

NO. 37791-8  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

BATTLE GROUND PLAZA, LLC,

Plaintiff, Respondent/ Cross-Appellant,  
vs.

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

Defendants, Appellants/Cross-Respondents,

and

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

Third-Party Defendants.

---

APPEAL FROM THE SUPERIOR COURT

---

HONORABLE JOHN F. NICHOLS

---

BRIEF OF RESPONDENT/CROSS-APPELLANT

---

BEN SHAFTON  
Attorney for Respondent/Cross Appellant  
Caron, Colven, Robison & Shafton  
900 Washington Street, Suite 1000  
Vancouver, WA 98660  
(360) 699-3001

09 AUG 31 PM 12:26  
STATE OF WASHINGTON  
BY  DEPUTY  
COURT OF APPEALS  
DIVISION II

6/18/21  
WM

**Table of Contents**

INTRODUCTION ..... 1

RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES  
PRESENTED ..... 2

ASSIGNMENTS OF ERROR ON CROSS APPEAL..... 3

STATEMENT OF THE CASE..... 3

    I. General Facts. .... 3

    II. Course of Litigation. .... 7

        a. Initiation of Suit and Pretrial Proceedings. .... 7

        b. Proceedings at Trial..... 7

        c. Proceedings after Trial. .... 8

        d. The Sellers’ Motion to Vacate. .... 9

ARGUMENT ..... 11

    I. Standard of Review. .... 11

    II. The Trial Court Did Not Err By Making Findings of Fact Nos. 26,  
51, and 55..... 12

        a. Finding of Fact No. 26. .... 12

        b. Finding of Fact No. 51. .... 14

        c. Finding of Fact No. 55. .... 14

    III. The Trial Court Did Not Err in Entering the Amended Order of  
Specific Performance. .... 15

        a. Introduction. .... 15

b. The PSA Did Not Terminate on August 1, 2001.....	17
c. BGP Has Not Waived Rights or Remedies. ....	21
d. BGP Was Not in Default. ....	25
e. The PSA Does Not Preclude Specific Performance in This Situation.....	26
f. Paragraph 30(N) Does Not Limit BGP’s Remedy to “Indemnification.” .....	28
g. Remedies for Breach of Representations and Warranties Contained in Paragraph 30 Are Not Limited to Harm Occurring after Closing.....	29
i. The Sellers Were Properly Required to Remediate the Property.....	31
j. If Specific Performance Is Not Available, BGP Is Entitled to Damages.....	34
IV. BGP Is Entitled to Abatement of the Purchase Price by Stigma.	35
V. Issues Concerning Attorney’s Fees.....	38
a. Introduction and General Considerations.....	38
b. BGP’s Claim and the Trial Court’s Findings.....	40
c. The Sellers’ Objections Have No Merit. ....	40
d. The Trial Court Impermissibly Reduced Mr. Palumbo’s Hourly Rate.....	41
VI. The Trial Court Improperly Denied Damages for Loss of Income.....	43
VII. The Trial Court Erred by Granting the Order Granting Defendants’ Motion for Relief from Order Re: UST’s. ....	46

STATEMENT REQUIRED BY RAP 18.1(A).....	49
CONCLUSION.....	50

## Table of Authorities

### Cases

<i>Alexander Myers &amp; Co., Inc. v. Hopke</i> , 88 Wn.2d 449, 565 P.2d 80 (1977) .....	38, 40
<i>Allard v. First Interstate Bank</i> , 112 Wn.2d 145, 148-9, 768 P.2d 998 (1989).....	44
<i>American National Fire Insurance Co. v. B &amp; L Trucking &amp; Construction Co., Inc.</i> , 82 Wn.App. 646, 669-70, 920 P.2d 192 (1996) .....	45
<i>Bacmo Associates v. Strange</i> , 388 A.2d 487 (E.C.App. 1978) .....	51
<i>Ban-co Investment Co. v. Loveless</i> , 22 Wn.App. 122, 135, 687 P.2d 567 (1978).....	37
<i>Bellevue School District v. Bentley</i> , 38 Wn.App. 152, 159, 684 P.2d 793 (1984).....	22
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 667, 801 P.2d 222 (1990) .....	20, 32
<i>Blaney v. International Association of Machinists and Aerospace Workers</i> , 151 Wn.2d 203, 87 P.3d 757 (2004) .....	36
<i>Bluor v. Fritz</i> , 143 Wn.App. 718, 731, 180 P.3d 805 (2008) .....	12
<i>Bowers v. Transamerica Title Insurance Company</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	43
<i>Bowman v. Webster</i> , 44 Wn.2d 667, 670, 269 P.2d 960 (1954).....	25
<i>Brown v. Scott Paper Worldwide</i> , 143 Wn.2d 349, 364, 20 P.3d 921 (2001).....	20
<i>Brundridge v. Fluor Federal Services, Inc.</i> , 164 Wn.2d 432, 440-41, 191 P.3d 879 (2008).....	16
<i>Byrne v. Ackerlund</i> , 108 Wn.2d 445, 453-4, 739 P.2d 1138 (1987).....	34

<i>Calbreath v. Borchert</i> , 248 Iowa 491, 81 N.W.2d 433 (1957).....	51
<i>Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.</i> , ___ Wn.2d ___, 209 P.3d 863, (2009).....	32, 33
<i>Carpenter v. Folkerts</i> , 29 Wn.App. 73, 78, 627 P.2d 559 (1981).....	18
<i>Casco Co. Public utility District #1 of Thurston County</i> , 37 Wn.2d 777, 784-85, 226 P.2d 235 (1951).....	16
<i>CBS, Inc., v. Ziff-Davis Publishing Co.</i> , 75 N.Y.2d 496, 554 N.Y.S.2d 449, 553 N.E.2d 997 (1990).....	27
<i>Chan v. Smider</i> , 31 Wn.App. 730, 644 P.2d 727 (1982) .....	13, 51, 52
<i>Continental Casualty Company v. Municipality of Metropolitan Seattle</i> , 66 Wn.2d 831, 405 P.2d 581 (1965) .....	33
<i>Crafts v. Pitts</i> , 161 Wn.2d 16, 23-24, 162 P.3d 382 (2007) .....	17, 23
<i>Crest, Inc. v. Costco Wholesale Corp.</i> , 128 Wn.App. 760, 773-4, 115 P.3d 349 (2005).....	47
<i>Dean v. Gregg</i> , 34 Wn.App. 684, 663 P.2d 502 (1983) .....	37
<i>Dixon v. MacGillivray</i> , 29 Wn.2d 30, 35, 185 P.2d 109 (1947).....	38
<i>Dohrman v. Tomlinson</i> , 88 Idaho 313, 399 P.2d 255 (1965).....	51
<i>Douglas Northwest, Inc. v. Bill O'Brien &amp; Sons Construction, Inc.</i> , 64 Wn.App. 661, 684-5, 828 P.2d 565 (1992).....	30
<i>Essex Group, Inc. v. Nill</i> , 594 N.E.2d 997 (Ind.App. 1990) .....	27
<i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826, 837, 726 P.2d 8 (1986).....	34
<i>Forbes v. American Building Maintenance Co. West</i> , 148 Wn.App. 273, 286, 198 P.3d 1042 (2009).....	12

<i>Forest Marketing Enterprises, Inc. v. State</i> , 125 Wn.App. 126, 132, 104 P.3d 40 (2005).....	35
<i>Freidus v. Eisenberg</i> , 123 A.D.2d 174, 510 N.Y.S.2d 139 (1986).....	51
<i>Friebe v. Supancheck</i> , 98 Wn.App. 260, 992 P.2d 1014 (1999).....	39
<i>Glacier General Assurance Co. v. Casualty Indemnity Exchange</i> , 435 F.Supp. 855 (D. Mont. 1977).....	27
<i>Goldberg v. Sanglier</i> , 96 Wn.2d 874, 887, 639 P.2d 1347 (1982).....	2
<i>Granite Equipment Leasing Corp v. Hutton</i> , 84 Wn.2d 320, 327-8, 525 P.2d 223 (1974).....	56
<i>Graoch Associates No. 5 Limited Partnership v. Titan Construction Corp.</i> , 126 Wn.App. 856, 109 P.3d 830 (2005).....	31
<i>Haire v. Patterson</i> , 63 Wn.2d 282, 286, 386 P.2d 953 (1963).....	18
<i>Hardinger v. Till</i> , 1 Wn.2d 335, 96 P.2d 262 (1939).....	39
<i>Highlands Plaza, Inc., v. Viking Investment Group</i> , 2 Wn.App. 192, 203, 467 P.2d 378 (1970).....	15
<i>Holland v. Boeing Co.</i> , 90 Wn.2d 384, 390-1, 583 P.2d 621 (1978).....	11
<i>Holter v. National Union Fire Insurance Co.</i> , 1 Wn.App. 46, 50, 459 P.2d 61 (1970).....	21
<i>Home Savings of America v. U.S.</i> , 399 F.3d 1341 (Fed. Cir. 2005).....	36
<i>Hubbell v. Ward</i> , 40 Wn.2d 779, 787, 246 P.2d 468 (1952).....	36
<i>In Re: Marriage of Knudson</i> , 114 Wn.App. 866, 872, 60 P.2d 681 (2003).....	53
<i>Jaeger v. Cleaver Construction, Inc.</i> , 148 Wn.App. 698, 719, 201 P.3d 1028 (2009).....	13
<i>Kofmehl v. Steelman</i> , 80 Wn.App. 279, 285, 908 P.2d 391 (1996).....	50

