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STATE OF WASHINGTON
BY

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO AT TACOMA

NO. 35732-1-II

Brogan & Anesen, LLC, a Washington Limited Liability Company, Plaintiff/Respondent

v.

Wayne Lamphiear, Defendant/Appellant

RESPONDENT'S BRIEF TO APPELLANT'S OPENING BRIEF

JOHN L. JARRETT
Attorney for Respondents, Brogan & Anensen, LLC
925 Trosper Road SW
Tumwater, WA 98512
(360) 754-1925
Fax: (360) 352-6270
Johnljarrett@comcast.net

dated this 30th day of September, 2007

By: John L. Jarrett, W.S.B.A. # 5677

Certification: I certify that on this 30 day of September, 2007, I caused a true copy of this responsive brief of Respondent to be served upon Bonin & Cook, P.S. Attorney for Appellant by ~~ABC Legal Messenger~~ USmail to his address of record.

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III. STATEMENT OF CASE

The Plaintiff/Respondent, (hereafter Respondent), Brogan & Anensen, a Washington Limited Liability Company, entered into a Residential Real Estate Purchase and Sale Agreement with specific terms with Wayne W. Lamphiear, the Defendant/Appellant, (hereafter Appellant), on April 4, 2005 (Ex. to Declaration of Eric S. Marrifield CP 356-388). This purchase and sale agreement was for a 64.4 acre parcel located at 00134 West Elma Hickland Road, McCleary, Washington ("the Property").

The purchase and sale agreement contained an integration clause providing that the agreement constituted the entire understanding between the parties and superseded all prior or contemporaneous understandings and representations. (CP Id.)

On May 22, 2006, the Trial Court entered an order on summary judgment, granting Respondent's Motion for Summary Judgment and denying Appellant's Cross-Motion for Summary Judgment (CP 221-223). The Court declared the Respondent the title owner of the Property and granted Respondent's Petition for a Writ of Ejectment. (CP Id.) The Court further provided that Appellant was entitled to a 60 foot access easement to adjacent property owned by the Appellant. (CP Id.)

Closing on the Property occurred on May 25, 2005, the same date that the Appellants signed the statutory warranty deed, and the purchase price was paid in full. The deed was subsequently delivered and recorded. (CP 49) Subsequent thereto, between May 25, 2005, the Appellant took certain actions in relation to the property such as living in the house and conducting business on the property, dismantling a barn and removing it from the property, and continuing in possession under an alleged claim of authority, which resulted in a Complaint for Breach of Contract, Specific Performance, Ejectment and Trespass, filed December 5, 2005. (CP 1-16)

Respondent filed a Motion for Summary Judgment on January 24, 2006. (CP 24-40)

Respondent's Motion for Summary Judgment was supported by the declaration of Kenneth Brogan, and exhibits thereto (CP 48-82), and declaration of Eric Merrifield and exhibits thereto. (CP 41-47)

The Appellant filed a Cross-Motion for Summary Judgment on February 15, 2006. (CP 83) Contemporaneously therewith, Appellant filed a number of declarations, specifically of Bonnie Sweeney (CP 180-181), Daniel Lewis (CP 74-176), Francis "Skippy" Lasley (CP 172-173), John R. Bonin (CP 104-154), Larry Birindelli (CP 177-179), Lauren Lamb (CP 86-88), Michelle Sparks (CP 164-166), Robert (Bob) Rapheal Sr. (CP 182-183), Tim Hamilton (CP 167 -171), a second Tim Hamilton (CP 186-

187), Wayne Lamphiear (CP 155-163) and William "Billy" Anensen (CP 184-185), Bonnie Sweeney (CP 180-181), and Daniel Lewis (CP 174-176). All matters came before the Court and were considered by the Trial Court in its Order Granting Respondent's Motion for Summary Judgment and Denying Appellant's Cross-Motion for Summary Judgment (CP 221-223).

