

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BATTLE GROUND PLAZA, INC.,

Respondent/Cross-Appellant,

v.

DOUGLAS M. RAY, and EUGENE ANDERSON and
WILLIAM MACRAE-SMITH, as co-personal
representatives of the Estate of Irwin P. Jessen

Appellants/Cross-Respondents,

and

SCOTT BROTHERS OIL, INC., and TIME OIL
COMPANY, INC.,

Third-Party Defendants.

APPELLANTS'
REPLY/RESPONSE BRIEF

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I. SUMMARY OF ARGUMENT

Plaintiff (“Purchaser”) agreed to buy a shopping center (“the Property”) from defendants (“Sellers”). The parties executed a Purchase and Sale Agreement (“PSA”) and addendum thereto in which they agreed to a closing date of August 1, 2001. The transaction did not close by that date, however, because Purchaser never tendered the purchase price. As a result, the agreement terminated automatically, entitling Purchaser to a return of its earnest money, but nothing more.

Purchaser argues it had no obligation to tender the purchase price because, before the date scheduled for closing, the parties discovered that the Property was contaminated. In the PSA, Sellers had represented that it was not. Purchaser claims that Sellers’ breach of the environmental representation suspended the closing date indefinitely.

Contrary to Purchaser’s assertion, the PSA does not provide for a suspension of the closing date in the event of a breach of a representation by Sellers. Even if it had,

Purchaser expressly waived the right to delay closing based upon the contamination of the Property.

Purchaser further asserts it is entitled to specific performance and that the trial court therefore properly ordered Sellers to clean up the Property and then sell it to Purchaser. Purchaser is not entitled to the remedy imposed by the trial court for a number of reasons. First, because the PSA automatically terminated August 1, 2001, no contract exists that can be specifically performed. Second, Purchaser is not entitled to specific performance because it never paid or tendered the purchase price. Third, damages constitute an adequate remedy for breach of a warranty or representation. Finally, Sellers cannot be required to clean up the Property because they never promised to do so; they did nothing more than make a representation regarding the existing condition of the Property.

The trial court also erred in awarding Purchaser \$510,000 in stigma damages. This error is based upon the different definitions of "stigma" used by Purchaser's expert witness, Wayne Hunsperger, and the trial court.

Hunsperger defined “stigma” damages to mean the diminution in value of contaminated property *before* cleanup; the trial court defined such damages to mean any remaining diminution in value *after* cleanup. Purchaser did not present any evidence regarding the type of “stigma” damages awarded by the trial court, and the award must therefore be reversed because it is not supported by substantial evidence. Moreover, by awarding \$510,000, which represents the diminution in value before cleanup, *and* requiring Sellers to clean up the Property, the trial court impermissibly awarded Purchaser a double recovery.

Purchaser has raised three issues on cross-appeal, none of which has merit. First, it challenges the trial court’s attorney fee award, arguing that the trial court abused its discretion in reducing the rate charged by one of Purchaser’s attorneys. The attorney fee award should be reversed in its entirety because (1) Purchaser should not prevail, and (2) even if Purchaser does prevail, the trial court did not prepare the requisite findings of fact and conclusions of law. However, if the award is not reversed,

Purchaser has failed to show that the trial court abused its discretion in reducing the award to reflect rates charged by local counsel.

Second, Purchaser contends the trial court erred in refusing to award damages for loss of income. The trial court correctly recognized that Purchaser was not entitled to such damages in light of its failure to pay for the Property.

Finally, Purchaser argues the trial court abused its discretion in granting Sellers' motion to amend the Findings of Fact and Conclusions of Law and Amended Order of Specific Performance to reflect the fact that one of the shopping center tenants was no longer selling gasoline. Sellers argued that, as a result, should not be required to replace UST tanks on the Property. Sellers satisfied the requirements of CR 60(b), and the trial court properly exercised its discretion in granting the motion.

II. ARGUMENT

A. Purchaser is not entitled to specific performance.

Purchaser asserts a buyer is entitled to specific performance when (1) there is a valid contract between the parties, (2) the seller has breached the contract, (3) the contract terms are definite and certain, (4) damages are not an adequate remedy, (5) the buyer has not defaulted on its obligations, and (6) the contract does not expressly bar specific performance.¹ Purchaser has failed to satisfy its burden of establishing the existence of each of these requirements, and it is therefore not entitled to specific performance.

¹ Brief of Respondent/Cross-Appellant (“Response Brief”) at 15-16 (citing *Crafts v. Pitts*, 161 Wn.2d 16, 23-24, 162 P.3d 382 (2007); *Paradiso v. Drake*, 135 Wn. App. 329, 335, 143 P.3d 859 (2006)). Purchaser fails to mention that specific performance is *not* warranted when, as in this case, it would be inequitable to the seller and would require lengthy ongoing court supervision. See *Hallauer v. Certain*, 19 Wn. App. 372, 380, 575 P.2d 732 (1978) (specific performance denied where it would be inequitable to compel seller to perform); *Egbert v. Way*, 15 Wn. App. 76, 80, 546 P.2d 1246 (1976) (specific performance denied where enforcement would require “such long continued supervision by the court as is disproportionate to the advantages to be gained.”).

1. The PSA automatically expired on August 1, 2001; therefore no contract exists to be specifically performed.

As Purchaser acknowledges, an essential element of a claim for specific performance is the existence of a contract between the parties.² The PSA contained a date for closing: August 1, 2001. (Trial Ex. 3) The parties agreed that “time was of the essence,” (Trial Ex. 2 at 3, 11) and closing did not take place by August 1. Indeed, there has been no closing to date. By its terms, the PSA expired.