<i>Kreger v. Hall</i> , 70 Wn.2d 1002, 1008, 425 P.2d 638 (1967).....	36
<i>Kruse v. Hemp</i> , 122 Wn.2d 715, 722, 853 P.2d 1373 (1993).....	18
<i>Lambert v. Hein</i> , 218 Wis.2d 712, 582 N.W. 2d 84 (Wis.App. 1998) .....	26
<i>Lyall v. DeYoung</i> , 42 Wn.App. 252, 258-59, 711 P.2d 356 (1985) .....	38
<i>Marriage of Shui and Rose</i> , 132 Wn.App. 568, 580, 125 P.3d 180 (2005).....	15
<i>Mayer v. Sto Industries, Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)...	41, 42
<i>Mike M. Johnson, Inc. v. Spokane County</i> , 150 Wn.2d 375, 391, 78 P.3d 161 (2003).....	25
<i>Mutual of Enumclaw Insurance Company v. USF Insurance Company</i> , 164 Wn.2d 411, 425 fn. 9, 191 P.3d 866 (2008) .....	12
<i>Nelse Mortensen &amp; Co. v. Group Health Co-Op Puget Sound</i> , 17 Wn.App. 703, 566 P.2d 560 (1977).....	30
<i>Northwest Land Investment, Inc. v. New West Federal Savings &amp; Loan Association</i> , 64 Wn.App. 938, 942, 827 P.2d 334 (1992).....	56
<i>Northwest Television Club, Inc. v. Gross Seattle, Inc.</i> , 96 Wn.2d 973, 984, 634 P.2d 837 (1981).....	50
<i>Oddi v. Ayco Corporation</i> , 947 F.2d 257 (7 <sup>th</sup> Cir. 1991).....	36
<i>Olympia Lodge v. Keller</i> , 142 Wash. 93, 252 P.121 (1927).....	55
<i>P.A.W.S. v. University of Washington</i> , 54 Wn.App. 180, 773 P.2d 114 (1989).....	44
<i>Paraco Gas Corp. v. AGA Gas, Inc.</i> , 253 F.Supp.2d 563 (S.D.N.Y. 2003) .....	27
<i>Paradise Orchards General Partnership v. Fearing</i> , 122 Wn.App. 507, 517-18, 94 P.3d 372 (2004).....	29

<i>Paradiso v. Drake</i> , 135 Wn.App. 329, 335, 143 P.3d 859 (2006) .....	17, 29
<i>Pardee v. Jolly</i> , 163 Wn.2d 558, 568-69, 182 P.3d 967 (2008).....	17
<i>Prociw v. Baugh Construction Company</i> , 9 Wn.App. 750, 515 P.2d 518 (1973).....	33
<i>Pugel v. Monheimer</i> , 83 Wn.App. 688, 922 P.2d 1377 (1996).....	41
<i>Reiter v. Bailey</i> , 180 Wash. 230, 39 P.2d 370 (1934) .....	31
<i>Rekhi v. Olason</i> , 28 Wn.App. 751, 758, 626 P.2d 513 (1981) .....	1, 18, 50
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 42, 59 P.3d 611 (2002).....	12
<i>Sahalee Country Club v. Board of Tax Appeals</i> , 108 Wn.2d 26, 36, 735 P.2d 1320 (1987) .....	15
<i>Saletic v. Stamnes</i> , 51 Wn.2d 696, 698, 321 P.2d 547 (1958).....	1, 23
<i>Saviano v. Westport Amusement, Inc.</i> , 14 Wn.App. 72, 78, 180 P.3d 874 (2008).....	11
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wn.2d 141, 147, 859 P.2d 1210 (1993) ...	44
<i>Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.</i> , 120 Wn.2d 573, 580, 844 P.2d 428 (1993) .....	32
<i>Singleton v. Frost</i> , 108 Wn.2d 723, 742 P.2d 1224 (1987) .....	43, 44
<i>Sloan v. Thompson</i> , 128 Wn.App. 776, 115 P.3d 1009 (2005) .....	13
<i>Smith v. Dalton</i> , 58 Wn.App. 876, 795 P.2d 706 (1990).....	44
<i>Stieneke v. Russi</i> , 145 Wn.App. 544, 560, 190 P.3d 60 (2008) .....	12
<i>Streater v. White</i> , 26 Wn.App. 430, 613 P.2d 187 (1980) .....	17
<i>Stryken v. Panell</i> , 66 Wn.App. 566, 571, 832 P.2d 890 (1992).....	39

<i>Styrk v. Cornerstone Investments, Inc.</i> , 61 Wn.App. 463,474, 810 P.2d 1366 (1991).....	44
<i>Sunnyside Valley Irrigation District v. Vickie</i> , 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).....	11
<i>Tennant v. Lawton</i> , 26 Wn.App. 701, 615 P.2d 1305 (1980) .....	38
<i>Vance v. Offices of Thurston County Commissioners</i> , 117 Wn.App. 660, 671, 71 P.3d 680 (2003).....	54, 56
<i>Walker v. Benton</i> , 407 S.2d 305 (Fla.App. 1981).....	51
<i>Watts v. Dietrich</i> , 1 Wn.App. 141, 145, 460 P.2d 298 (1969).....	16
<i>West Coast Stationary Engineers Welfare Fund v. City of Kennewick</i> , 39 Wn.App. 466, 694 P.2d 1101 (1985).....	56
<i>Weyerhaeuser Co. v. Commercial Union Insurance Co.</i> , 142 Wn.2d 654, 670, 18 P.3d 115 (2000) .....	21
<i>Wheeler v. Catholic Archdiocese of Seattle</i> , 65 Wn.App. 552, 829 P.2d 196 (1992).....	45
<i>Woliansky v. Miller</i> , 154 Ariz. 32, 739 P.2d 1349 (Ariz.App. 1987) .....	50
<i>Yousoufian v. Office of Sims</i> , 165 Wn.2d 439, 446, 200 P.3d 232 (2009).....	12

**Statutes**

RCW 19.86 .....	37
-----------------	----

**Other Authorities**

<i>Restatement (Second) of Contracts</i> §206, Comment a .....	27
--	----

///

**Rules**

CR 59(b)..... 54

CR 60(b)..... 55

CR 60(b)(11)..... 39

CR 60(b)(3)..... 4, 53, 54

RAP 2.5(a) ..... 35

RAP 7.2(e) ..... 10

RPC 1.5(a)..... 47

RPC 1.5(a)(1), (4), (5)..... 48

## INTRODUCTION

In 2000, Douglas Ray and Irwin Jessen (the Sellers) agreed to sell a shopping center in Battle Ground, Washington, to the predecessor of Battle Ground Plaza, LLC (BGP). They represented and warranted in the Purchase and Sale Agreement (PSA), that the property was free from environmental contamination. In point of fact, the property was indeed contaminated. As a result, BGP could not consummate the transaction. Six years later, by the time of trial, the contamination had not been remediated. The property had appreciated in value, however, if the owner would not be required to do remediation.

The Sellers now claim that BGP is without a remedy other than the return of its earnest money. They seek the appreciated value of the property notwithstanding their clear and obvious misrepresentation and breach of the PSA's terms. Their position violates two established rules of law. First, any increase in value belongs to the Purchaser. *Rekhi v. Olason*, 28 Wn.App. 751, 758, 626 P.2d 513 (1981). Second, no one may profit by a wrong. *Saletic v. Stamnes*, 51 Wn.2d 696, 698, 321 P.2d 547 (1958); *Goldberg v. Sanglier*, 96 Wn.2d 874, 887, 639 P.2d 1347 (1982). The Sellers' arguments should be rejected.

RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES

PRESENTED

Assignments of Error No. 1 and 2: The trial court did not error by making Findings of Fact 26, 51, and 55 and Conclusions of Law 2-5 and entering the Amended Order of Specific Performance.

1. Does substantial evidence support the Findings of Fact?
2. Did the Addendum to the PSA relieve BGP of the duty to tender the purchase price by August 1, 2001, and avoid termination of the transaction?
3. Does the PSA preclude specific performance?
4. Does the inspection contingency in the PSA deprive the Purchaser from any other relief under the PSA's terms?
5. Was BGP precluded from any relief because it discovered environmental contamination prior to August 1, 2001?
6. Are the remedies provided by Paragraph 30 of the PSA exclusive in the absence of language to that effect?
7. Did the trial court err by requiring the Sellers to remediate the property?
8. Should the purchase price have been abated due to the Sellers' misrepresentation concerning the presence of environmental contamination?

Assignment of Error No. 3: The trial Court did not error in its award of attorneys' fees other than reducing the hourly rate of one of BGP's attorneys.

1. Did the Court abuse its discretion in its attorney fee award?

ASSIGNMENTS OF ERROR ON CROSS APPEAL

Assignment of Error No. 1: The trial court erred by not providing for the income BGP lost due to the Sellers' misrepresentation and breach.

1. Is such an award necessary to restore BGP to the position it would have occupied had the Sellers not misrepresented the property?

Assignment of Error No. 2: The trial court erred in the entry of the Order on Attorneys' Fees and the Supplemental Judgment.

1. Did the trial court abuse its discretion by not awarding attorney's fees on the basis of the normal rate of one BGP's attorneys?

Assignment of Error No. 3: The trial court erred by entering the Order Granting Defendants' Motion for Relief from Order Re: UST's.