The purchase and sale agreement executed by the parties on April 4, 2005 contained an easement in favor of the Appellant. The Court in granting Plaintiff's Motion for Summary Judgment provided that the Appellant was entitled to a 60-foot wide access easement onto adjacent property owned by Appellant, the title two which was acquired after the purchase and sale agreement. (CP 221-223)

Both an addendum to the purchase and sale agreement and the escrow instructions required that Respondent convey a 60 foot access easement to Appellant. The Addendum-Amendment to the Purchase and Sale Agreement provided:

> "IT IS AGREED BETWEEN THE SELLER [Appellant] AND BUYER [Respondent] AS FOLLOWS:
>
> > 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 No. 180502230000."

(CP 147)

After the Court ruled on the Summary Judgment, Respondent retained a surveyor to survey the easement and prepare a legal description. The surveyor, Chris Butler, prepared the survey and legal description. (CP 349-355) The reported easement in Mr. Butler's declaration in support of Plaintiff's Motion for Summary Judgment on the Easement, was filed on September 18, 2006 (CP 49-355). The Motion for Summary Judgment on the Easement (CP 613-624) was also supported by declaration of Erick S. Merrifield and exhibits thereto (CP 256-388).

Appellant responded to the Motion for Summary Judgment on the easement. The gravamen of Appellants position before the trial court was apparently that the easement was "defective" because it did not comply with alleged oral additional terms outside the written contract between the parties in that it failed to extend the entire length of Appellant's subsequently acquired (to the purchase and sale agreement) property.

At the time of the closing on the sale from the Appellant to Respondent, it was Respondent's understanding that Appellant had not closed yet on his purchase of an adjacent 40 acres. As a result, it was not possible or appropriate at that time to convey the easement agreed to under the purchase and sale agreement. Subsequently, Appellant closed on the 40 acres, Respondent then made and legally describes an easement extending far beyond the southwest corner to provide access to

Appellant's adjacent landlocked parcel. The easement that was created using a existing roadway centerline, in fact, extended 410 feet from the southeast boundary of the Property. The extension, though not necessary under the purchase and sale agreement, was provided to enable the Appellant to connect to utilities (the northern terminus of the easement).

The Trial Court granted Respondent's Motion for Summary Judgment on the issue of the scope of the easement (CP 474-478). Again, the easement in fact extended 410 feet north of the southeast corner of the Appellant's newly acquired property. This was done partly to enable Appellant to extend utilities onto his property by utilizing an existing power source, as the northern terminus of the easement encompasses an existing power transformer along the existing roadway and partly because the existing road does not come back to the shared property line directly at the corner of the property in the purchase and sale agreement and as newly acquired property. This is set forth in a declaration of Chris Butler in support of Motion for Summary Judgment on the Easement. (CP 374 – 378).

Pursuant to the attorney's fees provision in the Purchase and Sale Agreement executed by the parties, Respondent applied for an award of reasonable attorney's fees and costs against the Appellant. The request was supported by Declaration Erik Merrifield with exhibits (CP 625-657).

The hearing on Motion for Fees was held on July 14, 2006. Another hearing date was scheduled to allow the Appellant's surveyor time to evaluate the easement fully described by the Respondent's surveyor. The matter came back before the Court on August 28, 2006. The Trial Court ultimately ordered an award of fees and costs on May 23, 2007, after, inter alia, considering declarations in support of fees and opposing fees. The Court deducted an amount of $3,597.00 of the requested $65,476.76 for a total award of $61,877.76 (CP 658-662).

IV. ASSIGNMENTS OF ERROR

The Respondent does not allege any assignments of error.

V. ARGUMENT

The Respondent argues (See Argument A- G) in response to issues raised by the Appellants 1-4:

A. Standard for Summary Judgment on Appeal is the same as at the Trial Court.

The standard on Summary Judgment on appeal is well settled,

"when reviewing an order for summary judgment, the appellant court engages in the same inquiry as the trial court. *Mt. Park Homeowners v. Tydings, 125 Wn. 2d 337, 883 P.2d 1383; Syrovy Alpine Resources Inc., 122 Wn. 2d 544, 548, 859 P.2d 51 (1993).* The court therefore must affirm a summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c) *Syrovy*, Supra.

