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## REPLY TO CROSS-RESPONDENT COMBS

**A. The attorney fee clause in Chase's purchase and sale agreement entitles Chase to recover fees incurred in suing Combs because the agreement expressly provides that the representations in the agreement survive closing.**

**1. Standard of Review**

Chase agrees with Combs' statement that this is a review of summary judgment in which all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, who is Combs.

**2. Chase Properly Pled a Claim for Attorney Fees.**

Combs argues that Chase failed to plead a breach of contract. Combs Reply 4. The argument is misdirected because Chase properly pled for an award for attorney fees and costs against third-party defendants Combs. CP 25. Under the principles of notice pleading, Chase was not required to specify the basis for the claim for attorney fees. CR 8(a) specifically states that a pleading shall contain:

(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.

Chase properly pled a breach of the warranties in the warranty deed, and claimed attorney fees. No more was required.

Moreover, Combs did not raise a failure of pleading as a defense to Chase's motion for summary judgment. Combs' sole defense was that Chase's tender of the Erickson lawsuit was ineffective. CP 322-23. During oral argument of the motion, Combs argued for the first time that the Chases were not permitted attorney fees against the Combs under the holding of *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983). See CP 350.

Chase argued in his motion for reconsideration that fees should be awarded under the Purchase and Sale Agreement. CP 349-54. Combs alleged the failure of pleading in response to Chase's motion for reconsideration. CP 356. Chase replied, "If and to the extent that Combs claims that it somehow was unaware [that] the contract between the parties provided a basis for an award of attorney fees, there is ample time on this strictly legal issue for the Court to allow amendment of any pleading, should the court deem same necessary." CP 362. When the parties argued the motion for reconsideration, the Court simply ruled:

I haven't heard anything that's going to convince me to change my mind. I've already ruled that the Combs are responsible for the attorney's fees as far as defending the title, but not for their other attorney's fees concerning the dispute between the Combs and the Chases.

RP 750. Nothing about the Court's ruling suggests that the Court thought that the claim for attorney fees was inadequately plead or that the Court denied the motion for that reason. If the Court had indicated that a motion was necessary, Chase could certainly have filed one and under the liberal standards of CR 15 the motion should have been granted.

**3. Combs breached the representation in the Purchase and Sale Agreement that title shall be good and marketable.**

The Purchase and Sale Agreement included an attorney fee clause (CP 342):

The prevailing party in any legal proceeding brought under or with respect to the transaction described in this contract is entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorney's fees.

The agreement also recites that, "All representations contained in this contract will survive closing." *Id.* at ¶ 15. Paragraph 7 of the agreement represented that title would be good and marketable (CP 340):

Title shall be good and marketable, subject only to (a) covenants, conditions and restrictions of record, (b) public, private utility easements and roads and rights-of-way, (c) applicable zoning ordinances, protective covenants and prior mineral reservations, (d) special and other assessments on the property, if any, (e) general taxes for the year \_\_\_\_\_ and subsequent years and (e) other:\_\_\_\_\_.

Under the authority cited in Chase's earlier brief, Chase is entitled to attorney fees litigating against Combs because Combs breached the representation of good and marketable title, all representations in the agreement survived closing, and this lawsuit was brought "under or with respect to the transaction described in [the purchase and sale agreement]."

Combs argues that the only representations in the contract were set forth in ¶ 15, and that the representation in ¶ 15 were not breached. Combs Brief 4. But ¶ 15 does not limit representations to those contained in ¶ 15. Rather, ¶ 15 clearly provides, "[a]ll representations contained in this contract will survive closing." CP 342. The representation in ¶ 7 that title shall be good and marketable is clearly a representation "contained in this contract . . . ."

**B. The trial court's refusal to award damages for diminution in the value of Chase's property is contrary to the uncontradicted evidence that the dump truck traffic diminishes the value of the property.**

Combs does not deny any of the following principles governing the award of damages cited in Chase's earlier brief:

- "A party need not prove damages with mathematical certainty where the fact of damage is well established." *Topline Equip., Inc. v. Stan Witty*

*Land, Inc.*, 31 Wn. App. 86, 94, 639 P.2d 825, *rev. denied*, 97 Wn.2d 1015 (1982).