1. Should the trial court have granted relief under CR 60(b)(3) when the required showing was not made?

STATEMENT OF THE CASE

I. General Facts.

The Battle Ground Plaza Shopping Center in Battle Ground, Washington (the Center) consists of several different buildings. One was a

convenience store known as the Mini Mart that dispensed gasoline and was operated by Scott Bros. Oil, Inc. (Scott Bros.) (CP 454, FF 6)<sup>1</sup>

In December of 2000, the Sellers agreed to sell the Center to BGP for the purchase price of \$3,285,000.00.<sup>2</sup> (CP 457, FF 14; Ex. 2) In the PSA the parties executed, the Sellers both represented and warranted that the property was free of environmental contamination. (CP 456, FF 17) BGP subsequently deposited the earnest money the agreement required. (CP 458, FF 19)

By the spring of 2001, certain disagreements had arisen between the parties. They resolved the issues by entering into the Addendum to Real Estate Purchase and Sale Agreement (the Addendum). It reduced the purchase price to \$3 million and set July 1, 2001, as the closing date. However, BGP's duty to close was conditioned on the Sellers not being in default or breach of the PSA. The closing date could also be extended to August 1, 2001, if BGP paid an additional \$10,000.00 in earnest money. (CP 458, FF 20; Ex. 3)

In the spring of 2001, BGP contacted Richard Brooke, an executive vice president for National Mortgage Company. It specializes in

---

<sup>1</sup> "FF" refers to the applicable Finding of Fact contained in the trial court's Findings of Fact and Conclusions of Law.

<sup>2</sup> Battle Ground Plaza, LLC and its predecessor, Bruce Feldman, Inc., will both be referred to as "BGP." Bruce Feldman, Inc. is BGP's manager. Bruce Feldman is a director and officer of Bruce Feldman, Inc.

commercial real estate finance. (RP 1-22-07, 49)<sup>3</sup> Prior to 2001, Mr. Brooke had assisted with financing for another shopping center in Clark County with which Bruce Feldman, BGP's principal, was associated. (RP 1-22-07, 52-53; CP 458, FF 22)

Through Mr. Brooke's efforts, EverTrust Bank in Tacoma offered to finance BGP's purchase of Center by lending 70% of the appraised value at 7.875% per annum amortized over twenty-five years with all payments of interest and principal due in ten years. The offer was conditioned on an appraisal and environmental review. This arrangement was fairly standard at the time. (CP 217; RP 1-22-07, 56; RP 1-25-07, 3-4; Ex. 39, p. 55-56; Ex. 137-139; CP 459, FF 23)

Mr. Brooke ordered environmental reports for the property. The Level Two study, dated June 1, 2001, showed contamination by petroleum products in the soil and water at the Mini Mart. It also revealed contamination by tetrachlorethene and related compounds (PERC) in the area of a dry cleaning establishment known as Grace's Cleaners. (CP 455, FF 10; CP 459, FF 25; CP 461, FF 37) Upon discovering the results of the Level Two report, EverTrust advised Mr. Brooke that it would not provide

---

<sup>3</sup> The Verbatim Report of Proceedings has been prepared in volumes, one for each trial day. The pages are not consecutively numbered from one day to the next. Therefore, citations to the Verbatim Report of Proceedings will identify the volume by date and the page.

financing for the purchase of the property by letter dated June 19, 2001. However, it said would reconsider making the loan when all environmental issues were resolved. (Ex. 143, 144) The bank's action did not surprise Mr. Brooke because institutional lenders will not take any environmental risks. (RP 1-22-07, 56-7) In Mr. Brooke's opinion, the environmental contamination precluded the Purchaser from obtaining financing. (RP 1-22-07, 58)

BGP informed the Sellers of the contamination at both sites and tendered an additional \$10,000.00 to extend the closing date to August 1, 2001. (CP 459, FF 24; CP 461, FF 35) The Sellers' attorney responded by acknowledging an obligation under the PSA to remediate the property and indicating that closing would occur when the remediation was complete. (Ex. 141) The Sellers then engaged Three Kings Environmental (Three Kings) to do the necessary work. (CP 461, FF 33) In October of 2001, the Sellers' attorney advised that the Sellers were "proceeding with due diligence with having situation analyzed and corrected." He also anticipated that Sellers would receive "a clean bill of health from the State of Washington in the very near future." (Ex. 122) BGP did not tender the purchase price by August 1, 2001, because the breach interfered with its ability to finance the purchase. There is no evidence that the Sellers attempted to terminate the transaction on that basis.

## II. Course of Litigation.

### a. Initiation of Suit and Pretrial Proceedings.

In March of 2002, BGP sued for specific performance and damages. (CP 1-27) The Sellers did not deny an obligation to remediate. They stated that they were not then in breach of the PSA because they had successfully remediated the property. (CP 29) They reiterated this position when BGP moved for a receiver to address remediation, among other things. (CP 1555-56) Unfortunately, and as all later agreed, the remediation efforts of Three Kings proved inadequate. (CP 461, FF 33) No further remediation action, except for investigation, was taken prior to trial. (CP 462-63, FF 38, 39, 42, 43)

### b. Proceedings at Trial.

Most of the testimony at trial addressed the contamination and the cost to cure. BGP claimed that the sum of necessary remediation costs, offsets, and other consequential damages exceeded the \$3 million purchase price by over \$5 million. It therefore sought an order requiring the Sellers to deed the property to it, and an award of damages so that it

///

could undertake necessary remediation.<sup>4</sup> The evidence showed that BGP would have to pay income tax on any judgment over \$3 million. Therefore, BGP sought damages that would include this additional tax burden. This effect could be avoided, however, if the Sellers paid for the remediation. Alternatively, BGP sought damages if the trial court was unwilling to grant specific performance. (RP 1-24-07, 71-87; 2-8-07, 142-75)

The Sellers did not dispute their duty to remediate the property pursuant to the PSA. They argued that BGP should be limited to an award of damages and that it had failed to mitigate those damages because it had not walked away from the transaction in 2001 when it learned of the presence of contamination. Furthermore, the Sellers wanted to claim for themselves any appreciation in value since the parties had entered into the PSA. (RP 1-22-07, 32-3; RP 2-8-07, 216; CP 1640-2)

c. Proceedings after Trial.

The trial court issued its Memorandum Opinion on May 2, 2007. It stated that BGP would be entitled to specific performance on

---

<sup>4</sup> BGP's approach was supported by *Streater v. White, infra*. In that case, the seller could not discharge monetary encumbrances and provide clear title at closing. For that reason, the trial court ordered the seller to convey the property but excused the buyer's payment of the purchase price because the buyer would have to deal with the encumbrances. The Court affirmed.

certain conditions. The Court ruled, however, that BGP would not be entitled to lost income. (CP 240)

On May 28, 2008, the trial court entered its Findings of Fact and Conclusions of Law. (CP 453-70) In Findings of Fact Nos. 49-50, it found that the Mini Mart site should be remediated by excavating contaminated soil and removing and replacing existing underground storage tanks. (CP 465, FF 49-50). On May 30, 2008, the trial court entered the Amended Order of Specific Performance. (CP 535-40) Among other things, it directed remediation of the Mini Mart site as stated in Findings of Fact Nos. 49-50. (CP 538). It reduced the purchase price by certain offsets. It allowed BGP to close the transaction by paying the reduced price at any time or when the Court approved the remediation. The Sellers then appealed, and BGP cross appealed. (CP 504-34; 936-38)<sup>5</sup>

d. The Sellers' Motion to Vacate.

On July 2, 2008, the Sellers moved to vacate Finding of Fact No. 49 pursuant to CR 60(b)(3). The motion alleged the Scott Bros. Oil, Inc. had discontinued pumping gasoline and that there was no need to replace the tanks for that reason. (CP 973-76)

///

---

<sup>5</sup> BGP later attempted to secure financing to close. The Sellers then posted additional supersedeas to end BGP's effort.

BGP responded by noting the absence of any evidence as to whether Scott Bros. had stopped pumping gasoline before or after the entry of the Amended Order of Specific Performance. The shopping center's leasing agent indicated that the tanks should be replaced because they are a valuable amenity for the center. (CP 1006-08). BGP stated that the absence of replacement tanks could well interfere with its ability to obtain financing for the purchase. (CP 1009-11)

Scott Bros. also objected. It indicated its understanding that under the terms of its lease, the tanks had been merged into the reversion and became property of the landlord. (CP 1020-21) Furthermore, it believed that the failure to replace the tanks would interfere with the value of its business. (CP 996-1004)

The trial court expressed its inclination to relieve the Sellers of the obligation to replace the tanks. The Court of Appeals gave permission for entry of the order pursuant to RAP 7.2(e) but allowed BGP to appeal the grant of the order. The trial court then entered the Order Granting Defendants' Motion for Relief from Order re: USTs. (CP 1028-29) BGP contemporaneously filed the Amended Notice of Cross Appeal as the Court of Appeals allowed. (CP 1016-19)

## ARGUMENT

### I. Standard of Review.

Appellate review of findings of fact and conclusions of law following a bench trial is limited to determining whether substantial evidence supports the findings and, if so, whether the findings support the trial court's conclusions of law and judgment. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-1, 583 P.2d 621 (1978); *Saviano v. Westport Amusement, Inc.*, 14 Wn.App. 72, 78, 180 P.3d 874 (2008). Substantial evidence is that quantum of evidence sufficient to persuade a rational fair-minded person that the stated premise is true. If that standard is met, the appellate court cannot substitute its judgment for that of the trial court. *Sunnyside Valley Irrigation District v. Vickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003); *Stieneke v. Russi*, 145 Wn.App. 544, 560, 190 P.3d 60 (2008). Unchallenged findings of fact are verities on appeal. *Yousoufian v. Office of Sims*, 165 Wn.2d 439, 446, 200 P.3d 232 (2009); *Miles v. Miles*, 128 Wn.App. 64, 69-70; 114 P.3d 671 (2005).

