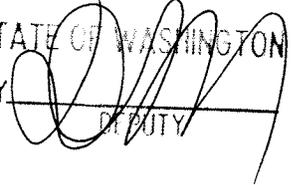


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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

GEONERCO, INC. and/or assigns, n/k/a RIVERSIDE HOMES, INC., an
Oregon corporation d/b/a Riverside Homes Vancouver,

Appellant,

vs.

GRAND RIDGE PROPERTIES IV LLC, an Oregon limited liability
company,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENTS

Riverside claims the trial court erred when it barred Riverside from changing its legal position after securing a decree for specific performance. Despite its previous in-court representations, Riverside wanted the judge to expand its Judgment to force Grand Ridge to complete nearly \$200,000 of improvements. This after Riverside expressly and repeatedly waived these requirements in court.

Riverside also challenges the trial court's authority to modify the Final Judgment. But it does so by mischaracterizing the judge's decision.

A. Riverside Waived Its Right To Require Grand Ridge To Produce Finished Lots.

When Riverside sued for and obtained specific performance, it represented that it was ready, willing, and able to close on the lots "as-is."¹ And when Grand Ridge asserted that the REPSA contained unenforceable provisions, and therefore could not be specifically performed,² Riverside waived these provisions before Judge Harris and then again before the Court of Appeals.

¹ Indeed, Riverside stated that all Grand Ridge needed to do was "tender title to the property." CP 141, 167.

² While the REPSA had many sections, the provisions at issue here (Section 12) required Grand Ridge to produce what the parties have described as "finished lots." For purposes of this Response, Grand Ridge will simply refer to these provisions as something similar to the "finished lot" conditions.

In reliance upon Riverside's representations, Judge Harris entered a decree of specific performance ordering Grand Ridge to tender the property for closing within 35 days.

But after the Judgment became final, Riverside refused to close.³ And instead of simply walking away, and relinquishing its interest under the REPSA to the property, Riverside, for the first time, announced that it had changed its legal position and wanted Grand Ridge to produce finished lots as a condition of closing. But under the theories of waiver, *res judicata*, or judicial estoppel, Riverside was legally barred from asserting a different position after the Judgment was entered.

B. Judge Harris Did Not Abuse His Discretion When He Modified The Decree Of Specific Performance.

Riverside's flip-flop has put Grand Ridge between a rock and a hard place—Grand Ridge can neither complete the sale with Riverside nor sell the property to a third party. This means Grand Ridge is stuck having to continue to pay the property's holding costs and suffering a declining real estate market while Riverside continues, even today, to assert an interest in the property.⁴

³ Grand Ridge appealed, but lost in the Court of Appeals. The Judgment therefore became final on January 16, 2008. CP 280.

⁴ Grand Ridge was paying \$6,673.48 per month in interest just to retain the property. SCP ____; Declaration of Jeff Dulcich, p.2. And because Riverside refused to close or relinquish its interest in the property, and because it has now appealed Judge Harris's

Left with no options, Grand Ridge filed for relief under CR 60(b). In particular, Grand Ridge wanted Judge Harris to declare that it had satisfied the decree of specific performance by tendering the property “as-is” for closing.⁵ Grand Ridge also wanted the court to remove Riverside’s cloud on title. And because Riverside had: (1) either misrepresented or changed its position on whether it was ready, willing, and able to close at the time the decree of specific performance was entered; and (2) either misrepresented or changed its legal position on whether it had waived the REPSA’s finished lot provisions, Grand Ridge also wanted the court to strike the previous award of \$155,000 in attorneys’ fees and costs.

Riverside objected to Grand Ridge’s motion and claimed that because Grand Ridge had failed to produce finished lots, it had violated the Court’s Order and the REPSA. Riverside wanted the court to order Grand Ridge to produce finished lots as a condition of closing.

After holding a show cause hearing where he considered both sides’ evidence and arguments, Judge Harris found that Riverside had in fact waived the finished lot provisions, and had engaged in inequitable conduct after the Judgment was entered. But Judge Harris declined to grant Grand Ridge’s request that the Judgment be vacated or strike the

Decision, Grand Ridge continues to incur these costs. *Id.*

⁵ Because it was using the impasse as a form of real estate option, without having to pay any consideration, Riverside seemed content to not seek either enforcement or clarification of the decree of specific performance.

attorneys' fees award. Judge Harris instead modified the Judgment to allow Riverside an additional 163 days to close.⁶ But realizing this extension would cause Grand Ridge to suffer additional costs, Judge Harris added "terms" to the Judgment designed to prevent an unjust result.⁷ So while he declined to give either party completely what they wanted, Judge Harris did provide some relief to both sides.⁸ The question is whether he abused his discretion in doing so.

C. Riverside Has Completely Mischaracterized Judge Harris's Ruling.

Riverside primarily argues that Judge Harris "entered a new" affirmative judgment to require Riverside to specifically perform the REPSA. Riverside then argues that this "new" judgment violates the REPSA's liquidated damages provision. Because Riverside has mischaracterized Judge Harris's ruling, these arguments must fail.

First, Judge Harris **did not** enter a new judgment. He instead modified the existing decree of specific performance to provide partial relief to both sides. But recognizing that: 1) Riverside had inexcusably failed to close, or at least relinquish its interest in the property;⁹ and

⁶ February 20, 2009 to August 3, 2009.

⁷ CR 60(b) (when granting relief from a judgment, the trial can impose "terms" that it considers "just.").

⁸ CR 60(b)(6).

⁹ Remember that although this case was pending before the Court of Appeals and the Supreme Court for approximately 17 months, Riverside never said a word about requiring Grand Ridge to do more than tender title at closing. Riverside instead waited

2) extending the closing date would cause Grand Ridge to incur additional costs, Judge Harris conditioned the extension of closing upon Riverside reimbursing Grand Ridge those damages caused by the delay.¹⁰

Second, Judge Harris **did not** order Riverside to specifically perform the REPSA. The modified Judgment simply leaves Riverside in the same position it was in before—either close or walk away from the transaction. Nothing in the modified Judgment requires Riverside to buy the property.

Third, Judge Harris **did not** violate the REPSA's liquidated damages provision when he added "terms" to protect Grand Ridge from what would have otherwise been an unfair result—granting Riverside an extension to close. Because the court's modification of the decree of specific performance did not implicate the liquidated damages provision, it is not an issue for appeal. And remember that although Judge Harris found that Grand Ridge had satisfied the Judgment, he still allowed an additional 163 days to close or walk away.

