows:

(1) A purchaser's rights under a real estate contract shall not be forfeited except as provided in this chapter. Forfeiture shall be accomplished by giving and recording the required notices as specified in this chapter. This chapter shall not be construed as prohibiting or limiting any remedy which is not governed or restricted by this chapter and which is otherwise available to the seller or the purchaser. At the seller's option, a real estate contract may be foreclosed in the manner and subject to the law applicable to the foreclosure of a mortgage in this state.

RCW 61.30.020(1) (emphasis added). However, RCW

61.30.100(2) states that

(2) Except as otherwise provided in this chapter or the contract or other agreement with the seller, forfeiture of a contract under this chapter shall have the following effects:

(a) The purchaser, and all persons claiming through the purchaser or whose interests are otherwise subordinate to the seller's interest in the property who were given the required notices pursuant to this

chapter, shall have no further rights in the contract or the property and no person shall have any right, by statute or otherwise, to redeem the property;

(b) All sums previously paid under the contract by or on behalf of the purchaser shall belong to and be retained by the seller or other person to whom paid; and

(c) All of the purchaser's rights in all improvements made to the property and in unharvested crops and timber thereon at the time the declaration of forfeiture is recorded shall be forfeited to the seller.

RCW 61.30.100(2). At the summary judgment hearing before Judge Fleming, Mr. Carlson's attorney argued that Judge Culpepper's order of 11/4/05 allowing Mr. Benoit to bring a separate breach of contract action was wrong, and that Judge Fleming should act as an appellate judge and *sua sponte* reverse Judge Culpepper's earlier decision.

Mr. King: And what happened, so I can resolve the procedural issues related to that, was at the hearing for the dismissal of that action. The language was interlineated into that order which indicated he may bring an action for breach of contract on this matter even though the lawsuit that he failed to stop the forfeiture was dismissed with prejudiced.[sic] And respectfully Judge Culpepper was incorrect about that because---

The Court: Now, this bothers me. You – what do you want me to do? You want me to be an appellate court for what Judge Culpepper did? Shouldn't this properly be back before

Judge Culpepper?

(5/12/06 Hrg. Tr., pp. 5-6). Mr. King, the Attorney for Ms. Carlson, also admitted on the record that he did not brief the issue before the trial court of whether RCW 61.30.100(2) prevents Mr. Benoit from filing a breach of contract action.

Mr. King: ...Judge Culpepper was not commenting on the validity of that lawsuit. That issue wasn't briefed, but the statute 61.30.100 provides clear and specific basis by which a party attempts to stop a forfeiture if in fact there is grounds to stop the forfeiture.

(5/12/06 Tr., p. 15, lines 15-19). It is telling that neither party provided any briefing nor cited a single case for the sole issue upon which Judge Fleming based his decision, namely Mr. Benoit's "failure to perfect his claims pursuant to RCW 61.30, et seq". The Act clearly indicates that "...This chapter shall not be construed as prohibiting or limiting any remedy which is not governed or restricted by this chapter and which is otherwise available to the seller or the purchaser." RCW 61.30.020(1).

Because the Appellant could find no reported

Washington Case addressing this question, it seems appropriate to review the available legislative history pertaining to the Act. The various drafting committees for the Real Estate Contract Forfeiture act prepared several volumes of drafting history, including an extensive compilation of "questions and answers" relating to the act authored by David H. Rockwell.

Question No. 63 states as follows:

Q: What if the property has already been sold or encumbered to a third party?

A.: If such third party is a bona fide purchaser or encumbrancer for value, his or her rights will not be affected by the action to set aside...In that event, the purchaser's remedy would be limited to a personal action against the seller.

See Appendix A, pp. 36-37 (emphasis added). The available legislative history materials do not provide any details as to what types of "personal actions against the seller" may be possible. Regardless, this statement clearly indicates that the act does not prohibit a "personal action against the seller". Because a "*personal action against the seller*" is not prohibited by the act, a "*personal action against the seller*" would

clearly constitute a type of action that "is not governed or restricted by this chapter [RCW 61.30] and which is otherwise available to the seller or the purchaser". See RCW 61.30.020(1). The act clearly makes no reference to a breach of contract action, which is certainly one category of "personal actions against the seller". As such, the only logical conclusion would be that a breach of contract action is not "governed or restricted" by RCW 61.30.

In the case of *Charles McKown v. Floyd Davis*, 47 Wn.2d 10, 285 P.2d 1048 (1955) the court was presented with the question of whether the "...vendee named in an earnest money agreement, who has been unsuccessful in a prior action to rescind that contract on the grounds of fraudulent representations, can subsequently maintain an action for specific performance of that contract?". *Charles McKown v. Floyd Davis*, 47 Wn.2d 10, 11, 285 P.2d 1048 (1955). In *McKown*, the court found that

The former action, while it finally determined the respondents' right to avoid the contract on the evidence there presented, did nothing to place beyond the reach of respondents the means of compelling appellants to specifically perform the terms of the

contract by which the parties were bound. We do not consider the former action as a bar to this action. *McKown v. Floyd*, 47 Wn.2d at 19. Although not directly on point to the instant case, *McKown* is illustrative of the conclusions reached by Washington Courts many decades ago in deciding similar types of issues.

