



## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF ISSUES.....	2
III.	RESTATEMENT OF FACTS .....	3
A.	Factual Background.....	3
1.	Dickinson Quit-Claimed His Interest In The Battleground Home To The Parties Jointly. The Parties Took Out A Joint Loan Against The Home And Paid Off Their Separate Debts.....	3
2.	Winther Moved Out Of The Battleground Home In January 2006, But Continued To Pay Her Share Of The Parties' Joint Obligations Until March 2007, After Dickinson Ceased Making Payments.....	6
3.	To Unwind Their Financial Affairs, The Parties Executed Settlement Agreements In Which Winther Relinquished Her Interest In The Battleground Home And Dickinson Released Any Claims Against Winther.....	7
B.	Procedural Background. ....	9
1.	Dickinson Filed An Action Against Winther Less Than Four Weeks After Executing The Settlement Agreements.....	9
2.	Winther Moved To Dismiss Dickinson's Action Based On The Parties' Written Settlement Agreements.....	11

3.	Dickinson Sought And Obtained A Lengthy Continuance Of The Summary Judgment Hearing. The Trial Court Denied Dickinson's Subsequent Attempt To Supplement His Response. ....	11
4.	The Trial Court Granted Summary Judgment Dismissing Dickinson's Action.....	12
IV.	ARGUMENT.....	13
A.	The Parties' Settlement Agreement Releasing One Another From Any Claims Bars This Action.....	13
B.	Any Claim Of Duress In Executing The Settlement Agreement Fails As A Matter Of Law.....	16
1.	The Threat To Exercise A Legal Right Cannot Constitute Duress.....	17
2.	An Agreement Not To Pursue A Claim May Be Given Gratuitously, But In Any Event There Was Adequate Consideration For The Agreement In This Case.....	19
3.	A Party Need Not Have "Reasonable Alternatives" To Release Claims, But In Any Event There Were Reasonable Alternatives In This Case. ....	21
4.	A Claim Of "Business Compulsion" To Avoid The Settlement Agreement Fails As A Matter Of Law Because There Was Opportunity To Take Actions Other Than Signing The Agreement. ....	24

B.	The Trial Court Properly Dismissed The Claim And Cancelled The <i>Lis Pendens</i> Because The Statute Of Frauds Precludes Any Claim Against Real Property Based On An Alleged Oral Agreement. ....	27
1.	No Partial Performance Took The Alleged Oral Agreement To Convey Property Out Of The Statute Of Frauds.....	27
2.	The Trial Court Properly Ordered Appellant To Revoke His Lis Pendens.....	31
C.	It Was Within The Trial Court's Discretion To Deny Appellant's Motion To Supplement The Record. ....	33
D.	This Court Should Award Attorney Fees To The Respondent. ....	35
V.	CONCLUSION .....	36

## TABLE OF AUTHORITIES

### CASES

<b><i>Barker v. Walter Hogan Enterprises, Inc.</i></b> , 23 Wn. App. 450, 596 P.2d 1359 (1979).....	16, 24, 25, 26
<b><i>Beers v. Ross</i></b> , 137 Wn. App. 566, 154 P.3d 277 (2007) .....	32
<b><i>Bennett v. Shinoda Floral, Inc.</i></b> , 108 Wn.2d 386, 739 P.2d 648 (1987) .....	13
<b><i>Berg v. Ting</i></b> , 125 Wn.2d 544, 886 P.3d 564 (1995) .....	28
<b><i>Chauvlier v. Booth Creek Ski Holdings, Inc.</i></b> , 109 Wn. App. 334, 35 P.3d 383 (2001).....	13
<b><i>Doernbecher v. Mutual Life Ins. Co. of New York</i></b> , 16 Wn. 2d 64, 132 P.2d 751 (1943).....	19
<b><i>Ennis v. Ring</i></b> , 49 Wn.2d 284, 300 P.2d 772 (1956) .....	27
<b><i>Home v. North Kitsap School Dist.</i></b> , 92 Wn. App. 709, 965 P.2d 1112 (1998) (App. Br. 33-34).....	22
<b><i>Jobe v. Weyerhaeuser Co.</i></b> , 37 Wn. App. 718, 684 P.2d 719 (1984), <i>rev. denied</i> , 102 Wn.2d 1005, 1984 WL 287390 (1984) .....	33
<b><i>Jorgensen v. Massart</i></b> , 61 Wn.2d 491, 378 P.2d 941 (1963) (App. Br. 34) .....	22
<b><i>Litts v. Pierce County</i></b> , 5 Wn. App. 531, 488 P.2d 785 (1971), <i>rev. denied</i> , 80 Wn.2d 1002, 1971 WL 39074 (1971) .....	20
<b><i>Mannington Carpets, Inc. v. Hazelrigg</i></b> , 94 Wn. App. 899, 973 P.2d 1103 (1999), <i>rev. denied</i> , 139 Wn.2d 1003, 989 P.2d 1141 (1999).....	34, 35

<b><i>Marriage of Ferree</i></b> , 71 Wn. App. 35, 856 P.2d 706 (1993) .....	14
<b><i>Marriage of Penry</i></b> , 119 Wn. App. 799, 82 P.3d 1231 (2004) .....	32
<b><i>Mitchell Intern. Enterprises, Inc. v. Daly</i></b> , 33 Wn. App. 562, 656 P.2d 1113 (1983), rev. denied, 99 Wn.2d 1021, 1983 WL 220696 (1983) .....	16, 17, 18, 19
<b><i>Morris v. Maks</i></b> , 69 Wn. App. 865, 850 P.2d 137 (1993), rev. denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993) .....	14
<b><i>Patterson v. Taylor</i></b> , 93 Wn. App. 579, 969 P.2d 1106 (1999) .....	14, 15
<b><i>Pleuss v. City of Seattle</i></b> , 8 Wn. App. 133, 504 P.2d 1191 (1972) .....	17, 19, 20, 22, 23
<b><i>Puget Sound Power &amp; Light, Co. v. Shulman</i></b> , 84 Wn.2d 433, 526 P.2d 1210 (1974) .....	24
<b><i>Quadra Enterprises, Inc. v. R.A. Hanson, Co., Inc.</i></b> , 35 Wn. App. 523, 667 P.2d 1120 (1983) .....	19
<b><i>Robinson v. Employment Sec. Dept.</i></b> , 84 Wn. App. 774, 930 P.2d 926 (1996) (App. Br. 33) .....	21
<b><i>Rosellini v. Banchemo</i></b> , 8 Wn. App. 383, 506 P.2d 866 (1973) .....	25
<b><i>Rosellini v. Banchemo</i></b> , 83 Wn.2d 268, 517 P.2d 995 (1974) .....	25
<b><i>Smith v. Mills</i></b> , 207 Or. 546, 296 P.2d 481 (1956) .....	29, 30
<b><i>Stokes v. Bally's Pacwest, Inc.</i></b> , 113 Wn. App. 442, 54 P.3d 161 (2002), rev. denied, 149 Wn.2d 1007, 67 P.3d 1097 (2003) .....	13, 14