B. Respondent was entitled to the benefit of the bargain from its purchase of the Property from Appellant.

In April, 2004, Respondent and Appellant executed a valid Purchase and Sale Agreement for 64.4 acres of real property in McCleary, Washington and all improvements thereon. Closing occurred in May 2005 and Respondent paid the purchase price in full, and Appellant executed the statutory warranty deed on May 25, 2005. Despite the fact that closing occurred earlier Appellant refused to deliver possession of the Property to the Respondent. Appellant continued to live on and conduct business on the Property, and removed improvements from the Property. The Appellant moved a barn from the Property, and asserted a right to remove a manufactured home.

Appellant asserted a right to remain for one year on the Property after closing and remove the buildings in question based upon an alleged oral agreement between the parties. At the same time, he asserted the right to rescind the sale and to tender the full purchase price to Respondent in exchange for clear title to "his land". Despite accepting the purchase price in full and executing the deed eight months prior, the Appellant appeared to still view the Property as "his" and appeared to clearly have buyer's remorse. Respondent asserted its rights under the purchase and sale agreement as plain and unambiguous, and that the purchase and sale

agreement constituted the entire agreement. All of Appellant's assertions were contrary to the plain language of the purchase and sale agreement. Because there is no dispute of material fact, the Respondent asserted its right to a judgment as a matter of law.

Under the purchase and sale agreement, Respondent was entitled to possession of the Property at closing. Appellant's assertion that he may remain on the Property for a full year after closing clearly contradicts the plain terms agreed to in the contract. Pursuant to section (f) of the purchase and sale agreement, possession was to be granted to Respondent at closing. The agreement states: "Seller shall deliver keys to Buyer on the Closing Date or on the Possession Date whichever occurs first." No earlier Possession Date is specified in the purchase and sale agreement, and under (f) Appellant should have delivered possession by delivering the keys on the Closing Date, or May 2005.

Appellant also claimed the right to remove the manufactured home and other improvements from the Property. However, the residential purchase and sale agreement concerned the sale of 64.4 acres of property, including fixtures and improvements on the land. Washington law is clear that all improvements on the land are conveyed with the real property. *Pruitt v. Meyer,* 2 Wn, App. 14, 21, 467 P.2d 364 (1970). There, the court held "[I]t is obvious that the purchase of land includes all improvements

thereon unless an agreement to the contrary is expressed in the agreement." The purchase and sale agreement does not contain any statement, express or otherwise, that deviates from this normal rule. In contrast, it provides that certain items are specifically included in the sale, including fixtures attached to the Property. Section (c) of the purchase and sale agreement specifies items included in the sale, such as electrical and lighting fixtures, windows and door screens, and all bathroom and other fixtures. [1]

C. The fully integrated purchase and sale agreement does not contain the covenants alleged by the Appellant, therefore cannot be enforced by the Court.

The Appellant alleges that contemporaneous with the execution of the purchase and sale agreement, the parties entered into an oral agreement providing him one year to vacate the Property, and granting him the right to remove the buildings from the Property. Respondent admitted through the Declaration of Brogan that it had discussions with the Appellant regarding the possession and the buildings prior to the execution of the purchase and sale agreement. The discussions were intended solely as

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[1] Under Washington law, in certain circumstances a manufactured home may be treated as personal property, instead of real property. However, RCW 65.20.030 provides that a manufactured home shall be treated the same as a site-built structure and ownership shall be based on ownership of the real property through real property law if the title to the manufactured home has been eliminated. A Manufactured Home Title Elimination application was signed by the Defendant on January 12, 2004 at the request of the home's legal owner, Washington Mutual Bank. *See* E. Merrifield Declaration, (CP41-47). Accordingly, the manufactured home is affixed and deemed part of the real property.

negotiations and were not part of the final agreement bargained for by the parties. In any event, if the alleged agreement were enforced, it would directly contradict the plain terms of the purchase and sale agreement, and the intent of Respondent in executing the residential purchase and sale agreement, and therefore may not be enforced by the Court. However, even if the Appellant's allegations were accepted as true, as they must be for the purpose of a Summary Judgment Motion, such allegations would not create a dispute of material fact.

