

Court of Appeals No. 42524-6-II

Lewis County No. 11-2-00574

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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JOHN J. HADALLER

Appellant

v.

DAVID A. and SHERRY LOWE, individually

and the marital community thereof;

and RANDY FUCHS, An individual;

Defendants

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APPELLANT'S BRIEF

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## I. INTRODUCTION

This case is the fifth of five cases (third on review) involving the actions of substantially the same parties. In this case David A. and Sherry Lowe (Lowe), Randy Fuchs (Fuchs) are defendants / respondents John J. Hadaller (Hadaller) is plaintiff / appellant.

This case involves substantially the same properties as the other four cases. They are the last large pieces of undeveloped land next to Mayfield Lake shoreline which became zoned for development into smaller lots shortly after Hadaller bought two of the three parcels involved in the six year long dispute. Hadaller negotiated for a first right of refusal on the third (lot two) as a condition to buy the other two,(lots one and three)<sup>1</sup> however, even though the first right of refusal writing was overlooked by the realtor drafting the addendum to the lease/purchase option agreement, when Hadaller first purchased the lots, vender (Fortman) and purchaser (Hadaller) both continually operated under and many times used the existence of it to further the improvements to the subject land. Hadaller borrowed and invested heavily into the project from January 2002- October 2007<sup>1</sup> while operating under the continued acknowledgment of the first right of

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<sup>1</sup> Legally described as Lot 1, 2,3 of segregation survey recorded September 17,1991 under Auditors File No. 9110392 in volume 10 of survey's page 46. Lewis County, WA. Located in the SW quarter of section 21, township 12 N Range 3 E.W.M. Lots 1 and three ewere bought by Hadaller and developed into Mayfield Cove Estates. Lot 2 was bought by the Lowes and that act is the subject of this case.

refusal to buy lot 2 from the original seller, William and Katherine Fortman Trust (Fortman). At the time of the 2001<sup>2</sup> original sale the Fortman's were very negative the property could be zoned for development and the shoreline designation would be able to be changed. Hadaller bought the property with a risk the property was going to be developable and if he may become successful obtaining development rights and in changing the shoreline designation to allow docks. Although prior to sale, Fortman was informed the zoning was changing to be developable. Once Hadaller showed success, Fortman became very regretful of making the original deal and avoided Hadaller's 2004, and 2005 purchase offers. Never the less he acknowledged the first right, by informing Hadaller when he received a huge cash offer to buy lot two offer from Fuchs. Fuchs later abandoned the sale and Fortman allowed Hadaller's offer expire.

One year later, when Hadaller completed phase two of Mayfield Cove Estates, platting lot three, Lowe ( an attorney) appeared out of the blue, unsolicited by any advertising, bought all three freshly developed lots Hadaller had for sale, befriended Hadaller, gathered information, then soon after bought lot two from Fortman under (mis) representations to Hadaller it would be mutually beneficially owned

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<sup>2</sup> Purchase and sale agreement was signed December 5,2001 amended on January 2,2002 and recorded January 17, 2002

by the two of them. Inevitably that fact became the elements of Hadaller's claims.

Hadaller attempted in another co-pending case to use the covenant he relied upon to protect his investment to obtain equitable redemption of his investment from the Lowe's. The Court found the covenant invalid and Hadaller moved for joinder of these claims of misrepresentation and tortious interference against the Lowe's, first in the Fortman case, where it needs to be, or alternately Fortman joined into this case, which the Trial Court denied. Thence, during the quiet title trial, (two years and 364 days after the Lowe's recorded the sale) Hadaller filed the summons and complaint for this suit.

The Lowe's moved for summary judgment swiftly in this case, which the court granted by what should be reversible error. Fuchs subsequently filed for summary judgment which was granted. This appeal is brought as a result.

## **II. ASSIGNMENTS OF ERROR**

**No.1** The Trial Court committed reversible error when it found that Honorable Judge James Lawler should not be required to recuse himself from hearing this case.

**No.2** The Trial Court committed reversible error when it found that Hadaller's claims filed against the Lowe's are time barred by the three year statute of limitations for misrepresentation and tortuous interference of contractual relations.

**No. 3** The Trial Court erred in its finding in the summary judgment proceeding that no genuine issue of material fact exists supporting the elements for Hadaller's claim for tortuous interference of contractual relations/misrepresentation, damages/specific performance.

**No. 5** The trial Court erred by awarding attorney fees under CR 11

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**No.1** The Honorable Judge James Lawler had previously recused from hearing two co-pending cases involving the Fortman Trust, who was his law firm's client when he was a partner of the firm. Fortman is his recent past law firm's present client representing them on the issues of the property at issue here and had been continually since and while Judge Lawler was a partner. The concerning fact is the co-pending case must be consolidated with this case to obtain complete relief. Hadaller moved for recusal under the "appearance of fairness doctrine" from this case too. He denied that motion.. The very next hearing he dismissed Hadaller's suit against the Lowe's by summary judgment, thus effectively avoiding any further adverse effect for his

ex law firms present client in the ongoing cases. Did the Court abuse its discretion by not considering the appearance of fairness doctrine indicating a possible view of prejudice? Should the Honorable James Lawler have recused himself and should the subsequent orders he signed be vacated?

**No. 2** Hadaller's claims were filed against the Lowe's on May 13,

2011, two years and 364 days after the Lowe's recorded the subject real estate purchase. His claim manifested later, depending on the date this Court holds the accrued. Did the Trial Court error in law by contradiction of precedent that holds the statute of limitations begins when the representations manifested into elements of misrepresentations actionable by Hadaller? Or, did it begin to run on May 9, 2008? The day the Trial Court found.

**No. 3** Did the Trial Court error granting summary judgment, finding:

(a) Did a genuine issue of material fact exist supporting a contract existed between Hadaller and Fortman when it was shown Fortman made a previous admission, in a deposition under oath, admitting, reconsidering and reaffirming the truth in the repeated question that he granted a first right of refusal to Hadaller on lot two, while Hadaller also showed and all parties admit, that Hadaller specifically performed his duties to Fortman when he substantially developed the lots, under the promise over a five year period while

Fortman continued to acknowledge the existence of the first right of refusal, creating a contract existing outside of the statute of frauds by promissory estoppels and part performance. Did the Trial Court error by finding Fortman's subsequent, contradictive statement rescinding his first admission, precludes a finding a contract was ever formed, thus no genuine issue of that contract's exists?

(b) Is it error to find by summary judgment, that the Lis Pendens, the declarations and other pleadings filed in the co-pending Fortman case, this case and the disclosure in the purchase and sale agreement did not raise a genuine issue of fact to be heard at trial whether the Lowe's knew of the existence of the Fortman/Hadaller agreement?

(c) Is it error to find there was no genuine issue of fact of an improper purpose that may support that element of interference, when two declarations were filed and the Lowe's even admitted to the discussions that gleam of misrepresentation? Is it relevant that Hadaller moved for and was denied a continuance of the summary judgment proceeding, which summary judgment was filed shortly after the answer, to allow discovery to produce more evidence, that is certain to be available, regarding their stated plan to come to an agreement, then instead of attempting to, or coming to that proposed agreement turning the other way and secretly forming a new

homeowners association and record themselves the easement, which they originally proposed to Hadaller to trade for to get Hadaller to drop his guard and go along with the misrepresented agreement?

(e) Is it error to find that Hadaller did not demonstrate a genuine issue of fact exists that the Lowe's and Fuchs' actions has damaged him, when he plead by declaration and the parties have acknowledged Hadaller expended his money and labor to build the roads and utilities and platted the Mayfield Cove Estates development for five years, expecting to be reimbursed from the proceeds of him obtaining and selling the lots possible from subdivision of Lot 2?

