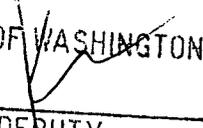


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DIVISION II

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No. 43824-1-II

STATE OF WASHINGTON

BY   
DEPUTY

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

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GEORGE WOODS,  
Respondent,

vs.

JOHNNY HILL and MALINDA HILL, husband and wife,  
Appellants.

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OPENING BRIEF OF APPELLANTS JOHNNY AND MALINDA HILL

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 ORIGINAL

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## I. ASSIGNMENTS OF ERROR

- A. The trial court erred in denying the Defendants' pre-trial motion to exclude Woods' witnesses and exhibits.
- B. The trial court erred in concluding that the parties entered into an enforceable, integrated contract (Findings of Fact (g) – (i), Conclusions of Law (b) – (m)).
- C. The trial court erred in failing to modify the contract in the presence of pre-contractual fraud in the inducement (Findings of Fact (g) – (i), Conclusions of Law (b) – (m)).
- D. The trial court erred in applying the doctrine of *caveat emptor* and concluding that the Hills had a duty to investigate and not sign a contract “on blind faith” (Findings of Fact (g) – (i), Conclusions of Law (b) – (m)).
- E. The trial court erred in finding that the subject van was in “good condition” (Finding of Fact (i)).
- F. The trial court erred in finding that the seller did not make misrepresentations regarding inspection of the subject van (Finding of Fact (j)).
- G. The trial court erred in finding that the Hills owed damages for back payments and attorney's fees (Findings of Fact (g) and (h), Conclusions of Law (j) – (k)).

H. The trial court erred in concluding that the Hills breached the contract (Findings of Fact (g) – (h), Conclusions of Law (c), (j), and (k)).

I. The trial court erred in concluding that Woods had no duty to release his security interest in the subject van (Conclusion of Law (l)).

J. The trial court erred in concluding that it could not order Woods to release the title to the subject van (Conclusion of Law (m)).

K. The trial court erred in concluding that Woods was entitled to judgment for back payments, interest, and attorney's fees (Findings of Fact (g) – (h), Conclusions of Law (j) and (k)).

L. The trial court erred in failing to enter findings of fact and conclusions of law relating to the Hills affirmative defenses and counterclaims (Findings of Fact (a) – (j), Conclusions of Law (a) – (m)).

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

A. The trial court abused its discretion when it denied the Hills' PCLR 16(b) motion to exclude Mr. Woods' witnesses and exhibits. (Assignment of Error A)

B. The trial court erred as a matter of law when it applied the doctrine of *caveat emptor* and concluded that the Hills did not have the right to rely on Mr. Woods' representations. (Assignments of Error B, C, D, G, H, and K)

C. The trial court erred when it concluded that the PSA was an integrated agreement and that evidence of the parties' verbal agreements could not be considered for purposes of modifying or contradicting the PSA. (Assignments of Error B, C, G, H, K, and L)

D. The trial court erred in concluding that the parol evidence rule precluded modification or contradiction of the PSA. (Assignments of Error B, C, F, G, H, and K)

E. The trial court erred in finding and concluding that there was no fraud in the inducement. (Assignments of Error B, C, E, F, H, and K)

F. The trial court erred in finding and concluding that Mr. Woods did not interfere with the Hills' contractual performance. (Assignments of Error G, I, J, and K)

G. The trial court erred in finding and concluding that Mr. Woods mitigated his damages. (Assignments of Error B, G, H, I, J, and K)

H. The trial court erred in entering findings and conclusions that were insufficient. (Assignment of Error L)

I. The Hills request attorney's fees and costs on appeal. (Assignments of Error A-L)

### III. STATEMENT OF THE CASE

#### A. FACTUAL HISTORY

On July 1, 2006, Johnny and Malinda Hill entered into a purchase and sale agreement (“PSA”) with George Woods for the purchase of Mr. Woods’ FedEx route and accompanying delivery van. Ex. 12. The Hills were first-time buyers and had never owned a FedEx route or van or negotiated for the sale of a FedEx route before. RP 81:7-9; 143:1-3.<sup>1</sup>

The PSA provided in pertinent part:

Purchaser shall accept the asset in the condition it is in on that date, subject to Seller’s warranties set forth herein. Other than the warranty of ownership and representations herein, Seller makes no express warranties. The Purchaser takes the Vehicle as is.

Ex. 12 at 3. The PSA also provided:

This instrument embodies the entire agreement between the parties hereto with respect to the transactions contemplated herein and there have been and are no agreements, representations or warranties between the parties other than those set forth or provided for herein.

*Id.* at 6.

Prior to signing the PSA, Mr. Woods represented to the Hills that the delivery van was in “good condition” and that it was suitable for the FedEx route. RP 73:25 – 74:3; 106:15-16. He indicated that the van was

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<sup>1</sup> For ease of reference, citations to the record of the June 4-5, 2012 trial will not contain a date. Citations to the records of the May 25 and July 20, 2012 hearings will contain a date to distinguish between the two records.

so easy to drive that “even Malinda” could do it. RP 106:17 – 107:2.

Although the PSA stated that there were 470,192 miles on the van, Johnny Hill’s understanding after talking to Mr. Woods was that the van’s engine had been rebuilt and that it was “pretty strong.” Ex. 12 at 2. RP 106:6-14. Mr. Woods represented that the van had just passed FedEx’s annual fleet inspection.<sup>2</sup> RP 23:20 – 24:17. Mr. Woods acknowledged that the route could not be serviced without a motor vehicle. RP 68:24 – 69:1.

Mr. Woods did not tell the Hills that the van he was selling had been in a prior accident. Ex. 26 at 10. RP 91:9-11; 145:8 – 146:2. He did not tell the Hills that his mechanic had given notice that **the van had “reached or exceeded its design intent.”** RP 76:2 – 77:3; 91:5-8; 91:12-17; 144:8 - 145:7; 146:7 – 147:5. Although the Hills asked to see Mr. Woods’ maintenance records for the van, Mr. Woods did not show them the documents.<sup>3</sup> RP 91:18-21; 144:11 – 145:2.

Mr. Woods also did not accurately represent the size of the FedEx route or the condition of the roads over which the van would have to be driven on the route. RP 107:3-15. Mr. Woods did not tell the Hills he was not taking all of the packages for his route as he should have, or that he

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<sup>2</sup>The Hills later learned that FedEx fleet inspections focused on safety issues, not mechanical problems. RP 117:1 – 118:12.

<sup>3</sup>Mr. Woods told the Hills that he was going to be moving soon and that the documents were packed or in storage. RP 105:23 – 106:2; 144:18-22. However, he did not actually move until February 2007. RP 45:21-22.

had not shown them the entire route prior to them signing the PSA. RP 84:1 – 85:9; 86:25 – 87:7; 88:11-16; 114:19-25; 116:4-25; 144:4-10.

