

NO. 357-32-1  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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BROGAN & ANENSEN, LLC, a Washington Limited Liability  
Company

Respondent,

v.

WAYNE LAMPHEAR

Appellant

No. 05-2-01593-1 Grays Harbor Superior Court

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

## TABLE OF AUTHORITIES

### **Cases**

Ban- Co Inv. Co. v. Loveless, 22 Wash.App. 122, 587 P.2d 567 (1978)..11, 20-22,

Black v. Evergreen Land Developers, Inc., 75 Wn2d 241, 450 P.2d 470 (1969)..11,13-19

Cahn v.Foster & Marshall, Inc., 33 Wash.App.838, 840, 658 P.2d 42 (1983)..27

Dix Steel Co. v. Miles Constr., 74 Wash.2d 114, 118, 443 P.2d 532 (1968)...13

Grant County Const'rs. v. E. V. Lane Corp.77 Wash.2d 110, 121, 459 P.2d 947(1969).13

Manning v. Liodhamer, 13 Wn.App. 766, 770, 538 P.2d 136 (1975).22

Marassi v. Lau, 71 Wash.App. 912, 915, 859 P.2d 605 (1993). .29

Meyer v. University of Washington, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)..27

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Roberson v. Perez, 123 Wash. App. 320, 346, 96 P.3d 420 (2004)..31

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Tiffany Family Trust Corp. v. City of Kent 155 Wash.2d 225, 119 P.3d 325 (2005)..12, 27

White v. State, 131 Wn.2d 1, 9 929 P.2d 396 (1997).....12, 26

**Law Review Articles and Treatises**

Corbin on Contracts s 534 at 9  
(1960).....13

Karl B. Tegland & Douglas J. Ende, 15A Washington Practice,  
Washington Handbook on Civil Procedure, § 71.7 at 442 (2005)...30

**TABLE OF CONTENTS**

Assignments of Error	1
Issues Pertaining to Assignments of Error	2
Statement of the Case	5
Summary of Argument	10
Argument and Authority	13
A. THE CONTRACT WAS NOT FULLY INTERGRATED AND THEREFORE PAROL EVIDENCE MUST BE CONSIDERED .....	13
B. SCOPE OF THE EASEMENT	23
C. SCOPE OF THE EASEMENT	26
D. ATTORNEY'S FEES AND COSTS	28
Conclusion	31



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2  
3  
4  
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into the sale contract and therefore had to be granted to Wayne Lamphiear at the initial summary judgment, when awarding costs and attorney's fees.

- 5. The trial court erred in not considering plaintiff's false statements when awarding costs and attorney's fees.
- 6. The trial court erred in awarding costs that were insufficiently explained and documented and in awarding travel time as part of a reasonable attorney's fees.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. In a contract for sale of real property should the court consider undisputed parol evidence that an oral agreement was made that the seller would retain possession of the real property for one year after the sale date, when the form residential purchase and sale agreement contains an integration clause and a statement that seller shall deliver the keys to the buyer on the closing date or on the possession date, whichever occurs first, and a recitation that all items such as built in

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appliances, and drapes are included in the sale.

2. In a contract for sale of real property should the court grant summary judgment when there is undisputed parol evidence that oral promises were made in conjunction with formation of a written contract specifically: that the seller would retain possession of the real property for one year after the sale date, and be allowed to move all buildings onto adjacent property.

3.a) Should the trial court consider parol evidence on the length of an easement when a contract provides "Buyer agrees to grant to Mr. Wayne W. Lamphiear a 60 Foot Wide access easement onto the adjacent parcel currently under contract for purchase. Easement to be located at the SW corner of parcel #180502230000", and the actual easement recorded was done as an as built extending only part way up an existing roadway, and the only point identified is the starting point of the easement on the servient property, and the dominant property is located more than eight hundred feet from

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the identified starting point up an existing drive way.

b) Should the court grant summary judgment to Wayne Lamphiear pursuant to the above, when the uncontroverted evidence is that a promise was made that the easement would run the entire length of the property, near where Wayne Lamphiear was to move his home.

4. Where the issue of whether or not the easement merged into the contract was disputed until summary judgment argument, should Brogan & Anensen be liable for fees and costs related to that issue, where the easement was to be awarded as part of the same contract.

5. Should Brogan & Anensen's false promises have been considered when awarding attorney's fees and costs based upon the contract.

6. a) Should a trial court allow costs that are undocumented except for notations at the bottom of copies of monthly billing statements for thousands of dollars in "messenger fees" when the costs are

1 questioned in briefing and no response is  
2 made.

3 b) Should travel time from Seattle be  
4 granted to Brogan & Anensen's attorneys as  
5 part of a reasonable attorney's fee under a  
6 contact.