Because the PSA expired before Purchaser filed suit, there was, and is, no existing contract between the parties that can be specifically performed.

a. *The closing date has not been suspended.*

Purchaser asserts the PSA is still in effect because the closing date has been suspended indefinitely as a result of Sellers’ breach of the environmental representation.³ This interpretation is not supported by the terms of the contract or by common sense, however. Paragraph 3(a) of

² *Id.* at 16 (citing *Kruse v. Hemp*, 122 Wn.2d 715, 722, 853 P.2d 1373 (1993); *Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.2d 953 (1963)).

³ Response Brief at 17-21.

the Addendum to Real Estate Purchase and Sale Agreement

states:

Providing Sellers are not then in default (or breach) of the Purchase and Sale Agreement as previously amended and modified herein, Buyer agrees to a closing date of July 1, 2001, except that Buyer shall have until August 1, 2001 to close upon payment of additional earnest money in the amount of \$10,000 cash into escrow, to be applied to the purchase price at closing.

(Trial Ex. 3) Purchaser paid an additional \$10,000 in earnest money to delay the closing date to August 1, 2001.

(CP 459) As noted, the transaction did not close by that date and the agreement therefore terminated by its own terms.⁴

Nothing in this provision states that the closing date will be extended indefinitely if Sellers are in breach.

Rather, it states that Purchaser agrees to close, as provided in that section, so long as Sellers are not in default or

⁴ Purchaser and, apparently, the trial court fail to appreciate the distinction between Sellers' right to terminate the agreement and the termination of the PSA by its own terms. If Sellers are in breach, they cannot terminate the agreement—if Purchaser wants to proceed with the transaction, Sellers must do so. Here, because the transaction did not close by August 1, 2001, the PSA terminated by its own terms; Sellers did not terminate the agreement.

breach. The provision extends the closing date for a specific period of time, but it makes no provision—nor would it reasonably do so—for an indefinite extension of the closing date, at Purchaser’s option, in the event of a default or breach by Sellers and known to Purchaser. On the other hand, if Sellers *are* in breach, Purchaser is not obligated to close, and the agreement will terminate.

Nor, as Purchaser claims, does the parties’ conduct establish that the closing date has been suspended indefinitely.⁵ For example, the fact that Sellers hired 3 Kings to undertake remediation does not, as Purchaser asserts, establish that Sellers believed the PSA to still be in effect. Property owners have a statutory obligation to clean up contaminated property, and Sellers were obligated to remediate the Property regardless of the terms of the PSA.⁶ And, contrary to Purchaser’s assertion, the fact that Sellers’

⁵ See Response Brief at 19-20.

⁶ See RCW 70.105D.040. Of course, in order to satisfy their statutory obligation, Sellers would be entitled to select their own cleanup method, subject to approval by the Department of Ecology. They would not have been required, as they now have been, to clean up the Property in accordance with the methodology ordered by the trial court.

answer to Purchaser's complaint states that Sellers were not in breach of the PSA does not prove that Sellers believed the agreement was still in effect. On the next page of their answer, Sellers specifically alleged, as an affirmative defense, that the PSA had expired. (CP 30)

In fact, Purchaser's own conduct belies its present assertion that its obligation to close has been indefinitely suspended by Sellers' breach of the environmental representation. If Purchaser believed this to be the case, it would not have paid an additional \$10,000 to extend the closing date to August 1, 2001. At the time Purchaser made the additional payment, it knew the Property was contaminated and, therefore, that Sellers had breached the environmental representation. Yet Purchaser made the payment, as expressly provided in the contract, to extend the closing date to the specific date provided in the agreement: August 1. If the closing date had been indefinitely suspended by Sellers' breach, Purchaser would not have needed to make this additional payment to extend the closing date one month.

In sum, the PSA terminated August 1, 2001, when Purchaser failed to close under its terms. Thus, at the time Purchaser filed suit, there was no agreement that could be specifically performed.

b. Purchaser waived its right to assert Sellers' breach of the environmental representation to delay closing.

Even if the PSA had not automatically terminated, the closing date has not been suspended indefinitely because Purchaser waived any right to rely on Sellers' breach of the environmental representation to delay closing. In its response, Purchaser improperly conflates Sellers' arguments that (1) Purchaser waived its right to rely on Sellers' breach of the environmental representation to delay closing and (2) Purchaser waived its right to recover damages for Sellers' breach of the environmental representation.⁷ These arguments are separate and distinct and must be analyzed accordingly.

As explained in Sellers' opening brief, Purchaser waived its right to rely on Sellers' breach of the

⁷ Response Brief at 21-25.

environmental representation to delay closing by (1) notifying Sellers, in a letter dated February 26, 2001, that it waived certain contingencies set forth in Paragraph 21 of the PSA as a condition to closing and (2) tendering an additional \$10,000 to extend the closing date to August 1, 2001, when it knew that the Property was contaminated. Purchaser does not directly respond to these arguments except to concede that its February 26, 2001, letter meant that Purchaser waived its right to terminate the agreement and recover its earnest money if it failed to close.⁸

A review of Paragraph 21 of the PSA exposes the fallacy of Purchaser's argument that its February 26, 2001, letter was of no consequence. The provision states that Purchaser's obligation to close is contingent upon certain conditions, including Purchaser's right to "inspect the soil conditions and other hazardous materials on or about the Property and to notify the Seller in writing that Purchaser approves." (Trial Ex. 2 at 6, 7) Further, "If Purchaser fails to approve this contingency," the PSA "shall be null and

⁸ *Id.* at 22.

void, Purchaser's entire deposit shall be returned, and the Purchaser and Seller shall have no further obligations hereunder." (*Id.* at 7)

Purchaser waived the soil contingency, *as a condition to closing*, and thus cannot now argue that it does not have to close based upon the existence of contamination. Under Purchaser's analysis, its decision to ignore any potential problems that might be revealed by a soil inspection would grant it greater rights than those provided for by the terms of the PSA. That is, if Purchaser had not waived the soil contingency, it would have been required either to (1) approve the soil conditions, in which case the closing would proceed in accordance with the deadlines set forth in the PSA and addendum, or (2) fail to approve the soil conditions, in which case the agreement would terminate. By waiving the soil contingency as a condition to closing, Purchaser cannot, as it asserts, avoid its contractual obligation to close on the ground that this obligation has been suspended indefinitely as a result of the contamination of the Property.