The questions therefore are whether Judge Harris abused his discretion when he found that Riverside was barred from requiring Grand Ridge to produce finished lots and when he modified the decree of specific

until February 4, 2009, just 16 days before closing, to announce that it had changed its position and was requiring Grand Ridge to produce finished lots. CP 280.

¹⁰ CR 60(b) (court can add "terms" when granting relief under the rule).

performance.

II. STATEMENT OF ISSUES

Although some of the Findings of Fact and Conclusions of Law are superfluous to the court's decision, Grand Ridge does not assign any errors, but restates the Issues as follows:¹¹

1. Trial courts can modify or vacate equitable decrees to reflect post-judgment changes that make continued application inequitable. Additionally, CR 60(b) permits a judge, under "terms as are just," to relieve a party from a judgment that has been "satisfied," or when prospective application would no longer be equitable. After Grand Ridge was ordered to convey the property "as-is," Riverside inequitably changed its position and refused to close or relinquish its interest in the property. Although finding Grand Ridge had satisfied the Judgment, and that Riverside could not rescind its waiver, Judge Harris modified the decree to extend the closing date, but with "terms" to mitigate Grand Ridge's damages. Did Judge Harris abuse his discretion?

2. A party waives a right when they "intentionally and voluntarily relinquish" that right. Riverside indicated—both to the trial judge and the Court of Appeals—that it had waived these provisions and

¹¹ For example, Riverview's attorney insisted upon adding a finding that Riverside breached the REPSA and now raises that as an error on appeal. Whether Riverside breached the REPSA by not closing is not material to whether Judge Harris abused his discretion. Thus, Grand Ridge will not spend much time on that issue.

would accept the property “as-is.”¹² But after securing specific performance, Riverside reversed its position and demanded Grand Ridge to produce finished lots. Did Judge Harris properly find Riverside had waived these conditions?

3. *Res judicata* prevents re-litigating claims that were, or could have been, considered in a previous action. In response to a defense that the REPSA contained unenforceable provisions, Riverside indicated that it had waived these provisions and would accept the property “as-is,” and then submitted a Judgment to only require Grand Ridge to tender title. Eighteen months after the Judgment was entered, Riverside changed its position and asserted that Grand Ridge breached the REPSA by not producing finished lots. Did Judge Harris abuse his discretion when he barred Riverside from asserting these new claims?

4. The doctrine of judicial estoppel prevents a litigant from asserting one position in court and later, in an effort to gain an advantage, assert an inconsistent position. To overcome a defense that the REPSA was unenforceable, Riverside represented that it was waiving these provisions. Judge Harris relied on these representations to order specific performance. Eighteen months after the Judgment was final, Riverside changed its position and tried to require Grand Ridge to produce finished

¹² Including the “finished lot” provisions.

lots as a condition to closing. Did Judge Harris abuse his discretion when he applied the doctrine of judicial estoppel?

5. Because specific performance is an equitable remedy, a plaintiff must have “clean hands” and be free of inequitable conduct. After representing that it: (1) was ready, willing, and able to close; (2) would waive the “finished lot” conditions; and (3) would accept the property “as-is,” Riverside changed its position and refused to close or relinquish its interest in the property. Did Judge Harris abuse his discretion when he found that Riverside’s actions were inequitable?

III. COUNTERSTATEMENT OF THE CASE

Grand Ridge offers the following counterstatement of the case.

A. Riverside Obtains Decree Of Specific Performance.

When this case was last on appeal, the issues were whether the REPSA violated the statute of frauds or contained sufficient terms to be subject to a decree of specific performance.¹³

Grand Ridge owns a parcel in Clark County, Washington. In June 2002 Grand Ridge and Riverside signed the REPSA to buy and sell the parcel.¹⁴ But when Grand Ridge refused to convey the property, absent an

¹³ *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 146 Wn. App. 459, 191 P.3d 76 (2008). The underlying facts of the original dispute are detailed in the Court of Appeal’s Opinion.

¹⁴ CP 7-37.

additional addendum, Riverside sued for specific performance. Grand Ridge countered that the REPSA was unenforceable¹⁵ because it violated the statute of frauds and contained terms too vague for a court to grant specific performance. On Cross-Motions for Summary Judgment, Riverside countered that either these provisions had been satisfied or waived.¹⁶ Riverside specifically stated in pleadings that it would accept the property “as-is”, and all Grand Ridge needed to do was “tender title” to the property.¹⁷

On June 29, 2007, Judge Harris, in relying upon Riverside’s representations, granted Riverside’s Motion for Summary Judgment and ordered specific performance.¹⁸ The court entered an Order and Subjoined Judgment on Motions for Summary Judgment presented by Riverside’s attorney Paul Brain.

This Judgment ordered Grand Ridge to “sell to [Riverside], and to fully cooperate in any activities necessary to closing the sale....”¹⁹ The Order further required closing to occur within 35 days.²⁰ However, because of the waiver, the Order **did not** require Grand Ridge to take any

¹⁵ CP 38-44.

¹⁶ CP 141, 148, 152, 161.

¹⁷ *Id.*

¹⁸ CP 256-59.

¹⁹ CP 258.

²⁰ *Id.*

further steps to produce “finished lots” as a condition to closing.²¹

Judge Harris also awarded Riverside its attorneys’ fees and costs (now at \$155,000), but ordered that these fees be deducted from the purchase price at closing.²²

When Grand Ridge appealed, Riverside requested that the parties stipulate to an order of stay extending the time of closing to 35 days after final resolution of the appeal.²³ Again, no mention was made then, or at any time during the appeal, that Riverside planned to rescind its waiver.²⁴

Grand Ridge appealed on the grounds that the REPSA was invalid. In its Response Brief, Riverside again represented to this Court that it was waiving all of the remaining conditions for finished lots and would accept the property as-is.²⁵

B. Grand Ridge Attempts To Close In Satisfaction Of The Judgment.

After the trial court’s ruling was affirmed, Grand Ridge Petitioned the Supreme Court for review. Because it was paying \$6,673.48 each month in finance charges to protect the property from foreclosure, because

²¹ Riverside drafted the proposed Order. Presumably, if Riverside reasonably believed that more work was required on the lots then it would have stated as much to the trial court or included such language in the Order.