B. Judge Culpepper's November 4th, 2005 order did not bar Mr. Benoit from filing a separate breach of contract action against Ms. Carlson due to res judicata. (Issues B-D)

1. The order of November 4th, 2005 was not a "final judgment on the merits"

As noted earlier, on May 25th, 2005 Mr. Benoit filed a pro se action to restrain the non-judicial foreclosure proceedings against his home instituted by Ms. Carlson. (CP 77-81) On September 20th, 2005, Mr. Benoit's equitable claims were dismissed solely because Mr. Benoit could not immediately produce a \$40,000.00 bond. (CP 124, Appendix E) After the initial order of dismissal, both parties sought clarification of the order. Ms. Carlson filed a "motion to clarify

order of dismissal" on October 20th, 2005 (CP 138) and on October 27th, 2005 Mr. Benoit filed a "motion for permission to amend complaint a second time". (CP 140-153) It is evident from these filings that both parties wanted clarification on precisely what claims were dismissed by original order of 9/20/05, and whether Mr. Benoit could still pursue breach of contract claims against Ms. Carlson.

After considering both parties' motions, Judge Culpepper entered a second order on November 4, 2005. (CP 155, Appendix F) Judge Culpepper intentionally inserted handwritten language into the November 4th, 2005 order, which stated "*That plaintiff's motion to amend the amended complaint is denied, but it is not prejudiced from starting a new lawsuit for breach of contract*". (CP 155, Appendix F) This language made very clear that only Mr. Benoit's equitable claims to stop the forfeiture were dismissed, and that Mr. Benoit "*is not prejudiced*" from filing a

separate action for breach of contract.

In the instant case, the only possible reason Judge Culpepper would have inserted the handwritten language into the 11/4/05 order was to address whether Mr. Benoit would be barred from filing a future breach of contract suit by Res Judicata and/or Collateral Estoppel. Washington Courts have held that "The threshold requirement of res judicata is a final judgment on the merits in the prior suit." *Hisle v. Todd Pacific Shipyards*, 151 Wn.2d 853, 865 93 P.3d 108(2004). The record makes clear that none of plaintiff's claims in the equitable action were actually litigated, and the action was dismissed simply because Mr. Benoit could not afford a \$40,000.00 bond. No discovery was taken, and no decisions were made by any court as to whether Ms. Carlson breached the real estate contract or whether the forfeiture proceedings instituted by Ms. Carlson were proper.

2. There is no concurrence of identity in the subject matters of the equitable action and the breach of contract action.

Even if the November 4th, 2005 order was a judgment on the merits, which it was not,

For the doctrine [of res judicata] to apply, a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.

Loveridge v. Fred Meyer, 125 Wn.2d 759, 762, 887 P.2d 898 (1995) (internal citations omitted).

In the instant case, both lawsuits did involve the same parties. This is where the similarity ends, however, as the remaining two factors do not apply.

First, the subject matter of the two actions are entirely different. The Washington Supreme Court has said the following on the issue of subject matter:

This court has held that that the same subject matter is not necessarily implicated in cases involving the same facts. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997) (finding different subject matter in cases involving a master use permit where the initial case sought to nullify the city council decision and the second case sought damages); *Mellor v. Chamberlin*, 100 Wn.2d 643, 646, 673 P.2d 610 (1983) (finding different subject matter in cases involving the sale of property where the initial case sought to establish misrepresentation and the second case sought to establish a breach of the covenant of title). *Hisle v. Todd Pacific Shipyards*, 151 Wn.2d at

866. The action dismissed by Judge Culpepper on November 4th, 2005 was a complaint in equity to enjoin the forfeiture proceedings instituted by Ms. Carlson. The second action was limited solely to breach of contract claims for monetary damages arising out of Ms. Carlson's breach of the Real Estate contract.

Mr. Benoit's original pro se complaint was filed on May 25th, 2005 under Pierce County Superior Court Cause No. 05-2-08170-3. (CP 77-81) In his complaint, Mr. Benoit prayed for the following relief:

WHEREFORE, Plaintiff prays for judgment as follows:

1. That Defendant's Notice of Intent to Forfeit be stricken and dismissed.
 2. That Defendant Carlson, [sic] not be awarded attorney fees and costs for bringing said notice.
 3. That Plaintiff be allowed entry to his property to complete the remodel and corrections to deficiency
- (CP 79) The amended complaint filed on July 7th, 2005 by Mr. Benoit's counsel prayed for the following relief from the court:

WHEREFORE, Plaintiff prays for judgment as follows:

1. For an order of the court declaring null and void Defendants' notice of intent to forfeit and declaration of forfeit; [sic]

2. for an order of the court reinstating the contract between the parties;
3. for an order of the court requiring Defendant's to give a payoff figure;
4. that Plaintiff be awarded his reasonable attorney's fees and costs in an amount to be proven at trial, but in any event, in an amount of not less than \$1500.00;
5. that Plaintiff be allowed sufficient time to resolve the dispute with the Pierce County Health Department concerning the status of said property; and
6. Such other and further relief as the court deems just and equitable.

(CP 90) In contrast, the complaint filed by Mr. Benoit in the breach of contract action under Cause No. 05-2-14225-7 requested the following relief:

WHEREFORE, Plaintiff prays for relief, jointly and severally, against the Defendant as follows:

1. For a judgment to be entered against the Defendant and in favor of the plaintiff in an amount to be proven at trial, but in any event, in an amount not less than \$260,000.00;
2. For an order of the court awarding Plaintiff his reasonable attorney's fees and costs in an amount to be proven at trial, but in any event, in an amount of not less than \$1500.00;
3. For an order of the court allowing statutory interest to incur on said damage amount, fees and costs; and
4. For such other and further relief as the court deems just and equitable.