This conclusion is bolstered by the fact that Purchaser wrote the February 2001 letter after obtaining a Phase I report indicating the possibility of contamination (See Trial Ex. 134), and it paid additional earnest money to extend the closing date after learning that the Property was, in fact, contaminated. (CP 459; Trial Ex. 140; 2/7/07 RP at 19)⁹ Purchaser could have refused to waive the environmental condition in February 2001, or it could have terminated the agreement in June 2001, and in both cases obtained a refund of its earnest money. Instead, Purchaser elected to proceed with the transaction. As noted above, Purchaser would not have needed to make this additional payment if, as it asserts, Sellers' breach of the environmental representation indefinitely suspended Purchaser's obligation to close.

Purchaser expressly waived the soil contingency as a condition to closing and then proceeded to pay to extend the closing date after it knew the Property was

⁹ The February 7 transcripts have two page numbers; the page number cited above is the page number at the bottom of the page.

contaminated. Even if the PSA had provided that the closing date would be suspended by Sellers' breach of the environmental representation (which it did not), Purchaser waived any right to delay closing by its actions. Thus, when the time for closing expired, the agreement terminated, and the agreement cannot provide the basis for an award of specific performance.

2. Purchaser is not entitled to specific performance under the PSA.

a. Purchaser is not entitled to specific performance because it has not tendered the purchase price.

Even if we assumed the PSA has not terminated, a party cannot obtain specific performance unless it can establish that it has performed or is willing to perform its contractual obligations, including payment or tender of the purchase price.¹⁰ Purchaser argues it has been relieved of this obligation because (1) Purchaser's obligation to tender the purchase price has been suspended as a result of

¹⁰ See *Kreger v. Hall*, 70 Wn.2d 1002, 1009, 425 P.2d 638 (1967); *Coonrod v. Studebaker*, 53 Wash. 32, 36-37, 101 P. 489 (1909); *Paradiso v. Drake*, 135 Wn. App. 329, 335, 143 P.3d 859 (2006).

Sellers' breach of the environmental representation, and (2) Purchaser could not tender the purchase price due to its inability to obtain financing as a result of the contamination of the Property. Neither of these arguments is persuasive.

First, as explained above, Sellers' breach of the environmental representation did not indefinitely suspend the closing date or Purchaser's obligation to tender the entire purchase price at the time of closing.

Second, even if Purchaser had been unable to obtain financing due to the contamination on the Property, it was still obligated to tender the purchase price. The PSA requires by its terms that Purchaser tender the purchase price. (Trial Ex. 2 at 1) It is generally true that a purchaser of property who is unable to pay for the Property cannot reasonably assert a claim for it, and the PSA offers no exception.

Purchaser asserts, however, that it is excused from the obligation to tender the purchase price because it was Sellers' fault Purchaser could not obtain financing to pay

for the Property.¹¹ In support of this assertion, Purchaser relies upon the testimony of Richard Brooke, a vice president of the mortgage company Purchaser contacted to arrange financing. Brooke testified that he believed Purchaser would have been able to obtain financing if the Property had not been contaminated. (1/22/07 RP at 58)

Preliminarily, this testimony does not provide substantial evidence proving that Sellers caused Purchaser's inability to finance the purchase. Brooke's deposition testimony ignores the several concerns enumerated by EverTrust Bank, the proposed lender, at the time Purchaser sought to obtain financing. The "[a]ge and condition of the collateral" was only one among the several concerns raised by EverTrust. (Ex. 143) Thus, Brooke's testimony does not support Purchaser's assertion that it would have been able to obtain financing in the absence of contamination on the Property.

In any event, even if the loan would have been made but for the contamination, Purchaser's obligation to close—

¹¹ Response Brief at 12-13.

once Purchaser waived that condition— did not depend upon *whether* it was able to obtain financing or the *reason* it was unable to do so. Paragraph 16 of the PSA gave Purchaser 90 days to remove the financing contingency. The PSA did *not* include a provision extending this time frame or relieving Purchaser of the obligation to tender the purchase price based upon Sellers' breach of the environmental representation. Purchaser does not, and cannot, assert any grounds in law or equity excusing a buyer from paying for the property under the terms of the purchase and sale agreement when the agreement itself does not express any contingencies.

In order to establish that it is entitled to specific performance, a party must show that it has performed its own obligations under the contract or that it is willing and able to do so. Purchaser has not satisfied this requirement, and it is therefore not entitled to specific performance.

b. Purchaser is not entitled to specific performance pursuant to Paragraph 29 or any other provision of the PSA.