²² CP 271-72.

²³ SCP _____, Plaintiff’s Notice of Supersedeas and Stay of Enforcement.

²⁴ CP 280.

²⁵ SCP _____, Brief of Respondents, p. 8, Div. II, Court of Appeals, Case No. 366096.

of the spiraling real estate market,²⁶ Grand Ridge also moved the trial court to modify the Stay. Grand Ridge wanted permission to either sell the property to Riverside or to a third party so that it would no longer be burdened with the holding costs.²⁷

Because Riverside objected, Judge Harris denied Grand Ridge's motion.²⁸ Grand Ridge therefore decided to abandon its appeal so that it could either close with Riverside or sell the property. The Judgment for specific performance therefore became final on January 16, 2009. And, so, as agreed by the parties, closure had to occur by February 20, 2009.²⁹

On January 20, 2009, Grand Ridge opened escrow with the title company and notified Riverside that it was ready to proceed with closing.³⁰ But, on February 4, 2009, 16 days before closing, Riverside notified Grand Ridge that closing could not occur because,³¹ contrary to its previous representations, it believed Grand Ridge needed to produce finished lots as a condition for closing.³² And because it insisted that it was still entitled to close, Riverside also refused to relinquish its interest in

²⁶ SCP ____, Declaration of Jeff F. Dulcich in Support of Defendant Grand Ridge Properties IV, LLC's Motion to Modify Stay, p. 2.

²⁷ SCP ____, Memorandum in Support of Defendant Grand Ridge Properties IV, LLC's Motion to Modify the Court's September 13, 2007 Partial Order of Stay.

²⁸ SCP ____, Supplemental Judgment Regarding Attorney Fees, p. 2.

²⁹ *Id.*

³⁰ CP 283-84.

³¹ CP 280.

³² CP 311-12.

the property, thereby creating an unmarketable cloud on title.³³

This left Grand Ridge in the dire position of not being able to close with Riverside nor resell the property to a third party, while being saddled with ever-increasing holding costs for property in a failing real estate market.

C. Grand Ridge Moves For Relief From The Judgment.

Grand Ridge therefore filed a Motion for Relief from Judgment³⁴ under CR 60(b). On March 17, 2009, the court directed Riverside to appear and show cause why the court should not grant the following relief:

- 1) Determine that Grand Ridge has satisfied the specific performance portion of the Final Judgment;
- 2) Determine that Riverside no longer had any legal interest in the property (remove the cloud on title) because it failed to close per the Final Judgment;
- 3) Strike the award of attorneys' fees and costs awarded to Riverside due to its failure to close per the Final Judgment; and

³³ CP 281.

³⁴ CP 116-17.

- 4) Award Grand Ridge its attorneys' fees and costs for having to bring the post-judgment motion.³⁵

Riverside objected, presented Declarations, and argued that it had either not waived the finished lot provisions, or that it had a right to rescind its previous waiver.³⁶ Riverside also wanted the court to find that Grand Ridge had breached the REPSA and violated the decree of specific performance when it failed to produce finished lots at closing.

D. Judge Harris Finds Grand Ridge Had Satisfied the Judgment And Riverside Acted Inequitably.

After conducting a hearing and considering both parties' evidence and arguments, Judge Harris held that Riverside had waived all of the finished lot conditions and could not force Grand Ridge to do anything other than tender title into closing.³⁷ Judge Harris therefore found that Grand Ridge had satisfied its obligations under the Decree of Specific Performance.

Judge Harris also rejected *all* of Riverside's arguments and ruled that "Riverside was aware that certain work was required to complete the subdivision under the contract, but specifically waived any such defects when it filed its motion for specific performance."³⁸ Judge Harris further

³⁵ CP 292.

³⁶ CP 369-79, 321-68, 310-20.

³⁷ CP 414-16, 433-47.

³⁸ CP 415.

ruled that the court's decision as to specific performance was final and binding and could not be further challenged.³⁹

Judge Harris also held that Grand Ridge was damaged as a result of Riverside's inequitable attempts to "manipulate the market price of property...."⁴⁰

Despite these findings, Judge Harris denied Grand Ridge's request to vacate the Judgment or strike the \$155,000 attorneys' fee award.⁴¹

Judge Harris instead granted the following relief to **both** parties.

First, Judge Harris modified the Judgment to extend the 35-day closing deadline from February 20, 2009 to August 3, 2009 (a 163-day extension). This afforded Riverside additional time to close or walk away, while again forcing Grand Ridge to hold the property at a monthly cost of \$6,673.48.

But Judge Harris also added a condition to the extension that required Riverside to reimburse Grand Ridge the cost of interest from February 20th to the earlier of the actual date of closing, or August 3, 2009, which did not calculate to be any more than \$60,478.75.⁴² This payment would be offset from Riverside's \$155,804.59 attorneys' fee award (which

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² This figures is the interest on the \$1,081,624 purchase price at 12% per annum for 164 days (February 20, 2009 through August 3, 2009).

the court declined to strike) and was designed to compensate Grand Ridge for the monthly holding costs and the lost opportunities for resale.

Second, Judge Harris ruled that if Riverside did not close by August 3, 2009, the cloud on title would be lifted allowing Grand Ridge to resell the property.⁴³ But again recognizing that the delay in closing would continue to mean that Grand Ridge could not resell the property in a declining market, Judge Harris also ordered that Grand Ridge be entitled to recover the difference between what it could have received from Riverside at closing—had Riverside decided to close, and whatever price Grand Ridge actually sold the property for. The court placed a six-month limit on this provision and ordered that this amount be offset from Riverside's previous award of attorneys' fees.⁴⁴

Third, and although he found inequitable conduct, the trial court denied Grand Ridge's request to strike the previous award of \$155,000 in attorneys' fees. However, the court did permit Grand Ridge to offset these fees by the approximately \$60,478 that Grand Ridge was to be paid for its holding costs between February 20th and August 3, 2009.

Finally, Judge Harris awarded Grand Ridge its fees for having to file and pursue its CR 60(b) motion.⁴⁵

⁴³ CP 445-46.

⁴⁴ *Id.*

⁴⁵ CP 447.