Prior to signing the PSA, Malinda Hill went on ride-alongs with Mr. Woods. RP 83:1 – 25. On those occasions he took her to the downtown Bainbridge Island area, where roads are paved and relatively flat. RP 85:10 - 86:24. Mr. Woods did not tell the Hills that the route actually included rural areas where roads are not always paved, and there was rough terrain with steep hills. *Id.* Mr. Woods did not take Malinda Hill out to the rural areas when he showed her the route. *Id.*; 88:19 – 89:9.

Mr. Woods also took Johnny Hill on ride-alongs. RP 113:23-25; 114:10-18. While on the ride-alongs, Mr. Woods only loaded a certain number of packages into the van, leaving the rest behind at the FedEx terminal. RP 114:19-25; 116:4-25. He did not tell Mr. Hill that he was not delivering all of the packages for the route. RP 144:4-7; 195:24 – 199:11. He did not tell Mr. Hill he was not driving the entire route. RP 144:8-10. Mr. Woods did not drive in any rural or residential areas, but kept to the business areas on the route. RP 115:1-10; 135:19-22.

The Hills believed in and relied upon Mr. Woods' representations regarding the condition of the van and the size and nature of the route. RP 107:3-15; 148:10-20; 168:4-7. Based on what Mr. Woods told them about the van, the Hills decided not to have the van inspected prior to signing the

PSA. RP 166:24 – 167:12. Although Mr. Woods had only paid \$45,000 for the van and route, the Hills agreed to purchase them from Mr. Woods for \$85,000 plus interest. RP 9:20-21; RP 12:16-22.

Mr. Woods prepared the PSA by copying the purchase and sale agreement he had entered into with his seller: “**It was a cookie cutter.** Pretty much the same thing I did with Al Haus he did with me, and I did exactly the same thing with his [the Hill’s contract].” RP 14:25 – 15:3 (emphasis added). Mr. Woods admitted that he made a few changes to the “verbiage,” but confirmed that he “did that contract based on what I had from Mr. Haus.”<sup>4</sup> RP 15:24 – 16:9. The changes Mr. Woods made were not subject to negotiation with the Hills; Mr. Woods make the changes himself. RP 49:23 – 50:3.

When Mr. Woods prepared the PSA, the result was a document that was clearly missing language in the printed version given to the Hills. *See, e.g.,* Ex. 12 at 4-5. RP 47:14 – 48:11. At trial, Mr. Woods admitted that there were parts missing from the copy that the Hills were given. RP 48:21-24. He also admitted that the Hills were never shown the missing portions of the PSA prior to signing. RP 49:8-13.

**Significantly, Mr. Woods conceded that although the PSA**

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<sup>4</sup>In addition to the PSA, Mr. Woods also prepared a security agreement based on a document he received from his seller. RP 51:14 – 52:8. The result was a document that was garbled and nonsensical in places. Ex. 13; RP 52:9-24.

**contained an integration clause, the parties had agreements that were outside of the four corners of the document.** RP 187:11-19. One of the “non-integrated” agreements that the parties reached required Mr. Woods to sign over title to the van as part of the transaction. RP 107:16 – 108:17. However, he later changed his mind and unilaterally decided to retain legal title to the van. *Id.*; RP 41:2-17.

Once they took over the route, the Hills learned that they were responsible for delivering all of the packages marked for their route, which included a larger area than just downtown. RP 86:7-24; 88:11 – 89:5. Almost immediately, the Hills began having mechanical trouble with the delivery van, which they discovered was not in good enough condition to drive over the rough terrain in outlying areas. RP 88:19 – 89:16; 121:14 – 122:20. The van frequently lost power on hills. *Id.*; 89:24 – 90:17; 119:6-14; 122:21 – 123:15; 124:4 – 125:1. There was trouble with the clutch. *Id.* at 121:14-25. There were problems with the steering. *Id.* at 122:4-14. The van could not accelerate beyond a certain speed. *Id.* at 122:15-20; 123:5-9. The van’s “rear end” malfunctioned. *Id.* at 123:10 – 124:22.

As the Hills began having mechanical trouble with the van, they started reporting the problems to Mr. Woods. RP 39:17-21; 89:17-23; 125:2 – 127:3. However, he felt that those problems were not his responsibility. RP 40:7-11. Mr. Woods acknowledged that because of the

problems they were having with the van, the Hills asked to sell the van so they could purchase a different one. RP 41:18-22; RP 92:7 – 93:10. Mr. Woods' initial justification for refusing to sign over the title was because the Hills weren't "paying me monthly," but at trial Mr. Woods conceded that the Hills were current in their payments up to August 1, 2010. RP 42:1-9; 128:22-24; 176:23-25.

The Hills ultimately found it necessary to purchase a second vehicle because the original van was not dependable, especially in outlying areas. RP 127:7-128:3; 133:23 – 135:16. By January 2010, the Hills had spent at least **\$85,271.79**, almost the full value of the PSA, on repairs to the original van, rentals to take the place of or assist the original van, and purchase of the second vehicle. RP 94:4-16; 131:17 – 143:25. Exs. 5-11.

Between August 2006 and July 2010, the Hills paid at least **\$73,678.50** on the PSA. RP 130:3-15.

Due to the continuous mechanical problems the Hills had with the van, between 2006 and 2010 they asked Mr. Woods on several occasions to release the title to the van so it could be sold. RP 92:7 – 93:10. Mr. Woods always refused. *Id.*

In August 2010, because Mr. Woods still refused to release the title, the Hills reached a financial breaking point and were unable to

continue making payments under the PSA. RP 93:11 – 94:3; 147:21 – 148:9. Then Hills testified that **had they known the van had been in an accident and had met or exceeded its design intent, and had known the actual size and nature of the route, they would not have signed the PSA.** RP 91:22 – 92:6; 147:6-20.

B. PROCEDURAL HISTORY

1. Procedural Facts Relating to the Hills' Motion to Exclude Witnesses and Exhibits

The case scheduling order herein was entered on September 16, 2011. CP 278. According to the case schedule, the parties were to exchange their lists of witnesses and exhibits no later than April 16, 2012. *Id.* The Joint Statement of Evidence was to be filed no later than April 23, 2012. *Id.* Trial was set to begin on June 4, 2012. *Id.*

The Hills complied with the case schedule and provided their witness and exhibit list on April 6, 2012 (ten days early). CP 87-90. Mr. Woods **did not** provide his own list of witnesses and exhibits, and did not otherwise respond to the Hills' list.<sup>5</sup> CP 102-03. Accordingly, the Hills filed their part of the Joint Statement of Evidence without any input from Mr. Woods. *Id.*; CP 95-98.