7 **STATEMENT OF THE CASE**

8 Brogan & Anensen, LLC, was granted summary  
9 judgment first on the issue of right to  
10 possession and then on the issue of scope of the  
11 easement and subsequently granted attorney's fee  
12 and costs. CP 221-223, CP 472-478, Order Granting  
13 Motion Petition filed 5-23-2007. The trial court  
14 refused to consider undisputed evidence that oral  
15 promises were made in conjunction with the  
16 contact formation. CP 286 - 288. Gary Anensen  
17 discussed repeatedly in a local restaurant and  
18 with local people(friends and relatives of Gary  
19 Anensen) the contract terms. These admissions  
20 came both before and after the closing of the  
21 land deal. Declarations of numerous local  
22 residents were submitted in support of Wayne  
23 Lamphiear's motion for summary judgment, all of  
24 which declared that they had heard Gary Anensen  
25 promise and/or affirm that he had promised Wayne

1 Lamphiear that he could remain in possession of  
2 the property for one year after the sale and move  
3 all the buildings off of the property during that  
4 year on to an adjacent piece of property Wayne  
5 Lamphiear was in the process of purchasing.  
6 Lasley CP 173 pp. 3 (heard promises by Anensen  
7 over course of formation more than once), Lewis CP  
8 175-176 (time promises by Anensen heard  
9 unspecified), Birindelli CP 178 pp 4 to CP  
10 179 (over several months again and  
11 again), Sweeny (during negotiations) CP 181,  
12 Rapheal CP 183 (all the way through the buying  
13 process), Anensen CP 185 (brother of defendant,  
14 "when the agreement at issue was formed and  
15 discussed"), Lamb CP 420 pp 6 (Anensen told her of  
16 promises in June the month after closing), Fritz  
17 CP 202-203. (just before closing.)

18 The Northwest Multiple Listing Service form  
19 purchase and sale agreement prepared by Brogan &  
20 Anensen was signed April 4, 2005, closing  
21 occurred May 25, 2005. CP 54-60 and CP 138 - 150.

22 The only denial to all of these specific  
23 allegations came not from Gary Anensen, but in a  
24 declaration from Kenneth Brogan. CP 49 pp. 1-2.  
25 Kenneth Brogan does not deny making the promises,

1 he wrote "it is my understanding that because  
2 they were not included in the contract they were  
3 not part of the agreement." CP 49 line 21-25.

4 Wayne Lamphiear is a seventy-five year old  
5 individual with very limited real estate  
6 experience. CP 155 pp. 1-2. Wayne Lamphiear  
7 trusted Garry Anensen because he had known him  
8 for about thirty years and had been acquainted  
9 with his parents. CP 155 pg.1, 1.-15. Wayne  
10 Lamphiear's declaration is very specific that Ken  
11 Brogan and Gary Anensen both promised him he  
12 could keep the buildings and that he has a year  
13 to get them off of the property when they  
14 appeared at his home with the purchase and sale  
15 agreement. They told Wayne Lamphiear that not  
16 including the provisions about moving the  
17 buildings and remaining on the property for one  
18 year were an oversight and it would cost too much  
19 to redo the paper work again, and assured Wayne  
20 he could trust their word. CP 157 pp. 1 Gary  
21 Anensen offered further assurances his word was  
22 good after signing the purchase and sale  
23 agreement and before closing in front of a  
24 witness. The assurances came when Wayne Lamphiear

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1 questioned again whether all the terms needed to  
2 be in writing. CP 202-03 pp. 1

3 In July of 2005 it was becoming clear Brogan  
4 & Anensen, LLC was not going to be allowed to  
5 develop the property as planned. CP 167 -171  
6 Wayne Lamphiear purchased liability insurance on  
7 the property at Brogan & Anensen's request naming  
8 them as landlord beneficiaries on October 4,  
9 2005. CP 157 line 13 to 20, CP 159 By the end of  
10 November Brogan & Anensen had the property listed  
11 for sale for a reduced price of one million  
12 dollars, (the original listing was for one million  
13 two hundred and fifty thousand). The property  
14 listing included the septic system but not the  
15 buildings. CP 164-166. Brogan & Anensen purchased  
16 the property from Wayne Lamphiear for five  
17 hundred thousand dollars. CP 7

18 The trial court found that the standard  
19 form NWMLS contract was not ambiguous, and it is  
20 understood that when one purchases land it  
21 purchases improvements as well, so parol evidence  
22 would not be heard. CP 286 - 288 The form  
23 purchase and sale contract contained an  
24 integration clause and stated that the keys were  
25 to be turned over at the closing or possession

1 date, and a clause that listed various fixtures  
2 which were purported to be included in the sale  
3 such as draperies.

4 Brogan & Anensen were then granted a  
5 subsequent motion for summary judgment on the  
6 issue of the scope of the easement. CP 472-478.  
7 Plaintiff initially argued that the easement  
8 merged into the deed. CP 450 line 31 to CP 451  
9 line 5. However, after the first summary judgment  
10 argument had begun they conceded that Wayne  
11 Lamphiear was promised a sixty-foot wide easement  
12 pursuant to the terms of the same contract. CP  
13 245 line 17-24. Brogan & Anensen admitted to a  
14 witness that they purposely delayed transferring  
15 the easement as long as possible. CP 331 line 13  
16 to 332 line 11. Brogan & Anensen finally recorded  
17 an easement after the first summary judgment and  
18 never delivered a copy of the easement to Wayne  
19 Lamphiear for review despite assurances to the  
20 contrary. CP 226 line 8-12. Brogan & Anensen  
21 recorded easement only extended part way up an  
22 existing roadway that ran almost the entire  
23 length of the property sold to Brogan & Anensen.  
24 CP 350. The existing roadway ran up to the Wayne  
25 Lamphiear's home at the back of the property, and

1 ran parallel to the property Wayne Lamphiear was  
2 purchasing which the easement was described as  
3 providing access to. CP 465-470 The contract says  
4 the easement is to be located at the SW corner of  
5 the Brogan and Anensen property. CP 12 However,  
6 the piece of property the easement is to provide  
7 access to is more than 800 feet beyond the SW  
8 corner of the servient property which is the only  
9 point identified in the contract. CP 355, CP 468,  
10 CP 470. Brogan & Anensen had promised Wayne  
11 Lamphiear that the easement the easement would  
12 run the entire length of the property. CP 424 pp-  
13 1,2.