This case involves interpretation of contractual provisions. Such issues are questions of law if the parties agree that written contractual language controls. They are mixed questions of law and fact when the court must divine the parties' intentions. *Mutual of Enumclaw Insurance Company v. USF Insurance Company*, 164 Wn.2d 411, 425 *fn.* 9, 191 P.3d

866 (2008); *Forbes v. American Building Maintenance Co. West*, 148 Wn.App. 273, 286, 198 P.3d 1042 (2009); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002); *Bluor v. Fritz*, 143 Wn.App. 718, 731, 180 P.3d 805 (2008).

The trial court's grant of specific performance is reviewed for abuse of discretion. *Chan v. Smider*, 31 Wn.App. 730, 644 P.2d 727 (1982); *Sloan v. Thompson*, 128 Wn.App. 776, 115 P.3d 1009 (2005) A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, such as when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on a legal error. *Jaeger v. Cleaver Construction, Inc.*, 148 Wn.App. 698, 719, 201 P.3d 1028 (2009).

II. The Trial Court Did Not Err By Making Findings of Fact Nos. 26, 51, and 55.

a. Finding of Fact No. 26.

In Finding of Fact No. 26, the trial court found, in essence, that BGP would have obtained a loan on the terms offered by EverTrust had there been no environmental contamination at the site. This finding is supported by the testimony of Richard Brooke, the experienced mortgage broker who BGP enlisted to find financing for its purchase and who

communicated with Evertrust Bank concerning the transaction. Mr. Brooke specifically stated that BGP would have gotten a loan had there been no contamination. He also testified that the terms offered by Evertrust were “standard.” (RP 1-22-07, 56, 58)

The documentary evidence supports the trial court’s finding. BGP and EverTrust communicated concerning the terms of the proposed loan during April and May of 2001. (CP 217; Ex. 39, p. 55; RP 1-25-07, 3-4; Ex. 137-38). On June 1, 2001, the Level Two environmental study revealed the presence of contamination. EverTrust indicated that it would not finance the project after the study was received, on June 19, 2001. And even then, Evertrust indicated it would revisit the matter when the “environmental issues were resolved.” (Ex. 144)

The Sellers point to the other issues raised by Evertrust in its June 19, 2001 letter. Responsive management could hardly be an issue once BGP had closed. Its principal, Mr. Feldman, was involved in another Clark County shopping center. (RP 1-24-07 157-62)

These facts present clear evidence to show any reasonable person that the contamination interfered with BGP’s ability to obtain financing. The trial court did not commit error in making Finding of Fact No. 26.

b. Finding of Fact No. 51.

In Finding of Fact No. 51, the trial court found that the amount of stigma related to the value of the property was \$510,000.00, based on the testimony of Wayne Hunsperger, an MAI appraiser with substantial experience in valuing contaminated properties. The Sellers presented no contrary evidence.

Expert opinion admitted and adopted by a trial court amounts to substantial evidence. This rule has been applied where the testimony concerned valuation of property as here. *Sahalee Country Club v. Board of Tax Appeals*, 108 Wn.2d 26, 36, 735 P.2d 1320 (1987); *Highlands Plaza, Inc., v. Viking Investment Group*, 2 Wn.App. 192, 203, 467 P.2d 378 (1970); *Marriage of Shui and Rose*, 132 Wn.App. 568, 580, 125 P.3d 180 (2005). Mr. Hunsperger's opinion amounted to substantial evidence to support Finding of Fact No. 51.

c. Finding of Fact No. 55.

In Finding of Fact No. 55, the trial court found that BGP did not waive the environmental warranty contained in Paragraph 30(N) of the PSA. This is a mixed question of law and fact. The factual component is must be supported by substantial evidence while the sufficiency of the facts to establish waiver is reviewed as other legal question. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 440-41, 191 P.3d 879

(2008). This section of the brief will deal with the factual component. The sufficiency of these facts to show waiver is addressed below.

Most of the matters on which Sellers rely are set out in uncontested Findings of Fact. (CP 459, FF 24-25) They cannot rely on the assertions of BGP's suspicions of contamination prior to contracting because the supporting evidence is contained in a pretrial declaration not brought to the attention of the trial court or admitted during trial. *Casco Co. Public utility District #1 of Thurston County*, 37 Wn.2d 777, 784-85, 226 P.2d 235 (1951); *Watts v. Dietrich*, 1 Wn.App. 141, 145, 460 P.2d 298 (1969).

### III. The Trial Court Did Not Err in Entering the Amended Order of Specific Performance.

#### a. Introduction.

Specific performance is an equitable remedy designed to do perfect justice. It is available to a purchaser when there is a valid and binding contract between the parties; when the seller has breached or is threatening to breach the contract; where the contract has definite and certain terms and is free from overreaching; when damages are not an adequate remedy for the buyer; when the buyer has not defaulted on its obligations; and the contract does not expressly bar specific performance. *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). Specific performance is appropriate in matters involving real estate because a parcel of land is considered unique. *Crafts v. Pitts, supra; Pardee v. Jolly*, 163 Wn.2d 558, 568-69, 182 P.3d 967 (2008). A court of equity has broad powers to fashion a remedy in an action where specific performance is sought. *Streater v. White*, 26 Wn.App. 430, 613 P.2d 187 (1980); *Carpenter v. Folkerts*, 29 Wn.App. 73, 78, 627 P.2d 559 (1981). The relief it grants should include consequential damages the plaintiff suffers due to the delay that has occurred. *Rekhi v. Olason, supra*.

Specific performance can be denied if there is no proof of a contract between the parties. *Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.2d 953 (1963); *Kruse v. Hemp*, 122 Wn.2d 715, 722, 853 P.2d 1373 (1993). Here, the existence of a contract between the parties is obvious.

In our case, all requirements for specific performance have been met. There most certainly is a valid contract between the parties. Since real property is involved, there is no adequate remedy at law. The Sellers either breached or threatened to breach the contract because of the breach of the representation and warranty concerning the absence of environmental contamination. The PSA does not bar specific performance. BGP is not in default. Therefore, specific performance is warranted. The Sellers arguments to the contrary must be rejected.

b. The PSA Did Not Terminate on August 1, 2001.

Sellers claim that the transaction terminated on August 1, 2001, because BGP did not tender the entire purchase price on that date. This argument ignores the terms of the parties' Addendum executed in April of 2001.

The Addendum was formulated to resolve disputes that had arisen, including when closing should occur. It states in pertinent part:

3. A dispute has arisen between the parties concerning operative dates in the Purchase & Sale Agreement. Buyer has asserted that one set of time frame should apply. Sellers have asserted another set of time frame. To remedy this dispute, Buyer and Sellers agree as follows:

a. Providing Sellers are not then in default (or breach) of the Purchase & 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 \$10,000.00 cash into escrow, to be applied to the purchase price at closing.

b. Sellers hereby waives [sic] the right to terminate the Purchase & Sale Agreement unless Buyer fails to meet the close date/extension deadlines detailed in Paragraph 3(a) above. . .

(Ex. 3)

As with all contracts, the Addendum must be interpreted in light of the parties' intentions. Their intentions normally follow from the

language of the contract. Furthermore, all contracts must be viewed as a whole. Finally, in determining the parties' intentions, a Court can look to the subject matter and objective of the contract; the circumstances of its making; the subsequent conduct of the parties; and the reasonableness of their interpretations. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). *Brown v. Scott Paper Worldwide*, 143 Wn.2d 349, 364, 20 P.3d 921 (2001).

When these rules are applied, it is clear that the PSA did not terminate because the purchase price was not paid on August 1, 2001. As the Addendum clearly states, the August 1, 2001, closing date applied only if the Sellers were not in default or breach of the PSA. By that date, they were in breach of the representations that they made in Paragraph 30 of the PSA. That paragraph provided:

Seller represents and warrants to Purchaser, and Seller understands that Purchaser is relying on such representations and warranties in connection with closing the transaction herein described:

(N) The property and the land thereunder do not contain hazardous material or conditions. Hazardous material or conditions shall herein be defined as any condition that requires remedial work of the property owner under either federal or Washington law.

Seller agrees and hereby does indemnify, agree to defend with counsel of purchaser's choice and hold harmless purchaser from any and all claims,

causes of action, costs (including attorney's fees), damages, liability, cost of any remedial work or harm of any kind or nature which Purchaser may experience as a result of the breach of any of Seller's representations and warranties contained within this agreement.

(Emphasis added.) (CP 457, FF 17) By August 1, 2001, it was clear that the property was contaminated. (CP 459, FF 25) This state of affairs amounted to a breach of the representation contained in paragraph 30(N).