**STATUTES**

RCW 64.04.010 ..... 27

**RULES AND REGULATIONS**

CR 2A ..... 14

CR 6(b)

CR 56(c)..... 33

RAP 7.2(c)..... 31

**OTHER AUTHORITIES**

6A Washington Practice Jury Instructions: Civil 301.10, at  
197 (5th Ed. 2005)..... 21

## I. INTRODUCTION

During their relationship, the parties took out a joint loan and paid off each party's separate mortgage and other debts. The parties also improved the parties' home in Battleground, Washington, which had originally been appellant's separate home, more than doubling its value. At the end of their relationship, the parties executed two agreements unwinding their joint financial affairs and respondent quit-claimed her one-half interest in the Battleground home. In exchange, appellant agreed that he had no claim on respondent's separate home in Vancouver, Washington.

Less than a month after these agreements were signed, appellant started this action seeking a one-half interest in respondent's home, based on an alleged oral agreement between the parties that predated their written settlement. The trial court properly dismissed appellant's action on summary judgment because their settlement agreement was binding. Further, the statute of frauds barred appellant's claim to an interest in respondent's real property. This court should affirm and award attorney fees to respondent pursuant to the parties' settlement agreement.

## II. RESTATEMENT OF ISSUES

1. Appellant did not dispute the existence of the parties' settlement or any of its material terms. Did the trial court properly dismiss appellant's action against respondent by enforcing the terms of their agreement, which precluded either party from pursuing any claims against the other relating to their earlier financial arrangements?

2. Respondent owned a one-half interest in the parties' joint home. She agreed to relinquish her interest if appellant signed an agreement waiving any claims against her. Appellant had at least four months to consult an attorney about the parties' dispute before signing the agreement. Did the trial court err in holding that appellant failed to prove any genuine issue of material fact to support his claim that he signed the settlement agreement under duress?

3. Did the trial court properly dismiss appellant's claim for an interest in respondent's home based on an alleged oral agreement under the statute of frauds?

4. Should this court award attorney fees to respondent under the terms of the parties' settlement agreement, which

requires appellant to pay respondent's attorney fees if he challenged the agreement in court?

### **III. RESTATEMENT OF FACTS**

It is true that in review of an order granting summary judgment, the facts are taken in the light most favorable to the non-moving party. But appellant spends much of his opening brief excoriating respondent with disputed "facts" that are not relevant to the issues on review. This restatement of facts presents the material facts relevant to the trial court's order dismissing appellant's action against respondent.

#### **A. Factual Background.**

##### **1. Dickinson Quit-Claimed His Interest In The Battleground Home To The Parties Jointly. The Parties Took Out A Joint Loan Against The Home And Paid Off Their Separate Debts.**

Respondent Kari Winther and appellant Andrew Dickinson began dating in 2004, while Dickinson was separated from his former wife. CP 187) At the time, Winther owned a home in Vancouver, Washington, where she and her two children lived. (CP 107-08, 187)

When Dickinson's divorce from his former wife was finalized in April 2005 (CP 197), he was awarded a home in Battleground,

Washington, valued at \$275,000, and was ordered to pay his former wife a judgment of over \$50,000 bearing interest at 5 percent per annum. (CP 99, 109, 198, 202)

In May 2005, Dickinson tried to refinance his Battleground home (CP 187), intending to pay his former wife's judgment and the nearly \$100,000 owed on the Battleground home. (CP 108, 189) To increase the amount that could be borrowed, Dickinson and Winther agreed to apply for the loan jointly, as Dickinson's work history was "very sporadic." (CP 108, 188-89) In order to take the loan jointly, the bank required that Winther be on the title of the Battleground home. (CP 189) Dickinson executed a quit-claim deed conveying the Battleground home to Winther and himself "for and in consideration of love and affection" on June 22, 2005. (CP 189, 219)

Together, the parties qualified for and took out a \$355,000 loan. (CP 188-89) From the loan proceeds, Dickinson paid the \$50,000 judgment in favor of his former wife and the underlying \$100,000 mortgage on the Battleground home. (See CP 187, 313-14) The parties also used approximately \$123,000 from the loan proceeds to pay off the mortgage on Winther's Vancouver home, and her minimal credit card debt. (See CP 107, 187, 313-14) The

parties opened a joint account in which they deposited the remaining loan proceeds of approximately \$68,000. (CP 109) With the funds in the joint account, the parties built a new shop on the Battleground property, purchased a motor home, and paid other bills related to the Battleground property. (CP 109)

The parties agreed to deposit their shares of the mortgage payment and motor home payment into the joint account, from which these payments would be made electronically. (CP 109, 189) After the refinance, the monthly mortgage payment on the Battleground home was \$2,452. (CP 108) Winther paid \$1,726 towards the Battleground mortgage, or 70% of the payment, and Dickinson paid \$726. (CP 108)

Shortly after obtaining the loan, Winther and her two children, ages 15 and 7, moved into the Battleground home. (CP 108) Winther rented out her Vancouver home, receiving monthly rental income of \$1,200, which she deposited into the joint account toward her "share" of the mortgage and motor home payments. (CP 108-09)

According to Dickinson, as part of this financial transaction, Winther promised to quit-claim a one-half interest in her Vancouver home to Dickinson. (CP 188) Winther denied making such a

promise, and there is no written document expressing such an agreement. (CP 108)

**2. Winther Moved Out Of The Battleground Home In January 2006, But Continued To Pay Her Share Of The Parties' Joint Obligations Until March 2007, After Dickinson Ceased Making Payments.**

By January 2006<sup>1</sup>, the parties had separated. (CP 190)

