

NO. 43874-7-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BATTLE GROUND PLAZA, LLC,

Plaintiff/Appellant,

vs.

DEAN MALDONADO and JANE DOE MALDONADO, husband
and wife and their marital community; MILLS END, LLC; MILLS
END CENTER, LLC; DRKBG, LLC; DOUGLAS RAY; and THE
ESTATE OF IRWIN JESSEN,

Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT

HONORABLE BARBARA JOHNSON

PLAINTIFF/APPELLANT'S BRIEF

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FILED
COURT OF APPEALS
DIVISION II
2013 FEB -4 PM 1:56
STATE OF WASHINGTON
BY  ~~STATE OF WASHINGTON~~
DEPUTY

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ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Assignment of Error No. 1: The trial court erred by entering the Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment.

Assignment of Error No. 2: The trial court erred by entering the Summary Judgment.

1. Should the Order Approving Sale of Real Estate Free and Clear of Liens and Encumbrances for Revised Sale Price made by the Bankruptcy Court be given preclusive effect?
2. Is Plaintiff's interest in the shopping center property senior to that of Mr. Maldonado and his entities?
3. Was the claim between Plaintiff and Mr. Maldonado and his entities sufficiently ripe for determination?

Assignment of Error No. 3: The trial court erred in entering the Order Granting Douglas M. Ray and the Estate of Irwin P. Jessen's Second Amended and Restated Motion for Attorney's Fees and Costs.

1. Must the issue of attorney's fees be remanded because the trial court did not enter findings of fact?
2. Did the trial court allow attorney's fees for time spent on matters for which attorney's fees cannot be recovered?

3. Did the trial court allow attorney's fees for duplicative or non-productive time?

4. Did the trial court allow costs that could not be recovered because they include office overhead and non-productive expenditures?

5. Should Plaintiff receive an offset for attorney's fees incurred in Bankruptcy Court?

STATEMENT OF THE CASE

I. Facts Concerning the Sale of the .5-Acre Parcel.

Douglas Ray and Irwin Jessen (the Sellers) owned a shopping center known as the Battle Ground Plaza. They also owned a .5-acre parcel to the west of the shopping center. (CP 472, 498) In December of 2000, the Sellers entered into a Purchase and Sale Agreement (PSA) to sell the shopping center property to the predecessor of Battle Ground Plaza, LLC (BGP). (CP 105-120, 127, 406) The PSA contained a provision allowing the purchaser a right of first refusal to buy the adjacent undeveloped .5-acre lot. (CP 119)

Mr. Ray filed for Chapter 11 bankruptcy protection after he experienced financial difficulties. He submitted a plan that was ultimately confirmed by the United States Bankruptcy Court on March 7, 2002. By that time, the sale of the shopping center had not closed due to

environmental contamination. The plan made mention of the PSA and the .5-acre lot. The plan recognized BGP's right of first refusal. (CP 586) It required Court approval of any sale of property. It also allowed any creditor to move for the conversion of the case to a Chapter 7 proceeding if that creditor believed that Mr. Ray was not utilizing his best efforts to liquidate assets to pay creditors. (CP 584)

By 2004, Mr. Ray had not satisfied the claims of two of his creditors, US Bank and E&M Rock Drilling Co. There was pressure from these creditors to have their claims paid. The Bankruptcy Court had directed Mr. Ray to list the .5-acre parcel for sale. (CP 480-481) Responding to the direction of the Bankruptcy Court, Mr. Ray and Mr. Jessen entered into a listing agreement with Ron Kawamoto of Norris, Beggs and Simpson. (CP 472, 499-502)

Dean Maldonado learned that the .5-acre parcel was for sale. He was interested in placing a commercial building on the property but was concerned about the amount of parking that would be available. He wanted a "4-to-1" ratio for parking, defined as four parking spaces to every one thousand square feet of space in the building. He felt that this parking ratio would allow him more flexibility in attracting tenants. He believed that he would have to use the shopping center's parking area to meet this goal. That meant that the existence of some sort of cross parking

arrangement would be an important consideration in his decision to purchase. (CP 490, 493-494) When Mr. Maldonado and Mr. Kawamoto discussed the parking issue, Mr. Kowomoto assured Mr. Maldonado that parking on the shopping center property would be available for his use on the .5-acre parcel. (CP 490-491)

On May 18, 2005, Mr. Maldonado signed a Purchase and Sale Agreement and Receipt for Earnest Money that Mr. Kawamoto prepared. It stated that he would purchase the .5-acre parcel for \$380,000.00. (CP 473, 509-516) The agreement reflected Mr. Maldonado's concern about parking. In Paragraph 5, he insisted on being provided with "cross easement for access and parking, rules for parking center, management and advertising." In Paragraph 3, he conditioned his purchase on "review and acceptance of cross parking agreements." (CP 509-510) Mr. Maldonado wanted to see these to make sure that he would have enough parking to meet City requirements and desires of prospective tenants. (CP 492) At that time, however, no "cross parking agreements" or "cross easement for access and parking" existed for the .5-acre parcel and the shopping center property. (CP 480)

Timothy Dack represented Mr. Jessen at that time. He received the Purchase and Sale Agreement and prepared an addendum setting out the terms of BGP's right of first refusal. The agreement and addendum were

ultimately signed by Mr. Ray, Mr. Jessen, and Mr. Maldonado. (CP 480, 509-16)

On May 27, 2005, Mr. Dack advised counsel for BGP of the pending sale to Mr. Maldonado. His letter made no reference of any intention to enter into any easement or cross parking arrangement between the .5-acre parcel and the shopping center property. (CP 279) Mr. Ray then moved the Court for approval of the sale of the .5-acre parcel to Mr. Maldonado. The motion did not disclose any intention to enter into a cross parking easement or similar arrangement as part of the transaction. (CP 311-324) The Bankruptcy Court approved the sale by order dated July 5, 2005. (CP 344-345)

The parties then began to work toward closing. By early August of 2005, Mr. Dack prepared a Reciprocal Easement Agreement. In essence, it allowed access to both the shopping center property and the .5-acre parcel to all persons using either parcel. (CP 536-47) He sent a draft of the document to Mr. Higgins, Mr. Kawamoto, and Mr. Maldonado on August 5, 2005. (CP 522) He did not send a copy of the agreement to any representative of BGP.