In Paragraph 30 of the PSA, the parties used the term "breach" to describe the failure of a representation or warranty. The same word, "breach," was used in the Addendum to indicate the exception to the new closing deadlines. When the same word is used in different parts of a contract, the word must be given the same meaning in the absence of a clear intent to the contrary. *Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142 Wn.2d 654, 670, 18 P.3d 115 (2000); *Holter v. National Union Fire Insurance Co.*, 1 Wn.App. 46, 50, 459 P.2d 61 (1970); *Bellevue School District v. Bentley*, 38 Wn.App. 152, 159, 684 P.2d 793 (1984). Therefore, a "breach" for the purposes of the Addendum must be equated with a "breach" of the representations and warranties contained in paragraph 30 of the PSA.

The parties' conduct also supports this construction of the contract. When BGP did not tender the purchase price on August 1, 2001,

the Sellers did not claim that the contract was terminated. Rather, they hired Three Kings to complete remediation. After suit was filed in March of 2002, they argued that they had complied with Paragraph 30(N) by completing the remediation. They did not assert that the contract was at an end because the purchase price was not paid by August 1, 2001.

BGP's interpretation of the PSA is reasonable. It recognizes that the Sellers had agreed to provide a property that was not contaminated. Conversely, the Sellers' interpretation is not reasonable. During argument on Findings of Fact and Conclusions of Law, the Sellers conceded that the presence of environmental contamination precluded them from terminating the PSA. Nonetheless, they continued to assert that the presence of contamination did not amount to a breach. They apparently sought to craft a distinction between their ability to terminate the contract and the contract terminating of its own accord. (RP 2-28-08, 78-81) The trial court did not believe this was a reasonable interpretation of the PSA. It said, "I think your logic on it doesn't make a lot of sense. I agree with the language, that it did suspend the duty to close as proposed." (RP 2-28-08, 80)

The Sellers argument would have the effect of allowing them to terminate the PSA notwithstanding the fact that the contamination interfered with BGP's ability to obtain financing to pay the purchase price.

The parties recognized that BGP was going to obtain financing in Paragraph 16 of the PSA. (CP 458, FF 21) Adopting the Sellers' argument would deprive BGP of any remedy and allow the Sellers to profit from a wrong—their misrepresentation in the PSA. Equity will not allow that to occur. *Saletic v. Stamnes, supra; Crafts v. Pitts, supra*, 161 Wn.2d at 23. For these reasons as well, the Sellers' interpretation of the contract cannot be adopted.

c. BGP Has Not Waived Rights or Remedies.

The Sellers then argue that BGP waived the right to rely on the breach of the environmental representation to suspend the duty to close or for any other relief. It bases its claim on BGP's initial waiver of the environmental contingency in Paragraph 21(A)(2) of the PSA and BGP's knowledge of the presence of contamination after receipt of the Level Two environmental report. The PSA's terms do not support this argument.

The environmental contingency reads as follows:

Purchaser's obligation to close this transaction shall be contingent upon the following conditions, all of which are solely for the benefit of Purchaser and which may be waived by Purchaser.

(2) This contract is subject to and conditioned upon Purchaser having 90 calendar days from and after the date of mutual acceptance hereof to inspect the soil conditions and other hazardous materials on or about the Property and to notify

the Seller in writing that the Purchaser approves. If Purchaser fails to approve this contingency within the specified time, this P&S Agreement shall be null and void, Purchaser's entire deposit shall be returned, and the Purchaser and Seller shall have no further obligations hereunder.

Parenthetically, the PSA did not automatically terminate because BGP gave this notice within ninety days of execution of execution. (CP 457, FF 18) But by eliminating this contingency to closing, BGP recognized that Paragraph 29 of the PSA would require it to forfeit its earnest money if it did not close. (RP 1-24-07 191-95) The latter provision provides as follows in pertinent part:

If Purchaser is in default, then all payments and things of value deposited into escrow hereunder shall be released and paid to Seller. . . and this payment shall constitute LIQUIDATED DAMAGES and are the SELLERS' SOLE AND ONLY REMEDY for Purchaser's failure to perform the obligations of this contract. . .

While BGP waived the right to terminate the agreement and recover its earnest money by giving this notice, it waived nothing else as the notice states. The notice does not state that BGP was also waiving its rights under Paragraph 30 of the PSA. To the contrary, BGP stated that it did "not intend to waive any other right of the Purchaser set forth in the Agreement." (Ex. 108)

Waiver can be express or implied by conduct. Sellers have pointed to no express waiver and therefore must show waiver by conduct. Waiver by conduct, however, requires unequivocal acts of conduct evidencing the intent to waive. Such conduct must be inconsistent with any other intention than to waive the right. *Bowman v. Webster*, 44 Wn.2d 667, 670, 269 P.2d 960 (1954); *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 391, 78 P.3d 161 (2003). When BGP explicitly preserved other rights in its February 26, 2001, letter, it can hardly be said to have waived anything.

The Sellers go on to state that BGP waived the right to rely on the breach of the environmental representation to suspend its duty to close or for any other relief because it knew of contamination by June of 2001. The Sellers can point to no express waiver. There is certainly nothing in BGP's conduct that would indicate waiver. To the contrary, it has steadfastly claimed rights to relief based on Paragraph 30(N) of the PSA.

Rather, the Sellers argue that any time a prospective purchaser has the opportunity to inspect, as did BGP, the purchaser waives all claims as to what an inspection would reveal if the purchaser later closes. Their reliance on *Lambert v. Hein*, 218 Wis.2d 712, 582 N.W. 2d 84 (Wis.App. 1998), for this proposition is misplaced because its holding

was based on different contractual provisions. The contract there specifically stated that the purchaser's failure to disapprove a condition report the seller gave meant that the purchaser accepted the property in the condition that had been disclosed. The contract also contained language indicating that the warranties and representations would survive closing. The Court construed these ambiguous and seemingly conflicting provisions to mean that warranties applied only to matters that were not disclosed or discovered.

By contrast, the PSA contains no provision to the effect that failing to terminate or waiving a contingency means that BGP is accepting the property is accepted in its then condition. To the contrary, Paragraph 19 of the PSA provides that BGP would "accept the premises 'as is', subject to the representations and warranties of the Seller as contained in Section 30 of this P&S Agreement, at closing." (CP 456, FF 15; Ex. 3)

Finally, Paragraph 30(N) shows that the parties assigned the risk of environmental contamination to the Sellers. According to the majority view, BGP is entitled to enforce such a provision as it would any other contractual term regardless of its knowledge or reliance. *Glacier General Assurance Co. v. Casualty Indemnity Exchange*, 435 F.Supp. 855 (D. Mont. 1977); *Essex Group, Inc. v. Nill*, 594 N.E.2d 997 (Ind.App. 1990); *CBS, Inc., v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 554

N.Y.S.2d 449, 553 N.E.2d 997 (1990). In our case, BGP first learned of the contamination from reviewing the Level Two environmental study. It advised the Sellers of the problem. This was the Sellers first knowledge that the property was contaminated. The Sellers did not disclose the breach of the representation to BGP. (CP 459-61, FF 25, 35) In such a situation, BGP is entitled to enforce the provisions of Paragraph 30. In *Paraco Gas Corp. v. AGA Gas, Inc.*, 253 F.Supp.2d 563 (S.D.N.Y. 2003), the Court held that the purchaser could enforce a similarly worded environmental warranty/indemnity provision although it had learned of the contamination through its own investigations. The Court noted that the seller could not assert any waiver of the warranty. 253 F.Supp. at 577.

d. BGP Was Not in Default.

The Sellers claim BGP cannot have specific performance because it was in default because it had not tendered the purchase price as of August 1, 2001. As discussed above, and under the terms of the Addendum, BGP was only required to tender the purchase price by that date if the Sellers were not in breach or default of the PSA. On that date, the Sellers were in breach of their representations under paragraph 30(N) of the PSA. Since the property has not yet been remediated, they are still in breach. Therefore, BGP's duty to tender the purchase price has never accrued. BGP has never been in default.

e. The PSA Does Not Preclude Specific Performance in This Situation.

The Sellers next argue that BGP was not entitled to specific performance because paragraph 29 of the PSA states that such relief is available when the Sellers are in “default,” and that the breach of the environmental representation and warranty do not amount to “default.” This argument has no merit.

Specific performance is only unavailable if it is precluded by the PSA. *Paradiso v. Drake, supra*. While the PSA expressly allows specific performance when the Seller is in default, it does not preclude this remedy in any other situation or limit specific performance to situations where the seller is in default. As Paragraph 29 provides:

. . . If Seller is in default (1) Purchaser may elect to treat this contract as terminated, in which case all payments and things of value received hereunder shall be returned to Purchaser and Purchaser may recover such damages as may be proper, or (2) Purchaser may elect to treat this contract as being in full force and effect and Purchaser shall have the right to an action for specific performance or damage, or both. . .

(Emphasis added) (Ex. 2) This language must be contrasted with that used in the same paragraph making forfeiture of earnest money the Sellers’ exclusive remedy. See, p.22, *supra*. The use of the word “may” in this paragraph along with the absence of any language making BGP’s remedy

exclusive means that BGP is entitled to specific performance if the law would otherwise allow this remedy. *Paradise Orchards General Partnership v. Fearing*, 122 Wn.App. 507, 517-18, 94 P.3d 372 (2004).