### **III. STATEMENT OF THE CASE**

This case resulted in an order denying recusal (CP 69, 70) and then granting summary judgments (CP 218-220 & 373-372) dismissing the complaint. The summons and complaint were served May 12, 2011 (CP 471) and filed on May 13, 2011 (CP 3) against the Lowe's. The same parties were ending a seven day trial in co-pending case No 09-2-00934-0 and post trial motions were pending, the findings and conclusions had not been entered and were being argued in that other case's trial. This case's complaint was filed at that time in consideration of any argument in regards to the statute of limitations, because the property sale in this dispute was recorded on

May 14, 2008. (CP96 ¶ 37) (CP131) One day short of three years before the complaint was filed and served in this case. The Lowe's filed a motion for summary judgment July 1, 2011, prior to any discovery being afforded due to the previous stated facts. Hadaller requested a continuance to the summary judgment in his response to allow for discovery. (CP199 L.6) (RP Pg 12 L.5-15)

### **Facts Re: Recusal Of Judge Lawler**

Hadaller immediately asked Judge Brosey to recuse himself as a matter of right, because he appeared to assist the opposition to avoid admission of very important relevant evidence and testimony in the previous cases that was central to their outcome and is the matter of the appeals of those. (CP 67 L.15- CP 68 L5) ( CP 39)(41 L.15-21) (CP 41 L.21-24) (CP47-63) Also Judge Brosey was asked, by Hadaller, to recuse because of the unwarranted obviously prejudicial statements such as, "Your actions are legalized terrorism" which Lowe has been singing like a number one tune since. Lowe has not filed a brief without a paragraph on that "provision", since. Hadaller feels that was an inappropriate statement to a citizen simply attempting to protect his investment and now his home from the underhanded hostile invasion the Lowe's and Fuchs' are attempting and another statement made by Judge Brosey that same week, at the end of the quiet title trial, "Fortman would not sell lot two to you for any

amount” which statement came in a co-pending case without trying any facts, or evidence related to whether Fortman had a legal obligation, or whether Fortman was or was not justified in that statement. Perhaps he was tired of the pro se litigator<sup>3</sup> and his “quite wordy” opponent that had been in his court to many Fridays since early 2009.

Hadaller filed a motion for judge Lawler to recuse from this suit based upon the fact that his recent ex law firm continues to represent a party that must be joined to obtain complete relief, the Fortman Trust. Judge Lawler has recused from both of the other two suits that his former partner and client are presently involved in. Hadaller also had negative personal relations with attorney James Lawler, when attorney Lawler made negative opinions in an interview with Hadaller for his 2001 divorce, because attorney Lawler had camped at Hadaller’s campground and only saw then Mrs. Hadaller working in it. ( Hadaller worked weekends too, in construction to pay for it) Accordingly, Attorney Lawler made opinions Hadaller did not agree with and flatly told him so and walked from his office and hired a competing attorney. Judge Lawler’s demeanor towards Hadaller in the few other previous hearings against Hadaller, coupled with his relationship with an opponent, caused Hadaller to feel very uncomfortable with him as “an unbiased referee.” (CP 22-23) (CP 28 l30-35) ( CP 32 L.1-4) (CP 29

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<sup>3</sup> Lowe ran Hadaller out of money for attorney fees in late 2009

L. 12- CP 30 L. 2) The only other Superior Court judge in Lewis County is Nelsen Hunt ,and is acceptable to Hadaller, has recused (CP469) himself from all these cases because he represented Hadaller in a dispute against Tacoma Public Utilities, regarding obtaining rights to use the shoreline next to the properties in this dispute. Hadaller is of the mindset either Judge Hunt should be appointed, or a judge be brought in from a neighboring county, or the matter should be heard in a Thurston or Cowlitz County Court.

**Facts Re: Merits of the claims of this case**

This case's complaint stemmed from facts arising from a last large parcel of land that was recently zoned, (July of 2002) for subdivision on a very popular recreational Lake in Lewis County, Mayfield Lake. The desire to cash in on what once was a potential lucrative development forced the Courts, to consider a plethora of legal principles, and some pretty underhanded facts, by a competing developer and his attorney partner. This case stems from facts directly or indirectly common to four previous suits.<sup>4</sup> The legal principles

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<sup>4</sup> The four preceding it in the Trial Court 09-2-00052-1 ( the Homeowners Association suit where David Lowe effectively took over the Mayfield Cove Estates Homeowners Association (HOA) and sued Hadaller in the name of the HOA) case No. 09-2-00711-8 ( The Rockwood suit where David Lowe negotiated with the Rockwood's, an owner in Mayfield Cove Estates to sue their neighbor, Hadaller, in exchange they obtained \$58,900 off the price they owed for the lot to Hadaller upon which Lowe's \$58,900 of fees were traded to the Rockwood's for an easement across their portion of a road that accesses lot 2, this is incidental and not directly relevant fact here) Case No. 09-2-00934-0 ( The Quiet Title Suit, where Hadaller sued the Lowe's, Fuchs and other related owners for quiet title, declaratory

being asked ,for a decision, in the review of this suit are be based upon misrepresentation, interference the Lowe's have engaged in with Hadaller's agreement with the Fortman's to buy their land and the damages resulting there from. (CP 3-21)

**Facts Re: Tortious Interference Of Contractual Relations/**

**Misrepresentation**

**An oral contract legally exists**

The underlying facts supporting the first element of tortuous interference of contractual relations, which is, a contract exists, in the first place, was an existing, ongoing, first right of refusal, that obligated Fortman to allow Hadaller to first match any offer to purchase lot two for the price Fortman could obtain for lot two. That was a part and condition of the terms of the sale of the two, six acre lots, ( lot 1 and 3) on each side of lot two, when Fortman sold them to Hadaller in January 2002. (CP104, 105 ¶1) ( CP169-172) That fact

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judgment for trading the easement descriptions and to confirm the standing of the CCR's he recorded with the created the platted lots that are Mayfield Cove Estates) to a suit the Appellate Court (40426-5-11, 41818-5-II, and 42835-1-II ). (The Fortman case 9-2-01146-3) Hadaller sued Fortman for reformation of a deed, Fortman sued two other third parties who sued Hadaller to move the easement accessing lot two over to the new road which is still pending in the Trial Court on the issue of misrepresentation and damages by Fortman

was orally admitted (CP 105¶5,106) (CP 122 L.12-23) and when asked again he acknowledged so ( CP 122 L.25- CP123 L. 16) and was an ongoing leveraging position for the Fortman's to get the most out of their land, which they urged Hadaller to continue improving for them, assuring Hadaller he was going to reap what he had sowed. (CP 170L.20-CP 171 L.22) (Cp 154L.28-42) (CP105L9- CP 106 L.7) While at the same time, Hadaller was attempting to convince Fortman to sell the land to him for at most an equitable amount commensurate with their original agreement. This went on from 2002 - 2008. ( CP 106 L.11-CP 107 L.3) ( CP108 L.21CP112 L.4) ( CP113 L.1-3)

**The original agreement was negotiated in 2002** through

Fortman's listing Realtor, Robert Kling,(Kling) (CP 169 L.30) who signed a dual agency agreement with each party during negotiating the sale.(CP170 L5-7) Hadaller's first offer was to buy two lots and his possible partner, buy one. His potential partner backed out of the sale and Hadaller decided he could only afford to buy two lots. His first choice was lots two and three of survey. Hadaller called Kling and informed him of that decision late in December 2001. (CP 170 L.11-13) Fortman, Kling and Hadaller met January 2, 2002 and after hours of negotiation to convince Hadaller to somehow take all three lots. (CP170 L.14) it concluded in Kling's office that Hadaller would buy lots one and three for \$66,333.33, each and held an exclusive right to buy lot two for \$66,333.33 for two years, then the set price was to be

removed, but Hadaller retained a right to first match any price Fortman may obtain from it. Hadaller felt comfortable the price was equitably restricted because of the 30 foot wide easement accessing lot two from the county (Wallace) road, was restricted by county code to a single home site. Fortman was aware of that when he sold the other two lots to Hadaller and that was the terms that created the checks and balances for each parties interest. On the other side Fortman was not limited to any amount except the functionally obsolescent (for subdivision) easement. Fortman was negative about the county ever allowing development anyway. (CP 171L.5-20) Under that agreement, Hadaller decided to buy lots one and three and attempt a larger development instead of his original conservative plan to buy lots two and three and only develop lot two, saving all of lot 3 for his own family's enjoyment. (CP170L.15-CP171 L.19) The idea of the agreement being bound within a two year lease was suggested by Kling and the terms of the lease were discussed and written into a nebulously drafted addendum to the purchase and sale agreement on January 2, 2002. Kling took notes and jotted them down on the addendum the parties then signed, then drafted a lease agreement, that was not signed by Hadaller at closing, because Kling had left out the final price of the property. (CP 171 L.20-CP 172 L.2)