The purchase and sale agreement executed by the Appellant does not include the right to possession after closing or the right to remove the home and other buildings, and the Court should not consider evidence about the contract that Appellant now *wishes* he had executed. Any extrinsic evidence contradicts the intent of Respondent in entering into the written residential purchase and sale agreement. "A court's primary task in interpreting a written contract is to determine the intent of the parties." *U.S. Life Credit Life Ins. Co. v. Williams,* 129 Wn.2d 565, 569, 919 P.2d 914 (1996).

The case of *Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990) specifically adopted the "context rule" for contractual interpretation. Under the rule, "extrinsic evidence is admissible in order to assist the court in ascertaining the intent of the parties and in interpreting

the contract." *US Life,* Supra at 569 citing *Berg,* Supra at 667. If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties. *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 502, 115 P.3d 262 (2005)

However, the "context rule" is not without limitations. In *Hearst,* the Washington Supreme Court took the opportunity to "further clarify [its] opinion" in *Berg. Hearst,* Supra at 500. The Court observed that "[s]ince *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used to determine the meaning of specific words and terms used and not to show an intention independent of the instrument or to vary, contradict or modify the written word". *Id.* at 503.

Washington Courts have also made it clear that language cannot be inserted into a contract under the guise of interpretation. *See, U.S. Life,* Supra. As the *U.S. Life* Court explained, to hold otherwise, "would be flying in the face of the portion of [the Washington Supreme Court's] decision in *Berg* that indicates that extrinsic evidence should not be considered for the purpose of contradicting and modifying other written

parts of the … contract". *Id.* at 570. Appellant's claim that the parties orally agreed to the possession date, one year after the closing date, contradicts the provision of the purchase and sale agreement that provides possession at the earlier of possession date or closing date. In order to have a reservation of right of possession to a date a year later, such a claim would require that this Court insert language into the contract. Even if this Court could consider evidence related to an alleged agreement regarding Appellant's reservation of right of possession following closing and right to remove the home and other improvements, any such oral agreement is barred under the Statute of Frauds. *See Richardson v. Cox,* 108 Wn. App. 881, 890, 26 P.3d 970 (2001)

In determining the parties' intent, the Court also looks to whether the contract contains an integration clause. An integration clause providing that the written document constitutes the parties' entire agreement strongly supports a conclusion that the parties' agreement was fully integrated. *Ban-Co. Inv. Co. v. Loveless,* 22 Wn. App. 122, 587 P.2d 567 (1978); *See also M.A. Mortenson Co. v. Timberline Software Corp.,* 140 Wn.2d 568, 579-80, 988 P.2d 305 (2000) (stating that the presence of an integration clause provides strong evidence that the parties intended the agreement to be fully integrated). Here, the purchase and sale agreement contains an integration clause, which strongly supports a

conclusion that the parties' agreement was fully integrated. Section (n) of the purchase and sale agreement provides: "[t]his agreement constitutes the entire understanding of the parties and supersedes all prior or contemporaneous understandings and representations. No modifications of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller."

Because the purchase and sale agreement is a fully integrated document, it constitutes the entire agreement between the parties. Appellant's alleged right to retain right to the Property for one year following closing and to remove the buildings contradicts the purchase and sale agreement, which provides that possession shall occur at closing. The written contract between the parties is clear, and Appellant may not add terms to the purchase and sale agreement which contradict the agreement. Whatever second thoughts the Appellant had regarding his sale of the Property, his claims must fail as a matter of law.