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<sup>5</sup> Mr. Woods had also violated a court order requiring him to respond to the Hills' written discovery, had not conducted any discovery of his own, failed to provide a primary witness list, and failed to provide a rebuttal witness list as required by the case schedule. 5/25/12 RP 3:12 – 5:10.

On May 14, 2012, the Hills filed a motion to exclude Mr. Woods' witnesses and documents pursuant to PCLR 16(b)(2) and (4). CP 99-108; 176-179. The hearing on the Hills' motion was held on May 25, 2012. 5/25/12 RP 1-21. At the hearing, the trial court treated the motion as if it were a motion for discovery sanctions, relying on *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). *Id.* at 2:9 – 3:10.

Although not required to do so under *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 167-69, 864 P.2d 1 (1993), *opinion amended* at 72 Wn. App. 164, 871 P.2d 1075 (1994), the Hills argued that Mr. Woods' failure to exchange his witness/exhibit list prejudiced their ability to adequately prepare for trial. CP 99-108; 176-79. 5/25/12 RP 3:11 – 8:10.

Just having discovery isn't enough, Your Honor. I have the burden of number one, defending against his claims; and also, my clients have counterclaims. And even if I had taken depositions of all these people, that doesn't tell me who he's going to call at trial and what exhibits he's going to rely on, and that [a]ffects my trial strategy. . . .

And I think that's why the *Allied Financial Services* case went the way it did. It's not enough to just hand out interrogatory answers and say, okay, now you got it all. Now guess what I'm going to do at trial. It doesn't work that way.

5/25/12 RP 16:19 – 17:14. Although not required to do so under *Allied Financial Services*, the Hills also argued that lesser sanctions would not be

adequate because money would not help the Hills prepare for trial, and a continuance would only reward Mr. Woods. *Id.* at 6:25 – 7:15.

In his response papers, **Mr. Woods did not offer any reasonable justification that would rise to the level of “good cause”** for his failure to follow the case scheduling order or the local court rules. CP 109-10; 173-75.

At the conclusion of the May 25 hearing, the trial court **did not make any findings, either orally or in writing, regarding “good cause.”** CP 180-81. 5/25/12 RP 1-21. The trial court found that Mr. Woods’ conduct “borderline[d] on willfulness,” but was not “the kind of willfulness that we see in the *Allied Financial Services* case or the *Danfer* case that followed.”<sup>6</sup> *Id.* at 20:10-11. The trial court awarded monetary sanctions in the amount of \$1,000, but declined to impose a deadline for when Mr. Woods would have to pay. 5/25/12 RP 20:9 – 21:4.

2. Procedural Facts Relating to the Findings of Fact and Conclusions of Law

After the parties rested, the trial court gave its oral ruling. RP 242:16 – 249:22; 251:6 - 17. Although both parties testified that there were agreements outside the four corners of the PSA and the Hills had presented evidence of fraud in the inducement, the trial court concluded

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<sup>6</sup> It is believed that the trial court was actually referring to *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994), *rev. denied* 126 Wn.2d 1015, 894 P.2d 565 (1995).

that the contract was integrated and applied the parol evidence rule to preclude modification and/or contradiction of the PSA. RP 107:16 – 108:22; 187:11-19; 245:18 – 247:2. The trial court specifically found that the Hills could not have relied on Mr. Woods’ representations because the contract required them to take the van “as is.” RP 247:17 - 248:9. The trial court made clear that its ruling was based in large part on the doctrine of *caveat emptor*:

THE COURT: What happened to due diligence. Do your part, investigate what it is you’re buying. Now, wait a minute. Buyer beware has been the law in the state of Washington for as long as I’ve been practicing, for 30 years. It’s different when you have someone who creates fraud and misrepresentation. It’s different when someone comes with a set of facts with certainty and distinction and says this is true, you can rely on it.

RP 216:22 – 217:4.

After the trial court’s oral ruling, Mr. Woods prepared a set of proposed findings of fact and conclusions of law which were never properly filed with the trial court. *See* RP 251:4-5. The Hills filed multiple objections to the findings and conclusions, and also proposed several additional findings and conclusions relating to the Hills’ defenses and counterclaims. CP 191-207.

On July 20, 2012, a hearing was held on the findings and conclusions and the Hills summarized their objections on the record.

7/20/12 RP 1-12. The trial court ordered minor revisions to Mr. Woods' proposed findings and conclusions, but refused to add findings and conclusions relating to the Hills' defenses and counterclaims. CP 271-73. The findings of fact and conclusions of law were finally entered on July 27, 2012. *Id.* A judgment was entered the same day. CP 274-75.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE HILLS' PCLR 16(b) MOTION TO EXCLUDE MR. WOODS' WITNESSES AND DOCUMENTS.**

This Court reviews a trial court's decision to exclude witnesses for failure to follow a case scheduling order for abuse of discretion. *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 167-69, 864 P.2d 1 (1993), *opinion amended* at 72 Wn. App. 164, 871 P.2d 1075 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Matheson v. Gregoire*, 139 Wn. App. 624, 634, 161 P.3d 486 (2007), *rev. denied* 163 Wn.2d 1020, 180 P.3d 1292 (2008), *cert. denied* 555 U.S. 881, 129 S. Ct. 197, 172 L. Ed. 2d 140 (2008). An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Id.* Here, it is the Hills'

position that the trial court relied on unsupported facts because it had no evidence of “good cause,” and, to the extent the trial court relied on *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), the trial court applied the wrong legal standard.

PCLR 16(b)(2) provides in pertinent part:

In cases governed by an Order Setting Case Schedule pursuant to **PCLR 3**, the parties *shall* exchange: (A) lists of the witnesses whom each party expects to call at trial; (B) lists of the exhibits that each party expects to offer at trial, except for exhibits to be used only for impeachment; and (C) copies of all documentary exhibits except those to be used only for illustrative purposes, and except for those items agreed to by counsel and self-represented parties . . . . *Any witness or exhibit not listed shall not be used at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires.*<sup>7</sup>

PCLR 16(b)(2) (boldface in original; italics and underline added).

Clearly, based on the plain language of the rule, parties are required to exchange witness/exhibit lists in accordance with the case schedule. Violation of a case scheduling order without reasonable excuse is deemed willful. *Allied Financial Services*, 72 Wn. App. at 168.

**Prejudice is not a prerequisite to a court’s exclusion of witnesses as a sanction for a party’s failure to submit a witness list.** *Id.* at 168-69.