Hadaller closed the sale of lots one and three, had his attorney draft a

new agreement and Fortman refused to sign that, then immediately denied the existence of a lease, but orally agreed that Hadaller held the right for first refusal and had continued that agreement orally, reiterating it several times over the next five years and partially performing it in 2006 (CP104, 105 ¶1) (CP169-172) (CP 105¶5,106) (CP 122 L.12-23) (CP 122 L.25- CP123 L. 16)

In late 2003, the County approved and Hadaller recorded his first plat. He immediately sold one lot for \$70,000.00 and offered another for sale for \$75,000.00, which sold in December 2004. At that time, Hadaller offered \$80,000.00 for lot two. Fortman refused the offer. (CP 106 L.11-18)

In November 2005 Hadaller approached Fortman and asked him what he wanted at that time for lot two. That was done at that time because Hadaller had some cash from a line of credit on the home at 145 Virginia Lee Lane and Deborah Reynolds had obtained possession of her marital estate, including a mini farm with sufficient equity to apply towards purchasing and platting lot2 (CP 108 L21- CP 109L. 19)

#### **Work completed after confirmation right to purchase in 2005**

Hadaller was contemplating completing another plat on lot three, the opposite side of lot two from the first plat, meaning he would have to build the very expensive county spec road across lot

two. In contemplating the expense, it became obvious the cost was more than the net return would be from the three future lots that would derive from the development. Accordingly, he approached Fortman and negotiated to buy the property, because Hadaller wanted to be sure his investment was not going to be lost. They agreed upon \$140,000.00 as the purchase price. Hadaller was able and willing to buy, but Fortman backed out of the deal in December 2005, stating he didn't want the capital gains tax liability he would be facing at the time because he could not find another property to roll the proceeds into. Fortman did promise he would freeze that price and consider Hadaller would be the guaranteed next owner. Because it was the first time and was about the price Fortman had been asking, Hadaller felt he could trust Fortman to his word and proceeded to build the road to accommodate 18 more home sites (12 on lot two, six on lot three) (CP 513 L.24- CP 514L8) and divided lot three, which he would not have done had Fortman not made the promise to sell lot two to him before any other for the equitable amount of \$140,000.00. Besides that, Hadaller relied upon the easement conditions and a covenant to the CCR's that held he was the only person that could add property to the road thus; no one but Hadaller could access lot two for development but himself. (CP 108 L21- CP 109L. 19)

**Fortman confirmed the first right of refusal in 2006**

Nine months later, August 2006, Fuchs offered Fortman

\$200,000.00 for lot two. Fortman came to Hadaller and asked if Hadaller would match the offer. Hadaller asked Fortman what happened to our \$140,000.00 agreement, Fortman replied, "It was not in writing so it is nothing." Hadaller was in the middle of building the road and deep into debt, but obtained a partner under the conclusion half the lot 2 was better than losing it all, or getting into a law suit. Hadaller/ D&R placed a matching offer. (CP210 -217) Immediately after Fuchs obtained the title report confirming what Hadaller had told him many times, that the original property easement would not support more than one home site on lot two. Fuchs quit the sale September 15, 2006. Fortman allowed Hadaller's/ D&R's \$201,000.00 matching offer to expire by seven days before Hadaller replaced his offer with an offer for \$180,000.00, which was closer to what he had been arguing to Fortman for years. Hadaller's opinion that if Fuchs would not buy the lot, nobody else would pay that amount and he chose to wait until he built his personal home as he and Fortman had previously agreed it would happen and expected Fortman would come back around to his original promise by then. (CP109L.20- CP. 1121.4) (CP210 -217)

**Fortman admits he granted a first right of refusal in 2007**

On August 22, 2007, Fortman was deposed under oath by the

attorney for the third parties, (Schlosser and Greer) that were being sued by Fortman and they in turn were suing Hadaller to move the 30 foot single residence easement to the new road, Virginia Lee Lane. Fortman was asked if he and Hadaller had an agreement of a first right of refusal? Fortman said “yes”, when again asked by the attorney if he had given a first right of refusal. **He again answered, “yes” he did give Hadaller a first right of refusal.** (CP 105¶5,106) (CP 122 L.12-23) and acknowledged so. (CP 122 L.25- CP123 L. 16) Fortman’s attorney came back shortly thereafter and attempted to alter Fortman’s testimony several times and Fortman did not seem to understand how he was attempting to being led out of his admission, which was never denied until after he had sold the property to Lowe in 2008. at which time he signed a declaration in his and Lowe’s support.

### **The Lowes begin their interference/ misrepresentaion**

One year later, shortly after Hadaller had recorded the plat of the large lot three, October 4, 2007, David Lowe called Hadaller out of the blue and stated he was searching on Google and found the lakes around Mossyrock and called Riffe Lake Campground, which was owned and built by Hadaller previously and then owned by his ex-wife, who stated Hadaller had some lots for sale in the course of their conversation and gave him Hadaller’s number to call, (CP 112L.12 18) which should have raised a big red warning flag because Fuchs had

previously asked Hadaller what he wanted for the whole project. Hadaller told him he would only trade this project for Riffe Lake Campground, which was for sale, otherwise the Mayfield property was not for sale. (CP 13 L.2 [FN2]) David Lowe came and viewed the property and bought both lots and a home on a third lot Hadaller had developed for sale and left in a matter of a few hours. (CP 112L.12-18) The terms of the sale were \$190,000.00 down and \$110,000.00 carried on a \$1,500 real estate contract<sup>5</sup>. David visited the property in the winter of 2007-08 and befriended Hadaller. (CP112 L.19-20) Hadaller thought he was just another guy and was helpful with where and how to take his kids fishing and exploring in the area. Lowe asked Hadaller about the entire development property, where the lot lines and utilities were. Hadaller and his significant other, Debbie Reynolds. (Reynolds) told Lowe of his law suit in regards to reforming the language of the deed, he told him also that the roads were only accessible for developing by him, because of the 2006 amended Covenant and the Fortman law suit, (CP 176) (CP113 L.8-12) where two other owners were attempting to move the easement from the old road to the new road, "Virginia Lee Lane". Most importantly here, Hadaller and Lowe discussed that Hadaller was relying on an agreement with Fortman

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<sup>5</sup> The contract became an issue in the Rockwood suit when Lowe pled he would pay the offset of mortgage Hadaller owed on the Rockwood property with it, because the offset Lowe obtained for the Rockwood's reduced the amount they owed below the amount Hadaller owed on the property. Thus he fraudulently obtained the relief of that debt by the Rockwood suit. Lowe traded his "services" for a missing link of easement, Hadaller was stuck paying for all their gains. The appeal of that suit was deemed untimely. That is over and a loss.

regarding the first right of refusal, and the fact Fortman agreed to allow Hadaller to first match any price on lot two. (CP 123 L.4-10) and efforts Fuchs had been taking to get lot two. (CP176) (CP113 L.8-12) Hadaller and Reynolds had told him that would not happen and attempted to discuss those issues with Lowe, who said he knew nothing about real estate law and the last thing he wanted to get into was a civil suit down here. (CP176)

In March of 2008, Hadaller sent Fortman's attorney a \$200,000.00 offer to buy lot two. Twenty minutes later it was returned refused. (CP 113 L.1-3)

#### **Lowe closes the sale**

On or about the end of April, or first day of May 2008, Lowe called Hadaller and said he was considering buying lot two and wanted to know how he could obtain an agreement from Hadaller to move the easement to lot two over onto the new road, Virginia Lee Lane. Hadaller said he had just offered to buy lot two from Fortman, who had refused to sell it. Hadaller told Lowe on the phone again that day that although he had a first right of refusal with Fortman he could enforce, it might be wise for someone else to purchase it to save the legal problems. Hadaller told Lowe that he had just spoke with a potential partner to buy the property with, because it was becoming obvious Fortman was going to be stubborn and the property cost was

going to be more than Hadaller wanted to invest alone. Lowe said, very panicly, "What about me? I would be interested in buying the property with you, we are already here and it would be much better for just us to do it." Hadaller asked Lowe what he was looking to get from the property, since he already had three lots. Lowe stated he was only interested in the waterfront area of lot two and a strip of land to connect his back lots to the lake. Hadaller told Lowe the agreement he had with D& R, which was D& R was to pay the full \$201,000 for the property and they would receive all the land between the road, crossing about the center of the lot and the lake. Thus they could easily create three lakefront lots valued at over \$120,000 each (\$360,000) within about two years to plat and sell them. Hadaller was doing the development. Lowe stated he was interested, but wanted to have a better lake access, because the lake front of lot 2 is very high bank about 60-80 feet almost straight down and too steep to walk on. Hadaller agreed that could happen by a lot line adjustment westerly across Hadaller's lakefront to where the bank substantially flattens out, but it would cost Hadaller a potential of one future lake front lot so he expected a \$100,000 price for that and the strip of land between what was discussed to be Lowes new lots and his original lots. Lowe said that there seemed to be a substantial agreement. Lowe, furthering the negotiations, asked Hadaller if Hadaller thought Fortman would sell it

to him. Hadaller suggested Lowe make an offer and see what happened. (CP 13¶3.34)(CP113 L4-CP114 L.9) (CP174 CP176 L4)