In the trial court, Purchaser asserted it was entitled to specific performance pursuant to Paragraph 29 of the PSA, which governs defaults. (CP 2, 262) Purchaser now apparently concedes Paragraph 29 does not apply, arguing instead that specific performance is authorized because (1) the PSA does not expressly prohibit specific performance and (2) Paragraph 30 of the agreement does not state that indemnification is the sole remedy for breach of a warranty or representation.¹²

Purchaser is mistaken. As Purchaser acknowledges, specific performance is authorized *only* when damages are not an adequate remedy.¹³ Purchaser disingenuously asserts, “Since real property is involved, there is no adequate remedy at law.”¹⁴ The Washington courts have recognized that, because real estate is unique, damages ordinarily will not compensate a purchaser for a seller’s

¹² Response Brief at 26-28.

¹³ *Id.* at 15 (citing *Crafts*, 161 Wn.2d at 23-24; *Paradiso*, 135 Wn. App. at 335 (2006)).

¹⁴ Response Brief at 16.

breach of a contract to sell a specific parcel of land.¹⁵

Here, of course, Sellers did not refuse to sell the Property to Purchaser. Instead, Purchaser's claims are based upon Sellers' breach of the environmental representation. As numerous decisions have held, damages are an adequate remedy for the breach of a representation or warranty regarding real property.¹⁶ Purchaser's assertion to the contrary must be rejected.

c. Purchaser waived its right to enforce Paragraph 30N of the PSA.

Under the circumstances of this case, however, Purchaser is not entitled to indemnification, for two reasons. First, Sellers cannot be liable for breaching the environmental representation set forth in Paragraph 30N because Purchaser never tendered the purchase price, and as

¹⁵ See, e.g., *Pardee v. Jolly*, 163 Wn.2d 558, 568-69, 182 P.3d 967 (2008).

¹⁶ See, e.g., *Olmsted v. Mulder*, 72 Wn. App. 169, 180-81, 863 P.2d 1355 (1993) (real estate purchaser entitled to damages for seller's breach of express warranties regarding well water and septic tank conditions); *Lyall v. DeYoung*, 42 Wn. App. 252, 259, 711 P.2d 356 (1985) (real estate purchaser entitled to damages for seller's breach of express warranty regarding water quality); *Tennant v. Lawton*, 26 Wn. App. 701, 703, 615 P.2d 1305 (1980) (real estate purchaser entitled to damages for seller's misrepresentation regarding results of percolation test).

a result, the transaction did not close. Second, Purchaser waived any right it may have had to enforce Paragraph 30N by proceeding with the transaction despite *knowing* the Property was contaminated and therefore that Sellers had breached the environmental representation.

(1) *Paragraph 30N does not apply because the transaction did not close.*

It is a fundamental rule of contract construction that a contract should be construed as a whole in a manner that gives effect to every provision.¹⁷ In this case, because Purchaser discovered the contamination on the Property before closing, Paragraph 21(A)(2) applies, not Paragraph 30N. As explained above, Paragraph 21(A)(2) allows the Purchaser to conduct a soil investigation before closing and either approve the soil conditions and proceed with closing or fail to approve them, in which case the agreement terminates. Purchaser does not explain why Paragraph 21(A)(2) would not apply. Purchaser cannot waive its rights under Paragraph 21(A)(2), refuse to tender the

¹⁷ *Colo. Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).

purchase price, and then recover under the terms of the contract.¹⁸

Purchaser cites two Washington cases in support of its assertion that it is entitled to indemnification under Paragraph 30 despite the fact that it has never tendered the purchase price—*Hardinger v. Till*¹⁹ and *Friebe v. Supancheck*.²⁰ Neither case authorizes a buyer to enforce a representation or warranty when the transaction does not close, and thus these cases do not establish that Purchaser can recover under Paragraph 30N of the PSA.

In *Hardinger*, the plaintiff entered into a purchase and sale agreement with the defendants. Before the deal

¹⁸ Purchaser cites the prefatory language of Paragraph 30, which states, “Seller represents and warrants to the Purchaser, and Seller understands that Purchaser is relying on such representations and warranties *in connection with closing the transaction* herein described” Response Brief at 30 (emphasis added). This language does not, as Purchaser asserts, allow it not to close if it discovers a breach of representation before closing and then seek recovery for that breach in accordance with Paragraph 30. Instead, the provision states nothing more than that Purchaser relies on Seller’s representations and warranties in making the decision to close. If, as in this case, the Purchaser fails to close, purportedly because of the breach of representation, then it cannot also recover under the contract.

¹⁹ 1 Wn.2d 335, 96 P.2d 262 (1939).

²⁰ 98 Wn. App. 260, 992 P.2d 1014 (1999).

closed and while the contract was still in effect, the defendants sold the property to someone else. The plaintiffs sought to recover benefit of the bargain damages. After noting the general rule that benefit of the bargain damages are the difference between the contract price and the reasonable market value of the property at the time of breach, the court explained, “[T]he measure of damages for the breach of a contract to convey land, *where the vendor subsequently sold the same to another*, is the amount paid by the plaintiff and the increase in value above the purchase price at the time of the breach.”²¹

Here, Sellers did not sell the property to anyone else; rather, Purchaser is the party who has failed to close. *Hardinger* does not stand for the proposition that a purchaser of real property can waive conditions to closing, fail to close, and then seek damages and/or specific performance of the contract. *Hardinger* has no application here.

²¹ *Hardinger*, 1 Wn.2d at 339 (emphasis added).

In *Friebe*, the plaintiffs agreed to buy three rental units. The deal did not close, however, because the plaintiffs discovered one of the units was an illegal use. The plaintiffs then filed suit for breach of contract, misrepresentation, and violation of the CPA.²² The plaintiffs subsequently obtained a default judgment against the defendants, and the defendants sought to overturn it. The trial court vacated the default judgment and entered summary judgment in favor of the defendants. The plaintiffs appealed, and the court of appeals reversed. The appellate court concluded the plaintiffs' damages calculation was sufficient to support a default judgment on the breach of contract claim, citing *Hardinger* for the proposition that benefit of the bargain damages are available for a breach of a purchase and sale agreement.²³

The issue in this case—whether a purchaser can recover for breach of a representation when (1) it waived all conditions to closing, (2) it failed to tender the purchase price, and (3) the seller was willing and able to convey the

²² *Friebe*, 98 Wn. App. at 262.