- "Damages must be supported by competent evidence in the record; however, evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture." ***Eagle Point Condo. Owners Ass'n v. Coy***, 102 Wn. App. 697, 704, 9 P.3d 898 (2000) (quoting ***Interlake Porsche & Audi, Inc. v. Bucholz***, 45 Wn. App. 502, 510, 728 P.2d 597 (1986), *rev. denied*, 107 Wn.2d 1022 (1987) (citations omitted)).
- The owner of property is competent to express an opinion of the value of the property. ***Port of Seattle v. Equitable Capital Group, Inc.***, 127 Wn.2d 202, 898 P.2d 275 (1995) ("The rationale behind this right is that one who has owned property is presumed to be sufficiently acquainted with its value and the value of surrounding lands to give an intelligent estimate of the value of his property.")

Chase Brief 34-36. Under these undisputed principles, the trial court should have awarded diminution damages.

Combs' sole argument is that there cannot have been any diminution of value from Erickson's prescriptive easement benefitting the 9 acres because there was already a recorded easement to use the Lower Road to benefit the 16 acres. Combs Brief 6-7. Combs ignores the fact that increasing the use of the Lower Road to benefit the 9 acres inevitably increases traffic, leading to a diminution in value. For example, Victor Erickson testified that at the time of trial there was no mining being

conducted on the 16 acres, and that, “[w]e haven’t removed probably rock off of the 16 acres probably for over a year or more.” RP 673-74. Erickson is not mining the 16 acres because he does not have the necessary permits. RP 127. Erickson testified that that they conducted more mining on the 9 acres than the 16 acres, or at least as much mining on the 9 acres as the 16 acres. RP 675.

The Chases are not arguing that the trial court was required to accept at face value either of their estimates of diminution of value. But, as Chase said in his earlier brief, faced with undisputed evidence of damage, the trial court should have made his own finding of loss of value within the range of the evidence. Chase Brief 40. Combs’ brief simply fails to respond to this fundamental principle.

Combs argues that Chase either waived or is equitably estopped from claiming damages because he must have known that Erickson’s trucks were using the Lower Road as a prescriptive easement. Combs Brief 7-8. Chase testified that he did not know that any truck traffic came from the 9 acre parcel, thinking that it came from the 16 acre parcel. RP 978. Chase also testified that there was no truck traffic coming from the 9 acres before he bought the property. RP 946. But truck operations skyrocketed after

Erickson bought a new rock crusher one year later. RP 948. Erickson admitted that the rock crusher can produce 7-8 truckloads of rock each hour, and that the crusher is on the 9 acre parcel, not the 16. RP 62-64.

Combs made the same waiver and estoppel arguments to the trial court. CP 371-72. Waiver and estoppel are factual matters that were obviously rejected by the trial court, who made no findings that either waiver or estoppel was present. The absence of a finding on a materially disputed issue has the same effect as an express finding against the proponent of the finding. ***Golberg v. Sanglier***, 96 Wn.2d 874, 880, 639 P.2d 1347, 647 P.2d 489 (1982). Thus Combs failed to prove either waiver or estoppel.

#### **REPLY ON CHASE'S CROSS APPEAL AGAINST ERICKSON**

Chase's prior brief argued against Erickson's appeal as to the Upper Road and cross appealed against Erickson as to the Lower Road. This Reply Brief is limited to replying to Erickson's response to Chase's cross-appeal as to the Lower Road.

Chase argued three separate reasons for reversing the trial court's finding of a prescriptive easement across the Lower Road. The first ground was that Erickson had failed to prove that his use of the Lower Road was adverse because use of vacant, open and

unenclosed property is presumed permissive. Chase Brief 22-24. Erickson replies that, “[t]here was ample evidence that no one gave anyone permission to use the road.” Erickson Reply 14. What Erickson actually means is that he never asked permission to use the road, RP 20, 308, which means there is no evidence that Erickson used the road with or without permission. In the absence of evidence, the presumption of permissive use is unrebutted.

The burden was on Erickson to prove each element of a prescriptive right, which includes proof that the use was adverse to the true owner. ***Granite Beach Holdings, LLC v. Dep’t of Natural Res.***, 103 Wn. App. 186, 200, 11 P.3d 847 (2000). The element of adversity is proven by showing “that the claimant treat the land as his own as against the world throughout the statutory period.” ***Chaplin v. Sanders***, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).