The next day Lowe called Hadaller again and said Fortman was insisting he wanted \$250,000.00 for lot two and wanted to know Hadaller's opinion if it was it worth it. Hadaller verbally informed Lowe of his reasoning that considering his discussed lot line adjustment there existed sufficient lake front to create 2 lake front lots, the Lowe's could sell at a return of a substantial part of their invested amount, thus they could have the best and very large lot for very little expense. Hadaller opined on the phone and David Lowe was listening to his opinion, that yes, it was worth the \$250,000.00 still. (CP114 L.10- 21)( CP175L15-21)

Hadaller was just glad the lot and the plan for the development was finally going to be settled, after two years of the civil suit regarding the easements issue, it was going to be solved to everyone's mutual benefit. Hadaller was expecting and hoping to get the entire lot 2, but was happy to at least be able to recoup his investment at that point. Hadaller drafted a written draft of the agreement to begin the draft language of the gist of their conversation. The negotiations then were done by e-mail. Hadaller hand wrote a memorandum of what they had discussed and tentatively agreed on, on the phone that night. He scanned it and sent it to Lowe, attached in an e-mail at 10:06 A.M.

May 7, 2008, making it clear how the agreement was equitable and that he was firm about the proposed agreement being negotiated. The intent was to memorialize the gist of their verbal proposals. (CP114 L15 – 21) (CP134-137)

Later that May 7, 2008, at 10:49 P.M., Lowe replied, showing a somewhat different and questionable approach, once they had signed the purchase and sale agreement. Although he failed to acknowledge what the terms would be until his wife was able to physically walk the property, he then sounded as if he was still optimistic they would, “*come to a meeting of the minds*”, about exactly where the lot lines would be, instead of the certainty spoken in order to get their deal off the ground the previous day(s) (CP 491)

Because of the law concerning a Lis Pendens prior to their purchase and the way Lowe was possibly backing off from the original verbal plans, the next day, Hadaller formally served the Lowe’s with a copy of the Lis Pendens related to the Fortman’s civil suit on lot2, prior to them closing the sale. (CP 484-486) The Lowe’s were also informed of Hadaller’s agreement with Fortman, he was relying upon, to realize a return from his huge investment when he was a party to the Fortman suit (CP 115 L.10-13) (CP 160 L.14 – CP 161 L.6) and through the purchase and sale agreement between them and Fortman. (¶5 CP 139,140) The Lowe’s and Fortman’s underhandedness is

demonstrated in their Provision No.5 agreement (CP 140) of their purchase and sale agreement. Where they agree to vote an easement and include lot two into Hadaller's development against Fortman's original agreements. And the provisions of the amended covenant (CP37 ¶1-3) that was recorded years before the Lowe's bought subject to it, equitably restricting the use of the road for development to Hadaller, who built it at his expense.

Lowe replied to the e-mail and reaffirmed their intent to come to the agreement discussed on the phone at the beginning of the negotiations. (CP488).

The following day May 9, 2008, Hadaller replied explaining why he was a little abrupt about the negotiations and again expressed his hopefulness the negotiations and agreements were forthcoming, while at the same time letting the Lowe's know that his easement across Virginia Lee Lane was something he intended to protect his investment in. (CP 489)

The communications ended and the Lowe's went to Europe on vacation, for that month. When the Lowe's returned they did not follow through with their previously stated plan to come down and walk the property, as they stated they would do when they returned. (CP491) Lowe's excuse that his wife was too ill played on Hadaller's

empathy to get Hadaller to let his guard down on his development of lot 2 as he had planned under his agreed first right of refusal. ( CP 489) Hadaller patiently did not pressure them in June when the Lowe's returned from their European vacation ,on, or about June 2, 2008. The Lowe's failed to take any steps towards proceeding with their part of their stated proposed agreement.

If it were not for Lowe's representations before allowing the sale to close, Hadaller would have either (1) exercised his first right to a enjoin the sale of lot 2 in May of 2008 and segregation lot 2 would have been sold to Hadaller , who had built the roads and utilities and obtained a change in the shoreline designation to allow for docks, at his time and expense.(CP 114 L.22)

They did not further any negotiations with Hadaller, or come to the property again until the annual homeowners association meeting over the 4<sup>th</sup> of July weekend in 2008. Hadaller first introduced them to the two other owners at the meeting. They had a very short meeting and David Lowe followed the other two parties out Hadaller's driveway and had a very businesslike discussion. Hadaller, beginning to see that the "agreement" may be a sham by the Lowe's approached David Lowe and insisted some sort of agreement be placed into writing regarding the verbal agreement spoke of to get Hadaller to not enjoin the sale. David Lowe's response to that was, "I'm not going to

sign anything, yet. I'm going to do some research first" (CP116 L.6-11) (CP 176 L11-14)

Because of that statement and because the Lowe's had become the real party in interest to reforming the deed concerning a different easement language across lot three in benefit to lot two and Fortman's attorney was forcing Hadaller to either join or dismiss the suit against Fortman Hadaller joined the Lowe's by serving them a summons later that weekend.

#### **The elements accrue in December 2008**

Over the course of the summer Lowe drafted and negotiated secretly behind Hadaller's back to incorporate a homeowners association, designed to replace the existing one Hadaller had recorded against the plats (CP 12 -13) On December 12, 2008, Lowe sent Hadaller a letter finally informing him of his previous, covert actions and informing him of a meeting scheduled to virtually take over the homeowners association (CP127) and to vote themselves an easement across the new road Hadaller had built, which would provide access to twelve home sites on lot two. (CP116 L.14 -CP17 L.7) (CP 129 ¶10) (CP 513 L.16-CP514 L23)

Hadaller voted against and insisted their vote was unauthorized

and the new "Association" led by then alleged, HOA president member and HOA attorney, David A. Lowe sued Hadaller to obtain control of the HOA. ( CP 116 L.22-23) In support of the show cause. Lowe caused a declaration filed, signed by Randy Fuchs claiming Hadaller forged his signature on the CCR amended covenant that identified Hadaller as the developer and stated only he or his assigns may add property to the road Hadaller built.(CP117L.1-4) Hadaller obtained an analysis from a forensic document examiner (CP117L.5-7) (CP 47-59) and Hadaller submitted two declarations from two eyewitnesses who watched Fuchs sign the covenant. (CP 41 L.18-22) (CP 43 L.21-24) The results of that and similar actions taken, or caused by Lowe has caused damages to Hadaller in the hundreds of thousands of dollars. ( CP 118 L.4-13)

Lowe's purchase of lot two (CP 139-144) ended the contractual relationship Hadaller had with the Fortman Trust. Hadaller not only was aware of the planned purchase, but encouraged it under the representation of the Lowe's ;the agreement stated would be forthcoming. The Lowe's took a matter of months to disclose that the approach they used in late April and early May was not only not going to occur, but in fact, what patience and trust Hadaller extended to the Lowe's was turned maliciously against him to cause him not to realize the gain from the over \$388,619.00 Hadaller invested into the development which would have not been done if Hadaller was not

assured control of the ownership of lot two. (CP114L.22 -CP116 L.5)  
(CP 104-173)