Riverside did not reject the court's extension of the Judgment's closing deadline or indicate that it had no plans or desire to close on the property. Instead, and much to Grand Ridge's chagrin, Riverside continued to refuse to close or relinquish its interest in the property. As a result, Grand Ridge continues to be saddled with holding costs for property it can't get rid of. In fact, Riverside recently obtained an order *preventing* Grand Ridge from selling the property.⁴⁶

Judge Harris's formal decision was entered as Findings of Fact and Conclusions of Law and Order on June 18, 2009.⁴⁷ Riverside filed a Motion for Partial Reconsideration,⁴⁸ but, after taking the Motion under advisement, Judge Harris denied the Motion on June 18, 2009.⁴⁹ Riverside then filed this appeal.⁵⁰

IV. ARGUMENTS

A. The Standard Of Review Is Abuse Of Discretion.

In its effort to mischaracterize the court's actions, Riverside tries to twist the standard of review to something other than the correct one—abuse of discretion.

⁴⁶ SCP ____, January 13, 2010 Ex Parte Motion and Order for the Appearance of Judgment Debtor Grand Ridge Properties IV, LLC.

⁴⁷ CP 443-47.

⁴⁸ CP 424-30.

⁴⁹ CP 441.

⁵⁰ CP 448.

A trial court's decision to grant or deny a motion to modify or vacate a final judgment under CR 60(b) will not be overturned on appeal absent an abuse of discretion.⁵¹ And a court only abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.⁵² Likewise, a court's decision to apply judicial estoppel is reviewed for an abuse of discretion.⁵³

B. Judge Harris Properly Rejected Riverside's Post-Judgment Claim That Grand Ridge Had To Produce Finished Lots To Close.

Riverside seems content in its opening brief⁵⁴ to only rely upon what transpired *before* the lawsuit was filed to argue that: (1) it did not clearly waive compliance with the REPSA's conditions for finished lots; (2) that the waiver was not in writing and mutually agreed upon; (3) Riverside's waiver was only an offer that Grand Ridge never accepted; (4) if there was a waiver, the waiver was not a "continuing waiver;" or, (5) if the waiver was continuous, Riverside had rescinded the waiver

⁵¹ *Little v. King*, 160 Wn.2d 696, 702-03, 161 P.3d 345 (2007); *Lindgren v. Lindgren*, 58 Wn. App. 588, 594-95, 794 P.2d 526 (1990), *rev. den.*, 116 Wn.2d 1009, 805 P.2d 813 (1991); *Pac. Sec. Cos. V. Tanglewood, Inc.*, 57 Wn. App.817, 820-21, 790 P.2d 643 (1990); *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 304-305, 122 P.2d 922 (2005).

⁵² *Mayer v. STO Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

⁵³ *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 205 P.3d 111 (2009).

⁵⁴ Since the Appellant has failed to address the in-court waivers in his opening brief, he should be barred from attempting to sandbag Respondent's brief by raising arguments that were not initially raised.

before closing, and therefore the waiver did not apply.⁵⁵

Since the Court did not rely upon any waivers that occurred *before* the lawsuit was filed, Riverside's arguments lack merit. The Court should instead focus on the in-court waivers relied by Judge Harris.

1. Facts surrounding waiver.

a. Judge's ruling.

When Riverside objected to Grand Ridge's CR 60(b) motion, Riverside claimed that Grand Ridge had violated the court's decree of specific performance and was not ready to close because it had failed to produce finished lots under the REPSA. After reviewing the testimony and considering both parties' arguments, Judge Harris rejected Riverside's claims and made the following Findings of Fact:

1. Riverside represented to the court that it was waiving all conditions or contingencies to closing of the REPSA and was willing to accept the property "as-is."

2. Grand Ridge denied Riverside's claim, raised several affirmative defenses, and asserted counterclaims. Grand Ridge argued the REPSA was not enforceable.

3. The court rejected Grand Ridge's defenses and counterclaims and held that the REPSA was enforceable and ordered specific performance.

4. The court relied upon Riverside's representations when it ruled in its favor and granted specific performance.⁵⁶

⁵⁵ See Appellant's Brief, pp. 23-28.

⁵⁶ CP 443-45.

Based on these facts, Judge Harris found three separate legal basis to reject Riverside's claims:

1. Riverside waived any defects in the condition of the property and is legally barred from requiring Grand Ridge to make any further improvements to the property as a condition of closing.
2. Riverside is judicially estopped from claiming that Grand Ridge has not satisfied the requirements and conditions under the REPSA.
3. Riverside is barred, by the doctrine of *res judicata*, from claiming that Grand Ridge is in breach of the REPSA.⁵⁷

These findings and conclusions are supported by substantial evidence and properly state the law.

- b. Riverside represented to the court that it had waived, or was willing to waive, the finished lot conditions.

When Riverside sued for specific performance, Grand Ridge raised several defenses to prove that the REPSA was invalid or to prevent specific performance—including arguing that the finished lot conditions were so vague and inconsistent that they could not be enforced.⁵⁸ In response, Riverside argued that it had waived -- or was waiving -- these problematic provisions so that the REPSA could be enforced. Riverside wrote:

⁵⁷ CP 445.

⁵⁸ As the Supreme Court stated in *Kruse v. Hemp*, 121 Wn.2d 715, 723, 853 P.2d 373 (1993), "When specific performance is sought, rather than legal damages, a higher standard of proof must be met: "clear and unequivocal" evidence that "leaves no doubt as to the terms, character, and existence of the contract." *Powers v. Hastings*, 93 Wn.2d 709, 717, 713, 612 P.2d 371 (1980) (quoting *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971)).

As a matter of law, all conditions or contingencies based on [Grand Ridge's] performance have been waived under common law. Notwithstanding [Grand Ridge's] semantic quibbling about the differences between a contingency and a condition under Section 5 of the PSA, Section 15(a) states that [Riverside] may waive 'any condition, contingency, or provision' in the PSA. *Riverside waived all conditions or contingencies to closing, accepting the condition of the property 'as-is'. The only remaining obligation of the defendant is to tender title.*⁵⁹

Riverside later reaffirmed that "the only remaining obligation of [Grand Ridge] under the PSA is to tender title, something defendant has refused to do."⁶⁰

On appeal, Riverside again stated that "all contractual obligations had been satisfied or waived" and that "Grand Ridge had fulfilled its primary obligation—to create the finished lots."⁶¹ Riverside's amnesia as to these representations obviously did not sit well with Judge Harris.