14 The trial court granted Brogan & Anensen  
15 attorney's fees and costs, including travel time  
16 all the way to Grays Harbor from Seattle as a  
17 reasonable attorney's fee under a contract, not a  
18 sanction. RP 33 line pp 2 The trial court also  
19 awarded all costs requested including  
20 undocumented "messenger fees" listed in the  
21 billings sometimes totaling thousands of dollars  
22 per month. See attachment Declaration of Jennifer  
23 Schorr filed 5-19-06 and same filed 02-07-07.

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**SUMMARY OF THE ARGUMENT**

1 Washington State courts have understandably at  
2 times had difficulty in determining when parol  
3 evidence should be considered when a written  
4 contract exists. However, a defendant cannot be  
5 bound by false recitals of fact, but instead  
6 declarations are admissible to prove the  
7 assertions are false. Black v. Evergreen Land  
8 Developers, Inc., 75 Wn2d 241, 450 P.2d 470  
9 (1969) citing Cook v. Vennigerholz, 44 Wash.2d  
10 612, 616--617, 269 P.2d 824, 827 (1954); see  
11 also, Federal Finance Co. v. Humiston, 66 Wash.2d  
12 648, 651, 404 P.2d 465 (1965). The facts of this  
13 case are similar to two Washington cases on  
14 point, where provisions in a contract (including  
15 integration clauses) are in conflict with the  
16 oral provisions of the contract. Black v.  
17 Evergreen Land Developers, Inc., 75 Wn.2d 241,  
18 450 P.2d 470 (1969), Ban- Co Inv. Co. v.  
19 Loveless, 22 Wash.App. 122, 129-130, 587 P.2d 567  
20 (1978). However, the facts of those cases are  
21 nowhere near as compelling or clear as they are  
22 in the present case.

23 Wayne Lamphiear should be granted summary  
24 judgment because the facts were not disputed by  
25 any evidence offered by Brogan & Anensen. Summary

1 Judgment should be granted where reasonable minds  
2 can reach but one conclusion. White v. State, 131  
3 Wn.2d 1, 9 929 P.2d 396 (1997). A party opposing  
4 summary judgment may not rely on "mere  
5 allegations or denials" set forth in the  
6 pleadings, but rather "must set forth specific  
7 facts showing that there is a genuine issue for  
8 trial." CR 56(e), Tiffany Family Trust Corp. v.  
9 City of Kent 155 Wash.2d 225, 119 P.3d 325  
10 (2005). Here, Wayne Lamphiear presented  
11 uncontroverted evidence that he was promised that  
12 he could remain on his land for one year after  
13 the sale and that he could keep all of his  
14 buildings and move them on to his adjacent  
15 property. Brogan & Anensen intended to develop  
16 the property and therefore they had no interest  
17 in the existing buildings and construction was  
18 not to start for sometime. CP 186, CP 156 line 7  
19 to 14. It was not until Brogan & Anensen's plans  
20 for development did not work out that they  
21 demanded Wayne Lamphiear leave the property and  
22 the buildings. CP 396 line 12-25. Brogan &  
23 Anensen caused further damage because their  
24 threats caused Wayne Lamphiear to have to board  
25 and dispose of his beloved Arabian horses

1 quickly. CP156 line 15, CP 157, line 19 to CP 158  
2 line 10.

3 **ARGUMENT AND AUTHORITY**

4 A. THE CONTRACT WAS NOT FULLY INTERGRATED  
5 AND THEREFORE PAROL EVIDENCE MUST BE CONSIDERED  
6 First and foremost it is the court's duty when  
7 interpreting a contract is to ascertain the  
8 parties intent. The primary purpose of any  
9 judicial interpretation is to ascertain the  
10 parties' intentions, Grant County Const'rs. v. E.  
11 V. Lane Corp. 77 Wash.2d 110, 121, 459 P.2d 947 (1969), 3  
12 Corbin on Contracts s 534 at 9 (1960), the trial  
13 court should first determine if the parties  
14 intended the writing to be a complete and  
15 accurate integration of the terms they mutually  
16 arrived at during negotiation. Dix Steel Co. v.  
17 Miles Constr., 74 Wash.2d 114, 118, 443 P.2d 532  
18 (1968).