Here, the trial court erred in denying the Hills’ motion for two reasons. First, Mr. Woods presented no evidence of “good cause,” as

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<sup>7</sup> The word “shall” in a court rule creates a mandatory duty. *Sorenson v. Dahlen*, 136 Wn. App. 844, 855, 149 P.3d 394 (2006).

required by PCLR 16(b)(2). Like the Mangums in *Allied Financial Services*, Mr. Woods “willfully violated” the case schedule order and failed to supply any reason for his noncompliance. *Allied Financial Services*, 72 Wn. App. at 169. Thus, Mr. Woods’ willfulness was exactly like the willfulness described in *Allied Financial Services*. See 5/25/12 RP 20:10-11. Under *Allied Financial Services* and PCLR 16(b)(2), the trial court was **obligated** to grant the Hills’ motion and exclude Mr. Woods’ witnesses and exhibits. The trial court did not do so, and abused its discretion.

Second, the trial court applied the wrong legal standard to the Hills’ motion. To be clear, the Hills’ motion was **not** a motion for discovery sanctions under CR 26 or 37; rather, the motion was based on PCLR 16(b)(2) and (4) and Mr. Woods’ failure to comply with the case scheduling order. The distinction is important, as different standards apply to each type of motion. See 9 WASH. PRAC., *Civil Procedure Forms* § 7.65 (3<sup>rd</sup> ed. 2012) (noting the different standards); *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 167-69, 864 P.2d 1 (1993), *opinion amended* at 72 Wn. App. 164, 871 P.2d 1075 (1994) (noting that prejudice is not a prerequisite to a court’s exclusion of witnesses as a sanction for a party’s failure to submit a witness list); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (describing the

three-part analysis to be employed by a court considering sanctions for a discovery violation).

At the May 25, 2012 hearing, the trial court indicated that it was applying *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). 5/25/12 RP 2:16. However, *Teter* involved alleged discovery violations, so its analysis was not on all fours with the Hills' motion. See *Teter*, 174 Wn.2d at 210. The trial court should have followed *Allied Financial Services*, which involved violation of a scheduling order. Because the trial court applied the wrong legal standard to the Hills' motion, the trial court abused its discretion. See *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 592, 187 P.3d 291 (2008) ("If a trial court has tenable grounds for a decision but applies the wrong law, it errs as a matter of law. Moreover, whatever its stated reasons under the inapplicable standard, these reasons are no longer reasonable under the controlling legal standard.").

The Hills respectfully request that the Court reverse the trial court's ruling on the Hills' motion to exclude Mr. Woods' witnesses and exhibits.

**B. THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF CAVEAT EMPTOR AND CONCLUDING THAT THE HILLS DID NOT HAVE THE RIGHT TO RELY ON MR. WOODS' REPRESENTATIONS.**

This Court reviews *de novo* questions of law and a trial court's conclusions of law. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 814, 225 P.3d 280 (2009), *rev. denied* 169 Wn.2d 1012, 236 P.3d 205 (2010). Here, because the trial court's conclusions were colored by its erroneous application of the doctrine of *caveat emptor*, the Hills assert that the trial court erred as a matter of law.

The doctrine of *caveat emptor*<sup>8</sup> was disapproved by the Washington Supreme Court several decades ago:

In the olden days, under the doctrine of *caveat emptor*, courts were inclined to think that a man dealt with another at his peril and that he should be on the lookout for possible deception, failing which, he would be penalized as negligent in failing to discover the fraud that was being perpetrated on him. **The modern rule is against such an attitude. A man who deals with another in a business transaction has a right to rely upon representations of fact as truth.** [citations omitted] These authorities sustain the view that one who has intentionally deceived another shall not be heard to say that the other person should not have trusted him. As the Supreme Court of Vermont said in an old case,

“No rogue should enjoy his illgotten plunder for the simple reason that his victim is by chance a fool.” [citation omitted]

This court reached the same conclusion in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 P. 1054.

*Scroggin v. Worthy*, 51 Wn.2d 119, 123-24, 316 P.2d 480 (1957) (italics in

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<sup>8</sup>The phrase is translated, “let the buyer beware.” BLACK’S LAW DICTIONARY 222 (6<sup>th</sup> ed. 1990).

original; boldface added). Our high court confirmed its disapproval of the doctrine more recently in *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990):

In the sale of new residential buildings, the doctrine of caveat emptor has properly been eroded by the winds of contemporary realities. [citations omitted] The fictional foundation of the doctrine was aptly dispelled in *Chandler v. Madsen*, 197 Mont. 234, 642 P.2d 1028 (1982), where the Montana Supreme Court explained:

*Caveat emptor*, which traditionally has applied to the sale of real estate, developed at a time when a buyer and seller were in equal bargaining positions. They were of comparable skill and knowledge and each could protect himself in a transaction.

In the modern marketplace that equality of position no longer necessarily exists, and a growing number of jurisdictions have abandoned *caveat emptor* in favor of implied warranties where a builder-vendor sells a new residence.

[citation omitted] This metamorphosis, as one court has observed, “brings the law much closer to the realities of the market for new homes than does the anachronistic maxim of caveat emptor.”

*Id.* at 517-18 (emphasis in original).

In the present case, the Hills argued that as first-time buyers of a FedEx route and van, they had the right to rely on Mr. Woods' pre-contractual representations, and were not required to fact-check his

statements regarding the condition of the van or the size and nature of the route before signing the PSA. *See* RP 148:10-20; 209:12 – 211:17.

The rule is followed . . . in respect to transactions involving both real and personal property, that **one to whom a positive, distinct, and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved.** The rule is a corollary to the broad principle of a general right of reliance upon positive statements. Under this rule it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and mislead the complaining party. Under such circumstances, it is immaterial that the means of knowledge are open to the complaining party, or easily available to him, and that he may ascertain the truth by proper inquiry or investigation.

*Rummer v. Throop*, 38 Wn.2d 624, 633, 231 P.2d 313 (1951) (emphasis added). The trial court disagreed, and held that the Hills did not have a right to rely on Mr. Woods' representations. RP 247:17 - 248:9. Because the trial court reached this conclusion through application of the doctrine of *caveat emptor*, which has been expressly disapproved in Washington, the trial court erred as a matter of law.

The Hills respectfully request that the Court reverse Conclusions of Law (b) – (k) and the judgment entered in favor of Mr. Woods.

C. THE TRIAL COURT ERRED IN CONCLUDING THAT THE PSA WAS AN INTEGRATED CONTRACT.

This Court reviews a trial court's conclusions of law *de novo*.