²³ *Id.* at 269.

property—was not presented in *Friebe* and thus was not decided by that court. In fact, the opinion does not state whether the purchaser had tendered the purchase price, whether the agreement contained any provisions regarding contingencies or inspection of the premises, or whether the seller was willing to convey the property. Under these circumstances, the *Friebe* decision provides no assistance in resolving this case.

(2) *Purchaser waived the right to enforce Paragraph 30N.*

By proceeding with the transaction despite *knowing* the Property was contaminated, Purchaser waived the right to enforce the environmental representation. As the Wisconsin Court of Appeals explained in *Lambert v. Hein*,²⁴ a purchaser's decision to proceed with closing despite knowledge of a breach of warranty constitutes a waiver of that warranty. To conclude otherwise would "turn[] the

²⁴ *Lambert v. Hein*, 582 N.W.2d 84 (Wis. Ct. App. 1998).

purpose of the inspection/disapproval process against itself.”²⁵

Purchaser cites cases from other jurisdictions to support the proposition that a purchaser need not show reliance or lack of knowledge to enforce an express warranty. In each of those cases, unlike the present case, the transaction at issue closed, and the buyer then proceeded to enforce the warranty.²⁶ And, none of those cases involved the situation presented here, where it is undisputed that Sellers had no knowledge the property was contaminated and Purchaser *knew* (as opposed to not knowing or to merely suspecting) before closing that the property was contaminated. Moreover, as evidenced by the

²⁵ *Id.* at 729-30. Purchaser contends *Lambert* is distinguishable because the contract at issue in that case does not contain language identical to that set forth in the PSA. Purchaser misses the point. The *Lambert* decision is based upon the principle that, when, as in this case, the buyer discovers a defect constituting a breach of warranty before closing and elects to proceed anyway, ***even though not contractually required to do so***, it has waived the right to assert a claim for breach of warranty.

²⁶ See *Glacier Gen. Assur. Co. v. Cas. Indem. Exch.*, 435 F. Supp. 855, 858 (D. Mont. 1977); *Paraco Gas Corp. v. AGA Gas, Inc.*, 253 F. Supp. 2d 563, 567 (S.D.N.Y. 2003); *Essex Group, Inc. v. Nill*, 594 N.E.2d 503, 505 (Ind. Ct. App. 1992); *CBS, Inc. v. Ziff-Davis Publ'g Co.*, 554 N.Y.S.2d 449, 451 (N.Y. 1990).

Lambert decision and others, a split of authority exists as to whether reliance is an essential element of a claim for breach of an express warranty.²⁷

Most significantly, the decisions cited by Purchaser are not in accord with Washington law. For example, in *Lyall v. DeYoung*,²⁸ the buyers sought to enforce, after closing, a provision in a real estate purchase and sale agreement in which the seller warranted, among other things, that the well serving the property provided an adequate supply of water. The court rejected the seller's argument that the warranty was not part of the contract and concluded the evidence established the warranty had been breached.²⁹ The court ruled that the buyers were therefore entitled to damages, noting, "The courts have consistently

²⁷ See, e.g., *Hendricks v. Callahan*, 972 F.2d 190, 194-95 (8th Cir. 1992) (purchaser required to show reliance on express warranty to prevail on claim for breach of that warranty); *Land v. Roper Corp.*, 531 F.2d 445, 449 (10th Cir. 1976) (reliance is an essential element of a claim for breach of an express warranty); see also *Assocs. of San Lazaro v. San Lazaro Park Props.*, 864 P.2d 111, 116 (Colo. 1993) (where buyer does not rely on warranty, and warranty therefore does not constitute an inducement to purchase, buyer waived right to enforce warranty).

²⁸ *Lyall v. DeYoung*, 42 Wn. App. 252, 711 P.2d 356 (1985).

²⁹ *Lyall*, 42 Wn. App. at 258.

provided relief for buyers of property where the seller or their agent misrepresented the property or its water *thereby inducing the sale*, whether based on oral or written representations.”³⁰

Here, Purchaser knew, for a fact, that the Property was contaminated, yet elected to proceed anyway. Even if a buyer could recover for breach of a representation or warranty despite the fact that the transaction did not close, Purchaser cannot recover in this case because it waived the right to recover for Sellers’ breach of the environmental representation.

3. Even if Purchaser were entitled to specific performance, specific performance of the contract does not require Sellers to clean up the Property.

As explained in Sellers’ opening brief, specific performance cannot be ordered unless the precise act to be specifically performed is clearly ascertainable from the

³⁰ *Id.* (emphasis added); see also *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 535, 799 P.2d 250 (1990) (express oral warranty regarding construction of home exists when builder or vendor makes oral representations regarding workmanship and/or materials, prior to the sale, and *upon which the buyer relies*).

terms of the contract.³¹ Purchaser ignores this principle, asserting that specific performance is warranted because this remedy was supposedly cheaper for Sellers to implement than a damage award would have been.

Even if Purchaser were entitled to damages, the trial court still cannot order Sellers to clean up the Property over Sellers' objection because the PSA does not obligate Sellers to do so. Sellers did nothing more than make a representation as to the existing condition of the Property; Sellers did not represent that they would undertake to remediate any contamination found.