(CP 8) Washington Courts have also noted that,

While there is a dearth of case law defining when the subject matter of cases differs, one noted authority has observed that when courts examine subject matter "[t]he critical factors seem to be the nature of the claim or cause of action and the nature of the parties." Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 812-13 (1985).
Hayes v. City of Seattle, 131 Wn.2d 706, 712, 934

P.2d 1179(1997) It is clear from even a cursory examination of the complaints in both cases, that the equitable action filed under Cause No. 05-2-08170-3 and the breach of contract action filed under Cause No. 05-2-14225-7 did not involve the same subject matters. It is also clear that

The defense of *res judicata* is an affirmative defense and must be pleaded and proved. *Wood v. Earls*, 39 Wash. 21, 80 P. 837; *Russell v. Mutual Lumber Co.*, 134 Wash. 508, 236 P. 96. When the defense of *res judicata* is pleaded and there is a denial thereof by reply, an issue of fact is presented which must be determined by the evidence thereon. *Pugsley v. Stebbins*, 87 Wash. 187, 151 P. 501; *Flessher v. Carstens Packing Co.*, 96 Wash. 505, 165 P. 397; *Flessher v. Carstens Packing Co.*, 105 Wash. 694, 179 P. 100.

George E. Large v. Edna R. Shively, 186 Wash. 490, 497, 58 P.2d 808 (1936). Because Ms. Carlson failed to present sufficient evidence as to the concurrence of identity between the subject matters litigated in the equitable action and the breach of contract action, Judge Fleming should not have found that Mr. Benoit was barred by Res Judicata from filing his breach of contract action.

3. There is no concurrence of identity with respect to the causes of action asserted in the equitable case and the breach of

contract case

For res judicata to apply, there must also exist a sufficient concurrence of identity with both causes of action. *Loveridge v. Fred Meyer*, 125 Wn.2d at 762. Washington Courts have noted that,

While it is often said that a judgment is res judicata of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. 50 C.J.S. *Judgments* § 668 (1947); 46 Am. Jur. 2d *Judgments* § 404 (1969). A judgment is res judicata as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated. *Seattle-First National Bank v. George Y. Kawachi*, 91 Wn.2d 223,226, 588 P.2d 725(1978). A review of the orders entered in the equitable action filed under Cause No. 05-2-08170-3 clearly show that no breach of contract claims were "adjudicated". In fact, the November 4th, 2005 order of Judge Culpepper clearly proves Mr. Benoit's breach of contract claims were not adjudicated, and could be pursued in a separate action. (CP 155-156, Appendix F)

After Mr. Benoit filed the amended complaint for equitable relief on July 7, 2005 (CP 88-91), Ms. Carlson filed a motion for Summary Judgment on July 18th, 2005, requesting dismissal of Mr. Benoit's amended complaint. (CP 100-106) On July 22nd, 2005 Judge Culpepper entered an order requiring Mr. Benoit to post a \$40,000.00 security bond within ten days. (CP 109; Appendix B) On July 29, 2005 Commissioner David H. Johnson signed an additional order, again requiring Mr. Benoit to post a \$40,000.00 security bond within ten days. (CP 11-113, Appendix C) Mr. Benoit was unable to post the bond, and Ms. Carlson again moved for summary dismissal on August 25th, 2005. (CP 115-118) On September 14th, 2005 Judge Culpepper entered the following order:

THE ABOVE MATTER coming on regularly for hearing upon the Defendant's Motion to dismiss the Plaintiff's Amended Complaint for failure to comply with the Court's Order of July 29th, 2005, and the Court having before it the files and records in said cause and listening to argument of counsel for each of the parties, finds that the Plaintiff has failed to comply with said Order as relates to the filing of a bond in the amount of Forty Thousand Dollars (\$40,000.00),
NOW, THEREFORE, IT IS HEREBY
ORDERED, ADJUDGED, and DECREED that if the Plaintiff has

not filed with the Court and delivered a copy thereof personally or by fax to the Defendant and/or the Defendant's Attorney, a Bond in the amount of Forty Thousand Dollars (\$40,000.00) on or before the 19th day of September, 2005 at 4:30 P.M. as provided and required in that certain order dated July 29th, 2005 the Court will enter an Order Dismissing the Plaintiff's Amended Complaint. It is further

ORDERED, ADJUDGED and DECREED, that upon the failure of the Plaintiff to file said Bond, the Defendant may present an Order of Dismissal, Ex Parte, in the form attached hereto at any time after 4:30 P.M., September 19th, 2005.

(CP 120-121, Appendix D) Mr. Benoit could not

procure the funds, and as a result his equitable claims were dismissed on September 20th, 2005. (CP 124-125, Appendix E) The order of dismissal stated in relevant part as follows:

THE ABOVE MATTER coming on regularly for hearing before the Court and the Defendant having failed to file the bond as required by the Order of September 14th, 2005 on or before September 19th, 2005,

NOW, THEREFORE, IT IS HEREBY

ORDERED, ADJUDGED and DECREED that the Plaintiff's Amended Complaint be and is hereby dismissed with prejudice and with costs and attorney's fees incurred by the Defendant (reserved for determination at a subsequent hearing) in defending against the Plaintiff's Pro Se Complaint and Amended Complaint.