D. Not only is the Purchase and Sale Agreement a fully integrated document, but the agreement is and all prior negotiations are merged into the deed.

Appellant claims that the parties entered an oral agreement granting him the right to possession for one year following closing, and the right to remove the buildings form the Property. However, all

covenants in the purchase and sale agreement, and any prior or contemporaneous negotiations or agreements between the parties, either merged in the deed or expired at closing. "It has long been the general rule of law that the provisions of a contract for the sale of real estate, and all prior negotiations and agreements, are considered merged in a deed made in full execution of the contract of sale." *Black v. Evergreen Land Developers, Inc,.* 75 Wn.2d 241, 248, 450 P.2d 470 (1969).

The doctrine of merger "is founded on the parties' privilege to change the terms of their contract at any time prior to performance." *Barber v. Peringer,* 75 Wn. App. 248, 251, 777 P.2d 223 (1994). Under the merger doctrine, the execution, delivery and acceptance of the deed becomes the final expression of the contract and subsumes all prior agreements. *Id. (*citing *Snyder v. Roberts,* 45 Wn.2d 865, 871, 278 P.2d 348 (1955); *See also Kunkel v. Meridian Oil, Inc.,* 54 Wn. App. 675, 678 775, P.2d 470 (1989), *rev'd on other grounds,* 114 Wn.2d. 896, 792, P.2d 1254 (1990) (stating that "any inconsistency which existed between the contract and the deed was merged into the deed"). Appellant executed the deed on May 25, 2005, and the deed was subsequently delivered and accepted by the Respondent. Accordingly all negotiations and alleged agreements regarding possession of the property were subsumed by the deed, which transferred a fee simply interest in the property to the

Respondent. Any alleged oral agreement providing Appellant possession for one more year is inconsistent with the deed and the Respondent's fee simple interest in the Property.

Once the deed has been executed and accepted, the doctrine of merger extinguishes any contractual right created by the purchase and sale agreement or a prior agreement.

There is no case in Washington where a court has recognized and upheld an alleged oral agreement for sellers' continued possession of real property after execution, delivery and acceptance of the deed. In fact, recognition of such an alleged agreement would lead to uncertainty and delay in real property transactions, as a buyer could be forced to seek judicial review of their right to possession upon closing. Despite a plain written agreement between the parties, a seller could potentially delay delivery of possession until after trial, often a period for a year of more, simply by *alleging* that buyer and seller entered into an oral agreement granting seller continued possession. Even when it was opposite the language of the purchase and sale agreement itself. The doctrine of merger protects against such alleged agreements by merging negotiations into the deed. Appellant's assertions of an oral agreement granting him possession for one year and the right to remove the buildings from the

Property are inconsistent with the deed and should be rejected by this Court as they were by the Trial Court.

Both parties conceded that the matter may be decided on Summary Judgment. Plaintiff disputed that any side agreement regarding the buildings and possession of the land after for one year after closing was reached by the parties. Even assuming that the parties reached such an agreement, however, under the law, such an agreement would be unenforceable. The merger doctrine is premised on an important policy:"... "the parties' privilege to change the terms of the contract at any time prior to performance. Execution, delivery and acceptance of the deed becomes the final expression of the parties' contract and therefore subsumes all prior agreements." *Barber v. Peringer,* 75 Wn. App 248, 251, 877 P.2d 223 (1994) (*citing Snyder v. Roberts,* Wn. 2d. 865, 871, 278 P.2d 348 (1955). As a matter of law, the Appellant's Counter-Claim was appropriately dismissed.

The Appellant's own supporting declarations indicate that the Appellant was well aware that, in order to protect his interest and create a binding contract, he should memorialize the terms he believed had been agreed to. For example, Appellant was informed by Steve Fritz, a third party, that he should insure the written contract contained all the terms of the agreement. (CP 202-203) ("I told Wayne he ought to get it in writing.