This distinction is illustrated in *Dean v. Gregg*,³² cited by Purchaser in its response brief. In that case, the seller agreed to short plat the property into four parcels. Although the seller performed most acts required to close,

³¹ See Appellants' Opening Brief at 39 (citing *State v. Bisson*, 156 Wn.2d 507, 524, 130 P.3d 820 (2006); *Emrich v. Connell*, 105 Wn.2d 551, 558, 716 P.2d 863 (1986); *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wn.2d 109, 132, 173 P.2d 194 (1946); *Wright v. Suydam*, 59 Wash. 530, 536, 108 P. 610 (1910); RESTATEMENT (SECOND) CONTRACTS § 366 (1981)). Contrary to Purchaser's assertion, Sellers did raise this issue in the trial court. (See CP 250-51)

³² *Dean v. Gregg*, 34 Wn. App. 684, 663 P.2d 502 (1983).

he did not perform his obligation, as expressly agreed, to short plat the property because it became too expensive.³³ The purchasers sued, and the trial court awarded damages but denied their request for specific performance.³⁴ The court of appeals reversed, concluding financial hardship did not excuse the seller from his obligation to obtain a short plat.³⁵

Here, unlike the seller in *Dean*, Sellers did not promise to perform the affirmative act of cleaning up the Property.³⁶ Instead, they simply made a representation regarding the existing condition of the Property. The PSA specifically provides that the remedy for a breach of a warranty or representation is indemnification; Sellers did *not* agree to make the warranty or representation true. Because the PSA did not impose any obligation on Sellers

³³ *Dean*, 34 Wn. App. at 685.

³⁴ *Id.*

³⁵ *Id.* at 686.

³⁶ Purchaser contends the contract at issue in *Dean* did not contain “specific contractual language” requiring the seller to “put the property in a certain condition.” Response Brief at 33. In fact, the contract expressly required the seller to short plat the property. *Dean*, 34 Wn. App. at 685.

to clean up the Property, the trial court improperly ordered Sellers to do so.

B. Purchaser is not entitled to stigma damages.

The trial court awarded Purchaser \$510,000 in “stigma” damages based upon the testimony of Purchaser’s expert witness, Wayne Hunsperger. Hunsperger defined such damages as:

an adverse effect on property value produced by the market’s perception of increased environmental *risk* due to contamination. This *risk* is derived from perceived *uncertainties* concerning: the nature and extent of the contamination; *estimates* of future remediation costs and their timing; *potential* for changes in regulatory requirements; liabilities for cleanup (buyer, sell[er], third party); *potential* for off-site impacts and other environmental *risk* factors as may be relevant.

(Ex. 36 at 29; 2/1/07 RP at 42-43 (emphasis added))

Hunsperger added that, the rate of property value diminution decreases as the investigation and remediation proceeds and may ultimately near or equal zero when the property is cleaned up. (See Ex. 36 at 31-32. 2/1/07 RP at 44-47)

Hunsperger then explained that he calculated “stigma” damages to be \$510,000 as of spring 2001, representing the diminution in market value, *before* cleanup, due to contamination. (Ex. 36 at 46, 2/1/07 RP at 54-68)

In contrast, “stigma” damages, under Washington law, represent the decrease in value that remains *after* the damaged property has been fully repaired or remediated.³⁷ Such damages can be awarded only when damage to property is permanent, to compensate for the diminution in value that remains after repair.³⁸ In awarding “stigma” damages, the trial court relied upon Washington case law involving permanent diminution in value. (CP 239-40)

It is readily apparent that Hunsperger and the trial court were using two different definitions of “stigma” damage—to Hunsperger, such damage represented the

³⁷ See *Pugel v. Monheimer*, 83 Wn. App. 688, 693, 922 P.2d 1377 (1996).

³⁸ *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 694-95, 132 P.3d 115 (2006) (when damage to property is permanent, plaintiff may also recover for the property’s diminished value); *Pugel*, 83 Wn. App. at 693 (plaintiff entitled to damages for permanent loss of market value resulting from withdrawal of lateral support).

diminution in value *before* cleanup; to the trial court, such damage represented the diminution in value *after* cleanup. Because Hunsperger and the trial court used different definitions of “stigma,” the court ended up awarding Purchaser a double recovery.

That is, the court awarded \$510,000, representing the loss of market value as a result of contamination, *and* ordered Sellers to clean up the Property so that it was no longer contaminated. Purchaser is not entitled to both specific performance *and* damages—it cannot recover clean property and damages based upon dirty property.

It is clear from the Memorandum of Opinion that the trial court intended that “stigma” damages should represent any loss of market value remaining *after* the Property had been cleaned up. However, Purchaser provided no evidence either (1) that such a stigma would exist in this case or (2) its value. Because the trial court’s award of \$510,000 in “stigma” damages is not supported by any evidence, let alone substantial evidence, it must be overturned.

C. **Purchaser is not entitled to an award of attorney fees.**

As explained in Sellers' opening brief, Purchaser is not entitled to attorney fees because it is not entitled to prevail. Moreover, even if Purchaser does prevail on the merits, the attorney fee award must be reversed because the trial court failed to provide sufficient information to explain the basis for its award.

In *Mahler v. Szucs*,³⁹ the Washington Supreme Court explained:

Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.⁴⁰

The trial court's order awarding attorney fees does not include the requisite findings of fact and conclusions of law and, contrary to Purchaser's assertion, it is not sufficiently

³⁹ *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).