The Sellers cite *Douglas Northwest, Inc. v. Bill O'Brien & Sons Construction, Inc.*, 64 Wn.App. 661, 684-5, 828 P.2d 565 (1992). That case does not assist them. There, the general contractor argued against subcontractor's quantum meruit claim on the basis that the contract provided a specific remedy for the claim the subcontractor was making. In essence, it asserted the unremarkable proposition that a quantum meruit recovery is not available in the face of an express contractual provision dealing with the issue. *Nelse Mortensen & Co. v. Group Health Co-Op Puget Sound*, 17 Wn.App. 703, 566 P.2d 560 (1977). The Court ultimately rejected the general contractor's argument on the basis that the contract in question did not provide a specific remedy for the claim the subcontractor was making.

The Sellers hint that this provision should be construed against BGP because it drafted the PSA. This is a default rule to be applied only when other rules of interpretation fail. It also has little applicability in situations such as this—when the other party has participated in the drafting process or is knowledgeable. *Restatement (Second) of Contracts* §206, Comment a. Clearly, as shopping center

owners, the Sellers had sophistication. They participated in drafting by making interlineations in Paragraph 17. (CP 456, FF 14)

f. Paragraph 30(N) Does Not Limit BGP's Remedy to "Indemnification."

Apparently conceding the breach of the environmental representation in Paragraph 30(N) of the PSA, the Sellers argue that the sole remedy is "indemnification" and that specific performance is unavailable. While Paragraph 30 allows for indemnification, its language does not preclude any other remedy and specifically does not preclude specific performance if a representation or warranty is breached. In the absence of contractual language making a remedy exclusive, an aggrieved party may seek any relief the law allows. *Reiter v. Bailey*, 180 Wash. 230, 39 P.2d 370 (1934); *Graoch Associates No. 5 Limited Partnership v. Titan Construction Corp.*, 126 Wn.App. 856, 109 P.3d 830 (2005).

These parties clearly understood how to provide for an exclusive remedy. They did so in Paragraph 29 when they agreed that the Sellers' sole remedy for a breach by the purchaser was forfeiture of earnest money. The absence of any similar language in Paragraph 30 requires the conclusion that "indemnification" was not to be the sole remedy for a breach of the terms of that paragraph.

g. Remedies for Breach of Representations and Warranties Contained in Paragraph 30 Are Not Limited to Harm Occurring after Closing.

The Sellers contend that BGP can seek relief for a breach of the representations and warranties contained in paragraph 30 only after closing. That argument does not square with the contractual language.

The fundamental rules of contract interpretation must be applied to indemnity provisions. The words used must be given their ordinary meaning. Furthermore, courts should not adopt an interpretation that renders a term ineffective or meaningless. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, \_\_\_ Wn.2d \_\_\_\_, 209 P.3d 863, (2009). The rules for interpretation set out in *Berg v. Hudesman, supra*, apply. *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Finally, indemnity language must be interpreted reasonably to carry out rather than frustrate their intended purpose. They should not be construed so narrowly as to frustrate their obvious design or so loosely as to relieve a party from liability within the obvious purpose of the agreement. *Continental Casualty Company v. Municipality of Metropolitan Seattle*, 66 Wn.2d 831, 405 P.2d 581 (1965); *Prociw v. Baugh Construction Company*, 9 Wn.App. 750, 515 P.2d 518 (1973).

The indemnity provision in Paragraph 30 of the PSA is quite broad. It requires Sellers to indemnify and hold harmless Purchaser from “harm of any kind or nature which Purchaser may experience as a result of the breach of any of Sellers’ representations and warranties contained in this agreement.” That breadth of language has been held to mean exactly what it says. For example in *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc., supra*, the Court held that a provision requiring indemnification from “any and all claims” could not be limited to claims alleging a tort.

Sellers argue that the warranty applies only to claims made after closing. There is no language in Paragraph 30 to support their assertion. In fact, the paragraph begins by stating that “Seller understands that Purchaser is relying on such representations and warranties in connection with closing the transaction herein described.” That language is reasonably interpreted to allow BGP not to close if a breach of any warranty is discovered.

The Sellers’ interpretation of the PSA would require BGP to pay the purchase price and then sue them for damages for the breach of warranty to recoup the purchase price that had been paid as damages. In other words, they would have BGP both tender the purchase price at closing and simultaneously serve them with an action for damages for

breach of warranty. The mere statement of that result shows its absurdity. It also flies in the face of the rule that reasonable interpretations must be favored over unreasonable interpretation that lead to absurd results. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986); *Byrne v. Ackerlund*, 108 Wn.2d 445, 453-4, 739 P.2d 1138 (1987); *Forest Marketing Enterprises, Inc. v. State*, 125 Wn.App. 126, 132, 104 P.3d 40 (2005).

i. The Sellers Were Properly Required to Remediate the Property.

The Sellers argue that the trial court could not force them to remediate the property as part of the Amended Order of Specific Performance. Their argument lacks merit because it ignores the Sellers' conduct and the Sellers' position at trial. Furthermore, the Sellers did not raise this issue at trial. For that reason alone, the Court should not consider it. RAP 2.5(a)

First of all, the Sellers attempted to remediate the property after the contamination was discovered. They did so because they believed that they were required to "remedy the violation of the representation" made in paragraph 30(N) of the PSA. (CP 1555) The conduct of the parties demonstrates how that contract should be

interpreted. Since the Sellers undertook remediation, they are in no position to claim that the PSA did not require them to do so.

Secondly, requiring the Sellers to remediate reduced their monetary exposure. BGP contended that the costs of remediation and other damages and offsets would greatly exceed the \$3 million purchase price. But such an order would require BGP to pay additional federal and state income tax. BGP presented the trial court with alternatives. Based on such cases as *Blaney v. International Association of Machinists and Aerospace Workers*, 151 Wn.2d 203, 87 P.3d 757 (2004), *Oddi v. Ayco Corporation*, 947 F.2d 257 (7<sup>th</sup> Cir. 1991), and *Home Savings of America v. U.S.*, 399 F.3d 1341 (Fed. Cir. 2005), it asked the trial court to award additional damages equal to the taxes BGP would have to pay. Alternatively, those damages could be avoided if the Sellers performed and paid for the remediation. The trial court believed this approach was more equitable. It noted agreed that requiring the Sellers to remediate would eliminate its having to estimate the cost in a damage award and avoid complications with insurance. (CP 240-41)

Where specific performance is warranted, the court may grant whatever relief is warranted by the facts. *Hubbell v. Ward*, 40 Wn.2d 779, 787, 246 P.2d 468 (1952); *Kreger v. Hall*, 70 Wn.2d 1002, 1008, 425 P.2d 638 (1967); *Ban-co Investment Co. v. Loveless*, 22 Wn.App. 122, 135,

687 P.2d 567 (1978). In this case, the trial court required the Sellers to remediate because it believed doing so was more equitable for both parties. The Sellers can hardly complain when the trial court's approach eliminated their exposure to additional damages. The trial court did not abuse its discretion.

Moreover, a specific performance decree can require the seller to put the property in a certain condition notwithstanding the absence of specific contractual language obliging the seller to do so. In *Dean v. Gregg*, 34 Wn.App. 684, 663 P.2d 502 (1983), the seller agreed to sell certain land "subject to being short platted into 4 parcels." The seller refused to obtain the final plat because it would be too expensive. In reversing the trial court's denial of specific performance relief, the Court required the seller to take steps to insure the recording of a final plat.

The Sellers point to Paragraph 4 of the PSA to support their argument. It does not apply here. That provision allows termination of the PSA if a governmental agency requires certain work to be done on the property; the Sellers refuse to do the work; and BGP does not elect to take the property without the work being done. (Ex. 2) The record is devoid of any evidence of any notice from any governmental agency or any notice from the Sellers to BGP that would satisfy the terms Paragraph 4.

j. If Specific Performance Is Not Available, BGP Is Entitled to Damages.

In Paragraph 30(N) of the PSA, the Sellers represented that the property was not contaminated. As all agree, it was. The Sellers' misrepresentation entitled BGP to damages based on the difference between the value of the property as represented as of the date of the PSA and the value of the property as it actually was at that time regardless of whether the misrepresentation was fraudulent or made in good faith. *Dixon v. MacGillivray*, 29 Wn.2d 30, 35, 185 P.2d 109 (1947); *Alexander Myers & Co., Inc. v. Hopke*, 88 Wn.2d 449, 565 P.2d 80 (1977); *Tennant v. Lawton*, 26 Wn.App. 701, 615 P.2d 1305 (1980); *Lyall v. DeYoung*, 42 Wn.App. 252, 258-59, 711 P.2d 356 (1985).

BGP may recover these damages without closing the transaction. *Hardinger v. Till*, 1 Wn.2d 335, 96 P.2d 262 (1939). The Court applied this rule where a misrepresentation occurred in *Friebe v. Supancheck*, 98 Wn.App. 260, 992 P.2d 1014 (1999). In that case, the Supanchecks agreed to sell rental property to the Friebes. They represented that the property consisted of three units from which three rents were collected. The Friebes subsequently learned that only two of the units were lawful. The Supanchecks would not lower the price or obtain a variance. The transaction did not close for that reason. The

Friebes then sued and obtained a default judgment against the Supanchicks, which the trial court later vacated pursuant to CR 60(b)(11). In reversing, the Court noted that the facts entitled the Friebes to damages based upon the failure to obtain the benefit of their bargain. 98 Wn.App. at 269.

BGP presented the Court with two options for specific performance relief and also requested damages if the trial court was not inclined to allow specific performance. The trial court's election would therefore become BGP's choice of remedies. *Stryken v. Panell*, 66 Wn.App. 566, 571, 832 P.2d 890 (1992). Therefore, if the Court believes that specific performance is not warranted, the Court should nonetheless remand for a determination of damages based upon the Sellers' misrepresentation of the property.