(CP 124-125, Appendix E) In response to

subsequent motions filed by both the parties described above, Judge Culpepper entered another order on November 4th, 2005, which read as follows:

THIS MATTER having come before the above-entitled court and

having heard argument of counsel and reviewed all pleadings in this case, it is now, therefore, hereby

ORDERED, ADJUDGED and DECREED that the previous order of dismissal entered on September 20th, 2005 was intended and does hereby dismiss claims of the plaintiff including the original complaint and the amended complaint filed by the plaintiff. That all claims of the plaintiff were dismissed with prejudice and this order clarifies the same. That Plaintiff's motion to amend the amended complaint is denied, but it is not prejudiced from starting a new lawsuit for breach of contract.

(CP 155-156, Appendix F) It is crucial to observe that the proposed order prepared by Ms. Carlson's counsel for the hearing on 11/4/05 stated "...that the previous order of dismissal entered on September 20th, 2005 was intended to dismiss any and all claims of the plaintiff..." . (CP 155, Appendix F) However, a careful review of the final order signed by Judge Culpepper on 11/4/05 indicates Judge Culpepper deliberately crossed out the words "any and all" from Ms. Carlson's proposed order. (CP 155, Appendix F) By crossing out these three words, Judge Culpepper clearly limited the order of dismissal to apply only to Mr. Benoit's equitable claims to enjoin foreclosure of the property. Furthermore, Judge Culpepper deliberately added the following handwritten language to the order:

That Plaintiff's motion to amend the complaint is denied, but it is not prejudiced from starting a new lawsuit for breach of contract

(CP 155, Appendix F) By deliberately crossing out the words "any and all" and by affirmatively adding handwritten language to the order proposed by Ms. Carlson's Counsel, Judge Culpepper evidenced his clear and unequivocal intent that the order of 11/4/05 would not construed to dismiss "any and all claims" of Mr. Benoit, and would not prejudice Mr. Benoit "from starting a new lawsuit for breach of contract". (CP 155, Appendix F). A review of the orders regarding Mr. Benoit's equitable claims filed under Cause No. 05-2-08170-3 clearly indicates that no breach of contract claims were "actually adjudicated" in the first action.

When Ms. Carlson's attorney filed the motion for summary judgment in the breach of contract case on April 7th, 2006, Ms. Carlson requested dismissal of Mr. Benoit's contract claims on three theories, namely Collateral Estoppel (CP 204), Res Judicata (CP 205), and failure to state

a claim upon which relief can be granted under CR 12(b)(6). (CP 206) The order on Summary Judgment signed by Judge Fleming on 5/12/06 stated in relevant part as follows:

The court having further heard oral argument from plaintiff's counsel and defendant's counsel and being otherwise informed of the factual and legal basis in support of and in opposition to defendant's motion, finds the following:

Plaintiff's claims were dismissed by res judicata because Plaintiff failed to perfect his claims in the prior action (05-2-08170-3) pursuant to RCW 61.30 et. seq. Based on the foregoing, it is hereby,

ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment regarding plaintiff's claims is Granted. It is further hereby,

ORDERED, ADJUDGED AND DECREED that Plaintiff's claims and causes of action are hereby DISMISSED WITH PREJUDICE. It is further hereby,

ORDERED, ADJUDGED AND DECREED THAT Plaintiff's Motion for Summary Judgment regarding plaintiff's liability for defendant's waste counterclaims is DENIED. It is further hereby

ORDERED, ADJUDGED AND DECREED that the sole remaining issue for trial in this cause is defendant's counterclaim. (CP 269-270, appendix G) A careful review of the

May 12th, 2006 order also indicates Judge Fleming crossed out certain portions of the proposed

order on summary judgment submitted by Ms.

Carlson. Specifically, the order drafted by Ms.

Carlson's counsel initially stated that

1. There are no material issues of fact which support plaintiff's claims.

2. To the extent any issues existed with respect to the real estate contract forfeiture, those issues were dismissed with prejudice in Pierce County Cause No. 05-2-08170-3. (CP 269, Appendix G) However, the final signed order clearly indicates Judge Fleming deliberately crossed out these two sentences proposed by Ms. Carlson, and added his own handwritten language that read:

Plaintiff's claims were dismissed by res judicata because plaintiff failed to perfect his claims in the prior action (05-2-08170-3) pursuant to RCW 61.30 et. seq. (CP 269, appendix G) Judge Fleming's order of 5/12/06 clearly indicates Judge Fleming affirmatively rejected Ms. Carlson's arguments that Mr. Benoit's contract claims should be dismissed for failure to state claim under CR 12(b)(6), Collateral Estoppel or that there were no issues of material fact which supported Mr. Benoit's claims. Washington Courts have noted early on that

The burden of proving that a claim is res judicata is upon the defendant pleading the defense. We find *Bradley v. State, supra* at 917, setting forth the rule as follows:

[A] person relying upon the doctrine of res judicata as to a particular issue involved in the pending case bears the burden of proving, by competent evidence consistent with the record in the former cause, that such issue was involved

and actually determined, where it does not appear from the record that the matter as to which the rule of res judicata is invoked as a bar was necessarily adjudicated in the former action. *Rufener v. Scott*, 46 Wn.2d 240, 280 P.2d 253 (1955).

Joseph Meder v. CCME Corporation, 7 Wn.App. 801, 807, 502 P.2d 1252 (1972) (citing *Bradley v. State*, 73 Wn.2d 914, 442 P.2d 1009 (1968)). A review of the record clearly indicates that Ms. Carlson failed to demonstrate that any issues were "actually determined" in the equitable action dismissed by Judge Culpepper on November 4th, 2005, and particularly that the breach of contract claims filed in the second lawsuit were "actually determined" in the first lawsuit dismissed by Judge Culpepper.