#### IV. SUMMARY OF ARGUMENT.

Hadaller submits that the trial Court erred when it found no genuine issue of material fact exists to warrant a trial on the issue of the existence of a first right of refusal contract that was left undrafted by the realtor, but was continually acknowledged by grantor, Fortman. It was oral, spoken several times and admitted under oath still five years later, in which time Hadaller shaped the entire development under that agreement understanding with Fortman he would be able to buy lot two before any one at a price that could be obtained by Fortman. Hadaller's argument relies upon the many cases that have removed oral agreements from the statute of frauds by clear and unequivocal evidence. (admission of the contract.) which Fortman did in deposition before obtaining an inflated price for lot two with Hadaller's work , from a third party. Fortman then changed his statement , by declaration, which the trial Court erred by its finding Fortman had standing to deny his previous agreement they worked under all those years. Hadaller trusted in the agreement. It reconfirmed and was mutually spoken when he went forth with a major addition to the development in 2005. Hadaller submits the Court should hold with the many cases such as, *Berg v. Ting*, *Miller v. McCamish*, *Richardson v. Taylor*

*Land & Livestock Co, Kruse v. Hemp* holding three elements indicate a contract shall be held binding without the requirement of the statute. They are (1) delivery and assumption of actual and exclusive possession; Hadaller was encouraged by Fortman to build his road and prepare for the ownership of lot two. He cleared the right of way, installed a road and utilities to serve twelve homesites on lot two, in addition to the improvements necessary upon his own lot 3 under an agreement and understanding he would be able to match any offer for it, (2) payment or tender of consideration; Hadaller changed his position from only buying two lots and not worry about the third, into buying two lots and preparing and expecting to buy the third lot, lot two and (3) the making of permanent, substantial and valuable improvements, referable to the contract. Because Hadaller was assured he was going to be able to match any offer, he continued to build the road and utilities and improve the lot with dock rights, environmental reports, etc .

The Court substantially erroneously, based the other four elements on its findings of no contract in existence. But specifically, the Court erred when it found that no genuine issue of material fact exist showing the Lowes were aware of Hadaller's reliance upon any agreement with Fortman when the Lowes were delivered a Lis Pendens recorded on lot two then were joined as a

party, for another issue. A declaration submitted by Hadaller in support of his answer to the Fortman's counterclaims affirmatively states he was relying upon the Fortman / Hadaller first right of refusal agreement to protect his interest in lot two. That in addition to the purchase and sale agreement peripherally disclosed Hadaller's law suit with Fortman as well as declarations of Deborah Reynolds of first hand oral disclosure.

The court also substantial relied upon no contract exists when it found the Lowes did not terminate, nor was the termination of the contractual relations ended by improper means. Hadaller submits that genuine issue of material fact was shown by the simple fact lot two was bought by the Lowes which ended the existing contractual relations using misrepresentation by David Lowe, that they and Hadaller were going to mutually rearrange the lines of lot two and three and divide the property mutually. That representation became a misrepresentation when the Lowes failed to further any negotiations then abandoned the deal altogether turning maliciously against Hadaller with a barrage of legal issues and battles. Severely damaging is the fact Hadaller has invested over \$388,619 and has been paying interest on which can be substantially directly applied to the development, which was expected to be repaid from lot two. Under Fortman's agreement the Lowes knew or should have known of, Hadaller suffered a loss

of over \$145,000. Hadaller submits that it is not likely two reasonable persons could conclude no genuine issue of fact was shown in summary judgment that Lowe bought lot two not knowing Hadaller had a contractual, expectancy from it. his or that his representations, shown by emails and actions, do not create at least an issue of fact which is material to the claim of interference of contractual relations and misrepresentation.

Hadaller also submits the court erred as a matter of law by finding the three year tort, per RCW 4.16.080 for these actions based upon misrepresentation, began to run on May 9, 2008, when Hadaller was negotiating with the Lowes and was aware they were buying lot two. Hadaller submits that because the Lowes diabolical plan to ignore their plan to trade the land with Hadaller and sue him for it instead until later. That the elements for the misrepresentation/ interference claim did not accrue until December 2008 thus the statute had not ran. The complaint and summons were served on May 12, 2011 and filed on May 13, 2011. Hadaller's states his weakest argument would be that the claim accrued when it was known to maybe exist, the day the sale was recorded per well held case law, but to reach that finding the claim would have to have been in contract law allowing six years. Finally Hadaller asked Judge Lawler to recuse based upon the fact his recent law firm, he was a partner in, was and still is

representing Fortman on the same issue against Hadaller and they have to become a party either in this suit or this consolidated with the Fortman suit to obtain complete relief.<sup>6</sup> Hadaller is relying upon Canon 3, the doctrine of appearance of fairness. RCW 4.12.050. Hadaller also had negative personal relations with the Attorney James Lawler before he took the bench

Finally, Hadaller submits that the Trial Court erred by apply CR 11 sanctions, basing his argument on his pleadings are supported by substantial first hand declaration, admissions under oath and evidence to prevent summary judgment and genuine issue of material fact is present.

## V. ARGUMENT

An order granting summary judgment is reviewed de novo, with the appellate court performing the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). A motion for summary judgment may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court must construe all facts and reasonable inferences in favor of the nonmoving party. *Scott v.*

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<sup>6</sup> Hadaller moved to join these parties and claims into the Fortman suit was denied and will be a possible issue of that appeal if it comes to that.

*Blanchet High School*, 50 Wash. App. 37, 42, 747 P.2d 1124 (1987).

Summary judgment should be affirmed only if reasonable minds could

reach but one conclusion. *Id.* Citing: MacMeekin v. Low Income

Hous. Inst., Inc., 111 Wash. App. 188, 195, 45 P.3d 570, 573 (2002)

Motion for summary judgment should be denied if, from evidence,

reasonable men could reach different conclusion. Duffy v. King

Chiropractic Clinic, 17 Wash. App. 693, 565 P.2d 435 (1977)

On motion for summary judgment, trial court must consider all

evidence and all reasonable inferences therefrom in light most

favorable to nonmovant. CR 56(c). Lamon v. McDonnell Douglas

Corp., 91 Wash. 2d 345, 588 P.2d 1346 (1979)

**The Trial Court Erred Finding No Genuine Issue Of Material  
Fact Exists Supporting The Elements Of Lowes Tortious  
Interference Of Hadaller's Contractual Relations.**

The elements of tortious interference with a contract or expectancy are: (1) the existence of a valid contractual relationship or business expectancy; (2) the defendant's knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) **the defendant's interference for an improper purpose or by improper means**; and (5) resulting damage. Koch v. Mut. of Enumclaw Ins. Co., 108 Wash. App. 500, 31 P.3d 698 (2001)

**Hadaller demonstrated a genuine issue of material fact of the existence of a valid contractual relationship with Fortman**

Washington courts have recognized that claims for the enforcement of an oral contract are particularly likely to involve disputes of a factual nature, and are therefore particularly unsuitable for resolution by summary judgment:

“Oral contracts are often, by their nature, dependent upon an understanding of the surrounding circumstances, the intent of the parties, and the credibility of the witnesses. **If a dispute exists with respect to the terms of the oral contract, then summary judgment is not appropriate.** Instead the finder of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement. Citing: *Duckworth v. Langland*, 95 Wn. App. 1,6-7, 988 P.2d 967 (1998). quoting *Garbell v. Tall’s Travel Shop, Inc.*, 17 Wn. App 352, 354,563 P.2d 211

This case is certainly such a case that must have testimony heard by the trier of facts. It is undisputed Fortman admitted his over 5 year old working agreement with Hadaller of a first right of refusal, (CP 122 L.22 – CP L.1) Fortman’s promises. (CP 171L.10-19) ( CP 108 L.21- CP 109 L.19) and Hadaller’s performance based on that repeated promise, (CP 109 L.20- CP 112 L. 4). Fortman’s acknowledgment that he considered and Fortman partially performed his part of the first right of refusal to be of

standing as Hadaller has stated is confirmed in his August 22, 2007 deposition. (CP 123 L. 4- 10)

“ When a party has given clear answers to unambiguous [deposition] questions which negate (or support) the existence of any genuine issue of material fact, that party cannot thereafter create ( or deny) such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony” *Duckworth v. Langland*, 95 Wash. App. 1, 7-8, 988 P.2d 967, 970 (1998) (parentheses added by party, brackets are Court’s)

Fortman’s subsequent denial, of a first right of refusal in a declaration he signed for the Lowe’s after they paid him \$250,000.00 for the lot. (CP 139 ¶2) ( CP 487¶2) Hadaller had placed substantial improvement upon,( CP 109 L.13- CP111 L.12) has little weight under the *Duckworth* Court, this court should disregard too.