IV. BGP Is Entitled to Abatement of the Purchase Price by Stigma.

When a seller misrepresents the quantity or quality of land in a contract of sale, a purchaser seeking specific performance is entitled to abate the purchase price representing the difference between the property as represented and the property as is. *Alexander Myers & Co., Inc. v. Hopke, supra*. It is uncontested here that Sellers represented in the PSA that the property was free from environmental contamination when it was not.

At trial, BGP presented testimony from Wayne Hunsperger, an MAI Certified Appraiser. (RP 2-1-07, 6-7) He testified that the generally accepted method of valuing contaminated property is to obtain the value of the property as if it were unimpaired — without contamination — and then subtract the sum of the cost of remediation and a stigma factor. (RP 2-1-07, 41-42) He stated that the generally accepted definition of stigma is “an adverse effect on property value produced by the market’s perception of increased environmental risk due to contamination. This can be based on the nature and extent of contamination, estimates of future remediation costs and their timing, potential for changes in regulatory requirements, liabilities of clean up, potential for off-site impacts, and other relevant environmental risk factors.” (RP 2-1-07, 41-3, 51-2) Mr. Hunsperger testified that the amount for stigma in the spring of 2001 — when the addendum was executed—was \$510,000.00. (RP 2-1-07, 67).

Notwithstanding the fact that remediation has yet to occur in the eight years since the execution of the PSA, the Sellers contend that damages for stigma can only be awarded if the property cannot be remediated, citing *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006), and *Pugel v. Monheimer*, 83 Wn.App. 688, 922 P.2d 1377 (1996). These cases stand for the proposition that damages to real property can include permanent diminution of the property’s value.

Neither holds that stigma as defined by Mr. Hunsperger cannot be awarded. Moreover, neither dealt with abatement of the purchase price based on misrepresentation of real property. *Pugel v. Monheimer, supra*, was a legal malpractice claim against an attorney who failed to timely file a complaint against a neighboring property owner for failure to provide lateral support. In *Mayer v. Sto Industries, Inc., supra*, plaintiff sought damages under RCW 19.86 and the Washington Product Liability Act against a siding manufacturer and others.

The Sellers argument appears to stem from the Court's use of the term "stigma" to refer to permanent diminution in value due to the perceived failure to accomplish remediation in *Mayer v. Sto Industries, supra*, 156 Wn.2d at 694. Mr. Hunsperger gave the term a different definition—value reduction for the perceived uncertainty in remediating contaminated property. The Court in *Mayer v. Sto Industries, supra*, did not indicate that "stigma" was limited to permanent diminution due to remediation failure. The opinion also did not deal in any way with reduction in value for contaminated property. Parenthetically, the term "stigma" was not used in *Pugel v. Monheimer, supra*.

In sum, Mr. Hunsperger's testimony provided the Court with the method for determining the value of contaminated property and an opinion of one aspect of that value. BGP was clearly entitled to abatement of the

purchase price based on the Sellers' misrepresentation. The trial court did not err by abating the purchase price based on Mr. Hunsperger's testimony.

V. Issues Concerning Attorney's Fees.

a. Introduction and General Considerations.

Both sides have assigned error to the Court's award of attorney's fees. As will be seen, Sellers' objections have no merit while BGP's do.

In Paragraph 29, the PSA specifically states that the court may award reasonable costs and expenses including attorneys' fees to the prevailing party in the event of any litigation arising out of the contract. The amount to be awarded for attorney's fees allowed by contract is determined by the "lodestar" method set out in *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 675 P.2d 193 (1983). *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987). The lodestar method requires documentation of hours worked and costs. However, the documentation "need not be exhaustive or in minute detail." Furthermore, an established rate for billing clients is likely a reasonable rate. *Bowers v. Transamerica Title Insurance Company, supra*, 100 Wn.2d at 597.

The reasonableness of any attorney fee award is subject to appellate review. It is recognized that the trial court is in the best position

to evaluate the reasonableness of an award of fees in a particular case. *Styrk v. Cornerstone Investments, Inc.*, 61 Wn.App. 463,474, 810 P.2d 1366 (1991). Therefore, the trial court's determination of what constitutes a reasonable award will not be reversed absent a manifest abuse of discretion—when no reasonable person would take the position adopted by the trial court. *Singleton v. Frost, supra*, 108 Wn.2d at 730; *Allard v. First Interstate Bank*, 112 Wn.2d 145, 148-9, 768 P.2d 998 (1989); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

Appellate courts have reversed attorney fee awards that significantly reduced the amount claimed when the record does not indicate how the trial court reached its decision. *P.A.W.S. v. University of Washington*, 54 Wn.App. 180, 773 P.2d 114 (1989), reversed on other grounds, 114 Wn.2d 677, 790 P.2d 604 (1990); *Smith v. Dalton*, 58 Wn.App. 876, 795 P.2d 706 (1990); *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn.App. 552, 829 P.2d 196 (1992), reversed on other grounds 124 Wn.2d 634, 880 P.2d 29 (1994). On the other hand, courts have declined to reverse an attorney's fee award when the amount claimed was reduced by 30% and the non-prevailing party objected. *American National Fire Insurance Co. v. B & L Trucking & Construction Co., Inc.*, 82 Wn.App. 646, 669-70, 920 P.2d 192 (1996), *aff'd.*, 134 Wn.2d 413, 951 P.2d 250 (1998).

b. BGP's Claim and the Trial Court's Findings.

BGP itemized a total of \$527,787.25 in attorneys' fees and \$230,370.31 in costs. (CP 429-32; 541-44; 736-821; 932-35) The trial court awarded slightly less than 80% of the attorneys' fees claimed or \$420,068.00. The trial court awarded \$190,000.00 in costs or approximately 82% of the \$230,370.31 claimed. The Court gave its conclusions in a letter ruling. (CP 549-51) It then entered its Order on Motion for Attorneys' Fees further memorializing its findings and entered a Supplemental Judgment for the amount of the award. (CP 574-78)

The trial court reduced the amount of fees claimed for the services of Ralph Palumbo, an attorney who specializes in matters involving environmental contamination. In its Order on Attorney's fees, the trial court allowed all time claimed for Mr. Palumbo's services; found his normal hourly rate to be \$395.00 per hour; but reduced his hourly rate from \$395.00 to \$295.00 even though the higher figure was his normal rate. (CP 549-51; 575; 932)

c. The Sellers' Objections Have No Merit.

First of all, the Sellers claim that BGP should not have been awarded fees because it should not have prevailed. This argument is obviously dependent on the Sellers success on their other points. Since

they will not prevail on those, the trial court did not err by allowing fees to BGP.

The Sellers also complain that the trial court was not sufficiently specific in its ruling. That assertion is belied by its letter ruling and the Order on Motion for Attorneys' Fees. In both, it stated the hours it found reasonable together with the rates. It cut the request as to one firm by approximately one-third. The Sellers are hardly in a position to claim lack of specificity when the trial court made such a large reduction.

The Sellers also seem to be concerned about the specificity of costs. These were outlined by category. The trial court reduced the cost request by approximately 20%. The trial court specifically indicated that it was not allowing charges for copying, mail, telephone, or travel. These sums totaled \$13,653.71. Therefore, the trial court necessarily also did not allow \$33,560.54 of other charges to include expert witness costs. Sellers have no complaint here.

d. The Trial Court Impermissibly Reduced Mr. Palumbo's Hourly Rate.

The trial court based its decision to reduce Mr. Palumbo's rate on normal rates charged by Clark County attorneys. (CP 550) The hourly rates that attorneys charge in a community may be considered by a

court in establishing a normal hourly rate. However, all factors set out in RPC 1.5(a) must also be considered. The failure to do so is an abuse of discretion. *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 773-4, 115 P.3d 349 (2005).

The trial court apparently did not consider other critical factors set out in RPC 1.5(a). For example, the reasonableness of an attorney's fee is governed by the skill needed to perform the legal services properly; the time limitations involved; the amount involved; and the results obtained. RPC 1.5(a)(1), (4), (5). Each of these applies here.

BGP engaged Mr. Palumbo because its lead counsel recognized his inexperience in matters involving environmental contamination and agreed to take a reduced hourly for that reason. (CP 470, 716) Mr. Palumbo specializes in environmental matters. He argued the environmental issues at closing. He cross-examined the Sellers' environmental expert witnesses and presented one of BGP's environmental experts. (RP 2-5-07, 228-84; RP 2-6-07, 5-77, 134-77; RP 2-7-07, 52-191, 229-241; RP 2-8-07, 65-90, 236-45)

Furthermore, Mr. Palumbo joined this lengthy and complicated matter about six months before trial. Whenever an attorney is brought in late in such circumstances, that attorney is entitled to a higher fee because the attorney has to learn the case on the fly.

Finally, this case involved large amounts of money. The parties were contesting a sale of a shopping center for \$3 million and costs for remediation that exceeded that sum. Mr. Palumbo's normal rate was consistent with the issues in this case.

The trial court abused its discretion by not awarding fees consistent with Mr. Palumbo's normal hourly rate and by not considering other critical factors in assessing the reasonableness of his rate. Its Order on Attorney's Fees and Supplemental Judgment should be reversed for that reason.