V. REQUEST FOR ATTORNEYS FEES AND EXPENSES INCURRED ON APPEAL PURSUANT TO RAP 18.1

Pursuant to RAP 18.1(a), (b), Appellant Robert Benoit respectfully requests this court award Mr. Benoit his attorney's fees, expenses and costs incurred in the prosecution of this appeal. This request is authorized pursuant to RCW 4.84.330, which provides as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.
The Real Estate contract that is the subject

of this litigation was signed by Sharon Carlson and Robert Benoit before a Notary on June 4th, 1999, and was subsequently recorded on June 7th, 1999 under Pierce County Auditor's file No. 9906071183. The contract states, at ¶ 24, as follows:

Attorneys' fees and costs:

In the event of any breach of this contract, the party responsible for the breach agrees to pay reasonable attorneys' fees and costs, including costs of notice of service and title searches, incurred by the other party. the [sic] prevailing party in any suit instituted arising out of this Contract and in any forfeiture proceedings arising out of this contract shall be entitled to receive reasonable attorneys' fees and costs incurred in such suit or proceeding.

(CP 150) The contract between the parties clearly provides for an award of attorney's fees and costs to the prevailing party. As such, pursuant to ¶24 of the real estate contract, RCW 4.84.330 and RAP 18.1, Mr. Benoit requests that upon conclusion of this appeal, the Appellant be awarded all of his attorney's fees, costs and expenses incurred in this prosecution of this appeal.

VI. CONCLUSION

In the instant case, Judge Fleming abused his judicial discretion by effectively "reversing" Judge Culpepper's order allowing Mr. Benoit to file an independent breach of contract action against Ms. Carlson. Contrary to Judge Fleming's sua sponte ruling, the Real Estate Contract Forfeiture Act does not specifically prohibit a purchaser from filing a breach of contract action against the seller, if the seller has not enjoined the subject property pursuant to RCW 61.30.110. As such, this court should reverse the

portion of Judge Fleming's May 12th, 2006 order dismissing Mr. Benoit's breach of contract claims due to res judicata, remand Mr. Benoit's breach of contract claims for trial, and award Mr. Benoit his attorneys fees, expenses and costs incurred in the prosecution of this appeal pursuant to RAP 18.1 and RCW 4.84.330.

Respectfully submitted this 25th day of May 2007.



Thomas S. Olmstead WSBA # 8170

APPENDIX A

REAL ESTATE CONTRACT FORFEITURES

SEPTEMBER 21, 1985

MATERIALS FOR A CONTINUING LEGAL EDUCATION SEMINAR

PRESENTED BY

UNIVERSITY OF WASHINGTON SCHOOL OF LAW
WASHINGTON LAW SCHOOL FOUNDATION

QUESTIONS AND ANSWERS REGARDING
CONTRACT FORM
AND
REAL ESTATE CONTRACT FORFEITURE ACT

David H. Rockwell
Jones, Grey & Bayley, P.S.
Bellevue

Questions and Answers Regarding

Contract Form

and

Real Estate Contract Forfeiture Act
Laws of 1985, ch. 237
(proposed RCW ch. 61.30)

David H. Rockwell, Bellevue

A. Contract Form

1. Q.: What situations is the contract form designed to address?

A.: The contract form was not drafted for any particular type of property (e.g., residential, commercial, agricultural, etc.), but rather it is designed to be a general form which may be used in a variety of situations. As such, it has the inherent limitation of not being tailored to a specific property or transaction, and if used, the drafter must take the same precautions as with any other form to ensure that its provisions accurately and completely evidence the intent of the parties. It is not the intention of the Washington State Bar Association to formally "sponsor" this form and one should not present it as being "recommended" by

61. Q.: What happens if the purchaser wishes to contest the forfeiture after the declaration of forfeiture has been recorded?

A.: For a period of sixty days following the date the declaration of forfeiture is recorded, the persons who were given the notices (by certified or registered mail, personal service, or where appropriate, posting) may seek a court order to set aside the forfeiture. See Section 14(2).

62. Q.: On what grounds may the forfeiture be set aside?

A.: Under Section 14(4), the forfeiture may not be set aside unless the person bringing the action establishes that the seller was not entitled to forfeit the contract or that the seller did not materially comply with the act.

63. Q.: What if the property has already been sold or encumbered to a third party?

A.: If such third party is a bona fide purchaser or encumbrancer for value, his or her rights will not be affected by the action to set aside. See Section 14(4).

(Of course, a third party would not be "bona fide" if acquiring its interest after the recordation of a lis pendens giving notice of such an action.) In that event, the purchaser's remedy would be confined to a personal action against the seller.

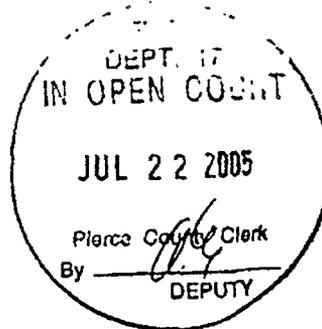
64. Q.: May a person who did not get the required notices seek to set aside the forfeiture?

A.: Yes, if such person was entitled to receive the required notices under Section 4(1) and 4(2). See Section 14(2). However, the sixty-day period in Section 14(2) in which an action must be brought is limited to those persons given the required notices. Therefore, the time period in which other persons entitled to seek a vacation order is governed by the applicable statute of limitations.