- c. The Final Judgment never envisioned that Grand Ridge would need to do anything other than tender title to the property.

Riverside's in-court representations, the Judgment's language, and the circumstances of its entry also support Judge Harris's finding that Grand Ridge was not required to produce finished lots to close or satisfy the Judgment.

⁵⁹ CP 141 [emphasis added].

⁶⁰ CP 167.

⁶¹ *Id.*

Riverside argues that Grand Ridge couldn't close on February 20th because "Grand Ridge had not come close to providing finished lots", and that it would cost Grand Ridge nearly \$200,000 to make the required improvements.⁶² Yet the decree of specific performance, prepared by Riverside's attorney, only required Grand Ridge to "fully cooperate in any activities necessary to closing the sale" and required closing to occur within 35 days.⁶³

The property's condition has not changed since this lawsuit was filed, or when Riverside drafted or entered the Judgment. Riverside therefore knew the exact condition of the property when 1) this lawsuit was filed; 2) when it presented the Final Judgment; and 3) when this matter was returned from the Court of Appeals.⁶⁴ It defies logic to believe that the parties, or the court, ever intended the Judgment to require Grand Ridge to complete \$200,000 of site improvements in a span of 35 days.⁶⁵

If Riverside believed that Grand Ridge would need to complete – to use Riverside's agent Bill Wagoner's words – "significant excavation and grading" to satisfy the conditions for closing, then you would have

⁶² Appellant's Brief, p. 24.

⁶³ Since Riverside prepared the Final Judgment, any ambiguity should be construed against it.

⁶⁴ CP 385-88. Mr. Wagoner testified that the lots have not been finished in accordance with the conditions and requirements of the REPSA.

⁶⁵ Indeed, Judge Harris orally stated that the reason for the 35 days was for finality of the Judgment.

expected its attorney to have inserted language stating as much. One would also have expected Riverside to have recognized that nearly \$200,000 of work would take more time than 35 days to complete, or have at least raised the issue at some point during the 17 months that this case was on appeal. The truth is that Riverside waived these conditions and agreed to accept the property “as-is.”

Now with a downturn in the real estate market, Riverside wants to change its position so that it can force Grand Ridge to hold the property in abeyance, at no cost to Riverside. By holding up the sale, and refusing to release its interest in the property, Riverside can wait for the market to recover while making Grand Ridge pay the holding costs. Judge Harris saw through this ploy and modified the Judgment accordingly.

2. Riverside waived the conditions to require Grand Ridge to produce finished lots.

“A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.”⁶⁶ It may result from an express agreement, or be inferred from circumstances indicating an intent to waive.⁶⁷

⁶⁶*Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). “The right must exist at the time of the waiver.” *Hirata v. Evergreen State Ltd. P’ship*, 124 Wn. App. 631, 641 (2004).

⁶⁷ *Bowman*, 44 Wn.2d at 669.

Before the Judgment was entered, Riverside represented to the trial court that it had, “as a matter of law,” waived all conditions and was “accepting the condition of the property ‘as-is’, and later, to the Court of Appeals, it wrote that “all contractual obligations had been satisfied or waived.”⁶⁸

Riverside now claims it did not “close” because Grand Ridge failed to “finish” the lots. However, as set forth above, Riverside expressly and repeatedly waived these requirements. Judge Harris correctly held that Riverside waived these conditions.

3. Res judicata also bars Riverside from claiming Grand Ridge failed to close.

Res judicata bars Riverside from re-litigating the issue of finished lots because it previously failed to claim, and in fact waived this claim, before the trial and appellate courts.

Res judicata is designed to curtail the re-litigation of the same claims or causes of action. It prevents piece-meal litigation by prohibiting parties from litigating new matters that were, or could have been, considered in a previous action.⁶⁹

⁶⁸ CP 167. SCP ___, Brief of Respondent, p. 8, Div. II Court of Appeals Cause No. 366096.

⁶⁹ See Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L. REV. 805 (1985); See also Specific Performance 71 AM. JUR.2D, § 226 (1974) (A claim for specific performance will bar a subsequent claim for damages); see also *Sanwick v. Puget Sound Title Insurance Co.* (Court held purchasers of land barred under *res judicata* from suing for damages after obtaining judgment for specific performance.).

The Washington Supreme Court has used *res judicata* to mean both claim preclusion and issue preclusion, saying, for example, that “[*r*]es judicata refers to ‘the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.’”⁷⁰ But the Court has also used *res judicata* to mean claim preclusion: “[*r*]es judicata acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding.”⁷¹ The Court has also said, on numerous occasions, that *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, *exercising reasonable diligence*, might have brought forward at that time.

Judge Harris was therefore correct⁷² to find that *res judicata* barred Riverside from compelling Grand Ridge to do anything other than tender title after the Judgment was entered.

⁷⁰ *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

⁷¹ *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980).

⁷² The Final Judgment entered in this case lends further support to Judge Harris’s decision. It provides that “this judgment shall constitute a final judgment *on all claims* and defenses asserted by the parties herein and because Riverside’s counsel prepared all Final Judgments so ambiguity should be construed against Riverside. *See* CP 258 and 272.

4. Riverside is also barred by the doctrine of judicial estoppel.

Judge Harris also rejected Riverside's claim under the doctrine of judicial estoppel.⁷³ Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an unfair advantage.⁷⁴ The core "factors" are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position, and whether the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party, if not estopped.⁷⁵ These "factors" are not an "exhaustive formula," but are intended to help guide a court's decision.⁷⁶

As set out above, Riverside represented in court that it had waived the finished lot conditions.⁷⁷ Judge Harris says he relied upon these representations when he granted Riverside specific performance. In his April 15, 2009 written Opinion, Judge Harris wrote:

Riverside was aware that certain work was required to complete the subdivision under the contract, but

⁷³ *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (a trial court's decision to apply judicial estoppel is reviewed for abuse of discretion).

⁷⁴ *Id.* at 538.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See* n. 68.

specifically waived any such defects when it filed its motion for specific performance of the contract. They [Riverside] had maintained that position both at the trial court level and subsequently during the appellate process that following [sic] the court's decision. They now claim that they have a right to reassert those defenses.

It is clear that the court relied upon the waivers in ordering specific performance. That decision is final and binding among the parties and that cannot be raised that there was any defect in the completing of the grading and making the property available for purchase.