*Mitchell*, 153 Wn. App. at 814. This Court reviews findings of fact under a “substantial evidence” standard. *Id.* “Substantial evidence” is evidence that would persuade a fair-minded person of the truth of the statement asserted. *Id.*

Generally, people have the right to make their agreements entirely oral, entirely in writing, or partly oral and partly in writing. *Barber v. Rochester*, 52 Wn.2d 691, 698, 328 P.2d 711 (1958); *Diel v. Beekman*, 1 Wn. App. 874, 878-80, 465 P.2d 212 (1970), *rev. denied* 81 Wn.2d 1007 (1972). With a written contract, it is the court’s duty to “ascertain from all relevant extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not. That is a question of fact.” *Id.* An agreement may be only partially integrated, notwithstanding a full integration clause, if the clause is false boilerplate, because parties are not bound by incorrect statements of fact. *South Kitsap Family Worship Center v. Weir*, 135 Wn. App. 900, 907, 146 P.3d 935 (2006).

In the present case, **both Mr. Woods and Johnny Hill** testified that the parties made agreements that were not contained within the four corners of the PSA.

A (cont.) **Some things we didn’t put in the contract because we communicated verbally.** Just like the allotment was not put in the contract, because we

verbally said that's what we were going to do.

Q So there was more to this contract than what's written down?

A **Only the things that were, again, the things we talked about**, which was how he was going to do his payment, because he couldn't afford to do a down payment. . . .

RP 187:11-19 (emphasis added). Defendant Johnny Hill testified that the parties verbally agreed that Mr. Woods would sign over the title to the van as part of the transaction. RP 107:16 – 108:22. Mr. Woods also testified that the PSA was essentially a copy of the contract he had with his seller, and that the Hills had no part in negotiating the terms contained in the PSA. RP 14:25 – 15:3; 15:24 – 16:9; 49:23 – 50:3.

Based on the foregoing, the trial court's conclusion<sup>9</sup> that the PSA was an integrated agreement is not supported by substantial evidence. *See* RP 245:18 – 247:2. To the contrary, the parties' testimony establishes that they intended their agreement to be partly written (in the form of the PSA) and partly oral (to encompass the things that were "communicated verbally"). Mr. Woods' testimony also confirms that the integration clause contained in the PSA was not the subject of a negotiation that resulted in a meeting of the minds on that particular term, but was mere boilerplate copied from a prior contract Mr. Woods had with his seller.

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<sup>9</sup> The trial court did not enter specific findings of fact regarding integration. CP 271-72.

The Hills should not be bound by such boilerplate, and the trial court should have considered the Hills' evidence of the parties' verbal agreements for purposes of modifying and/or contradicting the PSA. *See also* Subsection D below.

The Hills respectfully request that the Court reverse Conclusions of Law (b) – (m) and the judgment entered in favor of Mr. Woods.

D. THE TRIAL COURT ERRED IN CONCLUDING THAT THE PAROL EVIDENCE RULE PRECLUDED MODIFICATION OR CONTRADICTION OF THE PSA.

Again, this Court reviews a trial court's conclusions of law *de novo*, and findings of fact are reviewed under a "substantial evidence" standard. *Mitchell*, 153 Wn. App. at 814.

Under the parol evidence rule, prior or contemporaneous negotiations and agreements are said to merge into the final written contract, and evidence is not admissible to add to, modify, or contradict the terms of the integrated agreement. *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986); *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). However, the parol evidence rule is only applied to writings intended as the final expression of the terms of the agreement. *Emrich*, 105 Wn.2d at 556.

Moreover, Washington courts recognize that parol evidence is generally admissible if some form of fraud is present. 25 WASH. PRAC. ,

*Contract Law and Practice* § 4:7, “Fraud” (3<sup>rd</sup> ed. 2012). The rule is that proof of fraud in the inducement may be shown to avoid a written agreement. *Id.* This is true **even if the evidence offered specifically contradicts the writing or a merger clause.** *Id.* “Though there be a written contract between the parties, this \*\*\* does not preclude parol proof of fraudulent representations made at the same time as an inducement to making it . . . .” *Griffith v. Strand*, 19 Wn. 686, 694, 54 P. 613 (1898). “The rule that parol evidence is inadmissible to vary the terms of a written contract does not exclude evidence of a want of consideration, illegality, or fraud, when a defense is made on any one of these grounds.” *Kritzer v. Moffat*, 136 Wn. 410, 417, 240 P. 355 (1925).

As discussed in subsection C above, the trial court improperly concluded that the PSA was an integrated agreement and did not consider evidence of the parties’ oral agreements for purposes of modifying or contradicting the PSA. RP 245:18 – 247:2. The trial court also erred in concluding that the parol evidence rule precluded modification or contradiction of the PSA in light of the Hills’ evidence of fraud in the inducement. *Id.* See also Subsection E below. Because the Hills’ evidence of verbal agreements and fraud in the inducement should have been considered for purposes of modifying and/or contradicting the PSA, the trial court erred as a matter of law. The Hills respectfully request that

the Court reverse Conclusions of Law (b) – (m) and the judgment entered in favor of Mr. Woods.

E. THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS NO FRAUD IN THE INDUCEMENT.

This Court reviews a trial court’s conclusions of law *de novo*, and findings of fact are reviewed under a “substantial evidence” standard. *Mitchell*, 153 Wn. App. at 814.

Fraud in the inducement relates to false statements of fact, warranties, or promises that lead a party into contracting; it does not concern the contents of the writing. 25 WASH. PRAC., *Contract Law and Practice*, § 4:7 “Fraud” (3<sup>rd</sup> ed. 2012). A party has engaged in fraud or inequitable conduct if it conceals a material fact from the other party. *Washington Mut. Sav. Bank*, 125 Wn.2d at 526. To prove fraud, a party must present clear, cogent, and convincing evidence of the following: (1) a representation of existing fact; (2) its materiality; (3) its falsity; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that it be acted upon by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom the representation is addressed; (7) the latter’s reliance on the truth of the representation; (8) the right to rely upon it; and (9) consequent damage. *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d 157, 166, 273 P.3d 965 (2012).

1. Representations of existing fact

In the present case, there is no dispute that Mr. Woods told the Hills that the van was in “good condition.” Ex. 12 at 3. RP 73:25 – 74:3; 106:6-16; 168:4-7. Although the van had high mileage, Mr. Woods assured the Hills that the van was reliable, dependable, and easy to drive. RP 106:6 – 107:2; 168:4-7. Mr. Woods told the Hills that the van had passed an annual inspection by FedEx. RP 23:19 – 24:20.