65. Q.: If the forfeiture is set aside, may the moving party also obtain damages from the seller?

A.: Yes. Section 14(5) requires the court to award actual damages and may award the moving party its attorneys' fees and costs in the event it prevails in the action.

APPENDIX B



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

ROBERT E BENOIT

Plaintiff(s)

vs.

SHARON CARLSON

Defendant(s)

Cause Number: 05-2-08170-3

MEMORANDUM OF JOURNAL ENTRY

Page 1 of 2

Judge: RONALD E CULPEPPER

Court Reporter: KARLA JOHNSON

Judicial Assistant: ANGELA EDWARDS

BENOIT, ROBERT E
CARLSON, SHARON
CARLSON, JACK

JUDSON CHANTRY GRAY
ALBERT EUGENE HAMMERMASTER
ALBERT EUGENE HAMMERMASTER

Attorney for Plaintiff/Petitioner
Attorney for Defendant
Attorney for Defendant

Proceeding Set: Motion for Default
Proceeding Outcome: Motion Held
Resolution:

Outcome Date: 07/22/2005 10:34

Clerk's Scomis Code: MTHRG
Proceeding Outcome code: MTHRG
Resolution Outcome code:
Amended Resolution code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

ROBERT E BENOIT

vs.

SHARON CARLSON

Cause Number: 05-2-08170-3
MEMORANDUM OF JOURNAL ENTRY

Page: 2 of 2
Judge: RONALD E CULPEPPER

MINUTES OF PROCEEDING

Judicial Assistant: ANGELA EDWARDS
Start Date/Time: 07/22/05 9:43 AM

Court Reporter: KARLA JOHNSON

July 22, 2005 09:42 AM Atty Judson Gray present for plaintiff. Atty A. Eugene Hammermaster present for defendants.

Argument proceeds.

10:05 AM Motion to amend - granted; not requiring dismissal of action and refiling. Court will allow 60 days for Benoit to remove personal property, allowing limited rights of possession and entry. Mr. Benoit may move nothing more onto property; cannot reside on property; conduct any business out of or have tenant reside. Court is requiring Mr. Benoit to make all required payments, assessments and keep all taxes current; pay any arrearages, late payments w/in 10 days of today to the Hammermaster Law Firm who has the authority to pay directly to Ms. Carlson. Security of \$40,000 to be posted w/in 10 days.

Parties agree to set over motion for summary judgment, currently set for 8/22, to 9/9/05.

End Date/Time: 07/22/05 10:34 AM

APPENDIX C



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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

ROBERT E. BENOIT,
Plaintiff,

NO. 05 2 08170 3

vs.

**ORDER RE: AMEND COMPLAINT AND
TEMPORARY LIMITED POSSESSION**

**SHARON Y. CARLSON and JACK
CARLSON,**

(Clerk's Action Required)

Defendants.

THIS MATTER having come before the above-entitled Court and the Court having reviewed Plaintiff's Motion and Supporting Declarations, Defendants Responding Declarations, and all other pleadings filed herein, and the Court having heard oral arguments from the Attorneys representing each party, and the Court being otherwise fully advised in premises,

IT IS NOW, THEREFORE, HEREBY

ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion to Amend the Complaint is hereby granted; it is further,

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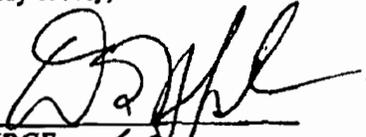
ORDERED, ADJUDGED, and DECREED that Plaintiff shall pay to the Clerk of the Court all late fees and monthly payments currently in arrears pursuant to the terms of that certain Real Estate Contract executed by and between the above-named parties recorded under Pierce County Auditor's Number 9906071183 within ten (10) days of July 22nd, 2005, to wit, August 1st, 2005. That Plaintiff shall also pay to the Clerk of the Court when due the ongoing monthly obligations, real property taxes, and any other financial obligation as required by the aforementioned Real Estate Contract. That the Clerk of the Court shall immediately and forthwith pay to the Defendant, SHARON CARLSON, any and all monies it receives from the Plaintiff herein; it is further,

ORDERED, ADJUDGED, and DECREED that Plaintiff shall post a Forty Thousand Dollar (\$40,000.00) bond within ten (10) days of July 22nd, 2005, to wit, August 1st, 2005, and thereafter shall be entitled to limited possession of the subject real property, to wit, the real property located at the common address of 5205 Sumner Heights Dr. E., Edgewood, Washington for a period of sixty (60) days from July 22nd, 2005. That Plaintiffs' possession of the property shall be limited to entering the property to remove Plaintiff's personal property and/or to clean up the property by lawful means. That Plaintiff's right to possess the property is subject to Plaintiff securing appropriate written permission from Pierce County Health Department, City of Edgewood, and/or any other governmental entity that has restricted the Plaintiffs' rights to access and/or possess the same; it is further,

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ORDERED, ADJUDGED, and DECREED, that Plaintiff shall not reside on the property nor permit any other person to reside on the property. The Plaintiff shall not conduct any business on the property nor permit any other third-party to conduct business on the property. The Plaintiff shall not commit any unlawful or criminal conduct on the property.

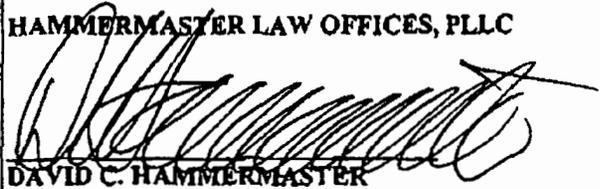
DONE IN OPEN COURT this 29 day of July, 2005.