Winther and her children moved out of the Battleground home and returned to Winther's Vancouver home, losing its rental income. (CP 110) Dickinson alone lived in the Battleground home (CP 110), but Winther continued to deposit her share of the mortgage payment and the motor home payment into the joint account throughout 2006. (CP 190)

Dickinson ceased making "timely or complete" deposits into the joint account to cover his portion of the parties' joint obligations, and ceased entirely to pay his share of the motor home payment. (CP 111, 112) The joint account was in arrears for insufficient funds to pay the automatic mortgage and motor home payments. (CP 111, 112) Winther could no longer continue to pay both her share of the mortgage and Dickinson's share. (CP 111) Winther

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<sup>1</sup> Winther's declaration stated that the parties were separated in January 2007. (CP 110) This was a typographical error. It is undisputed the parties separated in January 2006. (App. Br. 11)

closed the joint account in March 2007, when it contained approximately \$1,300. (CP 112) Winther applied those funds toward the Battleground mortgage, bank fees, and the March 2007 motor home payment. (CP 112)

**3. To Unwind Their Financial Affairs, The Parties Executed Settlement Agreements In Which Winther Relinquished Her Interest In The Battleground Home And Dickinson Released Any Claims Against Winther.**

The parties had substantially improved the Battleground property, using proceeds from the loan and Winther's income. (CP 109) Winther had also paid for landscaping and other home-related expenses and improvements to the Battleground home. (CP 109) Due to the parties' efforts, the Battleground property had increased in value. (CP 109) Dickinson listed the Battleground property for sale in February 2007 for \$629,000, \$354,000 more than it had been valued at in his dissolution. (CP 99, 102, 109)

In spring 2007, Dickinson took the Battleground property off the market and asked Winther to relinquish her ownership interest in the property. (CP 110) Winther claimed an interest in the increased equity of the Battleground home (CP 110), whereas Dickinson claimed an interest in Winther's Vancouver property based on paying off the mortgage with the parties' joint loan. (CP

189, 192) On June 27, 2007, the parties agreed that each party would relinquish any claims against the other if Winther quit-claimed her interest in the Battleground property to Dickinson. (See CP 110, 193)

Dickinson signed and presented to Winther his handwritten agreement that neither party owed the other anything:

Kari Winther owes no money, or payment to Andy Dickinson, and is free and clear of loans or contracts held against him.

Andy Dickinson owes no money, or payment to Kari Winther and is free and clear of loans or contracts held against her.

(CP 103, Appendix A) Dickinson also signed a typed agreement, prepared by Winther, releasing Winther from any financial responsibility relating to payments made on her Vancouver home in consideration of Winther quit-claiming her interest in the Battleground home:

In consideration of Kari N. Winther's release of interest by quit claim deed to Andrew P. Dickinson for the property currently jointly owned at 14012 NE 333<sup>rd</sup> St. Battle Ground, Washington, I Andrew P. Dickinson, release Kari N. Winther of any and all financial responsibility, or repayment of any monies regarding her property at 1911 NE Landover Dr. Vancouver, WA 98684.

(CP 95, Appendix B)

Dickinson also agreed that any amounts owed by Winther on the Battleground mortgage “have been completely satisfied” by improvements made by Winther to the Battleground home by means of financial contributions and “sweat equity” and certain items of personal property that were left in the Battleground home, including a motorcycle, riding lawn mower, and household furnishings, and acknowledged that Winther would be unable to obtain a loan against her Vancouver home with as favorable terms (5.75% interest) as she had before it was paid off. (CP 95) Dickinson released his interest in the motor home. (CP 105) Finally, Dickinson agreed not to make any future claims against Winther and agreed to pay Winther’s attorney fees if he challenged their agreement in court. (CP 95)

The parties executed the two agreements and Winther signed the quit-claim deed to the Battleground home on June 27, 2007. (CP 30-31, 95, 103)

**B. Procedural Background.**

**1. Dickinson Filed An Action Against Winther Less Than Four Weeks After Executing The Settlement Agreements.**

Dickinson never intended to release any of his alleged claims against Winther in these agreements. (CP 193) Instead,

Dickinson testified by affidavit that he signed the agreements in order to obtain Winther's quit-claim, so he could refinance the Battleground home and borrow "over \$450,000 so that [he] would have sufficient money to pay [his] new \$3,962 monthly mortgage while [he] sought legal redress for Winther's wrongdoing." (CP 193) Less than four weeks after he signed the settlement agreements and Winther quit-claimed her interest in the Battleground property, Dickinson filed the present action, claiming breach of contract, unjust enrichment, fraud, conversion, and specific performance (CP 1), and filed and recorded a *lis pendens* against Winther's Vancouver property. (CP 32)

Dickinson later filed a separate action alleging that the parties had a "meretricious relationship." (See CP 741) On February 26, 2008, the meretricious relationship action was dismissed on summary judgment. (CP 741-43) The trial court held that Dickinson failed to show that the parties' "short-term relationship" met the "number of significant and substantial factors" to prove a committed intimate relationship. (CP 743) Dickinson has not appealed this ruling.

**2. Winther Moved To Dismiss Dickinson's Action Based On The Parties' Written Settlement Agreements.**

On October 29, 2007, Winther moved for summary judgment, asserting that Dickinson's complaint in this present action should be dismissed with prejudice in light of the parties' written settlement. (CP 46-61) Dickinson claims in his brief that Winther's motion for summary judgment was "limited to the [Dickinson's] defense of economic duress." (App. Br. 34) This is false. The motion was based on the parties' written settlement agreement and the statute of frauds. (See CP 54-61) Winther also sought summary judgment on Dickinson's other claims for return of an engagement ring and repayment of a loan to purchase a car for Winther as having no factual basis. (CP 54, 111-12) Dickinson did not respond to that portion of the summary judgment, nor does he challenge the trial court's dismissal of those claims on appeal.