Mr. Maldonado subsequently discovered a sewer pipe beneath the ground. Its presence interfered with development plans. He requested that the purchase price be reduced because of this issue. The parties

ultimately agreed to reduce the purchase price by \$15,000.00 or to \$365,000.00. (CP 475-476, 483, 495, 523) By October 8, 2005, all parties had executed an addendum reducing the purchase price. (CP 523)

Matters then proceeded rapidly. On October 18, 2005, Mr. Ray's attorney, Michael Higgins, notified counsel for BGP of the reduction in the purchase price. His letter made no mention of the Reciprocal Easement Agreement that Mr. Dack had prepared in August. (CP 281)

On October 24, 2005, Mr. Ray moved for approval of the sale with the revised purchase price and sought an order shortening time so that the matter could be heard on November 1, 2005. The motion made no reference to an intention to enter into the Reciprocal Easement Agreement. (CP 623-642)

BGP timely attempted to exercise its right of first refusal by letter dated and delivered October 21, 2005. It delivered a Promissory Note for the earnest money the following day. (CP 282-283, 361-362)

On October 25, 2005, counsel for BGP wrote to Mr. Higgins and Mr. Dack. He requested, among other things, copies of all "cross parking agreements." (CP 363) This letter was sent because BGP had the same concerns about parking as did Mr. Maldonado. It wanted to exercise the same rights as were afforded Mr. Maldonado under paragraphs 3 and 5 of the PSA — the rights to review any "cross easement for access and

parking” and the right to condition the duty to close upon approval of those agreements. (CP 352-57; 366-72; 407-408)

Mr. Dack and Mr. Higgins did not respond to this letter. They did not provide a draft of the Reciprocal Easement Agreement or advise BGP of its existence. This was intentional. According to Mr. Dack, the document was not provided because BGP “had no interest in the property and no reason to have a copy of it.” (CP 485)

The Bankruptcy Court ultimately approved the sale. (CP 641-42) It subsequently denied BGP’s motion for reconsideration ruling that BGP’s acceptance was not sufficiently identical to Mr. Maldonado’s because BGP desired to condition closing on review and approval of cross parking agreements. (CP 643-645)

The transaction closed in late November of 2005. Mr. Maldonado signed the Reciprocal Easement Agreement and transmitted it to the closing agent. The transmittal message indicated that the agreement was to be signed by all parties. Legal descriptions for the document were attached to the agreement by the closing agent. The document was recorded with the Clark County Auditor on January 10, 2006. (CP 486, 496, 532-534, 536-547, 648-649)¹ Prior to closing, the Sellers did not

¹ Mr. Ray and Mr. Jessen conveyed the property to Mills End, LLC, an entity controlled by Mr. Maldonado. That entity subsequently conveyed its interest to DRKBG, LLC. (CP 650-651)

notify BGP that they intended to enter into the Reciprocal Easement Agreement. (CP 407) The Sellers did not make another motion in the Bankruptcy Court to approve the sale along with the grant of the Reciprocal Easement Agreement.

II. Course of Proceedings Concerning the .5-acre Parcel.

Mr. Maldonado and his entities (collectively Mr. Maldonado) applied for land use entitlements from the City of Battle Ground before construction of a building on the .5-acre parcel. As part of the notification process, the City sent a copy of the Reciprocal Easement Agreement to the shopping center's property manager who in turn passed it along to BGP. This was BGP's first knowledge that the parties had entered into the Reciprocal Easement Agreement. (CP 407, 426-31)

On July 5, 2006, BGP sued in Clark County Superior Court. It sought specific performance and damages from the Sellers on the basis that they had not complied with the right of first refusal provision in the PSA (the right of first refusal claim). It also sought a ruling that its interest in the shopping center was superior to that of Mr. Maldonado under the Reciprocal Easement Agreement (the seniority claim). (CP 1-4) Mr. Maldonado cross claimed against the Sellers claiming breach of the warranty contained in the deed given to convey the property. (CP 8-9)

On August 31, 2006, Mr. Maldonado moved to dismiss the action. He claimed that the Bankruptcy Court had sole jurisdiction to determine the issues that were presented. (CP 11-14) The Sellers joined in the motion. (CP 57-58) The trial court remanded the matter to the Bankruptcy Court and stated that it would dismiss any part of the action over which the Bankruptcy Court assumed jurisdiction. (CP 59-61) Meanwhile, Mr. Jessen passed away and his estate was substituted as a party in his place.²

The matter then went to the Bankruptcy Court. It first determined that it had jurisdiction. (CP 667-668) It then concluded that BGP could not contest its prior ruling approving the sale and that the Sellers had complied with the right of refusal provision contained with the PSA. (CP 209-222) It also awarded attorney's fees to the Sellers and against BGP. (CP 924-25) BGP ultimately satisfied this judgment. (CP 926-27)

The Bankruptcy Court did not take jurisdiction of the seniority claim at first. While the appeal was pending, BGP moved for summary judgment on that claim. (CP 179-88) The Sellers prevailed on the trial court to defer to the Bankruptcy Court on that issue.

² Additional clerk's papers have been ordered by the Sellers. BGP sought an extension so that it could receive the index and incorporate the numbering in this brief. However, the clerk has not yet returned the index. Therefore, no citation to the clerk's papers for this assertion is made.

BGP appealed the Bankruptcy Court's rulings first to the Bankruptcy Appellate Panel. It affirmed the Bankruptcy Court. (CP 223-250) BGP then appealed to the United States Court of Appeals for the Ninth Circuit. It reversed. It ruled that the Bankruptcy Court did not have jurisdiction to consider the issues presented in the suit. *In re Ray*, 624 F.3d 1124 (9th Cir. 2010).

After remand to the Bankruptcy Court, BGP successfully moved to vacate the judgment for attorney's fees. (CP 963-64) It ultimately obtained a restitution order requiring the Sellers to return the money paid to satisfy that judgment. (CP 1466-67)

The matter returned to Superior Court after the decision in *In re Ray, supra*. BGP renewed its summary judgment motion on the seniority claim. (CP 179-188) The Sellers moved for summary judgment. They claimed that BGP's actions against them were barred by 11 U.S.C. §363 and by the doctrine *res judicata* or claim preclusion. Notwithstanding the fact that the seniority claim was not directed against them, they argued that it was not ripe for determination. (CP 189-200) The trial court granted the Sellers' motions and denied those of BGP. (CP 785-788; 1009-1012)

The Sellers then moved for an award of attorneys' fees. They sought relief pursuant to RCW 4.84.185 and CR 11 as well as under a provision in the PSA. (CP 789-855) They asked to be awarded

\$159,089.06 for attorneys' fees spent in Bankruptcy Court proceedings. This included time spent to collect the judgment for attorneys' fees that was later vacated; time spent in the appeals before the Bankruptcy Appellate Panel and the United States Court of Appeals for the Ninth Circuit; and proceedings connected to the vacation of the judgment for attorney's fees and BGP's motion for restitution. The Sellers also sought time spent in defending against the seniority claim and Mr. Maldonado's cross claim against them.

