

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

No. 42098-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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FREDERICK BEAU GOULD and JULIE P. GOULD, husband and wife,

Respondents,

v.

HONG BIN IM and NANETTE MARIE IM a/k/a YOUNG B. IM, husband  
and wife,

Appellants.

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APPELLANTS IM'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

I. The Trial Court Improperly Determined Contractual Intent, Reformed The Well Maintenance Agreement And Found Intentional Breach On Summary Judgment..... - 1 -

A. The evidence, view most favorably to Im, presents a material issue of fact regarding the Well Maintenance Agreement’s drafter’s intent. .... - 4 -

B. The hearsay declaration testimony, to which an appropriate objection was made to the trial court, fails to establish that the legal description in the Well Maintenance Agreement was a scrivener’s error. .... - 7 -

C. The trial court’s action to re-write the Well Maintenance Agreement was not a minor correction of a scrivener’s error..... - 9 -

D. The trial court’s summary judgment “finding” that Im knowingly breached the Well Maintenance Agreement improperly ignored contradicting evidence that must be construed in the light most favorable to Im. .... - 14 -

II. A New Trial Is Required On The Issue Of Damages.....- 17 -

A. If summary judgment is reversed, a new trial on all issues is required.....- 17 -

B. The trial court misapplied the law requiring that awarded contract damages be foreseeable. .... - 17 -

C. The trial court’s damages award is based upon improper speculation.....- 21 -

III. CONCLUSION.....- 22 -

## TABLE OF AUTHORITIES

### Cases

<i>Berg v. Ting</i> , 125 Wn.2d 544, 549, 886 P.2d 564 (1995) .....	8
<i>Dennis v. N. Pac. Ry. Co.</i> , 20 Wash. 320, 55 Pac. 210 (1898).....	12
<i>East Gig Harbor Imp. Ass'n v. Pierce County</i> , 106 Wn.2d 707, 710, 724 P.2d 1009 (1986).....	17
<i>Hostetler v. Ward</i> , 41 Wash.App. 343, 346, 704 P.2d 1193 (1985)....	8
<i>J.J. Welcome &amp; Sons Const. Co. v. State</i> , 6 Wn. App. 985, 988, 497 P.2d 953 (1972).....	15
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 6, 390 P.2d 677 (1964). .....	17
<i>Lewis v. Jensen</i> , 39 Wash.2d 301, 235 P.2d 312 (1951) .....	17
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 139 Wn. App. 334, 338, 160 P.3d 1089 (2007).....	17
<i>Marks v. Mike Scaler's, Inc.</i> , 2 Wash.2d 277, 97 P.2d 1084, 1086 .....	9
<i>Martin v. Momany</i> , 26 Wn.2d 379, 383-384, 174 P.2d 305 (1946)..... .....	9, 11
<i>Maxwell v. Maxwell</i> , 12 Wn.2d 589, 591, 123 P.2d 335 (1942).....	2
<i>Meyer v. Young</i> , 23 Wn.2d 109, 159 P.2d 908 (1945).....	10
<i>Mohr v. Grantham</i> , 172 Wn.2d 844, 859, 262 P.3d 490, 497 (2011).. .....	3
<i>Molsness v. City of Walla Walla</i> , 84 Wn. App. 393, 928 P.2d 1108 (1996).....	4

*Neal v. Green*, 71 Wn.2d 40, 42, 426 P.2d 485 (1967)..... 2

*Osborn v. Public Hospital Dist. I, Grant County*, 80 Wn.2d 201, 206,  
492 P.2d 1025 (1972).....16

*Parkin v. Colocousis*, 53 Wn. App. 649, 652-653, 769 P.2d 326 (1989)  
..... 7

*Puget Mill Co. v. Kerry*, 183 Wash. 542, 49 P.2d 57, 100 A.L.R. 1220..  
..... 9

*Tenco, Inc. v. Manning*, 59 Wn.2d 479, 483 P.2d 372 (1962) .....10

*Wm. Dickson Co., v. Pierce County*, 128 Wn. App. 488, 491, 116 P.3d  
409 (2005)..... 4

I. **The Trial Court Improperly Determined Contractual Intent, Reformed The Well Maintenance Agreement And Found Intentional Breach On Summary Judgment.**

Im's challenge is to the trial court's summary judgment determination that Im is liable for damages for intentional breach of contract – intentional breach of a Well Maintenance Agreement that could only bind Im if re-written to describe a wholly different parcel than the one described in the original Agreement. This appeal does not focus on the issue of whether respondent Gould holds a right – on any basis – to continued use of the well on Im Parcel 1. Gould may have a legal right to continued well use based on other legal theories, such as prescriptive easement or the Health Department regulations that make 12 months' notice a precondition to disconnecting any public well, even a well lacking requisite government approvals as is the case here. Those legal theories do not, however, authorize an award of damages; and, in any event, Gould did not advocate those legal theories to the trial court.