⁴⁰ *Mahler*, 135 Wn.2d at 435 (citations omitted); *see also Leda v. Whisnand*, 150 Wn. App. 69, 86-87, 207 P.3d 468 (2009) (attorney fee award must be accompanied by findings of fact and conclusions of law in order to allow meaningful appellate review).

specific to enable this Court to determine the basis for the award. For example, Purchaser sought \$237,213.25 in fees for services provided by the law firm of Cable, Huston, Benedict, Haagenson & Lloyd, LLP. (CP 575) The trial court awarded \$160,000, noting in its one-page⁴¹ letter opinion, “Hourly rate and amount of time expended was reduced as I could not justify the amount as compared to that incurred by Mr. Shafton.” (CP 550) The order provided little more in the way of explanation, stating only that different members of the firm charged different rates and that those rates were the attorneys’ normal rates. (CP 575) Similarly, the court awarded \$190,000 in costs, stating only that the figure had been reduced to exclude certain categories of expenses. (*Id.*)

Purchaser contends Sellers cannot complain about the award of attorney fees and costs because the trial court

⁴¹ The letter contains three pages, one of which consists almost entirely of the names and addresses of the recipients, and one of which includes only a short paragraph. (CP 549-51) The explanation of the attorney fee award consists of less than one page. (CP 550-51)

awarded less than Purchaser had requested.⁴² Purchaser misses the point. Washington law requires the trial court to provide specific information explaining how it arrived at the award so that this Court may determine whether the award should stand. It is entirely possible that, if the trial court provided such information, this Court would recognize that further reductions are required. The trial court failed to comply with its obligation to provide findings of fact and conclusions of law, and its award of attorney fees and costs must therefore be reversed and remanded.

Purchaser also assigns error to the trial court's award of attorney fees, asserting the court improperly reduced the hourly rate of Seattle attorney Ralph Palumbo from \$395 per hour to \$295 per hour.⁴³ Purchaser complains that the court abused its discretion by reducing Palumbo's hourly rate to that charged by attorneys in Clark County.

⁴² Response Brief at 41.

⁴³ *Id.* at 41-43.

In support of this argument, Purchaser relies upon *Crest, Inc. v. Costco Wholesale Corp.*⁴⁴ In that case, the Washington Court of Appeals noted that one factor to be considered in determining the reasonableness of attorney fees is “the fee customarily charged in the locality for similar legal services.”⁴⁵ The court added that other factors set forth in RPC 1.5(a) may be considered as well and concluded remand was required because the trial court did not provide sufficient information to permit an adequate review of its decision.⁴⁶

In this case, as explained above, the trial court provided only minimal information to support its award of attorney fees and costs and did not provide the requisite findings of fact and conclusions of law. However, it is evident from the court’s rulings that it considered not only the prevailing rate in Clark County but Palumbo’s expertise in environmental law. (CP 550, 575) The trial court did not abuse its discretion in reducing Palumbo’s hourly rate

⁴⁴ *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 115 P.3d 349 (2005).

⁴⁵ *Crest*, 128 Wn. App. at 77 n.16 (quoting RPC 1.5(a)(3)).

⁴⁶ *Id.* at 774.

and, in the event the attorney fee award is not reversed for other reasons, the court's decision on this issue should stand.

D. Purchaser is not entitled to an award for loss of income.

Purchaser assigns error to the trial court's refusal to award damages for loss of income. In its Memorandum of Opinion, the trial court explained, "Plaintiff did not tender the purchase price nor assume usual vestments of ownership. To award loss of income without assuming possession would be a windfall to the buyer." (CP 240)

The trial court was correct, and the cases cited by Purchaser do not show otherwise. For example, in *Chan v. Smider*,⁴⁷ the parties' contract required a down payment of \$75,000, with the remainder of the purchase price to be paid monthly over a period of 15 years.⁴⁸ After the sellers refused to close, the buyer deposited the down payment into the registry of the court and sought specific performance.⁴⁹ Here, in contrast, Purchaser has never complied with its

⁴⁷ *Chan v. Smider*, 31 Wn. App. 730, 644 P.2d 727 (1982).

⁴⁸ *Chan*, 31 Wn. App. at 732.

⁴⁹ *Id.* at 732-33.

obligation to tender the purchase price. As the trial court correctly recognized, Purchaser therefore cannot recover lost income.⁵⁰

Moreover, in affirming an award of lost rents to the buyer, the *Chan* court recognized that the sellers were entitled to an offset for, among other things, the interest they would have earned on the down payment and subsequent installments.⁵¹ The trial court explained that a decree of specific performance should place the parties, to the extent possible, in the condition they would have been in had the contract been performed in a timely manner.⁵² In this case, then, Sellers would, at a minimum, be entitled to an offset for interest on the purchase price as well as any expenses Sellers have incurred in connection with their

⁵⁰ In the other cases cited by Purchaser, the sellers (or, in one case, the purchasers' guarantor), refused to convey the property to the buyers, and there is no indication the buyers had not either performed or tendered performance. See *Woliansky v. Miller*, 739 P.2d 1349, 1351 (Ariz. Ct. App. 1987); *Bacmo Assocs. v. Strange*, 388 A.2d 487, 489 (D.C. Ct. App. 1978); *Walker v. Benton*, 407 So. 2d 305, 306 (Fla. Dist. Ct. App. 1981); *Dohrman v. Tomlinson*, 399 P.2d 255 (Idaho 1965); *Calbreath v. Borchert*, 81 N.W.2d 433, 437 (Iowa 1957); *Freidus v. Eisenberg*, 510 N.Y.S.2d 139, 142 (N.Y. App. Div. 1986). Of course, that situation is not present here.

⁵¹ *Id.* Chan, 31 Wn. App. at 737.

⁵² *Id.* at 736.

continued ownership of the Property, all of which Purchaser fails even to acknowledge, much less discuss.