By this time, Todd Mitchell and Russell Garrett had left the firm representing the Jessen Estate. They had been the lead attorneys for the Sellers up to that time. Mr. Mitchell had joined the Ater Wynne firm. Bullivant Houser Bailey enlisted Daniel Blair, a 2010 law graduate, to compile the motion.

The matter came on for hearing on October 20, 2011. The trial court first stated that the total application for attorneys' fees was \$248,377.96, some three to four times the next largest application that it had ever reviewed. (RP 3) It denied the Sellers' motion for attorneys' fees under RCW 4.84.185 and CR 11. (RP 4) It stated that:

. . .much of the award of fees in the bankruptcy proceedings is not appropriate for this Court to order; that this Court will only consider an award of fees that can be allocated to support the Court's order for summary judgment herein.

(RP 4-5) It stated that no award for attorneys' fees related to the seniority claim would be made. Finally, it expressed concerns about the costs sought and the use of multiple attorneys. (RP 5) The proceeding ended with the Sellers indicating that they would reevaluate their claim and make further motion. (RP 39-40)

The Sellers then filed a motion for reconsideration. (CP 1256-1260) The Court entered an order that the statements in the October 20, 2011, hearing were not based upon the belief that the Court lacked subject matter jurisdiction to grant attorneys' fees for proceedings before the Bankruptcy Court. (CP1266-67)

In December of 2011, the Sellers filed their Second Amended and Restated Motion for Attorney's Fees and Costs. They claimed a total of \$100,114.77 in this application. (CP 1390-1397) Of this sum, \$42,230.50 was incurred in connection with their motions for attorneys' fees. (CP 1398)

In a letter opinion dated February 14, 2012, the Court gave its ruling concerning attorneys' fees. This included \$137.00 for the services of Timothy Dack; \$3,170.00 for the services of Michael Higgins; and \$90,250.00 for the services of the Bullivant Houser Bailey firm. (CP 1461) It subsequently entered the Order Granting Douglas M. Ray and the

Estate of Irwin Jessen's Second Amended and Restated Motion for Attorney's Fees (CP 1498-99) BGP had conceded the amounts the trial court awarded for Mr. Dack and Mr. Higgins. (CP 1400-1402) The trial court never gave a rationale or made findings of fact concerning the amount awarded for services by the Bullivant Houser Bailey firm.

Finally, the trial Court entered the Summary Judgment. (CP 1487-89) BGP appealed. (CP 1491-1503) The Sellers cross appealed.

III. Facts Concerning the Companion Case.

In March of 2002, BGP sued the Sellers in Clark County Superior Court for specific performance and damages in connection with the sale of the shopping center property. (CP 605-08) It filed a *lis pendens* when it did so. (CP 99-100)

In May of 2008, the Clark County Superior Court entered the Amended Order of Specific Performance. (CP 669-674) The Sellers appealed. They asserted that the PSA had terminated by its terms. The Court of Appeals rejected that argument but remanded the matter for further consideration of the remedy, be it damages or specific performance. (CP 675-93) The Superior Court has not yet made a decision on remand.

ARGUMENT

Assignment of Error No. 1: The trial court erred by entering the Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment.

Assignment of Error No. 2: The trial court erred by entering the Summary Judgment.

I. Standard of Review.

The substantive decision in this matter was made on summary judgment. Decisions on summary judgment are subject to *de novo* review. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When determining whether an issue of material fact exists, however, the Court construes all facts and inferences in favor of the nonmoving party. A genuine issue of material fact exists where reasonable minds could reach different conclusions. *Ranger Insurance Company v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

Summary judgment is subject to a burden-shifting scheme. The moving party must first submit adequate affidavits showing that it is entitled to judgment as a matter of law. If it does not sustain that burden, the summary judgment must be denied regardless of whether the

nonmoving party has submitted any opposition. If the moving party has met its burden, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue of any material fact. *Ranger Insurance Company v. Pierce County*, *supra*, 164 Wn.2d at 552; *Michael v. Mosquera-Lacy*, *supra*, 165 Wn.2d at 601-602.

The Sellers moved for summary judgment on the basis that the Bankruptcy Court's order of November 1, 2005, approving the sale to Mr. Maldonado precluded BGP's claim. Therefore, their summary judgment motion must be limited to this issue. They cannot claim that they are entitled to summary judgment on the grounds that they complied with the requirements of the right of first refusal provision in the PSA. The moving party must raise in its summary judgment motion all issues in which it believes it is entitled to summary judgment. *R.D. Merrill Co. v. State, Pollution Control Hearings Board*, 137 Wn.2d 118, 147 *fn. 10*, 969 P.2d 458 (1999); *White v. Kent Medical Center, Inc., P.S.*, 61 Wn.App. 163, 168-169, 810 P.2d 4 (1991). Conversely, summary judgment cannot be granted on an issue not raised in the moving party's initial motion. *Tucker v. Hayford*, 118 Wn.App. 246, 75 P.3d 890 (2003) — the trial court should not have dismissed a negligent misrepresentation claim when that claim was not included in the moving party's summary judgment motion;

Davidson Serles & Associates v. City of Kirkland, 159 Wn.App. 616, 246 P.3d 822 (2011) — the trial court should not have dismissed a spot zoning claim when it was raised for the first time in the moving party’s rebuttal materials. For these reasons, the Court’s consideration must be limited to whether or not the Bankruptcy Court’s November 1, 2005, order approving the sale of the .5-acre parcel is entitled to preclusive effect.

II. The Bankruptcy Court’s November 1, 2005, Order Cannot Be Given Preclusive Effect.

a. The Normal Rules for Preclusion Apply.

Bankruptcy Court orders are like any other judgment in that they can have preclusive or *res judicata* effect. *Katchen v. Landy*, 382 U.S. 323, 334, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966). This rule applies to orders approving the sale of property under the terms of 11 U.S.C. §363(f) such as the November 1, 2005, order approving the sale of the .5-acre parcel. Furthermore, the preclusive effect of such an order is determined by the normal rules governing *res judicata* or claim preclusion. See, e.g., *In re Adelpia Recovery Trust*, 634 F.3d 678 (2d Cir. 2011); *In re Werth*, 37 B.R. 979 (Bkrtcy. D. Colo. 1984).

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b. Washington Law Concerning Preclusion Applies; the Full Faith and Credit Clause Does Not Apply.

While all judgments from federal courts can have preclusive effect, this notion is not based on the full faith and credit clause in Article IV, Section 1 of the United States Constitution. That clause refers only to judgments rendered in state courts. It says:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. . .