Regardless of any alternative right Gould holds to continued use of the well on the Im Parcel 1, he does not hold a right founded in contract. At the very least, it cannot be deemed in this case that Gould holds a contract right as a matter of law, when that contract does not

even describe the well property. Yet, the foundation of the substantial damages award in this case is the trial court's summary judgment determinations that

- the Well Maintenance Agreement (which was written 20 years ago by a party who is a stranger to the parties in this lawsuit and is now deceased) was intended to apply to a completely different parcel of land than the property actually described in the Agreement;
- the legal description on the Well Maintenance Agreement was a mere scrivener's error, even though no evidence regarding the circumstances surrounding the drafting of the Agreement was presented, and
- Im knowingly breached the terms of this Well Maintenance Agreement, even though the Agreement (which, if read as written, burdens a different Parcel 2) was not expressly identified on the deed through which he took title to Parcel 1 and Gould did not raise the Agreement as a basis for well use rights after Im gave substantial advance notice of his intent to terminate the well connection.

Of course, the extraordinary equitable relief of reformation requires proof of mutual mistake as to the written words on the contract by clear, cogent and convincing evidence. *Neal v. Green*, 71 Wn.2d 40, 42, 426 P.2d 485 (1967){ TA \I "*Neal v. Green*, 71 Wn.2d 40, 42, 426 P.2d 485 (1967)" \s "*Neal*" \c 1 }. The standard of proof is so high that, if "any doubt exists as to the intent of the parties, reformation will not be granted." *Maxwell v. Maxwell*, 12 Wn.2d 589, 591, 123 P.2d 335 (1942){ TA \I "*Maxwell v. Maxwell*, 12 Wn.2d 589,

591, 123 P.2d 335 (1942)" \s "Maxwell" \c 1 } (emphasis added). Gould did not meet this standard. Gould most certainly did not establish that reformation is appropriate on summary judgment or that intentional breach of a reformed contract could be found as a matter of law.

Gould's response to Im's appeal is to argue the facts. Gould unilaterally labels all inferences that Im draws from the evidence as unreasonable and invites this Court to weigh and reconcile the evidence and inferences and summarily decide these issues that are not only normally deemed factual issues, but are in dispute in this case. However, in this Court's *de novo* review of the trial court's summary judgment findings, the law does not authorize the Court to weigh and choose between competing inferences. Instead, the law requires that the evidence be viewed in the light most favorable to Im. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490, 497 (2011){ TA \l "*Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490, 497 (2011)" \s "*Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490, 497 (2011)" \c 1 }{ TA \s "*Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490, 497 (2011)" }{ TA \s "*Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490, 497 (2011)" }. Application of the correct

standard to the evidence in the record compels reversal of the trial court's summary judgment findings.

- A. The evidence, view most favorably to Im, presents a material issue of fact regarding the Well Maintenance Agreement's drafter's intent.**

Once again, a prerequisite to the trial court's summary finding that Im knowingly breached the Well Maintenance Agreement was the trial court's finding that the drafter intended to describe a different parcel of land than actually described in the Agreement. Despite that contract parties' intentions are considered fact questions,<sup>1</sup> the trial court had to determine the Well Maintenance Agreement's drafter's intent as a matter of law.

Gould relies heavily on the fact that the well on Im's Parcel 1 has been connected to the Gould property for many years. From this fact, Gould infers that the drafter (Davis) must have intended to describe a different parcel when he drafted the Well Maintenance Agreement 20 years ago. Gould then oversimplifies Im's position and argues that Im exclusively relies upon the surveyor's testimony that the Im Parcel 2 (which the Well Maintenance Agreement actually describes as the burdened property) has "a surface well, connected underground

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<sup>1</sup> *Wm. Dickson Co., v. Pierce County*, 128 Wn. App. 488, 491, 116 P.3d 409 (2005).{ TA \j "Wm. Dickson Co., v. Pierce County, 128 Wn. App. 488, 491, 116 P.3d 409 (2005)" \s "Wm. Dickson" \c 1 }

by a vertical PVC pipe, approximately ten inches in diameter, with a four inch PVC pipe connected thereto.” (CP 227.) Gould unilaterally declares unreasonable the inference<sup>2</sup> that the drafter actually intended what was written (to include the Im Parcel 2 with the surface well) because the surface well is not approved for connection and could not be approved for connection under 2010 regulatory standards.