* * *

Riverside in its attempt to manipulate the market price of property cannot withdraw the waiver as that is *res judicata* when the court granted the order of specific performance.⁷⁸

Judge Harris also issued a "Supplemental Memorandum of Decision" on April 16, 2009 citing to a recent Supreme Court Opinion on judicial estoppel and concluding that the doctrine was "clearly...applicable in this case and as such is binding."⁷⁹

Judge Harris also found that Riverside had taken a position that was inconsistent with its pre-judgment position in an effort to gain an inequitable advantage. Judge Harris did not abuse his discretion when he found that Riverside was legally barred from trying to compel Grand Ridge to produce finished lots as a condition of closing.

⁷⁸ CP 414-15.

⁷⁹ CP 417; *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 205 P.3d 111 (2009).

C. **A Trial Court Retains The Inherent Authority To Modify Or Even Vacate Judgments.**

1. **Background.**

While it concedes that the trial court had the “authority under CR 60(b)” to release Grand Ridge from the Final Judgment, Riverside argues that Judge Harris couldn’t “grant [Grand Ridge] new, affirmative relief—including the entry of a judgment for damages—against the judgment creditor [Riverside].”⁸⁰ There are two flaws with Riverside’s argument.

First, Riverside has mischaracterized the trial court’s decision. Judge Harris did not enter a new judgment against Riverside. He instead modified the existing decree of specific performance to give Riverside an additional 163-days to close. Judge Harris recognized that extending the closing deadline would damage Grand Ridge. Judge Harris also recognized that Riverside’s unjustified refusal to either close *or* at least relinquish its interest under the REPSA had already cost Grand Ridge money and lost opportunities to resell the property. In recognition of these facts, the court added a condition to extending the closing date by requiring Riverside to reimburse Grand Ridge its holding costs. The court did not, however, enter a new affirmative judgment against Riverside.

⁸⁰ Appellant’s Brief, pp. 14-16.

Second, by limiting its analysis to CR 60(b), Riverside completely ignores a trial court's inherent power to modify or vacate final judgments, especially judgments issued in equity. Judge Harris did not abuse his discretion when he revised the Order of specific performance to provide relief to both sides after taking into consideration Riverside's post-judgment antics.

2. A trial court has broad discretion in equity to fashion an appropriate remedy, even after a judgment has been entered.

Specific performance is an equitable remedy governed by equitable principles.⁸¹ This remedy rests in the sound discretion of the court and is controlled by a just and fair consideration of all the facts and circumstances of each particular case.⁸² Courts sitting in equity have broad discretion to fashioning remedies "to do substantial justice to the parties and put an end to litigation."⁸³ A reviewing court will not disturb an exercise of such discretion unless it is manifestly unreasonable or based on untenable grounds.⁸⁴

As an equitable remedy, specific performance is governed by general principles of fairness. "Equity' is the principle, or set of principles, under which substantial justice may be attained in particular

⁸¹ *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 711, 184 P.2d 90 (1947).

⁸² *Cowley & Strickland v. Foster*, 143 Wash. 302, 306-07, 255 P. 129 (1927).

⁸³ *Carpenter v. Folkerts*, 29 Wn. App. 73, 78, 627 P.2d 559 (1981).

⁸⁴ *Paris v. Allbaugh*, 41 Wn. App. 717, 720, 704 P.2d 660 (1985).

cases where the prescribed or customary forms of ordinary law seem to be inadequate.”⁸⁵ “Equity will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality.”⁸⁶

A trial court sitting in equity may therefore fashion a broad range of remedies to do substantial justice to the parties.⁸⁷ Trial courts are instructed to balance the equities whenever they are asked to issue an equitable remedy. The novelty of a problem will not prevent a court from acting, and the court may suit the remedies to fit the particular circumstances of the case *so as to enforce the substantial rights of all parties before them.*⁸⁸

Equity also includes the power of courts to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances.⁸⁹ As the Washington Supreme Court recently noted, “[a] court should ensure enforcement will not be oppressive, unconscionable, or result in undue hardship to *any* party involved.”⁹⁰ Therefore, stripping a trial court of its equitable discretion, as Riverside seeks in this case,

⁸⁵ 27A AM. JUR.2D EQUITY § 1 (2008).

⁸⁶ 27A AM. JUR.2D EQUITY § 84 (2008).

⁸⁷ *Paris v. Allbaugh*, 41 Wn. App. 717, 719, 704 P.2d 660 (1985).

⁸⁸ *Grismer v. Merger Mines Corp.*, 43 F. Supp. 990 (1942), *modified* 137 F.2d 335 (1943), *cert. den.*, 320 U.S. 794, 64 S. Ct. 261, 88 L. Ed. 478 (1943).

⁸⁹ *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460, 45 P.3d 594 (2002).

⁹⁰ *Crafts v. Pitts*, 161 Wn.2d 16, 24, 162 P.2d 382 (2007).

would mark a significant, unprecedented, and unwanted change in the law.

3. Trial courts have the inherent authority to modify or vacate a final judgment.

Courts have long had the inherent authority to modify, dissolve, or vacate an equitable remedy when there has been a change in circumstances, or prospective enforcement of the remedy would be inequitable.⁹¹ The change in circumstances must be sufficiently significant to justify the modification, but when continued application would be unjust, a court is justified to modify the judgment.⁹²

Courts have also held it appropriate to grant motions for relief from a judgment when the moving party meets its initial burden by showing a significant change in factual conditions or prospective compliance would be more onerous.⁹³

Here, Riverside repeatedly represented to the court that it was ready, willing, and able to close within 35 days of the Final Judgment. But then, apparently due to the decline in the real estate market, Riverside changed its mind and decided not to close. Riverside wanted to force

⁹¹ *State ex rel. Bradford v. Stubblefield*, 36 Wn.2d 664, 674, 220 P.2d 305 (1950) (“It is generally recognized that a court of equity has inherent power to modify or vacate a permanent preventive injunction where a change in circumstances demonstrates that the continuance of the injunction would be unjust or inequitable or no longer necessary”); *see also* 43 CJS INJUNCTIONS, § 393 (2008); 42 AM. JUR.2D INJUNCTIONS, § 306 (2009).

⁹² *Pac. Sec. Cos. v. Tanglewood*, 57 Wn. App. 817, 790 P.2d 643 (1990).