The Supreme Court has held that this clause does not govern the preclusive effects of federal court judgments because its language is limited to state court judgments. *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506-507, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). Rather, when a federal court decides a state law claim — as when it has jurisdiction based on diversity — the federal judgment will have the same preclusive effect and be subject to the same rules concerning preclusion as those that would be applied to a judgment rendered in state court in which the federal court sits. *Semtek International, Inc. v. Lockheed Martin Corp.*, *supra*, 531 U.S. at 508. This rule has been applied to bankruptcy court judgments. As the Court stated in *In re Cass*, 476 B.R. 602 (Bkrtey. C. D. Cal. 2012), there is no reason why the holding in *Semtek International, Inc. v. Lockheed Martin Corp.*, *supra*, should not

be applied to situations where a bankruptcy court decides state law issues. 476 B.R. at 609.

The issue presented here is whether the Sellers complied with their contractual duties set out in the right of first refusal clause in the PSA. This is clearly an issue of state law. It is not governed by the federal bankruptcy law. The order in question was rendered by a bankruptcy court sitting in the State of Washington. Therefore, the preclusive effect of the November 1, 2005, order is subject to Washington law concerning *res judicata* or claim preclusion.

The trial court stated that it was “obliged to give full faith and credit” to the November 2005 Bankruptcy Court order approving the sale of the .5-acre parcel. (CP 787) This statement was incorrect. The preclusive effect of that order must be determined by Washington law.

c. The November 1, 2005, Order Is Not Entitled to Preclusive Effect Because the Four Necessary Identities Are Not Satisfied.

i. The Test.

In order for a judgment to have preclusive effect under the doctrine of *res judicata* or claim preclusion, each of the following identities must be present between the prior case and the current case:

1. identity of subject matter;

2. identity of cause of action;
3. identity of persons and parties; and
4. identity of the quality of the persons for or against whom the claim is made.

Hayes v. City of Seattle, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997). As will be discussed below, these identities are not present in this case.

ii. The Subject Matter Identity Is Not Present.

The critical factors concerning the subject matter identity are the nature of the claim or cause of action and the nature of the parties. *Hayes v. City of Seattle, supra*, 131 Wn.2d at 712-13 It is therefore useful to compare decisions addressing the subject matter identity with our case. That comparison shows that the subject matter identity is not satisfied here.

The Supreme Court has been hesitant to find the presence of the subject matter identity. In *Mellor v. Chamberlain*, 100 Wash.2d 643, 673 P.2d 610 (2003), the buyer alleged that the seller had misrepresented the property that was the subject of their transaction. That suit was ultimately dismissed with prejudice after the parties settled. The buyer brought a second action claiming that the seller had breached a covenant of warranty because of an adjoining landowner's encroachment onto the property. The seller contended that the second lawsuit was barred

by the dismissal of the first. The Court stated that although both suits arose out of the same transaction, the subject matter differed. The first suit dealt with misrepresentation of the property included in the sale while the second dealt with an alleged breach of the covenant of title contained in the deed given to the buyer. 100 Wn.2d at 646 In *Hayes v. City of Seattle*, *supra*, the Court held that the plaintiff's suit for judicial review of a land use decision presented a different subject matter than his subsequent suit for damages based on the initial denial of a permit. The Court reached a similar decision in *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004). In that matter, unionized workers first sued to invalidate a collective bargaining agreement. That case was settled with each side releasing claims against the other. The workers then filed a second suit claiming that the collective bargaining agreement violated Washington's Minimum Wage Act. The employer argued that settlement of the first proceeding precluded the second. The Supreme Court disagreed on the basis that the subject matter of the two cases was not the same. It noted that the first action sought to invalidate the collective bargaining agreement while the second presumed its validity but sought to apply the Minimum Wage Act to it.

In our case, the subject matter is different because different relief was sought before the Bankruptcy Court than is sought

Court approved such a sale. The Sellers subsequently gave notice of an intention to sell the parcel in the amount of \$365,000.00 again without the grant of the Reciprocal Easement Agreement and also obtained approval of that sale by the Bankruptcy Court. They never gave notice, however, of the sale with the grant of the Reciprocal Easement Agreement either to BGP or to the Bankruptcy Court. Obviously, the Bankruptcy Court could never approve the terms of a sale that were never presented it and what the rights of the parties were in connection with such a proposed sale under the right of first refusal provision. Since the Bankruptcy Court never considered what is at issue here, there can be no identity of subject matter.

iii. The Cause of Action Identity Is Not Present.

The cause of action identity was simply stated in *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 226, 588 P.2d 725 (1978), as follows:

A judgment is res judicata as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.

Under that test, it is clear that the cause of action identity is not satisfied because the Bankruptcy Court never ruled on the question presented in our case—whether the Sellers were obliged to notify BGP of their intention to

enter into the Reciprocal Easement Agreement—when it approved the sale of .5-acre parcel in November of 2005. The Bankruptcy Court ruled on another question—whether BGP’s attempt to exercise its right of first refusal was sufficient under the circumstances then presented, when the intention to enter into the Reciprocal Easement had not been disclosed.

In determining whether causes of action are identical for purposes of res judicata or claim preclusion, the Court considers (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) where substantially the same evidence is presented in the two actions; (3) whether the two suits involved infringement of the same rights; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Norco Construction, Inc. v. King County*, 106 Wn.2d 290, 294, 721 P.2d 511 (1986); *Hayes v. City of Seattle, supra*, 131 Wn.2d at 713. Of these, the most critical issue is whether the same evidence will be presented in the second action as was presented in the first. The Court relied on the differing evidence to rule that the cause of action identity was absent in *Hayes v. City of Seattle, supra*. It stated:

. . .we are convinced that Hayes's [sic] action for judicial review and his subsequent action for damages are separate. In the action for judicial review, Hayes essentially sought to overturn a decision of

the Seattle City Council. In order to succeed in that lawsuit, Hayes needed only to establish that the Seattle City Council's action met one of the five standards listed in the statutory writ of certiorari. . . .The evidence he needed to maintain that action is far different than the type of evidence that he needed to muster to establish that he was entitled to an award of damages. . .

131 Wn.2d at 713.

The evidence in this case will be quite different from that presented in the Bankruptcy Court. First of all, the Bankruptcy Court never heard about the Reciprocal Easement Agreement when it ruled in November of 2005. Secondly, BGP will have to present evidence concerning the remedy it is seeking—either specific performance or damages. Evidence of that type was not warranted in the relatively brief proceeding to approve the sale of the .5-acre parcel to Mr. Maldonado.

iv. The Identity Concerning Parties Is Not Satisfied.

Res judicata or claim preclusion requires an identity of parties and the quality of parties. This identity is dependent upon the causes of action that are asserted. As the Supreme Court stated in *Mellor v. Chamberlain, supra*:

Clearly, the identity of the parties was the same; their “quality” differed, however, as the causes of action changed from misrepresentation to breach of covenant of title. . .