Wayne said – yeah, I should - but they are promising me and I can't challenge their word."). And, Appellant did insist that certain agreed provisions be included in the final contract. (CP 293-296) ("I looked at the contract while I was standing in my driveway and saw…that the 60-foot easement we had discussed was not in the contract. So I told Garry that the contract needed to be changed."). Yet, the final purchase and sale agreement did not contain either the alleged agreement granting one years possession or the alleged agreement granting the Appellant fee interest in the buildings.

By Appellant's own evidence, he was aware that all terms agreed to by the parties should be included in the written contract, yet signed a contract that did not contain the alleged agreements. Because the Appellant reviewed and made changes to the purchase and sale contract, but did not insist in an inclusion of terms allegedly agreed to, those terms cannot now be added to the fully integrated contract. A party to a contract may offer extrinsic evidence for the purpose of aiding in the interpretation of a contract, but not for the purpose of adding to or modifying the agreement that was actually reached. This Court's role is to interpret and enforce the contract that was executed, and not the contract the Appellant wishes he had executed. *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wn.2d. 493, 502, 115 P.3d 262 (2005) (Explaining that extrinsic

evidence may be used "to determine the meaning of specific terms used," and not to "show an intention independent of the instrument" or to "vary, contradict or modify the written word"). The contract that was executed granted Respondent property in fee simple, with an absolute right to structures affixed to the property and an absolute right to exclusive possession effective upon closing.

Appellant's evidence, although raising disputes regarding facts, fails to establish any dispute of *material* fact. Accordingly, Respondent was entitled to Summary Judgment.

E. The doctrine of partial integration does not apply.

The Appellant argues on appeal that the contract was not fully integrated and the Court should have therefore considered parole evidence to establish additional terms. (Appellant's brief, commencing on Page 13). The case relied upon is *Black v. Evergreen Land Developers, Inc,.* 75 Wn.2d 241, 450 P.2d 470 (1969). *Black,* however, is in support of and consistent with Respondent's position in the instant case. The ruling in *Black* is that the doctrine of partial integration "...recognizes the right of contracting parties to reduce some provisions of their contract to written form and to leave others unwritten...[t]he provisions not in writing may be proved by parole <u>insofar as they are not inconsistent with the written portion</u>." *Citing Barber v. Rochester,* 52 Wn.2d. 691, 328 P.2d 711

(1958); *Byken v. Ertner,* 33 Wn.2d. 334, 205 P.2d. 628 (1949); *Corbin, Contracts* ¶ 581 (1960). Here, as previously stated, the alleged oral agreement to allow possession for one year and the removal of certain structures on the Property were directly contrary to the written portions of the contract.

The Appellant further cites the case of *Ban-Co. Inv. Co. vV. Loveless,* 22 Wn. App. 122, 587 P.2d 567 (1978) for the same proposition; that parole evidence should be considered by the Court in determining whether there is an oral agreement that does not merge into the written contract between the parties. Again, the doctrine of partial integration does not apply here. In *Ban-Co.,* the Court of Appeals held as follows:

> "in deciding the legal issue of whether or not an enforceable agreement is made out in the face of parole evidence rule objection, the decisions and text writers have placed particular emphasis on two objective factors extrinsic to the writing. These are first, that the additional terms should not vary or contradict that which has been reduced to writing but must be additional to and consistent with the contents of the documents, ... "

Ban-Co. Inv. Co. 131

Again, here the alleged oral promises are inconsistent to the writing.

F. The foregoing arguments apply to Appellant's contention that the parties had an oral agreement that the easement extended the length of the Property.