The Trial Court held, See ( RP 7/29/11 Pg.18 L.1-8) That because there is no documentation, “And so without any documents, with Fortman’s also refuting that fact, there is no evidence of a first right of refusal”. Well , It just isn’t that simple, under the holdings on this issue handed down by, *Berg v. Ting*, 125 Wash. 2d 544, 564, 886 P.2d 564, 575-76 (1995) *Miller v. McCamish*, 78 Wash.2d 821, 829, 479 P.2d 919 (1971) *Richardson v. Taylor Land & Livestock Co.*, 25 Wash.2d 518, 528-29, 171 P.2d 703 (1946). *Kruse v. Hemp*, 121 Wash.2d 715, 724-25, 853 P.2d 1373 (1993); *Powers v. Hastings*, 93

Wash.2d 709, 717, 612 P.2d 371 (1980); Losh Family, LLC v.

Kertsman, 155 Wash. App. 458, 465, 228 P.3d 793, 797 (2010)

The Trial Court Erred. The *Berg* Court's holding is most relevant on this issue:

“[T]he making of the promise [must be] admitted or ... clearly proved [.] [t]he promisee must act in reasonable reliance on the promise before the promisor had repudiated it, and the action must be such that the remedy of restitution is inadequate. If these requirements are met, neither the taking of possession nor payment of money nor the making of improvements is \*560 essential. Thus, the rendering of peculiar services not readily compensable in money may justify specific performance, particularly if the promisee has also taken other action in reliance on the promise.”

Berg v. Ting, 68 Wash.App. 721, 732, 850 P.2d 1349 (1993) (quoting Restatement (Second) of Contracts § 129 cmt. *d* (1981)), review granted, 123 Wash.2d 1013, 871 P.2d 599 (1994)

Fortman admitted and acted on the first right of refusal from 2002-2007 partially performing the terms. (CP 122 L.22 - CP L.1), (CP 171L.10-19) ( CP 108 L.21- CP 109 L.19) and Hadaller's performance was based on that repeated promise (CP 109 L.20 - CP 112 L. 4). prior to the May 2008 sale to the Lowes.

In determining the enforceability of an agreement granting an easement,[ or interest in land] the court first considers whether the agreement conforms with the statute of frauds. If it does not, the court

determines whether there is sufficient part performance to remove the agreement from the statute of frauds. *Kruse v. Hemp*, 121 Wash.2d 715, 724-25, 853 P.2d 1373 (1993); *Powers v. Hastings*, 93 Wash.2d 709, 717, 612 P.2d 371 (1980); **\*\*576** *Richardson v. Taylor, Lund & Livestock Co.*, 25 Wash.2d 518, 528-29, 171 P.2d 703 (1946). Even if sufficient part performance exists, there must be “clear and unequivocal” evidence of the terms, character and existence of the agreement to compel its enforcement. *Miller v. McCamish*, 78 Wash.2d 821, 829, 479 P.2d 919 (1971) (quoting *Granquist v. McKean*, 29 Wash.2d 440, 445, 187 P.2d 623 (1947)). *Berg v. Ting*, 125 Wash. 2d 544, 564, 886 P.2d 564, 575-76 (1995) (brackets added)

In this case Fortman admitted to granting ,( CP 122 L.22 - CP L.1)and he also admitted to performing ( CP 123 L. 4- 10) the first right of refusal when Hadaller matched Fuchs September 2006 (CP110 L.6-CP 112 L.4) ( CP 569L.7- CP 570 L.18) offer. The first right of refusal has a showing that is clear and unequivocally in existence. Hadaller had performed his work, which has never been denied, relying on Fortman’s promise so Hadaller would be the beneficiary of his work, not Fortman who has been unjustly enriched by Hadaller’s, which would have been actionable under the doctrine of unjust enrichment had Hadaller not been misrepresented by the Lowes that they were going to mutually, beneficially own lot two with Hadaller in May of 2008. The Lowes also became enriched unjustly when they obtained

the easement they originally pretended to negotiate for by David Lowes May 2008 proposal ( CP 116 L.6 – CP 117 L.17) regarding takeover of the homeowners association and granting the easement across the road Hadaller built which they got awarded by the Trial Court for no compensation (CP 547 L.19- CP548 L.18).

“Conveyance can be taken out of statute of frauds where there has been part performance of contract on one side and acceptance of benefit on other; equity should intervene to deny one party what would be clearly unjust **enrichment** as long as character, terms, and existence of contract can be clearly and unequivocally established to satisfaction of court”. Citing: *Kirk v. Tomulty*, 66 Wash. App. 231, 831 P.2d 792 (1992)

All of the materials are present for the Court to find a contract was constructed. *Eaton v. Engelcke Mfg., Inc.*, 37 Wash. App. 677, 681 P.2d 1312 (1984) Hadaller is entitled to take this issue to the trier of fact. : *Duckworth v. Langland*, 95 Wn. App. 1,6-7, 988 P.2d 967 (1998), *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 345, 588 P.2d 1346 (1979)

**(Element No. 2 The Lowes have no creditable claim they did not know about Fortman/ Hadaller’s contractual relationship;**

The Trial Court held there was no evidence the Lowes knew about the first right of refusal. ( RP 7/29/11 Pg18 L.9-12)

Aside from the attestable, (CP 176 L.1-10) times the relationship of Hadaller and Fortman was discussed as neighbors from October 2007 – 2008, Hadaller again certainly informed Lowe on the Telephone the no night Lowe called Hadaller to discuss Lowes purchasing lot two

and how they might obtain an easement to allow subdivision and consider whether Hadaller was going to enjoin the sale Hadaller. Deborah Reynolds was on the line as she usually was in Hadaller's business. ( CP 174 L 27- CP 176 L.4) ( CP 113 L.8 - 23)( CP 212) However regardless of those oral disclosures Hadaller legally informed the Lowes of that through the Lis Pendens filed against lot two. ( CP 502-505) The first right of refusal was an issue in the Fortman Case No.06-2-01146-3 which Lowe was joined into ( CP 577 L.9 CP 579) Document No. 45 was a Declaration in support of the Answer to Fortman's Counterclaims. It was filed on 09/ 07/07 ( CP 146) thus it was in the clerks files when the Lowes bought with notice by the Lis pendens and his involvement as a party, in Fortman's shoes none the less, to the suit. In that declaration of John J. Hadaller, He affirmatively stated that he held a first right of refusal and relied upon that agreement, when he went forth with his development. (CP 160-161).Regardless of Lowes self serving false argument that he did not know, he has no ground to claim he should not have known of the existence of the first right of refusal via the Lis Pendens

“The purpose of a lis pendens is to give notice of pending litigation affecting the title to real property, and to give notice that anyone who subsequently deals with the affected property will be bound by the outcome of the action to the same extent as if he or she were a party to the action. RCWA 4.28.320. Citing: United Sav. & Loan Bank v. Pallis, 107 Wash. App. 398, 27 P.3d 629 (2001)

The Fortman Trust suit is waiting for the Lowes in the trial Court. or.

This Lowe suit should be remanded back to join the Fortman's and be heard once.

The Lowes argument of ignorance is even more specious, when considering he's an attorney subject to provision # 5 of the purchase and sale agreement between Fortman Trust and the Lowes for lot two. ( CP 487, 488 ¶ 5) They initialed the acknowledgment they were aware of Fortmans obligations and stepped into Fortman's dirt shoes anyway. (take note of ¶ 7CP 480) when Fortman sold their dirty shoes knowingly to the Lowes.<sup>7</sup>

There is substantial issue of genuine material fact to preclude summary judgment Re. the Lowes had knowledge of this contract. On motion for summary judgment, trial court must consider all evidence and all reasonable inferences therefrom in light most favorable to nonmovant. CR 56(c).

**Element (3) and (4) The Lowes intentionally ended, by improper means ( Misrepresentation), any contractual relationship between Hadaller and the Fortman's, when they smoothed Hadaller into actually believing and assisting them in buying lot two under their improper guise they were interested in buying the property together with Hadaller, then holding that thought until December of 2008, and suing him in January 2009.**

The Trial Court erred when it found there was no intentional cause

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<sup>7</sup> There is a clear showing of conspiracy upon Fortman's to change his original agreement any way he could, the Lowes improved the quality of deceit.

of a breach and no improper purpose was used to cause any breach.