Gould ignores, however, that the well on Im Parcel 1 likewise does not have the requisite government approval for multiple connections. (CP 218, VT 229.) Gould further ignores that, at the time Davis court drafted the Well Maintenance Agreement, he was aware that government approval was required for connection to more than one single-family residence. (See CP 281.) Thus, the lack of

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<sup>2</sup> Gould points to *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 928 P.2d 1108 (1996){ TA \ "Molsness v. City of Walla Walla, 84 Wn. App. 393, 928 P.2d 1108 (1996)" \s "Molsness" \c 1 } to somehow support his claim that all of the Im's proffered inferences from the evidence should be rejected outright as unreasonable. *Molsness* has no application in this case.

There, the court was presented with a wrongful termination claim. The plaintiff had resigned from his position. Thus, as a precondition to proceeding with his claim, the plaintiff had to proffer sufficient evidence to overcome the legal presumption that the resignation was voluntary. 84 Wn. App. at 398. Prior case law established that, as a matter of law, the subjective belief that resignation was necessary to avoid termination is insufficient to rebut the presumption. *Id.* Only evidence that the employer knew or believed that termination could not be substantiated is sufficient to overcome the presumption. *Id.* at 398-99. The plaintiff failed to proffer such evidence and relied only on his subjective belief that the threatened employment termination was a pretext. In the absence of the required objective proof on a key threshold issue, his case was dismissed on summary judgment. This case addressed unique threshold proof requirements in wrongful employment termination cases and has no application here, where the heightened burden of proof is on the moving party.

government approval is a factor present for both wells and will not support summary judgment. Finally, Gould ignores the neighbor testimony in the declarations that Gould himself presented that the creek had historically been a source of water for residences in the area (CP 251) and that the well on the Im Parcel 1 had sometimes been insufficient to serve the three homes to which it was connected. (CP 255.) All of this evidence supports the reasonable inference that Daviscourt did not intend for the Well Maintenance Agreement to provide perpetual rights to the unapproved and sometimes inadequate well on the Im Parcel 1, but that it was drafted as intended. In any event, this evidence alone demonstrates that resolution of the factual question of Daviscourt's intent requires a trial and is not appropriately resolved summarily.

Finally, Gould does not respond to the fact that the declarations of the predecessor owners of the Gould and Im properties (CP 248-56) are completely devoid of any testimony that they were even aware of a written Well Maintenance Agreement. This fact also requires an inference that that the Agreement (which does not describe the Im Parcel 1) was not intended to apply to the well on the Im Parcel 1. Even Gould was unaware of the Well Maintenance Agreement until after Im disconnected the water and Gould requested a realtor to

research the issue. (See CP 283-85, 294-95.) Despite Gould's claim that the Well Maintenance Agreement was "of record," it appears that none of the owners succeeding Davis court were aware of its existence.

This case calls for a determination of the intentions of a party who drafted the Well Maintenance Agreement 20 years ago and is no longer living to testify regarding his own intent. Under such circumstances it is especially important to consider all inferences from the record evidence, all of which is circumstantial in nature. The trial court erred when it determined Davis court's intent as a matter of law and then re-wrote the Well Maintenance Agreement on summary judgment.

- B. The hearsay declaration testimony, to which an appropriate objection was made to the trial court, fails to establish that the legal description in the Well Maintenance Agreement was a scrivener's error.**

Perhaps recognizing the deficiencies in the proffered declarations from predecessor owners and Davis court's son, Gould claims that Im waived any objections to the declaration testimony as containing hearsay or lacking foundation on personal knowledge. Gould makes no effort to defend the declarations under the rules of evidence. Im did, however, object to the hearsay declarations in his response brief (CP 244) and the issue is properly reserved for appeal.