19 A case almost directly on point is, Black v.  
20 Evergreen Land Developers, Inc., 75 Wash.2d 241,  
21 450 P.2d 470 (1969). In the Black case the  
22 actions and admissions of the defendant developer  
23 affirmatively demonstrated the existence of an  
24 oral covenant to preserve a homeowner's view,  
25 notwithstanding an integration clause in the

1 contract for sale. Black v. Evergreen Land  
2 Developers, Inc., 75 Wash.2d 241, 450 P.2d 470  
3 (1969). In Black, the plaintiffs were induced to  
4 purchase their property by oral representations  
5 that their view would not be impaired. Defendants  
6 in Black made the same arguments that plaintiff  
7 makes here, 1) that merger occurred so that both  
8 oral agreements and written agreements merged  
9 into the deed and 2) that parol evidence is  
10 inadmissible when a term of the contract reads  
11 that the contract is fully integrated. In  
12 response to the argument that merger occurred the  
13 court said:

14 It has long been the general rule of the law in  
15 this state that the provisions of a contract  
16 for the sale of real estate, and all prior  
17 negotiations and agreements, are considered  
18 merged in a deed made in full execution of the  
19 contract of sale. Davis v. Lee, 52 Wash. 330,  
20 100 P. 752 (1909); Peoples Nat. Bank v.  
21 National Bank of Commerce of Seattle, 69  
22 Wash.2d 682, 420 P.2d 208 (1966). However, this  
23 rule is not ironclad and in the past this court  
24 has found grounds for exceptions. See, Becker  
25 v. Lagerquist Bros., Inc., 55 Wash.2d 425, 348  
P.2d 423 (1960); Cf. Shelton v. Fowler, 69  
Wash.2d 85, 94--96, 417 P.2d 350 (1966);  
Gronlund v. Andersson, 38 Wash.2d 60, 227 P.2d  
741 (1951). After stating the general rule, in  
Snyder v. Roberts, 45 Wash.2d 865, 872--873,  
278 P.2d 348, 52 A.L.R.2d 631 (1955), we made  
reference to these exceptions:  
Intrigued by the problem presented, we have

1 made an extensive, intensive, and, we must  
2 confess, frustrating exploration of the  
3 authorities, to discover some way (on solid  
4 ground) around what \*\*475 Kent, C.J., in Howes  
5 v. Barker, 1808, 3 Johns., N.Y. 506, 3 Am.Dec.  
6 526, called 'the impediment of the deed,' which  
7 he was unable to 'surmount.'

8 There are many exceptions to the doctrine of  
9 merger, but for the most part they are applied  
10 in cases where either the grantor or the  
11 grantee is attempting to enforce against the  
12 other, stipulations in the contract which are  
13 not contained in, not performed by, and not  
14 inconsistent with the deed and which are held  
15 to be collateral to or independent of the  
16 obligation to convey. The following, from  
17 Morris v. Whitcher, 1859, 20 N.Y. 41, 47, is  
18 widely quoted:

19 'In all cases then, where there are  
20 stipulations in a preliminary contract for the  
21 sale of land, of which the conveyance itself is  
22 not a performance, the true question must be  
23 whether the parties have intentionally  
24 surrendered those stipulations. The evidence of  
25 that intention may exist in or out of the deed.  
If plainly expressed in the very terms of the  
deed, the evidence will be decisive. If not so  
expressed, the question is open to other  
evidence, and I think in the absence of all  
proof there is no presumption that either  
party, in giving or accepting a conveyance,  
intends to give up the benefit of covenants of  
which the conveyance is not a performance or  
satisfaction.' (Italics ours.) (Quoted by this  
court in Davis v. Lee (52 Wash. 330, 100 P. 752  
(1909)), Supra.) (emphasis added)

23 Black v. Evergreen Land Developers, Inc., 75  
24 Wash.2d 241,248-249 450 P.2d 470 (1969).

1 Here, there was no intentional surrender of  
2 any of the conditions, and nothing to the  
3 contrary in the deed. An oral agreement existed  
4 that was ratified over and over by the  
5 plaintiff's own admissions.

6 As for the argument that the terms of the  
7 contract for sale are inconsistent with the  
8 oral promises, and they should therefore not be  
9 allowed into evidence the court in Black made  
10 short work of that argument as well.

11 Both the admissions and the actions of  
12 the defendants demonstrate that the  
13 oral covenant did in fact exist, was an  
14 inducement to enter the contract, and  
15 was foremost in the minds of all the  
16 parties subsequent to the execution of  
17 the deed of conveyance.

18 Under such circumstances the doctrine  
19 of 'partial integration' would apply.  
20 That doctrine recognizes the right of  
21 contracting parties to reduce some  
22 provisions of their contract to written  
23 form and to leave others unwritten,  
24 trusting the latter to oral expression  
25 only. The provisions not in writing may  
be proved by parol insofar as they are  
not inconsistent with the written  
portion. Barber v. Rochester, 52  
Wash.2d 691, 328 P.2d 711 (1958);  
Buyken v. Ertner, 33 Wash.2d 334, 205  
P.2d 628 (1949); 3 Corbin on Contracts  
s 581 (1960).