Mr. Woods also led the Hills to believe that it would take approximately eight hours to drive the route. RP 84:1 – 85:9; 86:25 – 87:11; 114:19 – 115:6. Johnny Hill was under the impression that the Hills were buying a small route. RP 107:3-15. When Malinda Hill went on ride-alongs with Mr. Woods, Mr. Woods took her to delivery locations in the downtown Bainbridge Island area. RP 85:10-14. Mr. Woods also took Johnny Hill on ride-alongs, again only making deliveries to business areas and avoiding rough or rural roads. RP 113:22 – 116:25; 135:19-22; 195:17 – 199:11.

2. Materiality

Mr. Woods conceded that the route could not be serviced without a delivery vehicle. RP 68:24 – 69:1. The Hills stated that they relied on the Plaintiff’s representations regarding the condition of the van and the size and nature of the route in deciding whether to have the van inspected and

whether to sign the PSA. RP 148:10-20; 166:24 – 167:12. The Hills testified that had they known the van had been in an accident and had met or exceeded its design intent, and had known the actual size and nature of the route, they would not have signed the PSA. RP 91:22 – 92:6; 147:6-20. Clearly, the representations regarding the condition of the van, as well as the size and nature of the route, were material facts that affected the Hills' decision-making process.

3. Falsity

Mr. Woods did not tell the Hills that the van had been in a prior collision. Ex. 26 at 10. RP 91:9-11; 145:8 – 146:2. Mr. Woods did not tell the Hills that he had spent over \$11,000 in repairs to the van. RP 73:25 – 74:3; 91:5-8; 145:3-7. Mr. Woods did not tell that Hills that on November 16, 2005, eight months before he sold the van to the Hills, Mr. Woods received notice from his mechanic that the van had “reached or exceeded its design intent.” Ex. 2 at 24. RP 76:2 – 77:3; 91:12-17; 146:7 – 147:5. Mr. Woods did not show the Hills his maintenance records for the van prior to having them sign the PSA. RP 91:18-21; 144:11 – 145:2. The Hills later learned that the annual inspections done by FedEx were for safety purposes (lights, tires, mirrors, etc.) and were not intended to review mechanical issues. RP 118:2-12.

Shortly after taking over the route, the Hills began having

mechanical troubles with the van. RP 89:6-23; 90:6-13; 121:2 – 124:4. The van also had difficulty on rough terrain and did not perform well on hills. *Id.* It could not travel above 40 miles per hour. RP 124:4-16.

When Mr. Woods took the Hills on ride-alongs, he did not show them the entire route; he took them primarily to the “business areas” in downtown Bainbridge Island. RP 85:10 - 86:24. On Malinda Hill’s ride-alongs, Mr. Woods did not take her to rural areas or tell her that the route included areas where roads were in bad condition or had steep hills. RP 86:21 – 87:7. Malinda later learned that Mr. Woods had left the FedEx terminal without taking all of the packages for his route. RP 84:24 – 85:9.

The Hills also discovered that the route was more complex and took longer to complete than what they had understood from Mr. Woods. RP 88:19 – 89:5. If all of the packages were delivered, it would take Malinda Hill approximately 12 hours to drive the route. RP 88:14-16. The Hills came to believe that the Plaintiff had been refusing packages at the FedEx terminal in order to limit the number of hours it took him to work the route. RP 86:7 – 87:7; 116:4-25.

4. Mr. Woods’ knowledge of falsity

Mr. Woods revealed in discovery that the van had been in a prior accident. Ex. 26 at 10. RP 91:9-11; 145:8 – 146:2.

During trial Mr. Woods’ surviving maintenance records for the van

were admitted as Exhibit 2. Ex. 2. Mr. Woods testified that he read those records and that he asked questions if he did not understand something:

Q Now I want to go back to your Exhibit 2. . . .

I think your testimony earlier was that these are documents showing repairs that you had done on the van; is that right?

A These are some of the documents that I had worked out on the van, correct.

Q When you received these documents from the various repair shops, did you actually read through them and make sure you understood them?

A For the most part I understand them, yes. . . .

Q If you had a question about something would you ask the mechanic is this right or what does this mean, that sort of thing?

A In reference to what, though?

Q The details that they put on these individual documents. If there was something that you didn't understand or that you wanted clarified, would you ask?

A The mechanic, yes.

Q Okay.

A Or whoever gives me the payment history or whatever the case may be, yes.

RP 76:2 – 77:2. The documents in Exhibit 2 also established that Mr.

Woods spent over \$11,000 in repairs to the van while he owned it. Ex. 2.

RP 76:14-16.

Based on Mr. Woods' own testimony, he had knowledge that the statements he made about the van being reliable, dependable, easy to drive, and in good condition were directly contradicted by the extensive repair history of the van, as well as his mechanic's notice that the van had reached or exceeded its design intent.

With regard to the route, Mr. Woods testified that he personally drove the route while he owned it. RP 68:21-23. Thus, he had knowledge of the true size and complexity of the route, and the fact that he did not show the Hills the entire route or deliver all of the packages for the route when he took them on ride-alongs.

Furthermore, when Johnny Hill went on his ride-along with Mr. Woods, he noticed that Mr. Woods left the FedEx terminal without the van being fully loaded. RP 114:19-25; 116:21-25. Mr. Woods made a comment to the effect of, "They will call me by the time I get to the Narrows Bridge." RP 197:21-24. Johnny Hill saw that Mr. Woods did receive a call when they reached the Narrows Bridge, and after the call Mr. Woods said, "I told you." RP 198:21-23. Clearly, Mr. Woods knew that his actions were misleading.

5. Mr. Woods' intent that the Hills would act upon his representations

Mr. Woods testified that he wanted to sell the route and van so that he could move to Michigan to help his ailing sister. RP 11:1-13. He told the Hills that he would be moving “very soon.” RP 105:18 – 106:2. The reason he could not show the Hills his maintenance records was because they were already packed or in storage. RP 144:11-25. In reality, Mr. Woods did not move until February 2007, seven months after the PSA was signed. RP 45:21-22. Mr. Woods received a significant financial benefit once the PSA was signed. RP 130:3-15.

Mr. Woods’ testimony regarding his reasons for selling the route and the representations regarding the condition of the van and size and nature of the route indicate that he intended for the Hills to act on his representations and sign the PSA quickly. The Hills testified that Mr. Woods’ representations did in fact affect their decision to forego an inspection of the van and their decision the purchase the van and route. RP 91:22 – 92:6; 147:6-20; 148:17-20; 166:24 – 167:12.

6. The Hills’ ignorance of falsity

The Hills testified that they had never before negotiated or purchased a FedEx route or van. RP 81:7-9; 144:1-3. They testified that Mr. Woods was the only person with detailed information about the van and the route:

Q When you were in the negotiation stage of this

contract, was there anyone else who you could have talked to about the van or the route who would have had knowledge like Mr. Woods had?

A Not that particular van, probably not.

Q What about the route?