On May 22, 2006, the Trial Court entered an Order on Summary Judgment, granting Respondent's Motion for Summary Judgment and denying Appellant's Cross Motion for Summary Judgment (CP 221-223). Respondent conveyed and recorded a 60-foot access easement which not only complied with the expressed terms of the contract, but exceeded the requirements of the contract. The location and width of the easement are precisely as set forth in the parties' purchase and sale agreement. After the easement had been conveyed and recorded and subsequent to the Motion for Summary Judgment, Appellant responded alleging that the scope of the easement extended the entire length of the Respondent's property rather than to the point identified in the purchase and sale agreement. This apparently was based upon an alleged promise outside of the written terms of the contract. (CP 435-460). Again, Appellant has not established any dispute of material fact regarding the adequacy of the easement in complying with the terms of the purchase and sale agreement. The Trial Court granted Respondent's Motion for Summary Judgment on this issue (CP 474-478) and Plaintiff would reassert those arguments in support of the first order on summary judgment as set forth in Section IV. B through J of the brief herein.

G. The easement in question is not a "floating easement".

A floating easement is one that is defined in general terms, without a definite location or description. *Se,e Sunnyside Vly. Irrig. Dis. V. Dickie,* 149 Wn.2d. 873, 880, 783 P.3d 369 (2003).

The Court in *Sunnyside* goes on to hold that a floating easement which has an undefined width, is bounded by the doctrine of reasonable enjoyment. *Citing Everett Water Co., v. Powers,* 37 Wash. 143, 152, 79 P. 617 (1905). The Appellant attempts to use the concept of floating easement and undefined boundaries to argue that parole evidence was necessary to determine the intent of the parties under the doctrine of reasonable enjoyment. (Brief of Appellant, Page 25). This does not follow. The easement in question was specifically defined in the purchase and sale agreement as a 60-foot wide access easement onto the adjacent parcel currently under contract for purchase (by the Appellant). The easement was defined as being located at the SW corner of the Property in question herein.

To the extent that the easement in question could be defined as a "floating easement" it does not have an undefined width. It has specifically defined location and width, and is not subject to need of any interpretation as to the intent of the parties under the doctrine of reasonable enjoyment.

As to Appellant's agreement re: attorney's fees (commencing Page 28 of Appellant's Brief), Respondent argues as follows:

H. Attorney's fees awarded to the Respondent should be affirmed as well as attorney's fees on appeal.

On May 23, 2007, the Trial Court awarded the fees and expenses against the Appellant in the amount of $61,877.76 in Plaintiff's renewed Motion for Award of Fees and Costs (CP 658-662). The Appellant now argues that the attorney's fees were improperly awarded because of the Respondent's misconduct, *Citing Manning v. Loidhamer* 13 Wn. App. 766, 538 P.2d 136 (1975). That case, and those cited therein alleged by the Appellant herein to be authority for an award of fees against the Respondent, all involve the same general rule. Three elements are necessary to create liability: "(1) A wrongful act or omission by A toward B; (2) Such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event, ..." *Citing Manning v. Loidhamer* 13 Wn. App at 769. There is no two part transaction here.

I. As prevailing party, Respondent is entitled to fees against the Appellant.

Again, the Respondent prevailed on both Motions for Summary Judgment and all motions brought forth by the Appellant were denied and

their action dismissed. It cannot be contented with any credibility that somehow Appellant was a prevailing party on any or some issues.

J. "Travel Time" can be awarded as an element of reasonable attorney's fees and costs.

The award of fees in this case is by contract contrasted to the case of *Roberson v. Perez* 123 Wn. App. 320, 96 P.3d 420 (2004) cited as controlling by the Appellant. Appellant argues that *Roberson* impliedly stands for the proposition that travel time is not part of reasonable attorney's fees and costs in contract, except where fees are awarded incident to a sanction.

In the instant case, the Trial Court reasoned that fees or travel time where appropriate because the travel time was incurred and that the fees had to be paid by someone. Certainly, as a matter of interpretation of contract, as opposed to a sanction, it appears that the parties recognized that the attorney's fees and costs would be incurred; they were, and the Trial Court indeed awarded them including the attorney's fees charged for time traveling.

VI. CONCLUSION

For the reasons set forth herein the decisions of the Trial Court should be affirmed and the Respondent should be awarded attorney's fees on appeal.