Basing the decision substantially on Fortman was O.K with ending his obligation to Hadaller.<sup>8</sup>

“To be entitled to go to jury on a theory of wrongful interference with business [or contractual] relationship, plaintiff, in addition to proving that defendant intentionally interfered with plaintiff’s business [or contractual] relationship, also must show that defendant interfered for an improper purpose rather than for a legitimate one or that he used improper means resulting in injury to plaintiff. Citing: Straube v. Larson, 287 Or. 357, 600 P.2d 371 (1979) [brackets are parties]

Unless the Lowes agree to; or the Court forces, specific

performance and restitution for damages The Lowes smooth actions amount to either: innocent misrepresentation, if they are found to have began negotiating in earnest then saw an opportunity and ran with it like a common purse snatcher.

“A material innocent misrepresentation is a sufficient representation on which to base a claim for rescission. It is unnecessary for the purpose of affording the remedy of rescission to find that the representation is fraudulent. See Anthony v. Warren, 28 Wash.2d 773, 184 P.2d 105, 190 P.2d 88 (1947); Algee v. Hillman Inv. Co., 12 Wash.2d 672, 123 P.2d 332 (1942); Restatement of Contracts ss 470, 476 (1932); 12 S. Williston, Contracts s 1500 (3d ed. 1970). Citing: Kruger v. Redi-Brew Corp., 9 Wash. App. 322, 326, 511 P.2d 1405, 1407 (1973)

Hadaller pled for specific performance and/or damages

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<sup>8</sup> He obtained \$250,000 for it I would assume he would be. Obviously the Court was considering there was no contract between Fortman and Hadaller constructed .

“ In accord with Second Restatement of Law of Torts, if person whose actions interfere with another's business [or contractual] relationships does not have the intent to cause the result, such person's conduct does not subject him to liability, but even if he does not act for purpose of interfering or does not desire it, his interference is to be regarded as intentional if he knows that the interference is substantially certain to occur from his action and is a necessary consequence thereof. Straube v. Larson, 287 Or. 357, 600 P.2d 371 (1979)

The Lowes cannot creditably state they did not know their purchase of lot two would end Hadaller's expectations to recoup his investment into the development from selling subdivisions of lot two after he obtained it.( most glaring of Hadaller's damages

Case is made out which entitles plaintiff to go to jury on theory of wrongful interference with his business relationship only when the interference resulting in injury is wrongful by some measure beyond the fact of the interference itself. Straube v. Larson, 287 Or. 357, 600 P.2d 371 (1979)

Or negligent misrepresentation if the Lowes succeed at convincing the Court they were unaware of the provisions of the Lis Pendens<sup>9</sup> and other notices, or fraudulent misrepresentation if the Court receives and weighs the evidence yet to be discovered (and there is substantial) and the prima facie showing made at this point of all the surrounding facts.

Intentional interference in pursuit of improper objective or use of wrongful means of interference which in fact causes injury to a plaintiff's professional or business [or contractual] relationships

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<sup>9</sup> When Hadaller asked Lowe for free advice regarding the Fortman Case In 2007 (when he told him of the facts stated) “ I am a patent attorney I don't know anything about real estate law”

usually gives rise to a tort claim. Citing Straube v. Larson, 287 Or. 357, 600 P.2d 371 (1979)

David Lowe misrepresented his intent when he negotiated with Hadallerto buy lot two with Hadaller's interest in mind that is demonstrated in: ( CP 113 L.4- CP 115 L.20) ( CP 174- CP 176) ( CP 134- 137), (CP 499, 501,505,507) ( Discovery will provide more evidence)

No Washington cases on were discovered directly on point , a case from the woods of Montana is more on point than the environmental aspects to this wooded case. See Maloney v. Home & Inv. Ctr., Inc., 2000 MT 34, 298 Mont. 213, 994 P.2d 1124

In Maloney a neighboring land owner (i.e.Fortman) had granted an oral first right of refusal to the Maloneys ( i.e. Hadaller). Once the neighbor decided to sell he instructed<sup>10</sup> the realtor to give the Maloney's the first right to purchase the property. The realtor offered the property to a third party ( i.e.. the Lowes) to purchase the very desirable parcel before the Maloneys. The Maloneys brought a suit for interference of contractual relations and sued the realtor. The Montana Court found that the realtor had in fact interfered improperly and awarded damages to the Maloneys in the offset amount of \$288,000. And \$76,000 for emotional distress.

The facts are substantially the same in this case except the Lowes

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<sup>10</sup> Unlike the Fortman facts though.

between Hadaller and Fortman thus he stepped into the dirty shoes as the realtor did. Hadalle rand the Court has a little work because unlike Maloney's good neighbor Fortman changed his mind about his first right of refusal, after he received \$250,000 for the property and then submitted a declaration attempting to erase his first honest statement, thus very little work is needed to show Fortman is committed. The Lowes knew that and are attempting to escape responsibility. But the Court can remedy that under *Berg*.

**Element No. 5 Resulting damages caused by Lowes misrepresentation.**

The trial Court erroneously held there is no damages RP 7/29/07 Pg 18 L.22).

Hadaller has suffered damages. Hadaller built a road sufficient for 18 homes, (CP 108 L.21 – CP 111L. 17) ( CP 513 L.24- Cp 514 L. 18) (CP 548 L.7-13) at his own expense, expecting to be the benefactor of his investment but has not realized that. Hadaller platted lot three which would have only required a road and utilities much less expensive. However because of the long road through a ravine next to a fish bearing waterway and utilities sufficient for 18 homes the expense of creating the plat on lot three was greater than the income received from it. That costing Hadaller over \$145,000 in losses above

the cost<sup>11</sup>. (CP 115 L.21 –Cp 116 L.5) The road itself is a prima facie showing of loss caused by Fortman's and the Lowes actions that is not denied. Hadaller has shown and Lowe admits damages for at least the expense of utilities, road, dock rights, for twelve home sites, and the loss of quiet enjoyment of his lot 3 because he developed the lot for no gain, relying on the proceeds from lot two.

Whether a party has acted in bad faith or dishonestly for purposes of a tortious interference with contract claim will generally be an issue of fact. *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wash. App. 500, 31 P.3d 698 (2001)

Hadallershows sufficient genuine issue of material fact exists to preclude summary judgment. . *Duffy v. King Chiropractic Clinic*

**(Error No.2 ) The very soonest a Court could find the claim accrued beginning the statute to run for Hadaller's tort claim was December of 2008.**

“We review statute of limitations rulings de novo. *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 263, 840 P.2d 860 (1992). Citing: *In re Marriage of Anderson & Wysling*, 158 Wash. App. 1039 (2010)

The Court found the statute for Hadaller's claims began to run on

May 9, 2008 the date it assumed Hadaller became aware of the purchase. ( RP 7/29/07 Pg 17 L. 18 - 24)

The error in that finding is this, Hadaller's tort claim is based upon

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<sup>11</sup> An accounting consisting of over 400 pages of the expenses are in case No. 09-2-934-0 The quiet title suit where Hadaller moved to amend to plead unjust enrichment against Lowe at trial.

misrepresentation, the contractual interference elements had not manifested at all because on that date at least Hadaller was in the belief the Lowes were intending to follow through with their agreement. ( CP 498, 494-496, 499, 507 ) On July 3, 2008 the Lowes had elevated Hadaller's concern they were going to renege on their proposal, ( CP 116 L.6-8) (CP 176 L.11-14) but there still accrued no actionable elements manifested.

Statute of limitation for damage action based on common-law fraud does not begin to run until aggrieved party discovers, or should have discovered, fact of fraud by due diligence and sustains some actual damage as result therefrom. West's RCWA 4.16.080(4). First Maryland Leasecorp v. Rothstein, 72 Wash. App. 278, 864 P.2d 17 (1993)

Hadaller joined the Lowes in the Fortman suit replacing Fortman in July and argued about an unrelated easement until December. Although they turned hostile the elements for the claim had not accrued.

On or about December 12, 2008 Lowe sent Hadaller a letter stating he had incorporated a new homeowners association and replaced Hadaller's in the development and the owners were going to vote to move the easement to lot two off the other owners lake front (where it was purchased at) and over to the road Hadaller had built and relied upon to be legally impossible without his agreement. At that time the elements may have (probably) accrued, arguably. That action has been feverishly opposed since

the Court did not conclude that fact until June 10, 2011. ( CP 515 L.1-CP 517 L.16)( CP 547 L. 20 – CP 550 L.4) However there is basis at least for argument from Lowes point of view, that it began to run at that time and for sake of (saving ) argument Hadaller asserts it did in fact begin at that time. Thus, Hadaller's complaint was not even close to being time barred.