⁹³ *Flores v. Arizona*, 516 F.3d 1140, 229 ED. LAW REP. 427 (9th Cir. 2008), as amended on denial of *reh’g* and *reh’g en banc*, (Apr. 17, 2008) and *cert.* granted, 129 S. Ct. 893 (2009) and *cert.* granted, 129 S. Ct. 893 (2009).

Grand Ridge to “carry” the property until the market rebounded. So rather than relinquishing its interest in the property to remove the cloud on title, Riverside chose to switch its legal position and insist that Grand Ridge had violated the Judgment because it had not produced finished lots.

Judge Harris saw through this and found that Riverside’s change in position, and its refusal to allow Grand Ridge to resell the property, was inequitable and had financially harmed Grand Ridge.

But instead of granting Grand Ridge’s request to vacate the Judgment -- for having been satisfied -- and strike the \$155,000 attorneys’ fees award, Judge Harris decided to strike a balance and grant relief to both sides. He therefore modified the Final Judgment to give Riverside a 163-day extension of the closing date but tempered the financial harm to Grand Ridge by adding “terms” under CR 60(b).

Because a trial court has the inherent authority to modify, or even vacate, a final judgment issued in equity, and because there was a sufficient change in circumstances to warrant a modification in this case, Judge Harris did not abuse his discretion.

D. Under CR 60(B), A Trial Court Can Relieve A Party From The Obligations Of A Judgment, Upon “Terms” That The Court Deems “Just”.

In addition to its inherent authority, CR 60(b) also permits any party to file a motion for relief from a final judgment. Under this rule, the

court, “upon such terms that are just [] may relieve a party...from a final judgment...” Grand Ridge sought relief under subsections 6 and 11 of CR 60(b).

1. CR 60(b)(6) permits a trial judge to relieve a party from a final judgment when that party has satisfied the judgment, or when it would no longer be equitable for the judgment to have prospective application.

CR 60(b)(6) provides relief when a “[j]udgment has been satisfied, released, or discharged, ... or it is no longer equitable that the judgment should have prospective application.” Under this rule, and the court’s inherent power discussed above, a judge can “address problems arising under a judgment that has continuous effect ‘where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment.’”⁹⁴

Pacific Security Company v. Tanglewood provides guidance on how the courts should construe CR 60(b)(6) as well as provide a basis for this Court to reject Riverside’s arguments. In that case, Tanglewood, Inc. borrowed \$157,000 from Pacific Securities and secured the loan with real property it was purchasing from Jean Johns under a real estate contract. Tanglewood had also sold the property to Rega Properties, Ltd. Rega defaulted and filed bankruptcy. The bankruptcy court determined that the

⁹⁴ *Pac. Sec. Cos. v. Tanglewood, Inc.*, 57 Wn. App. 817, 820, 790 P.2d 643 (1990) (quoting *Metro. Park Dist. v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986)).

property was worth \$600,000.

Because Rega quit paying on its real estate contract, Tanglewood also quit paying on its loan with Pacific. Pacific therefore sued and obtained a \$318,334 judgment against Tanglewood. Pacific also obtained a decree of foreclosure ordering a Sheriff's sale together with a deficiency judgment against Tanglewood.

At the Sheriff's sale, Pacific bid \$245,244. But when Tanglewood objected to the confirmation of the sale, Pacific purchased John's vendor's interest in the real estate contract and withdrew its bid. Pacific then attempted, under John's real estate contract, to forfeit Tanglewood's interest in the property.

Tanglewood called foul and therefore filed a motion under CR 60(b)(6) to extinguish all liens on the property and to be discharged of any debt under the judgment. Tanglewood argued that Pacific had acquired an equitable interest in the property at the Sheriff's sale, that Pacific Securities' interest in the property had "merged" with the John's contract, and therefore its obligation under the deficiency judgment had been extinguished.

Tanglewood also asked the court to order Pacific to pay Tanglewood the "difference between their obligation to Pacific" and the value given to the property by the bankruptcy court. In other words,

Tanglewood wanted the court to require Pacific to pay it money under CR 60(b)(6).

Pacific opposed the motion and claimed that the trial court “had no jurisdiction with respect to the relief sought and a separate civil action should have been commenced.”⁹⁵ If this objection sounds familiar, it’s because it is identical to Riverside’s claims in this case. And while the trial court agreed with Pacific Securities’ position, the Court of Appeals reversed and held that “CR 60(b)(6) permits the court to ‘relieve a party or his legal representative from a final judgment, ... if it is no longer equitable that the judgment should have prospective application.’”

The Court of Appeals further ruled that this rule permits a trial court to address problems arising under a judgment that has continuing effect “where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment”⁹⁶ The Court further stated that “The court has the inherent right in equity to modify an injunction when changed circumstances render the injunction an instrument of wrong.”⁹⁷ The Court concluded by stating that a court has the “inherent power” to ensure an “equitable result” from the prospective application of

⁹⁵ *Tanglewood* at 820.

⁹⁶ *Id.*, quoting *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986).

⁹⁷ Quoting *Lubben v. Selective Serv. Sys. Local Bd.*, 27, 453 F.2d 645, 651, 14 A.L.R. Fed. 298 (1st Cir.1972) and *System Fed’n 91, Ry. Employes’ Dep’t v. Wright*, 364 U.S. 642, 81 S. Ct. 368, 5 L.Ed.2d 349 (1961).

a judgment when a party has filed a CR 60(b)(6) motion.

Therefore, Judge Harris had both the inherent authority, and the authority under CR 60(b)(6), to modify the Judgment and include terms designed to protect the defendant, Grand Ridge.

2. Grand Ridge was not required to file a separate lawsuit to seek relief from the Judgment.

Riverside argues that Grand Ridge needed to file a separate lawsuit to get relief from the Judgment. As illustrated by *Tanglewood*, this is not the case. In fact, because CR 60(b) already provides an adequate “remedy at law,” Grand Ridge may have been subject to a motion to dismiss had it tried to file a separate action.⁹⁸

3. Judge Harris did not grant relief that exceeded either party’s request.

Riverside claims that because Judge Harris granted relief beyond what was requested, he abused his discretion. In support of this last argument, Riverside can only cite to one case in which the respondent *successfully* vacated a default judgment under CR 60(b) because the *default judgment* exceeded was requested in the petition for divorce.⁹⁹

⁹⁸ See Tegland, 15 WASH. PRACTICES, § 39.15 (2009) (“An independent suit in equity cannot be brought if relief is available by motion because the remedy at law, *i.e.*, the motion for relief, is adequate”).