A About – yeah, about the route. Just Mr. Woods.

Q So you were relying on what he told you as far as to decide whether or not to sign the contract?

A Everything he was telling me is what I was basing everything off of.

RP 148:10-20. Yet Mr. Woods did not show them his maintenance records for the van, and FedEx would not release their copies of the documents to the Hills. RP 91:18-21; 144:11 – 145:2. The Hills clearly did not know that the van had been in a prior accident or met or exceeded its design intent, as they testified that they would not have signed the PSA if they had known those facts. RP 91:22 – 92:6; 147:6-20; 148:17-20; 166:24 – 167:12. Similarly, they did not know the true size and nature of the route, because they testified that they would not have signed the PSA if they had known. *Id.*

#### 7. The Hills' reliance

Again, prior to signing the July 1, 2006 contract, the Hills had never before purchased or owned a FedEx route or delivery van. RP 81:7-9; 144:1-3.

Mr. Woods was the only person who could supply the Hills with information about the van and route. RP 148:10-20. Although they asked to see his maintenance records, Mr. Woods did not show the records to the Hills, and FedEx would not release its copies to the Hills. RP 144:8 – 145:2. Although they went on ride-alongs with Mr. Woods, he did not take them on the full route, which actually included rural areas. RP 85:10 - 86:24; 88:19 – 89:9; 115:1-10; 135:19-22; 144:8-10.

The Hills nevertheless testified that they relied on and believed the representations Mr. Woods made regarding the van and route. RP 148:10-20; 166:24 – 167:12. The Hills testified that details about the condition of the van and the size and nature of the route were important to them, and had they known that the van had been in a prior collision, that the van had reached or exceeded its design intent, or if they had known the true size and nature of the route, they would not have entered into the July 1, 2006 contract with the Plaintiff. RP 91:22 – 92:6; 147:6-20; 148:17-20; 166:24 – 167:12.

8. The Hills' right to rely

Mr. Woods was the only person who could supply the Hills with information about the van and route. RP 148:10-20. He told them that the van was in good condition, and that it was reliable and easy to drive. Ex. 12 at 3. RP 73:25 – 74:3; 106:6 – 107:2; 168:4-7. Although not required

to under *Rummer v. Throop*, 38 Wn.2d 624, 633, 231 P.2d 313 (1951) (one to whom a positive, distinct, and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved), the Hills asked to see Mr. Woods' maintenance records. RP 144:8 – 145:2.

When the Hills asked to see the records, Mr. Woods stated that he did not have access to the papers and that the Hills could get copies from FedEx. RP 144:8-22. The Hills attempted to get copies of the records from FedEx, but because the Hills were not the current owners of the route and van, FedEx refused to release the records. RP 144:23 – 145:2.

The Hills also had Mr. Woods take them on ride-alongs so they could learn the route. RP 83:1 – 25; 113:23-25; 114:10-18. Although Mr. Woods took the Hills on ride-alongs, he did not show them the entire route and did not deliver all of the packages for the route. RP 85:10 - 86:24; 88:19 – 89:9; 115:1-10; 135:19-22; 144:8-10. Under these circumstances, the Hills had a right to rely on what Mr. Woods told them about the van and route.

#### 9. Consequent damage

Because the van had serious mechanical problems and was not suitable to drive in the rural areas included in the route, between July 2006 and January 2010 the Defendants incurred at least \$85,271.79 in expenses

relating to repairs to the van, rentals of secondary vehicles to assist or replace the van, and purchase of a replacement vehicle. *See* RP 143:5-22; 147:21 – 148:9. Had Mr. Woods been forthright about the van’s accident and repair history, and had also taken the Hills on the entire route so they could see the terrain over which the van would have to drive, they would not have signed the PSA and would not have had these expenses. RP 91:22 – 92:6; 147:6-20; 148:17-20; 166:24 – 167:12.

There is not substantial evidence in the record to support the trial court’s finding that the van was in good condition. All nine elements of fraud in the inducement were satisfied at trial. Because there was fraud in the inducement, the trial court had authority to reform the contract to provide equitable relief. “A party to a contract is entitled to reformation of the contract if either there has been a mutual mistake **or one party is mistaken and the other party engaged in fraud or inequitable conduct.**” *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 525, 886 P.2d 1121 (1994) (emphasis added).

The trial court therefore erred in concluding that there had been no fraud, and that it could not order Mr. Woods to release his security interest in the van and turn over its title to the Hills. The Hills respectfully request that Findings of Fact (g) – (i), Conclusions of Law (b) – (m), and the judgment in favor of Mr. Woods be reversed.

F. THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT MR. WOODS DID NOT INTERFERE WITH THE HILLS' CONTRACTUAL PERFORMANCE.

This Court reviews a trial court's conclusions of law *de novo*. *Mitchell*, 153 Wn. App. at 814. This Court reviews findings of fact under a "substantial evidence" standard. *Id.*

If one party enters into a contract with another, there is an implied agreement by each to do nothing that will hinder, prevent or interfere with the performance of the contract terms by the other.

If the defendants prove by a preponderance of the evidence that plaintiff interfered with or prevented use of a workable vehicle to make deliveries on the subject route, then the defendants were excused from performing their duty of making monthly payments under the contract.

*See* WPI 302.08 (modified). *See also Jones Associates, Inc. v. Eastside Properties, Inc.*, 41 Wn. App. 462, 471, 704 P.2d 681 (1985) (proof of a party's interference with the performance of the other party's obligation under the contract will work to discharge the other party's duty); *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986) (in every contract there is an implied covenant of good faith and fair dealing which obligates each party to "cooperate with the other so that [each] may obtain the full benefit of performance"); *Payne v. Ryan*, 183 Wn. 590, 597, 49 P.2d 53 (1935) (one who prevents a thing

may not avail himself of the nonperformance which he has occasioned).

In the present case, the van's poor condition and Mr. Woods' failure to show the Hills the complete route, combined with Mr. Woods' refusal to release title so that the van could be sold, prevented the Hills from being able to use the van to service the FedEx route in a cost-effective manner. RP 127:7 – 128:3; 132:9 – 143:25. The financial strain placed on the Hills due to Mr. Woods' refusal made it very difficult for them to make their contractual payments.<sup>10</sup> *Id.* The Hills actually spent more on repairs, rentals, and replacements than on the PSA itself. *Id.*

Based on these facts, there is no question that Mr. Woods interfered with the Hills' ability to perform under the PSA. Mr. Woods did not cooperate with the Hills and did not uphold his duty of good faith and fair dealing when he continually refused to release the title to the van. Mr. Woods may not "avail himself of the nonperformance which he has occasioned."