**3. Dickinson Sought And Obtained A Lengthy Continuance Of The Summary Judgment Hearing. The Trial Court Denied Dickinson's Subsequent Attempt To Supplement His Response.**

After obtaining a continuance of the summary judgment hearing, Dickinson filed his response to the motion for summary judgment on December 7, 2007, the deadline established by the

trial court. (CP 186, 493, 729) One week later, Dickinson sought to “supplement” his response to include a copy of the transcript of Winther’s deposition, which he indisputably had in his possession prior to filing his response. (CP 493-94)

The trial court continued the summary judgment motion hearing to a later date, to allow the judge in the meretricious relationship action to make a decision on Winther’s pending motion to dismiss. (CP 729) On February 26, 2008, the trial court dismissed the meretricious relationship action. (CP 729, 741) On February 29, 2008, Dickinson filed a separate motion for an order “enlarging time” to file a supplemental legal memorandum in opposition to the motion for summary judgment in this action. (CP 705) The trial court denied Dickinson’s motions to supplement his response and to enlarge time to file a supplemental memorandum. (CP 841)

#### **4. The Trial Court Granted Summary Judgment Dismissing Dickinson’s Action.**

On May 2, 2008, the trial court granted Winther’s motion for summary judgment, concluding “there are no genuine issues of material fact.” (CP 839) The trial court held “[d]efendant is entitled to summary judgment as a matter of law because Plaintiff and

Defendant entered into a valid settlement agreement, which is binding.” (CP 839) The trial court retained jurisdiction to award attorney fees to Winther under the parties’ written settlement agreement. (CP 839)

On May 16, 2008, the trial court cancelled the *lis pendens* recorded against Winther’s property and denied Dickinson’s motion for reconsideration. (See CP 846, 848) Dickinson appeals. (CP 834)

#### IV. ARGUMENT

##### A. The Parties’ Settlement Agreement Releasing One Another From Any Claims Bars This Action.

Allowing plaintiffs like Dickinson to set aside pre-litigation settlement agreements would “severely impair the policy favoring private settlements and promoting their finality.” ***Bennett v. Shinoda Floral, Inc.***, 108 Wn.2d 386, 395, 739 P.2d 648 (1987). Summary judgment dismissing a plaintiff’s action is proper when the parties execute a pre-litigation settlement releasing their claims against the other. See e.g. ***Chauvlier v. Booth Creek Ski Holdings, Inc.***, 109 Wn. App. 334, 347, 35 P.3d 383 (2001) (affirming summary judgment dismissing skier’s negligence claims against ski resort when skier signed a liability release); see also

**Stokes v. Bally's Pacwest, Inc.**, 113 Wn. App. 442, 450, 54 P.3d 161 (2002) (reversing trial court's refusal to grant summary judgment and dismissing plaintiff's claim when plaintiff, a gym club member, signed a release in his membership with a "waiver and release" provision), *rev. denied*, 149 Wn.2d 1007, 67 P.3d 1097 (2003). The parties' settlement agreement releasing one another from any claims bars this action.

Civil Rule 2A compels enforcement of a written settlement agreement signed by the parties. **Patterson v. Taylor**, 93 Wn. App. 579, 585, 969 P.2d 1106 (1999) ("When the party undertakes a settlement directly with the other party, reduces it to writing, and signs it . . . the requirements of CR 2A are met"); *see also Morris v. Maks*, 69 Wn. App. 865, 869-70, 850 P.2d 137 (1993), *rev. denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993), (enforcing as a binding agreement letters exchanged between parties' attorneys reflecting the material terms of an agreement). On summary judgment, the issue for the court is not whether Dickinson wished to "abide by [the agreement], but rather whether the agreement was disputed in the sense that [Dickinson] had controverted its existence or material terms in such a way as to raise a genuine issue of fact." **Marriage of Ferree**, 71 Wn. App. 35, 45, 856 P.2d 706 (1993).

Dickinson signed two separate agreements – one typewritten and one in his own handwriting – surrendering any claim against Winther based on their earlier financial arrangement:

I Andrew P. Dickinson, release Kari N. Winther of any and all financial responsibility or repayment of any monies regarding her property at 1911 NE Landover Dr. Vancouver, WA 98684. I agree that any amounts previously owed by means of a joint loan through US Bank [ ] have been completely satisfied.

(CP 95) Dickinson does not deny that he entered into an agreement that released both parties from any claims arising from their financial arrangement, nor does Dickinson claim that the agreement was unclear or ambiguous.

Winther met her burden in the summary judgment proceeding by showing that there were “no genuine disputes regarding the agreement’s existence or material terms.” *Patterson*, 93 Wn. App. at 579. The parties’ June 27, 2007 agreements constituted a valid settlement agreement, the existence and terms of which are not disputed. As a matter of law, Dickinson could not pursue his claims against Winther. (CP 95, 103) The trial court properly dismissed Dickinson’s action on summary judgment. (CP 893)

**B. Any Claim Of Duress In Executing The Settlement Agreement Fails As A Matter Of Law.**

The trial court properly dismissed Dickinson's actions based on his allegation that he signed the agreements under duress because there were no genuine issues of material fact to support his claim. Even if, as Dickinson claims, the Battleground home was near foreclosure, Winther's refusal to quit-claim her one-half interest in the home without consideration or a release of any alleged claims against her was within her legal right, and could not as matter of law constitute duress. *Mitchell Intern. Enterprises, Inc. v. Daly*, 33 Wn. App. 562, 566, fn. 3, 656 P.2d 1113 (1983), rev. denied, 99 Wn.2d 1021, 1983 WL 220696 (1983).

Further, as the parties' dispute over each other's responsibility for the mortgage of the Battleground home was evident by as early as January 2006, when the parties separated, and at the latest March 2007, when Winther ceased paying her share of the mortgage, Dickinson had more than enough opportunity to consult with an attorney or take other action before he signed the settlement agreement at the end of June 2007. *Barker v. Walter Hogan Enterprises, Inc.*, 23 Wn. App. 450, 452, 596 P.2d 1359 (1979). As the facts alleged by Dickinson do not

meet any definition of duress, the trial court properly dismissed his action.

**1. The Threat To Exercise A Legal Right Cannot Constitute Duress.**

Dickinson claims that Winther's alleged "take it or leave it" demand that he release her from any liability or she would not release her interest in one-half of the Battleground home forced him to sign the settlement agreements. (App. Br. 26) But a "mere threat to exercise a legal right made in good faith is neither duress nor coercion in law." *Pleuss v. City of Seattle*, 8 Wn. App. 133, 137, 504 P.2d 1191 (1972); see also *Mitchell Int'l Enterprises v. Daly*, 33 Wn. App. 562, 566, fn. 3, 656 P.2d 1113 (1983).

Duress is "(a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his vilitation [sic], or (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement." *Pleuss*, 8 Wn. App. at 137 (quoting Restatement of

Contracts, § 492 (1932)). The threat to exercise a legal right cannot constitute duress.