100 Wn.2d at 646. Once again, the causes of action are different between this suit and what was pending before the Bankruptcy Court. BGP had no cause of action before the Bankruptcy Court. The issue there was whether BGP had sufficiently exercised its right of first refusal when there had been no disclosure of the pending Reciprocal Easement Agreement and whether the Court should approve the sale of the .5-acre parcel to Mr. Maldonado under Mr. Ray's Chapter 11 plan. In this case, however, BGP seeks relief because the Sellers breached their duty to disclose all terms of all terms of any proposed sale under the right of first refusal provision. Since the causes of action are different, the quality of identity is not satisfied.

The party identities can only be satisfied when one party actually makes a claim against the other. This conclusion follows from *Krikava v. Webber*, 43 Wn.App. 217, 716 P.2d 916 (1986). In that case, Ms. Krikava and Officer Webber of the Hoquiam Police Department were involved in a motor vehicle collision. Ms. Krikava's passengers sued her, Officer Webber, and the City of Hoquiam. Ms. Krikava also cross claimed against Officer Webber and the City of Hoquiam for contribution and indemnification. Officer Webber sued Ms. Krikava in a separate action. Those two suits were dismissed after settlement was

reached. Ms. Kirkava then sued Officer Webber and the City of Hoquiam. The Court ruled that her claim against the City was not precluded because the quality of the parties and the cause of action were different. In the first action, Ms. Kirkava had limited her claim against the City of Hoquiam to indemnification.

BGP made no claim against anyone in Bankruptcy Court. The issue was whether the sale to Mr. Maldonado should have been approved. Therefore, the identity of quality is not satisfied.

d. The Bankruptcy Court Order Cannot Have Preclusive Effect Because It Was Obtained by Fraud and Deception.

The Sellers never advised the Bankruptcy Court of their intention to enter into the Reciprocal Easement Agreement. BGP specifically asked them to provide all cross parking agreements by letter dated October 25, 2005. The Sellers never responded. For that reason alone, the judgment cannot have any preclusive effect.

Washington recognizes the judgments obtain by fraud or deception cannot have *res judicata* or preclusive effect. In *White v. Miley*, 137 Wash. 80, 241 P. 670 (1925), the plaintiff sued claiming that defendants had converted his logging equipment. The defendants told him to go to a location in Clallam County to recover some of his equipment subject to his suit. He then obtained judgment against the defendants for

other articles. When he went to pick the articles up, the defendants did not deliver them. He then filed a second suit in replevin to recover them. The defendants claim that he impermissibly split his cause of action by not including the articles in question — the ones they had told him they could pick up in Clallam County. The Court refused to apply the doctrine of res judicata or claim preclusion and stated that the doctrine of *res judicata* did not apply when a claim is omitted through fraud or mistake induced by the defendant. 137 Wash. at 83

A similar result was reached in *Rosenberg v. Rosenberg*, 141 Wash. 86, 250 P. 947 (1926). The executors of Mr. Rosenberg's estate were his wife, Mrs. Rosenberg, and Mr. Levinson. They entered into an agreement to sell some of the decedent's property to Mr. Levinson's company for \$120,000.00. They did not disclose, however, that Mr. Levinson's company was going to make a \$20,000.00 profit on the transaction. Shortly thereafter, other heirs sued to receive an accounting of the executors' actions. When they received the accounting, the suit was dismissed. During the course of those proceedings, they did not learn of the nature of the transaction of the sale to Mr. Levinson's company. When they discovered what had happened, they sued again. The Court rejected the executors' claim that the second action was barred by *res judicata*

stating that their failure to disclose the facts of the transaction violated their fiduciary duty and barred the application of the doctrine.

The Sellers had a contractual duty to BGP under the right of first refusal provision in the PSA to disclose all terms under which they were willing to sell the .5-acre parcel. They did not do so. BGP was deceived by this nondisclosure. It believed — as did Mr. Maldonado — that the ability to park on shopping center property was critical to the successful development of the .5-acre parcel. Had it known that the Sellers intended to grant the Reciprocal Easement Agreement, it would have offered to close the transaction immediately. The question that troubled the Bankruptcy Court — BGP’s supposed failure to “match” Mr. Maldonado’s offer because it wanted to see cross parking agreements — would never have arisen.

e. Conclusion.

The facts are clear in this case and lead to one conclusion—the Bankruptcy Court’s November 1, 2005, order is not subject to preclusive effect. The trial court should have so ruled since the facts are clear. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992). It erred by ruling to the contrary.

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III. BGP Was Entitled to Summary Judgment on the Seniority Claim.

a. Introduction.

The interest of Mr. Maldonado under the Reciprocal Easement Agreement is junior to BGP's interest in the shopping center property. The trial court erred by ruling that the issue was not ripe for determination.

b. BGP's Interest in the Shopping Center Property Is Senior to That of Mr. Maldonado.

Generally speaking, a person with knowledge of another's interest in real property takes that property subject to that known interest. RCW 65.08.070; *Tacoma Hotel, Inc. v. Morrison & Co.*, 193 Wash. 134, 140, 74 P.2d 1003 (1938); *Kim v. Lee*, 145 Wn.2d 79, 86, 31 P.3d 655 (2001). Mr. Maldonado had notice of BGP's interest in the property. The *lis pendens* that BGP filed when it commenced its specific performance action is the most prominent of these. As RCW 4.28.320 states in pertinent part as follows:

At any time after an action affecting title to real property has been commenced. . .the plaintiff. . .may file with the auditor of each county in which the property is situated a notice of pendency of the action containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the

property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice. . .

This statute is applicable here. BGP's specific performance is an action affecting title to real property. In that regard, the courts of New York have held that a specific performance action is one affecting title to real property. *RKO Properties, Ltd. v. Boymelgreen*, 37 A.D.3d 580, 829 N.Y.S.2d 657 (2007), and Washington courts rely on New York decisions to interpret RCW 4.28.320 because New York's *lis pendens* statute, CPLR 6501, contains similar language. *R.O.I., Inc. v. Anderson*, 50 Wn.App. 459, 748 P.2d 1136 (1988).

Under the terms of RCW 65.08.070, Mr. Maldonado was chargeable with knowledge of BGP's interest in the property. As that statute states:

A conveyance of real property. . . may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser. . . in good faith and for a valuable consideration from the same vendor. . . of the same real property or any

portion thereof whose conveyance is first duly recorded. . .

Mr. Maldonado and his entities were purchasers since an interest in real property was conveyed to them for a valuable consideration. RCW 65.08.060(2). They received a cross parking easement in exchange for the other terms and conditions stated within the Reciprocal Easement Agreement.