Here the entire exchange of letters and  
negotiations, subsequent to the  
execution of the deed, was based upon

1 the existence of the oral covenant and  
2 representation in the brochure that the  
3 plaintiffs' view would not be impaired.  
4 Throughout the construction of the  
5 Avann house the defendant Past  
6 repeatedly promised the Blacks that  
7 their view of the east channel would  
8 not be impaired; and the defendants  
9 affirmatively demonstrated the  
10 existence of this oral covenant on  
11 several occasions by using a crossbar  
12 to show the plaintiffs how high the  
13 Avann roof could be without impairing  
14 their view of the east channel. There  
15 is no evidence in the record to show it  
16 was the intention on the part of either  
17 party that the oral covenant be merged  
18 into either the deed or the earnest  
19 money agreement. Rather, the asserted  
20 merger in the pleadings of the  
21 defendants appears clearly to be an  
22 afterthought relied upon by the  
23 defendants after suit was taken against  
24 them.

25 However, while the evidence of this  
case does not conflict with the  
provisions of the deed, it does  
conflict with the standardized fine  
print which concludes the earnest money  
agreement by stating: 'There are no  
verbal or other agreements which modify  
or affect this agreement.' The same  
situation existed in the case of \*\*476  
Rinaudo v. Bloom, 209 Md. 1, 9, 120  
A.2d 184, 189 (1956) (cited in Barber  
v. Rochester, Supra), where that court  
stated:

We are met at once by the integration  
clause of the agreement which states in  
part that 'This Contract contains the  
final and entire Agreement between the  
parties.' As Professor Corbin points

1 out in an article on the Parol Evidence  
2 Rule, in 53 Yale Law Journal 603, at  
3 page 621, even such a clause itself may  
4 embody a recital of fact which may be  
5 untrue. Doubtless, however, such a  
6 clause strengthens, and it may go  
7 beyond, the presumption of integration  
upon which the parol evidence rule  
proceeds; but it is not invariably  
conclusive and its coverage is a matter  
of interpretation.

8 **We find, in view of the overwhelming**  
9 **evidence of this case, it is obvious**  
10 **that the above statement of the earnest**  
11 **money agreement is false and therefore**  
12 **we will not adhere to it. Rinaudo v.**  
13 **Bloom, Supra. Under the law of this**  
14 **jurisdiction 'a party to a contract is**  
15 **not bound by a false recital of fact,**  
16 **and parol evidence is admissible to**  
17 **show the true state of affairs.'** Cook  
18 **v. Vennigerholz, 44 Wash.2d 612, 616--**  
19 **617, 269 P.2d 824, 827 (1954); see**  
20 **also, Federal Finance Co. v. Humiston,**  
21 **66 Wash.2d 648, 651, 404 P.2d 465**  
22 **(1965). Moreover, the recent trend of**  
23 **the courts has been to discredit fine**  
24 **print clauses when to enforce them**  
25 **would be against public policy. See,**  
**\*251 Henningsen v. Bloomfield Motors,**  
**Inc., 32 N.J. 358, 161 A.2d 69, 75**  
**A.L.R.2d 1 (1960); see also, Norway v.**  
**Root, 58 Wash.2d 96, 361 P.2d 162**  
**(1961); Udell v. Rohm & Haas Co., 64**  
**Wash.2d 441, 392 P.2d 225 (1964);**  
**Kessler, Contracts of Adhesion-Some**  
**Thoughts about Freedom of Contract, 43**  
**Colum.L.Rev. 629 (1943). In Henningsen,**  
**32 N.J. at 403--404, 161 A.2d 95 the**  
**court stated:**  
Courts keep in mind the principle that  
the best interests of society demand

1 that persons should not be  
2 unnecessarily restricted in their  
3 freedom to contract. But they do not  
4 hesitate to declare void as against  
5 public policy contractual provisions,  
6 which clearly tend to the injury of the  
7 public in some way. Hodnick v. Fidelity  
8 Trust Co., 96 Ind.App. 342, 183 N.E.  
9 488 (App.Ct.1932).

10 Black v. Evergreen Land Developers, Inc., 75  
11 Wash.2d 241, 249-251 2 450 P.2d 470 (1969).

12 Here, the overwhelming evidence is that  
13 Brogan & Anensen made all of the promises  
14 alleged. Numerous local residents made statements  
15 indicating they were appalled that Brogan &  
16 Anensen did not abide by their promises. The  
17 declarants include Gary Anensen's brother, long  
18 term friends and Gary Anensen's wife's brother's  
19 girlfriend. CP 173, CP 175, CP 178, CP 181, CP  
20 183, CP 185, CP 420., CP 202. Nearly all of these  
21 people expressed that they felt compelled to tell  
22 what happened in spite of close relationships  
23 with Gary Anensen, because they felt what Brogan  
24 & Anensen was doing was wrong.

25 Wayne Lamphiear cannot be bound by Brogan &  
Anensen's false recitals of fact, but instead  
the declarations are admissible to prove the  
assertions are false. Standardized print in the  
contact about keys that were to be turned over at

1 the closing or possession date, and a clause that  
2 listed various fixtures which were purported to  
3 be included in the sale such as draperies, have  
4 never been allowed to interfere with the clear  
5 intent of the parties. To allow Brogan & Anensen  
6 to abide by only the written terms of the  
7 contract would go against public policy. To allow  
8 this decision to stand would undermine faith in  
9 the courts and in the public's ability to form  
10 oral contracts. Several of the declarations talk  
11 about the impact of this case undermining faith  
12 in oral contacts in the community, and their  
13 disbelief that Gary Anensen in particular refused  
14 to honor his word. CP 87 last pp CP 171 pp 2, CP  
15 173 pp4, CP 176 last pp, CP 185 pp 3.