Even, if the declarations were wholly considered despite their evidentiary flaws, the declarations remain insufficient to prove, as a matter of law, that Davis court intended to describe a completely different burdened parcel in the Well Maintenance Agreement. No objection is necessary to preserve this challenge. As the court explained in *Parkin v. Colocousis*, 53 Wn. App. 649, 652-653, 769 P.2d 326 (1989){ TA \ | "*Parkin v. Colocousis*, 53 Wn. App. 649, 652-653, 769 P.2d 326 (1989)" \s "*Parkin*" \c 1 }:

However, the rule requiring objection to the affidavit should not apply in cases where the deficiency in the moving party's affidavit pertains to a lack of proof rather than evidentiary problems. Although there is no case law directly on point, the rules on appellate review form the logical basis for this proposition. When an appellate court reviews a summary judgment, the appellate court engages in the same inquiry as the trial court. *Hostetler v. Ward*, 41 Wash.App. 343, 346, 704 P.2d 1193 (1985){ TA \ | "*Hostetler v. Ward*, 41 Wash.App. 343, 346, 704 P.2d 1193 (1985)" \s "*Hostetler*" \c 1 }, *review denied*, 106 Wash.2d 1004 (1986).

The declaration of predecessor owners and Davis court's son are insufficient to prove Davis court's intentions as a matter of law and the trial court improperly decided the issue on summary judgment.

**C. The trial court's action to re-write the Well Maintenance Agreement was not a minor correction of a scrivener's error.**

Gould next defends the summary judgment by arguing that the trial court's reformation was minor. It merely corrected the legal description, a correction Gould claims is commonly made through reformation. Gould seems to imply that reformation to revise a legal description is always tantamount to correction of a scrivener's error.

The legal description of the property burdened by an easement is not, however, and immaterial contract term. See *Berg v. Ting*, 125 Wn.2d 544, 549, 886 P.2d 564 (1995){ TA \l "*Berg v. Ting*, 125 Wn.2d 544, 549, 886 P.2d 564 (1995)" \s "*Berg*" \c 1 }. Moreover, none of the reformation cases cited by Gould involved cases in which the trial court reformed the contract on summary judgment. As important, in none of the cases did the trial court reform a contract where the original parties to the contract were not available to testify regarding their intentions and the circumstances surrounding the drafting of the agreement.

Our Supreme Court appropriately emphasized the reason for the high burden of proof for reformation and instructed courts to be especially cautious of reforming a contract where the circumstances have changed since its creation:

In the exercise of their jurisdiction to reform written instruments courts of equity proceed with utmost caution, particularly where subsequent to the execution of the instrument sought to be reformed, there have arisen new circumstances which might have some bearing upon the question of whether or not there was a mutual mistake. This rule is reflected by the degree of proof required by the courts upon which to base a decree.

It is pointed out in *Puget Mill Co. v. Kerry*, 183 Wash. 542, 49 P.2d 57, 100 A.L.R. 1220{ TA \l "Puget Mill Co. v. Kerry, 183 Wash. 542, 49 P.2d 57, 100 A.L.R. 1220" \s "Puget" \c 1 }, that such a decree will never be granted upon a probability, but only where the evidence is clear and convincing.

The rule was succinctly stated in the recent case of *Marks v. Mike Scaler's, Inc.*, 2 Wash.2d 277, 97 P.2d 1084, 1086{ TA \l "Marks v. Mike Scaler's, Inc., 2 Wash.2d 277, 97 P.2d 1084, 1086" \s "Marks" \c 1 }, where it was said: 'In considering this case, we have in mind the principle of law relative to the reformation of written instruments as laid down by former decisions of this court to the effect that, in order to justify judicial reformation, the party claiming the equity must sustain the burden of producing clear, cogent, and convincing evidence of mutual mistake in the drafting of the instrument, and of what was the true agreement and intention of the makers.'

*Martin v. Momany*, 26 Wn.2d 379, 383-384, 174 P.2d 305 (1946){ TA \l "Martin v. Momany, 26 Wn.2d 379, 383-384, 174 P.2d 305 (1946)" \s "Martin" \c 1 }.

Reformation of the Well Maintenance Agreement that was drafted 20 years prior by parties who are strangers to the lawsuit and unavailable to testify was not a minor action. The passage of time, change in ownership, and failure to implement contract terms (e.g. sharing operating and maintenance costs) are all changed circumstances that need to be considered and weighed before a decision on reformation can be made. The trial court's reformation did not simply correct a typo or slightly revise the legal description written. Here the reformation burdened a wholly different parcel than the one described and affected rights of people who were not original parties to the Agreement. The cited law does not support the trial court's reformation of the Well Maintenance Agreement on summary judgment.