Mr. Maldonado and his entities cannot claim to be purchasers in “good faith,” however. A subsequent purchaser is not one in “good faith” if he or she has knowledge of facts sufficient to excite inquiry of the equitable rights of others affecting the property in question. *Casa del Rey v. Hart*, 110 Wn.2d 65, 71, 750 P.2d 261 (1988).

The *lis pendens* imparted notice to Mr. Maldonado. So did Addendum “A” to the Purchase and Sale Agreement. The latter document specifically referred to the PSA. Had he followed up and reviewed the PSA, he would have learned that the Sellers were required to convey the property by statutory warranty deed and that the cross parking rights stated in the Reciprocal Easement Agreement were not an exception to the grant that the PSA allowed. In short, Mr. Maldonado had more than sufficient information to learn that BGP had an equitable interest in the shopping center property that was senior to his.

This case is governed by *Hudesman v. Foley*, 4 Wn.App. 230, 480 P.2d 534 (1971). In that case, Mr. and Mrs. Foley entered into a contract to sell thirty-seven acres of land to Kreger Bros., Inc. for \$74,000.00. They later entered into another agreement to sell the same land to Mr. and Mrs. Smith. Mr. Hudesman, an assignee of the rights of Kreger Bros., Inc., sued for specific performance when the Foleys closed the sale to Mr. and Mrs. Smith. The Court held that the Smiths were not bona fide purchasers in good faith because they were aware of the earnest money agreement between Kreger Bros Inc. and the Foleys. In the same way, Mr. Maldonado was aware of the PSA. He cannot be considered a purchaser in good faith under the terms of RCW 65.08.070. His interest under the terms of the Reciprocal Easement Agreement is therefore junior to that of BGP's in the shopping center property. The trial court should have so ruled.

c. The Issue Is Ripe for Determination.

The trial court did not address the merits of this issue. Rather, it ruled that the matter was not ripe for determination. This was error.

BGP sought declaratory relief against Mr. Maldonado on this issue. The declaratory relief statute, RCW 7.24, can be used to resolve all manner of disputes concerning real property. Tegland *Civil*

Procedure 15 Wash.Prac. §42:30. An action for declaratory relief must, however, present a justiciable — or “ripe” — controversy. In order to be justiciable, the matter must present (1) an actual, present and existing dispute or the mature seeds of one as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement; (2) between parties having genuine and opposing interests; (3) which involves interests that must be direct and substantial rather than potential, theoretical, abstract, or academic; and (4) a judicial determination of which will be final and conclusive. *Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973). These considerations are liberally construed so that parties can obtain declaratory relief. *DiNino v. State*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984).

Under this test, it is clear that BGP’s seniority claim was “ripe” and presented a justiciable controversy. BGP and Mr. Maldonado have genuine and opposing interests — whether rights under the Reciprocal Easement Agreement are subject to BGP’s interest in the shopping center property. The two interests are direct and substantial. A judicial determination will obviously be final and conclusive. The Sellers argued that the seniority claim was not “ripe” because the specific performance action has not yet been concluded. The Court of Appeals has ruled, however, that BGP may yet be entitled to specific performance as

the Superior Court may determine on remand. The posture of the specific performance action creates at very least the “mature seeds” of an actual, present, and existing dispute.

The fact that an issue is subject to contingencies is no impediment to the grant of declaratory relief. *Arnold v. Department of Retirement Systems*, 74 Wn.App. 654, 875 P.2d 665 (1994), reversed on other grounds, 128 Wn.2d 765, 912 P.2d 463 (1996), provides the best example. In that case, the plaintiff sued to establish her right to receive LEOFF benefits on the death of her former spouse. The Department of Retirement Systems contended that the action was not “ripe” because plaintiff would have to survive her former husband in order to obtain these benefits. The Court ruled that the issue was nonetheless justiciable because it addressed her entitlement to such benefits. 74 Wn.App. at 661.

Whether Mr. Maldonado will have to face loss of rights under the Reciprocal Easement Agreement is contingent on BGP’s closing the sale under the decree of specific performance that will ultimately be entered in a specific performance action. The existence of such a contingency, however, is no impediment to a grant of declaratory relief on BGP’s seniority claim under the authority of *Arnold v. Department of Retirement Systems*, *supra*. Therefore, the issue is sufficiently ripe for determination, and the trial court erred by ruling to the contrary.

d. Conclusion.

The trial court erred by not considering the merits of the seniority claim. Once again, the facts are clear. BGP's claim to the shopping center property has priority over Mr. Maldonado's rights under the Reciprocal Easement Agreement. This Court should so rule. *Impecoven v. Department of Revenue, supra.*

Assignment of Error No. 3: The trial court erred in entering the Order Granting Douglas M. Ray and the Estate of Irwin P. Jessen's Second Amended and Restated Motion for Attorney's Fees and Costs.

I. General Considerations and Standard of Review.

Attorney's fees are recoverable by the prevailing party only when authorized by a statute, contract, or rule of equity. *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). When a party prevails both on claims for which attorney's fees are authorized and claims for which there is no such authorization, the fee award should be limited to the services provided on the claims for which a fee is authorized. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-850, 726 P.2d 8 (1986); *Travis v. Washington Horse Breeders Association, Inc.*, 111 Wn.2d 396, 410, 759 P.2d 418 (1988); *Pearson v. Schubach*, 52 Wn.App. 716, 723, 763 P.2d 834 (1988).

Entitlement to attorneys' fees is calculated based upon the "lodestar" method. *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Singleton v. Frost*, 108 Wn.2d 723, 733, 742 P.2d 1224 (1987). That method allows for an award measured by the hours reasonably expended on the claim multiplied by reasonable hourly rate for attorneys involved. However, "the court must limit the lodestar to hours reasonably expended and therefore should discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers v. Transamerica Title Insurance Co.*, *supra*, 100 Wn.2d at 597. A party seeking an award of attorneys' fees must segregate time spent on successful theories or claims from that spent on unsuccessful claims. That party must also segregate time spent on claims for which an award of attorneys' fees is allowed from time spent on claims for which no fee is allowed. *Loeffelholz v. C.L.E.A.N.*, 119 Wn.App. 665, 690, 82 P.3d 1199 (2004).

The amount of attorney's fees to be awarded is addressed to the trial court's discretion and is reviewed for abuse. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Discretion is abused when the trial court makes a decision based on untenable grounds or for manifestly untenable reasons. *In re Recall of Lindquist*, 172 Wn.2d 120, 135, 258

P.3d 9 (2011); *Nuttall v. Dowell*, 31 Wn.App. 98, 639 P.2d 832 (1982); *Estate of Bussler*, 160 Wn.App. 449, 470, 247 P.3d 821 (2011).