E. The trial court did not abuse its discretion by granting Defendants' Motion for Relief From Order Re: USTs.

On May 28, 2008, the trial court entered Findings of Fact and Conclusions of Law. Finding of Fact No. 49, describing the cleanup plan for the Minit Mart site, proposed “replacing the underground storage tanks [USTs] with new tanks.” (CP 522) Paragraph 6 of the Amended Order of Specific Performance and Judgment filed May 30, 2008, requires Sellers to clean up the Minit Mart site in accordance with the plan described in Finding of Fact No. 49. (CP 532)

After the entry of the Findings of Fact and Conclusions of Law and the Amended Order of Specific Performance and Judgment, Sellers discovered that third-party defendant Scott Brothers Oil, Inc., a tenant on the property, had stopped selling gasoline. (CP 973-74) Thus, as part of the cleanup of the property, Sellers would no longer be required to replace the USTs on the property

leased by Scott Brothers because the original cleanup plan contemplated the existence of an active gas station. (CP 974) Accordingly, Sellers filed a motion asking the trial court to amend the decisions cited above to reflect this new information. (CP 973-76) The court granted Sellers' motion and amended Finding of Fact No. 49 to state that replacement of the USTs was no longer necessary due to the cessation of gasoline sales at the Minit Mart site. (CP 1029) The court also amended Paragraph 6 of the Amended Order of Specific Performance and Judgment to add the following language: "EXCEPT that replacement of the underground storage tanks with new tanks is not required." (*Id.*)

The trial court's ruling on a motion for relief from judgment under CR 60 is reviewed for abuse of discretion.⁵³ "An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court."⁵⁴ Here, the trial court correctly recognized that it no longer

⁵³ *Nw. Land & Inv., Inc. v. New W. Fed. Savings & Loan Ass'n*, 64 Wn. App. 938, 942, 827 P.2d 334 (1992).

⁵⁴ *Nw. Land*, 64 Wn. App. at 942.

made sense to require Sellers to install new USTs in light of the fact that Scott Brothers had stopped selling gasoline, and thus the court did not abuse its discretion in granting relief under CR 60.

CR 60(b)(3) authorizes relief from judgment based upon “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under CR 59(b).” CR 60(b)(11) applies when there is “[a]ny other reason justifying relief from the operation of the judgment.”

The facts in this case warrant relief under CR 60(b)(3) and/or CR 60(b)(11). Scott Brothers acquired the right to sell gasoline at the Minit Mart in 1989 and had been doing so continuously since that date. (CP 455) However, on June 17, 2008, a few weeks after entry of the Findings of Fact and Conclusions of Law and Amended Order of Specific Performance and Judgment, Linda Anderson, the wife of Eugene Anderson, a co-personal representative of the Jessen Estate, happened to drive to the Minit Mart and discovered Scott Brothers was no longer

selling gasoline. (CP 1647) Scott Brothers apparently stopped selling gas shortly before May 20, 2008. (CP 1651) Sellers had no previous notice that Scott Brothers had stopped selling gas. Anderson asked whether sales would resume in the future and learned that they would not. (CP 1648)

Sellers then acted promptly to obtain relief from the order requiring them to replace the USTs, filing a CR 60 motion approximately two weeks after learning about the cessation of gasoline sales. Before Anderson's visit to the Minit Mart on June 17, 2008, Sellers had no reason to believe Scott Brothers had stopped selling gasoline. Under these circumstances, the trial court did not abuse its discretion in amending the Findings of Fact and Conclusions of Law and the Amended Order of Specific Performance and Judgment to reflect the newly discovered evidence submitted by Sellers.

III. CONCLUSION

For the reasons set forth above, Sellers respectfully request that the trial court's rulings described in Sellers'

Assignments of Error be REVERSED and that the trial court's rulings described in Purchaser's Assignments of Error be AFFIRMED.

DATED: October 30, 2009

BULLIVANT HOUSER BAILEY PC

By *Deborah L. Carstens*
Jerret E. Sale, WSBA #14101
Todd A. Mitchell, WSBA #29040
Deborah L. Carstens, WSBA #17494

Attorney for Estate of Irwin Jessen

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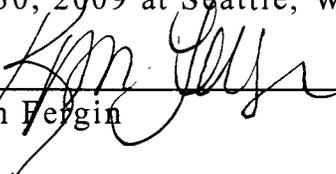
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No. 37791-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BATTLE GROUND PLAZA, INC.,

Respondent/Cross-Appellant,

v.

DOUGLAS M. RAY; EUGENE ANDERSON and WILLIAM
MACRAE-SMITH, as co-personal representatives of the
Estate of Irwin P. Jessen

Appellants/Cross-Respondents,

and

SCOTT BROTHERS OIL, INC.; and TIME OIL
COMPANY, INC.,

Third-Party Defendants.

JOINDER IN APPELLANTS'
REPLY/RESPONSE BRIEF

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ORIGINAL

Appellant Douglas M. Ray hereby joins in the arguments set forth in the Reply/Response Brief filed by appellants Eugene Anderson and William MacRae Smith, as co-personal representatives of the Estate of Irwin P. Jessen.

DATED this 19 day of November, 2009.

BULLIVANT HOUSER BAILEY, P.C.

By 
Todd A. Mitchell, WSBA #29040

Attorneys for Appellant Douglas M. Ray

COURT OF APPEALS
DIVISION II

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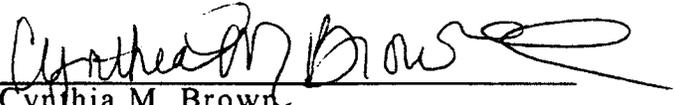
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Dated November 19, 2009, at Vancouver,
Washington.


Cynthia M. Brown