In ***Mitchell***, for instance, the defendant entered into a compromise agreement settling his dispute with his former employer. The parties agreed that defendant would pay \$36,000 of the \$72,000 that he misappropriated from the company. Defendant signed a note containing an acceleration clause providing that if he defaulted on the note, the compromise agreement would be null and void and defendant would be liable for the entire \$72,000. ***Mitchell***, 33 Wn. App. at 563.

Defendant sought to set aside the note after he defaulted, claiming he signed the note under duress. Although the court reversed summary judgment on whether the defendant raised a genuine issue of fact as to reformation of the contract, ***Mitchell***, 33 Wn. App. at 565-66, it affirmed the trial court's dismissal of the defendant's claim of duress. Defendant's claim that he "wanted to sign the note quickly and that he was depressed through fear of civil suit or criminal prosecution" was insufficient to withstand summary judgment, and the employer's "threat to do what one has a legal right to do" was not duress. ***Mitchell***, 33 Wn. App. at 566, fn. 3.

Likewise here, Winther's "threat" to refuse to quit-claim her interest in the Battleground property without consideration could not, as a matter of law, constitute duress. There is no dispute that Winther was a joint owner of the Battleground property pursuant to the quit-claim deed executed by Dickinson in June 2005. (CP 70) It was well within Winther's "legal right" to demand some consideration before releasing her interest in the Battleground property – in this case, a release from any liability. Her doing so was not tantamount to "duress." *Mitchell*, 33 Wn. App. at 566, fn. 3; see also *Pleuss*, 8 Wn. App. at 137; *Doernbecher v. Mutual Life Ins. Co. of New York*, 16 Wn. 2d 64, 73, 132 P.2d 751 (1943) ("it is never duress to threaten to do that which a party has a legal right to do"); *Quadra Enterprises, Inc. v. R.A. Hanson, Co., Inc.*, 35 Wn. App. 523, 529, 667 P.2d 1120 (1983) ("a threat to exercise a legal right made in good faith is neither duress nor coercion in law").

**2. An Agreement Not To Pursue A Claim May Be Given Gratuitously, But In Any Event There Was Adequate Consideration For The Agreement In This Case.**

Dickinson's claim that the settlement was not "fair on its terms" as "evidence" of duress also fails. (App. Br. 26-27) A claim

of duress cannot be based on whether the agreement entered into is “fair.” See *Pleuss*, 8 Wn. App. at 137 (defining the factors of duress). Although an agreement not to pursue legal action against another may be given “for less than full consideration, even gratuitously,” *Litts v. Pierce County*, 5 Wn. App. 531, 533-34, 488 P.2d 785 (1971), *rev. denied*, 80 Wn.2d 1002, 1971 WL 39074 (1971), Winther provided Dickinson with adequate consideration in exchange for him releasing his claims against her.

Here, Dickinson does not deny that the Battleground property increased substantially in value, in large part due to improvements made by Winther with her own funds and while Winther was legally responsible for and paying 70% of the mortgage. (*Compare* CP 74-94, 109 *with* CP 186-93) By the time Winther quit-claimed her interest in the Battleground property, the value of the property had more than doubled, and its equity was \$274,000. (CP 99, 102, 110) By releasing her ownership interest in the property, Winther was relinquishing substantial equity that she helped create. Winther also agreed to allow Dickinson to retain valuable personal property belonging to her that she left at the Battleground home. (CP 95) In exchange, Dickinson waived any claim against Winther, including his claim for any interest in her

home. (CP 95) An agreement not to pursue any claims may be given gratuitously, but in any event there was adequate consideration for the agreement in this case.

**3. A Party Need Not Have “Reasonable Alternatives” To Release Claims, But In Any Event There Were Reasonable Alternatives In This Case.**

Dickinson’s claim that Winther left him with “no reasonable alternative” but to sign the agreements as “evidence” of duress also fails. (App. Br. 33-34) First, a claim that “no reasonable alternative” existed is evidence of duress is not supported by case law. No cases address whether the party had “no reasonable alternative” before signing an agreement as basis for finding duress. Dickinson relies on the Washington Pattern Jury Instruction WPI 301.10 for this assertion (App. Br. 24), but as the comments to the instruction note, “Washington courts have not so far explicitly adopted [this] new approach.” 6A Washington Practice Jury Instructions: Civil 301.10, at 197 (5<sup>th</sup> Ed. 2005). This is evident from the fact that none of the cases cited by Dickinson involve settlement agreements or claims of duress:

***Robinson v. Employment Sec. Dept.***, 84 Wn. App. 774, 780, 930 P.2d 926 (1996) (App. Br. 33) deals with whether the plaintiff could obtain unemployment benefits when she quit her

employment for good cause after exhausting all “reasonable alternatives.” *Home v. North Kitsap School Dist.*, 92 Wn. App. 709, 723, 965 P.2d 1112 (1998) (App. Br. 33-34) deals with whether the plaintiff who was injured at a school football game voluntarily assumed the risk of injury when he testified that he had “no reasonable alternative” but to position himself in such a way that resulted in his injury. Finally, *Jorgensen v. Massart*, 61 Wn.2d 491, 495, 378 P.2d 941 (1963) (App. Br. 34) deals with whether a plaintiff’s exposure to a known risk was reasonable if there were no other “reasonable alternatives.”

None of these cases deals with defenses to enforcement of a settlement agreement. In any event, Dickinson had reasonable alternatives available to him. Dickinson had ample time to consider his alternatives, and to consult an attorney if he did not wish to release his claims against Winther.

In *Pleuss*, for instance, plaintiff was a former firefighter for the City of Seattle who alleged that his supervisor gave him an ultimatum of either resign or be fired, due to plaintiff’s falsification of medical records upon joining the fire department. The plaintiff was given approximately six hours to decide. The plaintiff chose to resign so as to not affect his later ability to find employment. The

plaintiff subsequently sued the City seeking reinstatement as a firefighter claiming that his resignation was obtained under duress. *Pleuss*, 8 Wn. App. at 133. The *Pleuss* court rejected plaintiff's claims of duress, noting that "the fact that the alternatives offered were each disagreeable to the plaintiff, or the fact that he was confronted with these alternatives initially at the end of his working day when he was tired, or the fact that he was informed of these alternatives by the chief of the fire department in the presence of the assistant chief, even when considered together are insufficient to constitute either duress or undue influence." *Pleuss*, 8 Wn. App. at 138.