Alternately and in the worst case if this was contract law, which would be six year statute, but the court is not clear on their reasoning. However, even if the Court could somehow stretch the accrual of Hadaller's claims back to the May 2008 period the sale occurred case law supports Hadaller's argument on that by First Maryland Leasecorp v. Rothstein, 72 Wash. App. 278, 282, 864 P.2d 17. 19 (1993) Greene v. Brown, 123 Wash. App. 1061 (2004) which holds that the statute begins to run in a dispute on real property the date the sale is recorded in the auditors files. In this case it was May 14, 2008 ( CP 131) Hadaller served his complaint hurriedly under duress of trial on May 12, 2011 ( CP 471,472 and filed it on May 13, 2011( CP 1 CP 3) one day short of the three year statute for misrepresentation/ tortious interference tort claims. Citing: RCW 4.16.080 If the claim had accrued in May of 2008 ,which it did not. First Maryland Leasecorp v. Rothstein,

**Judge Lawler should have complied with the doctrine of appearance of fairness and recused from this case with his**

**recent firms (Fortman) present client handling the same issues as it was when he was in the firm.**

Recusal lies within the sound discretion of the trial judge, whose decision will not be disturbed absent a clear showing of abuse of that discretion. Citing: *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash. App. 836, 14 P.3d 877 (2000)

Judge Lawler's relationship to the parties ( particularly Fortman)

shown in the record ( CP 22- 23) ( 28- 63) demonstrates a fact that he is in a position that Canon 3 and the appearance of fairness doctrine hold to be unethical.

“Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *State v. Dominguez*, 81 Wash.App. 325, 328, 914 P.2d 141 (1996). The trial court is presumed, though, to perform its functions regularly and properly without bias or prejudice. *Kay Corp. v. Anderson*, 72 Wash.2d 879, 885, 436 P.2d 459 (1967); *Jones v. Halvorson-Berg*, 69 Wash.App. 117, 127, 847 P.2d 945 (1993). A party claiming to the contrary must support the claim; prejudice is not presumed as it is when a party files an affidavit of prejudice under RCW 4.12.050. *Dominguez*, 81 Wash.App. at 328-29, 914 P.2d 141. Citing: *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash. App. 836, 841, 14 P.3d 877, 879 (2000)

That holding is based on the concern of appearance of the judicial system to the community as a whole, it just shouldn't place itself in a possible position to have the general layman feel the Court system may be prejudiced and “protects its own” over the general public, while upholding the respect it must continue to retain from the entire public. A judge sitting on a bench trying a party who is represented by his recent partner and has been representing him, since they were

partners in the firm is risking that respect of the public and certainly causes Hadaller some fear. Judge Hunt certainly professionally seems to agree by his actions, (CP 469) Fortman's present firm's partner should do the same. Hadaller respectfully asks the Court to consider this fact and order either a visiting judge, or this case be heard in a neutral zone of Thurston or Cowlitz County. RCW 4.112.040

**The trial Court erred by awarding attorney fees under CR 11 and RCW 4. 84.185.**

The Trial Court granted the Lowes CR 11 Sanctions ( RP 7/29/11 Pg 19 L. 11) (CP 219 L. 9 -16)

“Whether a party is entitled to attorney fees is an issue of law, which is reviewed de novo. N. Coast Elec. Co. v. Selig, 136 Wash. App. 636, 151 P.3d 211 (2007)

In order to impose sanctions for filing a complaint that lacks a factual or legal basis, the court must make explicit findings as to which pleadings violated the Civil Rules and as to how such pleadings constituted a violation; the court must also specify the sanctionable conduct in its order. CR 11. N. Coast Elec. Co. v. Selig, 136 Wash. App. 636, 151 P.3d 211 (2007)

It is a waste of judicial resources to argue that the order granting sanctions fails to identify the specific pleadings or basis it generally states Hadaller is sanctioned. Why go back and forth with details that would have to be argued several times. However, There are no contradictions in Hadaller's previous and present declarations, nor pleadings, or anywhere in the record, let alone were they shown.

Hadaller's facts are supported by declaration and are consistent and true. The very similar facts in this case won the Maloney case in Montana with damages from emotional distress!! The pleadings are supported by declaration of third parties with first hand experience to the facts and testimony was made under oath by Fortman presenting a meritorious claim of misrepresentation, and tortious interference if not emotional distress, which Hadaller felt was too much for him along with the other claims, he should focus on this at this time and that claim should be reserved as the facts are unraveled.

The fact that a party's action fails on the merits is by no means dispositive of the question of CR 11 sanctions. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220, 829 P.2d 1099 (1992). The court applies an objective standard to determine "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Id.*; *Biggs v. Vail*, 124 Wash.2d 193, 197, 876 P.2d 448 (1994) (*Biggs II*). \* Citing: *Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wash. App. 180, 190, 244 P.3d 447, 452 (2010)

The facts are set forth above, this Court has the information to make its determination that Hadaller's claims against the Lowes are meritorious and certainly not warranting CR 11 sanctions.

## **VI. CONCLUSION**

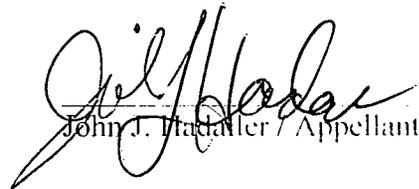
The Court should find: Genuine issue of material fact exists precluding summary judgment on the elements of Hadaller's Claims for Tortious interference and misrepresentation against the Lowes. An oral agreement dispute is particularly inappropriate to

be granted summary judgment, the parties must be heard by the finder of facts via oral testimony. The Court substantially relied upon the finding Hadaller and Fortman had no contract to dismiss the other elements, however, Hadaller has demonstrated material facts do exist at issue that must be heard by and found by the fact finder at trial with live testimony. The Court should reverse the order Granting Lowes summary judgment, at remand for trial.

The Court should find the statute of limitations for the tort claims began to run when the claims elements manifested in December 2008, at the soonest. The Court should find the statute does not preclude Hadaller's claims against the Lowes.

The Court should find in favor of public interest by avoiding a situation that casts a shadow of doubt of prejudice upon the Court, by finding Judge Lawler may appear to be in a position to cast that shadow upon the Lewis County bench. The Court should remand with orders to either bring a visiting judge or move the case to Thurston County if that is possible considering real property is involved.

Respectfully submitted by:

  
John J. Hadaller / Appellant

On this 8<sup>th</sup> day May 2012.

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DIVISION II  
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COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

JOHN J. HADALLER ) COA No. 42524-6-II  
An individual, ) LCSC No. 11-2-00574-5  
Plaintiff )  
v. )  
DAVID A.and SHERRY LOWE,individually ) DECLARATION OF SERVICE  
and the Marital community thereof; )  
and RANDY FUCHS, An individual; )  
Defendants )

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Deborah J. Reynolds, Declares as follows, That I am now and at all times here-in mentioned , was a citizen of the United States of America and a resident of the state of Washington, over the age of eighteen (18) years, and not a party to the above action and competent to be a witness therein.

That on the 8<sup>th</sup> day of May 2012. I served the following documents :

- *DECLARATION OF SERVICE*

1 • APPELLANTS BRIEF

2  
3 On the following, by this method:

4 [ x ] Personal Service;

5 [ ] facsimile

6 [ ] U. S. Mail

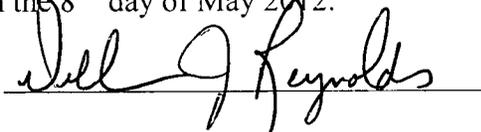
7 [ ] e-mail

8 To the following:

9 David A. Lowe  
10 701 Fifth Ave. Suite 4800  
11 Seattle, Wa. 98104  
12 (206) 381-3303  
13 lowe@blacklaw.com  
14 (206) 381 – 3301 fax  
15

16 The fore-going statements are made under penalty of perjury under the laws of  
17 the state of Washington and are true and correct.

18 Signed at Mossyrock, Washington on the 8<sup>th</sup> day of May 2012.

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