JUDGE *Comur*

Presented by:
HAMMASTER LAW OFFICES, PLLC

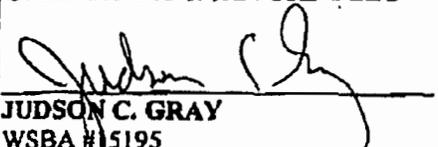
DAVID H. JOHNSON
COURT COMMISSIONER



DAVID C. HAMMASTER
WSBA #22267
Attorney for Defendant

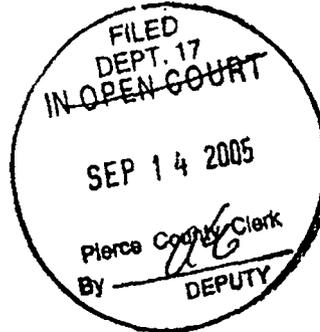
FILED
IN OPEN COURT
JUL 29 2005
PIERCE COUNTY, Clerk
By 
DEPUTY

Approved as to Form and Notice of Presentment Waived by:
GRAY PARKS & ALVORD PLLC



JUDSON C. GRAY
WSBA #15195
Attorney for Plaintiff

APPENDIX D



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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

ROBERT E. BENOIT,

Plaintiff,

vs.

SHARON Y. CARLSON and JACK
CARLSON,

Defendants.

NO. 05 2 08170 3

**ORDER ON DEFENDANT'S MOTION TO
DISMISS FOR FAILURE TO COMPLY
WITH THE ORDER OF JULY 29th, 2005**

THE ABOVE MATTER coming on regularly for hearing upon the Defendant's Motion to Dismiss the Plaintiff's Amended Complaint for failure to comply with the Court's Order of July 29th, 2005, and the Court having before it the files and records in said cause and listening to argument of counsel for each of the parties, finds that the Plaintiff has failed to comply with said Order as relates to the filing of a bond in the amount of Forty Thousand Dollars (\$40,000.00),

NOW, THEREFORE, IT IS HEREBY

ORDERED, ADJUDGED, and DECREED that if the Plaintiff has not filed with the Court and delivered a copy thereof personally or by fax to the Defendant and/or the Defendant's

1 Attorney, a Bond in the amount of Forty Thousand Dollars (\$40,000.00) on or before the 19th
2 day of September, 2005 at 4:30 P.M. as provided and required in that certain Order dated July
3 29th, 2005 the Court will enter an Order Dismissing the Plaintiff's Amended Complaint. It is
4 further
5

6 **ORDERED, ADJUDGED, and DECREED**, that upon the failure of the Plaintiff to file
7 said Bond, the Defendant may present an Order of Dismissal, Ex Parte, in the form attached
8 hereto at any time after 4:30 P.M., September 17th, 2005.

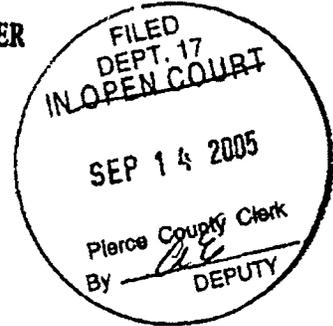
9 **DONE IN OPEN COURT** this 14th day of September, 2005

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13 **JUDGE**

14 Presented by:

RONALD CULPEPPER

15 **HAMMERMASTER LAW OFFICES, PLLC**



16
17 
18 **DAVID C. HAMMERMASTER**
19 **WSBA #22267**
20 **Attorney for Defendant**

21 Approved as to Form and Notice of
22 Presentment Waived by:

23 **GRAY PARKS & ALVORD PLLC**

24
25 **JUDSON C. GRAY**
26 **WSBA #15195**
27 **Attorney for Plaintiff**
28

APPENDIX E

FILED
IN COUNTY CLERK'S OFFICE

A.M. SEP 20 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY DEPUTY

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

ROBERT E. BENOIT,

Plaintiff,

vs.

SHARON Y. CARLSON and JACK
CARLSON,

Defendants.

NO. 05 2 08170 3

ORDER OF DISMISSAL

THE ABOVE MATTER coming on regularly for hearing before the Court and the Defendant having failed to file the bond as required by the Order of September 14, 2005 on or before 4:30 P.M., September 19th, 2005,

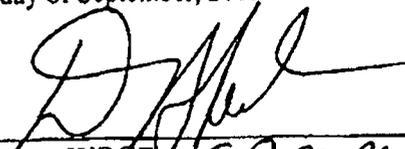
NOW, THEREFORE, IT IS HEREBY

ORDERED, ADJUDGED, and DECREED that the Plaintiff's Amended Complaint be and is hereby dismissed with prejudice and with costs and attorney's fees incurred by the Defendant (reserved for determination at a subsequent hearing) in defending against the Plaintiff's Pro Se Complaint and Amended Complaint. It is further

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ORDERED, ADJUDGED, and DECREED that the Plaintiff immediately remove any
and all Lis Pendens heretofore filed with the County Auditor.

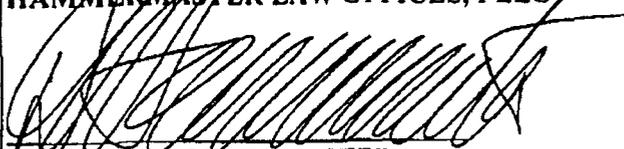
DONE IN OPEN COURT this 20 day of September, 2005.