Here, unlike the plaintiff in *Pleuss* who had only hours to make a decision on the ultimatum, Dickinson had months to decide how to resolve his dispute with Winther. According to Dickinson, Winther ceased paying her portion of the Battleground mortgage in March 2007, and Dickinson had nearly four months before he signed the agreement to consult with an attorney to determine his options. That four months was more than enough time for Dickinson to consult with an attorney is evidenced by the fact that he filed his complaint in this action less than four weeks of signing the agreement. A party need not have "reasonable alternatives" to

release claims, but in any event there were reasonable alternatives in this case.

**4. A Claim Of “Business Compulsion” To Avoid The Settlement Agreement Fails As A Matter Of Law Because There Was Opportunity To Take Actions Other Than Signing The Agreement.**

Dickinson’s claim of “business compulsion” to avoid his agreement also fails as a matter of law. Business compulsion is a “species of duress involving involuntary action in which one is compelled to act in such a manner that either he suffers a serious business loss or he is compelled to make a monetary payment to his detriment.” *Barker v. Walter Hogan Enterprises, Inc.*, 23 Wn. App. 450, 452, 596 P.2d 1359 (1979). But the “mere fact that a contract is entered into under stress of pecuniary necessity does not constitute business compulsion.” *Puget Sound Power & Light, Co. v. Shulman*, 84 Wn.2d 433, 443, 526 P.2d 1210 (1974). “Contracts made under stress are a daily occurrence, and if such urgency is to affect their validity, no one could safely negotiate with a party who finds himself in difficulty by virtue of financial adversities.” *Barker*, 23 Wn. App. at 452-53.

The “key elements” to the doctrine of business compulsion “revolve around the meaning of the words ‘involuntary’ and

'compelled.' Implicit in both words is the concept that the immediacy of the situation renders impractical any court action by which the victim might avoid the burden of either of the detrimental choices." *Barker*, 23 Wn. App. at 453. Further, when a bona fide dispute exists, "it is not duress to refuse to make payment until the question of the amount due has been litigated." *Rosellini v. Banchemo*, 8 Wn. App. 383, 387, 506 P.2d 866 (1973) (reversed upon other grounds, *Rosellini v. Banchemo*, 83 Wn.2d 268, 517 P.2d 995 (1974)).

Here, Dickinson did not dispute that he ceased making timely or complete payments toward the mortgage payments even before Winther stopped paying her portion because she could no longer continue to pay both parties' share. (*Compare* CP 112 with CP 186-94) As a result, Winther, who had not lived in the Battleground home for over a year, was forced to cover both parties' share of the mortgage payments for a period of months. (CP 112) The parties had a bona fide dispute over each party's obligations to each other. *Rosellini*, 8 Wn. App. at 387. Even if, as Dickinson claims, Winther's refusal to pay her portion of the Battleground mortgage left him in a financially precarious situation, he could not prove that he was under "business compulsion" when

he signed the agreements. There was no “immediacy of the situation” rendering “impractical any court action.” *Barker*, 23 Wn. App. at 453. In particular, there was no evidence that foreclosure proceedings were ever started on the Battleground home. There had been only one late payment, in March 2007, and a notice was sent advising of that late payment. (See CP 191-92) The late status was cured in April 2007. (CP 192) It is obvious that Dickinson could have brought suit, as he did so less than four weeks after signing the settlement.

If Dickinson did not wish to sign the agreement, he had ample time to consult with an attorney and seek redress from the courts. The trial court properly rejected Dickinson’s claims of duress because there was no genuine issue of material fact – Winther had a legal right to demand consideration for her interest in the Battleground property, consideration was provided for the settlement, and Dickinson had reasonable alternatives other than signing the agreements. As a matter of law, Dickinson could not show that he was under duress when he signed the agreements. The trial court properly held that the evidence presented by Dickinson did “not create a genuine issue of material fact as to Plaintiff’s alleged duress defense, requiring a showing that he was

compelled or induced to enter into a transaction involuntarily as a result of a wrongful act by Defendant.” (CP 844)

**B. The Trial Court Properly Dismissed The Claim And Cancelled The *Lis Pendens* Because The Statute Of Frauds Precludes Any Claim Against Real Property Based On An Alleged Oral Agreement.**

Dickinson could not prove any interest in Winther’s Vancouver home based on an alleged oral agreement. Therefore, after dismissing Dickinson’s action on summary judgment, the trial court properly ordered Dickinson to revoke the *lis pendens* that he had recorded against Winther’s home.

**1. No Partial Performance Took The Alleged Oral Agreement To Convey Property Out Of The Statute Of Frauds.**

Dickinson’s breach of contract claim based on his allegation that Winther orally agreed to give him with a one-half interest in her Vancouver property fails as a matter of law under RCW 64.04.010, which requires that “every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” An oral agreement to surrender an interest in real property is within statute of frauds and is unenforceable. *Ennis v. Ring*, 49 Wn.2d 284, 290, 300 P.2d 772 (1956). While an oral agreement to convey an

interest in real property may be proved under the doctrine of part performance, *see Berg v. Ting*, 125 Wn.2d 544, 555-56, 886 P.3d 564 (1995), there are no facts alleged in this case to meet the “clear and unequivocal” evidentiary standard required to enforce any alleged oral agreement between the parties.

Our Supreme Court has identified three factors that are examined to determine if there has been part performance of the agreement so as to take it out of the statute of frauds:

- (1) delivery and assumption of actual and exclusive possession;
- (2) payment or tender of consideration; and
- (3) the making of permanent, substantial and valuable improvements, referable to the contract.

*Berg*, 125 Wn.2d at 556. While Dickinson could arguably claim that the parties’ use of loan proceeds to pay off the underlying mortgage on Winther’s property was consideration, Dickinson has not and cannot allege facts that support the other two factors. Dickinson has never assumed possession nor made any improvements to Winther’s Vancouver property. Consideration alone is not sufficient to satisfy the evidentiary function of the doctrine of partial performance. *Berg*, 125 Wn.2d at 558.