Erickson failed to prove that he adversely used the road, or that he used the road without permission, or that he treated the road as if he had an absolute right to use it without or without permission. There are no findings of hostility or adversity. Erickson points to finding 7 that his use of the property “averaged about 700 trips per year,” but he omits the qualifying phrase from the finding,

“although in a sporadic or off and on nature.” Erickson FF 7, CP 210. Finding 7 does not redeem Erickson’s claim.

Erickson argues that the facts of the cases on which Chase relies are different than this case. Erickson Reply 15-17. That is the nature of cases, the facts are almost always different, but the announced principles continue to apply.

Erickson argues that Robson had logged the 20 acres before he subdivided it. Erickson Reply 17. The presumption of permissive use does not depend on whether property is logged or unlogged, but on whether the property is “vacant, open, unenclosed, and unimproved . . . .” ***Granite Beach, supra***, 103 Wn. App. at 200.

Chase’s second argument was that Erickson’s use of the Lower Road was neither open nor notorious after Erickson’s short plat application was filed, reciting that access to the 9 acres was to the south, not to the north across the Lower Road. Chase Brief 25-26. Erickson mischaracterizes this argument, characterizing it as an “argument that the short plat application somehow lulled the true owners of the 20 and the 16 into believing the Erickson’s would not continue to use the Road as their primary access to the pit . . . .” Erickson Reply 17-18.

The cross-easements have nothing to do with “lulling” anyone. The Supreme Court emphatically held in ***Chaplin v. Sanders*** that subjective beliefs are irrelevant to determination of hostility or adversity. ***Chaplin, supra***, 100 Wn.2d at 860-61. The issue, as stated above, is whether the claimant treats the property as his own as against the world throughout the prescriptive period. By obtaining access for the 9 acre parcel to the south, instead of the north through the Lower Road, Erickson was not treating the Lower Road as if he had a right to use it.

Erickson argues that the short plat application had nothing to do with prescriptive use of the Lower Road because the use of alternative roads is of no concern to the County. Erickson Reply at 18. Erickson again misses the point. By filing the plat application, Erickson was telling the world he was not claiming a right of access over the lower road.

Chase’s third argument against Erickson’s prescriptive easement over the Lower Road was that after Robson and Zumstein exchanged easements, it was impossible for anyone to know whether the trucks using the Lower Road were coming from the 16 acres or the 9 acres. Chase Brief 27-28. Since the 16 acres have a recorded easement, Erickson’s use of the Lower Road

cannot be open and notorious as to the 9 acres. Erickson does not seem to have any response to this argument. Erickson Reply 18.

### **CONCLUSION**

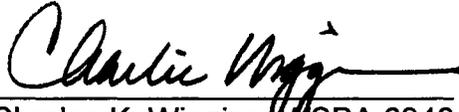
The Court should reverse the trial court's grant of an easement to Erickson allowing Erickson to use the Lower Road for the benefit of the 9 acres.

The Court should reverse the trial court's denial of attorney fees against Combs for the cost of bringing this action against Combs because the attorney fee clause in Chase's purchase and sale agreement entitles Chase to recover fees incurred in suing Combs. The Court should also hold that the trial court erred in denying any damages to Chase for diminution in value of his property and remand for determination of the amount of diminution.

Finally, the Court should to Chase award fees on appeal against Combs.

RESPECTFULLY SUBMITTED this 3 day of September,  
2009.

WIGGINS AND MASTERS, P.L.L.C.

A handwritten signature in cursive script, appearing to read "Charles Wiggins", with a horizontal line extending to the right.

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I certify that I mailed or caused to be mailed a copy of the foregoing **MOTION FOR LEAVE TO FILE AMENDED REPLY BRIEF**, via U.S. mail, postage prepaid, on the 3 day of September, 2009 to the following counsel of record at the following addresses:

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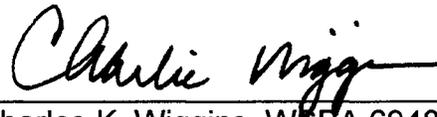
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