JUDGE Comm

Presented by:

HAMMERMASTER LAW OFFICES, PLLC



DAVID C. HAMMERMASTER

WSBA #22267

Attorney for Defendant

*Attorney Judson Gray, was notified via telephone
at ex parte hearing and he stated he has no objections
for entering the order at this time.*

FILED
IN COUNTY CLERK'S OFFICE

A.M. SEP 20 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY G DEPUTY

APPENDIX F

FILED
IN COUNTY CLERK'S OFFICE

A.M. NOV - 4 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

ROBERT E. BENOIT,

Plaintiff,

NO. 05 2 08170 3

vs.

ORDER RE: DISMISSAL OF ACTIONS

SHARON Y. CARLSON and JACK
CARLSON,

Defendants.

THIS MATTER having come before the above-entitled court and having heard argument of counsel and reviewed all pleadings in this case, it is now, therefore, hereby,

ORDERED, ADJUDGED and DECREED that the previous order of dismissal entered on September 20, 2005 was intended and does hereby dismiss ^{all} any and all claims of the Plaintiff including the original complaint and the amended complaint filed by the Plaintiff. That all claims of the Plaintiff were dismissed with prejudice and this order clarifies the same. *That Plaintiff's*

Motion to amend the Amended complaint is denied, but it is not prejudiced from starting
DATED this 4 day of NOVEMBER 2005. *a new lawsuit for breach of contract.*

JUDGE

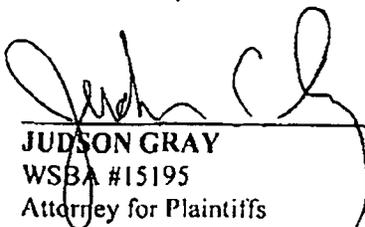
RONALD CULPEPPER

1 Presented by:



2
3 **DAVID C. HAMMERMASTER**
4 **WSBA #22267**
Attorney for Defendants

Approved as to form:

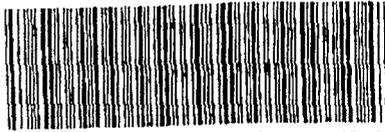


JUDSON GRAY
WSBA #15195
Attorney for Plaintiffs

8 **FILED**
IN COUNTY CLERK'S OFFICE
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10 **A.M. NOV - 4 2005 P.M.**
11 **PIERCE COUNTY, WASHINGTON**
KEVIN STOCK County Clerk
12 **BY [Signature] DEPUTY**

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APPENDIX G



05-2-14225-7 25480463 ORGSJ 05-15-06

Judge Frederick W. Fleming

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

ROBERT E. BENOIT,

Plaintiff, No. 05-2-14225-7

vs.

SHARON CARLSON, a married individual, in her separate capacity

Defendant.

FILED
DEPT. 7
IN OPEN COURT
MAY 12 2006
Pierce County Clerk
BY [Signature] DEPUTY

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come on duly and regularly for hearing on May 12, 2006, before the Honorable Frederick W. Fleming of the Pierce County Superior Court, upon defendant Sharon Carlson's motion for partial summary judgment, and the Court having considered the following:

1. Defendant Sharon Carlson's Motion of Partial Summary Judgment;
2. Affidavit of Sharon Y. Carlson and exhibits thereto;

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Page 1 of 3

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DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 Based on the foregoing, it is hereby,
2 ORDERED, ADJUDGED AND DECREED that ~~Plaintiff's~~ ^{Defendant's} Motion for ~~Partial~~
3 Summary Judgment regarding plaintiff's claims is GRANTED. It is further hereby,
4 ORDERED, ADJUDGED AND DECREED that Plaintiff's claims and causes of
5 action are hereby DISMISSED WITH PREJUDICE. It is further hereby,
6 ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary

JK BK
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7 Judgment regarding plaintiff's liability for defendant's waste counterclaims is
8 ~~GRANTED~~ ^{DENIED}. It is further hereby,

BK JK
BK JK

9 ORDERED, ADJUDGED AND DECREED that the sole issue remaining for trial
10 in this cause is the ~~amount of defendant's damages on her counterclaim~~. It is further,
11 ~~ORDERED, ADJUDGED AND DECREED that defendant may file a motion for~~
12 ~~an award of attorney's fees.~~

S

13 DONE IN OPEN COURT this 12 day of May 2006.

[Signature]
JUDGE FREDERICK W. FLEMING

17 Presented by:
DAVIES PEARSON, P.C.

Approved as to form only by
GRAY ALVORD, P.S.

19 *[Signature]*
20 BRIAN M. KING, WSB #29197
Attorneys for Defendants

[Signature]
20 JUDSON C. GRAY, WSBA #15195
Attorney for Plaintiff

DEPT. 7
IN OPEN COURT
MAY 12 2006
CLATSOP COUNTY CLERK
BY *[Signature]* DEPUTY

24 ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

25 Page 3 of 3
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24 DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

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1 Via facsimile to (253) 572-3052 and First class mail:

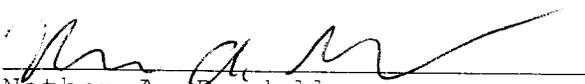
2 **Brian M. King**
3 **Davies Pearson PC**
4 **PO Box 1657**
5 **Tacoma, WA 98401-1657**

6 Via hand delivery:

7 **Washington State Court of Appeals**
8 **Division Two**
9 **950 Broadway, Suite 300**
10 **Tacoma, WA 98402**

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

13 Executed this 25th day of May 2007 at Poulsbo, Washington.

14
15 
16 Nathan A. Randall