For example, in *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 483 P.2d 372 (1962){ TA \ "Tenco, Inc. v. Manning, 59 Wn.2d 479, 483 P.2d 372 (1962)" \s "Tenco" \c 1 }, there was no dispute between the parties regarding the property that was supposed to be the subject of a certain earnest money agreement. In fact, it was the trial judge, not the contract parties, that discovered that that the legal description erroneously covered more property than intended. *Id.* at 481-82. Even then, the trial court did not use parole evidence to reform the contract

to be consistent with the parties' undisputed intent until after a trial on the merits.<sup>3</sup> *Id.* at 482.

In *Meyer v. Young*, 23 Wn.2d 109, 159 P.2d 908 (1945) { TA \l "Meyer v. Young, 23 Wn.2d 109, 159 P.2d 908 (1945)" \s "Meyer" \c 1 }, the decision to reform once again followed a trial in which the parties to the original contract were available to testify. Based on the testimony and evidence presented at trial, the trial court found that the legal description in the contract was used to perpetuate a fraud. After making this finding, the trial court reformed the legal description to comport with the representations made by the seller and deny the seller profit from her fraudulent conduct. 23 Wn.2d at 113-14.

In *Martin* { TA \s "Martin" } v. *Momany*, *supra*, the trial court was once again had the benefit of testimony at trial from the parties to the original agreements. 26 Wn.2d at 381-83. The trial court reformed a lease agreement to conform to the parties intent only after hearing testimony from the parties to relevant agreements and concluding that the testimony, by clear, cogent and convincing evidence, established that all of the parties were "fully acquainted with the intention" of the agreement. *Id.* at 384.

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<sup>3</sup> The trial court granted partial summary judgment on another issue, however, it did not reform the contract to correct the legal description until after the trial. 59 Wn.2d at 482.

Finally, in *Dennis v. N. Pac. Ry. Co.*, 20 Wash. 320, 55 Pac. 210 (1898){ TA \l "Dennis v. N. Pac. Ry. Co., 20 Wash. 320, 55 Pac. 210 (1898)" \s "Dennis" \c 1 }, the trial court reformed a deed to include a reservation of a 400-foot wide strip that was mistakenly omitted from the deed. At trial, testimony was presented to explain the scrivener's error. A standard form was used, however, the wrong section of the form was utilized for the conveyance. Had the correct section of the form been used, the form would have prompted the scrivener to include a reservation. 20 Wash. at 322-23. There was no real disagreement regarding the intention of the parties and affirmative evidence was proffered to explain how the scrivener's error arose. The court ultimately concluded that there was clear and convincing evidence that the deed did not express the real agreement between the parties. *Id.* at 328, 336.

While scrivener's errors in legal descriptions may lead contract reformation, such reformation has only occurred after a trial where testimony from the original parties to the agreement was considered, there was no real dispute regarding the true intentions of the parties and the circumstances surrounding the drafting were presented. Such was not the case here. The trial court did not have sufficient evidence to reform the Well Maintenance Agreement. It certainly did not have

sufficient evidence to reform the Agreement summarily as a matter of law.

**D. The trial court's summary judgment "finding" that Im knowingly breached the Well Maintenance Agreement improperly ignored contradicting evidence that must be construed in the light most favorable to Im.**

On this issue, Gould repeatedly states that Im intentionally disconnected Gould's home from the well on the Im Parcel 1. Im's act of disconnecting the well was, indeed, an intentional action. It was an action taken only after providing more than three weeks notice to Gould and, despite receiving the notice, a failure by Gould to respond. (CP 283-84, 289, 294, VT 219, 261, 251-52, 216-17.) Im's act of disconnecting the well does not, however, translate to a knowing and intentional breach of the Well Maintenance Agreement.

The trial court's finding that Im knowingly breached the Well Agreement was, once again, a finding made on summary judgment, despite that Im denied knowledge of the Agreement at the time the well was disconnected. The trial court explained the scope of her summary judgment ruling:

So in making its order for summary judgment, the Court included the issues of knowledge on behalf of Mr. Im and would have had to when you look at the entire case. It's not logical not to have looked at it. And the Court did in fact look at it. And in fact in reconciling all the evidence the Court remembers distinctly getting

the seller disclosure and remembers that in the seller disclosure form...