Dickinson's reliance on an Oregon case to support his claim that he can avoid the statute of frauds to enforce an oral agreement transferring real property is misplaced. In *Smith v. Mills*, 207 Or. 546, 296 P.2d 481 (1956), the Oregon Supreme Court affirmed the trial court's decision enforcing an oral agreement to execute a mortgage in the plaintiff's favor in view of the property owner's part performance of accepting funds from the plaintiff. In *Smith*, the plaintiff agreed to use her separate funds to pay off the mortgage of the man she was dating, who in turn orally promised to execute a note secured by his real property. Shortly thereafter, the man "transferred his affections to another," and deeded his real property to his brother without executing the note to the plaintiff. The *Smith* court expressed concern that not enforcing the agreement on the sole basis that it was an oral agreement would "cause equity to lend its aid to the perpetration of an unconscionable fraud." *Smith*, 296 P.2d at 487.

Here, however, there would be no "perpetration of an unconscionable fraud" in refusing to enforce an alleged oral agreement that would require Winther to quit-claim an interest in her separate home to Dickinson. It is undisputed that the parties jointly took out a loan for \$355,000, on which they were both

obligated. From those funds, the parties paid \$150,000 of Dickinson's separate debts and \$123,000 of Winther's separate debts. Winther then paid the majority of the monthly payment on the loan against the Battleground property, continuing to do so for over a year after she moved out and Dickinson alone lived on the Battleground property. Finally, in consideration of Winther quit-claiming her interest in the Battleground property, Dickinson, in writing, released any alleged claim he might have against Winther's home.

No fraud would be perpetrated in holding the parties to their written settlement over any alleged pre-settlement oral agreement to convey an interest in the Vancouver property. In fact and law the only fraud perpetrated in this case was by Dickinson, not Winther. Dickinson fraudulently induced Winther to quit-claim her interest in the Battleground property based on his written promise not to pursue any further claims against her, while secretly planned to commence this lawsuit almost immediately after Winther released her interest in the property, despite his written agreement not to do so. (CP 193) This case is entirely distinguishable from **Smith** on this point alone, and the trial court properly dismissed Dickinson's

claim of an interest in Winther's real property on the basis of the statute of frauds.

**2. The Trial Court Properly Ordered Appellant To Revoke His Lis Pendens.**

Dickinson had no colorable interest in Winther's home, and the trial court did not abuse its discretion by ordering Dickinson to revoke the *lis pendens* he filed encumbering Winther's home. In its oral ruling canceling the *lis pendens*, the trial court specifically noted that it "granted the summary judgment on this case, and I used my discretion to cancel the *lis pendens*, and so you must have some idea by now what I think on the merits of this." (6/06 RP 28)

As Dickinson correctly points out, "[t]he court clearly has the right to deny the 'application' to cancel a *lis pendens* and thereby continue it in place – or to only cancel it in part – pending appeal." (App. Br. 48) Dickinson fails to show how the trial court abused its discretion in ordering Dickinson to revoke the *lis pendens* in this case. The trial court dismissed Dickinson's action, and he did not thereafter seek a stay. See RAP 7.2(c) (judgments fully enforceable pending appeal absent stay). Thus, Dickinson did not have any justification to file a *lis pendens* against Winther's real

property. See **Beers v. Ross**, 137 Wn. App. 566, 575, 154 P.3d 277 (2007).

In **Beers**, this court rejected a claim similar to Dickinson – that a case is not “settled, discontinued or abated” because the case is pending on appeal. 137 Wn. App. at 575. (See App. Br. 48) This court held that the trial court did not abuse its discretion when it cancelled the *lis pendens* when the appellants did not file a stay in **Beers**, 137 Wn. App. at 575. Likewise, this court affirmed the trial court’s cancellation of a *lis pendens* under similar circumstances in **Marriage of Penry**, 119 Wn. App. 799, 801, 82 P.3d 1231 (2004), where the intransigent husband, much like Dickinson in this case, filed a *lis pendens* on property after appealing the trial court’s decision awarding the property to the wife. The trial court properly cancelled the *lis pendens*, and this court awarded fees against the husband for his frivolous appeal of an order appointing a commissioner to sign the release of *lis pendens* and quit-claim deed and real estate excess tax affidavit on the husband’s behalf. **Penry**, 119 Wn. App. at 803-804.

**C. It Was Within The Trial Court's Discretion To Deny Appellant's Motion To Supplement The Record.**

Pursuant to CR 56(c), "the adverse party may file and serve opposing affidavits, [ ] not later than 11 calendar days before the hearing." Civil Rule 6(b) also provides that the trial court may enlarge the period for filing pleadings after the expiration of the specified period only if "the failure to act was the result of excusable neglect." Whether to accept or reject untimely filed affidavits is entirely within the trial court's discretion. See **Jobe v. Weyerhaeuser Co.**, 37 Wn. App. 718, 724, 684 P.2d 719 (1984), *rev. denied*, 102 Wn.2d 1005, 1984 WL 287390 (1984).

Dickinson fails to show that the trial court abused its discretion in refusing to consider his untimely "supplemental" pleadings. In **Jobe**, Division One affirmed a trial court's decision refusing to consider a supplemental affidavit filed prior to formal entry of an order dismissing a complaint on summary judgment. In affirming, the court noted "the supplemental affidavit did not change or contradict any of the factual matters before the trial court so as to raise an issue of material fact." **Jobe**, 37 Wn. App. at 727.

Likewise here, the material presented by Dickinson, including the deposition of Winther, included no new information

that was not already presented in the parties' competing affidavits. Dickinson spends five pages of his brief outlining the "key deposition testimony" of Winther that the trial court declined to review (App. Br. 38-42) but fails to show what "new" information it provided that was not already presented in either Winther's declaration or Dickinson's declaration.

The information presented was immaterial to the claims made by Dickinson in his complaint, and would not have created a genuine issue of material fact. Winther's deposition testimony merely confirmed that the parties' decision to take out a loan together was neither a gift nor a loan but a "joint financial transaction" as the parties progressed "as a couple." (App. Br. 39 *citing* CP 502) Further, Winther testified in her deposition that she would not sign the quit-claim deed unless he also provided something in writing, because she did not "trust his word." (App. Br. 41 *citing* CP 525) In this, Winther was prescient, but none of this information creates a genuine issue of material fact to allow Dickinson to avoid the settlement agreement.