VI. The Trial Court Improperly Denied Damages for Loss of Income.

BGP sought to offset the purchase price by the loss of income it would have received from the shopping center and the loss of principal reduction of its mortgage had it been able to close. The trial court denied that relief because BGP had not tendered the purchase price or "assume(d) (the) usual vestments of ownership." It stated that "to award loss of income without assuming possession would be a windfall to the buyer." (CP 240) This decision amounted to an abuse of discretion.

Bruce Feldman gave undisputed testimony concerning the loss of income experienced by BGP from 2001 to time of trial. He based his calculation on actual revenues at the Center and actual expenses incurred. The calculation did not recognize as expenses those items personal to the

Sellers such as their draws, their interest expenses, and their attorney's fees. It allowed for what BGP's debt service would have been under the terms EverTrust would have offered. (CP 459, FF 23) Mr. Feldman concluded that BGP was deprived of \$492,960.01 of income after debt service. Furthermore, during the same period, it lost \$191,787.00 of principal reduction of its obligation. (RP 1-24-07, 231-61; Ex. 39, p. 2)

A specific performance order must place the parties, as far as possible, in the condition in which they would have been had the contract been duly performed at the time the conveyance should have been made. *Northwest Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 984, 634 P.2d 837 (1981); *Kofmehl v. Steelman*, 80 Wn.App. 279, 285, 908 P.2d 391 (1996). To advance that goal, it is clear that consequential damages must be granted. These are awarded so that the purchaser, unable to have exact performance because of the delay, may have an accounting of any losses caused by the delay to restore him to what would have occurred had the seller properly performed. *Rekhi v. Olason, supra*, 28 Wn.App. at 757.

Where income producing property is concerned, either commercial or agricultural, it has long been recognized that the purchaser compelling specific performance is entitled to an award for lost rents or profits. *Woliansky v. Miller*, 154 Ariz. 32, 739 P.2d 1349 (Ariz.App. 1987); *Bacmo Associates v. Strange*, 388 A.2d 487 (D.C.App. 1978); *Walker v. Benton*,

407 S.2d 305 (Fla.App. 1981); *Dohrman v. Tomlinson*, 88 Idaho 313, 399 P.2d 255 (1965); *Calbreath v. Borchert*, 248 Iowa 491, 81 N.W.2d 433 (1957); *Freidus v. Eisenberg*, 123 A.D.2d 174, 510 N.Y.S.2d 139 (1986).

Washington courts have granted this precise relief. In *Chan v. Smider, supra*, the purchaser sought specific performance to require the sellers to enter into a real estate contract for his purchase of an apartment building. He had deposited the down payment into the registry of the court required by that real estate contract. The clerk placed the sum into interest bearing accounts. The court granted specific performance and allowed the purchaser to offset from that down payment the amount of rents sellers had received from the apartment building in the interim less the amount of their expenses. The sole issue on appeal was whether the purchaser was also entitled to interest on the amounts deposited into the court's registry. The Court required him to elect entitlement to interest or rents. It affirmed the trial court's ruling because he had never waived his claims for rents.

BGP sought no more than what was allowed the purchaser in *Chan v. Smider, supra* — an accounting of rents less expenses from the time that BGP would have been able to close had the property been in the condition represented. It then sought to deduct the net rentals from the purchase price. The trial court's reasoning in denying this relief was infirm. Had

the property been as represented, BGP would have secured financing, paid the purchase price, and obtain the net revenues. By denying BGP this relief, it allowed the Sellers to retain those sums and profit by their misrepresentation. This was error.

On the basis of this assignment of error, the Court should remand for a determination of net rentals together with reduction of mortgage principal that would have occurred if BGP had been allowed to close. Naturally, since an additional two and one-half years have passed since trial, that sum will be substantially greater than what was earlier claimed. This amount should then be offset from the purchase price as the Court did in formulating the Amended Order of Specific Performance.

VII. The Trial Court Erred by Granting the Order Granting Defendants' Motion for Relief from Order Re: UST's.

The trial court directed the Sellers to remediate the Mini Mart site by removing the aged underground storage tanks (UST's); excavating contaminated soil; and then replacing the tanks. Approximately one month after the entry of this order, the Sellers moved to relieve themselves of the requirement of replacing the tanks because Scott Bros. was no longer dispensing gasoline at the site. The trial court ultimately granted the Sellers' motion. This was error.

The Sellers based their motion on CR 60(b)(3). That rule allows relief to a party on the basis on newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial under CR 59(b). The rule states two requirements. First of all, the evidence in question must exist at the time the judgment was entered. If it comes into existence after the entry of the judgment, it cannot form the basis of a motion under CR 60(b)(3). *In Re: Marriage of Knudson*, 114 Wn.App. 866, 872, 60 P.2d 681 (2003). Secondly, the party seeking relief must also show that he or she could not have discovered the evidence in question in time to make a motion for a new trial. A mere allegation of diligence is not sufficient. The moving party must state facts that explain why the evidence was not available for trial. *Vance v. Offices of Thurston County Commissioners*, 117 Wn.App. 660, 671, 71 P.3d 680 (2003).

The Sellers did not show the existence of either element. They presented no evidence as to exactly when Scott Bros. stopped dispensing gasoline. Without that evidence, the trial court could not have known whether the critical evidence was in existence at the time of the entry of the Amended Order of Specific Performance or not. If Scott Bros. ceased dispensing gasoline after the entry of the Amended Order of Specific Performance, no relief would be available under the terms of CR 60(b)(3).

If Scott Bros. had stopped dispensing gasoline prior to the Amended Order of Specific Performance, the Sellers did not show why they could not have discovered that fact prior to the entry of that order or within ten (10) days thereafter so as to move for reconsideration or a new trial under the terms of CR 59(b). The fact that Scott Bros. was not dispensing gasoline would be easily observable by anyone driving by the shopping center. The Sellers claim to be owners of the property. The Sellers can hardly be said to have shown due diligence when they failed to observe events on property they own.

The Order also allowed the Sellers to sell less to BGP than what they had agreed to sell. The tanks had become part of the realty. As paragraph 8 of the lease between Scott Bros. and Sellers provides in pertinent part:

. . . all alterations and equipment installed by tenant that is affixed to the floor, walls, or ceiling of the premises or to any column or any other structural element within the premises, including air handling equipment, lighting fixtures and plumbing fixtures shall immediately become Landlord's property, and at the term hereof, shall remain on the premises without compensation to Tenant unless designated by Landlord for removal, or unless Landlord agrees to removal of the same in writing at the time of the installation.

Scott Bros. agreed that this term meant that the tanks were fixtures and became the landlord's property. The Court came to the same conclusion in

the face of a similar lease provision as applied to a service station tanks and equipment in *Olympia Lodge v. Keller*, 142 Wash. 93, 252 P.121 (1927). Therefore, the tanks and related improvements amounted to “fixtures owned by Seller and located at the Real Property” that the Sellers had agreed to sell in the first paragraph of the PSA. (Ex. 2) The failure to replace these would violate the parties’ agreement.

A motion pursuant to CR 60(b) is addressed to the sound discretion of the trial court. *Northwest Land Investment, Inc. v. New West Federal Savings & Loan Association*, 64 Wn.App. 938, 942, 827 P.2d 334 (1992). That discretion is abused, however, when it is manifestly unreasonable or based on untenable grounds or reasons. *Vance v. Offices of Thurston County Commissioners, supra*. In this case, the trial court’s grant of the motion was based on untenable reasons because there was no showing of when Scott Brothers Oil, Inc. stopped dispensing gasoline or of Sellers’ due diligence in discovering that fact. Furthermore, the grant of the order violated the terms of the PSA. For that reason, the grant of the Order should be reversed.

STATEMENT REQUIRED BY RAP 18.1(A)

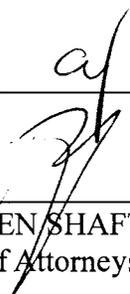
The parties agree that the PSA allows fees to the prevailing party. Such a contractual provision supports an award of attorney’s fees on

appeal. *Granite Equipment Leasing Corp v. Hutton*, 84 Wn.2d 320, 327-8, 525 P.2d 223 (1974); *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn.App. 466, 694 P.2d 1101 (1985). BGP should therefore receive an award of attorney's fees on appeal.

CONCLUSION

For the reasons stated above, the Order Granting Defendants' Motion for Relief from Order Re: UST'S should be reversed. Furthermore, the Order on Attorneys' Fees in the Supplemental Judgment should be reversed with directions to allow attorney's fees for Ralph Palumbo at his normal hourly rate of \$395.00 per hour but should otherwise be affirmed. Finally, the Amended Order of Specific Performance should be reversed with directions to make findings concerning BGP's lost income but should otherwise be affirmed in all respects.

DATED this 28 day of af, 2009.

  
\_\_\_\_\_  
BEN SHAFTON, WSB #6280  
Of Attorneys for BGP

NO. 37791-8  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

BATTLE GROUND PLAZA, LLC,

Plaintiff, Respondent/ Cross-Appellant,  
vs.

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

Defendants, Appellants/Cross-Respondents,

and

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

Third-Party Defendants.

---

APPEAL FROM THE SUPERIOR COURT

---

HONORABLE JOHN F. NICHOLS

---

AFFIDAVIT OF MAILING

---

BEN SHAFTON  
Attorney for Respondent/Cross Appellant  
Caron, Colven, Robison & Shafton  
900 Washington Street, Suite 1000  
Vancouver, WA 98660  
(360) 699-3001

09 AUG 31 PM 12:26  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II

PM