So in looking at all the evidence, the Court obviously looked at the issue of knowledge.

(VT 57-58.)

Thereafter, the trial court refused to allow Im to present testimony at trial regarding his knowledge, even though the issue of whether his breach was willful remained to be decided. (VT 54, 48, CP 135-36.) The trial court stated that it already “heard” evidence on this issue and would not receive evidence duplicative to that “heard” on summary judgment. *Id.* Gould makes no response to Im’s challenge that the trial court’s order in limine denied Im a fair trial on the issue of whether he willfully breached the Well Maintenance Agreement.

Moreover, whether Im knowingly breached the Well Maintenance Agreement was a disputed issue of fact not appropriately decided on summary judgment. It was error for the trial court to “reconcile” the evidence in a summary proceeding.

Substantial evidence was presented to create a genuine issue of material fact regarding Im’s knowledge and whether he knowingly breached the agreement. First and foremost, Im testified that he did not believe that the Well Maintenance Agreement applied to his Parcel 1. (CP 228-30, 275-77.) The Agreement did not describe the Im

Parcel 1 and the Agreement was not expressly identified on his deed. (CP 290, 232-34.) Despite a promise by Gould's contractor to research the issue, neither Gould nor his representatives presented the Well Maintenance Agreement in response to Im's notice or a basis for continued well use. (CP 294.) It was only after the well was disconnected that Gould finally researched the issue and discovered the Well Maintenance Agreement himself. (CP 295.)

The extraordinary remedy of reformation is a remedy provided only by a court sitting in equity. *J.J. Welcome & Sons Const. Co. v. State*, 6 Wn. App. 985, 988, 497 P.2d 953 (1972){ TA \ | "J.J. Welcome & Sons Const. Co. v. State, 6 Wn. App. 985, 988, 497 P.2d 953 (1972)" \s "J.J. Welcome & Sons Const. Co. v. State, 6 Wn. App. 985, 988, 497 P.2d 953 (1972)" \c 1 }. A court sitting in equity that reforms a contract, must also do equity when subsequently deciding if damages are an appropriate remedy for breach of a newly reformed contract. Once again, Im was not an original party to the contract that was drafted many years before he purchased his property. The Well Maintenance Agreement was not expressly noted on his deed and the review of the public records would only disclose an Agreement that describes a wholly different burdened property.

Whether Im knowingly breached the Well Maintenance Agreement is a question that may only be answered following a trial. The trial court's finding that Im knowingly breached the Well Maintenance Agreement as a matter of law was error.

**II. A New Trial Is Required On The Issue Of Damages.**

**A. If summary judgment is reversed, a new trial on all issues is required.**

Gould does not respond to Im's argument that, if summary judgment is reversed, a new trial should be conducted on all issues. All of the issues are interrelated, especially since breach may only be found if the equitable remedy of reformation is granted. Full evaluation of all issues in this case may only be accomplished in the context of complete and un-bifurcated trial testimony. Upon reversal of the summary judgment, the entire case should be remanded for a complete new trial on all issues.

**B. The trial court misapplied the law requiring that awarded damages be foreseeable.**

**1. The issue of foreseeability was before the trial court.**

Unable to dispute Im's correct statement of the law on foreseeability of contract damages, Gould argues that Im failed to raise the issue to the trial court. Notably, Gould acknowledges that Im

raised the issue of foreseeability to the trial court. (Response Brief at p. 26, citing VT 141-45.)<sup>4</sup> Gould nonetheless argues that the issue was not preserved because, despite express direction in the general common law on contract foreseeability, Im did not expressly advise the trial court that it was not following the common law on contract damages.

Gould misapplies the law that governs preservation of issues for appeal. The case law cited by Gould establishes that, so long as the trial court had sufficient notice of the general issue, the issue is properly preserved for discussion on appeal. See *Osborn v. Public Hospital Dist. I, Grant County*, 80 Wn.2d 201, 206, 492 P.2d 1025 (1972){ TA \l "Osborn v. Public Hospital Dist. I, Grant County, 80 Wn.2d 201, 206, 492 P.2d 1025 (1972)" \s "Osborn" \c 1 } (holding statutory safety standards not raised to trial court may be raised on appeal since general issue of duty of hospital safety was before the trial court); *East Gig Harbor Imp. Ass'n v. Pierce County*, 106 Wn.2d 707, 710, 724 P.2d 1009 (1986){ TA \l "East Gig Harbor Imp. Ass'n v. Pierce County, 106 Wn.2d 707, 710, 724 P.2d 1009 (1986)" \s "East Gig Harbor" \c 1 } (holding that issue standing could be raised on appeal even though not clearly framed for the trial court); *Lunsford v.*

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<sup>4</sup> See also VT 283-85.

*Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007){ TA \I "*Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007)" \s "Lunsford" \c 1 }(holding appellate court has discretion to consider issues arguably related to issues presented to the trial court.)

Im relies on the most basic and general rule regarding damages that may be awarded in contract: "Damages for breach of contract in this state can be recovered only for such losses as were reasonably foreseeable by the party to be charged, at the time the contract was made." *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 6, 390 P.2d 677 (1964) (emphasis added){ TA \I "*Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 6, 390 P.2d 677 (1964)" \s "Larsen" \c 1 }. See also, *Lewis v. Jensen*, 39 Wash.2d 301, 235 P.2d 312 (1951){ TA \I "*Lewis v. Jensen*, 39 Wash.2d 301, 235 P.2d 312 (1951)" \s "Lewis" \c 1 }. Im raised the issue of foreseeability to the trial court and is thus authorized to request this Court to review the trial court's findings (or lack of required findings) in the context of the general law on contract damages.

2. There is both a failure of proof regarding foreseeability, as well as an absence of requisite findings.

Gould does not deny that the trial court presented no findings with regard to whether the damages awarded were foreseeable to Daviscourt at the time he executed the Well Maintenance Agreement. Gould argues that the remedy for the omission is not a new trial, but a remand to the trial court to make findings on the issue. The remedy proposed by Gould is not viable, however, since he points to no evidence in the record that would support any finding regarding the damages foreseeable to Daviscourt in 1991. A new trial, with relevant evidence on the issue is required.

Gould next argues that it would be foreseeable to Daviscourt that, without water, the connect Gould home could not be sold. Gould is too myopic in his response. The issue is whether it could reasonably have been foreseen that breach of the Well Maintenance Agreement could lead to exorbitant damages that flow exclusively from an extraordinary economic down turn. Damages flowing from extreme and unexpected market fluctuations could not reasonably be foreseen as a consequence of breach. Regardless, the trial court was not presented with evidence on the issue and did not make the requisite finding. The damages award that includes a substantial award based

upon the unanticipated market fluctuation is not supported by the trial court's findings or the substantial evidence in the record.

**C. The trial court's damages award is based upon improper speculation.**

Here Gould argues that his proffered expert testimony, in the absence of competing and contradicting expert testimony, must be accepted on its face. It would appear that Gould argues that, without contradictory expert testimony, his experts' testimony cannot be scrutinized for improper speculation. Gould offers no authority for this proposition.

Moreover, Gould's response focuses on the realtor's listing and sales price ratios. But he fails to address the fact that, in the absence of speculation, it is impossible to conclude that, even if the water had never been disconnected, the Gould home could have been completed and sold in 2007.

Im disconnected the water on September 17, 2007, near the end of the extraordinary anomaly year that Gould claims he was denied the opportunity to exploit. At that time, the remodel was not yet complete and, as explained in detail in the opening brief, would not likely not have been completed for another two months. It is highly speculative that the house could have been completed, listed,

marketed and sold before the close of 2007, much less that it could have been sold for \$1.6 million.

According to Gould, the opportunity to sell at the height of the market ended with 2007. It requires great speculation to conclude that the Gould home could have been completed, listed and sold by the 2007 yearend. The trial court's award of damages, which is largely based on market fluctuation, was impermissibly based upon speculation that the home would have sold before the sharp residential market correction.

### III. CONCLUSION

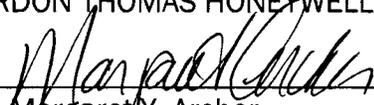
This court should reverse the trial court's summary judgment order and remand the matter for a new trial on all issues.

Dated this 17 day of January, 2012.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By

  
Margaret Y. Archer

Attorneys for Appellants Im

WSBA No. 21224

COURT OF APPEALS  
DIVISION II  
12 JAN 17 PM 4:43  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 17th day of January, 2012, I did  
serve via method indicated below), true and correct copies of the  
foregoing by addressing and directing for delivery to the following:

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