16       There is another Washington Case on point  
17 that also contended an integration clause. In  
18 Ban- Co Inv. Co. v. Loveless, 22 Wash.App.  
19 122,129-130, 587 P.2d 567 (1978), developers of a  
20 shopping center made an oral agreement at the  
21 time they entered into a lease, with option to  
22 purchase that they would in fact purchase the  
23 land, and the court enforced the oral agreement  
24 even though an option to purchase is clearly in  
25 conflict with an agreement to purchase. In

1 addition, that contract also contained an  
2 integration clause, however the court found it  
3 was not conclusive. The evidence in the present  
4 case is much stronger than that in Ban-co Inv.  
5 Co.. There the court relied heavily on evidence  
6 of business practices and monetary benefit to  
7 Ban-co of executing a lease option rather than an  
8 agreement to purchase. Here, the court not only  
9 has evidence of a business benefit, but also  
10 direct evidence of the promises. The declaration  
11 of Tim Hamilton and accompanying documentation  
12 points out that Brogan & Anensen could not have  
13 petitioned the county for annexation, as part of  
14 their development plan, if the value of Wayne  
15 Lamphiear's home had not been included in the  
16 property value. CP 171 pp. 3. This was a  
17 motivation for leaving that part of the agreement  
18 out of the written documents prepared by Brogan &  
19 Anensen.

20 In Ban- Co Inv. Co. v. Loveless, 22  
21 Wash.App. 122,129-130, 587 P.2d 567 (1978)the  
22 court analyzed the admissibility of parol  
23 evidence as follows:

24 The court in Barber thoroughly analyzed the  
25 rule and concluded:  
People have the right to make their  
agreements partly oral and partly in

1 writing, or entirely oral or entirely in  
2 writing; and it is the court's duty to  
3 ascertain from all relevant, extrinsic  
4 evidence, either oral or written, whether  
5 the entire agreement has been incorporated  
6 in the writing or not. This is a question of  
7 fact.

8 Barber v. Rochester, supra at 698, 328 P.2d  
9 at 715.

10 Here, the plaintiff believes that due to the  
11 fact terms were not written into an agreement the  
12 promises are not binding. Case law makes clear  
13 courts will not tolerate using the ability to  
14 contract in such a way.

15 With respect to the integration clause the  
16 Ban-Co court said:

17 The integration clauses in the ground leases  
18 (with options to purchase land) to the  
19 effect that the written documents  
20 constituted the entire agreement of the  
21 parties doubtless strengthened those written  
22 agreements in the view of the trial court,  
23 as they do in our view. Such clauses,  
24 however, were not conclusive in view of the  
25 trial court's findings of fact in this case  
and the substantial evidence supporting  
them. Black v. Evergreen Land Developers,  
Inc., 75 Wash.2d 241, 250-51, 450 P.2d 470  
(1969). See also Dix Steel Co. v. Miles  
Constr., Inc., supra 74 Wash.2d at 118, 443  
P.2d 532.

Ban- Co Inv. Co. v. Loveless, 22 Wash.App.  
122,132, 587 P.2d 567 (1978).

1 Here, all of the evidence supports the fact  
2 that the buildings were intended to be removed  
3 from the property within one year.

4 B. SCOPE OF THE EASEMENT

5 All of the above referenced law applies to  
6 the portion of the contract regarding the  
7 easement. The location of an easement is  
8 determined by the intent of the parties. "The  
9 interpretation of an easement is a mixed question  
10 of law and fact; what the original parties  
11 intended is a question of fact and the legal  
12 consequence of that intent is a question of law."

13 Sunnyside Valley Irr. Dist. v. Dickie, 149  
14 Wash.2d 873, 880, 73 P.3d 369 (2003) Citation  
15 omitted.

16 The intent of the original parties to an  
17 easement is determined from the deed as a  
18 whole. Zobrist v. Culp, 95 Wash.2d 556, 560,  
19 627 P.2d 1308 (1981). If the plain language is  
20 unambiguous, extrinsic evidence will not be  
21 considered. City of Seattle v. Nazarene, 60  
22 Wash.2d 657, 665, 374 P.2d 1014 (1962). If  
23 ambiguity exists, extrinsic evidence is allowed  
24 to show the intentions of the original parties,  
25 the circumstances of the property when the  
easement was conveyed, and the practical  
interpretation given the parties' prior conduct  
or admissions. Id.