***Mannington Carpets, Inc. v. Hazelrigg***, 94 Wn. App. 899, 973 P.2d 1103 (1999), *rev. denied*, 139 Wn.2d 1003, 989 P.2d 1141 (1999) (App. Br. 37) does not aid Dickinson's argument. In

**Mannington**, Division One rejected appellants' claim that the trial court should have granted them a continuance so that they could supplement the record with depositions before formal entry of a summary judgment order. Division One held that the trial court did not abuse its discretion when the appellants failed to state what material evidence would be established through the additional discovery. **Mannington**, 94 Wn. App. at 903. Likewise in this case, Dickinson fails to show what "material evidence" in Winther's deposition was not already present in the affidavits that were already before the court.

**D. This Court Should Award Attorney Fees To The Respondent.**

This court should award attorney fees to Winther for responding to this appeal under the terms of their agreement. The June 27, 2007 agreement provides that "in the event [Dickinson] breach[es] this agreement, you (Andrew P. Dickinson) agree to pay all attorney fees incurred by Kari Winther regarding this agreement should you choose to challenge this agreement in court." (CP 95) As Winther is entitled to fees under this agreement, this court should award attorney fees to Winther on appeal.

An award of attorney fees to Winther is especially warranted in this case. Dickinson convinced Winther to quit-claim her interest in the Battleground property on the basis that the parties reached a mutual agreement unwinding their financial affairs to avoid litigation. Less than four weeks after Winther released her interest in the home and Dickinson agreed in writing to release any alleged claims against Winther, Dickinson brought this action. Dickinson also brought a separate action against Winther based on his claim that the parties had a meretricious relationship. As a result, Winther has been forced to defend herself against Dickinson's legal machinations despite already releasing her interest in the Battleground property. The egregiousness of Dickinson's actions is no more evident than when his counsel threatened to file "1,400 motions" (versus the 14 he had already filed) if this case is remanded after appeal. (6/06 RP 29) This court should award attorney fees to Winther for having to respond to this appeal.

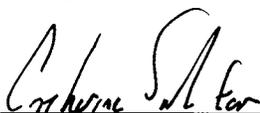
#### **V. CONCLUSION**

The parties entered into a valid settlement agreement resolving their financial dispute after a short-term relationship. Appellant does not dispute the existence of the settlement agreement, and cannot as a matter of law show that he signed the

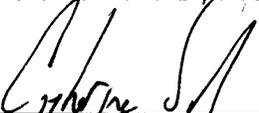
agreement under duress. Further, the statute of frauds bars appellant's claimed interest in the respondent's real property based on an alleged oral agreement. This court should affirm the trial court's dismissal of appellant's action against respondent and award attorney fees to respondent under the terms of the parties' agreement.

DATED this 5th day of November, 2008.

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Attorneys for Respondent

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DIVISION II

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STATE OF WASHINGTON

DEPUTY

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 5th, 2008, I arranged for service of the foregoing Brief Of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input checked="" type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Larry E. Hazen Attorney at Law 1014 Franklin Street Vancouver, WA 98660	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Curtis A. Welch Duggan Schlotfeldt & Welch 900 Washington Street, Suite 1020 P.O. Box 570 Vancouver, WA 98666-0570	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

**DATED** at Seattle, Washington this 5th day of November, 2008.

  
\_\_\_\_\_  
Carrie O'Brien

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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KARI WINTHER OWES NO  
MONEY, OR PAYMENT TO ANDY  
DICKINSON; AND IS FREE AND  
CLEAR OF LOANS, OR CONTRACTS  
HELD AGAINST HIM —

ANDY DICKINSON OWES NO  
MONEY, OR PAYMENT TO KARI WINTHER  
AND IS FREE AND CLEAR OF LOANS,  
OR CONTRACTS HELD AGAINST HER —

Andy Dickinson

EXHIBIT   G    
PAGE   1

In consideration of Kari N. Winther's release of interest by quit claim deed to Andrew P. Dickinson for the property currently jointly owned at 14012 NE 333<sup>rd</sup> St. Battle Ground WA, I Andrew P. Dickinson, release Kari N. Winther of any and all financial responsibility, or repayment of any monies regarding her property at 1911 NE Landover Dr. Vancouver, WA 98684. I agree that any amounts previously owed by means of a joint loan through US Bank account # 7884362079 have been completely satisfied through the following means as listed below.

1) Improvements made Kari Winther to property at 14012 NE 333<sup>rd</sup> St, BattleGround WA 98607 including but not limited to both financial and sweat equity means. Including home interior improvements, countertops, flooring, and painting. Interior clean up and garbage removal. Cost of cleaning service for deep cleaning and professional window washing. Exterior improvements, extensive yard landscaping and care . Nursery items, trees, mole removal, work on fencing, brush and blackberry removal. Repeated yard, flowerbed and weed upkeep. Tree pruning, painting, cleaning, dump garbage removal. Installation of drainage system and dry well for shop, including labor and materials. Plumbing of shop, including some cost of materials.

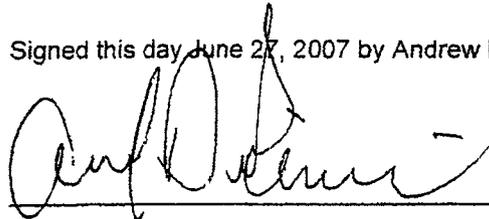
2) Physical items remaining in Andy's possession, including but not limited to Kawasaki 250 motorcycle, riding lawn mower, household furniture king bed and mattress set, recliner, bedroom hutch, and other miscellaneous pictures, decorative items, garden tools, lawn and garden items, automotive items, tools, etc.

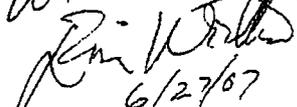
3) Monetary payments including but not limited to payments for Utilities and repairs, credit cards belonging to Andy Dickinson, attorney fees, unpaid mortgage payments and motor home payments.

3) In consideration of the fact that previous mortgage rate on Landover property as a first mortgage, prior to the payoff at 5.75% cannot be grand fathered and subsequent loan would have to be categorized as a second at a higher interest rate, causing economic loss to Kari Winther.

By signing this agreement you Andrew P. Dickinson agree to not challenge this agreement or make any future claims against Kari N. Winther her interest, estate or family, either in property and or monetary terms in regards to the terms of this agreement. In the event you breach this agreement you (Andrew P. Dickinson) agree to pay all attorney fees incurred by Kari Winther regarding this agreement should you choose to challenge this agreement in court.

Signed this day June 27, 2007 by Andrew P. Dickinson:

 6-27-07

*witnessed by*  
  
6/27/07