⁹⁹ *In re Marriage of Lesley*, 112 Wn.2d 612, 617,618, 772 P.2d 1013 (1989). The court held there:

In entering a default judgment, a court may not grant relief in excess of or substantially different from that described in the complaint. *Sceva Steel Bldgs., Inc. v. Weitz*,

In this case, Grand Ridge did not file a new complaint or obtain a default judgment. Grand Ridge filed a motion for a show cause hearing to ask for relief from the Final Judgment. At the show cause hearing, both sides presented evidence and arguments to support their respective positions. Unlike the case it relies upon for its appeal, Riverside was provided sufficient due process.

Perhaps more importantly, neither side received what it requested. While Judge Harris agreed to extend the closing, he refused to allow Riverside to rescind its previous waiver. And while Judge Harris found that Grand Ridge had satisfied the Judgment and that Riverside refused to close was unjustified and inequitable, he refused to clear title. He instead extended the closing and required Riverside to reimburse Grand Ridge the costs caused by the delay in closing.

66 Wn.2d 260, 262, 401 P.2d 980 (1965); *Stablein v. Stablein*, 59 Wn.2d 465, 466, 368 P.2d 174 (1962); *In re Marriage of Campbell*, 37 Wn. App. 840, 845, 683 P.2d 604 (1984); *In re Marriage of Thompson*, 32 Wn. App. 179, 183-84, 646 P.2d 163 (1982); *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12 Wn. App. 952, 954, 533 P.2d 152 (1975).

Further, a court has no jurisdiction to grant relief beyond that sought in the complaint. To grant such relief without notice and an opportunity to be heard denies procedural due process. *Conner v. Universal Utils.*, 105 Wn.2d 168, 172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips*, 77 Wn.2d 879, 884, 468 P.2d 444 (1970).

To the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void. *Stablein*, 59 Wn.2d at 466, 368 P.2d 174; *Sheldon v. Sheldon*, 47 Wn.2d 699, 702-03, 289 P.2d 335 (1955); *State ex rel. Adams v. Superior Court*, 36 Wn.2d 868, 872, 220 P.2d 1081 (1950); *In re Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988); *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985); *Allison*, 36 Wn. App. at 282, 673 P.2d 634.

Riverside also contends that Judge Harris granted Grand Ridge specific performance of the REPSA and that this exceeded what Grand Ridge had requested. Grand Ridge was not, in its CR 60(b)(6) motion, seeking specific performance—it was instead seeking to either have Riverside (1) close on the transaction; or (2) release its interest in the property. Judge Harris *did not* order specific performance.

E. Judge Harris Had The Authority Under CR 60(B)(11) To Modify The Judgment.

Finally, while Grand Ridge believes the court has the inherent authority to modify or vacate a judgment, and that CR 60(b)(6) provides the appropriate mechanism for the court to exercise this authority, a trial court also has the authority under subsection (b)(11) to relieve a party from the “operation of a judgment” for any other “reason justifying relief.”¹⁰⁰

F. The Trial Court Did Not Impose A New Judgment In Violation Of The REPSA.

Riverside complains that the trial court entered a new judgment switching it from the judgment creditor to the judgment debtor without due process. Riverside is mistaken because it was afforded an opportunity to “appear and show cause” as to why the trial court should not modify the

¹⁰⁰ This rule applies when none of the other provisions allow the court to correct a miscarriage of justice. *Summers v. Department of Revenue*, 104 Wn. App. 87, 14 P.3d 902 (2001).

Final Judgment. Moreover, the court did not impose a new judgment -- it simply conditioned the extension of the existing judge's closing deadline with terms designed to reimburse Grand Ridge the costs associated with the delayed closing.

Finally, Riverside attempts to make hay with the argument that the trial court found Riverside breached the REPSA for its failure to close. In fact, this finding was not included in the trial court's Memorandum of Decision and was only added to the Findings of Fact and Conclusions of Law at Riverside's behest.¹⁰¹ Riverside seemingly included this language to set up its appeal. This Court should therefore reject Riverside's invited error. Regardless, this Finding or Conclusion was not necessary for the trial court's ruling, and any reliance on it by Riverside is misplaced.¹⁰²

G. Grand Ridge Was, And Is, Entitled To Recover Its Attorneys' Fees For Having To Bring The CR 60(B) Motion And To Defend The Ruling On Appeal.

Under Paragraph 21(q) of the REPSA, the prevailing party is entitled to recover their reasonable attorneys' fees and costs.¹⁰³ Because Grand Ridge was the prevailing party on its motion, it is entitled to

¹⁰¹ RP 55-56 (May 1, 2009 proceeding).

¹⁰² "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so." *State v. Momah*, 167 Wn.2d 140, 153 (2009).

¹⁰³ Paragraph 21(q) provides: "The prevailing party in any such action shall be entitled to an award of reasonable attorney fees and court costs incurred in such action or proceeding." CP 335.

recover its attorneys' fees and costs incurred before the trial court and on this appeal.

V. CONCLUSION

Judge Harris properly rejected Riverside's claim that Grand Ridge needed to produce finished lots to satisfy the Judgment. He also did not abuse his discretion when he modified the Judgment to address Riverside's post-judgment conduct and its harm to Grand Ridge. Grand Ridge therefore asks this Court to uphold the trial court's decision in its entirety and require Riverside to pay its attorneys' fees and costs.

Dated: February 9th, 2010

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Bradley W. Andersen, WSBA #20640
Phillip J. Haberthur, WSBA #38038
Attorneys for Respondent,
Grand Ridge Properties IV LLC

CERTIFICATE OF FILING

I hereby certify that on the 9th day of February 2010, I caused to be filed the original and one copy of the foregoing RESPONDENT'S BRIEF with the State Court Administrator at this address:

David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway
Suite 300 MS TB-06
Tacoma, WA 98402-4454

by First Class Mail.



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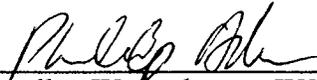
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February 2010, I served one correct copy of the foregoing RESPONDENT'S BRIEF by First Class

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