The trial court erred in failing to find that the Hills were discharged from their duty to make payments under the PSA. Findings of Fact (g) and (h), Conclusions of Law (b) – (m), and the judgment in favor of Mr. Woods must be reversed.

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<sup>10</sup> See WPI 302.09, "Impossibility or Impracticality."

G. THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT MR. WOODS MITIGATED HIS DAMAGES.

This Court reviews a trial court's conclusions of law *de novo*, and findings of fact are reviewed under a "substantial evidence" standard.

*Mitchell*, 153 Wn. App. at 814.

A plaintiff who sustains damage as a result of a defendant's breach of contract has a duty to minimize his loss. Plaintiff is not entitled to recover for any part of the loss that he could have avoided with reasonable efforts. The defendant has the burden to prove plaintiff's failure to use reasonable efforts to minimize his loss, and the amount of damages that could have been minimized or avoided.

WPI 303.06. *See also Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840, 100 P.3d 791 (2004); *City of Puyallup v. Hogan*, 168 Wn. App. 406, 422-23, 277 P.3d 49 (2012); *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825-26, 142 P.3d 209 (2006), *rev. denied* 161 Wn.2d 1013, 166 P.3d 1218 (2007).

Here, Mr. Woods could have easily mitigated his damages by agreeing to release title to the defective van on the condition that he be given a security interest in any replacement vehicle. However, Mr. Woods never made such a request of the Hills. RP 148:24 – 149:9. This is unfortunate, as had he done so the Hills would have been able to service the route with a different vehicle, which would have been more cost-effective, and continued making their payments under the PSA. *Id.*

Nevertheless, there is no evidence that Mr. Woods took any action to minimize his losses. He merely insisted that the Hills continue to use a van that broke down regularly and was unfit for use on the FedEx route.

Mr. Woods did not mitigate his damages. As such, he should not be permitted to recover the final year of payments that the Hills would have owed under the PSA. The trial court erred in concluding that Mr. Woods mitigated his damages, and the Hills respectfully request that Findings of Fact (g) – (i), Conclusions of Law (b) – (m), and the judgment in favor of Mr. Woods be reversed.

H. THE TRIAL COURT ERRED IN ENTERING FINDINGS AND CONCLUSIONS THAT WERE INSUFFICIENT.

CR 52 requires a trial court to enter findings of fact and conclusions of law in any action tried without a jury. CR 52(a)(1). A refusal or failure of a trial judge to render complete findings is error and renders any judgment entered thereon subject to reversal on appeal and remand for the entry of findings. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979) (if the findings are not sufficient, a new trial should be granted, or the case should be remanded for further findings). Findings of fact must cover all material issues of fact controverted at trial. *Westberg v. All-Purpose Structures Inc.*, 86 Wn. App. 405, 410, 936 P.2d 1175 (1997); 10 WASH. PRAC., *Civil Procedure*

*and Forms* § 52.21 “Proposed findings of fact and conclusions of law” (3<sup>rd</sup> ed. 2012). The findings of fact and conclusions of law should be sufficient to inform an appellate court of the basis of the trial court’s decision. 10 WASH. PRAC., *Civil Procedure and Forms* § 52.21 “Proposed findings of fact and conclusions of law” (3<sup>rd</sup> ed. 2012).

In the present case, the Hills objected to Mr. Woods’ proposed findings of fact because they did not set forth all material facts that were controverted at trial, and were insufficient to inform an appellate court of the basis for the trial court’s decision. CP 191-207. Specifically, the trial court refused to add findings relating to the Hills’ affirmative defenses and counterclaims. 7/20/12 RP 9:11-22. In the event that due to insufficient findings or conclusions the Court is unable to make a decision regarding an issue raised on appeal, the Hills would respectfully request that the judgment in favor of Mr. Woods be reversed and the case remanded for entry of proper findings and conclusions.

I. THE HILLS REQUEST ATTORNEY’S FEES AND COSTS ON APPEAL.

RAP 18.1 provides in pertinent part:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RAP 18.1(a). When the terms of a contract between the parties allows for an award of fees and costs to the prevailing party, such an award can be granted under RAP 18.1. *See Floor Exp., Inc. v. Daly*, 138 Wn. App. 750, 757, 158 P.3d 619 (2007) (attorney fees awarded to prevailing party in appeal arising out of breach of contract claim).

Here, the PSA contained the following term:

In the event any controversy or claim arises under this Agreement, the **prevailing party** shall be entitled to its **reasonable costs, disbursements, and, [sic] attorney's fees**, including attorney fees incurred in enforcing or executing upon any judgment rendered, together with all expenses which it may reasonably incur, including, but not limited to, costs incurred in searching records, expert witness and consultant fees, discovery depositions whether or not introduced into evidence in the trial, hearing or other proceeding and travel expenses in any arbitration, trial **or other proceeding**, including any proceeding brought to enforce an award or judgment, **and any and all appeals taken there from.**

Ex. 12 at 6 (emphasis added). Accordingly, if the Court should find that the Hills are the prevailing party in this appeal, the Hills respectfully request an award of their attorney's fees and costs incurred herein.

## V. CONCLUSION

The trial court committed numerous errors of law, and its factual findings are not supported by substantial evidence. The Hills respectfully request that the Court reverse the trial court as indicated above, reverse the

judgment in favor of Mr. Woods, and remand the matter for further proceedings.

Respectfully submitted,

DATED this 12 day of November, 2012.

**TROUP, CHRISTNACHT, LADENBURG,  
McKASY & DURKIN, INC., P.S.**

  
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SHELLY K. SPEIR, WSBA # 27979  
Of Attorneys for Appellants

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DIVISION II  
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STATE OF WASHINGTON  
BY   
DEPUTY

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

GEORGE WOODS,  
Respondent,

v.

JOHNNY HILL and MALINDA  
HILL, husband and wife,  
Appellants.

APPEAL NO. 43824-1-II

**CERTIFICATE OF SERVICE**

Alicia R. David, on oath, hereby states and declares:

On November 12, 2012, I caused copies of the Appellants'

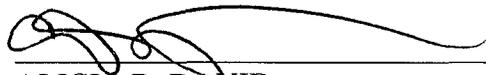
Opening Brief and this Certificate of Service to be filed with the Court and  
served via U.S. Mail on the following:

George Woods  
c/o Steven M. Bobman  
8701 45<sup>th</sup> Street West  
UP, WA 98466

On this same day I also caused copies of the transcripts of the May 25, 2012 hearing; June 4-5, 2012 trial; and July 20, 2012 hearing to be served on George Woods through his attorney, Steven M. Bobman, via U.S. Mail at the address stated above.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate to the best of my knowledge.

DATED this 12<sup>th</sup> day of November, 2012.



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ALICIA R. DAVID