Sunnyside Valley Irr. Dist. v. Dickie, 149  
Wash.2d 873, 880, 73 P.3d 369 (2003)

1           In the context of the easement the contract  
2 merely sets out a starting point, so there is no  
3 conflict, just additional asserted terms not  
4 included in the contract. The relevant term of  
5 the NMLS purchase and sale agreement reads "Buyer  
6 agrees to grant Mr. Wayne Lamphiear a 60 Foot  
7 Wide access easement onto the adjacent parcel  
8 currently under contract for purchase. Easement  
9 to be located at the SW corner of parcel of  
10 #180502230000." CP 12

11           This term could not possibly cover the  
12 length of the easement since Wayne Lamphiear's  
13 property is more than 800 feet from the SW Corner  
14 of parcel #180502230000. CP 355, CP 468, CP 470.  
15 Therefore, the contract only gives a starting  
16 point which is why Brogan & Anensen's surveyor  
17 did an as built survey. CP 349, 350 The surveyor  
18 must have been directed to make the easement as  
19 short as possible because he cut off the easement  
20 at the point where the existing road first  
21 connects to the Lamphiear property. CP 355 The  
22 surveyor additionally alleges that a transformer  
23 exits at that point on the roadway. However, the  
24 only transformer is located near the rear of the  
25 property. CP 398 line 14 -24, CP 305 line 20.

1           The uncontroverted evidence was that Wayne  
2 Lamphiear was promised that the easement would  
3 extend the entire length of the property, up the  
4 existing roadway. CP 224 line 14 Cp 226 line 1-to  
5 CP 227 line 24. As soon as they ran into problems  
6 Brogan & Anensen almost immediately express an  
7 intent to do everything they could not to grant  
8 an easement at all. Cp 397 line 16.

9           The scope of the easement can be determined on  
10 summary judgment as it is uncontraverted it was  
11 to run the length of the property.

12           Furthermore, if the scope of the easement had  
13 not been orally agreed upon the easement would be  
14 what is referred to as a "floating easement". "An  
15 easement defined in general terms, without a  
16 definite location or description, is called a  
17 "floating easement" or "roving easement."  
18 Sunnyside Valley Irr. Dist. v. Dickie, 149  
19 Wash.2d 873,73 P.3d 369 (2003)

20  
21           The scope of a floating easement is determined  
22 by facts as well.

23  
24           An easement defined in general terms, without a  
25 definite location or description, is called a  
floating or roving easement (floating  
easement). See Berg v. Ting, 125 Wash.2d 544,

1 552, 886 P.2d 564 (1995). Generally, a floating  
2 easement becomes fixed after construction and  
3 cannot thereafter be changed. Rhoades v.  
4 Barnes, 54 Wash. 145, 149, 102 P. 884 (1909).  
5 If the floating easement has an undefined  
6 width, it is bounded by the doctrine of  
7 reasonable enjoyment. Everett Water Co. v.  
8 Powers, 37 Wash. 143, 152, 79 P. 617 (1905).  
9 Sunnyside Valley Irr. Dist. v. Dickie, 149  
10 Wash.2d 873, 880, 73 P.3d 369 (2003)

11 "Reasonable enjoyment" is defined by case law  
12 as is reasonably necessary and convenient to  
13 effectuate the original purpose for granting the  
14 easement. Id. At 880. Therefore the doctrine of  
15 reasonable enjoyment is a factual issue that  
16 reasonable minds could only resolve in favor of  
17 the easement allowing access to transformers and  
18 the planned home cite at the rear of the  
19 property.

#### 20 C.APPLICABLE SUMMARY JUDGMENT STANDARD

21 Summary judgment is the appropriate remedy for  
22 Wayne Lamphiear because, "Summary Judgment should  
23 be granted where reasonable minds can reach but  
24 one conclusion." White v. State, 131 Wn.2d 1, 9  
25 929 P.2d 396 (1997). A party opposing summary  
judgment may not rely on "mere allegations or  
denials" set forth in the pleadings, but rather  
"must set forth specific facts showing that there

1 is a genuine issue for trial." CR 56(e). Tiffany  
2 Family Trust Corp. v. City of Kent, 155 Wash.2d  
3 225, 119 P.3d 325 Wash.(2005).

4 Summary judgment is proper if the nonmovant  
5 fails to make a showing sufficient to establish  
6 the existence of an element essential to that  
7 party's case, and on which that party will bear  
8 the burden of proof at trial.

9 "The burden of proving a contract, whether  
10 express or implied, is on the party asserting it,  
11 and he must prove each essential fact, including  
12 the existence of a mutual intention." Cahn  
13 v.Foster & Marshall, Inc., 33 Wash.App.838, 840,  
14 658 P.2d 42 (1983)(citing Johnson v. Nasi, 50  
15 Wash.2d 87, 91, 309 P.2d 380 (1957)). After the  
16 moving party submits adequate affidavits, the  
17 nonmoving party must set forth specific facts  
18 that sufficiently rebut the moving party's  
19 contentions and disclose the existence of a  
20 genuine issue as to a material fact. Meyer v.  
21 University of Washington, 105 Wn.2d 847, 852, 719  
22 P.2d 98( 1986).

23 Here, Wayne Lamphiear as the moving party has  
24 set forth uncontraverted facts to sufficient to  
25 prove the terms of the contracts and the parties'

1 intent, and should therefore be granted summary  
2 judgment.

3 D. ATTORNEY'S FEES AND COSTS

4 First, Wayne Lamphiear should be awarded  
5 attorney's fees and costs at both the trial court  
6 level and for the appeal, since the oral terms  
7 were part of the same contract, which provided for  
8 costs and fees. CP 10 pp 3, Also a contractual  
9 provision authorizing attorney fees is authority  
10 for granting fees incurred on appeal. Mike's  
11 Painting, Inc. v. Carter Welsh, Inc., 95 Wn.App.  
12 64, 71, 975 P.2d 532 (1999).