The trial court must enter adequate findings of fact and conclusions of law to support an attorney's fee award. These findings must state what time was necessarily spent and whether hourly rates were reasonable. The matter must be remanded to develop such a record in the absence of findings on these questions. *Mahler v. Szucs*, *supra*, 135 Wn.2d at 435; *Svendsen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001); *McConnell v. Mother's Work, Inc.*, 131 Wn.App. 525, 535, 128 P.3d 128 (2006); *Day v. Santorsola*, 118 Wn.App. 746, 76 P.3d 1190 (2003); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 415-416, 157 P.3d 431 (2007). *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn.App. 700, 281 P.3d 693 (2012).

The trial court should not have awarded attorney's fees to the Sellers because they should not have prevailed. Furthermore, it abused its discretion in setting the amount of attorneys' fees to be awarded. Unfortunately, that is difficult to determine because the trial court entered no findings of fact to justify its decision. The matter must be remanded for these reasons.

II. An Adequate Record Was Not Made.

In its Second Amended and Restated Motion for Attorneys' Fees and Costs, the Sellers claimed a total of \$100,114.77. This consisted of \$990.00 in fees for Timothy Dack; \$12,463.00 in fees for Michael Higgins; \$83,294.25 in fees for the Bullivant Houser Bailey and Ater Wynne firms; and \$3,367.52 in costs. (CP 1396, 1400-1402) The trial court awarded \$137.50 for Mr. Dack's services; \$3,170.00 for Mr. Higgins' services; and \$90,250.00 for the services of the Bullivant Houser Bailey firm. (CP 1461, 1482-1483)

The trial court gave no rationale for its decision and entered no findings of fact. This failing is thought not to be critical as to the award for services provided by Mr. Dack and Mr. Higgins because BGP conceded those amounts. (CP 1401-1402) That is not the case where the award to the Bullivant Houser Bailey and Ater Wynne firms is concerned. First of all, the trial court did not make it clear whether it included time claimed for Todd Mitchell after he left the Bullivant Houser Bailey firm and joined Ater Wynne. Secondly, BGP raised significant questions regarding whether the claimed hours should be awarded. Most importantly, the trial court awarded more to the Bullivant Houser Bailey and Ater Wynne firms than was claimed. Under the circumstances,

remand is required to determine exactly what the trial court ordered before review can occur.

IV. The Trial Court Abused Its Discretion.

a. The Trial Court Awarded More In Fees than Was Claimed.

In the Second Amended and Restated Motion for Attorney's Fees and Costs, a total of \$83,294.25 was claimed as and for attorneys' fees for the Bullivant Houser Bailey and Ater Wynne firms. (CP 1275-1311; 1322-1337; 1376-1387; 1396)³ Claim was also made for \$3,367.52 in costs. This brought the total to \$86,661.77. Without explanation, the trial court awarded \$90,250.00, or \$3,588.23 more than what was claimed. An award of attorneys' fees that exceeds the amount claimed must amount to an abuse of discretion.

b. The Trial Court's Award Included Sums Spent on the Seniority Claim and the Cross Claim.

The Sellers sought attorneys' fees under Paragraph 29(C) of the PSA. It provides as follows in pertinent part:

. . . Anything to the contrary herein notwithstanding, in the event of any litigation arising out of this contract, the court may award to the prevailing party all reasonable costs and expense, including attorneys' fees.

³ The claim is summarized at CP 1396.

(CP 420) This would allow them attorneys' fees on BGP's right of refusal claim. As the trial court correctly observed, the Sellers were not entitled to attorneys' fees or anything having to do with the seniority claim or the cross claim made against them by Mr. Maldonado because the claim was not made against the Sellers and because there is no contract or rule of law allowing attorney's fees on such a claim.⁴

The Sellers amended motion included at least \$11,693.50 in fees for this claim and Mr. Maldonado's cross claim. (CP 1322-1326; 1381-1387; 1405-1409; 1424) The trial court's award necessarily included these fees since it awarded more than the Sellers' claimed. Since attorneys' fees should not be awarded for time spent on matters for which no attorneys' fee claim is available, the trial court abused its discretion by apparently awarding those sums.

c. The Trial Court Should Not Have Awarded Attorneys' Fees for Time Spent in Connection with the Companion Case.

This case and BGP's suit for specific performance were both pending during the time for which attorneys' fees were claimed.

⁴ The seniority claim is analogous to a quiet title action. Attorney's fees are not allowed in quiet title actions absent some contractual provision that applies or other statutory authorization. *King County v. Squire Investment Co*, 59 Wn.App. 888, 896, 801 P.2d 1022 (1990).

Timesheets show that the Sellers met with attorneys at the Bullivant Houser Bailey firm after the trial on the specific performance action in January of 2007 but before Findings of Fact and Conclusions of Law had been entered. The discussions included those apparently relating to a possible appeal of the specific performance action. There was also time related to whether the completion of Mr. Ray's plan afforded a bankruptcy discharge. (CP 1275; 1403-5) This time had nothing to do with this case. It was not segregated out should not have been awarded. The trial court abused its discretion by apparently awarding it.

d. The Trial Court Should Not Have Awarded Time Spent in the Bankruptcy Court Proceedings.

The trial court correctly determined that time spent in bankruptcy proceedings should not have been awarded. Nonetheless, it appears that it did award \$17,676.00. (CP 1322-37; 1406-13) This time should not have been awarded because it was the product of the Sellers' joining in the motion to remand the case to the Bankruptcy Court, a court that lacked jurisdiction. It therefore amounted to time spent on an unsuccessful claim and should not have been awarded.

Some of the time spent on the seniority claim is included in this total. The total also includes \$3,565.50 expended to defend a protective order motion BGP made to require the Sellers to depose its

principal, Bruce Feldman, in the San Francisco Bay Area where he resides rather than in Vancouver. The Bankruptcy Court did not insist on Mr. Feldman traveling to Vancouver, and the Sellers ultimately abandoned their attempt to depose him. (CP 1410-11)

e. The Court Should Not Have Awarded Duplicative Time.

Four attorneys worked on the Sellers' Motion for Summary Judgment. The time records show that each would edit the motion in some way. Between them, they spent a total of 70.4 hours in connection with the summary judgment motion, more than double the time spent by counsel for BGP. (CP 1302-11; 1376-77; 1413-1421) This work must have been duplicative and the lodestar cannot include hours spent in duplicative efforts. *Bowers v. Transamerica Title Insurance Co.*, *supra*, 100 Wn.2d at 597.