13 Brogan & Anensen should not have been awarded  
14 attorney fees and costs. A party cannot collect  
15 them when their own misrepresentations have  
16 brought about the need to litigate. Manning v.  
17 Liodhamer, 13 Wn.App. 766, 770, 538 P.2d 136  
18 (1975).(citing a series of six cases were  
19 misrepresentations caused lawsuits and the party  
20 making the misrepresentation was liable for  
21 attorney fees.) Here, plaintiffs made well-  
22 documented promises to defendant that he could  
23 retain the buildings, remain in possession of the  
24 land for one year, and that they would grant a  
25 sixty-foot wide easement

1 Had these promises not been made, no  
2 litigation would have been necessary. Therefore  
3 plaintiff is not entitled to attorney fees.

4 In addition, both parties prevailed on  
5 substantial issues, and therefore no attorney's  
6 should be awarded either side. If both parties  
7 **prevail** on major **issues**, **attorney fees** are not  
8 appropriate for either of them. Marassi v. Lau,  
9 71 Wash.App. 912, 915, 859 P.2d 605 (1993). The  
10 Marassi case reads as follows:

11 When a contract clause allows the successful  
12 plaintiff to recover attorney fees, the clause  
13 applies bilaterally under RCW 4.84.330 <sup>FN3</sup> to  
14 allow successful defendants to recover also.  
15 Marine Enterprises, Inc. v. Security Pacific  
16 Trading Corp., 50 Wash.App. 768, 772, 750 P.2d  
17 1290 (1988), review denied, \*916 111 Wash.2d  
18 1013 (1988) (citing Herzog Aluminum, Inc. v.  
19 General Am. Window Corp., 39 Wash.App. 188,  
20 196-97, 692 P.2d 867 (1984)). If neither party  
21 wholly prevails then the party who  
22 substantially prevails is the prevailing party,  
23 a determination that turns on the extent of the  
24 relief afforded the parties. Rowe v. Floyd, 29  
25 Wash.App. 532, 535 n. 4, 629 P.2d 925 (1981);  
Marine Enterprises, 50 Wash.App. at 772, 750  
P.2d 1290. However, if both parties prevail on  
major issues, an attorney fee award is not  
appropriate. American Nursery Prods. v. Indian  
Wells Orchards, 115 Wash.2d 217, 235, 797 P.2d  
477 (1990) (citing Sardam v. Morford, 51  
Wash.App. 908, 756 P.2d 174 (1988)); Rowe v.  
Floyd, 29 Wash.App. at 535, 629 P.2d 925; Puget  
Sound Serv. Corp. v. Bush, 45 Wash.App. 312,  
320-21, 724 P.2d 1127 (1986). (emphasis added).

1  
2 Here, both parties prevailed on substantial  
3 issues. The sixty -foot wide easement was of  
4 tremendous value, much more than the value of the  
5 buildings plaintiff was allowed to keep. CP 227  
6 pp2 , CP 230 Without the easement plaintiff  
7 would have been unable to develop the adjacent  
8 forty acres, and the value of the property would  
9 have been drastically reduced. Without the  
10 easement the property is land locked. In  
11 addition, one must have an easement over 30 feet  
12 wide to develop property into five acre lots as  
13 the property is currently zoned, and a sixty foot  
14 easement is necessary for further subdivision in  
15 the future, if the counties other requirements  
16 can be met. CP 230.

17 As for their costs the only requested fees that  
18 should be paid are reasonable mailing costs, not  
19 thousands of dollars in messenger fees.

20 "Incidental costs such as messenger services and  
21 photocopying are not recoverable." Karl B.

22 Tegland & Douglas J. Ende, 15A Washington  
23 Practice, Washington Handbook on Civil Procedure,  
24 § 71.7 at 442 (2005) citing Absher Construction

1 CO. v. Kent School District, 79 Wn. App. 841, 917  
2 P.2d 1086 (1995).

3 Courts may not include travel time as an  
4 element of a reasonable attorney's fees, only as  
5 an sanction. Roberson v. Perez, 123 Wash. App.  
6 320, 346, 96 P.3d 420 (2004). The court in this  
7 case explicitly stated travel time was being  
8 awarded because the attorney has to bill someone  
9 for that time. RP page 33 line 10, 11.

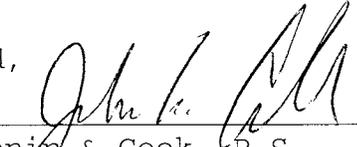
10 **CONCLUSION**

11 Wayne Lamphiear requests that this court  
12 overrule the trial courts findings, vacate the  
13 judgment entered against him, grant summary  
14 judgment to him and order Brogan & Anensen to pay  
15 all costs and fees resulting from their breach of  
16 contact including the boarding costs of the  
17 horses, the value of his buildings, rent for the  
18 amount of time he was forced to vacate the  
19 property early, and attorney fees & costs  
20 pursuant to the contact for trial court and  
21 appeal, and all costs of litigation as a sanction  
22 as well as pursuant to the contract.

23  
24 Dated May 29, 2007,  
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Respectfully submitted,

  
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