The time spent on the motion was excessive. The trial court abused its discretion by apparently awarding all of it.

f. The Court Should Not Have Awarded All Time Spent after It Decided the Summary Judgment Motion.

When the Sellers first moved for attorneys' fees, they sought fees based on CR 11 and RCW 4.84.185. They also sought attorneys' fees for all proceedings in the Bankruptcy Court to include time spent on a collecting a judgment that was subsequently vacated; time spent

on appeals that were ultimately decided in BGP's favor; and time spent on responding to BGP's motions to vacate the judgment for attorneys' fees and for restitution of the amount that had been paid. They also sought fees for work on the seniority claim. On October 20, 2011, the trial court orally denied their motion based on CR 11 and RCW 4.84.185; stated that no fees would be awarded on the seniority claim; and also indicated that any fees for time spent in the bankruptcy proceeding would have to be clearly related to the summary judgment motion that the Sellers had filed. (RP 4-6) The hearing ended with the Sellers recognizing that they would have to present their claim anew based upon the Court's rulings. (RP 40)

The Sellers' sought \$83,294.25 in attorney's fees for the Bullivant Houser Bailey and Ater Wynne firms in their amended and restated motion. This sum included \$42,407.50 incurred in connection with their motions for attorneys' fees. (CP 1422) Of this amount, \$33,645.50 was incurred through the October 20 hearing. As the Court stated in *Bowers v. Transamerica Title Insurance Co.*, *supra*, the lodestar should not include time that was spent on unsuccessful theories or claims. The time the Sellers spent on and before October 20, 2011, qualifies as an unsuccessful claim and unproductive time. Their motions based on CR 11 and RCW 4.84.185 were denied as well as much of their attorneys' fee claim. BGP should not be forced to pay the attorneys' fees the Sellers

incurred because they did not segregate their attorneys' fee claim as they should have. None of the time spent on the attorneys' fee matter on and before October 20, 2011, should have been awarded.

g. The Trial Court Should Not Have Awarded the Costs That It Did.

As indicated, the trial court's award of attorneys' fees for the Bullivant Houser Bailey firm and Ater Wynne was greater than what was claimed. This included \$3,367.52 for costs. (CP 1396) Therefore, the trial court's award necessarily included these costs. Awarding all of them was clearly error.

The Sellers stated that they incurred \$9,904.47 but decided to claim only for 34% of them. (CP 1272) The costs included such things as copies, fax charges, public records, overnight mail, and messenger services. These items amount to nothing more than ordinary office overhead. They cannot be awarded because costs are factored in to reach the hourly rate used to compute the amount of attorneys' fees to be awarded. *Collins v. Clark County Fire District No. 5*, 155 Wn.App. 48, 103-104, 231 P.3d 1211 (2010).

Other costs are attributable solely to the bankruptcy proceeding. These include the Trustee's fee. That fee was paid to keep Mr. Ray's bankruptcy open so that the parties could litigate in Bankruptcy

Court. There are also costs for travel and hotel expenditures. These were incurred to argue appeals in Seattle before the Bankruptcy Appellate Panel and the Court of Appeals for the Ninth Circuit. These should not have been awarded because they were the product of the Sellers' seeking remand of the matter to the Bankruptcy Court, a Court that did not have jurisdiction.

The Sellers made no presentation showing the precise nature or necessity of any costs for which they made claim in their motion. Most of the costs amounted to ordinary office overhead or matters associated with the bankruptcy proceeding. The trial erred by awarding them.

h. BGP Should Receive an Offset for Its Attorney's Fees.

When a plaintiff makes several claim in an action where attorney's fees are allowed pursuant to a contractual provision and prevails on some but not all of those claims, the plaintiff receives an attorney's fee award for the claims on which it prevails; the defendant receives an award of attorney's fees on the claim on which it prevails; and the two awards are offset. *Marassi v. Lau*, 71 Wn.App. 512, 859 P.2d 605(1993); *Mike's Painting, Inc v. Carter Welsh, Inc.*, 95 Wn.App. 64, 975 P.2d 532 (1999). This rule should apply in this case to allow BGP the considerable attorney's fees it incurred in litigating this matter in Bankruptcy Court, a

court that lacked jurisdiction to consider the matter. It should also receive the fees it incurred in vacating the judgment and securing restitution of the sums it paid to vacate that judgment. These amounts are considerable. (CP 1429) They should be applied to offset any award the Sellers received.

There is no principled reason against that result. The matter was in Bankruptcy Court due to a motion in which the Sellers joined to have the matter heard there. BGP prevailed on the question of jurisdiction.

The trial court apparently did not agree with this assertion because it awarded the Sellers more in attorney's fees than they requested and did not allow for any offset. This was error.

g. Conclusion.

The trial court should not have awarded attorney's fees to the Sellers because they should not have prevailed. In any event, it erred by failing to enter Findings of Fact and Conclusions of Law coupled with its awarding more than was claimed for fees incurred by the Bullivant Houser Bailey and Ater Wynne firms together, apparently, with costs. Remand is required for that reason. It also erred by making an award including elements that should not have been included. For those reasons, the order awarding attorney's fees must be remanded. The Court should give direction to the trial court on the issues raised here.

STATEMENT REQUIRED BY RAP 18.1

The PSA contains provision entitling a prevailing party to an award of attorney's fees in Paragraph 29. Such provision authorizes an award of attorney's fees on appeal. *Reeves v. McClain*, 56 Wn.App. 301, 783 P.2d 606 (1989); *Bloor v. Fritz*, 143 Wn.App. 718, 753, 180 P.3d 805 (2008). BGP should be considered the prevailing party on this appeal. It is therefore entitled to an award of attorney's fees on appeal.

CONCLUSION

The trial court erred by entering judgment in favor of the Sellers and awarding them attorneys' fees. The matter should be remanded to the trial court for further proceedings. BGP should also receive an award of attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 4 day of February,
2013.



BEN SHAFTON, WSB #6280
Of Attorneys for Battle Ground Plaza

APPENDIX

RCW 65.08.060(2).....49
McKinney’s CPLR §6501.....49

McKinney's CPLR §6501:

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.

RCW 65.08.060(2):

- (2) The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration and every assignee of a mortgage, lease or other conditional estate.

NO. 43874-7-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BATTLE GROUND PLAZA, LLC,

Plaintiff/Appellant,

vs.

DEAN MALDONADO and JANE DOE MALDONADO, husband
and wife and their marital community; MILLS END, LLC; MILLS
END CENTER, LLC; DRKBG, LLC; DOUGLAS RAY; and THE
ESTATE OF IRWIN JESSEN,

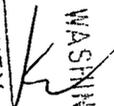
Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT

HONORABLE BARBARA JOHNSON

DECLARATION OF SERVICE

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